IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 50 Original

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.

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION TO VERMONT'S MOTION FOR LEAVE TO FILE COMPLAINT

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Jurisdiction

Vermont's motion for leave to file a complaint against the State of New York and International Paper Company on non-federal allegations of nuisance and trespass seeks to invoke the original jurisdiction of this Court under Article III, Section 2(2) of the Constitution and 28 U.S.C. § 1251 which, to the extent here applicable, confer original jurisdiction over controversies between states or between a state and citizens of another state.

Question Presented

Should this Court exercise its discretionary original jurisdiction in this case which involves, so far as concerns the State of New York, a non-justiciable claim that New York has failed to enforce its own laws properly against International Paper Company, and which involves, so far as concerns Vermont's claims against International Paper Company, complex and technical issues of fact and scientific judgment as well as issues of state law relating to nuisance, trespass, causation, equitable relief and damages?

Constitutional Provision and Statute Involved

Pertinent Constitutional and Statutory Provisions are set Forth at 25 as Appendix A.

Statement of the Case

The Complaint

The State of Vermont, "acting for itself, and in its quasi sovereign capacity, and as *parens patriae* for its citizens and inhabitants" (Complaint, par. I), seeks to sue the State of New York and International Paper Company, a New York corporation authorized to do business in Vermont, for claimed nuisance and trespass in connection with alleged discharges from the International Paper Company pulp and paper plant in the Village of Ticonderoga, New York. The complaint alleges that International Paper Company has discharged pulp and paper-making wastes into Ticonderoga Creek and that a large "sludge" bed of "wood chips, cinders and organic material" has formed in Ticonderoga Creek and at its confluence with Lake Champlain (Complaint, pars. XIII-XIX). Vermont claims that this bed pollutes the waters of Lake Champlain, that "noxious and nauseous odors" are

carried into Vermont adversely affecting Vermont citizens, and that portions of the bed float into Vermont waters and against the Vermont shoreline, constituting an alleged "trespass and a public nuisance" (Complaint, pars. XXIII-XXV).

While the complaint does not allege any discharge or other affirmative action by the State of New York, Vermont claims that New York has consented to and approved discharges by International Paper Company and has refused to remove or confine the bed (Complaint, pars. XVI, XXII). Vermont alleges that defendants' actions have injured the ecology of Lake Champlain, have adversely affected business and property values "of the citizens and inhabitants" of Vermont, as well as damage to the Vermont tourist and recreation industry (Complaint, pars. XXX-XXXIII). Although Vermont further claims that it and its citizens have been deprived of certain unspecified federal and state constitutional rights (Complaint, pars. XXI, XXVIII), the thrust of the complaint is in nuisance and trespass (Complaint, pars. XXII, XXV, XXXI).

As relief, Vermont seeks a decree directing that this alleged nuisance be abated, that New York and International Paper Company be required to remove the bed and to restore the navigability and quality of waters in Lake Champlain, and that International Paper Company be enjoined from further discharges from its plant in the Village of Ticonderoga. The complaint further seeks to recover from New York and International Paper Company "compensatory damages in an amount not yet ascertained but to be determined in this action . . ." and punitive damages of an unspecified amount "for the wilful, intentional, reckless and wanton conduct of such defendants" (Complaint at 9-10).

The Facts

Lake Champlain is a large body of water bounded by New York State on the west, Vermont on the east, and the Province of Quebec on the north. This litigation does not involve Lake Champlain as a whole, but rather a limited area of the Lake located near the southern end at Ticonderoga, New York, where Ticonderoga Creek flows into Lake Champlain. We believe that it can be established that this area of Lake Champlain has never been a significant recreational or water-sports center and that tourism in the Ticonderoga area is limited to Fort Ticonderoga, the subject of considerable fighting in the French and Indian War and other wars, and a smaller outpost known as Fort Defiance.

The principal industry of Ticonderoga and environs has for many years been the manufacture of lumber and of pulp and paper products, utilizing timber from the neighboring Adirondack and Green Mountain forest areas. Indeed, such operations have existed in some form since 1756 when the French established a lumber mill there, and substantial paper and pulp operations have been in progress at all times since 1878. *See* TICONDEROGA HISTORICAL SOCIETY, TICONDEROGA 156 (1969). International Paper Company purchased its Ticonderoga mill in 1925 from a firm which had operated it since 1882. *See* H. SMITH, HISTORY OF ESSEX COUNTY 427 (1885). In 1969-70 International Paper Company's Ticonderoga plant employed approximately 1,000 persons with an annual payroll of approximately $9,000,000. Its Ticonderoga property was appraised for local tax purposes at approximately $6,000,000 and the Company is generally recognized as the mainstay of the economy of the Ticonderoga area.

Principal waste products from lumbering operations and pulp and paper mills contain inert wood fibers, chips,

bark and similar material, which together with waste water and various chemicals used in the manufacturing process, have customarily been discharged into adjoining waters. This was especially the case with respect to older mills, as at Ticonderoga, built in an era which was not seriously concerned with ecological problems.

In addition to natural erosion and silting, such waste material had been discharged into Ticonderoga Creek by a variety of lumber and pulp and paper manufacturers since long before 1925, when International Paper Company purchased its plant. In addition, there were other industrial operations such as that of the American Graphite Company, which discharged graphite and related waste material from its graphite refining plant on Ticonderoga Creek from 1863 to 1968. Domestic sewage from the Village of Ticonderoga and, to a lesser extent, from industrial facilities is also discharged directly into the Creek and presumably has been so discharged since the settlement of the area long prior to the Revolution.* The bed which is the subject of the proposed action is thus the result of natural erosion which creates deposits, as well as industrial discharges, not merely by International Paper Company, but by persons and firms dating back far into the history of the area, as well as municipal sewage from Ticonderoga and other settled areas along both the New York and Vermont shores.

Both International Paper Company and officials of New York State have long been concerned with the elimination or reduction of the discharges from the old mill at Ticon-

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* The Village of Ticonderoga plans to commence installation of its first sewage treatment facilities in 1971 by means of municipal borrowings and assistance from the State of New York.

deroga in a manner which would not adversely affect the economy of Ticonderoga. During the period since it acquired the Ticonderoga mill, International Paper Company has installed a substantial number of devices to reduce the quantity of discharge and has expended approximately $493,000 in this effort. For ecological and other reasons, International Paper Company decided in 1967 to construct a new mill near Crown Point, New York, a few miles north of the Village of Ticonderoga. This new mill has been equipped with the latest anti-pollution devices and it is expected that the mill will meet all requirements of federal, New York and Vermont law with respect to discharges. Specifically, no "sludge" of the type which has accumulated over the years at Ticonderoga will be present in the treated discharges from the new mill. This mill has required 4½ years to plan and construct and has cost International Paper Company more than $76,000,000. This new mill, which will continue International Paper Company's position as the primary economic support of the economy of the Ticonderoga area, opened on December 15, 1970.

The old Ticonderoga mill, which is involved in this litigation, has been substantially closed by International Paper Company. On December 1, 1970 all pulp-making operations were halted, and discharges from the mill were reduced by approximately 70%. The Company has announced that all remaining operations at Ticonderoga will be permanently shut down no later than April 24, 1971.* Thus, within less

* This is in accordance with the date required under a consent judgment entered into with the State of New York requiring International Paper Company to cease all discharges by April 24, 1971. A copy of the consent judgment is annexed hereto at 26, as Appendix B.

than one month, all discharges from the Ticonderoga mill will cease.

The problem of the existing bottom deposits at Ticonderoga has been a matter of concern not only to the States of Vermont and New York, but also to International Paper Company. It is the position of the Company—a position which will be maintained in litigation in this Court or elsewhere—that it should not in equity or justice be compelled to expend millions of dollars to remove bottom deposits which have to a substantial extent been deposited by others and which, to the extent deposited by the Company, were necessitated by legitimate industrial operations dating back to 1925, long thought to be a reasonable riparian use and undoubtedly constituting a significant economic benefit to the community. This is especially true where, as in this case, the Company will shortly discontinue all operations at Ticonderoga and has constructed at immense cost a new mill which will meet all environmental requirements.

Contrary to the vague generalizations of Vermont's proposed complaint, we submit that, at the very least, there are complex factual issues as to whether these bottom deposits are injurious to the water quality of that area of Lake Champlain, much less Lake Champlain in its entirety, and specifically whether any measurable or significant injury or damage has in fact been sustained by Vermont, its landowners or by the tourist and recreational industry of the State, as the proposed complaint claims. There are, we submit, significant additional factual questions involving whether Vermont enters this proposed litigation with the clean hands required of a litigant who seeks drastic injunctive relief. We believe that Vermont has

long tolerated industrial, municipal and other deposits from its shores into the waters of Lake Champlain.

Perhaps more significant than these issues is the overriding ecological question—which Vermont's proposed complaint ignores—whether removal of the bottom deposits can in fact be accomplished without wreaking injury to that area of the Lake by disturbing the presently inert subsurface deposits without any clear understanding of the short or long term effects of this action. Competent scientists have suggested that the removal process itself may result in the destruction of substantially all oxygen-consuming life forms in the waters of Ticonderoga Bay. We do not suggest this as established scientific fact. We do, however, suggest that no one now knows the answer and that it would indeed be tragic if the result of Vermont's efforts in this case were to harm the very Lake it seeks to protect.

The problem of the unknown ecological effect of removal was explored at a Conference on Pollution of the Interstate Waters of Lake Champlain conducted under the auspices of the Federal Water Pollution Control Administration. As a result, the Army Corps of Engineers made a study of the bottom deposits and considered various methods of disposing of them. Based in part on this study, the New York State Conservation Department (now the Department of Environmental Conservation) cautioned that, before any attempt is made to remove the deposits, further testing is necessary to determine the possible effect of such action on the ecology of the Lake (CONFERENCE PROCEEDINGS, June 25, 1970, at 244-45). In view of this problem, small-scale studies were conducted by International Paper Company in cooperation with New York State. As Henry L. Diamond, Commis-

sioner of the New York Department of Environmental Conservation advised the Acting Secretary of the Interior on December 1, 1970:

> "This Department and the International Paper Company experimented with sludge removal from the Lake in October and copies of the report on the results were sent to the conferees on November 13, 1970. The results further emphasized that the ecology of the Lake could be adversely affected by a large scale sludge removal operation.
>
> For the purpose of providing conclusive and unequivocal facts we plan to investigate thoroughly and expeditiously the various alternatives for abatement of pollution from the sludge suggested to date, i.e. stabilization in place, covering in place, and removal by dredging, and to determine the relative impact on the environment of each. To this end, we have developed with International Paper Company a detailed scope of work for this evaulation. A meeting of technical representatives of the conferees has been called for December 4 to review the proposed program. Following the evaluation we will proceed with the implementation of the best method of control." *

In furtherance of this effort to obtain scientific data, the State of New York and International Paper Company have entered into a contract with a licensed consulting firm specializing in such research to perform necessary studies. Because of the nature of the basic work, much of which cannot be performed until the summer months, and the time required for proper evaluation of the data obtained

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* A copy of this letter is annexed hereto at 31, as Appendix C, together with a copy of an announcement by the Department of Environmental Conservation issued on December 4, 1970.

at the time, it is expected that the consultant will submit a draft report by November 1, 1971 and that the final report and recommendation will be delivered on December 1, 1971.

Hence, as matters now stand, International Paper Company has substantially shut down its Ticonderoga plant and will close all remaining operations at that plant on April 24, 1971, thus terminating all discharges by it into Ticonderoga Creek. The Company is further cooperating with New York State in an effort to obtain answers to the complex technical questions regarding the effects of removal of the deposits upon the ecology of Lake Champlain.

ARGUMENT

I. This Action is Not Within the Exclusive Original Jurisdiction of this Court Because the Complaint Does Not Allege A Justiciable Controversy Between Vermont and New York.

The proposed complaint does not allege that New York State has contributed to the bottom deposits at Ticonderoga. Nor does it allege the commission of any tortious act on the part of New York. Rather, it charges New York with liability for both compensatory and punitive damages, as well as the cost of abating the alleged nuisance by removing the so-called sludge bed and restoring the navigability and water quality of Lake Champlain (Complaint at 9-10), on the theory that New York State has failed to enforce its own common and statutory law with respect to acts alleged to have been committed by International Paper Company. This is, we submit, the only fair reading of the complaint, especially paragraphs IX-XI (purporting to describe the

legal duties of New York with respect to Lake Champlain), paragraphs XVI-XVII (alleging long-standing knowledge on the part of New York of the alleged discharges by International Paper Company at Ticonderoga), paragraphs XXI, XXII, XXVI-XXXV (purporting to describe the alleged resulting nuisance and trespass and the claimed damage to Vermont and its citizens). Such a claim against the State of New York of alleged maladministration of its own laws—in effect a difference of opinion between Vermont and New York as to New York's quasi-sovereign actions in permitting International Paper Company to continue its operations within New York State—is not a justiciable controversy between states and therefore does not constitute a matter of which this Court would have exclusive jurisdiction under 28 U.S.C. § 1251(a)(1).

In *United States* v. *West Virginia*, 295 U.S. 463 (1935), the State of West Virginia was sued in this Court for having issued a permit to private parties for the purpose of constructing dams, the United States arguing that these dams could not be built without its consent. This Court dismissed the action against West Virginia because the complaint failed to allege any justiciable controversy between the federal Government and the State:

> "But the bill alleges no act or threat of interference by the State with the navigable capacity of the rivers, or with the exercise of the authority claimed by the United States or in behalf of the Federal Power Commission. It alleges only that the State has assented to the construction of the dam by its formal permit, under which the corporate defendants are acting. There is no allegation that the State is participating or aiding in any way in the construction of the dam or in any interference with naviga-

> tion; or that it is exercising any control over the corporate defendants in the construction of the dam; or that it has directed the construction of the dam in an unlawful manner, or without a license from the Federal Power Commission; or has issued any permit which is incompatible with the Federal Water Power Act; or, indeed, that the State proposes to grant other licenses, or to take any other action in the future.
>
> . . . .
>
> But there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation . . . There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion." 295 U.S. at 472-74.

Similarly in *Louisiana* v. *Texas,* 176 U.S. 1 (1900), this Court held that an original action challenging the method by which a state's officials enforced its laws did not present a justiciable controversy, despite allegations that Texas' conduct substantially injured Louisiana and its citizens. This Court stated:

> "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of the grievances of particular individuals.
>
> . . . .

> But in order that a controversy between States, justiciable in this court, can be held to exist, *something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another.*'' 176 U.S. at 16, 22. (Emphasis supplied).

Thus, even assuming the State of New York were maladministering its water pollution laws, this would not give Vermont the right to bring suit against New York in this Court for that reason. Rather, it must be shown that New York is itself or by its instrumentality actively contributing to the alleged nuisance or trespass. This is indicated by *Missouri* v. *Illinois and the Sanitary District of Chicago*, 180 U.S. 208 (1908), where the Court took jurisdiction of an action against Illinois for the active torts of the Sanitary District of Chicago which the Court found was:

> ''. . . not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.'' 180 U.S. at 242.

Essentially, Vermont seeks to join New York as a defendant in this suit simply because International Paper Company is a citizen of New York. This Court has specifically rejected the contention that a state can be brought before it to answer for the alleged wrongs of its private citizens:

> ''Missouri cannot be brought into court by the expedient of making citizens parties to a suit otherwise not maintainable against the state.'' *Massachusetts* v. *Missouri*, 308 U.S. 1, 18 (1939).

This Court's reluctance to interfere in disputes between states as to alleged failure of one state to enforce its own

laws against its own citizens is founded not only in a reluctance to interfere in the internal affairs of quasi-sovereign states, but also a desire to abstain from entering into controversies between states except in extraordinary situations. As the Court stressed in denying leave to file a complaint in *Alabama* v. *Arizona*, 291 U.S. 286 (1934):

> "Its [the United States Supreme Court's] jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. . . . A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. . . . Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. . . . The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties." 291 U.S. at 291-92 (citations omitted).

Similarly, in *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931), this Court dismissed without prejudice an original action to enjoin proposed diversion of interstate waters, noting:

> "The governing rule is that this court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. . . . The burden on [the complaining state] . . .

> is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties." 282 U.S. at 669.

See Utah v. *United States,* 394 U.S. 89, 95 (1969) ("our original jurisdiction should be invoked sparingly").

So far as concerns New York, we submit that Vermont has alleged nothing more than a claimed maladministration of or failure to enforce New York's own laws. For the reasons stated above, the complaint does not allege a justiciable controversy between the States of Vermont and New York and jurisdiction cannot be based on 28 U.S.C. § 1251 (a) (1) and Article III, Section 2(2) of the Constitution. Accordingly, Vermont's motion for leave to bring this action against New York should be denied.

II. This Court Should Deny Vermont's Motion to Bring an Original Action Because of the Presence of Detailed and Complex Issues of Fact and Predominantly Non-federal Issues of Law Which Should First be Examined by a State Trial Court with Ultimate Review by this Court of any Important Federal Issues in the Exercise of this Court's Appellate Jurisdiction.

Even assuming *arguendo* that the complaint presents a justiciable controversy, the factual, technical and scientific complexities of this case, and the prospect of many years of administration or enforcement by this Court of any decree rendered against the defendants, make this an inappropriate case for the exercise of original jurisdiction. It is well established that, although the Court may have original jurisdiction of disputes between a state and citizens of another state, as well as disputes between states, the exercise

of such jurisdiction is not mandatory but rather rests in the Court's sound discretion. *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 287 (1888); *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939).

Within the past week, this Court has again emphasized in *Ohio* v. *Wyandotte Chemicals Corp.*, No. 41 Orig. (U.S. Sup. Ct., March 23, 1971), the principles enunciated in those cases regarding the discretionary nature of its original jurisdiction:

> "And the evolution of this Court's responsibilities in the American legal system has brought matters to a point where much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law. This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. As the impact on the social structure of federal common, statutory, and constitutional law has expanded, our attention has necessarily been drawn more and more to such matters. We have no claim to special competence in dealing with the numerous conflicts between States and non-resident individuals that raise no serious issues of federal law." At 4-5.

There are several compelling reasons why "considerations of convenience, efficiency and justice", factors recognized in *Massachusetts* v. *Missouri, supra,* indicate that this Court should decline to exercise jurisdiction.

A major factor affecting this Court's attitude toward original actions of which it has discretionary jurisdiction is that:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to

> play the role of fact-finder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers." *Ohio* v. *Wyandotte Chemicals Corp., supra,* at 5.

As Chief Justice Stone pointed out in dissent in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945):

> " In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate district court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for the proper disposition of the case there." 324 U.S. at 470 (citations omitted).

After five years of litigation the wisdom of this view was demonstrated by the Court's dismissal of the complaint on the merits because of Georgia's complete inability to

prove the claimed injury to its economy. 340 U.S. 889 (1950). Professor Freund has suggested that, as a result of the Court's experience in that case, it may be more wary of sweeping allegations of injury to a state's economy. 3 J. LEGAL ED. 643, 644n.2 (1951). This comment would seem particularly apposite to this case in view of the sweeping, albeit conclusory, allegations of injury to the Vermont economy and tourist business made in the complaint (Pars. XXXII-XXXV) in connection with an area of the Vermont shore which historically has not been a significant recreational or tourist center.

As shown by this Court's decision in *Ohio* v. *Wyandotte Chemicals Corp., supra,* a case involving claims strikingly similar to those presented in Vermont's proposed complaint, major considerations in determining whether to exercise jurisdiction are the presence or absence of complex and highly technical factual issues and of significant matters of federal, rather than state, law. In that case, the Court pointed out the "formidable" fact-finding process which would be required to resolve "factual questions that are essentially ones of first impression to the scientists" (Opinion at 11). This Court further noted:

> "Finally, in what has been said it is vitally important to stress that we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court. Thus, entertaining this complaint not only would fail to serve those responsibilities we are principally charged with, but could well pave the way for putting this Court into a quandary whereby we must opt either to pick and choose ar-

> bitrarily among similarly situated litigants or to devote truly enormous portions of our energies to such matters." at 11-12.

The case at bar presents just such a number of complex and largely unsettled technical issues of fact, as well as legal issues which are matters of state law. For example, there is a substantial factual dispute as to whether the bottom deposits have in fact injured the ecology of Lake Champlain and the extent, if any, to which material deposited by International Paper Company has contributed to such harmful effects. One can expect that this case will further involve broad factual issues as to whether Vermont has tolerated pollution from its own shores and whether it can appear before this or any other court with the clean hands requisite to the drastic equitable relief which it seeks.

With respect to the granting of equitable relief, it would seem that Vermont's demand for an injunction against further discharge will be moot in a few weeks when the old Ticonderoga mill will be completely and permanently shut down on April 24, 1971. *See A. L. Mechling Barge Lines, Inc.* v. *United States,* 368 U.S. 324 (1961); *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). The request for such an injunction serves merely to waste the time and energy of this Court.

However, this Court should not become enmeshed, as a court of original jurisdiction, in the demand by Vermont for a mandatory injunction to require removal of the deposits and restoration of the water quality of Lake Champlain (Complaint at 10). As indicated above, removal involves a major scientific unknown as to whether it would do more harm than good to the ecology of the Lake (*see* pp. 7-9, *supra*).

At the very least, this will present scientific issues far better left to a trial court or to appropriate administrative agencies equipped with the necessary scientific expertise to reach sound scientific judgments. This Court has already commented on the difficulties created by an effort to have it handle, as a court of original jurisdiction, interstate pollution cases:

> "To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with —and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise nor reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance." *Ohio* v. *Wyandotte Chemicals Corp.*, No. 41 Orig. at 12 (U.S. Sup. Ct., March 23, 1971).

These considerations are equally applicable to Vermont's broad demand that defendants "restore the navigability and quality of waters in Lake Champlain", a demand which, in

the current state of incomplete scientific knowledge, may well be a form of relief which neither this nor any other court can properly impose or which, if imposed, can adequately enforce without involving itself in continuing and time-consuming controversy. In *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923), the Court held that it could not proceed to judgment because of the absence of sufficiently conclusive scientific proof. This failure of proof required the Court

> "... to leave the opinions and suggestions of the expert engineers for the consideration of the two States in a possible effort by either or both to remedy existing conditions in the basin." 263 U.S. at 388.

As Chief Justice Stone stated in *Georgia* v. *Pennsylvania Railroad Co.,* 324 U.S. 439 (1945):

> "It is the duty of this Court to dismiss an original suit in which it cannot make an effective decree. [citation omitted.] *A fortiori,* it is its duty not to entertain such a suit." 324 U.S. at 487 (dissenting opinion).

With respect to Vermont's claims for damages, we suggest that, apart from the legal issue as to Vermont's dubious standing to seek such damages as *parens patriae,* see *Hawaii* v. *Standard Oil Co. of California,* 431 F.2d 1282 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3367 (March 1, 1971), the factual resolution of such claims of damages to Vermont's economy will involve this Court in a morass of detail which, at the very least, should first be sifted and evaluated by the lower courts to avoid the waste of time and energy occasioned in *Georgia* v. *Pennsylvania Railroad Co., supra,* and avoided in *Ohio* v. *Wyandotte Chemicals Corp., supra.* Similarly, Vermont's claims of damages to the property values of its citizens, assuming *arguendo* that such

private claims may be enforced by a state in the face of the principles enunciated by this Court in *Oklahoma ex rel. Johnson* v. *Cook,* 304 U.S. 387 (1938); *North Dakota* v. *Minnesota,* 263 U.S. 365, 374-75 (1923); and *Oklahoma* v. *Atchison, T. & S.F. Ry.,* 220 U.S. 277 (1911), will involve extensive and detailed inquiry concerning the extent, if at all, to which each local riparian owner has suffered property damage by reason of the acts of defendants.

With respect to issues of law presented in this case, it would appear that, despite Vermont's vague claim of deprivation of federal constitutional rights, the real issues will relate to state law questions of nuisance, trespass, causation, unclean lands, equitable relief and damages. As this Court observed in *Ohio* v. *Wyandotte Chemicals Corp., supra,* these are issues which should properly be handled by state courts (Opinion at 7-8).

We respectfully submit that these essentially local issues, already the subject of litigation in the federal district court in Vermont, in *Zahn* v. *International Paper Company,* No. 6192 (D.Vt., filed February 9, 1971), are hardly the types of controversies to which this Court's energies should be devoted. Indeed, it would seem that if this case is considered as appropriate for the exercise of original jurisdiction, there would be little justification for this Court to refuse to hear other cases involving alleged local air or water pollution in which a state is a party plaintiff. Nor would there be any rational basis for refusing to hear as cases of original jurisdiction other types of actions such as antitrust cases in which states are plaintiffs, and in which issues of federal law, far more substantial than here, are presented for determination.

The issue as to whether this Court should exercise its original jurisdiction in this case is not governed by *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), as suggested in Vermont's brief. That case involved only a demand for a prohibitory injunction against future discharges, a matter which is for practical purposes moot in the instant case because of the substantial shutdown of the Ticonderoga plant in December 1970 and its complete closing on April 24, 1971. The *Tennessee Copper* case did not involve any disputes as to claimed damages or the right to mandatory injunctive relief as is sought here. The *Tennessee Copper* case, which was sufficiently simple to be tried on affidavits without objection by either side (206 U.S. at 236), is a far cry from the detailed and complex scientific disputes into which Vermont asks this Court to embroil itself. *Georgia* v. *Tennessee Copper Co.* is simply not applicable to this case.

We respectfully submit that this Court is already sufficiently burdened with important appellate litigation and that its original jurisdiction should be exercised only where there is no other available forum or where there are extraordinary circumstances requiring this Court to act as a court of first instance. For the reasons discussed, this is not such an extraordinary case and there is no reason why the issues presented cannot be tried elsewhere with ultimate review of any federal issues reserved to this Court in the exercise of its appellate jurisdiction.

If this Court declines to exercise jurisdiction, Vermont is not without a forum in which to seek against International Paper Company whatever relief may ultimately be held appropriate. International Paper Company is subject to suit in Vermont and the State of Vermont presumably can bring

suit in the courts of Vermont, which have the power to grant injunctions to abate nuisances. *Village of Bennington* v. *Hawks,* 100 Vt. 37 (1926); *Bourke* v. *Alcott Water Co.,* 84 Vt. 121, 78 A. 715 (1911). Alternatively, suit can be brought in the Supreme Court of the State of New York, where International Paper Company is subject to jurisdiction. In addition, Vermont may seek relief before various administrative bodies which have been active in ecological matters affecting Lake Champlain. Thus, there can be no claim that unless this Court exercises its original jurisdiction, Vermont will be foreclosed from obtaining relief. Under these circumstances, we respectfully submit that this is not an appropriate case for the exercise of this Court's original jurisdiction.

CONCLUSION

For the reasons stated above, we urge that Vermont's motion for leave to file a complaint in this Court be denied in all respects.

Dated: New York, New York
March 30, 1971

Respectfully submitted,

TAGGART WHIPPLE
RICHARD E. NOLAN
Attorneys for Defendant
International Paper Company

WILLIAM H. LEVIT, JR.
RONALD V. BRYANT
DAVIS POLK & WARDWELL
Of Counsel

APPENDICES

APPENDIX A

Pertinent Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 2. SUPREME COURT, ORIGINAL AND APPELLATE JURISDICTION

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. ORIGINAL JURISDICTION

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

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

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens. June 25, 1948, c. 646, 62 Stat. 927.

APPENDIX B

Consent Judgment

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Schenectady, at the Court House at Schenectady, New York, on the 11th day of March, 1971.

Present: Honorable

D. VINCENT CERRITO,

Justice.

Index No. 11972

HENRY L. DIAMOND, Commissioner of Environmental Conservation of the State of New York,

Plaintiff,

—against—

INTERNATIONAL PAPER COMPANY,

Defendant.

This action having been duly instituted by the plaintiff Commissioner of Environmental Conservation of the State of New York, by a summons and complaint, verified on the 28th day of August, 1970, seeking injunctive relief and statutory penalties against the defendant pursuant to Public Health Law, Article 12; and

The said summons and verified complaint having been personally served upon the defendant on August 31, 1970, by the delivery of a true copy thereof to Perry A. Harding, Mill Manager for said defendant; and

Appendix B—Consent Judgment

The defendant's answer, verified on the 16th day of September, 1970 having been duly served on or about September 16, 1970, by Frank J. Ferony, Jr., Esq., attorney for the said defendant:

Now, upon the consent of the attorneys for the parties hereto, such consent by the attorney for defendant being for the purpose of disposition of this action only and without any admission of wrongdoing or liability, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant International Paper Company shall, on or before April 24, 1971, completely terminate all paper making operations at defendant's paper mill plant located in the Village of Ticonderoga, County of Essex, State of New York, and cease all discharges of industrial wastes into Lake George Outlet from said plant and shall not thereafter discharge any industrial wastes into said stream without express permission granted by plaintiff herein, and it is further

ORDERED, ADJUDGED AND DECREED that any and all permits heretofore issued to the defendant or to any of its predecessors in interest for the discharge of industrial and other wastes into the waters of Lake George Outlet near its confluence with Lake Champlain by or on behalf of the New York State Department of Health or the Commissioner of Health, or the Water Pollution Control Board, be and they hereby are modified to the extent required by the terms and conditions of this judgment, and it is further

Appendix B—Consent Judgment

ORDERED, ADJUDGED AND DECREED that judgment is hereby granted for the following relief, which judgment is to become absolute only in the event the defendant fails to perform the act specified under the first decretal paragraph of this judgment above set forth:

"I. Directing that the defendant on and after April 25, 1971, discontinue the discharge of industrial and other wastes from its aforementioned plant in the Village of Ticonderoga, into the classified waters of the State through any and all outlets, owned, maintained or under its control.

"II. Directing that the defendant forthwith, on April 25, 1971, undertake and execute a program for the construction of facilities to effectively treat all industrial and other wastes in accordance with plans and specifications approved by the New York State Department of Environmental Conservation, and upon completion of the same, to place the industrial treatment system in operation in an efficient manner so as to prevent a condition in the waters of Lake George Outlet, at and in the vicinity of the waste disposal outlets of defendant, in contravention of standards adopted therefor and to prevent the impairment of the best usage of the waters of Lake Champlain at and in the vicinity of its confluence with Lake George Outlet.

"III. Enjoining and restraining the defendant, its officers, agents, servants and employees from, on and after April 25, 1971, causing or permitting the discharge into the waters of Lake George Outlet at and in the vicinity of said defendant's waste disposal outlets of untreated and inadequately treated industrial and other wastes causing or contributing to a condition in contravention of standards adopted

therefor and impairing the best usage of the waters of Lake Champlain at and in the vicinity of its confluence with Lake George Outlet and in violation of the provisions of Article 12 of the Public Health Law," and it is further

ORDERED, ADJUDGED AND DECREED that the civil penalties requested in Paragraph "IV" of the prayer for relief contained in the complaint herein may be assessed by the Court in a separate judgment upon ten days' written notice to the defendant's attorney upon any violation by the defendant of the terms and conditions of this judgment, and it is further

ORDERED, ADJUDGED AND DECREED that in the event of the violation by the defendant of the terms and conditions of this judgment, the plaintiff may apply to the Court for such other, further or different relief as may be just and proper, together with the costs and disbursements of this action.

Signed this 11th day of March, 1971, at Schenectady, New York.

P. VINCENT CERRITO
Justice of the Supreme Court

Appendix B—Consent Judgment

We hereby consent to entry of the above judgment.

Dated at Albany, New York,
on the 10th day of March, 1971.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Plaintiff
By: /s/ STANLEY FISHMAN
Assistant Attorney General

/s/ FRANK J. FERONY, JR., ESQ.
Attorney for Defendant

Dated at New York City, New York,
on the 4th day of March, 1971.

STATE OF NEW YORK }
COUNTY OF ESSEX } SS.:

CLERK'S OFFICE

A true copy of the original filed in this office on March 12, 1971.

Witness my hand and the seal of my office this 12th day of March, 1971.

/s/ ALICE WOOD GOUGH
Essex County Clerk

[SEAL]

APPENDIX C

Letter and Announcement of the New York State Department of Environmental Conservation

December 1, 1970

Dear Mr. Russell:

This is in reply to Secretary Hickel's letter of November 23, 1970, containing his recommendations for further action following the second session of the Lake Champlain Enforcement Conference on June 25, 1970, and the enclosed summary of the discussions.

We have made a careful review of our thermal standard and criteria as they pertain to Lake Champlain as compared with the recommendations of the National Technical Advisory Committee. Our analysis is appended. As a result we believe that our criteria numerically conform with the recommendations, and that our standard is more stringent. We can take legal action to require additional treatment even though the numerical criteria are met, if we find that a discharge is injurious to fish life.

In Secretary Hickel's letter he stated, relating to the sludge deposits, "I am informed that these deposits will remain an active source of pollution long after the untreated waste discharge from the International Paper Company is abated". After thorough review of the available information on the subject we believe that the substantiating evidence for this statement is weak. Any action based thereon might cause more pollution than it would remedy, if any.

This Department and the International Paper Company experimented with sludge removal from the Lake in October

and copies of the report on the results were sent to the conferees on November 13, 1970. The results further emphasized that the ecology of the Lake could be adversely affected by a large scale sludge removal operation.

For the purpose of providing conclusive and unequivocal facts we plan to investigate thoroughly and expeditiously the various alternatives for abatement of pollution from the sludge suggested to date, i.e. stabilization in place, covering in place, and removal by dredging, and to determine the relative impact on the environment of each. To this end, we have developed with International Paper Company a detailed scope of work for this evaluation. A meeting of technical representatives of the conferees has been called for December 4 to review the proposed program. Following the evaluation we will proceed with the implementation of the best method of control.

I want to be sure all members of the conference are represented and have sent special invitations to them to attend.

I am sure that the results of this program will be of great interest to you also because the matter of sludge residuals from past discharges or operations is a nationwide problem. The program carried out here will have far reaching effects. These reasons add to our rationale and to the justification for your continuing support for this course of action with which we are proceeding as first outlined to Mr. Murray Stein, Chairman of the Lake Champlain Enforcement Conference, in my letter of August 21, 1970.

Appendix C—Letter and Announcement of the New York State Department of Environmental Conservation

I will be happy to provide you with more detailed information about our program after the December 4 meeting.

Sincerely,

/s/ HENRY L. DIAMOND
Commissioner

Enclosure

THE HONORABLE FRED J. RUSSELL
Acting Secretary
U. S. Department of the Interior
Washington, D. C. 20240

Appendix C—Letter and Announcement of the New York State Department of Environmental Conservation

RELEASE DECEMBER 4, 1970

NOTE TO EDITORS—This memorandum details of New York State's plan to deal with the problem of sludge deposits in Lake Champlain near Ticonderoga. Because a pilot study of sludge removal showed that such an operation had a detrimental effect on the water quality and ecology of the lake, phase I sets up carefully guarded series of scientific tests to determine the best solution of the problem. The Department of Environmental Conservation invited Federal and Vermont officials to give the plan a technical review at the Department December 4.

PHASE I

NEW YORK STATE'S PROGRAM

Phase I of the New York State program will consist of a highly sophisticated scientific study in three different areas of Ticonderoga Bay designed to furnish effective proof of the probability of eliminating the *rising* bottom materials and the impact on water quality under three suggested alternatives.

The scope of the study will include:

1. Determination of the degree of dredging necessary to eliminate flotation of bottom materials. Determination of the impact on water quality standards during removal operations, including the necessary return waters, and over the dredge area on completion of operations.

2. Determination of the degree of cover in place, including type of material needed to prevent bottom materials

from rising. Determination of the impact on water quality during placement of the cover and after consolidation.

3. Determination of the probability of flotation of bottom materials in the event of stabilization in place. Determination of the effect on water quality standards if the bottom is not disturbed.

Before the tests begin, a series of caissons will be placed in the area—one close to the mouth of Ticonderoga Creek—the second on the outer edge of the bay—and the third near the New York-Vermont line in Lake Champlain.

The caissons will be placed during the winter months and testing conducted in the months of July and August in 1971, because the late summer period has reportedly been associated with the highest frequency of floating materials.

Control points will be established at points North and South of the general area of the bay.

Use of the caissons will keep the areas under study contained as much as possible and will make it easier to compare the test results from the three different areas.

The Department of Environmental Conservation will engage an independent contractor to make the necessary analyses of control points and test areas. He will make periodic reports to the Department. The contractor will be required to prepare a final report not later than December 1, 1971. The report must include a recommendation as to which of the three alternatives will be the best solution of the sludge problem.

Control points outside the bay area will be studied for oxygen uptake; gas production; nitrogen and phosphorus production, and fish toxicity.

Appendix C—Letter and Announcement of the New York State Department of Environmental Conservation

The analysis of the dredging method will include tests of lake water before, during and after dredging for oxygen uptake, nitrogen, phosphorus and fish toxicity.

The analysis of the covering method will include covers ranging in depth from a net of two to 24 inches. The covered bottom will be tested for oxygen uptake, gas production, nitrogen and phosphorus, and fish toxicity.

The analysis of the stabilization in place include tests of the bottom for oxygen uptake, gas production, nitrogen and phosphorus, and fish toxicity.

Background testing of the experimental areas will include tests on bottom samples for total solids by evaporation; suspended solids by filtration; total volatile solids by evaporation; volatile suspended solids; total carbon; inorganic carbon; total nitrogen; ammonia nitrogen; phosphate (ortho and poly); BOD 5; COD; and pH. Water from the sludge will be similarly tested except for suspended solids by filtration and volatile suspended solids.

During the study period the total sludge deposit will be studied daily to determine where rising sludge is present and the relative gasification in each general zone.

The Department's Phase I plan calls for three floating domes to be placed at strategic locations throughout the area. These domes will be fitted with gas sampling tubes and will be capable of containing gases rising to the surface. Collectors will be sampled periodically for oxygen, nitrogen, methane, hydrogen sulfide, carbon dioxide, ammonia and any other constituents of major interest. The dome contents will be replaced periodically with ambient air.

The Department has a special reactor to measure the dissolved oxygen and a respirometer to measure the flow of other materials of interest.

Appendix C—Letter and Announcement of the New York State Department of Environmental Conservation

The Department plans to initiate this project January 1 and have the caissons in place by February 15. The independent contractor to conduct the tests will be hired by March 15 and his detailed project plan reviewed by May 15. On July 21, the contractor will begin a series of weekly reports extending through September 1. By November 1, he will submit a final draft report to the New York State Department of Environmental Conservation and his final report and recommendations will be delivered December 1.

FOR FURTHER INFORMATION, call:

Arthur Woldt (518) 457-5400
Public Relations Officer

MS
12-4-70

Certificate of Service Under Rule 33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 50 Original

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.

TAGGART WHIPPLE, attorney for Defendant International Paper Company and a member of the Bar of this Court, certifies that all parties required to be served with Defendant's brief dated March 30, 1971 were served the 30th day of March, 1971, three copies having been mailed this day respectively to the Honorable Deane C. Davis, Governor of the State of Vermont, National Life Drive, Montpelier, Vermont 05602; the Honorable James M. Jeffords, Attorney General of the State of Vermont, State Library Building, Montpelier, Vermont 05602, attorney for plaintiff, and the Honorable Louis J. Lefkowitz, Attorney General of the

Certificate of Service Under Rule 33

State of New York, 80 Centre Street, New York, New York 10013, attorney for defendant State of New York, by depositing the same in a mail box maintained by the United States Post Office at 1 Chase Manhattan Plaza, New York, New York 10005, with first class postage prepaid.

March 30, 1971

TAGGART WHIPPLE

TAGGART WHIPPLE