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 existting under the laws of the State of New York, located at New York, New York, *Defendants*.

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

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JURISDICTION

The jurisdictional grounds are set out in Vermont's Brief in Support of Motion previously filed with the Bill of Complaint.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and Statutory Provisions are set out in Vermont's Brief in Support of Motion previously filed with the Bill of Complaint and in Appendix A, *infra,* pp. 1a-10a.

QUESTION PRESENTED

Should this Court exercise its original and exclusive jurisdiction over this dispute between one state and another and a citizen of the latter, concerning a claimed public nuisance, trespass, boundary dispute and violation of constitutional rights?

STATEMENT OF THE CASE

The State of Vermont has filed a motion with this Court for leave to file a complaint which alleges that the Defendants by their actions have created and are maintaining a public nuisance, are committing a trespass, and are unlawfully altering an interstate boundary. (Complaint, pars. XXII, XXIII, XXV). The same activity constitutes an impediment to navigation (Complaint, par. XXI) and interferes with the constitutional rights of Vermont citizens to a protected environment (Complaint, par. XXVIII).

Defendants resist the motion for leave to file, claiming:

1. Plaintiff's claim against New York is merely for mal-administration of its laws (therefore, no justiciable controversy) (Int'l Paper Brief, Argument I; New York Brief, Point I(B)).

2. The principles enunciated in *Ohio* v. *Wyandotte Chemicals Corp.,* 39 U.S.L.W. 4323 (U.S. Mar. 23,

1971) suggest that this Court should decline to exercise jurisdiction (New York Brief, Point I(A); Int'l Paper Brief, Argument II).

3. The pendency of a separate action in a U.S. District Court for Vermont bars the present action (New York Brief, Point II; Int'l Paper Brief, Argument II).

The briefs of both defendants contain lengthy factual statements which attempt to argue the merits of the controversy rather than the question of whether Plaintiff's motion for leave to file ought to be granted. These so-called "facts" (actually a premature presentation of arguments) insofar as they may raise doubts about the complaint, compel comment.

Vermont has on numerous occasions during the past ten years requested that New York remove the bottom deposits which are the subject of this litigation from New York's and Vermont's land under Lake Champlain. Negotiations to clean up these bottom deposits have been conducted over the years at the New England Interstate Water Pollution Control Commission of which New York and Vermont are members.

Finally, since no action was taken the State of Vermont requested that a federal enforcement conference be convened under the provisions of Section 10 of the Federal Water Pollution Control Act. Two conferences were held, one in November of 1968 and a second session in June of 1970. The conferees included representatives from the Federal Water Quality Administration, the New England Interstate Water Pollution Control Commission, the State of New York and the State of Vermont.

A Technical Committee appointed at the 1968 conference reported to the 1970 conference:

> It is the majority opinion of the committee that the best solution to the existing sludge problem is the removal of the sludge from Ticonderoga Creek and Lake Champlain. Placement of the spoils behind a dike constructed near the mouth of Ticonderoga Creek (Corps of Engineers alternative entitled "Land Reclamation") appears to be the most economical solution.
>
> CONFERENCE PROCEEDINGS, June 25, 1970, p. 126.

The question of possible dangers from mercury was raised at the 1970 conference and the conferees agreed to appoint a technical committee to investigate the location and concentration of mercury in the sludge deposits (CONFERENCE PROCEEDINGS, June 25, 1970, at 333-334). The technical committee, in July 1970, reported that mercury concentrations in the sludgebed are low enough so that they should not be a factor in deciding upon sludge removal. *See,* Technical Committee Report, Appendix B.

The conferees (including the New York representative) unanimously agreed that the sludge deposits would continue to constitute pollution of Lake Champlain even after discharges from the International Paper Company facilities ceased. (CONFERENCE PROCEEDINGS, June 25, 1970 at 333). Despite the conclusions of the Conference, no action has been taken by the Federal Government since that time.

Contrary to the allegations of New York (New York Brief, p. 4), Vermont experts agree with the independent technical committee that the sludge bed can

and should be removed from the Lake and to do so would have no harmful affect upon the Lake.

New York suggests that by way of a lawsuit instituted in August 1970, it has evidenced concern over the pollution problem. This suit was commenced at a time when International Paper Company had already commenced construction of a new plant and had announced that it would close the existing facility and stop its discharges. Significantly, the suit never mentioned the continuing nuisance which would be caused by the sludge bed and sought no relief whatsoever concerning the existence of the bottom deposits. In fact, the State of New York has never taken any action to alleviate the continuing damages done to the State of Vermont with regard to the bottom deposits.

It is significant that although International Paper Company alleges as a fact that it "should not in equity or justice be compelled to expend millions of dollars to remove bottom deposits . . . which, to the extent deposited by the Company were necessitated by legitimate industrial operations" (this, of course, is one of the central questions of the litigation), neither New York nor International Paper Company deny Vermont's allegation that the Defendant International Paper has created a public nuisance and Defendant New York suffers it to continue.

The State of Vermont has sought relief in every way available to it, including requests, negotiation and demands made to both defendants in this litigation, seeking assistance of the New England Interstate Water Pollution Control Commission and seeking the assistance of the Federal Government through various agencies which have power (all discretionary) to ren-

der assistance. Defendant International Paper Company has denied responsibility, Defendant State of New York has indicated sympathy and has done nothing, the New England Interstate Commission has agreed with Vermont's position and recommended action but has no power to enforce and the Federal Government has conducted two conferences but has declined to exercise its discretion to move to the enforcement stage of proceedings. The result of ten years of diligent effort on the part of Vermont officials to abate the existence of this nuisance which is depriving the citizens of the State of Vermont of their rights to swim, fish, boat, travel upon and enjoy the waters of Lake Champlain, free from the stench and filth which currently emanate from them has been zero. We are left with no alternative but to litigate.

ARGUMENT

I. This Action Is Within the Original and Exclusive Jurisdiction of This Court, Alleging as It Does a Justiciable Controversy Between Two States.

Vermont and New York are abutting landowners, each owning the soil under the waters of Lake Champlain from its respective shore line to the interstate boundary. *Massachusetts* v. *New York,* 271 U.S. 65 (1926). Each state owns the land in its sovereign capacity as a representative of and in trust for the people of the state. *Coxe* v. *State,* 144 N.Y. 396, 406, 39 N.E. 400, 402 (1895); *In re Lake Seymour,* 117 Vt. 367, 375, 91 A.2d 813, 826 (1952).

In its Bill of Complaint, Plaintiff alleges and intends to prove that Defendant New York, as an abutting landowner, has permitted to accumulate on its land, three hundred acres of sludge which is overflowing Plaintiff's land and causing harm to Plaintiff's

citizens. Plaintiff further alleges and will prove that Defendant State of New York has knowledge and actual notice of the existence of this continuing nuisance and has refused to remove or confine it or take any steps to prevent the damage. There is no question but that the keeping of a nuisance on one's land is actionable if it does harm to the neighboring land.

> For every man's land is in the eyes of the law enclosed and set apart from his neighbors' * * *. 3 *Blackstone's Commentaries* 209.
>
> Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.
>
> *Id.* at 217.

New York, as an abutting landowner, is responsible for damages done as a result of the existence of the nuisance on its property once it has been given notice and has failed to abate. This legal proposition is well grounded in our common law. *Penruddock's Case,* 5 Coke 101 (1776) (defendant inherited premises with a nuisance); *Barker* v. *Herbert,* 2 K.B. (Eng.) 633, 12 B.R.C. 526 (1911) (owner only liable for nuisance created by trespasser if he has notice); *Leahan* v. *Cochran,* 178 Mass. 566, 60 N.E. 382 (1901) (defendant acquired by purchase and had constructive notice); *Timlin* v. *Standard Oil Co., et. al.,* 126 N.Y. 514, 27 N.E. 786 (1891) (defendant, lessee suffered a nuisance to continue after constructive knowledge); *Vaughn* v. *Buffalo,* 25 N.Y.S. 246, 72 Hun. 471 (1893) (notice not necessary for liability from *public* nuisance); *Gray* v. *Boston Gaslight Co.,* 114 Mass. 149, 19 Am.Rep. 324

(1873) (landowner liable for nuisance created by trespasser following constructive notice); *Maynard* v. *Carey Constr. Co.,* 302 Mass. 530, 19 N.E. 2d 304 (1939) (owner liable for continuance of nuisance created by licensee); *Frenkil* v. *Johnson,* 175 Md. 592, 3 A.2d 479 (1939) (defendant, occupier became aware of nuisance created by third persons and failed to warn plaintiff); *see* J. & H. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES, §§ 454-460 (1906); Annot., *On the Liability of a Property Owner for a Nuisance Which He Did Not Create,* 96 Am. St. Rep. 508 (1901). This Court has previously adjudicated controversies between states seeking to abate a nuisance that exists in one state and produces noxious consequences in another. *Missouri* v. *Illinois and the Sanitary District for Chicago,* 200 U.S. 496 (1906); *New York* v. *New Jersey,* 256 U.S. 296 (1921) (dismissed for failure of proof).

In addition, the continuation of a trespass by Defendant New York constitutes an unlawful entry upon Plaintiff's land which is actionable and may properly be enjoined. *Appleby* v. *City of New York,* 271 U.S. 364 (1926).

The interstate boundary between the States of New York and Vermont is the middle of the deepest channel of Lake Champlain. By permitting the sludge to remain on its property, New York is causing a shift in the position of the channel in Vermont's direction. The result will be either a change of the boundary as a result of New York's unlawful activity or the creation of doubt as to the position of the boundary. Disputes over interstate boundaries are properly cognizable in this Court. *Michigan* v. *Wisconsin,* 270 U.S. 295 (1926); *Massachusetts* v. *New York,* 271 U.S. 65 (1926), *see* R. STERN & E. GRESSMAN, SUPREME COURT

PRACTICE, § 9.9 (4th ed. 1969), C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, p. 500 (2d ed. 1970).

It is precisely this kind of dispute between states for which the original jurisdiction of this Court was created. THE FEDERALIST No. 80 (A. Hamilton).

II. The Principles Enunciated in Ohio v. Wyandotte Chemicals Corp. Are Not Controlling in This Case and Should Not Be Applied Herein.

Both Defendants rely upon *Ohio* v. *Wyandotte Chemicals Corp.*, 39 U.S.L.W. 4323 (U.S. March 23, 1971) averring that its reasoning applies to the instant case. It does not. The major and critical distinction between that case and this one is, of course, the presence of New York as a defendant.

The jurisdiction of this Court over controversies between states is original *and exclusive.* U. S. CONST. ART. III, § 2, Cl. 2 (Emphasis added.); 28 U.S.C. § 1251(a). The latter provides:

> "The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) all controversies between two or more States".

This being the case Vermont has no other forum before which it may litigate its controversy with New York. There are no long arm statutes which would subject the State of New York to the jurisdiction of Vermont courts.

While we are not unmindful of the difficulties that this Court encounters in supervising the trial of a case before it, the Court has stated that it will decline to entertain a complaint only with assurance that "declination of jurisdiction would not disserve any of the principal policies underlying the ART. III jurisdic-

tional grant * * *." *Ohio* v. *Wyandotte Chemicals Corp., supra,* at 6. To decline jurisdiction in this case would do disservice to ART. III for the following reasons. The federal system in which a state gives up its sovereign right to forcibly abate nuisances existing in adjoining states, demands that there be some forum where states can litigate their differences. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907).

In fact, the framers of the Constitution had in mind when drafting ART. III, the necessity of avoiding the situation which existed in Germany in the Fifteenth Century where adjoining states often resorted to the sovereign power to wage war in settling disputes. THE FEDERALIST No. 80, (A. Hamilton).

Nor should the suggestion and concern expressed in *Wyandotte Chemicals* that the better way to solve this type of problem is by conference and that numerous other agencies are constituted to work on the problem be controlling in the instant case. The State of Vermont has tried the conference method and has worked with the other agencies in attempting to solve the problems with which this case is concerned. All alternatives have failed completely. While the New England Interstate Water Pollution Control Commission agrees with Vermont's position taken herein, it has no enforcement powers and cannot effect a result except through persuasion.

The federal machinery for dealing with these disputes is in no way intended to be an exclusive remedy. In fact, the Federal Water Pollution Control Act specifically provides that there is no federal pre-emption.

> [I]t is declared to be the policy of Congress to reorganize, preserve, and protect the primary re-

> sponsibilities and rights of the States in preventing and controlling water pollution.
>
> * * *
>
> (d) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. 33 U.S.C. § 1151;
>
> Consistent with the policy declaration of this chapter, State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not, except as otherwise provided by or pursuant to court order under subsection (h) of this section, be displaced by Federal enforcement action. 33 U.S.C. § 1160(b).

It is clear that under the federal scheme, bringing a judicial enforcement action is entirely discretionary with the Attorney General and not intended to preclude other remedies. 33 U.S.C. § 1160(b)(g); *see,* Brief of the United States as *Amicus Curiae, Ohio* v. *Wyandotte Chemicals Corp., supra.* While the State of Vermont has pursued alternative remedies, it has come to the point in this controversy where it is apparent that no action is likely to be taken by either of the adverse parties and none is being taken by the federal enforcement authorities. Therefore, litigation is necessary.

Nor is this case one in which difficult scientific questions are presented. There seems to be little factual dispute over the fact that the sludge bed is in the bottom of Lake Champlain and is causing injury to the Lake. The simple fact is that it can be removed in order to cease continued damage. The technical problems of removal have been studied by two federal conferences and the Army Corps of Engineers. A technical committee of the federal conference has recommended removal and concluded there is no danger of

mercury contamination (CONFERENCE PROCEEDINGS, June 25, 1970, p. 126; TECHNICAL COMMITTEE REPORT, Appendix B). The demand for additional study is an obvious continuation by Defendants of attempts to delay action. The fact that removal will be expensive does not make the issue more complex. The complexities of *Wyandotte Chemicals* simply do not exist here.

The Court in the *Wyandotte Chemicals* case expressed concern over the fact that nothing distinguished that case from complaints which might be lodged in a host of other cases. The present case is distinguishable from numerous others in that the source of the wrong is the continuing existence of a sludge bed which lies across an interstate boundary, not only causing damage as a public nuisance but also committing a trespass and causing a boundary dispute.

As a matter of policy, the Supreme Court should take jurisdiction in the instant case. The Bill of Complaint clearly alleges a wrong which is causing serious injury to the citizens of the State of Vermont. International Paper Company has for years enjoyed the use of a natural resource belonging to the people of the State of Vermont and at their expense. New York by permitting that activity and by failing to abate the continuing nuisance which presently exists has jointly caused damage to Vermont citizens. Both Defendants have profited (New York through tax revenue and employment for its citizens and International Paper through its business) at the expense of Vermont citizens who have been deprived of their right to use the waters which are held in trust for them. The State of Vermont has an obligation to its citizens to bring this suit and has no alternative forum wherein a complete remedy can be rendered.

III. The Pendency of a Separate Suit in the United States District Court of Vermont Has No Effect Upon the Jurisdiction in This Action.

Both defendants claim that this Court should not take jurisdiction in the instant case because of a pending class action (*Zahn* v. *International Paper Co.*, No. 6192 (D. Vt. 1971). This position reflects confusion over the essential difference between a private nuisance and a public nuisance. Plaintiffs in *Zahn* are seeking relief from the injury being done them as owners of property along Lake Champlain. The State of Vermont has a separate and distinct cause of action in that the activities of defendants are causing damage to all of the citizens of Vermont for whom the soil and waters of Lake Champlain are being held in trust by the State. The health, safety and comfort of the general community are being affected by Defendants' action. *See,* VI-AMERICAN LAW OF PROPERTY, § 28.23 (Casner ed. 1954). In any event, the pendency of a separate action in a lower court does not effect jurisdiction in this Court. *Kentucky* v. *Indiana,* 281 U.S. 163 (1930).

IV. The Doctrine of Sovereign Immunity Does Not Apply to Suits Between States.

Defendant New York claims the protection of sovereign immunity (New York Brief, p. 12). While that much maligned doctrine might protect the State of New York from a claim made by one of its own citizens, it is certainly not applicable to a claim by one state against another. *See, South Dakota* v. *North Carolina,* 192 U.S. 286, 321 (1904); *United States* v. *Texas,* 143 U.S. 621, 645-646 (1892).

CONCLUSION

For the reasons stated above, we urge that Vermont's Motion for Leave to File Complaint in this Court be granted.

Dated at Montpelier, Vermont, April 15, 1971.

Respectfully submitted,

STATE OF VERMONT

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APPENDIX

APPENDIX A

Constitutional Provisions and Statutes

United States Constitution, Article 3, § 2:

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

* * *

28 U.S.C. § 1251:

* * *

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> * * *
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

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

> (a) The purpose of this chapter is to enhance the quality and value of our water resources and to estab-

lish a national policy for the prevention, control, and abatement of water pollution.

(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. * * *

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

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

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

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

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

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Secretary or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Secretary may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Secretary publishes such regulations, the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

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

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

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

mit its findings to the Secretary. If the Hearing Board approves the standards as published or promulgated by the Secretary, the standards shall take effect on receipt by the Secretary of the Hearing Board's recommendations. If the Hearing Board recommends modifications in the standards as published or promulgated by the Secretary, the Secretary shall promulgate revised regulations setting forth standards of water quality in accordance with the Hearing Board's recommendations which will become effective immediately upon promulgation.

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

the physical and economic feasibility of complying with such standards, shall have jurisdiction to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require.

* * *

(d) (1) Whenever requested by the Governor of any State or a State water pollution control agency, or (with the concurrence of the Governor and of the State water pollution control agency for the State in which the municipality is situated) the governing body of any municipality, the Secretary shall, if such request refers to pollution of waters which is endangering the health or welfare of persons in a State other than that in which the discharge or discharges (causing or contributing to such pollution) originates, give formal notification thereof to the water pollution control agency and interstate agency, if any, of the State or States where such discharge or discharges originate and shall call promptly a conference of such agency or agencies and of the State water pollution control agency and interstate agency, if any, of the State or States, if any, which may be adversely affected by such pollution. Whenever requested by the Governor of any State, the Secretary shall, if such request refers to pollution of interstate or navigable waters which is endangering the health or welfare of persons only in the requesting State in which the discharge or discharges (causing or contributing to such pollution) originate, give formal notification thereof to the water pollution control agency and interstate agency, if any, of such State and shall promptly call a conference of such agency or agencies, unless, in the judgment of the Secretary, the effect of such pollution on the legitimate uses of the waters is not of sufficient significance to warrant exercise of Federal jurisdiction under this section. The Secretary shall also call such a conference whenever, on the basis of reports, surveys, or

studies, he has reason to believe that any pollution referred to in subsection (a) of this section and endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring; or he finds that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce because of pollution referred to in subsection (a) of this section and action of Federal, State, or local authorities.

(2) Whenever the Secretary, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any pollution referred to in subsection (a) of this section which endangers the health or welfare of persons in a foreign country is occurring, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State in which such discharge or discharges originate and to the interstate water pollution control agency, if he believes that such pollution is occurring in sufficient quantity to warrant such action. The Secretary, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the conference, and the representative of such country shall for the purpose of the conference and any further proceeding resulting from such conference, have all the rights of a State water pollution control agency. This paragraph shall apply only to a foreign country which the Secretary determines has given the United States essentially the same rights with respect to the prevention and control of water pollution occurring in that country as is given that country by this paragraph. Nothing in this paragraph shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the

Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of water pollution in waters covered by those treaties.

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

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

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

(f)(1) If, at the conclusion of the period so allowed, such remedial action has not been taken or action which in the judgment of the Secretary is reasonably calculated to secure abatement of such pollution has not been taken, the Secretary shall call a public hearing,

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

notice to the State water pollution control agency and to the interstate agency, if any, of the State or States where such discharge or discharges originate.

* * *

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

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

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

(h) The court shall receive in evidence in any such suit a transcript of the proceedings before the Board and a copy of the Board's recommendations and shall receive such further evidence as the court in its discretion deems proper. The court, giving due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved, shall have jurisdiction to enter such judgment, and orders enforcing such judgment, as the public interest and the equities of the case may require.

* * *

APPENDIX B

Technical Committee Report on the Mercury Content in Sludge in Ticonderoga Bay Area, Lake Champlain (N.Y.-Vt.)

Introduction

As recommended by the conferees at the Second Session of the Federal Enforcement Conference on the Matter of Pollution of Lake Champlain on June 25, 1970, a technical committee consisting of representatives of the States of Vermont and New York, the New England Interstate Water Pollution Control Commission and the Federal Water Quality Administration was appointed to investigate the sludge deposits in the Ticonderoga Bay area of Lake Champlain to determine the concentration of mercury therein. In reviewing its task, the technical committee determined that in addition to mercury analyses on the sludge from the Ticonderoga Bay area, the following analyses should be performed on selected samples:

mercury analyses on water

total sulfur series

nitrates

phosphates

atomic absorption scan for selected metals

pesticides

sludge disturbance test

CONCLUSIONS

1. The concentration of mercury in the Ticonderoga Bay benthic deposits are no higher than the sediment concentration throughout Lake Champlain as a whole (based on comparison of Ticonderoga Bay results with analysis of 37 samples collected throughout the entire length of the Vermont and New York sides of Lake Champlain).

2. The mercury concentrations in the Ticonderoga Bay benthic deposits are sufficiently low so that they should not be a factor in any decision to remove the deposits.

3. If sludge deposits are removed from Ticonderoga Bay by dredging for disposal on land or for treatment, strict operating control should be maintained to insure that adequate detention time or treatment is provided to insure that any resulting liquid effluent will not contravene water quality standards.

Certificate of Service Under Rule 33

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 50 Original

STATE OF VERMONT, *Plaintiff*

v.

STATE OF NEW YORK and INTERNATIONAL PAPER COMPANY, *Defendants.*

I, FRED I. PARKER, Deputy Attorney General for the State of Vermont, Plaintiff herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of April, 1971, I served copies of the Supplemental Brief of the State of Vermont In Support Of Motion For Leave To File Complaint by mailing three copies of the same to each party required to

be served in a duly addressed envelope, postage prepaid, in the United States mails, as follows:

The Honorable Nelson A. Rockefeller
Governor of the State of New York
Albany, New York 12201

The Honorable Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street,
New York, New York 10013

Attorney for Defendant State of New York

and to

Taggart Whipple, Esq.
1 Chase Manhattan Plaza
New York, New York 10005

Attorney for Defendant International Paper Company.

April 15, 1971.

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FRED I. PARKER