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**In the Supreme Court of the United States**

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STATE OF VERMONT, PLAINTIFF

*v.*

STATE OF NEW YORK AND INTERNATIONAL PAPER  
COMPANY

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**MOTION OF THE UNITED STATES FOR LEAVE TO INTERVENE,  
MEMORANDUM IN SUPPORT OF MOTION AND PETITION  
OF INTERVENTION**

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**MOTION OF THE UNITED STATES OF AMERICA FOR LEAVE TO  
INTERVENE**

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The United States of America respectfully moves this Court for leave to intervene in the above-entitled case and for leave to file the attached petition of intervention for the reasons stated in the accompanying memorandum.

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ERWIN N. GRISWOLD,  
*Solicitor General.*

DECEMBER 1972.

(1)



# *In the Supreme Court of the United States*

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No. 50, Original

STATE OF VERMONT, PLAINTIFF

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PAPER COMPANY

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## MEMORANDUM IN SUPPORT OF MOTION OF UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE

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1. This case was initiated by Vermont as an original action in this Court by the filing of a motion for leave to file a complaint against New York and the International Paper Company. The Court granted Vermont's motion for leave to file (406 U.S. 186) and appointed a special master. 408 U.S. 917. In its complaint, as subsequently amended, Vermont alleges that, as a result of discharges of industrial and other wastes, the defendants are responsible for a sludge bed on the bottoms of Lake Champlain and Ticonderoga Creek. Vermont alleges that the sludge bed has degraded the water and impeded navigation and constitutes a trespass and a public nuisance; Vermont seeks an order requiring the defendants to remove the sludge bed and for compensatory and punitive damages. Ver-

mont also seeks to enjoin air and water discharges from a new International Paper Company plant operating on the western shore of Lake Champlain.

2. The United States has numerous interests in the waters of Lake Champlain and Ticonderoga Creek. These interests fall into the following main categories:

(1) Protection of public health and control of pollution of Lake Champlain and its tributary, Ticonderoga Creek, which are both navigable waters of the United States.

(2) Protection of the navigational servitude in Lake Champlain and Ticonderoga Creek.

(3) Promotion of the general welfare of all the United States in the utilization of the fresh waters of Lake Champlain as one of the great natural resources of the Nation.

The interest of the United States in controlling water pollution stems from the federal statutes summarized in the attached petition of intervention (see pp. 9-19, *infra*). In brief, Congress declared in Section 101 of the National Environmental Policy Act, 42 U.S.C. 4331, the continuing policy of the federal government to use all practicable means to create and maintain conditions under which man and nature can exist in productive harmony. Under the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500, 86 Stat. 816), the Administrator of the United States Environmental Protection Agency is responsible for preparing, developing, and in large part administering a comprehensive program for the control of water pollution for all of the waters of the United States. Federal concern with both pollution



and navigation are reflected in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and implementing regulations. 33 C.F.R. 209.120. Under these provisions, no work in navigable waters, including excavations and fillings, may proceed without the prior consent of the Secretary of the Army. In determining whether to issue a permit for work in navigable waters, the Secretary must consider environmental as well as navigational factors. 33 C.F.R. 209.120(d)(1).

The utilization of Lake Champlain and its tributaries as one of the great assets of the nation is of prime importance. Whatever may be the powers and rights of the individual States in these interstate and navigable waters, the people of the United States as a whole have a vital interest in the use of Lake Champlain and its maintenance as part of the essential geographic structure of the country.

3. The United States may properly be permitted to intervene and present evidence and argument in a case where substantial federal interests are involved without technically aligning itself as a party-plaintiff or a party-defendant. In *Florida v. Georgia*, 17 How. 478, the United States sought leave to intervene in a boundary dispute between two States in order to present evidence and argument on the location of the boundary where part of the disputed territory had been ceded to the United States by Spain as a part of Florida. 17 How. at 491. The Court permitted intervention, noting that it has great flexibility in determining the mode and form of proceedings in original

actions. In rejecting the contention that intervention was improper since neither the Constitution nor any statute specifically authorized the Attorney General to intervene, the Court held that it is not

\* \* \* bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained. [17 How. at 493.]

The United States was thus permitted to participate fully in the proceedings without being deemed a party "in the technical sense", since intervention was the "simplest and best manner of bringing their interest before the court, and of enabling it to do justice to all parties whose rights are involved in the decision." 17 How. at 495-496.

Similarly, intervention by the United States was permitted in *Wisconsin v. Illinois*, 361 U.S. 956, a series of four consolidated original actions among various States and the Chicago Sanitary District involving a diversion of water from Lake Michigan. The United States sought leave to intervene in view of its extensive interests in navigation, international relations, development of hydroelectric power, protection of federal property, protection of public health, control of pollution and protection of the interests of all States in the Great Lakes. In its petitions for intervention, the United States asserted its interests and requested that the issues in the case be determined in the light of the federal interests, but did

not then align itself on one side or the other of the controversy. See Motion of the United States for Leave to Intervene, Memorandum in Support thereof, and Petitions of Intervention, *Wisconsin v. Illinois*, Nos. 2, 3, 4 and 12, Orig., October Term, 1959. Moreover, the extensive evidence subsequently presented by the United States in the trial proceedings was reflected in the Special Master's Findings of Fact, adopted by the Court in its decree. 388 U.S. 426.

As in the *Florida* and *Wisconsin* cases, the interests of the United States in the subject matter of the current controversy are substantial. To assure that those interests are presented to the Court in order that the Court's ultimate decision may take the interests into account, the United States should be permitted to intervene to present evidence, examine and cross-examine witnesses and participate in oral argument.

4. The first hearings in this case were held before the special master in November of this year and further hearings are scheduled in December. In the interest of expedition and in view of the special master's familiarity with the issues in this case, the Court may wish to refer our motion for leave to intervene to the special master and direct that all responses to the motion be filed with him. Alternatively, the Court could grant our motion and refer the attached petition of intervention to the special master. This was the procedure followed in *Wisconsin v. Illinois*, 361 U.S. 956, 362 U.S. 957.

It is therefore respectfully submitted that the motion for leave to intervene and file the attached petition

of intervention should be granted or, in the alternative, referred to the special master.

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**STATE OF VERMONT, PLAINTIFF**

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**STATE OF NEW YORK AND INTERNATIONAL  
PAPER COMPANY**

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**PETITION OF INTERVENTION OF THE UNITED STATES OF  
AMERICA**

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The United States of America for its Petition of Intervention in the above-entitled case alleges as follows:

## **PART ONE: INTRODUCTION AND BACKGROUND**

### **I**

On April 24, 1972, the Court granted the motion of plaintiff for leave to file a complaint invoking the original jurisdiction of the Court in this case. 406 U.S. 186. The Honorable R. Ammi Cutter was appointed as Special Master on June 26, 1972. 408 U.S. 917.

## II

On November 1, 1972, the Special Master granted plaintiff's motion to amend the complaint in certain respects, but denied that motion insofar as plaintiff sought to state a cause of action under Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. 407).

## III

In its amended complaint, the State of Vermont alleges that both the International Paper Company and the State of New York are responsible for a sludge bed that, as a result of discharges of industrial and other wastes, has formed on approximately 300 acres of the bottoms of Lake Champlain and Ticonderoga Creek, a tributary of the lake. Vermont alleges that the sludge bed has degraded the water and impeded navigation and constitutes a trespass and a public nuisance; Vermont seeks an order requiring both defendants to remove the sludge and pay Vermont compensatory and punitive damages; Vermont also requests that the International Paper Company be enjoined from discharging pollutants into Lake Champlain and emitting into the air nauseous and noxious odors from the company's new plant which began operations in December 1970 on the western shores of Lake Champlain.

## IV

The defendants, in answer to the amended complaint, deny its principal allegations and ask that it be dismissed.

**PART TWO: DESCRIPTION OF LAKE CHAMPLAIN AND  
TICONDEROGA CREEK**

**V**

Lake Champlain is a navigable waterway of the United States lying within the States of New York and Vermont and Canada. The middle of the deepest channel of the lake is, insofar as is pertinent to this action, the interstate boundary between the States of New York and Vermont, and the waters of the lake flow northerly across the boundary between the United States of America and Canada. The lake is the largest body of fresh water east of the Great Lakes and is used for commercial navigation, recreation and other public purposes.

**VI**

Ticonderoga Creek is a navigable waterway of the United States lying wholly within the State of New York. The waters of the creek flow into Lake Champlain.

**PART THREE: APPLICABLE FEDERAL LAWS AND FEDERAL  
ACTIVITY THEREUNDER**

**VII**

**NATIONAL ENVIRONMENTAL POLICY ACT**

In Section 101 of the National Environmental Policy Act, 42 U.S.C. 4331, Congress declared it to be the continuing policy of the federal government to use all practicable means "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and

fulfill the social, economic, and other requirements of present and future generations of Americans.”

Section 102, 42 U.S.C. 4332, authorizes and directs that the policies, regulations and laws of the United States shall, to the fullest extent possible, be interpreted and administered in accordance with the policies of the Act.

## VIII

### THE RIVERS AND HARBORS ACT OF 1899

Sections 9 through 20 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, *et seq.*, provide for federal control and protection of the navigable waters of the United States.

Section 10 of that Act, 33 U.S.C. 403, prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States and makes it unlawful to excavate, fill or in any manner alter or modify the condition or capacity of the channel of any navigable water of the United States unless such action has been authorized by the Secretary of the Army. The Secretary of the Army has promulgated regulations governing the issuance of permits to dredge or fill in navigable waters. 33 C.F.R. 209.120. Under these regulations, the permitting authority must consider, when evaluating a permit application, the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest. 33 C.F.R. 209.120(d)(1).



Section 13 of the Act, 33 U.S.C. 407, prohibits the discharge of refuse matter, other than that flowing from streets and sewers in a liquid state, into any navigable waters or any tributary of such waters where such matter shall float or be washed into navigable waters, unless a discharge permit is first obtained. The authority of the Secretary of the Army to issue permits under Section 13 was terminated by the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500, 86 Stat. 880, *et seq.*), and the Administrator of the United States Environmental Protection Agency is now authorized to issue permits pursuant to the Federal Water Pollution Control Act. Permits issued under the Act are deemed to be permits issued under Section 13 of the Rivers and Harbors Act of 1899.

## IX

### THE FEDERAL WATER POLLUTION CONTROL ACT

The Federal Water Pollution Control Act was enacted in 1948, 62 Stat. 1155, *et seq.*, and has been either extended or amended seven times.<sup>1</sup> From its inception the Act has provided procedures whereby the federal government may prevent and abate the pollution of interstate waters. In October 1972, the

<sup>1</sup> Act of July 17, 1952, 66 Stat. 755; Water Pollution Control Act Amendments of 1956, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, 75 Stat. 204; Water Quality Act of 1965, 79 Stat. 903; Clean Water Restoration Act of 1966, 80 Stat. 1246; Water Quality Improvement Act of 1970, 84 Stat. 91; Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816.

Act was substantially amended. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *et seq.*

The objective of the amended Act, as declared by Congress, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). The Act establishes as national goals the elimination of pollution discharges into navigable waterways by 1985 and the attainment by July 1, 1983, of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (Section 101(a)(1) and (2)). The amended Act provides (1) for federal assistance in the development of comprehensive programs for the prevention and abatement of water pollution (Title I), (2) for federal grants for the construction of waste treatment facilities (Title II), (3) for the establishment and enforcement of effluent and water quality standards (Title III), and (4) for the issuance of permits and licenses for discharges into waterways (Title IV).

Of particular relevance here are the provisions of Title I directing the Administrator of the Environmental Protection Agency to (1) develop a comprehensive program for the prevention, reduction and elimination of pollution on navigable waterways (Sections 102(a), 104(a)), (2) encourage compacts and cooperative activities between States for the control of pollution (Section 103(a)), and (3) render "technical services to pollution control agencies and other appropriate public or private agencies, institutions,

and organizations, and individuals, including the general public" to promote the investigation and study of methods of eliminating pollution (Section 104(a)(2)).

## X

### FEDERAL ACTIVITY WITH RESPECT TO LAKE CHAMPLAIN

Pursuant to the provisions of the Federal Water Pollution Control Act prior to its amendment in 1972, conferences were called in 1968 and 1970 to consider the reduction and prevention of pollution in Lake Champlain and its tributaries. Conferees representing the state water pollution control agencies of New York and Vermont, the New England Interstate Water Pollution Control Commission and the United States Department of the Interior participated. Among the unanimous conclusions of the conferees at the 1968 conference was that, as a result of untreated industrial waste discharges, several areas of Lake Champlain contain extensive sludge deposits, and that the major deposits affecting waters of Vermont are near the mouth of Ticonderoga Creek and are mainly the result of the discharge of untreated paper mill wastes from the International Paper Company. The conferees at the 1970 conference concluded that the sludge deposits which have accumulated in Lake Champlain as the result of discharges from the International Paper Company plant constitute and will continue to constitute pollution of interstate waters and recommended that, since the sludge deposits emanate from the State of New York, New York should report to the conferees

no later than August 21, 1970, its time schedule and program to abate the interstate pollution caused by the sludge deposits. New York reported to the conferees in August 1970, recommending further study of the problem for a nine-month period.

**PART FOUR: THE EFFECTS OF THE SLUDGE DEPOSITS AND  
THEIR REMOVAL**

**XI**

The sludge deposits in Ticonderoga Creek and Lake Champlain adjacent to the mouth of the creek have degraded and modified the waters of Ticonderoga Creek and portions of Lake Champlain, limiting or precluding the use of those waters for recreational bathing, boating and general aesthetic enjoyment, have destroyed the natural aquatic community in those waters, and have presented a health hazard to persons using those waters.

**XII**

Since 1970 the waters of Ticonderoga Creek and Lake Champlain adjacent to the mouth of the creek have improved in quality; such improvement is apparently due in part to the shutdown of the International Paper Company plant on Ticonderoga Creek and in part to unusually high water levels in the lake. On the basis of existing data, however, it is not possible to predict whether those waters will continue to improve in quality if there is a change in the natural conditions of the lake, such as a lowering of the water level.

## XIII

Removal of the sludge deposits in Ticonderoga Creek and Lake Champlain through the use of present dredging technology would result in severe water quality degradation for a significant period of time from the dispersion in those waters of pollutants released from the dredged material. Additionally, there is at present no known environmentally sound method of disposing of the great amount of material that would have to be dredged.

## XIV

In view of the recent improvement in the water quality of Ticonderoga Creek and Lake Champlain, it would not be in the public interest to disturb the sludge deposits at the present time. However, because such deposits retain the potential for causing further degradation of the waters of Lake Champlain and Ticonderoga Creek, the Court may wish to order defendant International Paper Company to test on a regular basis the sludge deposits and the waters adjacent to the deposits for the purpose of monitoring any adverse environmental effects which might be caused by the deposits in the future. Further, the Court may wish to require defendant International Paper Company to undertake a pilot program to determine the best available technology for removing and disposing of the sludge deposits in an environmentally sound manner should removal become desirable.

**PART FIVE: THE NECESSITY FOR INTERVENTION BY THE  
UNITED STATES**

**XV**

Because of the appropriate self-interest of the party States and corporation in the use of the natural resource here involved, they are unable, either separately or collectively, fully to assert and represent the interests of the United States in the matters in controversy. In order that such interests may be protected, it is necessary that the United States intervene as a party to this case.

**PART SIX: RESPONSE TO PLEADINGS OF OTHER PARTIES**

**XVI**

The United States does not plead specifically to the allegations of the parties as set forth in the amended complaint of the plaintiff and the answers of the defendants. However, this omission so to plead does not constitute an admission by the United States of any allegation of fact or conclusion of law contained in the amended complaint or the answers.

WHEREFORE, the United States of America requests that it be permitted to intervene in this case and be permitted to offer evidence, examine and cross-examine witnesses, and be heard in argument; that the facts relevant to the issues raised by the amended complaint, the answers and this petition in intervention be determined; that the rights of the parties in light of those facts and in light of the rights, interests and obligations of the United States be deter-

mined; and that appropriate disposition of the various claims herein be made, having due regard for the effect of such disposition on the rights, interests and obligations of the United States.

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ERWIN N. GRISWOLD,  
*Solicitor General.*

DECEMBER 1972.











