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In the  
Supreme Court of the United States

LAKE CARRIERS' ASSOCIATION,  
et al.,

Appellants,

vs.

RALPH A. MacMULLAN, et al.,

Appellees.

No. 71-422

Washington, D. C.  
March 22 & 23, 1972

Pages 1 thru 45

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## IN THE SUPREME COURT OF THE UNITED STATES

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LAKE CARRIERS' ASSOCIATION,  
et al.,

Appellants.

v.

RALPH A. MacMULLAN, et al.,

Appellees.  
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No. 71-422

Washington, D. C.,

Wednesday, March 22, 1972.

The above-entitled matter came on for argument at  
2:35 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SCOTT H. ELDER, ESQ., Johnson, Branand & Jaeger,  
2700 Terminal Tower, Cleveland, Ohio 44113; for  
the Appellants.

ROBERT A. DERENGOSKI, ESQ., Solicitor General of  
Michigan, The Seven Story Office Building, 525 W.  
Ottawa Street, Lansing, Michigan 48913; for the  
Appellees.

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Scott H. Elder, Esq.,  
for Appellants

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In rebuttal

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Robert A. Derengoski, Esq.,  
for Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-422, Lake Carriers' Association against MacMullan.

Mr. Elder.

ORAL ARGUMENT OF SCOTT H. ELDER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ELDER: Mr. Chief Justice, members of the Court:

I suppose our plea here is really quite simple, when you boil everything down. What's involved is basically a fleet of vessels navigating the Great Lakes. These vessels trade throughout some eight separate States in interstate and foreign commerce and two Provinces of Canada.

Now, we're involved with a somewhat emotional issue. Everyone knows what pollution is. We feel a responsibility to end pollution; that's the responsibility of every citizen. But we also feel that if the abatement of pollution is a valid premise in Michigan, it's also a valid premise in Ohio and Wisconsin and Illinois, and what-have-you.

We're willing to put the equipment on the vessel. We are not asking this Court to act as a superlegislature and decide what the pollution device is or should not be.

But we feel, as a basic concept, that once we install pollution equipment aboard the vessel, whatever that equipment should be, we should be able to use it wherever we go. We

have a federal license, which authorizes us to trade on the northern and northeastern frontiers. Having that federal license, we should then be able to use that pollution device in any port in any waters that we go into.

Q What's the basis for your saying that, Mr. Elder if the State of Michigan says otherwise? Is it a federal statute?

MR. ELDER: First of all, I think Michigan has exceeded the police power. I think the Michigan statute goes beyond the police power, because it has extraterritorial effect

Secondly, I think the uniform maritime law -- probably the most important point in this whole case -- requires that this be treated as a matter of uniformity and not a matter of individual State action.

Finally, -- not finally, but we do have the commerce clause involved here. There are numerous cases which hold that where a particular function in commerce requires national uniformity, even in the absence of a federal statute, then the States have no authority to act, because it has to be treated uniformly.

Finally, we do have the question of preemption under the Federal Water Quality Act of 1970. We also feel very strong about that particular issue. That this field has been completely preempted by the Federal Government.

Now, you take a look at the Act, that is the Federal

Act, and Congress came out with a comprehensive scheme of pollution control. It gave the EPA the authority to promulgate standards and figure out just what type of level of treatment you have to have aboard these vessels. And this is a nationwide standard.

Then it gave the Coast Guard the authority to go ahead and promulgate rules and regulations covering the design of that particular equipment. Now, this gets to be very important, because that equipment has to fit the vessel, and it has to comply with marine safety regulations; you've got problems of stability; you've got problems of the integrity of the hull. So it has to be all taken care of by the Coast Guard.

Now, we advocate that this shows a comprehensive over-all scheme for pollution control. We believe it preempts the States, because to let the States go ahead here now, even for a short time, completely frustrates the federal program.

Q Why does it, when the federal regulations don't become applicable to existing vessels until a future time?

MR. ELDER: Precisely for this reason: If we had to put a holding tank in because of Michigan's law, pretty soon we've got to pump that tank out, and if we're in Ohio or Wisconsin, we've got no legal remedy, no equitable remedy where we can compel anybody to put in a pump-out station and get rid of that stuff.

Q Well, isn't that a problem that will exist regardless of the pending federal regulation?

MR. ELDER: No, it isn't. No. If we have over-all federal regulations, then we could put the equipment in and we would have some leverage somewhere, and I assume that when these federal regulations do go in that the EPA is going to have some authority to control shore stations, if the solution is pump-out.

But I think, if you look at the Federal Act, you will see that it provides for an effluent standard, meaning that there is a certain overboard discharge to be allowed. This way the ship can function. I realize that there will probably be certain limited, restricted areas where no overboard discharges will be allowed, because of -- in certain harbors and so forth; that type of thing.

But once you do that, you make that particular restriction, and you put your treatment device aboard the vessel, then when you do have to hold, you can hold treated effluent not raw sewage. And this is what we want to do.

Now, we're not objecting to these no-discharge areas, but we say, under the federal Act, you're allowed to have an effluent go overboard, out in the lake and so forth, and then if we do have to hold and if we do have to store, then we ought to be holding treated effluent not raw sewage in a great big tank.

It is the extraterritorial effect of the Michigan Act --

Q You say that we ought to do this and we ought to do that; but, I mean, isn't that basically a policy judgment that's up to the judgment of the Legislature, in the first instance, rather than of a private carrier?

MR. ELDER: Definitely, very much so.

But the point I'm trying to make is this: I'm not asking this Court to sit as a legislature, as I indicated before, to decide the pollution fight. We're saying basically this: it's got to be uniform.

We're trading with eight States, two Provinces of Canada, so let's make this thing the same. We've got to go out and put something on these vessels.

Q You mean your concern is that Michigan will specify one form of solution, New York perhaps another, Illinois still a third, and that if you are subject only to the federal regulation, that then there would be a single specification; is that it?

MR. ELDER: That's a very distinct possibility. I mean that if the States can do something -- well, they already have done things completely different. The Wisconsin statute is not the same as the Michigan statute. The New York statute is not the same as the Michigan statute. In fact, actually our vessels are exempt under the New York statute,



because our vessels are already subject to the interstate quarantine regulations. We're already prohibited by federal law from discharging within three miles of any specified intake area on the Great Lakes. That is the domestic water intake area.

Now, if you just need one State alone, the problem is you've got to put something on your vessel, it's a machine, it's a piece of equipment. And then once you've done that, you just can't shut it off, you've got to be able to use that wherever you go. And you go outside of Michigan, you ought to be able to use it in Ohio.

Now, here's another typical example -- and I'm way off my argument here, but, anyway -- let's look at this one. Suppose you've got a ship going from Duluth to Chicago. Now, it passes down the St. Mary's River, it passes through Michigan waters; but that particular vessel company has no way of compelling the fellow in Duluth to put in a pump-out station, there's no way of compelling the fellow in Chicago to put in a pump-out station. Yet this ship is supposed to have a holding tank and put all its stuff into it.

Q Well, can't the ship arrange that, with its own funds to put in a pumping-out station in Duluth or in Chicago?

MR. EIDER: Well, do you think we could convince the CSO Railroad in Toledo, Ohio, for example, to put in this

pump-out station?

Q Well, are you saying it's a financial burden?

MR. ELDER: No, no. No, sir. No. We're not concerned about the cost, we are not raising the question of money. What we are saying is that we'll do it, we'll go ahead and put the devices in. But once we do we want to be able to use them where we go.

Now, I don't think that's an unreasonable request.

Q Do you have pump-out stations in your home ports?

MR. ELDER: No. There are no pump-out stations that I know of in existence for a commercial vessel. There are pump-out stations in these little yacht basins and so forth, where a vessels holds itself, so to speak. But our vessels don't. Our vessels go all over the Lakes.

Now, these holding tanks may be a good solution for some vessel that comes into a particular dock every trip, trades in there every one or two days. This may be a very simple and best arrangement.

But it's the vessel that's coasting all over the Lakes and never knows what State it's going to be into next, and this really gets down to the fundamental concept of maritime law. Now, this is more than just a commerce clause, the maritime. Uniform Maritime Law is based on an entirely different provision of the Constitution, and if you look at the

Knickerbocker Ice Company case and the Jensen case. they say that you've simply got to have uniformity throughout this maritime business. And there they held two things: They held, first of all, that the State of New York could not regulate longshoremen, and that's why we have the Longshoremen and Harbor Workers Compensation Act.

Then in Knickerbocker Ice, the Congress turned around and tried to give the authority to the States, and this Court said no, 'his is a congress of delegated powers, the delegation is from the people to the Congress and the Congress cannot give it back to the State. And this is the one area where the States cannot interfere.

Now, I know that the State of Michigan has said, well, if States can regulate pilotage, then there is no interference with the maritime law.

But I think that's an interesting example, because, look at what pilotage is. First of all, pilotage is based essentially on local knowledge. When the Constitution was written, we had a conglomeration of 13 separate States. But at that time each of those States had their own pilotage system within their own pilotage waters.

But what happens? Pilotage is law, it's based on local knowledge, and it ends at the State line. The pilot gets off the boat. Here if we put a holding tank on, we just can't throw it off the side after we get outside of Michigan

waters.

So I think the distinction here is between the full training crew cases and the cases regulating the length of tramps. Now, in the full crew cases the Court noted, this Court, that the effect of the statute ends at the State line. The extra man in the crew, whatever it is, gets off at the State line. It's simple enough to stop the train.

But now when you start regulating the length of the tramps, then there are only two alternatives: one is to break up the train at every border and reshuffle your cars, but you can't do this until you've got a larger car, and that takes it.

The other alternative is to comply with the very minimum number of cars of any State through which you pass. This Court specifically held, and I'm talking about Southern Pacific Company vs. Arizona; this Court specifically held that that gave the State statute base police power, extraterritorial jurisdiction, which the police power cannot extent.

Q Of course, the three-judge district court didn't rule against these claims on the merits, they just said you should raise them in the Michigan courts, didn't they?

MR. ELDER: Well, I'd like to get to that, if you don't mind, Your Honor. It's true the three-judge court did not rule on any of these issues. They said that they were going to abstain, that we should go back to the State courts,

Now, abstention. All right. It's pretty clear that where there's a case pending, a criminal case pending in the State court, that this Court feels that abstention is proper unless there is bad faith, harassment through this particular State prosecution.

Now, here there is no harassment. We are not challenging the spirit of the officials of Michigan. But also there's the fact that there is no State prosecution pending at all. So when the federal court rules and says go back to the State court, we actually have no place to go unless we just sit up there in Michigan and wait for the State to sue us.

Q And there's no civil proceeding of any kind pending?

MR. ELDER: No.

Michigan has got a declaratory judgment act.

Q So you could start a State declaratory judgment?

MR. ELDER: Oh, no. Oh, no. We couldn't use the State declaratory judgment act, because if there's no controversy in the federal court, then there is none in the State court.

Q Well, if there is no controversy in the federal court, you're out of court anyway.

MR. ELDER: Right.

But the Michigan statute is based on the same premise as the federal act.

Q Well, the three-judge court didn't say there was no controversy --

Q Yes, they did; they said, no three-judge court issue on preemption, which is true. And said as to the other issues there's no case or controversy.

MR. ELDER: That's right.

And this is --

Q Well, don't you think then you have to address yourself to why there is a case or controversy here?

MR. ELDER: Oh, very definitely.

There is a real case or controversy here, because we've got 187 vessels that we've got to do something with those vessels. Now, before we put in this equipment and install it, we disagree that Michigan has the right to require us to put in holding tanks.

Now, this, we feel, is a very real and ripe controversy. It means that we've got to go out and do something if this Michigan law is valid. If it isn't, then we can go the course of the federal legislation.

So there is a real, ripe and ready controversy here, and I was quite interested in an opinion here, this is a -- Mr. Justice Brennan, and Mr. Justice White, and Mr. Justice Marshall, in concurring in part and dissenting in part in this case of Piers vs. Letsma, decided last term, the citation is 39 Law Week 6214.

Now, this Court said in that particular case that if the State prosecution was first filed, and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene. When, however, as here, at the time the federal hearing there is no State prosecution to which the federal court plaintiff may be relegated for the assertion of his constitutional defenses, the primary reason for refusing intervention is absent.

Then it goes on to say: but the basic principle that in appropriate circumstances federal courts will exercise their equity power against State officials to protect rights secured and activities authorized by paramount federal law, remains firmly embedded in our jurisprudence.

Now, more importantly, it goes on and says this: Citing Charris vs. Thompson, they say that, talking about defendants or whatever you want to call them, appellants, whatever they might be: they are not obligated to take the risk of prosecutions, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.

Finally it says this: in cases of this sort, on whatever provision the claim of unconstitutionality rests, the justification for intervention is that individuals should be able to exercise their constitutional rights without running the risk of becoming law breakers. The justification applies

with full force where there is a continuing line of controversy and federal intervention is sought when there is no State prosecution in which the State may be treated.

In other words, we don't feel that we're law breakers, and we don't think we should have to sit and wait for the States to sue us before we can get an adjudication of our constitutional rights.

But -- now, let me ask you this question: Suppose the State did sue? In this particular litigation you've got 19 individual vessel companies as plaintiffs, operating a total of 187 ships. All right, which one of the 19 is going to be the first to get anything? And how many will really have the nerve to go out and try this type of case, a pollution case, in a criminal proceeding?

To take it one step further: each ship is potentially an offender, although the state courts have no in rem jurisdiction; but then you've got 187 potential offenders.

Take the total number of ships in the Great Lakes under the American flag: 422. Add to those the Canadian vessels, the foreign overseas-flag vessels. You've got all these possible potential offenders.

But what has really happened here: actually you've taken all these suits and you've consolidated them here down into one particular lawsuit. Now, this is the purpose of



the declaratory judgment act, exactly what it's for. Actually you've saved litigation, you've got a forum that has taken away the stigma of the criminal proceeding, and we can get right down to the substance of deciding the case.

Now, too, you --

Q Yes, but you can't have a federal declaratory judgments action without a case or controversy.

MR. ELDER: We do have a case or controversy here.

Q Well, you haven't -- what is it?

MR. ELDER: What is it? It's the fact that they are trying to require us to install these holding tanks under the Michigan law. We say that is an unconstitutional exercise of State power.

Q Have they actually demanded it yet? Have they suggested it, or what?

MR. ELDER: Yes, we went up, we had conferences with them. They wanted to cooperate. Their concept of cooperation was go ahead and put in these holding tanks.

Q Do you think that the adversary situation has developed to the point where there is some adverse interests?

MR. ELDER: Oh, very definitely. Very definitely. But, frankly, we didn't want to let it get along so far, but we had to go in there and decide it in a criminal proceeding.

Now, if we've already been accused of being law-breakers --

Q Well, apparently everyone concedes that when the federal rules come out there will be preemption?

MR. ELDER: Right.

Q Now, the federal rules haven't come out yet?

MR. ELDER: No, they are in the process of promulgation, and they should be put some time, but why they are not out, I don't know.

This federal act was passed on April 3, 1970, and they still haven't done anything.

Q But if you put in holding tanks and then the Federal Act comes out, with different requirements and preempts, then you will have to comply with the Federal Act?

MR. ELDER: Right. Then we're stuck with the holding tanks, and we've got even less means than of compelling some dockside owner to put in pump-out facilities. Because he'll say, You're crazy, we've got the Federal Act.

Q You have five years, though, for existing vessels, don't you, under the -- from the date of promulgation of the statute?

MR. ELDER: This is true, but there is presently legislation pending, it's passed the House, it's passed the Senate -- no, it hasn't passed the House, it's passed the Senate; it's reported out of committee in the House. Which says that while you still have this five-year and two-year period, that as soon as you put in a device that is approved

by the United States Coast Guard, then you are automatically deemed to be in compliance with the federal law, and there will be no State control or preemption.

So you can accelerate the five years by simply installing the device, once we got the device.

Q And once you get the law, too.

MR. ELDER: Right.

Q So the five years is for your protection, not the State?

MR. ELDER: No, no. The five years is not necessarily for our protection. The five years is to --

Q Well, it gives you five years to comply, though, with the federal law or not.

MR. ELDER: Well, it's not based -- it's not a concession. The sentence said that this is the most reasonable, practicable time, based on technology and reasonableness, that such a program could --

Q Well, which law are you supposed to comply with in this five years? Say, the Federal standards come out, are you supposed to comply with Federal standards right away? Or do you have a five-year grace period?

MR. ELDER: We do have a five-year grace period.

Q Well, that's for you --

MR. ELDER: But that doesn't mean that there's a vacuum there in the State statute.

Q Well, I understand that. But you have five years to change over from State regulation to Federal?

MR. ELDER: We have five years in which to comply with the federal; but I don't think it's a question of changing over from State to federal, because I don't think the States have the jurisdiction in the first place.

Q Well, I understand that.

But as far as the federals are concerned --

MR. ELDER: On just the vessels. But I'm sure that once we get the standards, we'll equip much faster than the five years.

Q You don't think -- let's assume Congress passed a law that says: carriers shall live up to the diverse State laws, however different they may be, for five years; at the end of five years there will be a uniform standard.

MR. ELDER: If they pass a law like that, Your Honor, we'd be right back here again in this Court.

Q Well, why? Hasn't Congress got plenary control over interstate commerce? Can't it permit States to regulate what might not otherwise be regulatable by the State?

MR. ELDER: That is an unlawful delegation of the problem. But, now, the other side of the coin is that I think the federal government can adopt the State regulations. That's Cooley vs. Port Wardens.

Q Well, don't you think the federal, the law, by

saying that five years -- presumption shall be delayed five years, is in effect a congressional statement that State law shall control meanwhile?

MR. ELDER: No, I do not. No.

Q Now, your point, I gather, would be that perhaps complete federal presumption of anything in the States, even though you have five years within which to comply?

MR. ELDER: Right.

Q And meanwhile the States can't do anything?

MR. ELDER: Right. I don't think --

Q Is that based on your admiralty argument or generally on presumption, which?

MR. ELDER: It's based primarily on our admiralty argument and the commerce clause. I think even in the absence of a federal statute, in other words, we wouldn't even need a federal statute, for this Court to hold this Michigan statute unconstitutional.

Q Why not?

Q That's on your admiralty argument?

MR. ELDER: It's on my admiralty argument, it's on the commerce clause argument, and it's on the basic concept of the police power. In fact, this first issue is the police power, you don't really get to any of the other issues. I mean, if the State statute exceeds their basic police power, because of its extraterritorial effect, then you don't

have to reach any of the other arguments.

Q You run up against, at least superficially, you run up against the Muron Cement case, don't you?

MR. ELDER: The use in that case, I think sets the outer limits of the police power. Because once that ship --

Q It didn't say so. It said it was talking about the inner core of the police power. That's what the opinion says, isn't it?

MR. ELDER: Yes. True.

I think, Mr. Justice Stewart, what you call the inner core also becomes the outer limit, because once that vessel sailed away from Detroit that ordinance had no more effect. It didn't require any equipment change. In fact, we've still got many, many hand-fixed, coal-fired vessels going in and out of Detroit. All it means is that when you're the fireman you've got to work a little harder to keep your smoke down.

But once that ship pulls away, she's free.

Q But the claim in that case was that it would require structural alterations.

MR. ELDER: I don't recall that -- oh, wait, yes, there is a footnote, where they said we did not reach this issue, as to the equipment on the vessel.

Q Well, as to criminal prosecution, was what the footnote was talking about.

MR. ELDER: Yes.

Now, I've kind of lost track of my time here.

MR. CHIEF JUSTICE BURGER: You have about one minute before we rise for the day, and then you'll have about five minutes left tomorrow.

MR. ELDER: All right, fine.

Now, as I indicated earlier -- well, I'll just briefly touch on due process and equal protection of the law.

The thing is that on some of the vessels right now we have these devices which treat it, secondary treatment.

MR. CHIEF JUSTICE BURGER: I think we'll continue in the morning.

MR. ELDER: Fine. Thank you.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Thursday, March 23, 1972.]

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## IN THE SUPREME COURT OF THE UNITED STATES

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 Appellees. :  
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Washington, D. C.,

Thursday, March 23, 1972.

The above-entitled matter was resumed for argument  
 at 10:10 o'clock, a.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
 WILLIAM O. DOUGLAS, Associate Justice  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice  
 LEWIS F. POWELL, JR., Associate Justice  
 WILLIAM H. REHNQUIST, Associate Justice

## APPEARANCES:

[Same as heretofore noted.]



P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 71-422, Lake Carriers' Association against MacMullan.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF ROBERT A. DERENGOSKI, ESQ.,

ON BEHALF OF THE APPELLEES

MR. DERENGOSKI: Mr. Chief Justice, and if it please the Court:

The Water Resources Act of 1966 and the Water Quality Act of 1970 prescribe it to be the national policy that the environment of this country, including its waters, be cleaned up. In each of these statutes they have placed upon the States the primary responsibility for implementing that policy.

And Michigan, in the case of the sewage disposal from vessels, has enacted a statute which is the ultimate in that area, namely, complete retention of sewage and disposal thereof on shore.

Therefore, Your Honors, I am somewhat surprised at being here.

In response to the question of Mr. Justice White at the conclusion of yesterday's session, I say that the only controversy now existing between the parties in this cause is the question of how this should be accomplished. Michigan says by complete retention, and they say no.

In addition, they attack the statute on numerous

constitutional grounds. That is the only controversy. There is no prosecution pending or imminent at this time. We realize the futility of a prosecution at this time, with inadequate shoreside pump-out facilities. But we are working on that, and were making headway until this litigation was commenced. We realize they must have facilities to pump out before the law could be properly applied. That is the only controversy.

Now, I might go a little further and say, in so far as the controversy goes, there is a controversy between the parties in this cause as to what constitutes pollution or clean water.

The appellants in this cause have said that, by the use of certain devices on their vessels by which they can pour -- if I may use the contradictory term -- clean filth into our waters, they are aiding and abetting and fulfilling the federal requirement that pollution of our waters be controlled.

Michigan says otherwise. We say in effect: thou shalt not dump.

Now, putting it in its proper perspective, may it please the Court, the devices which these plaintiffs claim will render their wastes less obnoxious to the waters of the State of Michigan, I would like to point out that the record shows that of the 187 vessels possessed by these appellants, only some 50 have a device of any kind.

In other words, oh, about 15 percent; in other words, you have about 85 percent of their vessels pouring raw, untreated sewage into the waters of the Great Lakes; projecting that to the entire Great Lakes fleet of some 422 vessels, the extent of their deprivation is horrendous to behold. It is a special problem in Michigan.

We are surrounded on three sides, as the Court knows, by waters of the Great Lakes, with the longest shoreline in this country except for Alaska. The bulk of Michigan people take their drinking water from the Great Lakes.

For example, in Detroit and its suburbs, 3,750,000 people -- that was the figure in 1970 -- take their drinking water from the Detroit River, which is one of the bodies of water involved in this litigation.

So the seriousness of the situation and the necessity for the total retention requirement by Michigan is, oh, so obvious.

May it please the Court, probably for the first time in my professional career I was pleased to receive a reply brief. For in this brief filed by the appellants I believe the verity of our cause is proved.

They say, and for the first time they recognize that Michigan has a problem. And they say that the problem is solved by the quarantine regulations issued by the Public Health Service under the guidance of the Surgeon General in

1960.

Now, I do not intend to be snide or petulant in this remark. Brother Elder has conducted himself in accordance with the highest standards of the profession during the conduct of this litigation. But if this 1960 regulation of the Surgeon General was of such significance in this cause, why was it not before the district court in the 1971 trial of this case?

I read the Surgeon General's requirements, Your Honor; in so far as at least Michigan is concerned, they are quite meaningless. Numbered paragraph 3, for example, exempts from the requirements vessels which have sewage disposal devices.

I have just given you the figures showing how few of these vessels have any device whatsoever.

Further, in numbered paragraph 1 of the regulations, it says that all vessels moored shall not discharge sewage, et cetera, into the waters if there are dockside facilities available for the disposition of same.

Well, that is one of the complaints of appellants in this cause: that there are no pump-out facilities anywhere; ergo, under the Surgeon General's regulations, these people just continue to dump.

And the basic requirement of the Surgeon General's requirement is that there shall be no disposal of sewage within

three miles of a public water intake.

Well, Your Honors, that presupposes that the real use, the water, the current, and even the sun are just perfect, and that the effluent dumped will remain in one spot. Those familiar with the Midwest will know that such a day has never occurred.

And in so far as the three-mile pump-out prohibition is concerned, the three-mile radius, the Detroit River, from which I said 3,750,000 people take their water supply, is at its widest point a mile and a half.

Q Mr. Derengoski.

MR. DERENGOSKI: Yes, sir.

Q Does Michigan claim the right under its police power to impose this regulation, say, on an ore boat coming from Duluth to Chicago down the middle of Lake Michigan?

MR. DERENGOSKI: Yes, sir, we do. If they are traversing Michigan waters.

Q What's your definition of Michigan waters?

MR. DERENGOSKI: Well, there is -- there's been a boundary line drawn by a commission years ago between the States, above Wisconsin and Michigan, out about approximately the middle of Lake Michigan, which is known as the boundary between Michigan and Wisconsin; and they are referred to, as the federal statute refers to them, as the boundary waters of the State.

Q So Wisconsin would have jurisdiction of the west side of the Lake, and Michigan would have it on the east?

MR. DERENGOSKI: Yes, sir.

Now, I realize the practical problem. We of course have no jurisdiction in Wisconsin waters. We don't want sewage dumped in Wisconsin waters any more than in ours; but the practical situation is that jurisdictionalwise we are here to enforce our requirement within the purview of Michigan's body of waters.

Q Are these ancient boundary lines shown on the charts that are maintained on vessels which ply the Great Lakes?

MR. DERENGOSKI: To the best of my knowledge, yes.

Q They were drawn by the Army Engineers, were they?

MR. DERENGOSKI: Sir, there was a boundary commission between -- comprised of Michigan and Wisconsin officials, probably over ten years ago, wherein this boundary was drawn.

Q Oh, it's a fairly recent one, then?

MR. DERENGOSKI: Yes, sir.

Q It was brought up to date?

MR. DERENGOSKI: Ten or fifteen years, somewhere in there, sir.

Q There was one drawn many, many years ago, was there not?

MR. DERENGOSKI: I believe there was, yes, sir.

Q By a joint commission that included Canada.

MR. DERENGOSKI: Yes, sir.

In the reply, we are cited to the Wisconsin statute, which requires total retention, just like the Michigan waters, or the Michigan statute; but then there is an exception in there on vessels engaged in interstate or foreign commerce. And that covers every vessel involved in this cause; they are all plying back and forth between the States.

And appellants underline that, evidently with joy that Wisconsin has excused them completely from any retention.

I say to cite Wisconsin statutes to this Court is a citation of the lowest form of pollution control of sewage disposal from vessels.

Q Mr. Solicitor.

MR. DERENGOSKI: Yes, sir.

Q On these 50 vessels that have treatment facilities, do they compare with the treatment facilities of the City of Detroit?

MR. DERENGOSKI: About 29 of them do, yes, sir. We contest in the record that the secondary treatment, which they claim, I think the Bio-gest system provides is as good as the secondary treatment now in effect in Detroit.

Q If they did set up a secondary system as good as Detroit, they still couldn't use it?

MR. DERENGOSKI: No, sir.

Q Why?

MR. DERENGOSKI: The reason for that is, sir, that these vessels are a moving point of discharge, over which there is no control. Now on sewage outlets from municipalities we can control that, that area, inspect it, designate where it will be dumped.

Appellants wander and meander throughout the Lakes, dumping without regard to location. They can't touch all that. Some vessels -- yes?

Q You can't control out in the middle of the Lake anyway, you can only control the Michigan waters.

MR. DERENGOSKI: That's right, yes, sir. But we would have absolutely no control if some dark night a vessel of the appellants came skulking along the Michigan shore and dumped a load. So it's a matter of controls, sir.

Q Well, suppose you had these tanks that you require here and they still dumped it, you would have the same problem. I don't think that's an answer to my question.

My question is: if the water that they send out after all of their facility is just as clean as the water dumped from Detroit, why do they have to have the tanks?

MR. DERENGOSKI: Because, sir, the actual process of testing this effluent is practically non-existent on these vessels. We can test it. We know the quality of the effluent being discharged at the city of Detroit at all times.



It takes practically a chemical engineer to perform that function.

Not only that, sir, while they claim that secondary treatment which they say, on a measly 28 of their vessels, exists will bring the coliform or bacteria count down to 90 percent, or reduce it, there would be a remaining ten percent. This does not include, sir, what we call the pathogens, the bacteria which, for example, gives you hepatitis, typhus, typhoid fever, dysentery.

Q But these are the same passengers that come from Detroit. Aren't they?

MR. DERENGOSKI: They are tested, they are tested for all types --

Q Aren't they?

MR. DERENGOSKI: Yes, sir.

Q And that after the treatment is made, that goes into the Michigan River -- Lake Michigan?

MR. DERENGOSKI: Yes, sir. In this area. We have areas set aside which are total body contact, swimming areas; we have a discharge for sewage area, and so forth. But with these vessels there is no control over the area in which they would make this dump.

Q In the gist of the offense under the Michigan criminal statute the failure to provide the retention facilities, or the dumping in Michigan waters?

MR. DERENGOSKI: Well, actually, it provides failure to comply with the statute, which makes a holding tank or other total retention device mandatory. That is an offense under the Michigan statute, yes, sir.

But --

Q And what is the penalty?

MR. DERENGOSKI: \$500 fine; yes, sir.

Q So it's much cheaper to incur the penalty than to comply?

MR. DERENGOSKI: According to the figures given by appellants, yes.

Q One last question: Your boundary problem is really no different than that attendant upon, for example, the Mississippi River, as between adjoining States?

MR. DERENGOSKI: That's right, sir.

Q Would you agree, Mr. Solicitor, that ultimately the solution to this problem requires uniformity of regulation?

MR. DERENGOSKI: That would be the ideal, yes, Mr. Chief Justice. But the argument they make concerning the necessity for uniformity, I respond to in this fashion: Must Michigan, for the sake of uniformity, bring its ultimate and best requirement for this problem and bring it down to, say, the lowest, Wisconsin's?

Now, I get the point the parties are driving at. They want to, or are hoping for federal regulations which, as

published in the Register on May 12th, 1971, would permit dumping. That's what they want. They want to continue dumping, even though with treatment facilities. And even though, in the process of rule-making, they were told that holding tanks, the Michigan requirement, would be acceptable under any federal rule issued.

Now, they know that if they complied with our statute they would be in conformity with federal law. Why haven't they gotten around to accomplishing things?

Q Mr. Derengoski, the court below apparently felt there was no case or controversy. What is Michigan's position or plan with respect to enforcement of this criminal statute? It's on the books now?

MR. DERENGOSKI: Yes, sir.

Q What are you going to do? Suppose this Court affirms the judgment below, what are you going to do timewise with respect to enforcement?

MR. DERENGOSKI: Timewise, sir? We urge that the leadtime for the construction or erection of pump-out facilities is necessary, and there would be no enforcement until pump-out facilities were available.

Q Are you going to leave that completely up to the --

MR. DERENGOSKI: It would be up to the Michigan Water Resources Commission to institute and implement the program

regarding pump-out facilities onshore.

Q But you're insisting that the carriers get ready to comply and --

MR. DERENGOSKI: Yes, sir.

Q -- because if you wait until pump-out stations are ready to begin installing tanks, then there will be another great delay?

MR. DERENGOSKI: Oh, yes, sir.

Q So you have a rather concrete confrontation with these carriers now, don't you?

MR. DERENGOSKI: Yes, sir, we do. But we see where no unreasonable demand could be made on these people if, within a reasonable time, pump-out facilities are --

Q Under Michigan law, who will be responsible for providing pump-out stations, the carriers? Or Michigan? Or --

MR. DERENGOSKI: The carriers, and under the Michigan statute the Michigan agency may prescribe which docks, wharves, and so forth, shall provide pump-out facilities.

Now, prior to this litigation, sir, we had been amicably and in a cooperative effort working with the carriers toward a solution of this problem.

May I say that I think it has been blown out of proportion. The provision for pump-out facilities is no great mechanical accomplishment. We're talking about, in many cases, dumping the holds from a boat to a municipal sewer.

That's all.

And you know, if it please the Court, along the lines of these pump-out stations, the TV fare was rather bland last night, so I started doing a little figuring, and attached to the jurisdictional statement are a number of charts showing all of the ports of call and the way these vessels meander throughout the Great Lakes.

Now, counting each one of these ports of call, I found about 40 of them in Michigan, at which, taking the appellants at their word, pump-out stations would be required. Ridiculous!

I took out one point. They list Manistee, Filer City, and Ludington as ports of call, which presumably would have to have pump-out stations. I'm a native of Manistee, Michigan, may it please the Court. It is three miles from Manistee to Filer City, and twenty miles to Ludington. You need to stop at all of these places and pump out?

Over on the east shore of Michigan there are eight ports of call listed in one area, in the Port Huron area, all within three to five miles of each other; are they going to stop at all of them and pump out? No, sir.

I say the issue of pump-out stations has been blown out of proportion, in view --

Q Did I understand you correctly that if the federal regulations were now effective, fully effective, say

the five years or the three years or whatever it is had run, fully effective. Do the federal regulations save State law?

MR. DERENGOSKI: I believe we would be preempted, yes, sir.

Q You mean you would be preempted?

MR. DERENGOSKI: By the federal statute, yes, sir.

Q Oh, you'd be preempted, but in the sense that -- let's assume that the federal law permits discharge in the Lakes; --

MR. DERENGOSKI: Yes, sir.

Q -- that you would be complying with the federal law if you had treatment facilities aboard and dumped only effluent that complied with federal standards?

MR. DERENGOSKI: Yes, sir; that would be in compliance with federal law.

Q That would. All right. But if you complied with federal law, would that be all you had to do? In short, would your Michigan requirement be preempted, would the ships still have to have -- could Michigan still insist that the ships have their holding tanks?

MR. DERENGOSKI: Well, that, I believe, sir, is a debatable question. However, --

Q Well, a moment ago you said that the federal regulations say that Michigan -- that the Michigan holding tank requirement would satisfy federal law.

MR. DERENGOSKI: Would satisfy federal requirements, yes, sir.

Q Well, if it would satisfy federal law, it means that it would be -- does it mean that it is not in conflict with federal law?

MR. DERENGOSKI: Yes, sir. If all of these vessels went out right now and installed holding tanks --

Q Oh, yes. Yes. Yes. But what if --

MR. DERENGOSKI: -- they're in good shape Federalwise.

Q Well, all right, I'll put it to you the other way: Suppose you complied with federal law, --

MR. DERENGOSKI: Yes, sir.

Q -- and then Michigan brought a criminal suit, brought a criminal action against one of the carriers, saying, You don't have holding tanks. Would Michigan be permitted to do that under the federal law?

MR. DERENGOSKI: Not, sir, if the federal regulation provided for discharge.

Q Well, is it clear that the federal law will forbid any more stringent regulations? Certainly it would forbid less stringent.

MR. DERENGOSKI: That's right, sir. Is the federal employment going to be a minimum or a maximum requirement? We don't know at this stage.

Q Doesn't the Act of 1970 provide for preemption?

MR. DERENGOSKI: Yes, sir, it does. It says that after the effective date of the Act the States may not enforce their statutes or regulations with reference to the disposal of vessel sewage.

Q Well, isn't that the answer, then? Michigan is just completely preempted then, isn't it?

MR. DERENGOSKI: Yes, sir.

Q You could not enforce your criminal statute?

MR. DERENGOSKI: Well, sir, if they have had holding tanks, which will meet the federal requirements, and were still discharging, I have an idea that we could enforce our statute. Without infringing upon the federal requirements concerning same.

Q When is the effective operative date of the federal program?

MR. DERENGOSKI: Oh, sir, we don't know. They haven't -- there's been no regulation published yet, and under the law it does not become effective for old vessels until five years after issuance of the regulation. And remember, that in this case we are talking about only old vessels.

New vessels, which has a two-year requirement, are those vessels which are constructed after the effective date of the Act.

Now, in the meantime, what is Michigan to do? Allow



this impairment of its waters, allow this defecation of what nature has given us?

Another hypothetical: Say Congress, as they have the right to do, took out the five-year requirement and made it a 10, 15 or 20-year requirement? What do we do? Stand by and watch Michigan waters become the world's largest cesspool?

Q Then I take it you would argue that the preemption is not true preemption until you have an effective federal operation, as distinguished from an effective date of some statute?

MR. DERENGOSKI: Right, sir.

Q In other words, you're not preempted until the Federal government is actually doing something?

MR. DERENGOSKI: Oh, yes, sir. In fact, they have told us, by their policy, to go ahead and work at this. You have the binding responsibility.

In conclusion, may I say to the Court that I believe a State has the constitutional right to protect its natural advantages and prevent them from any further impairment.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor.

Mr. Elders, you have a few minutes left.

## REBUTTAL ARGUMENT OF SCOTT H. ELDER, ESQ.,

## ON BEHALF OF THE APPELLANTS

MR. ELDER: Your Honor, I'll be very brief.

We certainly agree that the waters should be cleaned up. We are not asking for a license to pollute. But if pollution control is valid in Michigan, it's valid in every other State.

Mr. Derengoski has said it's a problem of control, that these vessels are moving sources, and therefore the State can't police them.

Who is in a better position to police the pollution than the United States Coast Guard, which licenses the vessels, inspects the vessels, has the competent personnel?

Our whole purpose here is to promote pollution control on a uniform basis throughout the entire Great Lakes. So that our vessels can install the equipment, whatever it is -- now, this Court does not have to decide what the equipment is or what the standards are going to be; but I think that this Court is to be bound to decide on the basis of the Uniform Maritime Law that this should be applicable throughout the entire Great Lakes, so we can go anywhere, to any port.

Now, the Uniform Maritime Law dictates that in order to carry on commerce, these vessels have to be free to move from port to port. I don't think this is a question that was ever really reached in the Huron case. You have one other element here, and that is the Boundary Waters Treaty of 1909

between the United States and Canada. This, in turn, calls for uniform regulations.

And I think, as a matter of international law, the individual States, such as Michigan and Ohio and so forth, are not recognized for purposes of treaties and so forth as separate entities. They are part of the United States. And the Boundary Water Treaty entitles our Canadian friends and our own vessels to the right to travel throughout the Great Lakes.

Q Mr. Elder.

MR. ELDER: Yes, sir.

Q You say just because you never reached in the Huron case, are you suggesting that the Huron case should have been decided differently than it was, or that that fact wasn't present in the Huron case?

MR. ELDER: I couldn't find any evidence in the Huron case where the argument of the Uniform Maritime Law had been raised. I think that case was decided pretty much on a commerce clause basis.

This was my own personal interpretation of that particular decision; others may disagree.

Finally, there is one thing I want to point out here: as Mr. Justice Marshall noted, we do have all these people living in Michigan, taking their drinking water from the Great Lakes, but also the wastes created by those people are going right back into the Lakes through the municipal

plants which, at best, have only primary treatment.

And then Michigan, in its brief on page 2, the third paragraph, says -- after talking about these vessels being moving sources, then it says: "the municipal systems are a known point of discharge and the water quality for that particular area can be set and governed accordingly."

Q I'm not sure I get your point on that. How does it help you if you simply point to the fact that there are other polluters besides the vessels?

MR. BIDER: Two things. First of all, they're not setting the quality of the water according to what it should be, they're setting it according to what a certain source of pollution is and allowing it.

The second point is that these very same devices that we have on our vessels, namely the Bio-gesters, are recognized and used in shopping centers, in small communities, the very same device is permitted on land in Michigan.

Now, we say it's a violation of the equal protection clause to permit them to go ahead and use them on land and not use them on the ships. Really, we're doing less harm than anybody. For the most part, your ship is way out in the Lake, away from shore, away from the populous area. And we think this is a denial of the equal protection clause.

Q Of course, that isn't true on the St. Mary's River or the other streams that comprise the path from Duluth

to Buffalo.

MR. ELDER: Ah, a very good point.

Now, you take a look at Michigan's law, and if the vessel is downbound, through the St. Mary's River, the St. Clair River, Detroit River, it's going to be prohibited.

But on the vessels upbound through Canadian waters? There's no restriction whatsoever, over the same river, side by side, two boats passing 25 feet apart. One is prohibited and one isn't.

The International Boundary is shown up here on the charts of the rivers, and in the exhibits filed in this case, and these vessels meander back and forth and these masters have to determine whose waters they're in.

Q Mr. Elder, how long have your vessels been plying the Great Lakes?

MR. ELDER: How long?

Q Yes.

MR. ELDER: You mean the actual vessels themselves, or the companies, or what?

Q The company.

MR. ELDER: Oh. Some of them go back to, oh, 1880, 1890, something like that.

Q That's 70 or 80 years. They've never done anything about this problem?

MR. ELDER: Oh, yes. Yes. Many of these vessels

have installed these Bio-gest systems. Every ship that's been constructed on the Great Lakes since 1950 has had a sewage treatment system installed. And we've got several new vessels under construction right now which will have a treatment system, but we really don't know what to put in. We've allowed the space for it, and here these ships are under construction and we don't know what kind of device to put in.

Now, for the Michigan waters to -- oh, I see my light on.

MR. CHIEF JUSTICE BURGER: Your time is up.

MR. ELDER: Yes. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Elder.

Thank you, Mr. Solicitor.

The case is submitted.

[Whereupon, at 10:41 o'clock, a.m., the case was submitted.]

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