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THE REFUSE ACT OF 1899: NEW TASKS FOR AN OLD LAW

In 1888 the Supreme Court held that there was no federal common law prohibiting obstructions in the navigable waters of the United States. In response to this decision Congress passed a series of laws which were later reenacted as the Rivers and Harbors Act of 1899. Section 13 of that act, which prohibits discharges of refuse into navigable waters without a permit, is known as the Refuse Act. Although it is more than 70 years old the Refuse Act is proving to be an effective weapon in the recently accelerated fight against water pollution.

The current need for full utilization of the Refuse Act is demonstrated by the inadequacy of other water pollution control devices—the private action and federal water pollution control statutes. Irrefutable evidence of their inadequacy is in every polluted stream or river that passes through any significant concentration of people and in every lake into which they flow.

I. Contemporary Abatement Devices

A. Inadequacy of Private Remedies

1. Nuisance Actions

Private citizens seeking remedies for water pollution have few feasible common law actions. Nuisance is the theory normally relied on, but the restrictiveness of its basic principles has made this action ineffective in most water pollution cases. If the nuisance is public, redress may normally be sought only by a public official. Private actions may be maintained for public nuisance only if the plaintiff can show special injuries, and even if the nuisance is private only those per-

4. ENVIRONMENTAL LAW HANDBOOK § 7.33 (Cal. Cont. Educ. Bar ed., 1970) [hereinafter referred to as HANDBOOK]. Nuisances are either public or private. A public nuisance is "an act or omission 'which obstructs or causes inconvenience or damage to the public in exercise of rights common to all Her Majesty's subjects.'" W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89, at 605 (3d ed. 1964). "The essence of a private nuisance is an interference with the use and enjoyment of land." Id. § 90, at 611.
5. See text accompanying notes 6-9 infra.
7. CAL. CIV. CODE § 3393; HANDBOOK, supra note 4, § 7.33.
sons whose property rights have been invaded can bring the action. These principles limit the feasibility of nuisance actions to cases where the pollutants emanate from a single source, or where the plaintiff can prove that a specific defendant's pollutants caused the damage.

Since the continuing nature of most water pollution makes injunctive relief the preferred remedy, nuisance actions are ill-suited to abate a pollution problem. If an injunction is sought in a nuisance action the normal defense is the doctrine of "comparative injury," a balancing test which weighs the damage to the plaintiff if the pollution continues against the cost to the defendant in abating the pollution. Since the economic and social costs of abatement are usually significantly greater than the plaintiff's damages, the equitable injunctive relief is often denied. Furthermore, some states expressly deny injunctive relief in nuisance actions without regard to the comparative injury test, thereby precluding the remedy in every case.

2. Standing

Private actions are additionally disadvantaged by the problems resulting from the plaintiff's lack of standing to sue. Traditionally, the courts have granted standing to landowners in water pollution abatement actions under the riparian rights theory. Riparian rights, however, are only recognized in landowners whose property fronts upon the watercourse. A private citizen not within that class will not have standing to sue under this theory until riparian rights are extended to the general public.

The problem of plaintiff's standing is not limited to the enforcement of riparian rights, but exists wherever plaintiff cannot show a specific injury. The most recent Supreme Court examination of the requirements for standing was in Association of Data Processing Service Organization, Inc. v. Camp. The Court developed in Camp a two-step test requiring the plaintiff to allege "injury in fact, economic or otherwise" and to demonstrate that "the interest sought to be protected . . . is arguably within one of the interests to be protected . . . is arguably within one of the interests to be protected by the
statute or constitutional guarantee in question."\(^{19}\) Since the plaintiffs in environmental suits are normally conservation organizations which suffer no specific harm from the defendants' activities, defendants usually raise as a defense the plaintiffs' lack of standing to sue.\(^{20}\)

The defense, while formidable, is not insurmountable. Despite the lack of specific injury to the typical conservation organization, some courts have recently granted standing to these groups.\(^{21}\) In *Citizens Committee for the Hudson Valley v. Volpe*\(^{22}\) the court found that environmental organizations had standing to seek review of an Army Corps of Engineers' permit for construction of an expressway on filled land in the Hudson river. The court reasoned that plaintiffs, by virtue of their long and active interest in environmental activities, were aggrieved parties under section 702 of the Administrative Procedure Act\(^{23}\) and therefore entitled to judicial review of the Corps' action.\(^{24}\)

The holding in *Citizens Committee*, however, is not accepted in all jurisdictions. In *Sierra Club v. Hickel*\(^{25}\) the Ninth Circuit Court of Appeals denied the Sierra Club standing to contest the granting of a permit to Walt Disney Enterprises to build the Mineral King Ski Resort in the Sequoia National Game Refuge. In reaching its conclusion the court distinguished *Citizens Committee* and similar cases with little discussion. Until the Supreme Court rules specifically on the standing of conservationist organizations, the problem of standing will continue to be a major impediment to private actions for pollution control.

### B. Statutory Environment Protection

Federal legislation has been equally ineffective in water pollution abatement efforts. The only comprehensive statutory scheme enacted by Congress to deal with water pollution is the Federal Water Pollution Control Act (FWPCA) passed in 1948.\(^{26}\) Although drafted in great detail and significantly amended in subsequent years, the act is still unresponsive to the practicalities and exigencies of water pollution con-

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19. *Id.* at 153.
21. *Id.*
22. 425 F.2d 97 (2d Cir. 1970).
24. 425 F.2d at 104.
The principal weakness of the FWPCA lies in its enforcement procedures and inherent time delays. The act provides for a complicated series of hearings and conferences; there is a minimum delay of 6 months before a hearing board can issue an abatement order, and the order cannot compel actual abatement until an additional 6 months have elapsed. Only after the order takes effect and the defendant has failed to comply can an enforcement action be brought by the Justice Department. The records of the few enforcement conferences which have been called demonstrate that, in practice, several years may elapse before an order is even promulgated.

The deficiency of the FWPCA's enforcement procedure is further compounded by the absence of any penalty provisions to induce polluters voluntarily to begin abatement activities before a final abatement order is issued. In addition, the act fails to provide any discharge standards for individual polluters; nor does it provide for the establishment of such standards. The only standards provided for are ambient standards which set maximum pollutant concentrations in receiving bodies of water. Consequently, there are no restrictions on the pollutants released in the individual polluter's effluent stream. This omission permits multiple polluters to continue discharging effluents while the cumulative effect of their discharges reduces the quality of the receiving body of water below the standards set by the act.

II. Provisions of the Refuse Act

The Refuse Act provides solutions to a number of the difficulties encountered in endeavors to abate water pollution through contemporary theories. In pertinent part, the act provides:

It shall not be unlawful to [discharge from any craft or shore installation] any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . ; and it shall not be unlawful to [allow material to be washed from a bank] whereby navigation shall or may be impeded or obstructed. . . .

28. HANDBOOK, supra note 4, § 7.18.
29. Id.
30. Id.
32. HANDBOOK, supra note 4, § 7.20.
33. Barry, supra note 27, at 1122.
A. Judicial Construction

Inquiry into construction of the act has centered on four terms: (1) refuse, (2) navigable waters, (3) discharges from sewers and (4) obstruction of navigation. The applicability of the act is determined by the scope given to "refuse" and "navigable water" under the act. On the other hand, the exception from the act of refuse "flowing from streets and sewers and passing therefrom in a liquid state" limits its applicability; the act is further limited by the clause requiring that "navigation shall or may be impeded or obstructed" by the discharged refuse.

The general attitude of the courts in interpreting the Refuse Act has been extremely favorable. For example, in United States v. Republic Steel Corp., the defendant had discharged suspended solids which settled out in the Calumet river in alleged violation of the Refuse Act and section 10 of the Rivers and Harbors Act of 1899, which forbids obstructions in navigable waters. In finding a violation of both sections the Court stated:

We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that "A river is more than an amenity, it is a treasure," forbids a narrow, cramped reading . . . of [the Refuse Act].

Because the terms "navigable water" and "refuse" have been given the broadest possible definitions, the Refuse Act can be invoked in situations involving almost any discharge into any body of water. A compilation of the interpretations given in the leading cases defines "navigable waters" as

waterways which either in their natural or improved condition are used, or can be used, for floating light boats or logs, even though the waterway may be obstructed by falls, rapids, sand bars, currants etc., and even though the waterway has not been used for navigation for many years.

From this all-inclusive definition it is clear that virtually any waters capable of use for significant discharge of refuse will fall within the definition of navigable waters and thus, within the scope of the Refuse Act.

The current definition of "refuse" is premised on the United States v. Ballard Oil Co. interpretation. In Ballard the defendant was charged with violation of the Refuse Act when oil was allowed to overfill a storage tank and flow into a river through a waste pipe. In

35. 362 U.S. 482 (1960).
36. Id. at 491.
37. See text accompanying footnotes 38-44 infra.
39. 195 F.2d 369 (2d Cir. 1952).
finding that the oil was refuse within the meaning of the Refuse Act, the court held that "‘refuse’ . . . is satisfied by anything which has become waste, however useful it may earlier have been."  

The Supreme Court considerably expanded the Ballard definition in *United States v. Standard Oil Co.* 41 In that case the defendant was charged with spilling commercially valuable aviation gasoline into a navigable river in violation of the Refuse Act. The federal district court had concluded that this discharge was not within the Refuse Act because the oil was valuable and therefore not waste. The Supreme Court, however, noted the nation's concern over increasing pollution and reversed the district court, providing: "The word ‘refuse’ includes all foreign substances and pollutants. . . ." 42

The broadness of this definition was demonstrated in a recent federal court case in Florida, *United States v. Florida Power & Light Co.* 43 In that case the United States filed an action under the Refuse Act to restrain the defendant from continuing to discharge pure but heated water into Biscayne Bay. Although the court denied a motion for a preliminary injunction because of an insufficient showing of irreparable harm, it did not question that the discharge of heated water was refuse within the meaning of the Refuse Act. If this "thermal pollution" is within the meaning of "refuse," most industrial discharges should fall within the scope of the act. 44

In furthering its apparent intent to make the Refuse Act broadly applicable, the judiciary has narrowly construed the two limiting clauses of the act. In *United States v. Republic Steel Corp.*, 45 the appellate court had construed the exception clause liberally, in favor of the defendant, to hold that suspended solids in liquid waste flowing from the defendant's private sewer constituted refuse "flowing from streets and sewers and passing therefrom in a liquid state." In rejecting this construction the Supreme Court stated:

Refuse flowing from "sewers" in a "liquid state" means to us "sewage". . . . The fact that discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability is no reason for us to enlarge the group to include these industrial discharges. 46

The practical effect of this holding is to apply the exception clause only

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40. *Id.* at 371.
42. *Id.* at 230.
44. Thermal pollution is the discharge of otherwise harmless water into a body of cooler water to such a degree that the ecology of the receiving body is adversely affected. *Note, Thermal Pollution: The Electrical Utility Industry and Section 21(b) of the Federal Water Pollution Control Act, 22 Hastings L.J. 685 (1970).*
45. 362 U.S. 482 (1960).
46. *Id.* at 490-91.
to discharges from municipal sewers\textsuperscript{47} and to deny the exception to industrial effluence, regardless of the manner of discharge.

The clause requiring that a discharge affect the navigability of a waterway has also been strictly construed. \textit{Ballard} specifically held that "whereby navigation shall or may be impeded or obstructed" applies only to the second Refuse Act prohibition against depositing refuse on banks abutting navigable waters, and not to the first prohibition of discharging refuse directly into navigable waters. The logical conclusion is that refuse discharged directly "into any navigable water" need not obstruct navigation to be in violation of the Refuse Act; the discharge per se is a violation.\textsuperscript{48}

\textbf{B. Discharge Permits}

The prohibition against discharging refuse into navigable waters is not absolute. The Refuse Act provides that the Corps of Engineers may permit the deposit of \{refuse\} in navigable waters, within limits to be defined and under conditions to be prescribed by \{the Secretary of the Army\} and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.\textsuperscript{49}

Historically this provision of the Refuse Act has been virtually ignored by the Corps of Engineers;\textsuperscript{50} only 266 permits under the Refuse Act were in effect in August 1970.\textsuperscript{51} Since all discharges of refuse into navigable waters without a permit are in violation of the Refuse Act, the granting of permits will be of increasing significance as public awareness of environmental problems expands to demand tighter control over the nation's waterways.\textsuperscript{52} A congressional committee studying the water pollution problem has specifically recommended that "the Corps of Engineers . . . vigorously enforce the Refuse Act" and request actions "against all persons whose discharges or deposits . . . violate the Refuse Act. . . ."\textsuperscript{53}

\textsuperscript{47} Interview with V.F. Smith, Chief Counsel, Corps of Engineers, Northern District of California, in San Francisco, Sept. 22, 1970 [hereinafter cited as Interview].

\textsuperscript{48} The Oregon Supreme Court has also held specifically that refuse need not obstruct navigation to be in violation of the Refuse Act. \textit{Myrtle Point Transp., Co. v. Port of Coquille River}, 86 Ore. 311, 168 P. 625 (1917).

\textsuperscript{49} \textit{33 U.S.C. § 407 (1964)}.

\textsuperscript{50} Not until its most recent regulations did the Corps of Engineers call for a permit for deposit of refuse under the Refuse Act. \textit{Proposed Corps of Engineers Discharge Regulations}, 35 Fed. Reg. 20,005 (1970). Contrast and compare Army Reg. ER 1145-2-303 (change 5) (Apr. 23, 1970) which does not cite the Refuse Act as authority for the issuance of permits.


\textsuperscript{52} The Corps has recently required 50 mercury dischargers to obtain Refuse Act permits. \textit{1 BNA ENV. REP. Current Developments} 781 (1970).

\textsuperscript{53} \textit{TWENTY-FIRST REPORT, supra} note 38, at 16-17.
Perhaps in response to this public and congressional pressure the President has announced that the permit provisions of the Refuse Act will be put to use.\textsuperscript{54} Under the Executive Order issued December 23, 1970, all companies discharging wastes into navigable waters will be required to submit an application for a permit under the Refuse Act by July 1, 1971.\textsuperscript{55} The order will affect about 40,000 current industrial facilities and approximately 1,000 new plants built each year.\textsuperscript{56}

Since the permit procedure provides opportunities for the environmentalist to make his views known, a thorough understanding of the procedure is beneficial. Prior to applying to the Corps of Engineers for a discharge permit, the applicant must obtain a certification from the appropriate state authorities that, with reasonable assurance, the proposed discharge will comply with the applicable state water quality standards.\textsuperscript{57} After obtaining state approval, the applicant must file for the discharge permit in accordance with the instructions in the pamphlet entitled “Permits for Work in Navigable Waters.”\textsuperscript{58} The pamphlet requires information pertaining to the location, construction and purpose of the project. In addition, applicants must furnish information pertaining to “chemical content, water temperature differentials, toxins, sewage, amount and frequency of discharge and the type and quantity of solids involved . . .” as well as plans for pollution abatement.\textsuperscript{59}

When the application is received by the Corps of Engineers, a public notice concerning the permit application will be sent to all parties known or believed to be interested in the application, such as . . . local conservation organizations. Public notice is mandatory except in those cases when it appears that the proposed work would have no significant impact on environment values. . . .\textsuperscript{60}

If the permit is protested, the Corps makes the protest and its proponents known to the applicant so a compromise may be worked out between the parties. If an agreement is reached the permit will issue conditioned on the terms of the agreement. If no agreement is reached, the application is sent to the Chief of Engineers in Washing-

\textsuperscript{56} Id.
\textsuperscript{57} This is required by the FWPCA § 21(b)(1); 33 U.S.C.A. § 1171(b)(1) (1970).
\textsuperscript{58} Corps of Engineers, DEP’T OF THE ARMY, PERMITS FOR WORK IN NAVIGABLE WATERS, AGO 20039A. Army Reg. ER 1145-2-303, para. 3(a) (change 5) (Apr. 23, 1970), requires compliance with the instructions in the pamphlet.
\textsuperscript{59} Army Reg. ER 1145-2-303, para. 3(c) (change 5) (Apr. 23, 1970). These provisions were added at the request of the Conservation and Natural Resources Subcommittee of the House of Representatives. Twenty-First Report, supra note 38, at 14.
\textsuperscript{60} Army Reg. ER 1145-2-303, para. 4(a) (change 5) (Apr. 23, 1970).
ton, who makes the final decision on issuance of a permit.\textsuperscript{61}

Any individual or organization will, upon request, be notified by the Corps of all permit applications, and be given an opportunity to challenge the granting of discharge permits and to reach a compromise with the applicants. Even if no agreement is reached, the protests are included in the applicant’s record and forwarded to Washington for consideration.\textsuperscript{62} The permit procedure, therefore, affords interested members of the public with an early opportunity to be heard on the relative merits of a proposed project having environmental ramifications. In this respect it differs markedly from the administrative procedures of other regulatory agencies,\textsuperscript{63} a fact which significantly enhances its value to conservation organizations.

**III. Enforcement**

The Refuse Act provides that it shall be unlawful either to discharge refuse without a permit or to violate the conditions of a permit.\textsuperscript{64} Unlawful acts of either type can result in enforcement proceedings brought by the Justice Department (either at the request of the Corps of Engineers or on its own volition)\textsuperscript{65} or in informer actions brought by private citizens.\textsuperscript{66} The provisions for enforcement of the Refuse Act are found in sections 16 and 17 of the Rivers and Harbors Act of 1899. Section 16 provides:

Every person and every corporation that shall violate [the Refuse Act] shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment . . . for not less than thirty days nor more than one year, or by both such fine or imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.\textsuperscript{67}

Section 17 expressly confers on the Justice Department authority to

\textsuperscript{61} Before granting any permit which might have a significant effect on the environment, the Corps is required by the National Environmental Policy Act to make a five-point statement detailing the environmental impact of the alternatives to the proposed project. 42 U.S.C. § 4332(2)(C) (Supp. V, 1970).

\textsuperscript{62} An earlier opportunity will be provided if the state provides for hearings in its certification procedure. California certifies its requests for federal permits through the normal discharge permit procedure. Thus a hearing may be had at either the regional or state board level. Administrative Procedures of the State Water Resources Control Board, published Sept. 23, 1970.

\textsuperscript{63} For example, the Federal Water Pollution Control Act has serious deficiencies in its provisions for public hearings which are made entirely discretionary. See FWPCA § 21(b)(1); 33 U.S.C.A. § 1177(b)(1) (1970).

\textsuperscript{64} 33 U.S.C. § 407 (1964).

\textsuperscript{65} See text accompanying notes 70-98 infra.

\textsuperscript{66} Qui tam actions are discussed in the text accompanying notes 109-43 infra.

enforce the act:

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of [the Refuse Act] . . . ; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . .

A. Propriety of Enforcement

Although the Justice Department is clearly authorized to "conduct the legal proceedings necessary to enforce" the Refuse Act, it has been reluctant to do so. Instead, its announced policy is to avoid using the Refuse Act as a pollution abatement statute in competition with the FWPCA. The Justice Department apparently finds a conflict between the two statutes because both are primarily directed towards the abatement of continuing discharges of effluents, the principal source of water pollution. Finding that "it is precisely this type of discharge that the Congress created the Federal Water Quality Administration [under the FWPCA] to decrease or eliminate," the Justice Department has stated that it will defer to the administration actions to abate such discharges.

The Justice Department predicated its deference to the Federal Water Quality Administration on the policy statement of the Federal Water Pollution Control Act: The act's purpose is "to establish a national policy for prevention, control, and abatement of water pollution." In light of other, more specific FWPCA provisions, however, it is doubtful that the department's position is justified. Section 24 of

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68. In practice the Corps of Engineers administers the Rivers and Harbors Act. Interview, supra note 47. Unless otherwise indicated, information regarding the Corps procedures in administrating the Rivers and Harbors Act was obtained from the Interview.

69. 33 U.S.C. § 413 (1964). The act names the agents in charge of river and harbor improvements, the engineers and inspectors employed by them, customs collectors and other revenue officers.

70. JUSTICE DEP'T, GUIDELINES FOR LITIGATION UNDER THE REFUSE ACT, II.1 (June 15, 1970), reprinted in 1 BNA ENV. REP. CURRENT DEVELOPMENTS 288 (1970) [hereinafter cited as GUIDELINES]. It should be noted at the start of this discussion that the Executive Order discussed in text accompanying notes 54-56 supra does not announce a change in administration enforcement policies but only requires that dischargers obtain the permit provided for in the Refuse Act.

71. GUIDELINES at II.1. The Federal Water Quality Administration has been abolished by Reorganization Plan No. 3 of 1970, § 6(a)(1), in [1970] U.S. CODE CONG. & AD. NEWS 2996. All of its functions have been transferred to the Administrator of the Environmental Protection Agency. Id. § 2(a)(1). Since only the administration of the FWPCA has changed, the Justice Department's position is not affected.

72. GUIDELINES at II.1.

the FWPCA, for example, states that:

This act shall not be construed as (1) superseding or limiting the functions, under any other law . . . of any other officer or agency of the United States, relating to water pollution or (2) affecting or impairing the provisions of sections 13 through 17 of the Rivers and Harbors Act of 1899. . . .

This section was not in any way altered by the 1970 amendments to the FWPCA. It is apparent, therefore, that Congress intended the Refuse Act to remain in full force, and that the Justice Department has unjustifiedly abdicated its authority.

The recent case of United States v. Interlake Steel Corp. also reached the conclusion that the Refuse Act was intended to remain in full force. The defendant in Interlake was indicted for discharging iron particles and oily substances into a navigable river in violation of the Refuse Act. One theory offered by the defendant in support of his motion to dismiss was that his discharges were within standards set under the FWPCA which, he claimed, had superseded the Refuse Act. In denying the motion the court rejected the defendant's contention, holding that the FWPCA "cannot be held to supersede or emasculate the prohibitions of the Rivers and Harbors Act," and that standards adopted under the FWPCA could not condone discharges prohibited by the Refuse Act.

In addition to retaining the specific provisions of section 24, the recent amendments to the FWPCA added a new procedure specifically relating to the Refuse Act. Section 21(b)(1) of the FWPCA, added in 1970, requires applicants for a federal permit "which may result in any discharge into the navigable waters of the United States" to obtain a statement from the responsible state or interstate agency certifying that the proposed discharge "will not violate applicable water quality standards." Since Refuse Act permits are federal permits, this amendment actually expands the role of the Refuse Act by bringing the states within the scope of the permit procedures.

Both of these FWPCA sections refute the Justice Department's position that the Refuse Act should not be enforced in competition with the FWPCA. Since the Refuse Act is an independent and viable tool for water pollution control, there is no compelling reason why the Justice Department should not actively prosecute Refuse Act violations of all types.

74. Id. § 24, 33 U.S.C.A. § 1174.
77. Id. at 916.
B. Mandatory Enforcement by the Justice Department

Contrary to the contention of the Justice Department—that its enforcement function has been preempted by the Federal Water Quality Administration (now the Environmental Protection Agency)—section 17 of the Rivers and Harbors Act makes enforcement of the Refuse Act by the Department of Justice a mandatory, nondiscretionary duty when enforcement is requested by the Secretary of the Army. The Secretary of the Army performs this function through the Corps of Engineers. 79

The role of the Corps of Engineers is to receive information and to request the Department of Justice to prosecute violators. 80 The Corps may receive information on alleged violations from any source, and information is routinely received both from the Coast Guard and from state agencies responsible for water quality protection. 81 On receipt of information of an alleged violation, the Corps determines whether it has sufficient evidence to support a cause of action. Before requesting the Department of Justice to institute an action, the Corps also ascertains whether the alleged unlawful discharge is exempt from prosecution under the Justice Department Guidelines. 82 If, in the opinion of the Corps of Engineers, the evidence is adequate and none of the Justice Department exemptions apply, the Corps will recommend to the Justice Department that a prosecution be instituted.

When the Corps of Engineers requests a prosecution, "it shall be the duty of the United States attorneys to vigorously prosecute . . . ." 83 The mandatory nature of this charge was referred to in South Carolina ex rel. Maybank v. South Carolina Electric & Gas Co. 84 At issue in that case was the proper interpretation of a section of the Rivers and Harbors Act providing that removal of an obstruction "may be" enforced by injunction and that proceedings to that effect "may be" instituted by the Attorney General. 85 Although the court held that the use of "may be" evidenced an intent to create a discretionary and not a mandatory duty, 86 there was dicta to the effect that a mandatory requirement is created by the use of "shall be" as those words are used

79. See note 68 & accompanying text supra.
80. See text accompanying notes 49-63 supra.
81. Interview, supra note 47. For instance, in California information is routinely sent by the Fish and Game Department.
82. These categories include cases "where the defendant is or has been a party to an administrative proceeding which has been or is being conducted by the Federal Water Quality Administration" and where the defendant's unlawful activity "is the subject of abatement litigation or criminal prosecution initiated by a State, County, municipality or other political subdivision." GUIDELINES, supra note 70, at III.3-5.
85. The section being construed was 33 U.S.C. § 406 (1964).
86. 41 F. Supp. at 118-19.
in section 17.\textsuperscript{87} Although dicta in the \textit{Maybank} case, the mandatory nature of "shall be" as applied to an official duty is supported by non-Rivers and Harbors Act cases.\textsuperscript{88}

C. Discretionary Enforcement on the Department's Own Volition

The Justice Department need not wait for the Corps of Engineers or other officials named in section 17 to request prosecutions under the Refuse Act. Section 17 has been construed to allow the Justice Department to proceed both at the request of others and on its own volition.\textsuperscript{89}

One of the defenses interposed by the defendant in \textit{United States v. Interlake Steel Corp.}\textsuperscript{90} was that the prosecution was undertaken at the request of the Coast Guard rather than one of the entities named in section 17.\textsuperscript{91} In rejecting this defense the court stated that "enforceability of the act clearly should not rest upon the fortuity of which particular federal agency, with jurisdiction over the navigable waters of the United States, detects a violation and reports it to the United States attorney."\textsuperscript{92} In reaching this decision the court relied on the broader language of \textit{United States v. Burns}.\textsuperscript{93} In \textit{Burns} the charge of obstructing navigable waters was based on the predecessor statute to section 17.\textsuperscript{94} Before granting the motion to quash for defects in the indictment, the court found that the action was not precluded because the district attorney had acted on his own volition. The court's conclusion was that despite the specified right of others to request a prosecution, the right of the federal prosecution officer "to initiate proceedings in the manner usual to criminal cases, is not affected, and remains as heretofore."\textsuperscript{95}

The Justice Department concedes that it has the authority to initiate actions under the Refuse Act if its enforcement functions are not preempted by the Federal Water Pollution Control Act.\textsuperscript{96} Its \textit{Guidelines for Litigation Under the Refuse Act} authorizes a United States attorney to institute criminal or civil actions where he is presented with evidence from the Corps of Engineers or "is otherwise satisfied that he

\begin{itemize}
\item \textsuperscript{87} Id. at 118.
\item \textsuperscript{88} United States v. Hughes, 414 F.2d 1330, 1334 (9th Cir. 1969); Petition of Shafer, 347 Pa. 130, 134, 31 A.2d 537, 540 (1943).
\item \textsuperscript{89} See text accompanying notes 90-98 \textit{infra}.
\item \textsuperscript{90} 297 F. Supp. 912 (N.D. Ill. 1969).
\item \textsuperscript{91} If the Corps of Engineers had requested the prosecution on the Coast Guard's information, this defense could not have been raised. See text accompanying notes 79-88 \textit{supra}.
\item \textsuperscript{92} 297 F. Supp. at 914.
\item \textsuperscript{93} 54 F. 351 (C.C.W. Va. 1893).
\item \textsuperscript{94} Act of Sept. 19, 1890, ch. 907, § 11, 26 Stat. 455.
\item \textsuperscript{95} 54 F. at 355.
\item \textsuperscript{96} GUIDELINES, \textit{supra} note 70, at II.4, III.2.A (iii).
\end{itemize}
has adequate evidence to prove that the defendant has violated the Refuse Act.\textsuperscript{97} Allowing United States attorneys to proceed on their own volition is the sound position, supported both by the cases in point and by the general judicial policy of charitably reading the Rivers and Harbors Act.\textsuperscript{98}

IV. Relief Available for Violation of the Refuse Act

A. The Injunctive Remedy

Section 16 of the Rivers and Harbors Act of 1899 specifically makes violation of the Refuse Act a misdemeanor and provides for a jail sentence or fine upon conviction.\textsuperscript{99} The United States is not, however, restricted to these criminal sanctions. The courts have held that injunctive relief will lie under section 17 in cases where other remedies are inadequate.

In \textit{United States v. Republic Steel Corp.},\textsuperscript{100} the Government had asked for an injunction against defendant's future discharges as well as for an order requiring removal of its past deposits. Although there is no specific provision for this type of injunctive relief in the Rivers and Harbors Act, the five members of the majority found it within the power of the Court to grant the relief prayed for under sections 10 and 17. In reaching this position, the Court first noted that section 17 provided "that the Department of Justice shall conduct the legal proceedings necessary to enforce' the provision of the [Rivers and Harbors] Act. . . ."\textsuperscript{101} An injunction was found to be within the necessary legal proceedings because "Congress . . . has provided enough federal law in [section] 10 from which appropriate remedies may be fashioned even though they rest on inferences."\textsuperscript{102} The four dissenting justices in \textit{Republic Steel} argued that section 10 did not provide for injunctive relief and narrowly construed section 17 as limiting the forms of relief available to those specifically provided for in the act.\textsuperscript{103}

When the issue arose again, however, the Court was much more certain that injunctive relief was a proper remedy. \textit{Wyandotte Transportation Co. v. United States}\textsuperscript{104} was a combination of two cases brought under section 15 of the act, which made it unlawful to sink a vessel in navigable waters. In one of the cases the Government asked for an injunction to require removal of the sunken hulk, and in the

\textsuperscript{97} Id. at III.1.A.(i).
\textsuperscript{98} See text accompanying note 36 supra.
\textsuperscript{100} 362 U.S. 482 (1960).
\textsuperscript{101} Id. at 491.
\textsuperscript{102} Id. at 492.
\textsuperscript{103} Id. at 493 (dissenting opinion).
\textsuperscript{104} 389 U.S. 191 (1967).
other asked for reimbursement for the costs it had expended in removing another vessel. The only enforcement provision of the Rivers and Harbors Act which applied was section 17. The Court granted the mandatory injunction in one case, and reimbursement in the other. In supporting its decision, the unanimous Court stated:

[O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else—in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law—that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. Applying the principles of our decision in Republic Steel, we conclude that other remedies, including [injunctions] are available to the Government.105

Although no case has specifically held that injunctions will lie for Refuse Act violations, either to prohibit future discharges or, more remotely, to require removal of past refuse discharges, both Republic Steel and Wyandotte provide strong support for such a conclusion. In each of these cases the only enforcement provision of the Rivers and Harbors Act which applied was section 17. Since section 17 also applies to the Refuse Act, the Court should encounter no difficulty in finding injunctive relief available to the government in prosecutions for its violation.

Further persuasive authority for allowing injunctions under the Refuse Act can be found in the Twenty-First Report by the Committee on Government Operations of the House of Representatives.106 That report urged the Corps of Engineers to actively seek injunctions against violators of the Refuse Act based on the Republic Steel and Wyandotte precedents.107 The same interpretation of Republic Steel and Wyandotte is made by the Justice Department. Its Guidelines state that under those decisions injunctions “are deemed to be authorized by necessary implication.”108 These conclusions are in harmony with the mandate of the National Environmental Policy Act that statutes be interpreted in accordance with sound environmental policies, and therefore should be given great weight by the courts.

B. Qui Tam Actions

If the Corps of Engineers does not act on information provided by a private citizen and the Justice Department cannot be persuaded to act on its own volition,109 the citizen will be compelled to look to

105. Id. at 200-01.
106. See note 38 supra.
107. TWENTY-FIRST REPORT, supra note 38, at 18.
108. GUIDELINES, supra note 70, at I.B.
109. Congressman H.S. Reuss (D-Wis.) filed four suits himself, explaining that
other methods of enforcement. The language in section 16, that “one-half of said fine . . . be paid to the person or persons giving information which shall lead to conviction,”110 strongly suggests a *qui tam* action. *Qui tam*111 is used to describe a civil action brought by a private citizen under a penal statute when the statute provides that a portion of the fine, penalty or forfeiture shall go to the citizen.112 The right of the citizen to institute his own action without relying on the government prosecutor distinguishes the *qui tam* statute from a statute which reserves to a governmental entity the exclusive authority to enforce the statutory requirements. Even where the statute authorizes a *qui tam* action on its face, the citizen may be precluded from bringing the action if the government has reserved jurisdiction to its own prosecutors.113

Statutes authorizing *qui tam* actions were employed in England to compensate for inadequate governmental enforcement due to lack of personnel or inclination.114 *Qui tam* actions “have been in existence . . . in [the United States] ever since the foundation of our government.”115 Their value has been specifically recognized by the courts. In *United States v. Griswold*,116 the Oregon Federal District Court defended the private prosecutor’s interest in a judgment obtained under a *qui tam* statute against an action by the United States to release the defendant from the penalty. The court said of such statutes:

> [O]ne of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary as the enterprising privateer does to the slow-going public vessel.117

he had informed the Justice Department of the violations earlier, but that the “Justice Department guidelines indicate the action will not be commenced.” 1 BNA ENV. REP. CURRENT DEVELOPMENTS 489 (1970).


111. *Qui tam* is a shortened derivation of the Latin term meaning “who brings the action as well for the king as for himself.” STAFF OF CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, 91ST CONG., 2D SESS., *QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION’S WATERWAYS* 1 (Comm. Print 1970). [hereinafter cited as *QUI TAM ACTIONS*].

112. Id.

113. See cases cited in *QUI TAM ACTIONS*, supra note 111, at 24-26 & text accompanying note 138 infra.


116. 24 F. 361 (D. Ore. 1885).

117. Id. at 366.
The language of section 16, although strongly suggestive of a *qui tam* action, presents several obstacles to maintenance of the action. First, the statute does not expressly provide for a *qui tam* action. Secondly, the statute provides that half the fine imposed be paid to the person providing information which leads to conviction rather than to a person who prosecutes the action. This distinction is significant because statutes construed to allow *qui tam* actions have usually provided that half the penalty go to the person who prosecutes the action. The third problem arises because section 16 allows the court discretion in imposing either a fine or imprisonment for violation of the Refuse Act. The alternative of imposing a prison sentence on the violator is not found in other statutes which the courts have found will support a *qui tam* action. These obstacles are not insurmountable, however, and do not *a fortiori* preclude a *qui tam* action under the Refuse Act.

A statute need not expressly confer a *qui tam* action in order to support it. This conclusion has its foundation in an early Supreme Court case recognizing the validity of a *qui tam* action, *Adams, qui tam, v. Woods.* That action was brought under a statute punishing slave trade with other countries by forfeiture of "the sum of two thousand dollars; one moiety thereof to the use of him or her who shall sue for and prosecute the same." The statute did not expressly confer a *qui tam* action. Although the action was barred by the statute of limitations, the Court said "the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie." This treatment was interpreted in *United States ex rel. Marcus v. Hess,* which involved a statute imposing criminal sanctions for defrauding the Government, to mean that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." This dicta is broad enough to allow construction of section


120. 6 U.S. (2 Cranch) 336 (1805).

121. *Id.*

122. *Id.* at 341.

123. 317 U.S. 537 (1943).

124. *Id.* at 541 n.4. An action to recover the fine and assessed damages authorized by the statute could be "instituted by 'any' person in behalf of the government, and where such a *qui tam* action is brought, half the amount of the recovery is paid to the person instituting the suit. . . ." *Id.* at 540-41.
16 as authorizing *qui tam* actions. Since the section does not expressly authorize the informer to institute the action, but does not prohibit private enforcement, the section can be construed to "authorize him to sue." This conclusion is supported by other cases which have used the same broad language as *Marcus* in construing inexplicit statutes to authorize a *qui tam* action.\textsuperscript{126}

If the Refuse Act is to be vigorously enforced, as recommended by a congressional committee\textsuperscript{126} and as intimated by the President,\textsuperscript{127} it is in the public interest that the courts not defeat *qui tam* actions enforcing the Refuse Act by distinguishing section 16 rewards to informers from rewards to those who prosecute an action. Both the Justice Department and the Corps of Engineers lack the funds and personnel necessary to adequately enforce the act.\textsuperscript{128} The burden of enforcing the Refuse Act against innumerable industrial dischargers can only be met if the citizen is allowed to privately enforce the criminal sanctions of the act. Private enforcement should be permitted, provided that the plaintiff first demonstrates to the court that the Justice Department does not plan to act on the information made available.

Allowing private enforcement of the act through *qui tam* proceedings will not subject the defendant to the possibility of a subsequent misdemeanor prosecution by the Government in an attempt to obtain the violator's imprisonment. Section 16 is clearly a criminal statute. Violators are "guilty" of a "misdemeanor" and upon "conviction" shall be "punished" by a fine or by "imprisonment,"\textsuperscript{129} the statute has been held by the United States Supreme Court to be a criminal statute. The fine provided for in section 16 is in no way remedial\textsuperscript{131} as it does

\textsuperscript{125} In United States v. Stocking, 87 F. 857 (D. Mont. 1898), the court, considering a statute which provided that a penalty "shall be sued for and recovered ... one half to the informer," stated that "[a]ny words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefore if he complies with the conditions of the statute." \textit{Id.} at 261. The court went further in Chicago & Alton R.R. v. Howard, 38 Ill. 414 (1865), where the statute being interpreted provided only for a penalty of 50 dollars for each neglect to be paid by the corporation owning the railroad, "one-half to the informer, and the other half to the state." \textit{Id.} at 417. The court found a *qui tam* action authorized by implication even though another section of the act specifically provided that the district attorney should sue for the fine. \textit{Contra}, Omaha & Republican Valley Ry. v. Hale, 45 Neb. 418 (1895), where the court found that the same language neither expressly nor impliedly authorized an action by an informer.

\textsuperscript{126} Twenty-First Report, supra note 38, at 14.

\textsuperscript{127} See text accompanying notes 54-56 supra.

\textsuperscript{128} *Qui Tam Actions*, supra note 111, at 11. \textit{See} note 142 infra.

\textsuperscript{129} 33 U.S.C. 411 (1964).


\textsuperscript{131} \textit{Cf.} United States ex \textit{rel.} Marcus v. Hess, 317 U.S. 537, 549 (1943). In \textit{Marcus}, however, the statute contained two enforcement sections; one provided for fine or imprisonment, and the other provided for a forfeiture and double damages. \textit{Id.} at
not attempt to relate the amount of the fine to damages caused either to the Government or to a private citizen by violation of the Refuse Act. Since the fine cannot be viewed as anything but a criminal sanction, a fine recovered in a *qui tam* action would subject the defendant to jeopardy within the fifth amendment meaning and would protect him from any further Refuse Act prosecution for the same offense.\(^{132}\)

Since a fine imposed in a *qui tam* action is a criminal sanction, the question arises whether a citizen can enforce such a sanction. An affirmative answer to that question is supported both by the history of *qui tam* actions in England, where citizens were commonly relied on to enforce criminal statutes by *qui tam* proceedings,\(^{133}\) and by the language of American courts. The words of Chief Justice Marshall in *Adams, qui tam, v. Woods*\(^{134}\) are instructive here. He stated that “[a]lmost every fine or forfeiture under a penal statute may be recovered by an action of debt, as well as by information.”\(^{135}\)

The remaining problem, that the language of the section allows the court, in its discretion, to impose either a fine or imprisonment, is solved by the very nature of the *qui tam* action. The action is brought only to collect a portion of the fine provided for by the statute\(^{136}\) and not to obtain a sentence of imprisonment. The court, in allowing the *qui tam* action on the basis of policy considerations and the information furnished by the plaintiff that the Government does not plan to act, would implicitly be recognizing the reluctance or inability of the Justice Department to seek a misdemeanor prosecution resulting in the imprisonment of the alleged violator. In effect, the court would be exercising its discretion to impose a fine as the penalty for any violation shown to exist and waiving its discretionary authority to impose a sentence of imprisonment. Should plaintiff prove a violation of the act, only a fine could be assessed by the court.

In addition to the language of section 16, the effect of the provisions of section 17 must be considered in determining whether *qui tam* actions will lie under the Refuse Act. The first clause of section 17 provides that the Justice Department shall conduct legal proceedings necessary to “enforce” the named sections of the Rivers and Harbors Act.\(^{137}\) An action *qui tam* is not literally an enforcement action,

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540. The Court properly concluded that the forfeiture and double damages section created a civil liability, remedial in nature, and that the section was separate and distinct from the enforcement section providing for criminal sanctions. *Id.* at 549.


133. See the authorities cited in *QUI TAM ACTIONS*, supra note 111, at 2-3.

134. 6 U.S. (2 Cranch) 336 (1805).

135. *Id.* at 341 (emphasis added).


but is a civil action by the informer to recover a portion of the penalty set out in the statute under which the action is brought. At first blush, therefore, section 17 would appear to deny the validity of a *qui tam* action brought under the Refuse Act.

While the courts have denied *qui tam* actions under statutes with similar or even more explicit provisions for rewards to informers than those provided by section 16, there have been other provisions of the applicable laws in those cases which clearly stated that the United States was to have exclusive jurisdiction to prosecute the action.\(^{138}\)

The direction of section 17 that “it shall be the duty of the United States Attorneys to vigorously prosecute all offenders . . .” standing alone might be considered such an explicit statement of exclusive jurisdiction. But, the clause does not stand alone; it is immediately followed by “whenever requested to do so by [the Corps of Engineers and other named officials].” Clearly the second clause qualifies any exclusive jurisdiction granted in the first by limiting it to situations where the Justice Department has received a request from the specified officials. As previously indicated,\(^ {139} \) the clause does not preclude enforcement actions by the Justice Department on its own initiative; nor should it preclude *qui tam* actions by the public.

*Qui tam* actions should be proper under the Refuse Act.\(^ {140} \) Historically, *qui tam* statutes were enacted to supplement the enforcement activities of government officials who would not or could not act themselves.\(^ {141} \) An analogous situation exists within the administration today.\(^ {142} \) Moreover, the courts have held *qui tam* actions proper un-

138. See the cases and discussion in *Qui Tam Actions*, *supra* note 111, at 24-26.
139. See text accompanying notes 89-98 *supra*.
140. See text accompanying notes 109-139 *supra*. *Contra*, Durning v. I.T.T. Rayonier Inc., Civil No. 9070 (W.D. Wash., Oct. 6, 1970). In that case, the first brought under the *qui tam* provisions of the Refuse Act, the court granted a motion to dismiss the action. The court concluded, without citing any authority, that in enacting the Refuse Act Congress did not intend to provide a means by which an informer could proceed to recover the reward. The court was also concerned that if a *qui tam* action would lie under the Refuse Act the United States and a private party could both bring an action for the same violation. Again the court cited no authority and was apparently unaware that a basic principle of *qui tam* is that the action belongs to he who first brings it and that subsequent actions are precluded. United States v. Griswold, 26 F. Cas. 42, 44 (No. 15,266) (D. Ore. 1877); Miami Copper Co. v. State, 17 Ariz. 179, 149 P. 758 (1915). See text accompanying notes 129-32 and text following note 136 *supra*.
141. See text accompanying note 114 *supra*.
142. The administration has announced a policy of not enforcing the Refuse Act in competition with the FWPCA. *Guidelines*, *supra* note 70, at II.1. Even if the administration were inclined to enforce the Refuse Act, lack of manpower would severely hamper its efforts. *Conservation Foundation, Conservation Foundation Letter* Aug. 1970, at 2. This lack of manpower will certainly become even more of a handicap to enforcement of the Refuse Act in light of the recent Executive Order discussed in the text accompanying notes 54-56 *supra*. With 40,000 additional permit ap-
Although these decisions do not form compelling authority for allowing *qui tam* actions under the Refuse Act, they do provide a basis for holding such actions valid. The criminal nature of the statute should not preclude a civil action in the form of a *qui tam* suit, and the provisions of section 17 do not appear to give exclusive enforcement jurisdiction under the Refuse Act to the Justice Department.

C. Effect of Enforcement Proceedings

Although a citizen may be authorized to bring a *qui tam* action under the Refuse Act, the preferred method of enforcement is by the Justice Department. The Government's easy access to the courts and the injunctive remedy available to it make federal enforcement the more desirable alternative. Enforcement proceedings brought by the Justice Department, either on its own volition or at the request of the Corps of Engineers, have been effective deterrents to water polluters in the past.

In the late 1950s, for example, the Corps' attention was alerted to the fact that contractors filling sections of San Francisco Bay were allowing logs and other refuse to float out into the bay. The Corps, with the assistance of the Coast Guard, instituted an investigation and requested several actions. In one of the actions, the federal district court sentenced the violator to imprisonment. Although that action was reversed on appeal, the fines meted out in the other actions provided the stimulus needed to induce the contractors to completely abate their polluting operations.

More recently, the Interior Department sought to control mercury pollution through enforcement of the Refuse Act. On July 24, 1970, the Justice Department authorized civil injunction proceedings against 10 firms accused of causing mercury pollution. By September 11, 1970, four of the cases were either settled or scheduled for trial.
and the other six were in various preliminary stages. On September 16, 1970, the Interior Department announced that fifty industrial plants discharging mercury had cut their discharges by 86 percent. Murry Stein, Assistant Commissioner of the Federal Water Quality Administration, directly credited the enforcement actions brought under the Refuse Act with easing the mercury pollution problem.

The preceding examples demonstrate the effect of Refuse Act prosecutions on a class of polluters. The effect of threat of prosecution on the individual polluter, however, should not be minimized. In United States v. Penn Central Co. the defendant was fined $4,000 for violation of the Refuse Act and half was paid to the Hudson River Fishermen’s Association. In another case the defendant’s own employee collected half the fine as a result of a prosecution instituted on the employee’s information.

Fines, of course, are only one aspect of Refuse Act prosecutions. Of far greater significance to the water pollution problem is the type of injunction issued in United States v. Republic Steel Corp. in which the defendant was ordered to cease its discharge of effluents into the Calumet River. Ultimately, it will be injunctions of this nature, imposing a continuing duty on the defendant to abate the pollution, that will lay the groundwork for restoration of the environment.

V. Conclusion

The Refuse Act is a viable weapon for enforcing water pollution control. Judicial interpretation has expanded its scope to encompass virtually all industrial discharges into any navigable body of water. With the development of injunctive relief under the Refuse Act, the Government is in a strong position both to prosecute recalcitrant polluters and to persuade others to modify their activities. If the Government chooses not to act against violators, the private citizen, perhaps, may institute a qui tam action. Even if no action is brought under the Refuse Act, the permit procedure allows the concerned citizen to make his views known to the polluter and to the Corps of Engineers.

As J. Brecher has said, “It is almost impossible to believe that a pollution control law as strict as the Refuse Act has been in existence for more than seventy years in view of the vast increase in water pollution [in] this century.” Considering the inadequacies of contem-
porary legislation and traditional common law actions, the Refuse Act provides one of the few existing means of achieving timely and effective water pollution control. It is ironic that this effective means of control—a subject that has achieved unprecedented public attention and legislative response—is embodied in an ancient statute that the government has until very recently largely chosen to ignore.

Whether the President’s recently announced requirement that dischargers obtain Refuse Act permits\(^5\) will mean that dischargers must clean up their effluents, or will merely rubberstamp the current quality of the effluents, cannot be determined until the process of granting the permits is implemented.\(^5\) If the administration does require dischargers to improve the quality of their effluents, the new policy could prove to be the most effective single step in improving water quality in the nation’s history.

William C. Steffin\(^*\)

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155. See text accompanying notes 54-56 supra.

156. Under paragraph (d)(3) of the proposed regulations issued by the Corps of Engineers, the Environmental Protection Agency will determine whether the permit is issued. Proposed Corps of Engineers Discharge Regulations, 35 Fed. Reg. 20,005 (1970). Although the proposed regulations provide many requirements for permittees, paragraph (l)(2) indicates that Environmental Impact Statements may not be required in many instances. Id. at 20,008. Some environmental organizations have expressed concern that the new permit procedure might become a license to pollute due to the difficulty of prosecution for violation. 1 BNA Env. Rep. Current Developments 949 (1971).

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