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## WATER POLLUTION CONTROL UNDER THE REFUSE ACT OF 1899.

### INTRODUCTION

Justice Holmes once said that "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."<sup>1</sup> Unless our waterways are to become irreversibly polluted, it has become apparent from observing such "treasures" as Lake Erie that we must move quickly to arrest the present rate of water pollution. The Refuse Act of 1899<sup>2</sup> can be of considerable strategic value in the battle against water pollution, although in its 71 year history, the Act has seldom been enforced. The wording of the Act is so all-encompassing that its value as a water pollution control statute is tremendous. The pertinent part of The Refuse Act is as follows:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind or from the shore, wharf, manufacturing establishment, or mill of any kind, 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, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer or procure to be posited material of any kind in any place on the bank of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: . . ."<sup>3</sup>

The statute is divided into two major sections. The first section prohibits depositing of refuse *in* navigable waters. The second section prohibits depositing refuse on the *banks* of navigable water. Also of considerable import is the fact that the second prohibition is qualified by the phrase "whereby navigation shall or may be impeded or obstructed" while the first clause contains no such qualifications. This distinction has very important implications as to the purview of the first clause. Under the first clause, the deposit of any refuse matter whatsoever, other than that flowing from streets and sewers in a liquid state, into navigable water is a criminal act, whereas under the second clause, there is no violation unless the deposit is of such a weight and mass as to constitute an obstruction to navigation.<sup>4</sup>

The Rivers and Harbors Act<sup>5</sup> in § 16 provides for penalties upon conviction for violations. Any person or corporation found guilty is

<sup>1</sup>New Jersey v. New York, 283 U.S. 336, 342 (1931).

<sup>2</sup>THE REFUSE ACT (30 Stat. 1152) (33 U.S.C. 407) is section 13 of THE RIVERS AND HARBORS ACT § 1-22 (1899), 33 U.S.C. 401, 403, 404, 406, 407, 408, 411, 412, 413, 414, 415, 416, 418, 502, 549, 686, 687.

<sup>3</sup>*Id.* at § 407.

<sup>4</sup>United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952); United States v. Alaska S. Packing Co., 84 F.2d 444 (9th Cir. 1936).

<sup>5</sup>RIVERS AND HARBORS ACT, *supra* note 2 at § 411.

subject to a fine not exceeding \$2,500 nor less than \$500 or imprisonment for up to one year. This statute contains a provision obviously meant to encourage informers in that one-half of the fine imposed can be paid to the person(s) giving information leading to the conviction, provided that the action is in personam and not in rem.<sup>6</sup>

In § 17 of The Rivers and Harbors Act<sup>7</sup> the enforcement duties of the United States Attorney and other federal officials are outlined. This section provides that "it shall be the duty of the United States Attorney to vigorously prosecute all offenders when requested to do so by the Secretary of the Army or any officer hereinafter designated." The officers designated are the officers and agents of the United States in charge of river and harbor improvements and the assistant engineers and inspectors of the Secretary of the Army and the United States collectors of customs along with other revenue officers. The use of the wording "it shall be the duty" has been interpreted to preclude any discretion on the part of the United States Attorney in his duty to prosecute.<sup>8</sup> The duty to prosecute is couched in a mandatory context. One particular case has held that the United States Attorney must act upon any incriminating evidence brought to his attention even though such evidence was not channeled to him via any of the enumerated officers in § 17.<sup>9</sup> The source of the information does not affect the duty of the United States Attorney to initiate proceedings.

If a United States Attorney fails to carry out his non-discretionary<sup>10</sup> duty to prosecute vigorously, he may be forced to do so through a writ of mandamus<sup>11</sup> under 28 U.S.C. § 1361 which provides that "the district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." According to *Bowen v. Culotta*<sup>12</sup> and *Hudgin v. Circuit Court*,<sup>13</sup> this statute may be used to compel an officer or employee of the United States to perform an absolute obligation where the duty involved will be ministerial, plainly defined and peremptory. Since § 17 of the Act sets forth such a plain<sup>14</sup> and unambiguous duty, it would be amenable to a writ of mandamus.

<sup>6</sup>*Shipman v. United States*, 309 F. Supp. 411 (E.D. Va. 1970).

<sup>7</sup>RIVERS AND HARBORS ACT, *supra* note 2 at § 413.

<sup>8</sup>*South Carolina v. South Carolina Electric & Gas Co.*, 41 F. Supp. (E.D. S.C. 1941).

<sup>9</sup>*United States v. Burns*, 54 F. 351 (C.C. W.Va. 1893) (deals with an 1890 act which was codified into the Act of 1899).

<sup>10</sup>*South Carolina*, *supra* note 8.

<sup>11</sup>*Kendall v. United States on the relation of Stokes*, 37 U.S. (12 pet.) 524, 610-11 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166-70 (1803) (dictum).

<sup>12</sup>*Bowen v. Culotta*, 294 F. Supp. 183 (E.D. Va. 1968).

<sup>13</sup>*Hudgins v. Circuit Court of Chesapeake*, 294 F. Supp. 258 (E.D. Va. 1968).

<sup>14</sup>*Switzerland Co. v. Udall*, 225 F. Supp. 812, *aff'd* 337 F.2d 56 (4th Cir. 1964).

### "REFUSE" DEFINED

The Refuse Act makes it unlawful to "throw, discharge . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States." The words "refuse" and "navigable" obviously play a very crucial role in determining whether the statute applies to a particular fact situation. The guilt or innocence of the defendant usually hinges upon the interpretation of one or both of these words.

The statute refers to "refuse matter of any kind or description whatever." The context of the word "refuse" demands a very liberal application and the courts have interpreted the phrase accordingly. In two of the earlier indictments under The Refuse Act, the courts had no trouble finding that the dumping of mud from a scow into navigable water was in violation of the statute.<sup>15</sup> The depositing of brush<sup>16</sup> and pile ends<sup>17</sup> has also been held to fall within the scope of "refuse". Both pile ends and brush were thought to present serious threats to navigation although such a threat is not a requisite to guilt under the first clause of the Act.

A harbor patrolman in Honolulu Harbor had the term "refuse" rather graphically defined for him while he was passing by the steamship *President Coolidge* and was showered with bits of orange peel, celery, and tea leaves all of which constituted "refuse" within the Act.<sup>18</sup> Over the years, "refuse" has been interpreted to encompass grain,<sup>19</sup> stones and earth,<sup>20</sup> laundry bags and garbage,<sup>21</sup> and iron particles.<sup>22</sup>

In 1960 the Supreme Court of the United States overruled a circuit court of appeals decision which had held that industrial solids from the defendant's iron mills fell within that clause of The Refuse Act which exempts "matter flowing in a liquid state from sewers and streets." The Supreme Court in *United States v. Republic Steel*<sup>23</sup> held that industrial solids created an obstruction within § 10 and that solids were discharges not exempted from The Refuse Act.

The accidental discharge of oil into navigable waters has presented a challenge to the concept of refuse as it is used by the layman. A Louisiana district court in *United States v. The Delvalle*<sup>24</sup> decided the issue by quoting Webster who defined "refuse" as that which is refused,

<sup>15</sup>The D. L. Halenbeck, 260 F. 554 (2nd Cir. 1919); *United States v. Moran*, 113 F. 172 (S.D. N.Y. 1901).

<sup>16</sup>*Myrtle Point Trasp. Co. v. Port of Coquille River*, 86 Ore. 311, 168 P. 625 (1917).

<sup>17</sup>*The Pile Driver No. 2*, 239 F. 489 (2nd Cir. 1916).

<sup>18</sup>*The President Coolidge Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939).

<sup>19</sup>*Maier v. Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1944).

<sup>20</sup>*United States v. Bigan*, 170 F. Supp. 219 (W.D. Pa. 1959).

<sup>21</sup>*United States v. Mormassaga*, 204 F. Supp. 701 (E.D. Pa. 1960).

<sup>22</sup>*United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969).

<sup>23</sup>*United States v. Republic Steel Corp.*, 362 U.S. (1960).

<sup>24</sup>*United States v. The Delvalle*, 45 F. Supp. 746 (E.D. La. 1942).

thrown or left as worthless or of no value. The court dismissed the case on the grounds that the oil involved was not refused intentionally or left as worthless. An accidental discharge of valuable oil did not, they felt, constitute a violation of the Act.

The rather narrow interpretation of "refuse" in the *Delvalle* case has not been followed. The United States Supreme Court in *United States v. Standard Oil*<sup>25</sup> adopted a more liberal approach by holding that refuse matter includes all foreign substances whether commercially valuable or not. Justice Douglas in the majority opinion of the *Standard Oil* case pointed out the fallacy of distinguishing valuable oil from discarded or waste oil for purposes of this Act: ". . . oil is oil, and whether usable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers is both a menace to navigation and a pollution problem."<sup>26</sup>

Fourteen years prior to the *Standard Oil* case, the United States Circuit Court of Appeals in the Second Circuit made an equally liberal interpretation of "refuse" as applied to spilled oil in *United States v. Ballard Oil*.<sup>27</sup> Spilled oil, they found, is "refuse" matter since it cannot be reclaimed and for all industrial purposes it has ceased to exist. "The word refuse does not demand that the matter must have been deliberately thrown away, it is satisfied by anything which has become waste, however useful it may earlier have been."<sup>28</sup> With the *Ballard* and *Standard Oil* cases as precedents, "refuse" can be said to encompass any matter foreign to the water<sup>29</sup> regardless of its pre-discharge value.

### "NAVIGABILITY" DEFINED

Since The Refuse Act of 1899 is a federal statute, the words therein must be given federal definitions.<sup>30</sup> In 1870 the United States Supreme Court established a test as to what does constitute a navigable waterway in the United States. In *United States v. Daniel Ball*<sup>31</sup> the Court said:

[T]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition as highways for commerce. . . .<sup>32</sup>

Although the *Daniel Ball* definition of "navigable" is still valid for determining whether title to a stream or lake bed was ceded to the state, it has been considerably broadened for commerce purposes. Three

<sup>25</sup>*United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

<sup>26</sup>*Id.* at 226.

<sup>27</sup>*United States v. Ballard Oil Co.*, *supra* note 4.

<sup>28</sup>*Id.* at 370.

<sup>29</sup>*United States v. Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1970) (motion for preliminary injunction denied for failure to show irreparable damage from thermal pollution of water).

<sup>30</sup>*United States v. Ladley*, 4 F. Supp. 580 (N.D. Idaho 1933).

<sup>31</sup>*The Steamer Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557 (1870).

<sup>32</sup>*Id.* at 563.

years after the *Daniel Ball* decision, the Court held in *United States v. Montello*<sup>33</sup> that the true criterion of navigability of a river is "the capacity of use by the public for purposes of transportation and commerce . . . rather than the extent and manner of that use."<sup>34</sup> Thus, if a river affords a channel for useful purposes, it is navigable in fact, although there may be difficulties encountered such as sand bars and rapids. The Court in *Montello* was explicitly attempting to expand the concept of navigability so as to include such things as lumber rafts rather than confining the use of the word to sail and steam vessels.

By 1940, the Federal Power Commission had been created and numerous cases arose challenging the Commission's right to regulate the construction and maintenance of such things as hydroelectric projects and dams. The power of the Federal Power Commission to regulate was contingent upon the "navigability" of the river in question. The most important case in this field was *United States v. Appalachian Power Co.*<sup>35</sup> in which the United States Supreme Court made a significant departure from the *Daniel Ball* holding, *i.e.* that to be "navigable" a river must be so in its natural condition. The Court in the *Appalachian Power* case said:

[T]o appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered.<sup>36</sup>

The Court relied on 16 U.S.C. § 796 (8) of the Water Power Act which defines navigable waters:

as those which either in their natural or improved condition are used or are suitable for use. . . . When once found to be navigable, a waterway remains so.

The *Appalachian Power* case brings two new classes of rivers within the ambit of "navigable". First, it encompasses those rivers which were not naturally navigable, but which have since been made navigable. Second, it includes those rivers which are not now navigable, but which could be made so by artificial improvements. Another very significant aspect of this decision was the finding that the extent of commercial use of a river is not determinative of its "navigability".

Small traffic compared to the navigable commerce of the region is sufficient. Even absence of use over long periods of years because of changed conditions, the coming of the RR or improved highways, does not effect the navigability of rivers in the Constitutional sense.<sup>37</sup>

<sup>33</sup>*United States v. The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874).

<sup>34</sup>*Id.* at 441.

<sup>35</sup>*United States v. Appalachian Power Co.*, 311 U.S. 377 (1941).

<sup>36</sup>*Id.* at 407.

<sup>37</sup>*Id.* at 409.

## POLICY OF THE CORPS OF ENGINEERS

At this point it is necessary to examine the Code of Federal Regulations concerning the Rivers and Harbors Act in light of the foregoing analysis of the case law. The pertinent regulations are contained in Title 33-Chapter 11. In 33 C.F.R. § 209.170 (d) (1970), the Refuse Act is quoted with reference to the illegality of injurious deposits. In 33 C.F.R. § 209.170 (g) (3) (1970) the duty of the District Engineer to take notice of violations is recognized. The policy toward enforcing the Act is one of securing compliance with its provisions short of legal proceedings. When the District Engineer becomes aware of an infraction, he will advise the responsible parties to remove the illegal structure or deposit or to repair the damage at their own expense within a specified time limit. If the situation is one demanding immediate action, the District Engineer "may" report the case to the United States Attorney. The discretionary implications of the word "may" are in conflict with the general tone of the *Carolina*<sup>38</sup> case and with the Refuse Act, which make prosecution of a violation mandatory.

Another serious problem is raised by § 209.170 (g) (4) in that this section makes a distinction between willful, intentional violations and accidental violations.

As a general rule, while minor and unintentional or accidental violations of the provisions of the Act need not be reported to the Chief of Engineers, all willful or intentional violations and all cases in which the parties responsible refuse or neglect to remove the unlawful structure or deposit or to make good the damage suffered should be reported. . . .<sup>39</sup>

This distinction made by the C.F.R. is unwarranted because the refuse matter or obstruction has the same deleterious effect regardless of how it was placed in the water; accidentally or intentionally. Intent is not a requisite to guilt under the Refuse Act. The penalties of this Act should apply without regard to the question of willfulness or intent, mistake or innocence.<sup>40</sup> This policy is necessary to protect the interests of the public from heedless misadventure or indifferent violations of the laws enacted for the general welfare. The Supreme Court has applied the penalties in cases of both accidental and willful discharges.<sup>41</sup> This overrules two earlier cases which excluded accidental discharges from the sanctions of the law.<sup>42</sup>

It is not clear whether "accidental" as used in § 209.170 (g) (4)<sup>43</sup> is used in conjunction with "minor". If the policy being advanced is one of refraining from prosecuting "minor" negligible deposits to avoid

<sup>38</sup>South Carolina, *supra* note 8.

<sup>39</sup>33 CODE OF FEDERAL REGULATIONS, § 209.170 (g) (4) (1970) [hereinafter cited C.F.R.].

<sup>40</sup>New England Dredging Co. v. United States, 144 F. 932 (1st Cir. 1906); United States v. The Terry E. Buchman, 138 F. Supp. 754 (S.D. N.Y. 1956).

<sup>41</sup>E.G., Standard Oil, *supra* note 25.

<sup>42</sup>The Colombo, 28 F.2d 1004 (S.D. N.Y. 1928); United States v. Delvalle, *supra* note 24.

<sup>43</sup>33 C.F.R., *supra* note 39.

pointless litigation, then the policy would logically extend to "minor" deposits whether they were accidental or willful. However, the regulations are inconsistent upon this point. The C.F.R. requires the reporting of "all willful or intentional violations" regardless of whether there is material public injury, while on the other hand it appears that minor *accidental* deposits do not have to be reported. If the government is going to prosecute for minor deposits, it should prosecute *all* minor deposits, both negligent and willful.

Immediately following the problematic language just discussed is § 209.170 (g) (5)<sup>44</sup> which deals specifically with deposits. This section states that the procedure in dealing with deposits is similar to that of other violations. This would lead one to infer that the distinction between willful and accidental would be carried over from § 209.170 (g) (4).<sup>45</sup> The question raised is whether a *major* but *accidental* deposit will be prosecuted. It would appear, in light of § 209.400<sup>46</sup> (Violations of Law) that no action would be taken on an injurious deposit if the deposit were unintentional or accidental.

As a general rule, no action is taken when the violation is minor, unintentional, or accidental, and the party responsible makes good the damages suffered.

The qualification that the responsible party make good the damages suffered seems to cancel the distinction between willful and accidental. However, this qualification has little if any value as applied to deposits because, "the damage thereby (from deposits) cannot be repaired readily."<sup>47</sup> It can be argued that accidental deposits would be included within the regulation by reading it to say, "prosecution is recommend . . . in all cases in which the parties responsible refuse or neglect to remove the unlawful . . . deposit. . . ." But it is doubtful if a person can be said to have "refused" or "neglected" to remove something which was impossible to remove in the first place.

The most significant discrepancy between the C.F.R. and the case law concerning The Refuse Act occurs in 33 C.F.R. § 209.395 (1968) :

The jurisdiction of the Department of the Army, derived from the federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the are obstructive or injurious to navigation.

This section explicitly states that legal action under The Refuse Act is limited to cases where navigation has been obstructed or injured. The policy of the Corps totally ignores the difference between the first clause of The Refuse Act and the second clause, *i.e.* that the first clause is not qualified by the "obstructing navigation" requirement while the second

<sup>44</sup>C.F.R. 1970, § 209.170(g) (5).

<sup>45</sup>33 C.F.R., *supra* note 39.

<sup>46</sup>33 C.F.R. 1968, § 209.400.

<sup>47</sup>33 C.F.R., *supra* note 44.



clause is so qualified. This distinction is recognized by the case law<sup>48</sup> and is very essential if the statute is to be at all effective in controlling water pollution. If the first clause is read as requiring an obstruction of navigation it becomes impotent because very rarely will a deposit be of such magnitude that it will actually impede navigation. Occasionally deposits will accumulate on the bed of the waterway and eventually affect the water depth. Most of the time, however, the deposit will be swept away by the water with no perceptible damage to navigation although the quality of the water may be seriously affected.

### COMMON LAW "QUI TAM"

Although the respective policies of the Corps of Engineers and the Justice Department<sup>49</sup> render The Refuse Act practically impotent, there is a provision in § 16<sup>60</sup> which makes the Act viable. Section 16 provides for a fine one-half of which is to be paid to the person or persons who give information leading to the conviction. Such a provision for an informer's fee is of import because it allows the use of an obscure form of action called "*qui tam*". *Qui tam*, as defined in Black's Law Dictionary, is an action by an informer in which he sues both for the state and for himself to recover the penalty imposed upon the violator.<sup>51</sup> A *qui tam* action would be of much strategic value under The Refuse Act because an informer bringing suit would not be hamstrung by the negative policies of the Corps of Engineers and the Justice Department.

The United States Supreme Court said in *Marvin v. Trout*:<sup>52</sup>

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.<sup>53</sup>

However, the weight *qui tam* actions gain in longevity they lose in frequency, since there are very few cases of this nature. Montana Federal District Court, however, has had a *qui tam* suit, *United States v. Stocking*,<sup>54</sup> which predates The Refuse Act itself.

The problem is one of deciding whether § 16 is amendable to a *qui tam* action. The court in the *Stocking* case held that:

any 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.<sup>55</sup>

<sup>48</sup>Ballard Oil Co.; Alaska S. Packing Co., *supra* note 4.

<sup>49</sup>Department of Justice, Guidelines for Litigation Under The Refuse Act, July 10, 1970.

<sup>60</sup>RIVERS AND HARBORS ACT, *supra* note 2 at § 411.

<sup>51</sup>BLACK'S LAW DICTIONARY, 1414 (4th ed. 1968).

<sup>52</sup>*Marvin v. Trout*, 199 U.S. 212 (1905).

<sup>53</sup>*Id.* at 225.

<sup>54</sup>*United States v. Stocking*, 87 F. 857 (1898).

<sup>55</sup>*Id.* at 861.

The informer's right to collect one-half the fine gives him the standing to sue therefore in the name of the United States. Section 16 plainly fits within these criteria. Further, the United States Supreme Court in *Adams v. Woods* held that "almost every fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information."<sup>56</sup> In the *Adams* case, the Court held that a statute which provided for a reward to informers but which did not specifically authorize or forbid him to institute the action is construed to authorize him to sue.

If a statute specifically defines a mode of enforcement such as indictment or information, then these remedies are to be exclusive.<sup>57</sup> Under such an explicit statute, an election to proceed otherwise, by *qui tam* for example, would be precluded. However, since neither § 16 nor § 17 mention proceedings by information or indictment, it can hardly be said that a *qui tam* suit would be precluded under The Refuse Act.

The only case in which *qui tam* suit has been brought under § 16, to date, is a 1970 Virginia case.<sup>58</sup> The government, in *Shipman v. United States*, had convicted a vessel of violating § 13<sup>59</sup> in an in rem proceeding. Shipman, the informer, then brought suit against the government to recover an informer's fee under § 16. The court held that the informer's fee is paid for information leading to a conviction and that the term "conviction" implies an in personam action. Since this particular action had been in rem, Shipman was allowed no reward although the court implied that had the suit been in personam, the informer would have won.

It is curious that the court in the *Shipman* case would entertain a suit by an informer regardless of whether the initial government proceedings were in rem or in personam. The common law rule provides that if the state brings the action on behalf of itself with no informer named, then the state recovers the *whole* fine. The informer is excluded from recovery unless he institutes the action on behalf of himself and the state. The right of an informer to sue, as recognized in *Shipman*, must be asserted through a *qui tam* action before the government prosecutes on its own behalf. The right to recover the forfeiture or penalty goes to the first informer who brings the action.<sup>60</sup> If one allows the government to proceed first as in the *Shipman* case, then the government becomes its own informer and recovers the whole fine.<sup>61</sup>

<sup>56</sup>*Adams v. Woods*, 6 U.S. (2 Cranch.) 336, 341 (1805).

<sup>57</sup>*Omaha & Republican Valley R.R. Co. v. Hale*, 45 Neb. 418, 63 N.W. 849 (1895); *United States v. Laeski*, 29 F. 699 (N.D. Ill. 1887); *Canfield v. Mitchell*, 43 Conn. 169 (1875); *United States v. Mattingly*, 26 F. Cas. 1208 (No. 15,743) (C.C. Ky. 1867); *United States v. Morin*, 26 F. Cas. 1316 (No. 15,810) (Ind. 1866).

<sup>58</sup>*Shipman*, *supra* note 6.

<sup>59</sup>RIVERS AND HARBORS ACT, *supra* note 2 at § 407.

<sup>60</sup>*Marvin v. Trout*, *supra* note 51.

<sup>61</sup>*Id. v. Maine v. Smith*, 64 Me. 423 (1875); *McNair v. The People*, 89 Ill. 441 (1878).

## CONCLUSION

Looking at the virtually unrestrictive language of The Refuse Act, (*any* refuse matter of *any* kind or description whatever . . . into *any* navigable water or *any* tributary) in conjunction with the liberal decisions of the Supreme Court defining "navigation" and "refuse" it is apparent that if the criminal sanctions of The Refuse Act were used to their fullest potential, the industrial pollution in the United States would be de minimus. However, the policies of the Corps of Engineers and the Justice Department emasculate the power of pollution control inherent in the first clause of the Act. The weakening of the Act results from the failure of the Corps to recognize the absence of the "obstructing navigation" requirement in the first clause and the Corp's unwarranted imposition of intent or scienter as a requisite to guilt. Under present policies of enforcement, industry is free to despoil the waters of the United States so long as it does not intentionally and willfully discharge refuse and in so doing, impede navigation. If it is particulate matter that is being discharged, as it most often will be rather than brush or pile ends, apparently therewould have to be an accumulation over the years which would lower the depth of the water and cause a commercial vessel to high-center, thus obstructing navigation. In all other cases where the particulate matter merely alters the odor, color, taste, temperature, or purity the sanctions of the law will not be brought to bear so long as a log or boat can still float on the surface of the water.

In spite of their apparent attempt to destroy The Refuse Act, the Corps of Engineers and the Justice Department have left the Act with one leg to stand on, *i.e.* the *qui tam* action. The common law rules of *qui tam* plus the *Shipman* decision open the door to an in personam action brought by the informer on behalf of himself and the United States to collect his half of the fine. A common law *qui tam* action would breathe life into the Act because the informer would be able to sue the alleged violator for infringing the statute as it was written and as it has been interpreted by the courts. An informer would not be tied down by the negative policies of the government agencies which should enforce the Act but which have chosen not to. *Qui tam* is a much more direct remedy than going to the Justice Department via the Corps of Engineers, regardless of their respective policies. *Qui tam* also has a distinct advantage over a nuisance action in that there is no requirement to show damages.

The Refuse Act could be a devastating weapon in battling water pollution although the present political realities demand that the citizen take the initiative in implementing the Act through writs of mandamus and *qui tam* suits. The Refuse Act in conjunction with the Montana *qui tam* case, *Stocking*, could easily serve as a stopgap to water pollution in such Montana waterways as the Missouri River and the Clark Fork of the Columbia, just to name two obvious examples.

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