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THE USE OF THE CORPS OF ENGINEERS PERMIT AUTHORITY AS A TOOL FOR DEFENDING THE ENVIRONMENT

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> The wisdom to recognize and halt follows the know-how to pollute past rescue. The treaty's signed, but the cancer ticks in your bones. Until I'd murdered my father and fornicated my mother I wasn't wise enough to see I was Oedipus. Too late now to keep the polar cap from melting. Venice subsides; South America explodes.
>
> Let's stab out our eyes.
>
> Too late: our resolve is sapped beyond the brooches.
>
> —John Barth, *Lost in The Funhouse*

It is an ironic fact that one of the most powerful tools for defending the nation's water resources has until recently been generally overlooked. The Army Corps of Engineers has the authority to prevent a substantial amount of the environmental damage being inflicted upon the nation's waterways. This authority takes the form of the power to issue or deny permits for activities which would effect the quality, condition, or capacity of United States' waters. Although past experience demonstrates that the Corps has been less than enthusiastic about its environmental duties, present indications are that it will make greater efforts to protect the environment.

Effective utilization of the Corps of Engineers permit authority will depend upon the support and encouragement given to and pressure placed upon the Corps from Congress, the public, and the press. In the final analysis, however, the most telling pressure upon it may come from private environmental litigants. Accordingly, although the first part of this article attempts to deal with all aspects of the permit authority, special emphasis is given to this authority within the context of private environmental litigation.

The Corps' permit authority is without a doubt the most signif-

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icant regulatory common denominator with respect to the nation's water resources. Its influence is pervasive and widespread. It would, perhaps, be enlightening to make a foray into the statutory foundation of this authority.

I
STATUTORY BACKGROUND

A. The 1899 Rivers and Harbors Act

Section 10 of the 1899 Rivers and Harbors Act states as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.[1]

Generally, this section imposes upon those whose operations would alter or change the capacity or condition of navigable waters a duty to first obtain a permit from the Corps of Engineers. It was, however, infelicitously drafted, and ambiguities abound. What, for instance, is meant by "any obstruction"? Does this vague term limit the operation of the section to buildings and structures, or does it require a permit for non-construction activity? The Supreme Court resolved this issue in 1960 in *United States v. Republic Steel Corp.*.[2] This case involved the discharge into the Calumet River of industrial wastes containing suspended solids which tended to flocculate into large particles, settle out, and decrease the depth of the river.[3] The respondent had failed to apply for a Corps permit and had consistently refused to dredge the river. It argued that section 10 was

1. 33 U.S.C. § 403, 30 Stat. 1151 (1899).
2. 362 U.S. 482 (1960).
3. The District Court found that the river had been reduced to a depth of twelve feet when twenty-one feet were required for navigation.

inapplicable since its activity did not involve a structure. The Court rejected this narrow definition of "obstruction." It held that because section 10 first bans "any obstruction," then in another clause following a semicolon bans various kinds of "structures" in United States' waters, and subsequently bans excavations and fills unless "the work" is approved by the Secretary of the Army, that Congress had not intended to limit the definition of "obstruction" to mean "structure" which is mentioned in a separate clause. The Court noted that its definition was based upon precedent as well as a common sense reading of the statute. *United States v. Rio Grande Dam and Irrigation Co.*[4] involved an interpretation of the 1890 Rivers and Harbors Act, a predecessor statute containing similar language. Here the Court construed "obstruction" in a remarkably broad manner:

> It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.[5]

This construction was carried over into the 1899 Act in *Sanitary District of Chicago v. United States*[6] in which the use of the Chicago River as a sluiceway to draw down the level of Lake Michigan was held to be an "obstruction" within the meaning of section 10.

Another major ambiguity raised by the section concerns the issue of whether the issuance of a permit or a prosecution or injunction for failure to obtain one must focus upon the effect of the activity in question upon navigation or whether broader considerations such as the effect of the activity upon the public interest and the environment may properly be considered. For many years the Corps has administered this section with an exclusive emphasis on navigation. Indeed, until recently Corps public notices for permit application hearings noted that the Corps would only consider testimony bearing upon navigability. The unusually broad language of section 10 certainly did not require such a cramped interpretation, and, in fact, as early as 1933 the Supreme Court had affirmed the authority of the Corps to consider the public interest. In *United States ex rel Greathouse v. Dern*[7] a writ of mandamus was sought to compel the Corps to issue a permit for the construction of a wharf into the Potomac River north of the District of Columbia. The Corps refused to grant

4. 174 U.S. 690 (1899).
5. *Id.* at 708.
6. 266 U.S. 405 (1924).
7. 289 U.S. 352 (1933).

the permit because the United States government was planning to begin construction of the George Washington Memorial Parkway and would be condemning the land in question.[8] The presence of a wharf would create an added expense to such condemnation and would be inimical to the public interest. It was stipulated that the proposed wharf would in no way interfere with navigation.

The Court sidestepped the need to directly confront the issue of whether section 10 imposes a mandatory duty upon the Secretary of the Army to issue a permit once he is satisfied that the activity in question will not interfere with navigation by deciding the case on the equitable theory that a court may in its discretion refuse mandamus to compel the doing of an idle act. Nevertheless, the effect of this decision is to confer upon the Secretary broad authority to deny permits for reasons of public interest.[9] Finally, as shall be demonstrated later, recent legislation dealing with the environment has confirmed the position that the broad language of section 10 should not be limited to consideration of the effect of proposed activity upon navigation.

B. The Refuse Act

By far the most interesting provision dealing with the Corps' permit authority is section 13 of the 1899 Act[10]—known as the Refuse Act. It is likely to be the subject of an ever-increasing attention since in the hands of a skilled and creative attorney its provisions can be invoked to forestall a wide variety of activities which have a detrimental effect upon the environment. It provides as follows:

> It shall not be lawful to throw, discharge, or deposit, or cause 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 deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed

8. In fact, Congress had already appropriated funds for the project.

9. Such a liberal reading of this case was also recently made by the House Committee on Government Operations, *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction & Pollution*, H.R. Rep. No. 21, 91st Cong., 2d Sess. 2 (1970). Hereinafter referred to as *Our Waters and Wetlands.*

10. 33 U.S.C. § 407, 30 Stat. 1152 (1899).

> into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* that nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Upon first glance this section appears to be a curious amalgam of broad language and substantial limitations. A more careful analysis, however, reveals its surprising potential. What, for instance, is refuse? For years it was claimed that any substance which had a commercial value was not refuse and not within the ambit of section 13. In 1952, however, a federal court ruled that spilled oil was refuse in spite of its value:

> The spilled oil was certainly "refuse matter"; it had escaped from the tank whither it could not be reclaimed; and for all useful industrial purposes it had ceased to exist. The word "refuse" does not demand that the material must have been deliberately thrown away; it is satisfied by anything which has become waste, however useful it may earlier have been.[11]

Recently, the Supreme Court affirmed this view.[12] It concluded that "refuse" was used by the drafters as a shorthand description for an exhaustive list of specific substances contained in antecedents to the section, some of which were commercially valuable.[13] It then noted succinctly that: "Oil is oil and whether usable or not by industrial standards it has the same deliterious effect on waterways."[14] Thus, the Court recognized that the policy of the Refuse Act was one oriented toward the prevention of pollution and that it should be generously interpreted with this policy in mind.

The most recent development with respect to the issue of what

11. U.S. v. Ballard Oil Co. of Hartford, 195 F.2d 369, 371 (2d Cir. 1952). *See also* The La Merced (U.S. v. Alaska Southern Packing Co.), 84 F.2d 444 (9th Cir. 1936).

12. U.S. v. Standard Oil, 384 U.S. 224 (1966).

13. Act Sept. 19, 1890, ch. 907, § 6, 26 Stat. 453 referred to, for instance, such valuable substances as ballast, stone, slate, gravel, and earth.

14. U.S. v. Standard Oil, *supra* note 12, at 226.

constitutes refuse involves thermal pollution. The United States sought to enjoin the completion and operation of a fossil fuel power facility on Biscayne Bay because it was feared that thermal pollution from this plant would destroy an important estuarine habitat. A creative argument was advanced to the effect that a Refuse Act permit was required for the discharge of heated water "laden with dead organisms." Although an injunction was denied in this specific case, the court did accept the validity of the "heat as refuse" argument.[15]

Perhaps the most significant limitation upon the application of the Refuse Act is the exception made for discharges "flowing from streets and sewers and passing therefrom in a liquid state." Since municipal waste represents one of the greatest environmental hazards today, this limitation would seem to be a major loophole—and indeed it is, but not as major as it appears to be initially. In the first place, this language has been restricted to mean literally sewage.[16] It would not be possible for a manufacturing establishment to avoid application of this Act by tying in to a municipal sewage system. Industrial waste is not sewage. Secondly, where the Refuse Act does not apply to municipal waste, section 10 of the Rivers and Harbors Act does. To the extent that sewage contains suspended solids, it is an "obstruction" to the navigable capacity of a waterway and requires a Corps permit, and in deciding whether or not to issue such a permit, Corps' regulations require the environmental impact of permit issuance to be considered. Finally, even though a permit may not be required for municipal sewage under the terms of the Refuse Act, a permit for construction of a municipal sewer outfall is required by section 10. Thus, these two sections taken together operate in such a manner so that prospective or non-liquid municipal waste may be controlled or abated. Only purely liquid sewage which exits from an outfall for which a permit has already been obtained is exempted from control by use of these provisions.

The Refuse Act requires that a deposit be made into a navigable water of the United States or a tributary thereof. This is not a significant limitation. The development of the definition of navigability has witnessed a continuing expansion. Early cases defined navigability in terms of commerce:

> [Rivers are] public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are

15. U.S. v. Florida Power and Light, 311 F.Supp. 1391 (S.D. Fla. 1970).
16. U.S. v. Republic Steel, *supra* note 2.

> susceptible of being used, in their ordinary condition, as highways of commerce.[17]

Later this definition was extended to include non-navigable portions of navigable rivers,[18] and rivers which whether for economic or geographic reasons have ceased to be used for commercial intercourse.[19] Recently, the Supreme Court in *United States v. Appalachian Electric Power Co.*[20] enlarged the "susceptible of being used in their ordinary condition" language of *The Daniel Ball*[21] so as to include within the definition of "navigable" those rivers which might be navigable with reasonable improvements.

Clearly, a large percentage of United States waterways fit within the comfortable confines of this expansive definition. Those which do not in most cases could easily be considered tributaries[22] of navigable waters. The Refuse Act encompasses almost every body of water in the United States with the limited exception of those which are non-navigable and flow nowhere.

It has long been assumed by conservationists and environmentalists that the Corps' permit authority extends only to those activities which occur in waterways or in close proximity thereto.[23] This misapprehension is a serious one and has no foundation in the statutory language. It has arisen in part because the Corps has not in the past sought to assert its jurisdiction far beyond the boundaries of waterways and in part, perhaps, because the second clause of the Refuse Act makes reference to the "bank" of a navigable water. Although this clause is somewhat redundant, it is useful because it makes a deposit on the banks of a waterway unlawful regardless of whether or not actual pollution or deposition in the waterway has occurred. It can be used to operate prospectively to force the removal of material which poses a threat to a waterway. "Bank" has been narrowly defined as that elevation of land which confines the waters of the river in their natural channel when they rise to their highest level but do not overflow the banks.[24] In any case, this

17. The Daniel Ball, 77 U.S. (10 Wall) 557, 563 (1870).

18. U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).

19. Economy Light and Power Co. v. U.S., 256 U.S. 113 (1931); Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

20. 311 U.S. 377 (1940).

21. *Supra* note 17.

22. Non-navigable tributaries to navigable waters have been held to be within the ambit of federal control since such streams affect the "navigable capacity" of navigable waters, U.S. v. Rio Grande Dam and Irrigation Co., *supra* note 18.

23. The Conservation Foundation forum, June 23, 1970, presentation by A. Baum, Deputy Director of the San Francisco Bay Conservation and Development Commission.

24. Paine Lumber Co. v. U.S., 55 F. 854 (C.C.E.D. Wis., 1893).

clause should not be read as geographically limiting the Corps' permit authority. Any deposit in a navigable water or tributary thereof—regardless of the distance of its origin—is unlawful.[25]

The limiting language "whereby navigation shall or may be impeded or obstructed" has been held to refer only to the second clause of the Refuse Act dealing with the deposit of refuse material on the bank of a waterway.[26] Thus, the primary thrust of the Refuse Act is to make a deposit in or the pollution of a waterway unlawful regardless of the effect upon navigation of such deposit.

The final limitation in the Refuse Act relates to public works projects conducted by United States officers. This exception is clear. Nevertheless, one should remember that:

(a) most federal public works projects are subject to Congressional approval. Consequently, a public forum for the discussion of the merits of such projects does exist.

(b) this exception refers only to federal activity and not to state or local projects. Whether or not it applies to federally aided or assisted state or local projects is questionable. It probably does not. The use of the word "supervising" implies a project under federal control.

(c) this exception applies only to construction-type activity and not to direct pollution from existing federal installations or activities.

(d) the discretion which it vests in United States officers presumably is not absolute and is subject to a test of arbitrariness or capriciousness.

The internal limitations on the applicability of the Refuse Act, then, are not as extensive as they appear to be at first glance. Nor is the Refuse Act limited by other legislation. The Federal Water Pollution Control Act,[27] for instance, authorizes the Secretary of Interior to promote the control and abatement of water pollution in interstate (as opposed to navigable) waters with such flacid devices as training grants, research grants, and conferences with polluters. It expressly states that it does not impair the operation of the Refuse Act.[28] In a similar vein the Water Quality Improvement Act of 1970[29] notes that "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any

25. In Northern Pacific Ry. Co. v. U.S., 104 F. 691 (8th Cir. 1900), the court confronted a situation in which a railway track located some distance from the waterway settled, and because of the plastic nature of the substratum of clay beneath the right of way, forced the clay into the river. The court considered this to be a violation of the Refuse Act in spite of the fact that the right of way was distant from the waterway or the bank.

26. U.S. v. Ballard Oil Co. of Hartford, *supra* note 11.

27. 33 U.S.C. § 1151, 84 Stat. 91 (1970).

28. 33 U.S.C. § 1174, 84 Stat. 91 (1970).

29. Pub. L. § 91-224; 84 Stat. 91 (1970).

other provision of law to require compliance with applicable water quality standards."[30] There is some confusion regarding the extent which the Outer Continental Shelf Lands Act[31] limits the operation of the Refuse Act. This Act and its relationship to the Refuse Act will be discussed later.

A final grace note to this discussion of the Refuse Act and its companion, section 10 of the Rivers and Harbors Act of 1899, involves a mention of the manner in which these statutes are to be construed. Although they are, strictly speaking, penal statutes, they represent an exception to the general rule that penal statutes are to be strictly and narrowly construed. The Supreme Court has noted that "We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in *New Jersey v. New York* . . . , that 'A river is more than an amenity, it is a treasure,' forbids a narrow, cramped reading of either section 13 or of section 10."[32]

C. The Fish & Wildlife Coordination Act[33]

This legislation represents an attempt by Congress to insure that federal permit agencies such as the Corps of Engineers are cognizant of the environmental effects of proposed projects and activity. It states in pertinent part as follows:

> . . . whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.[34]

The mandate expressed by this Act is significant when one considers that the Corps is the single most important agency affecting the

30. *Id.* § 224.
31. 43 U.S.C. § 1333, 67 Stat. 462 (1953).
32. U.S. v. Republic Steel, *supra* note 2 at 491.
33. 16 U.S.C. § 662, 12 Stat. 564 (1958).
34. 16 U.S.C. § 662(a), 72 Stat. 564 (1958).

ecological balance of the nation's estuaries and waterways.[35] Although the Act was passed in 1958, the Corps did not begin to take the position that it could deny permits on other than navigational grounds until 1967. It changed its position and decided to obey the statutory mandate primarily because of the introduction that year of H.R. 25, a bill designed to give the Department of Interior an environmental permit authority.[36]

Although the policy and intent of the Coordination Act are clear, the ability of the Corps to deny permits required by section 10 of the Rivers and Harbors Act of 1899 for environmental reasons has been the subject of a judicial challenge. This challenge has resulted from a fundamental weakness in the Coordination Act—namely that it forces the Corps to consider environmental factors when making a permit decision, but fails to provide the Corps with a clear authority to act upon these factors. The litigation which has resolved this Congressional oversight is the case of *Zabel v. Tabb.*[37] In this case the petitioner had sought to construct a bulkhead and a bridge and to dredge and fill to form an island in Boca Ciega Bay, Florida to be used as a trailer park. The District Engineer, after finding that the proposed project would not pose a threat to navigation noted:

> Careful consideration has been given to the general public interest in this case. The virtually unanimous opposition to the proposed work as expressed in the protests which were received and exhaustively presented at the public hearing have convinced me that approval of the application would not be in the public interest. The continued opposition of the Fish and Wildlife Service . . . leads me to the conclusion that approval of the work would not be consistent with the intent of Congress as expressed by the Fish and Wildlife Coordination Act . . .[38]

The District Court in a poorly constructed opinion ruled that the Corps had no power to deny a permit for environmental reasons.

> The taking, control or limitation in the use of private property interests by an exercise of the police power of the government for the public interest or general welfare should be authorized by legislature (sic) which clearly outlines procedure which comports to all Constitutional standards. This is not the case here.

35. Panel Reports of the Commission on Marine Science, Engineering, and Resources, *Science and Environment,* Feb. 9, 1969, at III-55.

36. *Hearing on H.R. 25 Before the Committee on Commerce,* 90th Cong., 1st Sess. (1970).

37. Zabel v. Tabb, 296 F.Supp. 764 (M.D. Fla., 1969) *rev'd* 430 F.2d 199 (5th Cir. 1970).

38. Memorandum from Col. R. P. Tabb, District Engineer, to the Chief of Engineers, Dec. 30, 1966.

> As this opinion is being prepared the Congress is in session. Advocates of conservation are both able and effective. The way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by Congress.[39]

This opinion evinces a lack of understanding of the traditional distinction between constitutional restrictions on federal power to condemn the property of others without paying compensation and the federal interest in protecting and regulating its own navigational servitude. The opinion also neglects to consider the clear implication of the Coordination Act that the Corps be able to act upon the basis of the environmental information which it is required to consider. Failure to recognize that this power is implicit in the Act is to require the Corps to perform a useless act.

The legislative history of the Coordination Act supports this conclusion. The Senate Report,[40] although it did not specifically refer to a Corps' authority to deny permits for environmental reasons, clearly assumed that such authority was implicit in the Act and that it was unnecessary to spell it out.

> . . . existing law has no application whatsoever to the dredging and filling of bays and estuaries by private interests or other non-Federal entities in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interests. The dredging of these bays and estuaries along the coastlines to aid navigation and also to provide landfills for real estate and similar developments, both by Federal agencies or other agencies under permit from the Corps of Engineers, has increased tremendously in the last five years. Obviously, dredging activity of this sort has a profound disturbing effect on aquatic life, including shrimp and other species of temendous significance to the commercial fishing industry. The bays, estuaries, and related marsh areas are highly important as spawning and nursery grounds for many commercial species of fish and shelfish . . .
>
> [The Coordination Act] would remedy these deficiencies and have several other important advantages. [It] would provide that wildlife conservation shall receive equal consideration with other features of Federal water resource development programs . . . which is highly desirable and proper and represents an objective long sought by conservationists of the Nation.[41]

More recently, Congress expressed its view that the failure of the Corps of Engineers to deny a permit for environmental reasons in

39. Zabel v. Tabb, *supra* note 37 at 771.
40. S. Rep. No. 1981, 85th Cong., 2nd Sess. 4-5 (1958).
41. *Id.*

one particular case was a violation of the Coordination Act.[42] The implication was that in this particular case the Corps had both the power and the duty to deny a permit because the project in question posed a substantial environmental threat.

Finally, the recently enacted National Environmental Policy Act[43] commands that the public laws of the United States (including the Coordination Act) be interpreted in accordance with the broad policies of that Act oriented toward environmental preservation.[44] Indeed, this seems to have been a significant determinant of the Fifth Circuit's decision to reverse the District Court. As the law now stands there is no longer any question as to the ability of the Corps of Engineers to deny a permit solely on the basis of environmental considerations.

D. The National Environmental Policy Act[45]

Besides making broad policy statements about the need to preserve the environment, this Act contains the following provisions:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall– . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[46]

The legislative history of this section serves to strengthen the Corps' contention that it has authority to deny permits for environ-

42. *The Permit for Landfill in Hunting Creek: A Debacle in Conservation*, H. R. Rep. No. 4, 91st Cong., 1st Sess. 40 (1969). Hereinafter referred to as *A Debacle in Conservation.*

43. Pub. L. § 91-190, 83 Stat. 852 (1970).

44. *Id.* § 102 (1).

45. *Supra*, note 43.

46. *Supra*, note 45, § 102(1), (2)(c).

mental reasons. The Senate Report states that "In some areas of Federal activity, existing legislation does not provide clear authority for the consideration of environmental factors which conflict with other objectives."[47]

One of the most significant aspects of section 102(2)(c) is the fact that it requires the Chief of Engineers to issue a detailed statement accompanying every major permit decision detailing the environmental factors which entered into the decision and the weight with which they were considered. This requirement is not clear on the face of the statute, but the reference to "other major Federal actions" would seem to include it. That it does was confirmed recently by the Council on Environmental Quality. President Nixon ordered the Council to prepare guidelines for federal agencies for the preparation of the detailed statements required by section 102(2)(c).[48] The Council responded and noted that "other major Federal actions" included those "involving a Federal lease, permit, license, certificate or other entitlement for use."[49] Although a section 102(2)(c) report is not in itself a powerful tool for defending the environment, it is important to note that a failure by the Corps to issue such a report could invalidate a permit the issuance of which would be detrimental to environmental values. Furthermore, even where a section 102(2)(c) report is issued, it may provide the basis with which to attack a Corps' permit decision as an abuse of administrative discretion, or it may serve to expose weaknesses or inadequacies in the reasoning process used by the Corps to arrive at a permit decision.

E. The Water Quality Improvement Act of 1970[50]

The primary thrust of this Act establishes a strict liability standard for oil pollution. One section, however, relates to the Corps' permit authority:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a

47. S. Rep. No. 91, 91st Cong., 1st Sess. 296 (1969).

48. "Protection and Enhancement of Environmental Quality," Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

49. The Council on Environmental Quality, Interim Guidelines pursuant to Executive Order 11514. Corps regulations have recently been revised to require a Section 102 statement for major permit applications which raise environmental issues, EC (Engineering Circular) 1165-2-86, Apr. 30, 1970.

50. Pub. L. § 91-224; 84 Stat. 91 (1970).

> certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that there is reasonable assurance, as determined by the State or interstate agency, that such activity will be conducted in a manner which will not violate applicable water quality standards.[51]

This provision allows a state to establish more stringent environmental standards than the Corps if it so wishes. It is, in effect, a dual permit system. Unfortunately, however, initial indications are that the Corps plans to treat a state certificate as determinative of the issue of whether a proposed project would endanger water quality. This attitude is a dangerous one in light of the fact that many states may have weak standards, may not enforce strong standards, or may issue a state certification in bad faith disregarding the environmental consequences in a headlong rush to increase a tax base. Where this occurs the Corps will have abdicated its responsibility to consider the effects of a proposed project upon water quality. So far as water quality is concerned, the dual permit concept of this section will be defeated. In any case, the Corps regulations relating to permit applications require it to consider a host of other environmental factors besides water quality. Since a project which has a detrimental effect upon water quality will also usually damage another environmental value such as aesthetics, fish and wildlife, or ecology, the Corps could deny a permit for one of these reasons in spite of the fact that the permit applicant may have obtained a state certification on the basis of weak standards or bad faith. Furthermore, the fact that this Act requires public notice and public hearings with respect to a certificate at the state level would tend to reduce the likelihood of state bad faith.[52]

It is apparent that the Corps of Engineers' statutory authority to protect the environment is broad. One should bear in mind, however, that this authority is a tool of *reaction* and of *advocacy*. It encourages sound environmental planning only in a negative and haphazard fashion. It has none of the virtues of legal tools based upon persuasion and cooperation, and it certainly is not a panacea. It will never be an adequate substitute for comprehensive and strong legislation designed to protect national water resource values, but in the absence of such legislation it would be folly for the environmental lawyer to neglect the use of this remarkable tool.

51. *Id.* § 21(b)(1).
52. *Id.*

II
ADMINISTRATIVE FACTORS

A. The Memorandum of Understanding

The Departments of the Army and the Interior on July 13, 1967 entered into a *Memorandum of Understanding* setting forth the policies and procedures for coordinating action in processing permit applications for dredging, filling, excavating and other related work in the navigable water of the United States. The purpose of the memorandum was to facilitate the coordination between the Corps and the Department of the Interior required by the Coordination Act and to provide the Corps with procedures for obtaining an adequate input of environmental information in order to make reasoned decisions on permit applications which involved potential environmental damage. The coordination policies expressed by the memorandum note that:

> 1. It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, district engineers of the U.S. Army Corps of Engineers shall coordinate with the regional directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with . . . permits issued under the 1899 act . . .
>
> 2. The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases . . . [and he] will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest . . .[53]

It is important to note that the memorandum requires the District Engineers to consult and coordinate their activities with regional directors of the Secretary of the Interior, whereas the Coordination Act requires them to coordinate with the Fish and Wildlife Service of the Department of the Interior. The memorandum's deviation from the Act is not an insignificant procedural difference. It is, rather, a means by which the spirit and intent of the Act can be subverted.

53. 33 C.F.R. § 209.120(11) (1970).

The Fish and Wildlife Service is a career oriented, non-political division of Interior. Regional directors and their superiors are political appointees. Consequently, the memorandum subtly opens an avenue by which political influence or pressure can taint the information upon which the Corps must base its permit decisions.

One should also note that the memorandum places upon the Corps the ultimate responsibiliity for balancing competing interests and rendering a decision. As shall be illustrated later, not only does the Corps accept inadequate or biased information from Interior, but it also often unquestioningly defers to Interior's suspect judgment.

The memorandum also provides for procedures by which coordination policy is to be effectuated. It outlines the responsibility of the District Engineer to issue notices to all interested parties and to hold public hearings where a controversy is indicated. It also provides that:

> Such regional directors of the Secretary of the Interior shall immediately make such studies and investigations as they deem necessary or desirable, consult with the appropriate State agencies, and advise the district engineers whether the work proposed by the permit applicant, including the deposit of any material in or near the navigable waters of the United States, will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment. . . .
>
> The Chief of Engineers shall refer to the Under Secretary of the Interior all those cases referred to him containing unresolved substantive differences of views and he shall include his analysis thereof, for the purpose of obtaining the Department of Interior's comments prior to final determination of the issues.[54]

The memorandum is ambiguous with respect to the "studies" which Interior is required to make. Are they to be extensive investigations or merely general analyses? The less specific they are, the greater is the likelihood that the Corps will neglect the environmental aspects of its balancing calculus. In fact, Interior studies are usually cursory and shallow. Furthermore, it is not clear whether they need be made at all. The memorandum speaks in mandatory terms ("shall . . . make") and then paradoxically speaks in discretionary terms ("as they deem necessary or desirable").

B. Corps of Engineers' Permit Regulations

Recently, the regulations which govern the issuance of permits by

54. *Id.*

the Corps of Engineers have undergone a significant policy growth in favor of protecting environmental values. Early in 1970 Lt. Gen. Frederick J. Clarke stated that although the Corps had in the past tended to reflect the views of private industry and state and local governments with respect to permits, it was in the process of changing its policy and its regulations so as to consider "the broader public interest."[55]

The most significant change in the regulations appeared shortly after Gen. Clarke's statement. It stated that permit applications are to be judged by evaluating the impact of the proposed work on the public interest. Public interest is then defined so as to include such factors as "navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people."[56] Although some commentators have questioned the ability of the Corps to effectively administer these standards,[57] it is reassuring that they exist. At the very least they can serve as a handle by which private environmental litigants can seek to upset environmentally unsound permit decisions.

The regulations with respect to harbor lines were also revised. Section 11 of the Rivers and Harbors Act of 1899[58] authorizes the Secretary of the Army to establish harbor lines whenever he deems them to be essential to the preservation and protection of harbors. Beyond these lines no piers, bulkheads, or other construction is to occur without a permit from the Chief of Engineers. Until recently Corps' regulations interpreted this section of the Act in such a manner so that it "implies consent to riparian owners to erect structures to the line without special authorization . . ."[59] This laissez-faire policy, however, was inconsistent with the Corps' developing environmental responsibilities since many projects conducted inside of harbor lines would escape scrutiny and control. Nineteen square miles of ecologically fragile San Francisco Bay, for example, were

55. New York Times, Apr. 5, 1970, at 35, col. 1.

56. 33 C.F.R. § 209.120(d) (1970); ER 1145-2-303, change 5, Apr. 23, 1970.

57. Wise, H. A., the Conservation Foundation forum, *supra* note 23. Mr. Wise considers these standards to be an unworkable example of Corps' overreaction to conservationist pressure: "How is some chicken Colonel bucking for a star going to decide how to balance all of these factors? This will lead to monstrous confusion with endless public hearings with every bleeding heart bird watcher snarling the system."

The best response to this criticism is that it is, perhaps, best to err on the side of conservation than to suffer irrevocable environmental degradation, and that, in any case, it should be administratively possible to separate frivolous objections from those with merit and substance.

58. 33 U.S.C. § 404, 30 Stat. 1151 (1899).

59. 33 C.F.R. § 209.105(i) (1970).

subject to dredge and fill operations without examination of the environmental consequences thereof.[60]

Although the "implied consent" interpretation of the Act was a reasonable one, it was inconsistent with the contemporary need to emphasize environmental protection and with the requirements of the Fish and Wildlife Coordination Act which made no distinction or exception with respect to harbor lines. In 1969 the House Committee on Government Operations suggested that the Corps revise its regulations so as to require permits for work inside harbor lines.[61] In response to this suggestion the Corps issued revised harbor line regulations. The new regulations make it clear that harbor lines are merely guidelines for determining, with respect to the impact on navigation interests alone, the offshore limits of construction. Those wishing to undertake work shoreward of harbor lines now must obtain a permit.[62]

Although section 10 of the 1899 Act requires a permit for construction of a sewer outfall, Corps regulations do not require the applicant to specify exactly what pollutants will be discharged into the waterway because of this outfall. The failure to obtain this critical information must cripple the Corps in its attempt to decide the ultimate environmental consequences of its permit action. On December 17, 1969 the Acting Chief of Engineers admitted that an applicant in this situation "is not specifically required to identify the effluent that will be discharged," and promised that the regulations would be revised to "eliminate this impression" and to "particularize the requirement."[63] Such a revision would have the effect of:

- —enabling complete Corps and public consideration of the effects of a proposed project;
- —enabling identification of deviation from permit conditions and restrictions if a permit is granted;
- —enabling the Corps to determine exactly what permit conditions are necessary to protect the public interest;
- —enabling easier prosecutions under the Refuse Act where required permits for discharge are not obtained;
- —helping to obtain and compile information as to the specific manner and extent to which various waters are polluted.

Until recently the Corps routinely approved permit applications unless the opponents of the permit were able to clearly demonstrate

60. *Our Waters and Wetlands, supra* note 9, at 7.
61. *Id.* at 10.
62. *Supra* note 56.
63. *Our Waters and Wetlands, supra* note 9, at 14.

that substantial damage to the public interest would result.[64] New regulations, however, recognize that this policy of placing upon the public the burden of proving that a proposed project is contrary to environmental values was inconsistent with the national policy favoring environmental protection. The regulations now require a permit applicant to furnish the information necessary for the preparation of the section 102 statement required by the National Environmental Policy Act.[65] This has the effect of forcing the applicant to affirmatively demonstrate the environmental soundness of the proposed project.

III
ADVANTAGES OF THE CORPS' PERMIT PROCEDURE

Undoubtedly, the primary advantage of the use of the Corps' permit authority as a tool for defending the environment is the breadth and fluidity with which the statutes and regulations can be applied. In the first place permits are required for a myriad of activities which have adverse environmental consequences, and a failure to obtain a permit can forestall or defeat the project in question. Furthermore, it is possible to creatively use the permit authority to collaterally attack an environmentally unsound project which for various reasons may not be susceptible to attack on other grounds. Examine, for instance, the hypothetical situation in which an unprepossessing structure such as a hotel or motel is scheduled to be constructed adjacent to a lake, river, or stream of exceptional natural beauty. The primary objection is one of aesthetics, and it is doubtful that the permit authority can be invoked in a direct manner so as to raise this issue.[66] The permit authority can, however, be used as a handle in order to raise the issue. Such a project as the hypothetical one in question will almost always in some manner affect the nearby water. Increased siltation and oily runoff from construction, for instance, may require a permit under the Refuse Act. At the permit hearing the issue of aesthetics may be raised; the project can be defeated at this level if the objection is sufficiently meritorious and is presented in a forceful manner with broad support. Recently, for instance, conservationists in Arkansas were able to prevent the destruction of an aesthetic feature along the Arkansas River by quarrying opera-

64. *Id.* at 6.

65. EC (Engineering Circular) 1165-2-86, Apr. 30, 1970.

66. § 10 of the 1899 Act does contain some intriguing language making it unlawful to "in any manner to alter or modify . . . the condition . . . of any navigable water." Are aesthetic values part of the "condition" of a navigable water? Note also that the regulations permit consideration of aesthetic factors once a permit has been applied for.

tions. The opponents of the quarrying raised the issue of aesthetics and the public interest when the quarry operator applied for a permit to construct the wharf needed by quarry barges. Although the wharf itself raised no aesthetic issues, the purpose which it was ultimately to serve did, and the Corps refused to grant the permit.

Similarly, the permit authority can be used as a handle to prevent environmentally unsound activities some distance removed from a waterway. A proposed housing development, for example, may result in the loss of a valuable wilderness area or operate to overload already taxed municipal sewerage facilities (an environmental consequence which is not readily susceptible to control by the Refuse Act). If opponents of the project can demonstrate that increased siltation and runoff will eventually find their way to a waterway or that the proliferation of parking areas and driveways so disrupt the underground water table that the capacity of a waterway is affected, then a permit is required for the project, and it may be possible to prevent its initiation or completion.

Another advantage to the use of the permit authority are the provisions for extensive public participation in the decision-making process. The regulations[6 7] require that the Corps give public notice of applications for permits for major projects or undertakings. Notice must be given "to all parties deemed likely to be interested, such as State or local harbor commissions, proper city authorities . . . adjacent property owners . . . the U.S. Fish and Wildlife Service. . . ." The notice must also be posted in a post office. In fact, the Corps distributes notices in a more liberal manner than is required by the regulations. It is not unusual for a notice to be sent to several hundred parties including the press, conservation organizations, and private individuals known to be interested in environmental matters. The notice will include at a minimum a sketch of the proposed project, an explanation of it, and a description of its location. A public hearing will be held whenever the response to the notice indicates that there is general public opposition to issuance of the permit or when local authorities or Congressional interests make a request for one.[6 8]

A strong advantage of the permit system is the wide range of remedies available to enforce permit statutes and to punish violations. The 1899 Act, for instance, provides that violations of section 10 "shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not

67. 33 C.F.R. § 209.120(f).
68. 33 C.F.R. § 209.120(g).

exceeding one year. . . ."[69] An injunction may also be obtained under this Act for the removal of "structures" erected in violation of section 10. Note, however, that the injunction remedy is not limited to "structures" but applies to any "obstruction." The 1890 predecessor statute referred to enjoining "obstructions" and the Supreme Court in *Sanitary District v. United States*[70] read this broader word into the 1899 Act by implication:

> Congress has legislated and made its purpose clear; it has provided enough federal law in section 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.[71]

This process of generously fashioning remedies by implication has been continued so as to include the remedy of damages. It is now possible for the federal government to recover the expenses incurred in removing obstructions from a waterway.[72] The ability of the government to obtain such damages will have a twofold effect. First, it will encourage the government to engage in clean-up activities. Secondly, it will have an effect analagous to that of the imposition of a permit condition forcing a permitee to engage in pollution prevention and treatment—it forces the pollutor to internalize his costs. This in turn will encourage the development and construction of treatment facilities and abatement procedures by the statute violator and by others similarly situated.

The 1899 Act also provides penalties for the violation of the Refuse Act.[73] The fine schedule is identical to that contained in section 10, as is the imprisonment provision. Again, there are no express provisions for injunctions or for recovery of damages. Nevertheless, it seems likely that they are available under the expansive rationale of *Sanitary District v. United States.*

Another advantage of the permit system is that it can enable the government to maintain control over pollution. It would be unrealistic or naive to assume that pollution of the nation's waterways will cease because of the efficient exercise of the permit authority or for any other reason. This will come only in the unlikely event of a

69. 33 U.S.C. § 406.

70. 266 U.S. 405. *See also* United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964).

71. 266 U.S. at 492.

72. United States v. Perma Paving Co., *supra* note 70. *See also* United States v. New York Central R.R., 252 F.Supp. 508 (D. Mass. 1965), *affirmed* 358 F.2d 747.

73. 33 U.S.C. § 411.

complete restructuring of social goals and priorities. Accordingly, as long as pollution exists, it would be well for the government to have a handle with which to control it and keep it within reasonable bounds. The permit authority provides just such a handle. Although the Corps is chary of granting "permits for pollution," the alternative of allowing uncontrolled and unabated pollution may be worse. By granting permits for discharge under the Refuse Act or construction, dredging, and filling permits under section 10, the Corps can condition the permits in such a manner so as to minimize the environmental damage.

Another advantage of the use of the permit authority is well worth mentioning. This tool is relatively costless. Aside from some increased administrative and investigative expenses, the permit provisions are inexpensive. Indeed, in many instances they may operate to create additional federal revenue. When one examines the immense cost of most pollution control and environmental protection proposals, this advantage is a significant one—especially in a time when federal funds for social and domestic programs are limited because of inflation and the demands of a rapacious military establishment.

IV

DISADVANTAGEOUS ASPECTS OF THE PERMIT AUTHORITY

A. Offshore Drilling

Section 4(f) of the Outer Continental Shelf Lands Act extended the authority of the Secretary of the Army "to prevent obstruction to navigation in the navigable waters of the United States [from] artificial islands and fixed structures located on the Outer Continental Shelf."[74] The inherent ambiguity between the Corps' recently expanded environmental responsibilities and the seemingly restricted wording of this section has caused a great deal of confusion. When, for instance, it became apparent to opponents of offshore drilling in the Santa Barbara Channel that a conspiracy existed between the oil industry, the Department of the Interior, and the Bureau of the Budget (which was desperate for the lease funds to help offset the cost of the Indochina War), they turned to the Corps' permit procedure in a final attempt to halt the drilling. At a Corps hearing for a permit for a Phillips Petroleum platform, the District Engineer heard testimony with respect to the environmental aspects of such drilling operations; and, largely as a result of this testimony,

74. 43 U.S.C. § 1333(f).

the permit which he proposed contained strict pollution control conditions.[75] Since, however, the statutory authority of the Corps to consider non-navigational aspects of offshore drilling was unclear, Phillips and Interior successfully lobbied the Corps for a revision and weakening of the permit conditions. That Interior viewed the oil companies as its constituents rather than the public and its interest in preserving the environment is illustrated by an internal memorandum in which Interior noted that it handled its:

> public relations business in Santa Barbara through City, County and State people and had chosen not to go the public hearing route. That we [Interior] had tried to warn L.A. District Engineer of Corps of what he faced and we preferred not to stir the natives up any more than possible.... All decided that more coordination and a better method of Corps permit handling could solve our problems. [The representative of the Corps will] ... see about combining our approvals for platform installations to give companies a better service.[76]

Because the Corps views its responsibility to consider the public interest with somewhat less levity than does Interior, and because the Corps' permit procedure is one of high visibility and extensive public participation, it would seem to be advisable from the standpoint of environmental protection that the Corps be allowed to consider non-navigational aspects of offshore drilling permit applications. Nevertheless, it is now clear that the Corps permit authority does not extend to the environmental aspects of offshore drilling. Because of the Santa Barbara confusion, the Corps recently revised its regulations so that "in the case of applications for permits for fixed structures or artificial islands on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the decision [as to whether a permit will be issued] will be based on the effect of the proposed work on navigation and national security."[77] Since this statement occurs at the end of the section outlining the environmental factors normally to be considered in permit applications, there is no question that with respect to offshore drilling permits *only* navigation and national security would be considered. It is clear, then, that one disadvantage of the permit authority is that it cannot be used as a handle to prevent environmentally unsound offshore drilling.

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75. *See generally,* Baldwin, *The Santa Barbara Oil Spill,* in Law and the Environment (Baldwin & Page ed. 1970).

76. *Id.* at 41.

77. 35 Fed. Reg. 79 (1970).

B. Administrative Lethargy or Malfeasance

At the present time the willful failure of federal administrative agencies to engage in their statutorily mandated duties with respect to the Corps permit authority represents the most severe threat to the usefulness of this device. The Justice Department is the primary villain. It appears to have embarked upon a bold and callous course intended to subvert the effectiveness of the Refuse Act by refusing to initiate prosecutions thereunder except under severely limited circumstances. At the same time, however, an occasional action will be initiated so that the Nixon administration can maintain the political myth that is actively interested in the preservation of the environment.

When Congress passed the Rivers and Harbors Act and the Refuse Act it sought to prevent the law's subversion by including a provision which radically restricted the amount of prosecutorial discretion available to the Justice Department. This provision requires United States Attorneys to "vigorously prosecute all offenders."[78] A recent exchange of letters between Congressman Reuss of Wisconsin and the Justice Department illustrates the attitude with which Justice approaches its prosecutorial responsibility. Although lengthy, relevant portions of the letters are reproduced below.

> Dear Mr. Attorney General:
>
> Enclosed is a copy of a prepared statement given by Mr. J. J. Lankhorst, Assistant General Counsel for the Corps of Engineers, before the Subcommittee on Energy, Natural Resources, and Environment of the Senate Committee on Commerce concerning enforcement of the 1899 Refuse Act (30 Stat. 1151) [Enclosure omitted.]
>
> We are concerned that the statement implies an executive branch policy to limit enforcement of that Act.
>
> Mr. Lankhorst said that the Corps is meeting with officials of the Justice Department and the Interior Department "to resolve the extent to which the Refuse Act should be used to control pollution * * * [and] that a memorandum of understanding will be reached governing use of the Refuse Act." He also said that, in the interim, instructions have been given to the Corps' district engineers "to refer reports of pollution to the local office of the Federal Water Quality

78. ,33 U.S.C. § 413. A cursory examination of this section would seem to suggest the conclusion that the duty of United States Attorneys to vigorously prosecute offenders arises only when offenses are reported by the Secretary of the Army. In United States v. Interlake Steel, 297 F.Supp. 912 (D. Ill. 1969), however, the court ruled that the enforceability of the Refuse Act should not be made to rest upon the fortuity of who reports violations, and that the duty of the United States Attorney is not affected by the nature of the informing party.

Administration for investigation, comment, and recommendations as to whether action should be taken under the Refuse Act."

We would appreciate your response to the following questions:

1. (a) Have similar instructions been issued by the Justice Department to United States attorneys?

2. (a) In view of section 24 of the Federal Water Pollution Control Act, as amended, by the Water Quality Improvement Act of 1970 (Public Law 91-224; 84 Stat. 91) which specifically provides that it does not limit enforcement of the Refuse Act, isn't it the responsibility of United States attorneys "to vigorously prosecute" (see 33 USC 413) alleged violations of the Refuse Act regardless of actions taken by the Interior Department to abate the pollution under laws it administers?

(b) If not, why not?

3. Under what circumstances would the Refuse Act not be used "to control pollution?"

4. What is the statutory authority for the Federal Water Quality Administration to conduct investigations to enforce a statute it does not administer?

5. (a) Will your Department seek injunctions, in addition to criminal prosecution, against those persons who discharge refuse matter into a navigable waterway without a Corps permit in violation of the Refuse Act, to require such persons "to cease future discharges and to remove the polluting substance already discharged?" (H. Rept. 91-917, March 18, 1970, p. 18).

(b) If not, why not?

Sincerely, HENRY S. REUSS[79]

Honorable Henry S. Reuss June 2, 1970
Chairman
Conservation and Natural Resources Subcommittee
House of Representatives Washington, D.C.

Dear Mr. Chairman:

This is in reply to your letter of May 13, 1970. . . . You expressed concern that the statement given by Mr. Lankhorst implies an executive branch policy to limit the enforcement of the Refuse Act and pose several questions to illuminate the Government's position.

Answering your expression of concern generally, we would say that the policy of the executive in the enforcement of the Refuse Act is to fit that Act into the regulatory scheme devised by Congress to combat pollution most efficiently and effectively, bearing in mind, as noted by Mr. Lankhorst, that it is the declared intent of Congress that the control of water pollution be dealt with primarily

79. Letter from Henry S. Reuss, Chairman, Conservation and Natural Resources Subcommittee, House of Representatives, to the Attorney General of the United States, May 13, 1970.

by the states, with additional and supplemental Federal support. It is patent that the Refuse Act is not and cannot be the weapon of choice in the armament of antipollution laws in all instances; thus, prosecutive discretion is always essential and must take into account the possible effects which the use of the Refuse Act might have upon the programs of other agencies concerned with the broad problem.

In answer to your specific question . . .

1 (a). Instructions have not been issued by the Justice Department to United States attorneys to refer reports of pollution to the local office of the Federal Water Quality Administration for investigation, etc. since under the specific terms of the Act, as well as the organizational structure for the enforcement of the Act, our primary relationship is with the Corps of Engineers. Therefore, complaints of violations of the Refuse Act will continue to be referred to that agency, as in the past. The Corps, of course, may choose to utilize the services and secure the advice and recommendations of the Federal Water Quality Administration in appropriate circumstances. We understand, however, that the statement of Mr. Lankhorst in that regard had reference to a limited class of pollution complaints, i.e., those dealing with continuing industrial discharges, and not to the isolated, noncontinuous deposits of refuse material unrelated to any program within the jurisdiction of the Federal Water Quality Administration.

2 (a). In view of the expression of congressional intent in recent enactments, this Department will continue to vigorously prosecute violations of the Act. However, it would be patently poor prosecutive judgment as well as lacking in common sense to bring prosecutive action under the Refuse Act where such enforcement activity would have a disruptive or devitalizing effect upon programs designed or approved by the Federal Water Quality Administration, and we will therefore endeavor always to take into account the effect upon such programs which prosecution under the Refuse Act might have upon them.

3. As indicated in reference to question 2(a) above, the Refuse Act would not be used "to control pollution" where satisfactory results are being achieved under state or Federal programs with which participating industrial producers are in full compliance. There are other circumstances where the Refuse Act would be legally inapplicable, e.g., where the affected body of water is not a navigable water or tributary thereof, where the Corps of Engineers has issued a permit which continues in effect or where the material consists of refuse matter flowing from streets or sewers in a liquid state. We do not intend to suggest that these examples exhaust the list of exceptions.

4. It is suggested that this question be addressed to the Federal Water Quality Administration.

> 5. This Department will seek injunctions against persons discharging refuse matter into navigable waters of the United States without a permit from the Corps of Engineers where the discharge is of a continuing nature, and where the injunction proceeding would not disrupt or be inconsistent with such administrative proceedings as the Department of the Interior may be conducting under the Federal Water Pollution Control Act, or duplicative of such action as a state may have initiated to abate the same source of pollution. In our opinion, it would not be in the genuine interest of the Government to bring an action under the Refuse Act to secure a criminal sanction against a company which admittedly is discharging refuse into the navigable waters of the United States, but which, pursuant to a program being conducted by the Federal Water Quality Administration, is spending significant amounts of money to secure the abatement of that pollution. Nor does it seem desirable for the Federal Government to seek to enjoin polluting activities when a state government has initiated court action to enjoin the same activity. . . .
>
> Sincerely,
> Shiro Kashiwa
> Assistant Attorney General[80]

Mr. Kashiwa's response is interesting in several respects. First, the attempt to subordinate the Refuse Act to the activities of the FWQA is a covert means of vitiating the effectiveness of this Act. One can only guess as to the political reasons which have motivated this attempt, but there is no need to guess as to its potential effect. Those familiar with the FWQA know it to be a weak agency with little statutory authority beyond the ability to slap wrists. Even then, its abatement procedures (which consist primarily of "conferences" aimed at "persuading" polluters to cease) often drag on for years. The manner in which Mr. Kashiwa expresses his fears that the Refuse Act might have a "disruptive or devitalizing" effect on FWQA programs is ludicrous. Rather, the Justice Department's use of FWQA programs as a bar to Refuse Act prosecutions will have a disruptive and devitalizing effect on that Act—the only pollution control statute with true vitality.

The references to prosecutive discretion clearly fly in the face of the statutory mandate that United States Attorneys shall "vigorously prosecute" offenders. Although it is possible to maintain an argument that this language leaves some room for the reasonable exercise of discretion, it clearly does not permit discretion to be used as a

80. Letter from Shiro Kashiwa, Assistant Attorney General, to Henry S. Reuss, June 2, 1970.

pretext for the subversion of the purpose and spirit of this legislation.

The cryptic statement that the Refuse Act is limited by mysterious and unnamed exceptions further serves to illustrate the reluctance with which Justice approaches the Act. Finally, the refusal to utilize the Refuse Act when it appears that a state has sought to enjoin the pollution in question is nowhere justified by language of the Act. It is a federal statute designed to provide a federal remedy for damage to what has traditionally been considered a national resource. If Congress had intended the Act to be subordinated to state action or to FWQA activity, it would have amended the Act to that effect. Indeed, Congress has stated that FWQA activities are in no way to limit the operation of the Refuse Act.[81]

In spite of the fact that its position is contrary to the general public interest and is of questionable legality, the Justice Department has remained firm in its determination to rob the Refuse Act of any real value. A recent departmental memorandum reiterated the limited conditions under which Justice would seek to enforce the Act and added several more qualifications.

> The policy of the Department of Justice with respect to the enforcement of the Refuse Act for purposes other than the protection of the navigable capacity of our national waters, is not to attempt to use it as a pollution abatement statute in competition with the Federal Water Pollution Control Act or with State pollution abatement procedures, but rather to use it to supplement that Act by bringing appropriate actions either to punish the occasional or recalcitrant pollutor, or to abate continuing sources of pollution which for some reason or other have not been subjected to a proceeding conducted by the Federal Water Quality Administration or by a State, or where in the opinion of the Federal Water Quality Administration the pollutor has failed to comply with obligations under such a procedure.[82]

It is also important to note that the provision in the Water Quality Improvement Act of 1970 which requires state certification for Refuse Act permits would be a meaningless provision in light of the Justice Department policy. Those who seek to pollute the nation's waterways will have no incentive to request a Refuse Act permit

81. The Water Quality Improvement Act of 1970, *supra* note 29, § 24.

82. The Department of Justice, *Guidelines for Litigation Under the Refuse Act.* The failure to enforce the Refuse Act is only a part of the administration's effort to prevent meaningful attempts to protect the environment. Recently, for example, Mr. Kashiwa testified before a Senate Environment Subcommittee against a bill designed to provide increased citizen participation (via standing to sue) in the battle against environmental pollution. The Washington Post, July 11, 1970.

unless it appears that the Act will be enforced. Where no permit is requested, then state certification becomes unnecessary. The Justice Department policy to refrain from enforcement assumes that Congress in enacting this provision has engaged in a useless gesture—certainly a tenuous assumption.

The Justice Department policy, then, has subverted the statutory mandate requiring vigorous prosecution of all offenders so that in practice government action amounts to a half-hearted prosecution of a few offenders. The conclusion is inescapable that since the Justice Department policy is contrary to a statutory mandate and is not within a range of discretionary authority conferred by statute, mandamus would be available as a remedy to private environmental litigants to force the Justice Department to perform its duty.

Effective use of the permit authority as a tool for defending environmental values also requires the active participation of the Corps of Engineers. The existence of public hearing provisions, environmentally oriented regulations, and a recently developed national policy favoring the preservation of environmental values[83] makes it highly unlikely that the Corps will make environmentally unsound permit decisions or will fail to properly condition permits for activities which have the potential for damage to the environment. Nevertheless, lethargy on the part of the Corps can hinder the effectiveness of the permit authority. The Corps has the fundamental responsibility of discovering instances in which required permits have not been obtained or in which violations of permit conditions have occurred and of reporting these violations to the Justice Department. In the past the Corps has not actively sought to enforce its permit authority, and every effort possible must be made to encourage it to do so in the future. Although means do exist by which private environmentalists can enforce the authority, active and enthusiastic Corps participation is important.

C. Poor Coordination and/or Political Influence

Another serious disadvantage of the use of the permit authority is its susceptibility to intergovernmental confusion at the federal level. The lines of communication and the areas of responsibility are less clear in practice than in theory. Consequently, an examination of several recent examples would be valuable as an aid to understanding

83. The National Environmental Policy Act, *supra* note 45. "The attainment of effective national environmental management requires the Nation's endorsement of a set of resource management values which are in the long-range public interest and which merit the support of all social institutions. The Federal role will involve in some measure nearly ever Federal agency," Senate Report 91-296, *supra* note 49, at 13.

the manner in which the environmental aspects of the permit authority can be subverted by confusion or indecision.

The attempt to obtain a permit for landfill in Hunting Creek, an estuary on the Virginia side of the Potomac across from the District of Columbia, represents one of the most infamous cases and serves as an excellent example of the potential effects of poor federal coordination. Howard Hoffman Associates, a real estate development organization, wished to bulkhead and fill more than twenty acres of submerged land in this estuary. It planned a large apartment development upon this landfill and in 1963 it applied to the Corps of Engineers for a permit to perform such work.

In March of 1964 the Corps of Engineers issued a public notice informing interested parties that it would hold a hearing with respect to the application. The replies indicated that government agencies, conservation organizations, and private individuals objected to the granting of the proposed permit. The Fish and Wildlife Service, for instance, in a letter dated April 14, 1964 informed the Corps of Engineers that pursuant to its obligation under the Fish and Wildlife Coordination Act it objected to the granting of the permit. Its report, which summarized many years of careful study of the area and echoed the objections of most of the conservation organizations which protested, stated as follows:

> (a) That the shallow waters and fertile bottom of the mouth of Hunting Creek provide excellent feeding ground for water birds; that 3,000 to 5,000 scaup and ruddy ducks winter in the general area; that almost every species of waterfowl normally occurring along the Atlantic seaboard has been recorded in the vicinity;
>
> (b) That Hunting Creek is one of the better remaining areas of the gradually diminishing natural wetland habitat in the Washington metropolitan area; that it is much used by naturalists and other persons interested in studying and observing the natural flora and fauna of the regions; that granting the applications would not only destroy the water bird habitat of the area actually filled, but would also accelerate the natural silting process in the mouth of Hunting Creek and thus further reduce valuable wildlife habitat; that ensuing development on the proposed fill would create a disturbance factor which would still further adversely affect waterfowl and shore bird utilization of the general area; and
>
> (c) That the proposed fill and ensuing development would seriously obstruct public observation and enjoyment of bird life from the National Park Service's access area at Jones Point and destroy esthetic values that cannot be appraised in monetary terms.[84]

84. *A Debacle in Conservation, supra* note 42, at 5-6.

In July of 1964 the applicant, Hoffman Associates reduced the area of fill for which it was applying in hopes of obtaining a compromise. The Fish and Wildlife Service, however, maintained its objections, and Secretary of the Interior Udall announced his support for the position taken by the Fish and Wildlife Service. At this point the application became dormant for a period of nearly three years. On October 10, 1967, the Hunting Creek controversy again resurfaced. Secretary Cain, assistant Secretary of the Interior for Fish and Wildlife and Parks, wrote to Colonel Frank W. Rhea, District Engineer, Corps of Engineers, Baltimore, Maryland. In this letter he informed the Corps of Engineers that the Department of Interior was withdrawing its opposition to the Hunting Creek project.

> However, since that time we have reconsidered our interests in this matter, in the light of existing conditions in the area. We have concluded that the granting of the applications would not significantly affect recreation or conservation values in the Hunting Creek area. Accordingly, we withdraw the objection interposed to the granting of the permits in accordance with the revised applications.[85]

Secretary Cain later testified that his reversal was "a decision based first on political considerations."[86] Just what these political considerations were is not clear. It is known, however, that Secretary Cain not only had not studied the surveys and investigations conducted by the Fish and Wildlife Service, but was also unaware of the fact that they even existed. It is also unclear who the "we" mentioned in this letter refers to. Consequently, his conclusion that granting the permit application would not significantly affect conservation values is one which must be regarded as having been pulled out of a hat.

Two weeks after Interior's objections were withdrawn, Hoffman's application for a permit was resubmitted. The Corps of Engineers scheduled a hearing which was held on February 21, 1968. The transcript of the hearing reveals that 13 witnesses, including many conservation organizations, testified against the application. Those witnesses who testified in favor of the application were employees of the applicant. The Department of the Interior, probably because of its internal conflict, did not testify at the hearing.

On March 15, 1968 the first indication of the coming rereversal by the Department of the Interior surfaced when Secretary Cain addressed a memorandum to the Director of the Bureau of Sport Fisheries and Wildlife in the Department of the Interior.

85. Hearings before the Natural Resources and Power Subcommittee of the Committee on Government Operations, House of Representatives, 90th Cong., 2nd Sess., at 213.

86. *A Debacle in Conservation, supra* note 42, at 32.

> The pot still boils on the decision I made some time ago to remove objections to this permit, reversing an earlier decision made before I was Assistant Secretary. . . .
>
> . . . Since I made my earlier decision without asking for a new study of the area, I think that one should be made now. Will you please have two or three of the Bureau staff-types who ordinarily make such judgments in river basins go over there and take a new look? Whatever the judgment of the Bureau turns out to be, I will go with it, as will the Secretary. Incidentally, I will not be bothered by reversing myself, if it should turn out that way. And if it doesn't, I'll have to take Mike Frome's possible barbs. C'est la querre![87]

In response to his request Secretary Cain received a memorandum from the Bureau of Sport Fisheries and Wildlife which noted that the restudy was conducted by specialists in ecology and waterfowl management and confirmed the position taken in 1964 by the Bureau of Sport Fisheries and Wildlife. The restudy emphasized the need for urban recreational area, beautification of the Potomac River, and preservation of natural wetlands. It strongly affirmed earlier studies which concluded that regardless of protestations to the contrary, the granting of the permit would have the effect of opening the way for succession of similar permit applications, both above and below the mouth of Hunting Creek and that such a "nibbling" phenomenon could only result in the destruction of a valuable estuarine wildlife habitat. The memorandum urged Secretary Cain to reverse his earlier reversal, and on April 10, Secretary Cain telephoned General Woodbury at the Corps of Engineers to inform him that he was reversing his earlier position. General Woodbury, perhaps sensing the confusion at the Department of the Interior, referred the matter to Mr. Black, the Under Secretary of the Interior, pursuant to the procedure outlined in *Memorandum of Understanding.* On April 26, Secretary Black addressed a letter to General Woodbury informing him that the Department of the Interior would not object to the granting of the permit.

> As to the damage to conservation values, I have received and considered the view of people in and out of this Department who entertain concern on this point. I have also made a visual inspection of the affected area in the company of technical experts on the subject. While there is no doubt of the opinions reached by those concerned with the conservation impact, their position is founded on subjective judgment considerations rather than any factual evidence which would support valid objection by this Department.[88]

87. *Hearings, supra* note 85, at 216.
88. *Id.* at 222.

In May of 1968, the Corps of Engineers granted the permit, and expressions of outrage followed this decision. Congressmen Reuss and Saylor urged the House Committee on Government Operations to block plans for the Hunting Creek high rise apartment development. The Congressmen charged that officials in the Interior Department and the Corps of Engineers had acceded to "political pressures" in the "Giveaway at Hunting Creek." They also were quoted as saying that their faith in the Interior Department was shaken and that "very frankly, somebody is getting paid. It's just that evident."[89]

On March 10, 1969, the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations met in executive session and unanimously recommended that the Corps of Engineers revoke the Hunting Creek landfill permit.[90] It was the Subcommittee's contention that the Fish and Wildlife Coordination Act was violated by both the Department of the Interior and by the Corps of Engineers and that, furthermore, the *Memorandum of Understanding* was also violated by the Corps of Engineers.

The Subcommittee regarded Secretary Cain's letter of October 10 as a violation of the Coordination Act because his withdrawal of objections was not "based on" surveys and investigations conducted by the Fish and Wildlife Service as is required by the Coordination Act, but was, rather, based on "political considerations." Secretary Black violated the Act because he approached the preparation of his response to General Woodbury as a matter of subjective policy decision-making and ignored the "surveys and investigations" conducted by the Bureau of Sport Fisheries and Wildlife. In his testimony before the Committee, he remarked:

> The evidence that I used to overrule their conclusions were my visual inspection of the area, my examination of the substance of their reports as distinguished from the conclusion, and my belief that eventually an executive decision has to be made . . . I think that the Interior Department has to balance interests, and to favor the granting of a fill permit that, in the judgment of the policy makers, will not harm conservation values, is such a balancing of interests.[91]

This testimony indicates that he violated the Act in two different ways. He rejected the extraordinarily well-documented views of the Fish and Wildlife Service out of hand on the basis of his own subjective analysis. Consequently, his report to the Corps of Engineers was not based on surveys and investigations by the Fish and Wildlife

89. The Washington Evening Star, June 25, 1968.
90. *Id.* March 11, 1969.
91. *A Debacle in Conservation, supra* note 42, at 36-37.

Service as the Coordination Act requires. Furthermore, he reserved for himself a decision which the Act expressly gives to the Corps of Engineers. It is the duty to the Corps of Engineers and not of the Under Secretary of the Interior to balance interests.

Although it is clear that the violations of the Coordination Act by the Department of the Interior were motivated by political considerations, the exact nature of the political pressures which were brought to bear remains unclear. It is known, however, the one Mr. Bregman was the Washington, D.C., attorney for Howard T. Hoffman Associates. Mr. Bregman was a law partner of Edward J. McCormack, Jr., nephew of the Speaker of the House. He was also a close political associate of then Vice-President Humphrey.[92]

The failure of the Corps of Engineers to comply with the Coordination Act was a sin of omission. The Act, as has been mentioned, required the Corps of Engineers to exercise its judgment and make a decision with respect to permits after having balanced the interests. In the Hunting Creek case the Corps failed to consult with the Fish and Wildlife Service as the Act required and instead consulted with the politically oriented Interior Department hierarchy. The Corps sinned again by abdicating its decision-making responsibility under the Act and deferring to the ill-considered judgment of the Interior Department.

The Corps also violated the *Memorandum of Understanding* in several ways. First, the Corps permitted participation in the decision making process by assistant Secretary Cain. Such participation was not a part of the procedure outlined in the memorandum. Secretary Cain himself admitted as much when he testified in front of the Subcommittee that his role in the proceedings was "an anomaly" and was "outside of the ordinary procedure."[93]

Furthermore, the *Memorandum of Understanding* requires that when unresolved substantive differences of views arise, the case be referred to the Under Secretary of the Interior. It was the Subcommittee's belief that such unresolved substantive differences existed upon the termination of the Corps of Engineers' public hearing and that the case should have been submitted to Undersecretary Black at that time. The Corps did not follow this procedure. It did, however, refer the case to the Undersecretary of the Interior after Secretary Cain's April 10 flip-flop. This inconsistency suggests that the Corps of Engineers only invokes the *Memorandum of Understanding* in order to destroy wildlife and not to protect it. In any case, it is clear that the Corps abdicated its responsibility to decide the issue.

92. The Washington Post, Sept. 30, 1968.

93. *A Debacle in Conservation, supra* note 42, at 43.

On April 3, 1969, Secretary of the Interior Hickel in a letter to the Secretary of the Army requested the Corps of Engineers to reconsider their position. This request provided the Corps of Engineers with the opening it needed to justify the reconsideration of the permit and to retreat in the face of intense public pressure and Congressional outrage. On June 9, 1969, Robert E. Jordan, Special Assistant to the Secretary of the Army, replied to Secretary Hickel:

> Your views concerning the permit vary from those expressed on behalf of the Department of the Interior by former Under Secretary of the Interior Black prior to issuance of the permit. Generally, as a matter of policy, in the absence of changed circumstances we would not review a permit that has been issued in conformity with applicable laws and regulations because of a change in viewpoint by a department of the government.
>
> My review of the matter, however, indicates that the method of consideration of the permit application within the Department of the Interior raises a question of substance with respect to the issuance of the permit in question. Specifically, I am concerned that there may have been less than adequate compliance with the requirements of that section of the Fish and Wildlife Coordination Act . . . which requires reports and recommendations of the Secretary of the Interior on the wildlife aspects of projects to be "based on" surveys and investigations conducted by the United States Fish and Wildlife Service. . . .
>
> Moreover, it appears that reviewing authorities within the Corps of Engineers were under the mistaken impression that the Bureau of Sport Fisheries and Wildlife . . . had abandoned earlier opposition to the permit application. In fact, it appears that the Bureaus maintained their opposition despite the position subsequently taken by Under Secretary Black. While it is difficult to determine whether or not awareness of continuing opposition at the Bureau level within the Department of the Interior would have altered either the favor recommendation of the Corps of Engineers or the ultimate decision to grant the permit application, the views of these specialized Bureaus on matters within their special competence are carefully considered in our review of permit applications. . . .
>
> Accordingly, I have instructed the Corps of Engineers to conduct a new public hearing. . . .

On April 13, 1970, the Corps of Engineers revoked the landfill permit. In making such revocation, it noted that the proposed landfill and high rise building "would change, probably irreversibly, the characteristics of the environment and would make it difficult, if not impossible, to restore the area to its more natural condition."[94]

94. The Washington Post, Apr. 14, 1969.

The Hunting Creek controversy is significant because it is one of the few well-documented illustrations of the total failure of intergovernmental cooperation at the federal level. An examination of its history leaves one with the uncomfortable feeling that the present jerry-built system of cooperation and communication between the Department of the Interior and the Corps of Engineers is poorly designed either to protect the environment or to strike a balance between environmental protection and rampant development.

Another example of the inadequacies of coordination between Interior and the Corps involves the permit sought for dredge and fill operations in the Darby Creek estuary near Philadelphia. Two hundred and forty-five acres of this estuary were a wildlife refuge. The local government in Philadelphia had authorized a contractor for construction of an inter-state highway to obtain gravel from Darby Creek and to dispose of a million cubic yards of dredged muck and silt in the estuary.[95] Both the creek and the marshy wildlife refuge were navigable waters and clearly subject to the Corps permit authority. A permit to dredge and fill was requested, and the Corps sought the assistance of the Department of the Interior with respect to the environmental aspects of the proposed work. Interior responded by furnishing the Corps with inadequate, useless information and with the following "recommendation": "Because of the damage that will result to the migratory bird feeding grounds as a consequence of the issuance of the permits, we cannot inform you that we no longer oppose their issuance. . . . We are aware of the many other considerations with which you are confronted and you may decide that it is in the overall public interest to issue the permits."[96] This situation represents the opposite extreme of the controversy created by the Hunting Creek permit application. Here the Interior Department, instead of seeking to dominate the decision-making process to assert a position contrary to environmental values, has created a void with respect to information and recommendations with the result that the Corps was incapable of properly assessing the potential adverse environmental effects of issuing the permit.

The above examples by no means exhaust the list of instances in which poor coordination at the federal level has resulted in the destruction of valuable natural resources. The conservationist seeking to utilize the permit process to protect the environment must con-

95. M. Baldwin, Preservation of the Coastal Zone Through Corps of Engineers Permits 17 (unpublished manuscript on file at the Conservation Foundation, Washington, D.C.).

96. Newsletter of the Izaak Walton League, Mar. 1970.

stantly be aware of the problems which poor coordination can create.

D. The Strength of the Penalties

Are the penalties provided for violation of the permit authority provisions strong enough to deter those who would seek to engage in activities which would be detrimental to the Nation's water resources? Senator Allott recently raised this question.[97] The maximum one year fine under the Refuse Act, for instance, is $912,000 ($2,500 per day) which appears to be an awesome total until one considers the immense expense in terms of initial capital outlay and maintenance costs of many pollution abatement systems. It is not inconceivable that a polluter might prefer to be fined the maximum amount rather than incur the expense of ending pollution. This result would have the unfortunate effect of transforming the Refuse Act into a form of pollution tax which would subvert the ultimate goal of environmental protection and which would indirectly seem to sanctify pollution.

In effect, however, Senator Allott's fears are unfounded. Even if a firm opted for a fine rather than pollution abatement, the permit authority legislation provides for other remedies in addition to the fine. An offender who failed to control its discharges in response to the penalty of a fine could easily be brought into line by means of an injunction or by forcing it to internalize the expense by obtaining a judgment for damages. The arsenal of remedies available to enforce the permit authority is a formidable one.

E. Delayed Permit Applications

Frequently an application is made for a Corps permit only after vast sums have been expended or the project has been completed. The Phillips Petroleum Company, by the time it requested a Corps permit for drilling in the Santa Barbara Channel, confronted the Corps with the following array of facts: substantial sums had already been expended to purchase leases for offshore oil; $2,000,000 had been expended by private investors to finance the operation; and the construction of the drilling rig itself was nearing completion and was due to be shipped through the Panama Canal shortly.[98] Similarly, Florida Power and Light Company applied for permits to dredge and fill to construct cooling water canals only after it had completed

97. 116 Cong. Rec. S-4422 (daily ed. Mar. 24, 1970).
98. Baldwin, *supra* note 95, at 19.

construction of the power facility.[99] In the past the Corps has tended to balance the equities in determining whether or not to grant a permit. There is nothing inherently wrong with this approach when the application was delayed as a result of confusion or a misunderstanding. But where the delay is the result of a cynical attempt to gain approval of a permit application by presenting the Corps with a *fait accompli,* the Corps has the obligation (as would a court of equity) to consider the fact that the applicant has approached the permit process with "unclean hands."

By once refusing to grant a permit and inflicting a substantial loss on an industry or utility acting in bad faith, the Corps would serve notice upon all potential applicants that the extent to which the project in question has been completed will be an irrelevant factor where the issuance of a permit could result in a detriment to environmental values.

V

PRIVATE LITIGATION UNDER THE PERMIT AUTHORITY

Since the government often cannot or will not enforce the provisions of the permit authority legislation, the burden of so doing falls upon conservation minded citizens. Fortunately, the Refuse Act provides a procedure which allows a high degree of public participation.

A. The Qui Tam Procedure

The statutory provision which specifies the penalties for violation of the Refuse Act also provides that "one-half of said fine [is] to be paid to the person or persons giving information which shall lead to conviction."[100] This is known as a qui tam provision and is patently designed to stimulate citizen participation and cooperation in the effort to achieve a public goal. In order to invoke this provision the citizen must first ascertain whether or not the discharge in question is authorized by a Corps permit. This information may be obtained by writing the District Office of the Corps for the District in which the discharge has occurred or is occurring. The Freedom of Information Act[101] renders this public information. Secondly, the citizen must provide the United States Attorney with enough information to enable him to discharge his statutory obligation to "vigorously prosecute all offenders." The information given to him should include, if at all possible, the following:

99. *Id.* at 26.
100. 33 U.S.C. § 411.
101. 5 U.S.C. § 552.

a) the nature of the refuse material discharged;
b) the source and method of discharge (e.g. from an industrial waste outfall, a barge, a tank overflow, etc.);
c) the location, name, and address of the person or persons (including corporations) who are causing the discharge;
d) the name of the waterway into which the discharge occurred;
e) each date on which the discharge occurred;
f) the names and addresses of all persons known to the complaining party, including the complaining party, who know of the discharges and could testify about them if necessary;
g) a statement that the discharge is not authorized by a Corps permit, or if a permit was granted that the alleged violator is not complying with permit conditions;
h) if the waterway into which the discharge occurred is not commonly known as navigable or as a tributary of a navigable waterway, facts should be stated to demonstrate such a status;
i) where possible, photographs should be taken, and samples of the discharge or foreign substance collected in a clean jar which is then sealed. These should be labeled with information showing who took the photograph or sample, where and when, and who retained custody of the film or jar.[102]

If the United States Attorney after having been provided with adequate information fails to institute an action within a reasonable period of time, may the complaining citizen institute an action? The answer to this question is an affirmative one, and herein lies one of the fundamental strengths of the Refuse Act. In *Adams, qui tam v. Woods*[103] the petitioner sought to recover from one who had engaged in the slave trade contrary to a 1794 act of Congress which prohibited such trade. The act in question provided that an offender "shall forfeit and pay the sum of two thousand dollars; one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."[104] Although the offender prevailed on a statute of limitations bar, Chief Justice Marshall rejected a challenge to the validity of qui tam provisions and noted that they were an accepted mode of prosecution at a time when prosecutorial resources were meagre. Furthermore, since the informer has an economic interest in the successful prosecution of the offender, he has a right to institute a civil action to recover his moiety regardless of whether the qui tam

102. Letter from Congressman Henry Reuss, June 20, 1970.
103. 6 U.S. (2 Cranch) 336 (1805).
104. *Id.*

statute involved confers upon him this right. The right is inherent in all qui tam provisions (including the Refuse Act). In light of the magnitude of the problem of environmental protection and the relative dearth of prosecutorial resources the time is ripe for a revival of interest in the use of this quaint but effective anachronism.[105]

Although qui tam provisions are so uncommon in federal law as to be bizarre, they have withstood several attacks. In one of the earliest attacks a defendant in a qui tam action argued that a qui tam statute was valid only when it provided for recovery of the fine by the injured party rather than the informer.[106] The Supreme Court rejected this argument as an unnecessary limitation which would vitiate the strength of qui tam statutes and noted that "[s]tatutes 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 since the foundation of our Government."[107]

The next challenge to qui tam actions asserted that they should be disallowed because they were somehow unseemly and disfavored. In *United States ex rel. Marcus v. Hess*[108] the Supreme Court reversed a lower court holding to the effect that qui tam actions "have always been regarded with disfavor" and should be construed with "utmost strictness."[109] The Court noted that there was nothing to justify such a conclusion and that, indeed, Congress had recently seen fit to enact two new qui tam provisions, one dealing with the protection of Indians[110] and the other with the crime of arming vessels against friendly powers.[111] It concluded by saying:

> Congress has power to choose this method . . . [and] to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours.[112]

Perhaps the most forceful answer to the suspicion that informer statutes were unseemly was voiced by a federal court in *United States v. Griswold*:[113]

105. Indeed, a strong revival seems to be imminent. Congressman Reuss recently reported 149 industries which were discharging into Wisconsin waterways without a Corps permit, Congressional Record-House, Apr. 2, 1969, at H2640. In the most recent case a sport fishing group in Alabama has reported 214 polluters. Alabama has recently been plagued by highly poisonous mercury pollution and no Refuse Act permits have been issued anywhere in the state. The Washington Post, July 11, 1970.

106. Marvin v. Trout, 199 U.S. 212 (1905).

107. *Id.* at 225.

108. 317 U.S. 537 (1943).

109. *Id.* at 540-541.

110. 25 U.S.C. § § 193, 201.

111. 18 U.S.C. § 23.

112. 317 U.S. at 542.

113. 24 F. 361 (D. Ore. 1885).

> The statute is a remedial one.... It was passed upon the theory, based upon experience as old as modern civilization, that one of the least expensive and most effective means of [achieving a social goal] is to make [offenders] 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 methods as the enterprising privateer does to the slow-going public vessel.[114]

It should be apparent, then, that a knowledge and understanding of the qui tam provision in the Refuse Act can provide concerned citizens and conservation organizations with the means to circumvent Justice Department hostility and lassitude with respect to the Act. Even if it is not possible to mandamus Justice to perform its duty to "diligently prosecute all offenders," an organized public can enforce the law itself and recoup both expenses and profits (which in turn can be directed toward further investigations and prosecutions). The Justice Department, in language and reasoning strongly reminiscent of its recent memorandum, has argued that qui tam suits should be blocked because "effective law enforcement requires that control of litigation be left to the Attorney General; ... [and] that the Attorney General might believe that [other] interests would be injured by filing suits such as this...."[115] The Supreme Court, which had already refused to substitute its judgment for that of Congress, refused to allow the Justice Department to do so either.

Nor is it possible for a hostile Justice Department to frustrate qui tam actions by settling with offenders by means of such devices as miniscule fines or consent decrees. A complaining citizen may bring an effective qui tam action after less than diligent action by the Justice Department. It is clear that a qui tam action is civil,[116] whereas an initial Justice Department action is criminal. Consequently, constitutional double jeopardy prohibitions do not apply.[117]

There are only two problems presented by qui tam litigation. The first is that qui tam actions are permissible only for violations of the Refuse Act and not for violations of section 10 of the Rivers and Harbors Act of 1899. Since, however, most of the activity covered by this section also involves a deposit of refuse into waterways, qui tam actions can be initiated under the Refuse Act. A second problem arising under qui tam actions is that of expense. The expense of

114. *Id.* at 366.
115. 317 U.S. at 547.
116. 6 U.S. (2 Cranch) at 337.
117. 317 U.S. at 549.

sustaining the burden of proof will vary depending upon the facts of the case. Although the Act does not require it, it is often advisable to make a showing of the damage done to the waterway by the deposit in question. Such a showing can lead to more exacting and more meaningful fines, but also involves an additional expense. Finally, the citizen who loses his action must bear his lawyer fees and costs. Of course the victorious litigant will suffer no financial burden. The obvious solution to the problem of the expense of litigation is to minimize the chances of losing cases and to maximize fines obtained by means of careful preparation and selection of cases to prosecute.

B. Procedural Problems Encountered by Private Environmental Litigants

Frequently, it may be necessary or advisable to bring suit against the government in order to enforce the environmental protection aspects of the permit authority provisions. Until recently, the private environmental litigant who sought to force agencies or departments of the government to protect and preserve or merely to consider environmental values was confronted with a welter of procedural roadblocks. The only safe general statement which can be made about the current state of the law with respect to these obstacles is that the problem which they present is rapidly diminishing in significance. Courts today are more amenable to hearing suits by private persons seeking to assert a public interest in the environment than at any time in the past and are less willing to allow narrow, antiquated procedural rules to stand in the way of such suits. Although it is not the purpose of this study to examine the myriad issues which surround these procedural obstacles,[118] it would, perhaps, be valuable to examine a few of the more significant recent developments.

Without a doubt the most important recent developments relate to the law of standing to sue. The old rule[119] that a litigant's status as a taxpayer was not sufficient to obtain standing, for instance, was reversed by the Supreme Court which redefined standing in general terms tailored to meet the broad requirement of Article III of the Constitution restricting judicial review to a "case or controversy":

> Thus in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It

118. An excellent and instructive overview of these issues is presented in Moorman, *Outline for the Practicing Environmental Lawyer,* in Law and the Environment, *supra* note 75.

119. Frothingham v. Mellon, 262 U.S. 447 (1923).

> is for that reason that the emphasis in standing problems is on whether the party involving federal court jurisdiction has "a personal stake in the outcome of the controversy," . . . and whether the dispute touches upon "the legal relations of the parties having adverse legal interests." . . . A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case.[120]

An even more encouraging recent development (and the only one directly involving environmental issues) occurred when a federal circuit court ruled that the Sierra Club and other conservation organizations had standing to sue the Federal Power Commission to force it to consider the environmental impact of a proposed project even though as petitioners they had no personal economic interest in the outcome of the case, but merely were seeking to assert the public interest.[121]

This concept of a standing to sue to protect the public interest reached its logical conclusion in the far-reaching decision of *Scanwell Laboratories v. Shaffer.*[122] The petitioner was a frustrated bidder for a government contract to manufacture instrument landing systems for airports. The low bidder (petitioner was second lowest) was awarded the contract in spite of the fact that its bid was materially non-responsive to the invitation for bids. The Code of Federal Regulations states in mandatory language: "Any bid which fails to conform to the essential requirements of the invitation for bids . . . shall be rejected as non-responsive."[123] There is no doubt that the FAA had committed a serious violation of the regulations.

What makes *Scanwell* interesting is the fact that the petitioner had no right to be awarded the contract should it prevail. Indeed, the contract had been 90% performed at the time of the decision. The petitioner argued that even though it had no personal interest in the outcome of the litigation, it should be accorded standing in order to vindicate the public's interest in having its government agencies follow federal regulations.

The Court held that it had standing and had suffered an injury sufficient to guarantee full litigation in line with constitutional requirements even though it had no remedy for the injury. The Court stated that:

> . . . the essential thrust of appellant's claim on the merits is to satisfy

120. Flast v. Cohen, 392 U.S. 83, 101 (1968).

121. Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2nd Cir. 1965). *But see* Sierra Club v. Hickel, ---- F.2d ---- (9th Cir. 1970).

122. 424 F.2d 859 (D.C. Cir. 1970).

123. 41 C.F.R. § 1-2.404-2(a).

> the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."
> ... When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those precedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will really have the incentive to bring suit against illegal government action, and they are precisely the plaintiffs to insure a genuine adversary case or controversy.[124]

The Court, after noting that there is no structured or institutional check on illegal agency action, clarifies the rationale behind its decision by saying that: "It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the *ombudsman* system used so successfully as a watchdog of government activity elsewhere."[125]

Scanwell Laboratories' standing to sue in the public interest, then, rests upon an expansive foundation. It would seem that after this case a petitioner seeking to assert the public's interest in environmental protection, for instance, need only demonstrate the existence of an agency action (or inaction) which allegedly violates statutory, regulatory, or constitutional mandates, that he has such an interest in the resolution of the issue so as to guarantee its complete litigation (even though he may have no personal remedy), and that Congress has not precluded judicial review where it is in Congress' power to do so.

A similar result was reached by the Supreme Court by interpreting section 10 of the Administrative Procedure Act[126] so that anyone "aggrieved" by agency action could obtain judicial review. In an opinion by Justice Douglas the Court noted that section 10 was to be construed "not grudgingly" but as granting "generous review" and should be interpreted as "serving a broadly remedial purpose," and

124. 424 F.2d at 864.
125. *Id.* at 867.
126. 5 U.S.C. § 702. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

that the legislative history of this Act indicates that standing can be precluded only when:

1) it is expressly precluded by statute, or

2) the statute upon its face clearly evinces a Congressional intention to preclude review, or

3) agency action is committed to agency discretion by law.[127]

Thus, review can almost always be obtained within the ambit of the Administrative Procedure Act—even though the Act under which the petitioner wishes to assert his substantive rights contains no provision for review.

It is clear that private citizens or conservation organizations can be considered to be "aggrieved" parties by a failure to effectively enforce the Corps permit authority provisions since it has been held that these provisions were manifestly intended for the protection of private parties.[128]

The other significant area in which recent developments have expanded the ease with which private environmental lawsuits may be brought relates to the law surrounding the assignment of the burden of proof. Presumptions, fictions, and burdens of producing evidence, although ostensibly procedural rules, are often used to achieve substantive ends.[129] Traditionally, the common law embodied a general preference for the initiator of economically productive action by casting the burden of persuasion on an aggrieved person to show cause why law should intervene to shift a loss from where it fell as a result of the initiative taken.[130] Needless to say, such a production and development orientation has proved to be a formidable obstacle to those seeking to assert environmental values. One who must bear the risk of getting a matter properly set before the court or of persuading a court that his interest is worthier of protection than the preferred interest has to that extent the dice loaded against him.

A recent state court case, however, is a harbinger of a new trend in which those seeking to assert environmental values in opposition to development enjoy a special status. *Texas Eastern Transmission Corp. v. Wildlife Preserves,*[131] involved an attempt by a public utility to condemn and destroy an ecologically valuable wildlife pre-

127. Association of Data Processing v. Camp, 397 U.S. 150 (1970).

128. Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 259 F.Supp. 633 (D. Va. 1966).

129. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 Stan. L. Rev. 5, 24 (1959).

130. J. Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 224 (1964).

131. 48 N.J. 261, 225 A.2d 130 (1966).

serve in order to construct transmission lines without adequately considering alternative routes. Wildlife Preserves sought to forestall the ill-advised condemnation by asserting that the utility's choice of routes was an arbitrary selection. Under normal circumstances the ultimate proof of such an assertion would have necessitated substantial expenditures or may have been altogether impossible. Here, however, the court ruled that Wildlife Preserves'

> . . . devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking of its preserve . . . by arbitrary action of a condemnor. In such unique cases courts realize that more than a dollar valuation is involved. The public service being rendered must be considered and it cannot be evaluated adequately only in dollars and cents. . . . The difference is not in the principle but in its application; that is, *the quantum of proof required of [Wildlife Preserves] . . . should not be as substantial as that to be assumed by the ordinary property owner* who devotes his land to conventional uses. [Emphasis added.][132]

The court continued by holding that once Wildlife Preserves had sustained a reduced burden of proving that the utility's route was arbitrary, then the burden of proving that the selection was not arbitrary and that all possible alternative routes were considered and were found to be unfeasible[133] shifted to the condemnor.

If the shift in priorities represented by this case continues to develop as a trend, it should soon be possible for private litigants who are asserting a public interest and who can make a reasonable showing that a proposed course of action poses a probable threat of environmental damage to force the initiator of such action to come forward with evidence relating to the likelihood of such damage, the alternative courses of action available, and a justification for such action.[134] An action instituted against the Corps of Engineers, for instance, to mandamus it to consider adequately the environmental aspects of a proposed permit would require the Corps to carry the burden of proving that the proposed work would have no adverse environmental consequences or, if so, that the social utility of the project outweighed its potential for damage. In the final analysis, of course, the Corps retains ultimate discretion to balance utilities, but private environmental litigation can guarantee that environmental

132. 225 A.2d at 137.

133. The expense of alternative routes is to be considered but one of many factors in determining feasibility.

134. Note that the § 102 statement required by the National Environmental Policy Act of 1969 forces government agencies to carry just such a burden of proof.

utilities are considered and are given adequate weight in the calculus used to determine whether a project or activity which could prove to be detrimental to the environment should be sanctioned with a permit.

In conclusion it is necessary to reemphasize the fact that the Corps of Engineers permit authority is not the ideal regulatory vehicle with which to control the development and to protect and reestablish the quality of our nation's water resources. Compared to existing and proposed legislation, however, this authority is a tool of remarkable flexibility and vitality, and one hopes that the future will witness a growth in its use by concerned citizens and government agencies.