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John C. Cernkovich

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QUI TAM ACTIONS AGAINST POLLUTERS OF NAVIGABLE WATERS: AN ATTEMPTED AUGMENTATION OF REFUSE ACT ENFORCEMENT

JOHN C. CERNKOVICH

A potentially puissant weapon in our Federal Government's armory of antipollution legislation is the Refuse Act¹ (hereinafter sometimes referred to as section 407), which was originally enacted as part of the Rivers and Harbors Appropriation Act of 1899.² Discontent with the Government's policy of enforcement recently precipitated a series of *qui tam* lawsuits by private citizens against alleged violators of the act.

Qui tam is an abbreviation of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" which is translated as "who prosecutes this suit as well for the king as for himself."³ A *qui tam* action is a civil one brought by a private person to collect a fine, penalty, or forfeiture, a share (usually one-half) of which he is allowed to keep for himself by the statute imposing the fine or penalty.⁴ The proceeding is usually brought in the name of the government on the relation (*ex rel.*) of the informer.

Although the paramount issue of this comment concerns the possibility of maintaining a *qui tam* action under the Refuse Act, collateral matters of almost inextricable relevancy are also briefly examined. They include the feasibility of a private citizen also obtaining concomitant injunctive relief under the act, the Government's policy of enforcing it, and proposed legislation which may affect the act and enlarge the role of private citizens in the crusade against pollution of our nation's waterways.

HISTORICAL BACKGROUND

Approbation and Demise of Qui Tam Actions in England

Due to a combination of factors, which included inadequate police forces and prosecutorial administration and parliament's lack of confidence in the Crown's enforcement of the laws passed by that legislative body, English citizens were frequently given the right to enforce criminal statutes.⁵ Sir William Holdsworth, commenting on the enact-

¹ 33 U.S.C. § 407 (1970).

² Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152.

³ BALLENTINE'S LAW DICTIONARY 1044 (3d ed. 1969).

⁴ Conservation & Natural Resources Subcomm. of the Comm. on Government Operations, 91st Cong., 2d Sess., *Qui Tam* Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways 1 (Comm. Print 1970).

⁵ *Id.* at 2.

ment of criminal statutes authorizing *qui tam* actions from the fourteenth through the seventeenth centuries, stated the following:

The number of statutes, old and new, in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience was very large.⁶

As to the ensuing epoch Professor Radzinowicz commented:

Throughout the eighteenth century, and in the early years of the nineteenth, a number of statutes were passed, which so widened the activity of common informers that an important section of criminal law came to depend upon them for its enforcement. It was hoped to extend their usefulness and vigilance to all the lesser infringements of the law.⁷

Qui tam actions gradually fell into disrepute in England. In commenting on the abuses of these expedients, Holdsworth stated:

Old statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound for a sum of money. Threats to sue were easy means of levying blackmail.⁸

Radzinowicz in the same tenor wrote:

Few, if any, instruments of criminal justice were more consistently or more sharply criticized than was the common informer.⁹

With the advent of the new Metropolitan Police, opposition against them became more relentless than ever. The police were against informers, and for the first time it could be pointed out that their disappearance would cause no serious breach in the arrangements for enforcing the law and the maintenance of good order.¹⁰

As a culmination of such criticisms, Parliament passed an act in 1951 which abolished the remaining vestiges of common informer actions wherein a part of the penalty or forfeiture is payable to a common informer.¹¹

Recognition of Qui Tam Actions in the United States

Qui tam actions have long been recognized in this country. In 1905 the Supreme Court of the United States noted:

⁶ 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 356 (1924).
⁷ 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 142 (1957).

⁸ 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 356 (1924).
⁹ 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 139 (1957).

¹⁰ *Id.* at 153.

¹¹ Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39.

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence . . . in this country ever since the foundation of our Government.¹²

In 1943 the Supreme Court once again commented on *qui tam* actions:

Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts.¹³

Among federal statutes in existence which seemingly allow such actions to aid in the enforcement of various laws are those pertaining to Indian affairs,¹⁴ slave trade,¹⁵ and fraudulent claims made against the Government.¹⁶

PERTINENT STATUTORY PROVISIONS

Section 407 states in part:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . 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.

The United States Army Corps of Engineers has in the past limited its enforcement of section 407 to discharges carrying suspended material which impeded navigation. Pollution was not considered a violation. Recent court decisions¹⁷ and the import of such legislation as the Fish

¹² *Marvin v. Trout*, 199 U.S. 212, 225, 26 S. Ct. 31, 34, 50 L. Ed. 157, 162 (1905).

¹³ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, 63 S. Ct. 379, 383, 87 L. Ed. 443, 447 (1943).

¹⁴ 25 U.S.C. § 201 (1970).

¹⁵ 46 U.S.C. §§ 1351-1354 (1970).

¹⁶ 31 U.S.C. §§ 231, 232 (1970).

¹⁷ See, e.g., *United States v. Standard Oil Co.*, 384 U.S. 224, 86 S. Ct. 1427, 16 L. Ed.2d 492 (1966); *United States v. Esso Standard Oil Co.*, 375 F.2d 621 (3d Cir. 1967); *United States v. Pennsylvania Industrial Chemical Corp.*, 329 F. Supp. 1118 (W.D. Pa. 1971);

and Wildlife Coordination Act,¹⁸ the Federal Water Pollution Control Act,¹⁹ and the National Environmental Policy Act of 1969²⁰ have all emphasized the exigency of applying the law more literally.

The penalty for the unlawful discharge of refuse into navigable waters is provided in section 411:²¹

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Qui Tam ISSUE

The first question presented herein is whether a private citizen who alleges unlawful pollution of navigable waters can maintain a civil action *qui tam* against a violator of the Refuse Act to recover a moiety of the criminal penalty imposed by section 411. A number of lower federal courts have recently been confronted with this problem.

ARGUMENTATION FAVORABLE TO ALLOWING *Qui Tam* ACTIONS UNDER REFUSE ACT

Standing for Informers to Enforce the Refuse Act

Although the Refuse Act does not specifically authorize *qui tam* actions, proponents of such suits can point to the recent trend in federal courts in allowing private citizens or groups of such citizens to enforce federal statutes where environmental interests are involved.²² Seemingly, the concept of standing may be said to have been broadened in this respect. Furthermore, it may be contended that an informer under

United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969).

¹⁸ 16 U.S.C. §§ 661-666c (1970).

¹⁹ 33 U.S.C. §§ 1151-1175 (1970).

²⁰ 42 U.S.C. §§ 4321-4347 (1970).

²¹ 33 U.S.C. § 411 (1970).

²² See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed.2d 136 (1971); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't., 446 F.2d 1013 (5th Cir. 1971); Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949, 91 S. Ct. 237, 27 L. Ed.2d 256 (1970); Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941, 86 S. Ct. 1462, 16 L. Ed.2d 540 (1966); Berkson v. Morton, Civil No. 71-1085 (D. Md., Oct. 1, 1971); Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 331 F. Supp. 925 (D.D.C. 1971); Road Review League, Town of Bedford v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

this act does have standing to sue since he has a personal stake in one-half of any fine paid by a violator.

Reasons of Public Policy

Since, as mentioned above, the Refuse Act in recent years has been given a more literal interpretation by the courts, it may be contended that the allowance of *qui tam* actions as a matter of public policy would enhance surveillance as to any such violations and bolster the enforcement of this act. It may also be argued that the Corps of Engineers, which has primary responsibility for the enforcement of the Refuse Act, and the Department of Justice, which prosecutes alleged violators, do not have the financial means and adequate staffs to ferret out and prosecute the thousands of industrial transgressors in this country.²³ To permit private citizens to partake in the enforcement of this act would assure additional protection against pollution of this nation's navigable waters and would be consistent with our policy of environmental preservation.

Supportive Case Law

Proponents of *qui tam* actions under the Refuse Act can subscribe to and rely on the position taken by Justice Black in a 1943 United States Supreme Court decision, *United States ex rel. Marcus v. Hess*,²⁴ for support of their position:

Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue²⁵

The Refuse Act does not specifically either authorize or proscribe the informer from bringing such a suit; hence, it may be said to logically follow from the oft quoted statement by Justice Black that a *qui tam* action would be authorized.

In *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.*,²⁶ a libel in admiralty was filed to recover a penalty for violation of a Harter Act section²⁷ which provides in part:

For a violation of any of the provisions of sections 190 to 193 of this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding \$2,000. . . . One-

²³ Conservation & Natural Resources Subcomm. of the Comm. on Government Operations, 91st Cong., 2d Sess., *Qui Tam Actions and the 1899 Refuse Act: Citizens Lawsuits Against Polluters of the Nation's Waterways* 11 (Comm. Print 1970).

²⁴ 317 U.S. 537, 541 n.4, 63 S. Ct. 379, 383 n.4, 87 L. Ed. 443, 448 n.4 (1943).

²⁵ *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 2 L. Ed. 297 (1804).

²⁶ 250 F. 939 (2d Cir.), *cert. denied*, 248 U.S. 564, 39 S. Ct. 8, 63 L. Ed. 423 (1918).

²⁷ 46 U.S.C. § 194 (1970).

half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

Although the statute did not expressly authorize or forbid a *qui tam* action, Judge Learned Hand speaking for the court of appeals said that the court had no doubt that the fine could be collected by a *qui tam* action.²⁸

The language used in the last sentence of the pertinent Harter Act section and that found in section 411, which is related to the Refuse Act, are analogous. Both provisions simply state that the informer is entitled to one-half of the penalty or fine.

In *United States v. Laeschi*,²⁹ the district court sustained a motion to quash an indictment sought by the United States on the ground that section 5188 of the *Revised Statutes*³⁰ did not prescribe a criminal sanction as to the penalty involved therein. The court held that the penalty could only be enforced by a suit brought by an informer although the statute did not specifically authorize such a civil action. Section 5188 stated in part:

It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one-half to the use of the informer.

Another decision, *United States v. Stocking*,³¹ lends weight to the proposition that where the statute does not expressly authorize or forbid a *qui tam* action, such a suit may be maintained. The court in that case stated:

Any words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefor if he complies with the conditions of the statute.³²

It would seem, however, that this latter statement is too broad in its scope, particularly if the statute or a related one has a proscription as to *qui tam* actions.

²⁸ *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.*, 250 F. 939, 941 (2d Cir.), *cert. denied*, 248 U.S. 564, 39 S. Ct. 8, 63 L. Ed. 423 (1918).

²⁹ 29 F. 699 (N.D. Ill. 1887).

³⁰ REV. STAT. § 5188 (2d. ed. 1878).

³¹ 87 F. 857 (D. Mont. 1898).

³² *Id.* at 861.

In *Chicago & Alton R.R. v. Howard*,³³ the Supreme Court of Illinois approved a *qui tam* action where no express statutory authorization existed.

ADVERSE CASE LAW INVOLVING SIMILAR STATUTORY LANGUAGE

It was held in *Williams v. Wells Fargo & Co. Express*,³⁴ that the plaintiff could not maintain a *qui tam* action. The plaintiff had alleged that Wells Fargo had established a private mail service in violation of a federal postal law (section 3982 of the *Revised Statutes*).³⁵ The law affixed a \$150 penalty for any such infraction. As authority to maintain this action the plaintiff relied upon section 4059 of the *Revised Statutes*³⁶ which stated in part:

All penalties and forfeitures imposed for any violation of law affecting the Post-Office Department for its revenue or property shall be recoverable, one-half to the use of the person informing and prosecuting for the same, and the other half to be paid into the Treasury for the use of the Post-Office Department.

The defendant countered with section 919 of the *Revised Statutes*³⁷ contending no such authority existed. Section 919 provided in part: ". . . all suits arising under the postal laws, shall be brought in the name of the United States." The defendant also pointed to section 292 of the *Revised Statutes*³⁸ which delegated to the Sixth Auditor of the Treasury the duty of superintending the collection of all penalties and forfeitures imposed for any violation of the postal laws.

The court observed that it would have felt constrained to allow the plaintiff, as an informer, to maintain this action; nevertheless, its decision hinged on the procedural aspect of section 919 which expressly commanded that all suits of this type were to be brought in the name of the United States. It was reasoned that no other person than the United States could maintain an action to recover the penalty prescribed by section 3982.

In *Rosenberg v. Union Iron Works*,³⁹ it was likewise held that a *qui tam* action could not be maintained. The pertinent act⁴⁰ prohibited the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States. Section 3 of the act imposed a \$1,000 penalty upon any person assisting in the importation

³³ 38 Ill. 415 (1865).

³⁴ 177 F. 352 (8th Cir. 1910).

³⁵ REV. STAT. § 3982 (2d ed. 1878).

³⁶ REV. STAT. § 4059 (2d ed. 1878).

³⁷ REV. STAT. § 919 (2d ed. 1878).

³⁸ REV. STAT. § 292 (2d ed. 1878).

³⁹ 109 F. 844 (N.D. Cal. 1901).

⁴⁰ Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332.

of such persons for the above mentioned reason. It further provided that this penalty "may be sued for and recovered by the United States or by any person who shall first bring his action therefor . . . the proceeds to be paid into the Treasury of the United States And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States."

The court opined that the evident intention of Congress in the last clause of section 3 was that no prosecution should be commenced and conducted under the act unless administered by the United States district attorney. It was also thought the clause which provided that any penalty recovered be paid into the treasury of the United States was likewise determinative in precluding a *qui tam* suit. The court did, however, concede that an informer's action would have lain had these qualifying clauses not been included in the act.⁴¹

Some state courts have also refused *qui tam* relief absent express statutory authority.⁴²

RECENT DECISIONS HAVE DENIED *Qui Tam* RELIEF UNDER THE REFUSE ACT

All the federal district courts which have considered the issue herein involved as to *qui tam* actions have denied relief to the informer.⁴³ The Fifth Circuit was the first United States Court of Appeals to rule on this matter. The court summarily affirmed the district court holding in *Bass Angler Sportsman Society v. United States Steel Corp.*⁴⁴ which had denied *qui tam* relief.

An informer under the Refuse Act has been held, nevertheless, to be entitled to one-half the fine when the suit is instituted by the United

⁴¹ *Rosenberg v. Union Iron Works*, 109 F. 844, 846 (N.D. Cal. 1901).

⁴² See, e.g., *O'Kelly v. Athens Mfg. Co.*, 36 Ga. 51 (1867); *Omaha & Republican Valley Ry. v. Hale*, 63 N.W. 849 (Neb. 1895). But see *Chicago & Alton R.R. v. Howard*, 38 Ill. 415 (1865), mentioned in text accompanying note 33 *supra*, where an almost identical statute was involved (pointed out in *Omaha & Republican Valley Ry. v. Hale*, 63 N.W. 849 [Neb. 1895]).

⁴³ *Mitchell v. Tenneco Chemicals, Inc.*, 331 F. Supp. 1031 (D. S.C. 1971); *Lavagnino v. Porto-Mix Concrete, Inc.*, 330 F. Supp. 323 (D. Colo. 1971); *Gerbing v. ITT Rayonier Inc.*, Civil No. 71-161-Civ-J (M.D. Fla., July 21, 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695 (D. Conn. 1971); *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *United States v. Florida-Vanderbilt Dev. Corp.*, 326 F. Supp. 289 (S.D. Fla. 1971); *Reuss v. E. I. Du Pont De Nemours & Co.*, Civil No. 70-C-238 (W.D. Wis., Mar. 18, 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971); *Bass Anglers Sportsman's Soc'y of America v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S. D. Tex. 1971); *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (S.D. Ala. 1971); *Durning v. ITT Rayonier Inc.*, 325 F. Supp. 446 (W. D. Wash. 1970).

⁴⁴ *Bass Anglers Sportsman Soc'y of America v. Koppers Co.*, No. 71-1622 (5th Cir., Sept. 10, 1971), *aff'g* 324 F. Supp. 412 (S. D. Ala. 1971).

States rather than by the informer.⁴⁵ This, of course, is not in the nature of a *qui tam* action.

A number of reasons have been given by the courts in denying *qui tam* relief under the Refuse Act. Among those relied upon are the following:

(1) Section 411⁴⁶ is criminal in nature.⁴⁷ It states that one who violates section 407 is guilty of a misdemeanor and on conviction may be imprisoned. There is no provision for enforcement of these sections by a civil suit. It has been held that a criminal statute may not be enforced by a civil action.⁴⁸ When the imposition of criminal sanctions is attempted in a civil proceeding, constitutional problems arise.⁴⁹

Criminal statutes can only be enforced by proper governmental authorities, and a private citizen has no right to exercise such powers.⁵⁰ *Qui tam* recognition apparently has been restricted to suits in which the informer seeks to recover statutory fines, penalties, or forfeitures which are civil in nature. No case has been cited or found which approved a *qui tam* action to collect a criminal fine or penalty.⁵¹

(2) Justice Black's dictum⁵² seemingly states the law too broadly. The *qui tam* action is not based upon common law; it is dependent upon statutory authorization and is derived solely from such origin. Although a statute entitles one to share in some penalty or forfeiture, it does not necessarily also permit that person to initiate an action to recover the penalty or forfeiture. Statutory authority, either express or implied, must exist before the informer can maintain the *qui tam* action. Black's statement may be vindicated in many cases when the statute is silent as to whether a *qui tam* action is authorized and congressional intent is lacking; however, such a construction is unsuitable when, by necessary implication, the statutory language precludes this conclusion.⁵³

(3) The Refuse Act contains no express authority for such an action. The language of section 411 by necessary implication rules

⁴⁵ See, e.g., *United States v. St. Regis Paper Co.*, 328 F. Supp. 660 (W.D. Wis. 1971); *United States v. Transit-Mix Concrete Corp.*, Criminal No. 70 Cr. 844 (S.D.N.Y., Dec. 11, 1970).

⁴⁶ See text accompanying note 21 *supra*.

⁴⁷ *Shipman v. United States*, 309 F. Supp. 441, 442 (E.D. Va. 1970).

⁴⁸ See *United States v. Claffin*, 97 U.S. 546, 24 L. Ed 1082 (1878); *United States v. Jourden*, 193 F. 986 (9th Cir. 1912).

⁴⁹ See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938) (double jeopardy); *Lipke v. Lederer*, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 (1922) (infringement of due process of law and trial by jury).

⁵⁰ See *Keenan v. McGrath*, 328 F.2d 610 (1st Cir. 1964); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961).

⁵¹ *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971).

⁵² See text accompanying note 24 *supra* for J. Black's statement.

⁵³ *Bass Anglers Sportsman's Soc'y of America v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 306 (S.D. Tex. 1971).

out a *qui tam* suit because the statute provides that an informer is entitled to part of the fine only upon the conviction of the violator of section 407. The informer's rights, therefore, are dependent upon a criminal prosecution by the Department of Justice, a conviction being obtained, and the imposition of a fine.⁵⁴ Short of a successful criminal prosecution by the Department of Justice, one does not have standing to maintain an action pursuant to sections 407 and 411.⁵⁵

(4) Even where some statutory language appears to grant such an action, if the same or a related statute also clearly reposes enforcement in governmental authorities, the right of action is exclusively vested in that governmental authority.⁵⁶ Under section 413⁵⁷ of the Refuse Act Congress specifically imposed the responsibility for prosecutions exclusively on the Government.⁵⁸ Section 413 provides in part:

"The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections . . . 407 . . . 411 . . . of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army"

This section specifically mentions section 411. This would seem clearly to evince congressional intent that only the Department of Justice should enforce the act.⁵⁹

EVALUATION OF COURT RATIONALE

Ambiguity of Section 413

The language utilized in section 413 is equivocal. It would appear somewhat dogmatic to glean congressional intent, of a definite preclusive character, as to *qui tam* suits from this provision. Its phraseology need not necessarily be construed as excluding such an action by a private citizen, for it does not expressly forbid such a suit.

Criminal Nature of Refuse Act Enforcement

The most cogent reasoning given by the courts against permitting a *qui tam* action to be maintained under sections 407 and 411 lies in the criminal nature of the latter provision. An attempt to enforce the

⁵⁴ *Id.*

⁵⁵ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 346 (E.D. Tenn. 1971).

⁵⁶ *Bass Anglers Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971). This contention was predicated upon *Williams v. Wells Fargo & Co. Express*, 177 F. 352 (8th Cir. 1910); *Rosenberg v. Union Iron Works*, 109 F. 844 (N.D. Cal. 1901). For a discussion of these last two cases see text accompanying notes 34-41 *supra*.

⁵⁷ 33 U.S.C. § 413 (1970).

⁵⁸ *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87, 91 (D. Minn. 1971).

⁵⁹ *Id.* at 92.

Refuse Act via a civil suit under section 411 would inevitably bring about constitutional consequences⁶⁰ prohibitive in nature. This reason alone seemingly creates an almost insurmountable barrier for the *qui tam* protagonists.

DENIAL OF INJUNCTIVE RELIEF

The issue of whether a private citizen can obtain injunctive relief under the Refuse Act against polluters of navigable waters was involved in several of the *qui tam* suits. While it was sought against the alleged violators in addition to one-half of the fine, injunctive relief was actually the primary objective of the plaintiffs in some of these cases.⁶¹

Ostensibly a federal court has authority to grant injunctive relief for a violation of section 407.⁶² It was said in a district court case, *United States v. Florida Power & Light Co.*,⁶³ that the case law interpretation of section 407, although arguable, endowed that court with the authority to issue injunctive relief for its violation.⁶⁴ United States Supreme Court decisions⁶⁵ likewise seemingly lend some support to this proposition, at least upon application by the United States to prohibit violation of section 407.⁶⁶

As a general rule, private citizens have been held to lack standing to champion the rights of the public except where such individuals sustain some special injury or damage apart from that of the general public.⁶⁷ The courts in these *qui tam* cases have thus denied injunctive relief holding that the plaintiffs have shown no interest in the enforcement of section 407 different from that of the public in general.⁶⁸ It would therefore appear that standing for private citizens seeking

⁶⁰ One potential problem would involve burden of persuasion. Since a *qui tam* action is a civil one and section 411 has been held to be criminal in character (see text accompanying note 47 *supra*), it would seem that employment in this situation of the civil standard, by a preponderance of the evidence, rather than the criminal one, beyond a reasonable doubt, would bring about a constitutional violation of due process where a criminal law is being enforced. See, e.g., *In re Winship*, 397 U.S. 358, 365, 90 S. Ct. 1068, 1073, 25 L. Ed.2d 368, 376 (1970), which discusses this problem.

⁶¹ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 346 (E.D. Tenn. 1971).

⁶² *Id.* at 348.

⁶³ 311 F. Supp. 1391 (S.D. Fla. 1970).

⁶⁴ *Id.* at 1392 n.1.

⁶⁵ Cf. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed.2d 407 (1967) (injunctive relief for obstruction of waterways) (interpreted 33 U.S.C. § 409 [1970]); *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed.2d 903 (1960) (construed 33 U.S.C. § 403 [1970]).

⁶⁶ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 348 (E.D. Tenn. 1971).

⁶⁷ *Id.*

⁶⁸ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 349 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347, 349 (D. Neb. 1971); *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D. Ala. 1971).

injunctive relief against polluters of our navigable waters cannot be predicated upon the Refuse Act alone.

Some of the courts⁶⁹ have pointed out that an injunction is generally held not to be a proper remedy for the enforcement of criminal laws, that is, where violation of a criminal statute is the only ground alleged in seeking such relief.⁷⁰ There are, however, exceptions to this rule, one of which pertains to alleging a public nuisance which may affect public property rights or privileges or endanger public health.⁷¹ A citizen plaintiff in such a case must show once again special injury or damage to obtain injunctive relief.

A Connecticut federal court held it lacked federal question jurisdiction⁷² for the injunctive relief sought. Plaintiffs cited recent cases⁷³ as supportive of their contention of an expansion of the standing doctrine in environmental suits. The court distinguished those cases contending that they entailed a challenge of some official action or decision either under the Administrative Procedure Act⁷⁴ or some statutory provision for relief to persons aggrieved by official action. It was held that no such independent jurisdictional grounds to maintain this suit was asserted, and no official action or decision was challenged.⁷⁵

Mandamus requiring the Department of Justice to perform its mandatory duties imposed by section 413 and join plaintiffs in seeking injunctive relief for violation of the Refuse Act has likewise been held not to lie. It was held that there is no mandatory duty upon the Department to pursue a criminal or civil remedy, and since these are matters of discretion, the court has no authority to direct the Department to join the plaintiffs in seeking an injunction.⁷⁶

Injunctive relief, therefore, has been denied to private citizens desirous of enforcing the Refuse Act against alleged polluters of this country's navigable waters.

⁶⁹ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 346 (E.D. Tenn. 1971); *Bass Angler Sportman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D. Ala. 1971).

⁷⁰ *See, eg., In re Debs*, 158 U.S. 564, 15 S. Ct. 900, 39 L. Ed. 1092 (1895); *United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969).

⁷¹ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 347 (E.D. Tenn. 1971).

⁷² Plaintiffs had contended a jurisdictional basis lay in 28 U.S.C. § 1331 (1970).

⁷³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed.2d 136 (1971); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941, 86 S. Ct. 1462, 16 L. Ed.2d 540 (1966). (See note 22 *supra* for these and other cases of a similar nature.)

⁷⁴ 5 U.S.C. §§ 701-706 (1970).

⁷⁵ *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695, 698 (D. Conn. 1971).

⁷⁶ *Bass Anglers Sportsman's Soc'y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 350 (E.D. Tenn. 1971).

LIMITED POLICY OF REFUSE ACT ENFORCEMENT BY GOVERNMENT

Interest in *qui tam* actions was primarily engendered by the limited Refuse Act enforcement policy of the Department of Justice,⁷⁷ which had been severely censured at times,⁷⁸ and the Government's failure to provide sufficient investigatory manpower and resources.⁷⁹

Permit Program

Section 407 authorizes the Secretary of the Army to issue permits to deposit refuse matter within prescribed limits into navigable waters. The Department of the Army never previously had a formal permit program and few permits had been issued.⁸⁰

A permit program, however, was created on December 23, 1970, by President Nixon in Executive Order No. 11,574.⁸¹ The program is jointly administered by the Secretary of the Army and the Administrator of the Environmental Protection Agency (EPA).⁸²

Investigatory Roles of EPA and the Corps of Engineers

Primary federal responsibility for identifying and investigating cases involving discharges into interstate or navigable waters which have an adverse impact on water quality has been reposed in EPA.⁸³ Regional Representatives of EPA are responsible for notifying District Engineers of the Corps of Engineers of known or suspected violations of the Refuse Act and for providing timely reports of investigations conducted. If upon review of all reports and any other available evidence, the District Engineer of the Corps or the Regional Representatives of EPA decide to request legal proceedings under the Refuse Act, these officials shall in consultation with each other forward all evidence and information, including any recommendations they may make, to the appropriate United States attorney.⁸⁴

⁷⁷ See the former *Guidelines for Litigation Under the Refuse Act*, issued by the Department of Justice, June 13, 1970, and reported 1 BNA ENVIRONMENTAL REP., CURRENT DEVS. 288 (1970). The Department's policy stated therein with respect to enforcement of the Refuse Act was not to attempt to use it as a pollution abatement statute in competition with the Federal Water Pollution Control Act but rather to use it to supplement the latter act and to utilize the Refuse Act to punish or prevent significant discharges of an accidental or infrequent variety but not as to industrial discharges of a continuing nature.

⁷⁸ See, e.g., 116 CONG. REC. H8362 (daily ed. Aug. 14, 1970) (remarks of Representative Reuss).

⁷⁹ *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. REV. 304, 349 (1971).

⁸⁰ *Id.* at 327.

⁸¹ 3 C.F.R. 188 (Supp. 1970), 33 U.S.C. § 407 (1970).

⁸² See 36 Fed. Reg. 6564 (1971) (addition in 36 Fed. Reg. 13835 [1971]).

⁸³ 36 Fed. Reg. 3074, 3075 (1971).

⁸⁴ *Id.*

Current Policy of Department of Justice

The current policy of the Department of Justice regarding allegations of violations of the Refuse Act submitted to United States attorneys from sources other than the District Engineer of the Corps or the Regional Representative of EPA is that such information shall be referred to these designated officials for investigation and recommendations as to whether or not legal action is advisable.⁸⁵ The discretion of the United States attorneys to initiate actions for Refuse Act violations has thus been greatly diminished from that permitted under the former policy.⁸⁶

Enforcement Policy of EPA

The policy of EPA represents further administrative attenuation of Refuse Act enforcement.⁸⁷ The use of a 180-day notice proceeding is seemingly favored over Refuse Act enforcement measures. This reprehensible policy can serve to give the polluter more time to continue the violation and delay its abatement. EPA, in its enforcement guidelines, also manifests an intent to utilize the Refuse Act only against industries and not against agricultural, municipal, and individual violators. Under these guidelines Refuse Act criminal prosecutions may be recommended in cases of isolated or instantaneous discharges resulting in serious damage. This language is analogous to that of the former guidelines for litigation employed by the Department of Justice, which received reproof from conservationists.⁸⁸

This policy of EPA in making the violator aware of the pollution before recommending any enforcement action seems to this writer to place the onus on the wrong party. It should not be incumbent upon the Government to notify the polluter. It is believed here that the polluter should be presumed cognizant of any such violation and dealt with accordingly. The debilitated enforcement policies of EPA further accentuate the need for increasing the citizen's role in water pollution control.

PROPOSED REVISION OF FEDERAL WATER POLLUTION CONTROL ACT

In all likelihood the Federal Water Pollution Control Act (FWPCA)⁸⁹ will soon be amended. The stated purpose of the FWPCA is to

⁸⁵ Department of Justice *Guidelines for Litigation Under the Refuse Act Permit Program* (April 7, 1971). (The draft guidelines with some variations appeared in 1 BNA ENVIRONMENTAL REP., CURRENT DEVS. 1099 [1971].)

⁸⁶ See *Guidelines for Litigation Under the Refuse Act*, reprinted in 1 BNA ENVIRONMENTAL REP. CURRENT DEVS. 288, 289 (1970).

⁸⁷ See *Guidelines on Water Pollution Enforcement*, issued by EPA June 25, 1971, and reported in 2 BNA ENVIRONMENTAL REP., CURRENT DEVS. 562 (1971).

⁸⁸ See notes 77 and 78 *supra* and accompanying text.

⁸⁹ 33 U.S.C. §§ 1151-1175 (1970).

enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution.⁹⁰ Under it the states have been required to set up water quality standards for interstate waters within their boundaries.⁹¹

Unlike the FWPCA, the Refuse Act prohibits all pollution of intrastate as well as interstate navigable waters;⁹² therefore, it now potentially provides the Federal Government with a greater range of anti-pollution coverage than does the FWPCA. The Senate, however, recently passed a bill to amend the FWPCA which likewise would apply this act to all navigable waters of the United States.⁹³

This bill would provide for criminal or civil penalties, depending on the type of violation.⁹⁴ It apparently would operate to pre-empt the Refuse Act as a pollution fighter.

Most germane to the topic herein involved, the bill would provide for citizen suits against alleged violators of effluent standards or any order issued by the EPA Administrator or a state. Even the Administrator could be sued by alleging his failure to carry out a nondiscretionary duty under the act.⁹⁵ This section is very similar to one included in the Clean Air Act.⁹⁶

REFUSE ACT-FWPCA LIAISON

Liaison does exist between the FWPCA and the Refuse Act. The FWPCA states that an applicant for a permit to discharge into navigable water of this nation must provide the permitting agency (Corps of Engineers) with a certification from the state in which the discharge originates that there is reasonable assurance, as determined by the state, that the activity will be conducted in a manner which will not violate applicable water quality standards. No permit shall be granted until such certification has been obtained or waived.⁹⁷

There is strong possibility that new legislation may further integrate the FWPCA and the Refuse Act. The Senate bill would transfer the permit program as to discharges of pollutants into navigable waters to EPA. It would also authorize the EPA Administrator to delegate to the states the power to issue such permits provided the states comply with certain requirements set forth by the Administrator.⁹⁸ It is hoped,

⁹⁰ 33 U.S.C. § 1151(a) (1970).

⁹¹ 33 U.S.C. § 1160(c)(1), (2) (1970).

⁹² *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. REV. 304, 309 (1971).

⁹³ S. 2770, 92d Cong., 1st Sess., 117 CONG. REC. 17464 (daily ed. Nov. 2, 1971).

⁹⁴ *Id.* at 17476 (§ 309).

⁹⁵ *Id.* at 17484 (§ 505).

⁹⁶ 42 U.S.C. § 1857h-2 (1970).

⁹⁷ 33 U.S.C. § 1171(b)(1) (1970).

⁹⁸ S. 2770, 92d Cong., 1st Sess., 117 CONG. REC. 17464, 17482 (§ 402 [b]) (daily ed. Nov. 2, 1971).

however, that the permit program, which gives additional assurance against pollution of navigable waters, will not be emasculated and delegated to the states, for state water quality standards have often been criticized as inadequate because of industry influence upon them.⁹⁹

This writer also favors the adoption of a provision which would authorize citizens to obtain immediate injunctive relief against a polluter who discharges refuse into any navigable water without a permit. This would, in effect, accomplish a principal goal of the *qui tam* plaintiffs.

CONCLUSION

Attempts by private citizens to obtain *qui tam* and injunctive relief for alleged violations of the Refuse Act have proved abortive. These suits have, nevertheless, served a utilitarian purpose in that they have focused attention on the need for further involvement by the citizen in the process of combatting water pollution.

It is hoped that any newly enacted legislation will expand citizen participation in an efficacious manner so as to greatly augment the enforcement of this nation's water pollution control laws. Moreover, the potential threat of a citizen suit against a would-be polluter could serve as a talisman and likewise be salutary.

⁹⁹ *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. Rev. 304, 340 (1971).