Missouri Law Review

Volume 36
Issue 4 Fall 1971

Fall 1971

Qui Tam Actions under the 1899 Refuse Act: Possibility of Individual Legal Action to Prevent Water Pollution

Charles N. Drennan

Follow this and additional works at: http://scholarship.law.missouri.edu/mlr
Part of the Law Commons

Recommended Citation
Charles N. Drennan, Qui Tam Actions under the 1899 Refuse Act: Possibility of Individual Legal Action to Prevent Water Pollution, 36 Mo. L. Rev. (1971)
Available at: http://scholarship.law.missouri.edu/mlr/vol36/iss4/4

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.
QUI TAM ACTIONS UNDER THE 1899 REFUSE ACT: POSSIBILITY OF INDIVIDUAL LEGAL ACTION TO PREVENT WATER POLLUTION

"A river is more than an amenity, it is a treasure."

I. INTRODUCTION

During the decade of the 1960's a host of environmental problems were brought to the attention of the American public, including overpopulation, poisoning from pesticides, air pollution, and water pollution. As a result, concerned individuals joined to form conservation clubs and other groups in an attempt to find methods of combating the various problems.

One of the methods proposed in the water pollution area arose from certain provisions in an 1899 statute which has now come to be known as the 1899 Refuse Act. Briefly stated, the Act prohibits the discharge of any refuse matter into navigable water without first obtaining a permit from the Corps of Engineers. Employees of the Corps are authorized to arrest violators and request prosecution by United States attorneys, which can result in the imposition of a fine and/or imprisonment. The statute also provides that one-half of the fine assessed shall go to the informant upon conviction. The fine that can be assessed ranges from a minimum of $500 to a maximum of $2500. Moreover, authority exists for the proposition that each separate discharge (e.g., on two separate days) can be regarded as a separate violation, and therefore punishable.

At first blush, this statute appeared to be a windfall for the environmentalist, who would be able to take action to prevent pollution by providing the information necessary to file a complaint against the polluter, and, upon conviction, be rewarded (sometimes quite substantially) for his efforts. There were some resulting convictions under the Act, but not nearly enough to satisfy some environmentalists, who felt that the Corps of Engineers was not fulfilling its duties under the Act and that the United States attorneys were failing "to vigorously prosecute all offenders . . . whenever requested . . ." as the Act commands.

3. E.g., Zero Population Growth, Natural Resources Defense Council, Friends of the Earth; one need only look at the names of the plaintiffs in recent environmental litigation to discover that the list is practically endless. Cf. Murphy, Environmental Law: New Legal Concepts in the Anti-Pollution Fight, 36 Mo. L. Rev. 78 (1971).
6. See, e.g., Time, Jan. 25, 1971, at 43 for an example of a refusal by the Justice Department to approve criminal action against a polluter (General Motors in this case) under the Refuse Act. The over-zealous assistant prosecutor who sought to bring the charges was subsequently dismissed from office. See also Polikoff, The Interlake Affair, The Wash. Monthly, Mar., 1971, at 7.
However, in March of 1970, the House of Representatives Committee on Government Operations issued a report\(^7\) which referred to the possibility of using a \textit{qui tam} action to implement the provisions of the 1899 Refuse Act. The report announced that a suit could be maintained by the informer in the name of the United States in order to collect his moiety of the penalty.\(^8\) That report generated tremendous interest among both members of Congress and private citizens.\(^9\) The Conservation and Natural Resources Subcommittee of the House Committee on Government Operations, in response to inquiries from members of Congress, prepared a memorandum discussing more fully the applicability of these \textit{qui tam} actions to the Refuse Act,\(^10\) and concluded that the right exists to bring such actions.\(^11\)

Meanwhile, the theory was being tested in the courts. At least four cases have been decided, all holding that there is no right to bring the \textit{qui tam} action. It is the purpose of this comment to discuss the scope of the Refuse Act (Part II), to give a brief history of the \textit{qui tam} action (Part III), and to examine the propriety of allowing \textit{qui tam} actions under the provisions of the Refuse Act (Part IV).

II. \textbf{Scope of the Provisions of the 1899 Refuse Act}

\textbf{A. Section 407 Defined}

1. Jurisdiction

Section 407 of title 33 United States Code provides in part:

\begin{quote}
It shall not be lawful to throw, discharge, or deposit ... from or out of any ship ... or from the shore, ... 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 ... 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 into such navigable water ... whereby navigation shall or may be impeded or obstructed: \textit{Provided} ... 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. ...\(^12\)
\end{quote}

Note that the Act applies to both navigable waters and their \textit{tributaries}, which may mean that practically all of the rivers and streams in the United States fall within its purview.

\begin{itemize}
\item \textbf{8.} Id. at 17.
\item \textbf{9.} Letter from Representative Henry S. Reuss to Representative Chet Holifield, Aug. 13, 1970.
\item \textbf{10.} STAFF OF CONSERVATION & NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOVT. OPERATIONS, 91ST CONG., 2D SESS., \textit{Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways} (Comm. Print 1970) [hereinafter cited as “Committee Print”].
\item \textbf{11.} Id. at 4.
\end{itemize}
States are covered. The scope of jurisdiction of the Corps of Engineers to regulate obstructions to and diversions from navigable waters of the United States has been defined in many cases. The United States Supreme Court decided over a century ago that rivers are navigable if they "are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Since the river need only be susceptible of being used for commerce, the test may vary slightly with the region involved, depending on the nature of the commercial traffic in that particular area. The basic test has received a liberal interpretation; the courts have looked to the early usage of a river in making the determination (e.g., to see if fur traders floated canoes in the river for "commercial" purposes). Also, they have held that a river is navigable if improvements, such as dams, make it commercially usable. In addition, federal jurisdiction has been extended to tributaries of navigable waters of the United States wherever obstructions to or diversions from those tributaries affect the navigable capacity of the navigable waters. If the same scope of jurisdiction is applied to water pollution regulation by the Corps as has been recognized for other forms of regulation of navigable waters, the Act has sufficient jurisdictional scope to be a very effective anti-pollution tool.

2. What Is "Refuse?"

The term "refuse" as used in the Act has been accorded a very liberal interpretation; it encompasses almost any deposit imaginable. As early as 1936 in La Merced (United States v. Alaska Southern Packing Co.), the Ninth Circuit Court of Appeals held that the phrase "whereby navigation shall or may be impeded" did not limit the term "refuse matter," but referred only to the deposit of materials on the bank of the river. The court went on to find that oil was included within the meaning of the term "refuse." Three years later the same court held that lack of intent on the part of a ship's officers did not prevent liability under the Act, provided there was in fact a discharge.

13. The authority of the Corps of Engineers to regulate obstructions to and diversions from navigable waters of the United States is derived from the Rivers & Harbors Act of 1899, of which the so-called 1899 Refuse Act is a part. See 33 U.S.C. §§ 401, 403-04, 406-09 (1964).
14. The Daniel Ball, 77 U.S. 557, 563 (1870) (emphasis added). This case involved interpretation of a federal statute imposing a penalty for failure to obtain a boat registration license on a "navigable water."
16. The Montello, 87 U.S. (20 Wall.) 430 (1874). For a detailed discussion of the different definitions of navigability and the purposes for which they are used, see Johnson, Recreational Rights and Titles to Beds on Western Lakes and Streams, 7 NAT. RES. J. 1 (1967).
18. 84 F.2d 444 (9th Cir. 1936). See also United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952), where the second circuit also applied this construction and upheld a conviction for allowing oil to be discharged into a navigable water. Id. at 371.
19. The President Coolidge (Dollar S.S. Co. v. United States), 101 F.2d 638 (9th Cir. 1939), where there was testimony that garbage was thrown from a steam-
In *United States v. Republic Steel Corp.*,\(^{20}\) the United States Supreme Court, in an opinion written by Mr. Justice Douglas, concluded that “industrial solids” which were in suspension in liquid wastes were encompassed by the phrase “any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state,” and were prohibited discharges within the meaning of the statute. The Court also stated:

The fact that discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability is no reason for us to enlarge the group to include these industrial discharges. . . . 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 either of [section 407] or of [section 408].\(^{21}\)

In 1966, the Supreme Court was again called upon to interpret provisions of the Refuse Act. In *United States v. Standard Oil Co.*,\(^{22}\) the defendant oil company was indicted under the Refuse Act for discharging 100-octane aviation oil into the St. John’s River. The district court dismissed the indictment on the ground that commercially valuable material such as this gasoline was not included in the term “refuse” under the Act. That ruling was reversed by the Supreme Court. In the majority opinion, Mr. Justice Douglas wrote:

This case comes to us at a time in the Nation’s history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said for the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe [section 407] in a vacuum. Nor can we read it as Baron Parke\(^{23}\) would read a pleading.\(^{24}\)

3. Indirect Discharges

The earlier cases had held that the requirement that navigation be impeded or obstructed applied only to the second of the two separate of-
fenses created by section 407.\textsuperscript{26} So in 1967 when Esso Standard Oil Company was indicted for violating the statute by allowing oil to flow over an area of land and into the ocean, the company contended that the first offense required a direct discharge since the second offense covered indirect discharges. The Third Circuit Court of Appeals refused to accept that argument since it would require a "narrow, cramped reading" of the statute which is forbidden by Republic Steel.\textsuperscript{26} The statute was once again given a liberal construction.

B. Remedies Available and Section 411

1. Injunctive Relief

Just as section 407 has been given the benefit of a liberal interpretation, so have the remedies available under the Act been defined liberally, at least until quite recently. In Republic Steel, the Supreme Court upheld a federal district court order enjoining the defendant from continuing to discharge industrial solid wastes into a river and ordering the defendant to remove the deposits that had already accumulated. In Wyandotte Transportation Co. v. United States,\textsuperscript{27} the Government was awarded its costs of removing a negligently sunken barge which the owner had refused to remove. The defendant contended that the section 411 remedies were exclusive, but this argument was rejected. The Court stated: "[O]ur reading of the [Refuse] Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others."\textsuperscript{28}

2. Criminal Penalties

The criminal penalty provided for in section 411 may appear to have little deterrent effect because of the relatively small amount of the maximum penalty. The section provides:

\begin{quote}
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.\textsuperscript{29}
\end{quote}

\textsuperscript{25} United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952); La Merced (United States v. Alaska S. Packing Co.), 84 F.2d 444 (9th Cir. 1936). See note 19 \textit{supra}.

\textsuperscript{26} United States v. Esso Standard Oil Co., 375 F.2d 621, 623 (3d Cir. 1967).

\textsuperscript{27} 389 U.S. 191 (1967). The barge, which contained 2,200,000 pounds of liquid chlorine, sank in the Mississippi River. It was feared that if any of the chlorine escaped, it would be in the form of lethal chlorine gas, which could result in a number of casualties. The recovery operation cost the Government more than $3,000,000. \textit{Id.} at 194-95.

\textsuperscript{28} \textit{Id.} at 200.

\textsuperscript{29} 33 U.S.C. § 411 (1964).
Although $2500 may seem like a slap on the wrist to many large polluters, the holding of the court in *United States v. S. S. Mormacsaga* indicates that more substantial fines are possible. There, three separate discharges from a ship, over a period of three and one-half hours, were held to be three separate offenses, with each one being punishable by assessment of a fine within the statutory limits. So the possibility of substantial cumulative fines does exist.

3. Relation to Other Federal Water Pollution Legislation

The Water Quality Improvement Act of 1970 specifically states that it is not to be construed as impairing the provisions of the Refuse Act. It should be clear that compliance with state or federal water quality standards will not prevent the possibility of prosecution under the Refuse Act. The Refuse Act is potentially a much more powerful weapon in the war against water pollution than the recent federal legislation because of the various limitations contained in that legislation. For example, under those statutes, the pollution must affect interstate waters, and abatement proceedings can be initiated only with the governor's consent unless the pollution is "endangering the health or welfare of persons in a State other than that in which the discharge or discharges . . . originate." Judicial enforcement proceedings under the Refuse Act may be begun without any period of delay such as that required by the Water Quality Improvement Act of 1970.
C. Enforcement of the Act

1. Statutory Provisions: Section 413

Section 413 of title 33 United States Code puts the duty of enforcing the provisions of the Refuse Act on the United States attorneys. It provides in part:

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested [by certain officials].

It has been pointed out that there was "little enforcement activity under this law for many years," but in February, 1970, "the Justice Department reported over 110 cases pending, while another 99 were closed out in fiscal 1969."

2. The "Deference" Policy

Early in 1970 the executive branch of the federal government decided that the Justice Department should "defer" in these pollution matters to the Federal Water Quality Administration Agency. The Government indicated that it did not intend to enforce the Refuse Act against many polluters. On June 2, 1970, Assistant Attorney General Kashiwa wrote:

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 to secure the abatement of that pollution.

That position was adopted by the Justice Department in a directive to all United States attorneys entitled "Guidelines for Litigation Under the

---

40. Id.
41. Polikoff, supra note 6, at 10.
42. Committee Print at 10.
43. Id. (emphasis added). For a very interesting factual account of an incident involving one of these companies that was spending a "significant amount" to secure the abatement of water pollution, see Polikoff, supra note 6, at 7. The author reports that the defendant steel company was convicted under the Refuse Act after complaints of the violation had been repeatedly filed with the Coast Guard by an employee of the company. The employee was awarded one-half of the $500 fine imposed under § 407. However, the violations continued after the conviction and the employee again filed complaints with the Coast Guard. Unfortunately, though, this was after the so-called "deference" policy had been instituted and no action from the Justice Department was forthcoming. So the pollution continued and the employee was fired. On last account (Nov. 19, 1970) the employee had filed a qui tam action against the company on the theory that he had the right to enforce the Act to obtain his half of the fine. Id. at 8-16. See the discussion of qui tam actions in pt. IV of this Comment.
Refuse Act” in July, 1970.\textsuperscript{44} One writer had these comments in regard to those “guidelines:"

These guidelines indicate a lamentable policy in 1970, to permit local United States Attorneys, acting on their own initiative to enforce the Refuse Act only against “the occasional or recalcitrant polluter” but not against “manufacturing plants which continuously discharge refuse into the navigable waters of the United States.” This is done allegedly to cooperate with the Federal Water Quality Administration, but no effective guidelines are set forth for such cooperation and the well known conservationists take great exception to the Department of Justice disarming its local United States Attorneys in this manner in the fight against water pollution.\textsuperscript{45}

President Nixon’s statement on December 23, 1970 concerning a “more activist utilization of the Refuse Act”\textsuperscript{46} would seem to be in conflict with the guidelines, but apparently the guidelines are still in effect.\textsuperscript{47} However, the fears of the conservationists may not be justified. Apparently under the cooperative guidelines, the Justice Department in 1971 filed a number of suits seeking abatement of water pollution under the Refuse Act. These suits have concentrated on large industrial and municipal waste dischargers.\textsuperscript{48}

3. The New Corps Permit System\textsuperscript{49}

Beginning on July 1, 1971, every existing waste discharge, except municipal liquid sewage, entering a water over which the Corps of Engineers asserts jurisdiction must be authorized by a Corps permit. By that date all waste dischargers must have applied for a permit. At the present time, all industrial waste dischargers\textsuperscript{50} and all agricultural waste dischargers generating animal wastes from feedlots containing 1,000 animal units or more\textsuperscript{51}

\textsuperscript{44} Committee Print at 10.
\textsuperscript{46} Polikoff, \textit{supra} note 6, at 14.
\textsuperscript{47} See Memorandum of Understanding Between the Administrator of the Environmental Protection Agency and the Secretary of the Army, Jan. 12, 1971, 36 Fed. Reg. 3074 (1971).
\textsuperscript{50} Except industries discharging into municipal or public sewer systems or treatment plants and into combined industrial waste treatment systems which themselves have applied for permits.
\textsuperscript{51} Statement of William D. Ruckelshaus, Administrator, Environmental Protection Agency, before House Committee on Agriculture, May 25, 1971. One thousand animal units is the equivalent of 1,000 beef cattle, 700 dairy cattle, 4,500 butcher hogs, 12,000 sheep, 35,000 feeder pigs, 55,000 turkeys, 180,000 laying hens, or 250,000 broilers. It is estimated that there are approximately 3,400 such feedlots in the United States. \textit{Id.}
must apply for a permit. The application on form 4845-1 requires detailed disclosure of the constituent parts, flow pattern and location of each discharge. Application is made at the Corps district offices at Tulsa, Memphis, Rock Island, St. Louis, Little Rock, Omaha and Kansas City respectively for the various watersheds in Missouri. Application for new discharges must be filed 120 days before they are begun. Application constitutes sufficient compliance with the Act pending processing of the application.

The Corps has begun processing the applications of the largest waste dischargers first, primarily to obtain the maximum impact from its permit program at an early date. The Corps will issue a permit to a waste discharger only if the state and/or interstate water pollution control agency certifies that the waste discharger has complied with state stream standards and if the federal Environmental Protection Agency certifies that the discharge complies with its effluent guidelines. Other federal agencies will also review applications for the impact of discharges on both wildlife and environmental values other than water quality. The Corps itself will specify the degree of treatment which is required for each discharge before a permit will issue. Pending construction of the required treatment facilities the Corps will issue interim permits. Waste discharge facilities existing on April 3, 1970, will have to get state certification of compliance by April 3, 1973. Even after a permit is issued, the waste discharger must comply with any change in water quality standards made subsequent to the date of the permit. Permits will be subject to suspension, modification or revocation if the authorized discharge is found to contain materials hazardous to public health or safety.

As part of the procedure for processing applications for Corps permits, the district offices will issue public notices identifying the nature and location of the discharge, and notify interested federal and state agencies and known interested parties. If expressions of public interest warrant, public hearings on applications will be held.

The procedure of the Corps of Engineers is designed to foster cooperation between itself, the state agencies, and the Environmental Protection Agency and to compel disclosure of the nature and extent of the major industrial waste discharges in the United States. If adequately implemented, the Corps permit system offers a forceful tool for cleaning the nation's waterways. It bears watching to see if it realizes its great potential.

III. Qui Tam Actions

A. Qui Tam Defined

"A qui tam action is a civil action brought by a citizen 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."52 The citizen

52. Committee Print at 1. BOUVIER'S LAW DICTIONARY 2784 (3d ed. 1914) defines qui tam as:

An action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, . . . or other insti-
must have sufficient information to convict the violator of the statute and the statute must provide that the informer is entitled to share in the penalty. Ordinarily this information would be turned over to the law enforcement officials who would take care of the prosecution. Where, for one reason or another, that solution is not satisfactory, the citizen may bring a civil action to recover his share of the penalty.

B. History and Purpose of the Qui Tam Action

Qui tam actions were necessary during earlier periods in English history since police forces and prosecutors were often inadequate or non-existent. However, it has been noted that they also serve another purpose: to insure that the law is complied with, when for one reason or another, the authorities are not enforcing it.

Qui tam actions have also been used as a means of enforcing both state and federal statutes in the United States. Most of the qui tam actions

The Dictionary of English Law (1463) (E. Jowitt ed. 1959) defines it as:

(A) popular action (i.e., one which anyone may bring) on a penal statute (q.v.) which was partly at the suit of the Crown and partly at that of an informer: so called from the words qui tam pro domino rege, quam pro se ipso, sequitur (who as well for our lord the king, as for himself, sues).

Black's Law Dictionary (4th ed. 1968) states:

An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a “qui tam action”; because the plaintiff states that he sues as well for the state as for himself.

Note the slight differences in the three definitions as to whether or not the statute must provide that the action may be maintained without express provision. Black's definition includes the words “and provides that the same shall be recoverable in a civil action.” The Dictionary of English Law makes no reference to any such requirement, while the Bouvier definition is somewhat ambiguous: “and makes it recoverable by action.”

The burden of proof in these cases, however, is the burden of proof required to prevail in a civil case (i.e., a preponderance of the evidence) rather than the criminal standard of beyond a reasonable doubt. United States v. Regan, 232 U.S. 37 (1914); Hepner v. United States, 213 U.S. 103 (1909); United States v. Zucker, 161 U.S. 475 (1896).

The burden of proof in these cases, however, is the burden of proof required to prevail in a civil case (i.e., a preponderance of the evidence) rather than the criminal standard of beyond a reasonable doubt.

If we lived in an age when the authorities could be suspected of refusing, out of favouritism or fear, to prosecute a particular kind of person, it might be a very useful thing to have [the common informer system] (emphasis added).


In Marvin v. Trout, 199 U.S. 212, 225 (1905), the United States Supreme Court stated:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.
have arisen under statutes which expressly provide for the maintenance of the action, i.e., statutes which state that the action may be instituted by any person on behalf of the Government. Where there is a statutory provision for part of the penalty to be paid to the informer and no express provision allowing the informer to institute the suit himself (which is the case with the Refuse Act), it is not clear from the case law whether the qui tam action may be brought.

IV. PROPRIETY OF QUI TAM ACTIONS UNDER THE 1899 REFUSE ACT

A. Related Cases Under Other Acts

The memorandum prepared by the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations which surveys the cases wherein the problem of whether or not express statutory authorization is necessary for a qui tam action to be maintained (i.e., when the statute neither specifically allows nor prohibits the qui tam action) has been discussed. There are a few state cases which hold that the qui tam action does not lie unless expressly authorized, and there are at least two federal court cases from which the same inference can be drawn.

On the other hand, there is authority for the proposition that the qui tam action does lie where the statute is silent on the matter. In 1943, in United States ex rel. Marcus v. Hess, Mr. Justice Black noted:

> 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 sue, Adams v. Woods, 2 Cranch 336.

In the Adams case, which Mr. Justice Black cited as authority, the question of express authorization did not arise. In that case, Chief Justice Marshall assumed that the right existed and held that the statute of limitations applied to the qui tam action as well as to the criminal prosecution. More-
over, the wording of the statute there in question differs from that of the Refuse Act; this illustrates one of the problems involved, since the same thing can be said of all of the other statutes where this question has arisen.

However, one statute which has substantially the same language as that in the Refuse Act has received favorable judicial interpretation. This is the Harter Act. In United States ex rel. Pressprich Son Co. v. James W. Elwell & Co. Judge Learned Hand stated:

*We think that the District Court had no jurisdiction in admiralty over the collection of a penalty by proceedings in personam . . . . Nevertheless, we have no doubt that the fine might be collected by *qui tam *action in the District Court* [citations, omitted] and that the jurisdiction of the District Court over the subject-matter was, therefore, complete.*

**B. Other Considerations**

Since it is unclear from the case law whether a *qui tam* action may properly be maintained under the Refuse Act and it is impossible to glean congressional intent from the wording of the statute, it seems that public policy considerations should be taken into account in making the determination. There is little doubt that this country's water bodies are threatened with destruction. Action must be taken before more of these watercourses and waterways get to the point where Lake Erie is presently. While programs are being initiated at both the state and federal levels, these programs are often slow in being put into operation and even slower in obtaining concrete results. Further, the multiplication of state and federal agencies,

---

64. The statute in question there provided that violators "shall severally 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" (emphasis added). Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 349. This statute seems to lend itself to a construction allowing the *qui tam* action more easily than the Refuse Act. See the language of § 407, quoted in the text accompanying note 12 *supra*.

65. 46 U.S.C. § 194 (1964), which provides:

For a violation of [the Harter Act] the [violator] shall be liable to a fine not exceeding $2000. . . . One half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

66. 250 F. 939 (2d Cir. 1918).

67. *Id.* at 941 (emphasis added). See also United States v. Stocking, 87 F. 857 (D. Mont. 1898), where the court 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.

*Id.* at 861.


69. The only dispute concerning the environmental quality of Lake Erie seems to be whether the lake is "dying" or is already "dead." See, e.g., Schrag, *Life on a Dying Lake*, SATURDAY REV., Sept. 20, 1969, at 19. Lake Erie serves as a prime example of what can happen when nothing is done to prevent water pollution.

70. See note 37 *supra* for an example of the cumbersome nature of some of the federal programs. The state programs often have the additional problem of inadequate funding.
particularly in an area where there is no clearly defined authority, leaves open the possibility that those concrete results may never be obtained. Allowing the *qui tam* action to be brought by the individual could well result in forcing polluters to comply with the law and refrain from discharging harmful materials into our nation's waterways, regardless of whether they are spending "significant amounts" on pollution abatement in another manner. It could also mean that results could be obtained more quickly, since the bureaucrats could be by-passed and suit could be filed immediately. Both of those results would, in this writer's opinion, be desirable, and should be taken into account by any court passing on the issue.

C. The Recent Cases

At least four *qui tam* actions have recently been brought in district courts under section 407 of the Refuse Act. All of those cases held that a *qui tam* action could not be brought under the provisions of the Refuse Act. In *Reuss v. Moss-American, Inc.*, the court felt that there was insufficient authority for the proposition that a *qui tam* action may be maintained in the absence of express statutory authorization. The court quoted from one of the other three cases, *Bass Anglers Sportsman's Society of America v. U.S. Plywood-Champion Papers, Inc.*, to rebut the statement made by Mr. Justice Black in *Markus*.

Justice Black's dictum would appear to state the law too broadly. The *qui tam* action depends entirely upon statutory authorization, as it has never found its way into the common law. The action arises only upon a statutory grant. The fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture. There must be statutory authority either express or implied, for the informer to bring the *qui tam* action. When the statute is silent as to whether the *qui tam* action is authorized, and nothing can be gleaned concerning congressional intent

---

71. The enforcement of the provisions of the Refuse Act provide an apt illustration of this. The typical enforcement procedure goes something like this: The violation is reported to the Coast Guard. The Coast Guard checks on the violation and then refers it to the Corps of Engineers. The Corps makes a further check, then notifies the local United States attorney's office where the information must be gone over once again before action is taken. That "action," as of late, has been to defer to yet another agency, the Federal Water Quality Administration. See Polikoff, *The Interlake Affair*, *The Wash. Monthly*, Mar., 1971, at 7.


74. 323 F. Supp. 848 (E.D. Wis. 1971).


76. See pt. IV, § A of this Comment.
from the circumstances surrounding the passage of the statute then perhaps Justice Black's construction in favor of the qui tam action may be justified in many instances. But Black's construction obviously is inappropriate whenever the statute's language, by necessary implication, precludes such a conclusion. 77

The court's reasoning is not completely clear. Since the Refuse Act is "silent as to whether the qui tam action is authorized," then it would seem that Justice Black's construction in favor of qui tam actions would be justified in this instance. Instead the court found that since section 413 provides that the Justice Department "shall conduct the legal proceedings necessary to enforce the provisions of section . . . 407," there is no room to imply that any others may sue to enforce the statute. The court went on to quote from another of the recent cases, Bass Angler Sportsmen Society v. United States Steel Corp. 78: "[W]here some statutory language seems to grant a private right of action, if the same or related statute clearly places enforcement in the hands of governmental authorities the right of action is exclusively vested in such governmental authority." 79 The court cited Williams v. Wells Fargo Co. 80 and Rosenberg v. Union Iron Works 81 as authority for that proposition. However, in each of those cases the statute involved lent itself to the "exclusive" interpretation more easily than the Refuse Act does. In Williams, the statute read: "[A]ll suits arising under the postal laws, shall be brought in the name of the United States," 82 and in Rosenberg the statute provided: "[T]he duty of the district attorney . . . to prosecute every such suit at the expense of the United States." 83

Section 413 makes no reference to all legal proceedings nor to every legal proceeding. It makes it the duty of the United States attorney to prosecute all offenders when requested, but it does not exclude other legal proceedings by providing that all legal proceedings are to be brought by the United States attorney.

V. CONCLUSION

It is submitted that those district courts which have refused to allow the qui tam action to be maintained under the Refuse Act are in error. It has been pointed out above that there is no controlling authority on the issue. By failing to give substantial weight to the public policy arguments in favor of allowing the action, 84 the courts have rendered useless what

79. 323 F. Supp. at 850.
80. 177 F. 352 (8th Cir. 1910).
81. 109 F. 844 (N.D. Cal. 1901).
82. Williams v. Wells Fargo Co., 177 F. 352, 354 (8th Cir. 1910) (emphasis added).
could be a very valuable tool in the prevention of water pollution in this country. The impact of these decisions may be increased by the existence of the "deference" policy of the Justice Department in enforcing the Refuse Act. It has been noted that the *qui tam* action could be a very useful thing "[i]f we lived in an age when the authorities could be suspected of refusing, out of favouritism or fear, to prosecute a particular kind of person." It is submitted that in regard to this particular matter, we do live in that imaginary age referred to, presently.

Further, the results are in conflict with two significant trends of judicial decisions, the first dealing with environmental problems in general, and the second dealing with the Refuse Act itself. The courts have become increasingly aware of environmental problems and in doing their part to insure that the environment is protected. This is evidenced by recent decisions expanding the concept of standing to sue and requiring agencies to consider environmental effects in certain cases before taking a course of action. Secondly, the Refuse Act has been repeatedly given a liberal construction and the Supreme Court has commanded that it should not be read "in a vacuum." It appears that these courts are doing precisely what the Supreme Court has forbidden: given the Refuse Act a "narrow, cramped reading."

If these rulings are upheld in the appellate courts, the private individual concerned with insuring that the provisions of the Refuse Act are complied with would apparently have only one alternative remaining. That alternative would be to file a mandamus action against the district attorney under the federal mandamus statute passed in 1962. Examination of the particular problems involved if such a suit were filed is beyond the scope of this comment, but it might be pointed out that at least one such action has reportedly been filed and in one of the recent *qui tam* actions dis-opinion, noted the seriousness of the problem of "the gradual degradation of [the] environment." Id. at 303. However, the court went on to find that the Refuse Act is "solely criminal" and that "[n]othing in these statutes intimates that a civil enforcement procedure is authorized." Id. at 305.

85. See note 55 *supra*.


88. See pt. II of this Comment.


91. 28 U.S.C. § 1361 (1964) provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

92. The district attorney would presumably argue that any prosecution is a "discretionary" act and therefore not within the scope of the Act since a writ of mandamus can not compel an official to perform a discretionary act. R.E.D.M. Corp. v. Lo Secco, 291 F. Supp. 53 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 303 (2d Cir. 1969). The plaintiff might contend that the word "shall" in the statute (§ 413) leaves no room for discretion. The author does not feel competent to speculate on the outcome of such a suit.

93. See Harris, *supra* note 45, at 714.
The court construed a request for injunctive relief to be a request for a writ of mandamus under the federal mandamus statute and denied the relief because it did not involve a "ministerial" act. Hopefully, the appellate courts will see fit to reverse the stand that has been taken by the district courts on the *qui tam* issue and such mandamus suits will not be necessary.

CHARLES N. DRENNAN

95. *Id.* at 416.