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by Ross Sandler

The Refuse Act of 1899, although approaching its diamond anniversary, is alive and well and providing the best legal framework for cleaning up the nation's navigable streams and their tributaries. Its absolute standard of no pollution, which is ameliorated through practical application, is to be preferred over attempts to provide elaborate statutory standards.

FOR PERSONS genuinely interested in the environment and the abatement of water pollution, the last year or two must surely look like the dawning of a new age. The distinction between today's relatively optimistic picture and the past rests on the emerging consensus that government must use its enforcement powers to bring a halt to pollution and to reclaim our natural environment. By enforcement I mean simply that government must use its power to order pollution halted, and if it is not halted, to invoke sanctions swiftly. Direct enforcement against the polluter—that has been the real difference.

The work of enforcement being carried out by the Federal Government through the Department of Justice, the Environmental Protection Agency and the Army Corps of Engineers is built on an almost common law of water pollution abatement. The primary federal statute remains the Refuse Act of 1899 (33 U.S.C. § 407), which simply states, in language that approaches a Biblical commandment, that no one may discharge industrial refuse of any kind into the navigable waters of the United States or its tributaries.

This act has emerged as the primary pollution abatement statute on the federal level for the simple reason that it alone has proved enforceable. It is axiomatic that the certainty of being caught and punished causes people to conform to law, not the harshness of the penalty. And that is the secret of the Refuse Act's unique success; it brought certainty and credibility to pollution law enforcement.

AUTHOR'S NOTE: The opinions expressed in this article are personal and do not purport to reflect an official statement by the United States Department of Justice.

Enforcement means no more than ordering the polluter to conform to the desired standard and, on his failing to meet that standard, imposing sanctions. Under the Refuse Act of 1899 the Federal Government has been doing precisely this. As many legislatures and the Congress contemplate pollution abatement legislation, it is worth taking stock of the accomplishments of the current straightforward mandate and its direct, enforcement approach.

Most of the criticism of and proposals to alter the Refuse Act relate to apparent deficiencies in the act. The primary so-called deficiencies are (1) that it makes no provision for civil abatement but only punishes the wrongdoer; (2) that it creates no administrative or investigative machinery; (3) that its maximum fine of $2,500 is not a deterrent; (4) that it does not set standards for an acceptable level of discharge but prohibits all discharges of industrial wastes; and (5) that it makes no provision for state enforcement.

"Deficiencies" Are Not Deficiencies At All

In fact, these "deficiencies" are not deficiencies at all; judicial interpretation and executive action not only have removed or avoided them but have honed the act into the most potent weapon against water pollution.

The first charge is that the Refuse Act appears defective because it makes no provision for civil relief. It reads as if it were only a criminal provision for punishment for past conduct but authorizing no power to require a polluter to abate his pollution. But recent judicial interpretations have entirely filled that void. Relying on Supreme Court cases under companion sections of the Rivers and Harbor Act which

held that the government could sue to enjoin future violations, the Department of Justice brought the first two law suits seeking civil relief under the Refuse Act in March, 1970—one in Florida against Florida Power and Light, and the second in the Southern District of New York against Oceana Terminals. In both cases the courts upheld the Federal Government's right to sue to enjoin pollution. Since March of 1970, the Department of Justice has brought ninety additional civil actions.

The civil relief obtained has been designed to abate the particular pollution at issue. In *United States* v. *Oceana Terminals*, 70 Civ. 1172 (S.D. N.Y. 1970), where the problem was oil leaching into the East River from an oil saturated shore, the defendant was required to maintain an adequate containment boom and to clean the oil from the water continuously, while at the same time he was required to repair the underground leaks from his tanks. In *United States* v. *Marathon Battery*, 70 Civ. 4110 (S.D.N.Y. 1970), the defendant was required to install pretreatment equipment to remove the toxic metal cadmium from its effluent. In *United States* v. *General Motors*, 70 Civ. 5469 (S.D.N.Y. 1970), the defendant was required by the court order to cease discharging entirely many toxic chemicals and to obtain primary and secondary treatment of its remaining wastes.

Civil relief requires the defendant to invest substantial amounts of capital for new equipment or for alteration of its manufacturing processes. The money invested does not always represent unrecapturable expenses, however. In the *Marathon* case, the illegally discharged waste was cadmium, the firm's primary raw material and an extremely expensive metal. It is now being captured from the effluent before discharge. In another case brought in the Southern District of New York, *United States* v. *Washburn Wire Company*, 70 Civ. 4624 (1971), the discharge into the East River proved so valuable that the defendent has barreled the effluent with the intent of selling it.

The Refuse Act appears defective in that it creates no laboratories, no investigative arms and no enforcement machinery. No administrative program is included to process and evaluate permit applications. So goes the second charge.

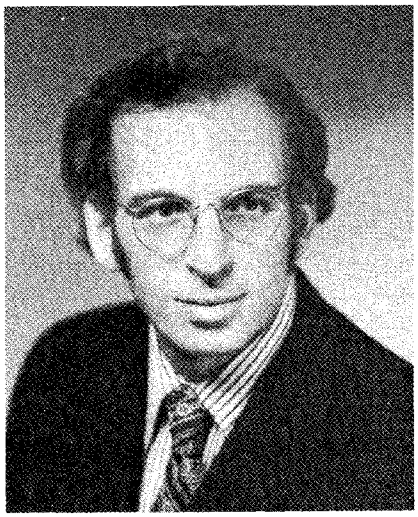
These defects were corrected in large measure by Executive Order 11,571 of December 23, 1970, which established the Refuse Act permit program, and by the creation and reorganization of the Environmental Protection Agency.[1] But one of the strongest tools of enforcement arises directly from the Refuse Act itself without special proclamations or funding. The Refuse Act is a criminal statute, and violation of it may be investigated in the same manner as any criminal conduct—by a grand jury. In the Southern District of New York, United States Attorney Whitney North Seymour, Jr., empaneled a special grand jury to investigate water pollution in September, 1970. It has indicted fifteen companies and investigated many more.

Grand Jury Wields Significant Power

The grand jury can subpoena anyone it wishes to testify. This is a significant power. Most potential defendants are corporations and do not enjoy a Fifth Amendment privilege. In the past, and even today, much of the investigative work by the Corps of Engineers began and ended with a boat ride and a glass jar of some noxious smelling liquid. But the grand jury can circumvent that procedure of evidence gathering entirely. It simply subpoenas the corporation's responsible officials and asks them to explain under oath just what chemicals and other refuse the plant discharges.

This method of investigation has the added advantage for the prosecutor that the defendant cannot readily challenge the evidence against him. Most indictments are based on admissions by corporate officials to the grand jury or on tests made by the defendant at the request of the grand jury. By the end of the investigation, there is little left for the defendant to dispute, and, as has been our experience, practically all defendants enter guilty pleas.

Ultimately the issuance of a permit by the Corps of Engineers will be a complete defense to a Refuse Act prosecution. That is not to be feared. The Corps and the EPA have made it clear that they intend to issue permits only on condition that the discharger receiving the permit meet appropriate water quality standards and not violate other environmental values. In addition, the Corps and EPA have asserted the right



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1. In *Kalor* v. *Resor*, 335 F. Supp. 1 (D. D. C. 1971), the court enjoined the Corps of Engineers from issuing any Refuse Act permits until such time as the Corps amends its regulations to require the filing of an environmental impact statement, as required by the National Environmental Policy Act of 1969 with respect to each permit. The Department of Justice has stated that it intends to appeal the lower court ruling, and the Corps, on December 28, 1971, ordered a moratorium on the issuance of permits, but stated that permit applications will continue to be received and evaluated.

On February 2, 1972, the Council on Environmental Quality and the EPA jointly recommended to the House of Representatives that the pending Federal Water Pollution Control Act explicitly exempt Refuse Act permits from the N.E.P.A. requirements. Among other reasons the agencies noted that potentially 20,000 additional N.E.P.A. statements would be needed if the *Kalor* decision were upheld and that the EPA, as an agency charged with protecting the environment, should be exempt from N.E.P.A. requirements geared for agencies charged with other functions and duties.

to attach conditions amounting to abatement orders to permits.[2] The applications on which the permits will be based specify precisely the nature of the discharge. Deviation from these specifications will open the discharger to prosecution. In time, the role of the Department of Justice in investigating and prosecuting polluters will no doubt diminish as the EPA and the Corps become more effective. But the ultimate criminal sanction will remain to give force to the administrative regulation.

The third alleged deficiency is that the Refuse Act appears on first reading to create nothing more than a misdemeanor and is a statute essentially lacking in a credible punishment. The statute provides that if convicted, a defendant can be fined a minimum of $500 and a maximum of $2,500. In the unusual case in which the defendant is a natural person, he can receive a term of imprisonment of not less than thirty days nor more than one year. Yet the statute has ample teeth, because defendants are routinely charged with multiple counts based on the actual workings of the defendant's plant. If a plant has one shift a day and the polluting discharge virtually stops with the ending of that shift, each day becomes a separate count in the indictment or information.

Recently in the Southern District of New York a defendant felt the full impact of this aspect of the Refuse Act (71 Cr. 1020 (1970)). Anaconda Wire & Cable Company, a subsidiary of Anaconda, routinely discharged large amounts of copper from its plant in Hasting-on-Hudson. The metal, which is highly toxic to virtually all life, was discharged from the plant as traces in its process water. The grand jury charged Anaconda with one hundred separate violations of the Refuse Act —an alleged violation on practically every working day in the first half of 1971. Anaconda pleaded guilty to the indictment, and was fined $2,000 per count for a total fine of $200,000—a record fine in a pollution case. There is no doubt that a fine of such severity has the desired impact of deterence. Other fines imposed in the Southern District have been relatively as severe, running as high as $25,000, $50,000 or, as in the case of *United States* v. *Standard Brands,* $125,000 (70 Cr. 858 (1970)).

Size of Fine Is Left to Court's Discretion

The size of the fine is entirely a matter of the court's discretion. The court has the traditional power to suspend imposition or execution of the fine and can place the defendant on probation. It is clear, though, from the size and severity of the fines imposed on defendants in the Southern District of New York and in other districts that judges are aware of the significance of pollution prosecutions and will impose a fine sufficient to achieve prevention and deterence.

The fourth charge is that the Refuse Act appears defective because it has no standards of any kind written into it. It merely states that it is unlawful to discharge refuse.

The absence of fixed standards of acceptable levels of discharge bothers many people, and in large measure the legislation now pending in Congress is an attempt to create standards. The most prominent bill is S. 2770, the so-called Muskie Bill, which passed the Senate by an 86 to 0 vote on November 2, 1971. It proposes that the administrator of the EPA establish a catalogue of standards for most effluents as well as a catalogue of available technology for certain types of pollutants. It also establishes a goal of elimination of all pollution discharges by 1985. The Muskie Bill does not call for the repeal of the Refuse Act, which would presumably remain as a parallel enforcement statute.

Russell E. Train and William D. Ruckelshaus, the respective heads of the Council of Environmental Quality and the EPA, have noted this duality and explicitly recommended that the Refuse Act ultimately be repealed except as it applies to anchorage and navigation.[3] The principal reason for this position is that the two statutes potentially subject the discharger to two distinct standards. It would appear, however, that this potential has remained entirely theoretical.

The current Department of Justice guidelines require the United States attorneys to refer all cases to the Corps of Engineers and the EPA for their opinion as to whether there is a factual basis for a Refuse Act action. The Department of Justice, which is without technical support staffs, relies directly on the facilities of the EPA laboratories and scientists. Virtually no substantial pollution case can be pressed without highly sophisticated evidence and testing—a requirement that inevitably forces the dovetailing of standards as between the prosecutor and the environmental specialist. Literally hundreds of criminal and civil cases have been prosecuted in the absence of a catalogue of fixed standards, and not in a single case has a defendant seriously contended that the absence of a standard misled him. It has not prevented the court from fashioning relief.

Refuse Act Does Have a Standard

The Refuse Act, of course, does have a standard—no discharge at all of industrial refuse. The flat prohibition appears harsh and unprecedented, but it is neither. As in other areas where pernicious conduct or laws affect matters of central importance, the courts have tended to reach parallel results. In the reapportionment cases, for instance, the flat rule of one man, one vote emerged as the standard.

More important, the actual practice of prosecutors, judges and administrators generally has been to adopt the only standard that as a practical matter can work—the maximum feasible abatement under the present technology. That is the standard for the relief sought in civil actions brought in the Southern District of New York, and that is the standard for abatement sought by the EPA in evaluating permit applications.

This standard is the only sensible one from an enforcement point of view. The Department of Justice has no power to order anyone to do any-

2. 33 C.F.R. 209.131; 36 Fed. Reg. 6564 (April 7, 1971).

3. Letter of Russell E. Train and William D. Ruckelshaus, February 2, 1972, 2 Env. Rptr. 1247.

thing. It can only take a defendant to court for the purpose of convincing a court either to impose a fine or to order the defendant to cease discharging and clean up the effects of past discharges. In either situation, the prosecutor must convince the court that the defendant has done or is doing something that should be halted. That burden, as a practical matter, is insurmountable if the defendant can establish that it has taken every precaution and in fact has abated its pollution to the maximum currently feasible.

There could be situations in which every conceivable precaution had not abated the discharge entirely. In my experience prosecution of this kind of case is completely hypothetical. Resources do not permit prosecution of these minimal polluters. There are far more polluters readily available who yet practice nineteenth century industrial mores. Reliance on the prosecutor to be sensible is part of the system of criminal justice and is not in the least unusual. In the last analysis, the abuse of discretion can only bring a defendant to court. There the prosecutor, in an open public proceeding, must bear his burden of demonstrating to the court that a fine or an injunction should be ordered.

Moreover, the primary rationale for a standard is not present in the pollution area. Companies desire standards in order to predict what will be an acceptable level of abatement. But standards are changing constantly. What today seems to be an acceptable level most likely will not be considered so in the future. For a company to install pollution abatement equipment meeting an outmoded standard is foolhardy. If it does not install the most advanced equipment available, regardless of the current written standard, it is wasting money.

The standard now found in the Refuse Act makes sense most of all because it is enforceable. It is a standard readily comprehensible to everyone, industrialist and citizen alike. At a time when pollution of practically all major waterways is plainly visible, the Refuse Act offers hope for meaningful abatement. Its clear commandment places the burden directly on the discharger either to cease discharging or to take every precaution currently available to eliminate contaminants from his effluent. Equally important, it mandates that the enforcement officials take action. Neither can hide behind disputes about relative toxicity, and neither can buy time awaiting the ultimate standard and the ultimate black box to eliminate the noxious portion of a discharge. It is unlikely that "zero" discharge can ever be achieved; it is equally unlikely that setting a lesser standard will produce more or better abatement.

The fifth allegation is that the Refuse Act appears defective in that it does not settle which government authority—the states or the Federal Government—has priority of enforcement. Whereas most recent federal legislation implicitly or explicitly defers to the states, the Refuse Act is silent. The Refuse Act follows the traditional criminal law theory that certain conduct, even if punishable under state law, might also be punished as a federal crime if constitutionally permitted contacts exist, as, for instance, receiving stolen goods (state crime) and receiving stolen goods that have moved in interstate commerce (federal crime).

Absence of Pecking Order Is No Defect

The absence of a pecking order is no defect at all. Surely no one would contend that there has been too much enforcement in the pollution area. The experience is quite the contrary. More important, concurrent jurisdiction has decided advantages. A United States attorney vigorously enforcing the Refuse Act cannot help but cause the competitive (or self-protective) fires to ignite in local and state enforcement agencies. The same competition works between the EPA and the United States attorney offices, as well as between United States attorneys in neighboring districts. While it may not be obvious to even the most well-informed people, this has been one of the most important products of the Refuse Act. In probably no other area has competition fostered by concurrent jurisdiction had a more beneficial effect. The Refuse Act is necessary and has been successful on this basis alone—actions under it proved enforcement possible and desirable and made others uncomfortable if they were not being equally as tough.

Refuse Act Is a Superior Enforcement Tool

The Refuse Act has developed into a superior enforcement tool for the betterment of our environment. An examination of the record of enforcement bears this out. Criminal indictments are being voted increasingly by grand juries around the country. In the two years ending July 1, 1969, eighty-seven criminal cases were brought under the act, but in the next two years almost four times as many criminal actions were brought—a total of 320. Once convicted, defendants can expect a substantial fine. As Judge Thomas F. Croake stated when he imposed the $200,000 fine on Anaconda, no longer can pollution fines be viewed as merely a cost of doing business. These actions bring credibility to the commitment to clean up. Without the certainty of being caught and punished, there is little left to that commitment, no matter how grand the administrative machinery or how stringent the standards.

If I were to grade the importance of the Refuse Act and enforcement under it, I would list these things as the most important, above even the significant successes of individual cases:

—It has and is creating a climate in which industry—the potential defendants—now feels a growing certainty that it can no longer pollute with impunity.

—It has and is creating a climate in which local and state agencies can become more stern in their enforcement policies.

Much remains to be done. But there could not be a more explicit mandate than is now found in the Refuse Act, nor could that be a more workable scheme of enforcement than is now evolving under the present statute.