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Environmental Law--The Refuse Act

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ponse to alcoholism reform legislation may be more significant in the reversal of the injurious effect of an *Erewhonian* imposition of criminality[77] for public drunkenness upon the chronic alcoholic than the legislation itself more specifically, a sympathetic police department and an understanding citizenry will be crucial to the recognition of the alcoholic as a person affilicted with disease—not as a damned drunk.

> *"[T]he sick alcoholic's misbehavior is less a symptom of his disease than it is an artifact of society's rejection of him."*[78]
>
> *James R. Gerchow*

(1) Uses offensive, disorderly, threatening, abusive, or insulting language, conduct, or behavior;
(2) Congregates with others on a public street or sidewalk and refuses to move on when ordered by the police;
(3) By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
(4) Shouts or makes a noise either ouside or inside a building during the nighttime to the annoyance or disturbance of any three or more persons; . . . .
(9) Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys the pedestrians; HAWAII REV. II § 772-2 (1968).

[77] "You are a bad and dangerous person, and stand branded in the eyes of your fellow-countrymen with one of the most heinous known offenses." Samuel Butler, *supra* note 41, at 107.

[78] Address of Gertrude L. Nilsson, (Coordinator of Services to Alcoholics, Division of Alcoholism Control, Maryland Department of Mental Hygiene) delivered at the 96th Annual Forum on Social Welfare in New York City, May 27, 1969.

Environmental Law—The Refuse Act

"A river is more than an amenity, it is a treasure."[1] There is growing concern over the methods of protection and conservation available for our natural "treasures." In the areas of waterways, at least, the United States Congress provided a method as early as 1899—section 13 of the Rivers and Harbors Appropriation Act of 1899,[2] commonly known as the Refuse Act. With increasing aware-

[1] New Jersey v. New York, 283 U.S. 336, 342 (1931).

[2] 33 U.S.C. § 407 (1970), which provides, 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 tri-

ness and growing concern with our environmental problems, the Refuse Act has been utilized frequently in recent years and, therefore, is worthy of study.

This paper will not attempt to delve into all the undercurrents of the Refuse Act, but will briefly discuss the Act before concerning the problem of what constitues a tributary of a navigable waterway.

A. The Refuse Act Generally

A violation of the Refuse Act,[3] by causing to be discharged or discharging refuse matter[4] into navigable waters of the United States[5] or into any tributary of navigable water, constitutes a mis-

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butary of any navigable water from which the same shall float or be washed into such navigible water; and it shall not be lawful to deposit or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise whereby navigation shall or may be impeded or obstructed. . . .

[3] 33 U.S.C. § 411 (1970), which provides in part:

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 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. . . .

[4] The United States Supreme Court, in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), defines the terms refuse matter as it is used in the Refuse Act. The Court suggested that "refuse" would include pollutants such as sawmill wastes, ballast, steamboat ashes, oysters and rubbish from passing vessels as well as commercially valuable oil and fuel—the subtance discharged in *Standard Oil*. In that respect, the Court said: "Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways." *Id.* at 226.

In addition to the specified materials listed in *Standard Oil*, the courts have classified other substances as being "refuse" within § 407—industrial deposits, United States v. Republic Steel, 362 U.S. 482 (1960); liquid petroleum products, United States v. Esso Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3d Cir, 1967); oil, United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952); La Merced, 84 F.2d 444 (9th Cir. 1936); unwanted ends of pile, Pile-driver No. 2, 239 F. 489 (2d Cir. 1916); and the overburden of earth removed during strip mining operations, United States v. Bigan, 170 F. Supp. 219 (W.D. Pa. 1959), *aff'd* 274 F.2d 729 3d Cir. 1960).

[5] Rivers are navigable public rivers when they are navigable in fact, *i.e.*, when they are used or are susceptible of being used in their ordinary condition as highways for commerce among the various states. The Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 563 (1870). In *United States v. Appalachian Electric Co.*, 311 U.S. 377 (1940), the Supreme Court defined a navigable water of the United States as a waterway which forms a highway for interstate commerce. It broadens the definition in *The Daniel Ball* by finding that the determination of navigability does not rest solely on the river's capacity in its natural condition, but *also in its capacity with reasonable improvements. Id.* at 407.

demeanor.[6] One exception to this prohibition is the discharge of refuse flowing in a "liquid state" from the "streets and sewers."[7] The Act also makes illegal the placing of material on the bank of any navigable water or its tributary if such material may be washed into the water and possibly impede or obstruct navigation.[8]

The responsibility for enforcement of the Act rests with the United States Army Corps of Engineers. The Act gives the Corps discretion to issue "pollution permits"[9] under its promulgated regulation.[10] It should be noted that there is a "bounty" provision[11] which gives a trial court discretion to grant payment of one-half an assessed fine[12] to the individual or individuals giving information which leads to the conviction of the polluter.

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[6] The term "tributary" as used in § 407 has not been defined by case law. It will receive special discussion in Part B. infra.

[7] In *United States v. Republic Steel Inc.*, 362 U.S. 482 (1962), the defendants were depositing industrial solids into the Calumet River, suspending them in large quantities of water and returning this water through numerous sewers. The Supreme Court reversed a Seventh Circuit Court of Appeals decision which had found that these suspended industrial particles fell within the exception clause of § 407. In reversing that decision, Justice Douglas stated: "All matter in suspension is not saved by the exception clause in § 13. Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage' . . . 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. *Id.* at 490-91.

[8] "Textually, the second clause [33 U.S.C. § 407 (1970)] is limited by the concluding phrase 'whereby navigation shall or may be impeded or obstructed'; and that interpretation fits well into its purpose, *provided* one reads it as covering only 'material' which *gravity alone will not carry* into a stream." United States v. Ballard Oil Co., 195 F.2d 369, 370 (2d Cir. 1952). (emphasis added). In *Ballard,* the defendants, while filling a tank, negligently spilled oil which was carried into the Connecticut River through a waste pipe. Though this spill did not impede or obstruct navigation, it was found to be a violation of § 407 because the oil had run off by its own accord (or with the help of gravity only) as opposed to being "washed" into the water.

[9] 33 U.S.C. § 407 (1970), which provides in part:

> *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such materials; and whenever any permit is so granted the conditions thereof shall be strictly compiled with, and any violation thereof shall be unlawful.

[10] *See,* 1 E.R. Recent Developments 1349 (April 9, 1971).

[11] 33 U.S.C. § 411 (1970).

[12] In a recent decision, the federal court for the southern district of New York held that it was completely within the discretion of the trial court to grant or refuse to grant the "bounty", but once the court determined that it was proper to grant the "bounty", it must equal half the amount of the fine. United States v. Transit-Mis, 2 E.R.D. 1074 (S.D.N.Y. 1970).

B. The Problem of the Tributary

One can readily see both the federal interest in the pollution control of navigable waterways and the federal right to regulate interstate "highways of commerce."[13] But what of the federal right and interest in controlling the tributaries of navigable waters? A hypothetical situation might best illustrate the problem.

> A.N. Thracite Coal Company is a small company with three portals, a tipple and a coal washery located on Backwoods Creek.
>
> B.T. Oomis Coal Company is another small coal company with four portals, a tipple and a coal washery located on Nodepth Creek.
>
> Backwoods Creek is non-navigable and flows into Nodepth Creek, which is also non-navigable. Both creeks are located entirely within the borders of West Virginia. Nodepth Creek flows into the Full Stream Ahead River, a navigable waterway. Both A. N. Thracite and B. T. Oomis are polluting the creeks on which they are located.

Are they in violation of the Refuse Act? Is Backwoods Creek a tributary within section 407? Is Nodepth Creek a tributary?

There have been no case decisions under the Refuse Act defining "tributary." However, there have been cases in which the term "tributary" has been defined.

In English case of *Hall v. Reid*,[14] the court found it necessary to define the term "tributary." The question was raised when Hall, a counter-bailiff of the Board of Conservation of the Trent Fishery District, brought an information against Reid for unlawfully attempting to take trout out of a Trent River tributary without a proper license. Reid had been fishing in the Wye River which flowed into the Derwent, which flowed into the Trent. The justices had dismissed the information, stating that the word "tributary" meant direct tributary. In reversing the justices, Field, J. said: "I see no necessity for putting the limitation suggested upon the word 'tributary' . . . *a 'tributary' is that which contributes to.* No one can doubt for a moment that the Wye is a tributary of the Trent for that purpose."[15]

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[13] The right of federal control is derived from the Commerce Clause of the United States Constitution. *See*, United States v. Monticello, 78 U.S. (Wall.) 411 (1871); United States v. Appalachian Electric Co., 311 U.S. 377 (1940). In these cases, the Supreme Court found a navigable waterway is one that either by itself, or in connection with other waterways, forms a highway for commerce among the various states or between a state and a foreign state.

[14] 10 Q.B. 134, 135 note (1882).

[15] *Id.* at 137 (emphasis added).

The American courts have also had the opportunity to define "tributary." One case held that the word "tributary" includes "all streams flowing directly or indirectly into a river."[16] In another case, one of the parties urged "that 'tributary' must be construed to mean 'a running natural stream which empties into another stream.' "[17] However, the court stated that the "limited definition of 'tributary' *cannot* be adopted."[18] In yet another case, a federal court stated, "I think to consider that tributary . . . is confined to a river or lake or other similar body immediately connected with another body of water of larger size would be entirely too restrictive."[19]

Of special interest is a West Virginia case defining "tributary," *Miller v. Citizens' Fire, Marine and Life Ins. Co.*[20] In *Miller,* the defendant had issued an insurance policy on plaintiffs' steamboat. The terms of the policy gave them "permission to navigate the Mississippi and tributaries." The steamboat was subsequently lost in Cypress Bayou, a body of water which flowed into the Red River, which then flowed into the Mississippi River. The question the West Virginia court had to decide was whether the Cypress Bayou was a tributary of the Mississippi. The court decided that Cypress Bayou was a tributary of the Mississippi within the meaning of the insurance policy. It based its decision on a liberal construction of the insurance policy, saying that while the bayou did not empty directly into the Mississippi, its water mixed with that of the Red River; and therefore, "in . . . general . . . it may be said that said bayou is a tributary of the Mississippi."[21]

The cases discussed above indicate that "tributary" does not mean *direct* tributary. Research has not revealed authority for a limited definition of "tributary" as a stream or body of water flowing directly into a larger body of water.[22] Because of its criminal sanctions, the Refuse Act must be strictly construed;[23] how-

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[16] Bull v. Siegrist, 169 Or. 180, 126 P.2d 832, 834 (1942).

[17] Ogilvy Irrigating and Land Co. v. Singer, 19 Colo. App. 380, 386, 75 P. 598, 599 (1904).

[18] *Id.* at 386, 75 P. at 599 (emphasis added).

[19] The Anthony D. Nichols, 49 F.2d 927, 930 (S.D.N.Y. 1931).

[20] 12 W. Va. 116 (1877).

[21] *Id.* at 131-132.

[22] In *Ogilvy Irrigating and Land Co. v. Singer,* 19 Colo. App. 380, 386, 75 P. 598, 599 (1904), the court stated that "an exhaustive examination of the authorities has failed to disclose one, which holds that the limited construction of 'tributary' . . . is applicable. . . ."

[23] H. Christiansen & Sons, Inc. v. Duluth, 154 F.2d 205, 207 (8th Cir. 1946).

ever, a strict construction does not mean that a limited definition of "tributary" must be applied. The Supreme Court has recognized that the Refuse Act should not be given a narrow or cramped reading or the purpose of the Act would be defeated.[24]

There is a federal interest in protecting tributaries from pollution. Whether water flows directly or indirectly, it contributes to and mixes with the water of navigable waterways. Pollution of a tributary is therefore pollution of the principal body. The question must then be—"How many streams removed may a stream be, and still be a tributary?" The answer is another question—"How many streams removed must you be from a navigable waterway before the pollution will settle out prior to reaching it?"[25]

For purposes of the hypothet proposed earlier, Nodepth Creek, flowing directly into the navigable waterway, would be a "tributary" within the meaning of the Refuse Act. The same is true of Backwoods Creek, even though it flows indirectly into the Full Stream Ahead River. Since B. T. Oomis and A. N. Thracite were polluting tributaries of a navigable waterway, both were in violation of the Refuse Act.

Before concluding there is one further question with respect to the Refuse Act which should be discussed.

C. Does the Federal Water Pullution Act Preclude Prosecution under the Refuse Act?

In the Federal Water Pollution Act,[26] (F.W.P.A.), Congress created a comprehensive plan for dealing with pollution. In a recent federal district court case, *United States v. Vulcan Material*,[27] the defendants contended the F.W.P.A. superseded the New York

[24] United States v. Republic Steel Corp., 362 U.S. 482 (1960). *See also*, United States v. Standard Oil Co., 384 U.S. 224 (1966), in which the Court stated that "whatever may be said of the rule of strict construction, it cannot provide a substitue for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum." *Id.* at 225-226.

[25] There are practical problems with finding and holding responsible a polluter of a tributary. First, the refuse must float or be washed into the navigable water causing pollution or the obstruction of navigation. Once it has reached the navigable water, there is a problem of "tracing" the source of the pollutants. If there are three or four polluters of one tributary, it can become quite difficult to determine the particular polluter, especially where the tributary is an indirect one.

[26] 33 U.S.C. § 1151 *et seq.* (1970).

[27] 2 E.R.D. 1074 (S.D.N.Y. 1970).