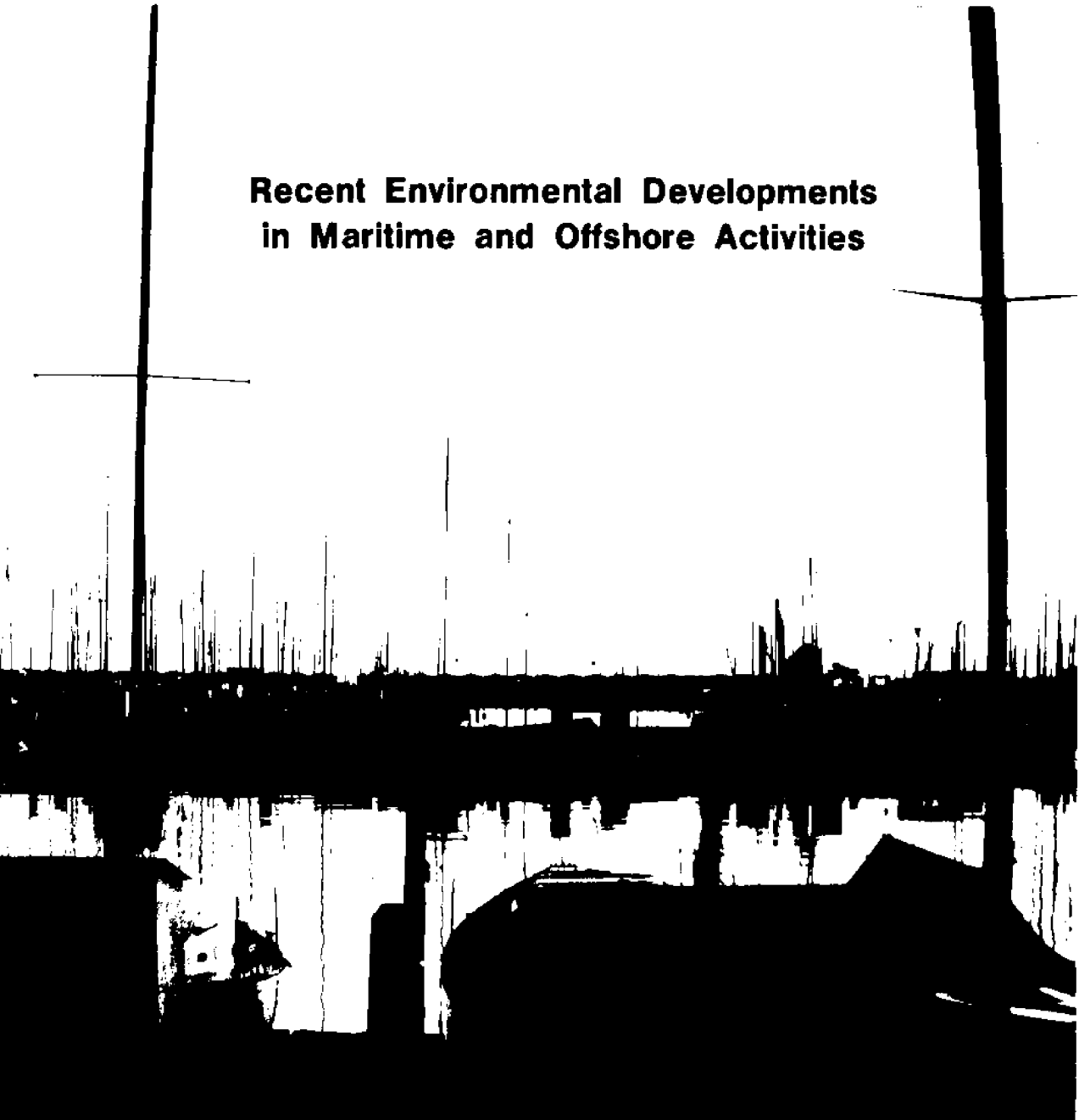
Texas Law Institute
of Coastal and Marine Resources

Recent Environmental Developments in Maritime and Offshore Activities



JURISCONSULTUS

RECENT ENVIRONMENTAL DEVELOPMENTS IN MARITIME AND OFFSHORE ACTIVITIES

INTRODUCTION

On November 11, 1971, the Texas Law Institute on Coastal and Marine Resources held a conference on Recent Environmental Developments in Maritime and Offshore Activities at the Bates College of Law, University of Houston. The conference was partially funded by the National Science Foundation and the Sea Grant Program.

The Texas Law Institute was formed through the cooperation of the Office of the Governor of Texas and the University of Houston pursuant to the recommendation of the Conference on the Legal-Administrative Needs of Texas Marine Resources in May 1970. The function of the Institute is to conduct research into the needs of Texas marine resources and disseminate the information obtained from such activity. This is accomplished through cooperation and participation of public officials, the bar, and industry.

During an age of advancing technology, there has been an awakening of interest in preserving and protecting our natural environment. Concern over environmental controls is being voiced by both the high public official and the private citizen. One of the greatest areas of discussion is the preservation of quality and usefulness in our marine and coastal resources. Industry will play an important role in this endeavor. Therefore, discussion in the seminar centered around the application of present water quality control legislation and indemnification for liability under current standards.*

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* The Texas Law Institute on Coastal and Marine Resources would like to thank State Senator A. R. Schwartz, Galveston, Chairman of the Interim Senate Coastal Zone Study Committee and State Representative W. S. Heatly, Paducah, Chairman of the House Appropriations Committee, for making introductory remarks to the conference.

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FINANCIAL RESPONSIBILITY UNDER THE WATER QUALITY IMPROVEMENT ACT

By Wm. Jarrel Smith, Jr.*

On March 25, 1970, Congress enacted the Water Quality Improvement Act of 1970, which amends the Federal Water Pollution Control Act to provide measures for the control of water pollution. The 1970 Act was signed into law by President Nixon on April 3, 1970, and on June 2, 1970, the President by letter[1] delegated to the Federal Maritime Commission the responsibility for the administration of the financial responsibility requirements contained in § 11(p)(1) of that Act.

Before I discuss with you the specifics of these financial responsibility requirements, I believe it would be helpful to outline briefly what is generally accomplished by § 11 of the Act. This section prohibits the discharge of oil in harmful quantities and requires any person so discharging oil into the waters of the United States to notify the appropriate United States authorities. This section also authorizes the United States to clean up any oil spills in the event such spills are not properly cleaned up by the person discharging the oil. If the United States Government is required to clean up an oil spill, a financial liability of $100 per gross ton of the vessel causing the discharge or $14 million, whichever is the lesser, is imposed upon the discharger of such oil unless the discharger can prove that the discharge was caused by (1) an act of God, (2) an act of war, (3) negligence by the United States Government, or (4) an act of a third party, in which case such third party is liable. However, if the discharge is willful the liability of vessel owner and operator is unlimited. This section further provides that if the person discharging the oil cleans up this spill and can prove such spill was caused by an act of God or war or negligence of the United States Government or a third party, the person discharging the oil and cleaning up said oil can look to the United States Government for reimbursement of his cleanup costs. It should be pointed out that § 11, as provided in the Act, will not preempt any state legislation in this area.

The purpose of § 11(p)(1) is to provide assurance that any vessel owner and operator, who may have liability imposed upon him for the cleanup of oil spills, is financially responsible to repay any cleanup costs

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1. On July 22, 1970, this letter was superseded "[w]ithout derogating from any action taken thereunder," by Exec. Order No. 11548, 3 C.F.R. 151 (Supp. 1970).

incurred by the United States Government. Specifically, § 11(p)(1) requires all vessels over 300 gross tons, using any port or place in the United States or the navigable waters of the United States, to establish and maintain evidence of financial responsibility to meet the costs to the United States Government of cleaning up oil spills. The required coverage, as I stated previously, is in the amount of $100 per gross ton, but not to exceed a maximum of $14 million, and can be in the form of an insurance contract, bond, self-insurance, or other evidence of financial responsibility acceptable to the Commission. Accordingly, with limited exceptions, the operator of every vessel over 300 gross tons which uses United States waters must apply for a certificate of Financial Responsibility (Oil Pollution), which is issued by the Federal Maritime Commission, as physical evidence that the vessel owner or operator has complied with the aforementioned financial responsibility requirements. The only exceptions are non-self-propelled barges which do not carry oil of any kind either as cargo or fuel to operate onboard equipment and public vessels.[2] A public vessel, as defined in the Act, is a vessel owned or bareboat chartered and operated by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce. An owner or operator subject to the financial responsibility requirements may file one application to cover all his vessels and the amount of financial responsibility required is based on the gross tonnage of such owner or operator's largest vessel.

Section 11(p)(1) provides that the required financial responsibility may be established by any one of, or a combination of, the following methods: (1) evidence of insurance, (2) surety bonds, (3) qualification as a self-insurer, or (4) other evidence of financial responsibility. The Commission's rules implementing these requirements specifically provide for the first three types of evidence of financial responsibility and in addition provide that a parent company may assume the liability for a subsidiary company when the subsidiary company cannot meet the criteria established for self-insurers. In such an event the parent company is required to execute a guarantee which in effect binds the parent company to assume any liability incurred by its subsidiary.

At the outset of this program, the Commission was required to determine which insurers would be acceptable to it. Naturally, the Commission could not accept insurance policies or other evidence of insurance from companies about which it had no knowledge. Since over 80 percent of the world's oceangoing tonnage is insured by the British, Scandinavian, and Japanese P & I associations, the Commission met with representatives of these associations and their attorneys to learn their method of operation and to gain information with respect to their insurance contracts, such as reinsurance with other insurers. As a result of these discussions, the Com-

2. *See* River and Harbor Act of 1970 § 120, 33 U.S.C. § 1161 (1970).

mission has approved, in effect, virtually all of the aforesaid P & I associations. With respect to American insurers, the Commission looks at the past performance of particular insurance companies and at the financial ratings placed on these institutions by such rating bureaus as Best's Insurance Reports. Similar information is obtained from other foreign insurance organizations. With the benefit of this information, the Commission has approved many foreign insurers, including among them, the sole Russian insurance institution, a Polish insurance institution and a Canadian syndicate of marine underwriters.

As regards the writing of this type of insurance in the United States market, many of the large marine insurance underwriters have banded together into a syndicate known as the Water Quality Insurance Syndicate. The Commission staff negotiated hard and long with these insurance underwriters in the formation of the Syndicate, and as a result, the Syndicate was formed to underwrite specifically the type of insurance coverage required under § 11(p)(1) of the Act. The insurance underwritten by this Syndicate is available not only to American vessels, but to vessel owners and operators throughout the world.

At this point, I would like to discuss briefly the Commission's Certificate of Insurance form and what is known in the trade as the Commission's uniform endorsement. As many of you know, existing insurance policies written throughout the world are cumbersome and contain many complicated clauses and endorsements. Many of these policies, as written, are not acceptable to the Commission. Therefore, the Commission devised what is known as the Certificate of Insurance form and its uniform endorsement. First, the uniform endorsement was designed merely to tailor any existing policy by the inclusion of this clause to cover specifically the liability imposed under § 11 of the Act and override any clauses to the contrary. Likewise, the Commission's Certificate of Insurance form, which is designed to be executed by acceptable insurers, merely is a document stating that the vessels listed on that document are covered for any liability which may be imposed under § 11 of the Act.

The surety bonds were drafted in conjunction with American surety companies, and for the most part, the Commission accepts any surety company which is listed on the Treasury Department's list of approved surety companies. This method of evincing financial responsibility is by far the most expensive and as a result has been used in a very limited way. With respect to self-insurers, it was necessary for the Commission to establish very strict standards to be met by such persons to insure that these persons had the capability to meet any financial responsibility in the required amounts. Therefore, the Commission's rules require self-insurer applicants to maintain working capital and net worth in specified amounts, to have good credit ratings, and to submit periodic financial reports to the Commission. As a precautionary measure the Commission rules require that

the net worth and working capital of self-insurers be maintained in the United States.

With respect to the filing procedures for Certificates of Financial Responsibility (Oil Pollution), a subject owner or operator must file one copy of the Commission's application form together with the requisite application and certification fees. The application fee is $100 per application. The certification fee pertains to each vessel included on that application and is calculated on a sliding scale depending on the gross tonnage of a particular vessel. Such fees range from $2 to $25 per vessel. In addition to the properly executed application and fees, the applicant must also submit its evidence of financial responsibility in the form of certificates of insurance, surety bond, insurance policies, etc. The Commission staff has worked closely with insurers throughout the world and as a result has worked out many procedures to simplify the evincing of financial responsibility and insurance coverage. For example, many of the large worldwide insurers have filed with the Commission what is known as a blanket Certificate of Insurance form. This blanket form may be amended from time to time by the insurer to add and delete vessels, of not just one, but many owners and operators.

With respect to the enforcement of these financial responsibility requirements, § 11 is unique in that it does not provide any specific enforcement provisions. The Commission staff, however, has worked closely with Panama Canal authorities, United States Customs, and the United States Coast Guard to assure that all vessel owners and operators are apprised of these requirements.

The only enforcement procedures presently available under the Act are those enumerated in § 11(m), which permit the boarding and inspection of vessels in the navigable waters of the United States or the waters of the contiguous zone, the arrest of any person violating the provisions of § 11 or regulations issued thereunder, and the petitioning to an appropriate district court, under § 11(n), to enjoin such vessel from the use of a port or place in, or the navigable waters of, the United States. These procedures, however, are not only impractical and cumbersome but could only be enforced on a "hit or miss" basis. Recognizing that the effectiveness of these procedures is, at best, highly questionable, enforcement legislation has recently been introduced in Congress, at the urging of the Commission. This proposed legislation would provide that the United States Coast Guard and the Bureau of Customs could deny entry or clearance to or detain any vessel not having complied with the Commission's financial responsibility requirements. In addition, this legislation would provide for fines, not to exceed $10,000, such fines to be assessed, remitted and mitigated by the Federal Maritime Commission.

Since the enactment of the financial responsibility requirements, the Commission has processed applications covering some 20,000 vessels. These

vessels include not only oceangoing vessels but also vessels over 300 gross tons operating strictly in United States waters. The Commission's staff is still endeavoring to obtain compliance rather than to detain vessels not having complied. However, once the enforcement legislation is enacted, strict enforcement measures will be taken. In anticipation of this, the Commission has recently stated that every vessel to which a Certificate has been issued must maintain that Certificate or a legible copy thereof aboard the subject vessel. This Certificate will be inspected by Coast Guard and Customs authorities as well as Panama Canal authorities, and any subject vessel not having the Certificate aboard may be subjected to detention and penalties.

The administration of this program is a large one inasmuch as approximately 20,000 vessels are certificated at any one time. Naturally, there are many changes in the ownership of vessels, charter arrangements, and the changes of the forms of insurance. Such changes are required to be reported to the Commission and are processed as quickly as possible. The Commission maintains a staff of 25 people in the administration of this program and these persons are available at any time to discuss particular problems with subject vessel owners and operators. It is the policy of the Commission to implement this program and to maintain it with a minimum of hardship upon those persons affected. We believe that this spirit of cooperation has been demonstrated many times not only in the performance of these duties by the Commission and its staff, but through physical evidence in amending its implementing rules on several occasions to accommodate those sectors of the shipping and insurance industries which had particular hardships. We believe that by fairly implementing this Act, all subject persons will comply, and that once financial responsibility is established, it will act as a deterrent to unwanted oil spills and the United States will benefit from cleaner waters.

WATER POLLUTION LIABILITY FROM AN INSURANCE STANDPOINT

By Nicholas J. Healy*

Long before the *Torrey Canyon* stranded in April 1967, it had become a well established principle of general maritime law—the case law as laid down by the federal courts in the exercise of their constitutional admiralty jurisdiction—that there is a right to recover damages caused by a willful or negligent discharge of oil from a vessel. Recovery may be had not only for physical damage to property but also for loss of enjoyment of the environment. Thus, interference with boating, swimming, or fishing rights as a result of a negligent discharge of oil is actionable.

The first statute requiring the federal government to clean up an oil spill likewise antedated the *Torrey Canyon*, although only by a year. In 1966 the Oil Pollution Act of 1924 was amended by the addition: (1) of a provision requiring the government to clean up a spill, and (2) of a provision making the vessel owner or operator liable for the cost if the spill was the result of gross negligence. In the absence of such a statute, the government might have been unable to recover the cost of cleaning up an oil spill causing, or threatening to cause, damage to private property or to the marine environment, as it might have been considered a "good Samaritan" without any legal obligation to act.

The 1924 Oil Pollution Act, as amended in 1966, was repealed when the Water Quality Improvement Act.[1] (W.Q.I.A.) became law on April 3, 1970. W.Q.I.A. likewise requires the government to clean up an oil spill if the vessel owner or operator fails to do so, but the owner or operator is then liable to the government for the clean-up expenses (including the cost of preventive measures), unless he can prove that the discharge was caused by one or more of four specified exceptions: (1) act of God; (2)act of war; (3) negligence of the federal government; and (4) act or omission of a third party. The limit of his liability is $100 times the vessel's gross tonnage, subject to a ceiling of $14 million, unless the government can prove that the discharge was caused by "willful negligence" or a willful act within the owner's privity or knowledge, in which case the liability is unlimited.

The owners and operators of approximately 80 percent of all of the world's oceangoing vessel tonnage, including perhaps 85 percent of its tanker tonnage, are insured against liabilities incurred in the operation of their vessels with the shipowners' protection and indemnity associations, or "clubs," forming the so-called "London Group." It may therefore be ap-

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1. Act of Apr. 3, 1970, Pub. L. No. 91-224, 84 Stat. 91.

propriate at the outset to examine the oil pollution liability coverage afforded by those associations.

Including the International Tanker Indemnity Association (I.T.I.A.), the Group is composed of 16 associations. Four are based in London and another four in other English cities. Three are Bermudian, two Norwegian, one Swedish, one Luxembourgian, and one Japanese. The members of I.T.I.A. mutually insure each other against oil pollution liabilities only, while the members of each of the other Associations mutually agree to indemnify each other, through the medium of their particular Association, against legal liabilities of numerous types, including liabilities for pollution damage caused by the discharge of oil and other substances.

In routine cases the liability is covered entirely by the particular Association with which the vessel concerned is entered. In more serious cases, however, pooling agreements among the Associations provide for a sharing of liabilities in excess of the amount of the "retention" of the Association with which the vessel is entered. To protect themselves against claims in the catastrophic category, the Associations, as a group, carry reinsurance with Lloyd's and other underwriters, including American, British, Continental European, Australian, and Japanese insurance companies.

All of the Associations in the London Group have been approved by the Federal Maritime Commission (FMC) as insurers under § 11(p) of W.Q.I.A., requiring that vessels using United States waters must show proof of financial responsibility to meet the liabilities imposed by the Act. The Associations have issued certificates of insurance on Form FMC-225 with respect to thousands of vessels owned or operated by their members, so that the government is fully protected against the expense of removing oil discharged from any such vessel, unless the owner or operator is able to prove that the discharge was caused solely by one or more of the four exceptions mentioned.

In the case of non-American oceangoing vessels, prior to the enactment of W.Q.I.A., there was no ceiling on the amount of insurance provided by the Associations with respect to any liability insured against, including liability for oil pollution. In this important respect the insurance provided by the Associations differed very materially from practically all other commercial insurance. This was possible primarily because the Associations were able to obtain reinsurance on the world market in very substantial amounts. Such reinsurance was made available because the reinsuring underwriters could rely on the facts: (1) that under maritime law civil liability for property damage was based on fault; and (2) that the amount of such liability could be limited where the fault was that of the vessel's master or crew and not that of the owner himself. Thus, under American law, the limit of liability was the damaged value of the vessel, plus the voyage earnings. Another reason why there was no ceiling on coverage was that the Associations operated on the "call" system. In the remote event of

a claim exceeding the amount of reinsurance, the members of the Associations could be called upon to contribute whatever additional amount was required to meet the claim.

However, largely as a result of W.Q.I.A., which (1) created an additional "limitation fund" of $100 per ton for United States Government oil pollution claims alone, (2) imposed strict liability instead of the traditional concept of fault liability, and (3) provided for direct action against insurers, and the concern that other governments might follow the example of the United States and adopt similar legislation, the Associations have been unable to obtain reinsurance for oil pollution liabilities in anything like the amounts available in respect of other types of liabilities. Therefore, commencing February 20, 1970, the Associations set a limit of $14.4 million (approximately £6 million at the then current rate) with respect to each vessel insured with one of the Associations for a single oil pollution incident. The limit applies to all oil pollution claims, whether under the general maritime law, W.Q.I.A., or any valid state oil pollution statute.

Suppose, for example, that a tanker of 30,000 gross tons carrying crude oil were to go aground two miles off the Gulf Coast and that most of its cargo were to escape and cause heavy pollution damage. If the vessel were insured with one of the Clubs in the London Group, the Club would have issued a certificate of insurance on Form FMC-225 in the amount of $3 million ($100 times 30,000 tons). If the United States Government claims for cleanup expenses (including the cost of preventive measures) were to equal or exceed that amount, the Club would be directly liable to the Government for $3 million, assuming that it could not prove (1) that the discharge was not caused by one or more of the four exceptions to liability—act of God, etc.—and (2) that it would have had a defense to an action brought against it by the insured owner or operator. Since the FMC-225 form of insurance certificate specifies no contractual defenses, it is difficult to conceive of any defense which would be available in an action by the owner or operator except willful misconduct, which would be a defense under any contract of insurance, whether or not specified therein.

The Association having paid $3 million under W.Q.I.A., the coverage remaining under the P & I certificate of entry (policy) would therefore be $11,440,000, *i.e.*, $14,400,000 less $3 million. Thus, if the owner or operator's liability for property damage claims under the general maritime law, any valid state statute or municipal ordinance, and the law of any foreign country concerned (*e.g.*, Canada or Mexico) did not total more than $11,440,000, he would be fully covered.

Certificates of insurance under W.Q.I.A. are issued by at least two P & I Associations which are not part of the London Group. These are the Oceanus Mutual Underwriting Association, Ltd. (Bermuda) and the American Steamship Owners Mutual Protection & Indemnity Association, Inc. (the American Club), both of which have been approved as insurers

by FMC. Like the London Group, Oceanus and the American Club also insure the other legal liabilities arising out of the discharge of oil from vessels insured with them.

The United States P & I Agency (Marine Office of America) insures against oil pollution liabilities arising under the general maritime law, but its contracts specifically exclude liability for removal costs under W.Q.I.A. However, it is a member of the Water Quality Insurance Syndicate (W.Q.I.S.), which was formed for the specific purpose of insuring against W.Q.I.A. liabilities, and the Agency therefore indirectly participates in W.Q.I.A. risks.

W.Q.I.S. is composed of 27 insurance companies, comprising virtually the entire American marine insurance market. Included in its policy limits of $100 per gross ton or $14 million, whichever is the lesser, is protection against such liability as may be imposed by any state, or any political subdivision thereof, for the cost of cleaning up an oil spill; provided, however, that such liability is not any broader than under W.Q.I.A. itself, and that the state or municipal law recognizes the same defenses as are allowed thereunder. W.Q.I.S. also covers reasonable costs and expenses incurred by an insured vessel owner or operator, with the consent of W.Q.I.S., in removing or arranging for the removal of oil.

In addition to the London Group, Oceanus, the American Club, and W.Q.I.S., it may be possible in certain instances to obtain special coverage against oil pollution liability directly from Lloyd's and other British underwriters and perhaps from certain American underwriters, although any of the 27 companies forming W.Q.I.S. would presumably decline to issue its own policy and would instead refer an applicant to the Syndicate.

At the present time, if any oil pollution liabilities could be validly imposed under state water quality legislation, they would be covered by the London Group, subject to the overall ceiling of $14.4 million previously mentioned. Such liabilities would likewise be covered by Oceanus and by the American Club, subject to whatever policy limits might have been stipulated.

As far as is known, no other insurance is available to cover liabilities such as are imposed under the stringent legislation of states such as Florida, which imposes absolute and unlimited liability for oil pollution. The constitutionality of the Florida statute is presently being considered by the courts. If the constitutionality is upheld, it will be impossible to satisfy the statutory requirements by means of insurance. This will mean that in the case of many American owners and operators and all, or virtually all, of the foreign owners and operators, none of whom maintain assets of any magnitude within the United States, proof of financial responsibility will have to be provided in the form of guarantees of oil companies or other charterers who can satisfy the financial responsibility requirements of the state law and regulations.

The Associations in the London Group and Oceanus cover not only legal liabilities for oil pollution but also the contractual liabilities assumed by those members who have become parties to the TOVALOP Agreement and have thereby undertaken certain contractual obligations to clean up oil spills. In the case of some of the major oil companies that are self-insured against most P & I risks, the liabilities which they assume as tanker owners under the TOVALOP Agreement are covered by I.T.I.A., which, as has been indicated previously, also covers legal liability for oil pollution.

The 1969 International Convention on Civil Liability for Oil Pollution Damage has not as yet come into force. The Senate Foreign Relations Committee has recommended ratification when and if it is supplemented by the proposed Convention which will set up an international fund to compensate oil pollution victims to the extent that they would not be compensated under the Civil Liability Convention. If the Civil Liability Convention comes into force, the Associations in the London Group will insure the liabilities which the Convention would impose. Such liabilities include liability for government cleanup costs similar to that imposed under W.Q.I.A., but the Convention would also regulate liabilities to states, municipalities, and private interests for damages resulting from the discharge of oil from vessels.

The proposed "Fund" Convention will not take definite shape until December 1971, when it will be considered at a diplomatic conference to be held in Brussels. It is therefore impossible to predict the precise effect it will have, if it eventually comes into force, on the insurance which would be provided under the Civil Liability Convention. It seems safe to say, however, while the Fund Convention may provide that a vessel's protection and indemnity or other liability insurers may recoup from the International Fund part of the amount paid to satisfy the owner's liabilities under the Civil Liability Convention, it is scarcely possible that the Fund Convention will increase the insurers' liabilities in any way.

On November 2, 1971, the Senate passed a bill, S. 2770,[2] which if passed by the House and signed by the President would amend W.Q.I.A. Among other things, the Bill would empower the Environmental Quality Administrator to list other substances, besides oil, which he considers "hazardous" and would impose the same liabilities with respect to their removal as are now imposed in the case of oil. It is understood that the Associations in the London Group and W.Q.I.S. would be willing to insure against liability for the cost of cleaning up such hazardous polluting substances, on the same terms and conditions as now apply in the case of oil, and presumably the American Club and Oceanus would do the same. However, S. 2770 would also empower the Administrator to list those hazardous polluting substances which he finds cannot be removed. It would then

2. S. 2770, 92d Cong., 1st Sess. (1971).

empower him to set penalties of not exceeding $5,000 per barrel for the discharge of such substances, subject to a minimum of $50,000, unless the discharge has been caused by one or more of the four recognized exceptions.

It is understood that W.Q.I.S. will not insure penalties of any size. While the Associations in the London Group would quite probably have been willing to insure against liability for penalties if the maximum had been set at $50,000, the indications are that they would not be willing to insure against liability for the first $50,000 of a penalty which could total many, many times that sum and could conceivably exceed $1 billion. While the Bill would require insurance against penalties only in the amount of $50,000, it is unlikely that even that amount of coverage would be obtainable.

Just recently, the Senate ratified the 1969 Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention) although it will not come into force until a specified number of countries have ratified it. When it is ratified, a government will have a clear legal right to destroy a vessel, if necessary, to avert threatened oil pollution. The Convention thus presents the question whether a loss so occasioned would fall under the marine risk hull insurance on the vessel or under the war risk coverage.

Even without the express authorization which they would have had if the Intervention Convention had been in force, two governments have already destroyed vessels in efforts to avoid or mitigate oil pollution damage to their coasts. The first such instance was the destruction of the *Torrey Canyon* by the British Government in 1967, and the second was the sinking of the *Wafra* by the South African Government early in 1971. It is understood that in each case the loss was paid by the vessel's marine risk underwriters. However, the problem was simplified by the fact that in each case the underwriters agreed that the vessel was a constructive total loss as a result of the grounding, and that the proximate cause of the loss was the marine peril that brought about the grounding rather than the subsequent bombing of the vessel.

Suppose, however, that a vessel which was plainly not a constructive total loss was nevertheless leaking oil in such quantities as to cause a serious threat to a coast line and that she was destroyed by a government in order to prevent or minimize pollution damage. Such an act could not be described as a hostile act and would therefore not fall under those provisions of a war risk hull policy which insure against losses caused by war or warlike acts. If, however, the bombing took place after a seizure of the vessel by the government, it might be argued that it was the result of the seizure and that the loss should therefore fall under the war risks policy provisions covering captures and seizures and losses caused thereby.

The British Parliament has already enacted domestic legislation em-

bodying the substance of the Intervention Convention, and other governments may soon follow its example. Furthermore, as has been noted, two vessels have already been destroyed in efforts to avoid oil pollution damage. The question of war risk versus marine risk should therefore be clarified—perhaps by express policy provisions—without waiting until the Intervention Convention comes into force, as this could conceivably take years.

The vessel owners and operators who can function without protection and indemnity or other liability insurance are few indeed. While all thinking persons want to minimize pollution by oil and hazardous substances, the imposition of liabilities and penalties which cannot be insured against will not end pollution by the few who can operate without insurance; it will simply end water transportation of needed products by the many who must have insurance to remain in business. Before imposing uninsurable liabilities and penalties, therefore, our legislators should first examine the question of whether the product involved is one which the country can do without.

VEHICLES FOR REIMBURSEMENT OF OIL POLLUTION DAMAGE

By Gordon L. Becker*

In opening, may I say that the opinions and remarks expressed by me should not be attributed to any oil company, large or small, and especially to my employer, Standard Oil Company of New Jersey. I am supposed to talk about TOVALOP and CRISTAL and briefly about the Civil Liability Convention and the Fund Convention, insofar as TOVALOP and CRISTAL relate to them. Personally, I think that these words are rather wonderful, despite the unjust criticism by my friend Nick Healy. What does TOVALOP mean? TOVALOP means Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution. CRISTAL means Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution. Those of you who have written the first letters of these words will notice that in formulating CRISTAL, the drafters left out the OP for "oil pollution." But we were looking for a word that sounded beautiful, and we had to get something that would clear the International Trademark people, so we came up with these. What do these agreements have in common? The outstanding thing to remember is that both are agreements or contracts. Let's start with TOVALOP.

TOVALOP became effective in October 1969. TOVALOP is an agreement or contract among tanker owners who felt that traditional maritime law did not provide adequate means of compensating governments which cleaned up oil spills. Incidentally, the parties to TOVALOP now include the owners of 90 percent of the free world's tanker tonnage. Let's look at TOVALOP itself. Under the provisions of TOVALOP, each owner agrees that when persistent oil is negligently discharged from any tanker owned by him, he will be responsible for its removal. When this oil damages or threatens damage to coastlines, the owner will do one of two things: He will clean up the mess or he will reimburse a government for cleanup costs that it incurs. The government, initially, was meant to be a national government. I mentioned damage to coastlines. "Damage" and "coastlines" are both defined in TOVALOP. Damage under TOVALOP is somewhat narrowly limited to physical contamination to coastlines. The somewhat difficult expression "coastlines" in TOVALOP means land, including structural improvements of the land adjoining the sea, inland waterways, lakes, bays, harbors, and estuaries.

One very interesting thing about TOVALOP is that although liability for cleanup is based upon negligence or fault of the tanker owner, TOVALOP reverses the burden of proof. Thus, in the case of a claim under

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TOVALOP, the owner has the burden of proving that his vessel was free from negligence. In practice, I suggest to you that this comes pretty close to imposing strict liability on the parties to TOVALOP, not too different from the Civil Liability Convention. Under TOVALOP, a tanker owner federation is established which administers the agreement and which, among other things, requires the parties to establish financial capabilities to meet their obligations. As Nick Healy pointed out, this is done through a so-called P & I, Protection and Indemnity Insurance, with the various underwriters that he has mentioned. The TOVALOP Tanker Owners Federation prescribes rules and directives interpreting the TOVALOP agreement.

For lawyers, the agreement between owners to pay for cleanup of negligent spills is perhaps one of the more intriguing aspects of the agreement. Yet there is another provision in TOVALOP which was really inserted by the businessmen rather than the lawyers. Although I hate to admit it, here the businessmen showed that they are perhaps miles ahead of the legal profession. Article 5, clause 5, of TOVALOP says that the federation, the body which administers TOVALOP, is to encourage steps to be taken whereby an owner will clean up regardless of fault or any degree of fault. The owner will be reimbursed. This, in my opinion, is perhaps the most important provision of TOVALOP. It is a rather hard one to understand, a hard one to explain, and one which has caused difficulty in practice. But the point of this provision is that the sponsors and parties to TOVALOP want to encourage prompt action to clean up any spill and prevent its spread. They want to encourage prompt action by the shipowner and to avoid lengthy lawsuits, arbitration, hairsplitting, and the legal niceties as to whether a tanker owner was negligent. If you do not remember anything else about TOVALOP, please remember that this one provision started with the assurance that the tanker owner is going to get reimbursed for his costs for cleanup.

In practice, many tanker owners include provisions in their charter agreement with parties that the tanker owner appoints his charterer to act on his behalf, subject to numerous limitations, for purposes of cleanup because charterers of tankers, particularly oil companies, may be in a better position to actually handle the cleanup than a foreign tanker owner with a ship far away from home territory. Maximum liability under TOVALOP of an owner to a national government, in the case of a negligent spill, is $100 per gross ton or $10 million, whichever is less. This same limitation applies to voluntary cleanup by the owner; that is the case where the owner has cleaned up pursuant to the TOVALOP provision I have just mentioned.

TOVALOP has provisions for the filing of claims against an owner and provisions for the arbitration of disputes. As a footnote to this clause, an arbitration may be held before the International Chamber of Commerce. We were told by some people when TOVALOP was drafted that this was an utterly impracticable provision, and that national governments, or govern-

ments generally, never arbitrate claims against private parties. Investigation proved that this was not so, that a number of governments have utilized the International Chamber of Commerce.

TOVALOP will remain in effect until October 1974, and perhaps beyond that. It is interesting to compare at least briefly the provisions of TOVALOP with the International Convention on Civil Liability for oil pollution damage, which I am going to refer to as CLC. TOVALOP has received its share of criticism from sources who think that the oil industry or tanker industry never does enough for anybody. Let me point out several interesting contrasts between TOVALOP and CLC. First, under the Civil Liability Convention and under the proposed Fund Convention, a tanker in "ballast" which spills oil from its bumpers is not covered. Under TOVALOP a tanker is a tanker whether or not it is carrying oil. Any spill from that tanker comes within the provisions of TOVALOP. The Convention, in some ways, is far more extensive than TOVALOP. For example, under the Convention claimants may be governments, third parties, or anyone who sustains pollution damage, whereas only governments are covered under TOVALOP. The definition of pollution damage in the Convention is very broad, so broad that it goes beyond mere physical damage and perhaps covers such items as loss of a fisherman's profits. The basis of liability in the Convention is strict. There are perhaps four narrow defenses. The Convention limits of liability are $134 per Convention fund, which I won't try to define here, with a maximum of $14 million, compared to the TOVALOP $100 per gross ton or $10 million. The Convention has at least one hole in it big enough to drive a tanker through. The Convention applies only to tanker owners, while TOVALOP applies both to tanker owners and bare boat charterers. In other words, if there is a bare boat charterer who is operating a vessel which is under TOVALOP, all of the provisions of TOVALOP will apply. Under the Civil Liability Convention there is a strong possibility that if a vessel is under a boat charter, spills oil, and there are no defenses, a claimant or claimants may not only sue the owner under the Civil Liability Convention provisions, but may also make claims separately against the boat charterer. Under provisions of maritime law, outside the Convention, this seems like a rather amazing gap. I understand that the point was raised to the group which formulated the Convention, but for some reason they refused to take into account the situation of the bare boat charterer. It seems to me that when a ship spills, the Convention should cover all liabilities resulting from the spill. Whether the vessel is under a bare boat charter or whether it is being operated by her owner should not affect the results. Under TOVALOP the limits of liability are absolute. It doesn't matter whether there is actual fault or privity on the part of the owner. Under the Convention if there is actual fault or privity, that is, if the vice president of the tanker company knows that the master is an old drunk and has been one for years, the Convention limits that I

mentioned do not apply. The Convention has provisions requiring financial responsibility to be established to show the ability of owners to meet obligations.

A very logical question you may ask is this: Does TOVALOP really have any value or significance in the United States? Some people might say that under W.Q.I.A. (Water Quality Improvement Act of 1970), a tanker owner has a liability of $100 per gross ton up to $14 million. In the case of an oil spill, that liability runs to the national government. If the liability is strict liability or a variety of strict liabilities, why in the world would the government of the United States ever make a claim against an owner under TOVALOP when they have W.Q.I.A., which has higher limits and a stricter basis of liability? I think personally that TOVALOP still has a considerable value in the United States. If I may cite just one case to you, and perhaps I will get some argument from you or my colleagues on this one, under W.Q.I.A. if there is a collision and if the spilling vessel is completely free from fault, and the other vessel was completely negligent, the spilling vessel has no liability whatsoever. All liability is on the colliding vessel. This may be cold comfort for those poor beach owners when that oil starts coming up on their shores. They are not interested in the legal aspects, but in getting someone on the ball fast to get the cleanup started. I suggest to you that the so-called Voluntary Cleaning Provisions that I've mentioned in TOVALOP may still be of some importance in this country. I can think of other examples, but I will leave it at that for now.

TOVALOP in practice has been very far from perfect, but it does have to its credit a fairly large string of cases where payment has been made on the kind of spills covered by the agreement. I might mention, also, several instances where underwriters have paid out tremendous amounts of money. One is the *Arrow* case involving a Greek tanker which spilled into Canadian waters while under charter to Imperial Oil Company. There was a substantial amount of money spent on cleanup, a large part of which was reimbursed through the underwriters. Another more recent instance is the *Oregon Standard* case involving Standard Oil Company of California.

I will talk briefly about CRISTAL. Unlike TOVALOP, which is an agreement among tanker owners, CRISTAL is an agreement among oil companies. CRISTAL came into effect on April 1, 1971, and is a contract between its oil company parties and the oil companies' Institute for Marine Pollution Compensation Limited. Under the contract, the institute agrees to supplement tanker liability for oil pollution damage pending ratification of the Civil Liability Convention and pending the enactment of a Fund Convention. In effect, CRISTAL creates a fund by means of contributions made by oil company parties based upon their receipts at terminals, refineries, and the like, of both crude oil and fuel oil. So in a sense, CRISTAL is somewhat parallel to a fund convention. I mention again that it is an interim measure designed to be a stopgap pending the drafting, enactment,

and ratification of a Fund Convention and Civil Liability Convention. The parties to CRISTAL strongly support suitable conventions.

CRISTAL's definitions, unlike TOVALOP's definitions, generally mirror those found in the Civil Liability Convention. The definition of "pollution damage," for example, in CRISTAL is much broader than that found in TOVALOP and is quite close to the definition found in the Civil Liability Convention.

What is the undertaking of the Institute with respect to paying or compensating for pollution damage? The Institute agrees that it will compensate persons for pollution damage when (1) the oil spilled from the tanker was owned by a party to CRISTAL; (2) when the tanker itself was enrolled in TOVALOP; and (3) if the Civil Liability Convention had been in effect, the tanker owner would have been liable under that Convention. CRISTAL goes on to say that after the Civil Liability Convention has come into effect, condition 3 will, of course, read that one of the conditions for payment is that the owner was in fact liable for the spill under the Civil Liability Convention.

The limits of liability under CRISTAL are $30 million less the aggregate of TOVALOP liabilities and expenditures and shipowner liability under existing law or convention, including such laws as WAQUA or other United States statutes and third party liability. Perhaps the spill was caused by a colliding vessel. Any payment from such vessel is substracted from the $30 million. This provision about subtraction is one of the most difficult to read and interpret. The point of the subtraction provision, however, is pretty clear. It is that the parties to CRISTAL, while they are quite willing to supplement tanker owner liability for spills, are not going to take over the liabilities of anyone who has any responsibility for the spill. As the agreement itself states, CRISTAL, the Institute, and the oil company parties expect that one who sustains pollution damage shall use due diligence to affect recovery from any source from which recovery is plainly available, and if that recovery is inadequate, CRISTAL comes into effect.

One of the important provisions of CRISTAL is that the Institute has the authority to interpret and administer the agreement and make rules and directives from time to time designed to make the agreement more effective. There are miscellaneous provisions about time for filing claims and about how the funds are to be raised by the Institute. I might mention to you that statutes in some jurisdictions have in effect ousted CRISTAL from any application whatsoever. Canada has a statute which proposes not only to impose liability on shipowners for spills, but to create a separate oil company fund raised by the cargo interests which would supplement shipowner liability. There appears to be no limit on this supplement. Since CRISTAL subtracts from the $30 million amounts available from other sources, CRISTAL would probably not apply. The Canadian legislation, although passed, requires an order in Council to be issued before it is

effective. Such an order has not been issued. Here in our own country we have heard about the State of Florida, which purports to impose absolute liability on shipowners for pollution damage. There is a strong probability that Florida has ousted the application of CRISTAL to many spills in Florida because if a shipowner had absolute and unlimited liability, CRISTAL is entitled to look at the subtractions and subtract from the $30 million the liabilities of anyone else who owes money because of the pollution damage. This is a most unfortunate result for many reasons.

CRISTAL has recently been amended. One such amendment changes the definition of "oil company" to include chemical companies or power companies which consume oil. More important than that, CRISTAL has been amended to enlarge the definition of "ownership of oil." Thus, for example, an oil company party who ships oil FOB to a nonparty may elect to have that shipment treated as if it were owned by the oil company party during transit. Thus, if there is a spill, and if the other conditions are met, CRISTAL coverage would be given. There is a further amendment that oil shall be deemed owned by a party to CRISTAL although at the time of the spillage the actual ownership was in a nonparty who was shipping it to a member party. Similarly, TOVALOP has been amended, and the definition of "oil" has been made a little more specific than it was before. Also, the definition of "government" has been broadened so that "government" may include not only national governments but a local government for whom a national government agrees to act.

How do we compare CRISTAL and the Fund Convention? The basis of liability may be somewhat different. There are pressures among those meeting in the latter part of 1971 to take away from the Fund Convention some of the defenses that would be available to the shipowner under the Civil Liability Convention. This does not make any sense to me, and I cannot understand why it should be. There is pressure to take away, for example, such defenses as an act of war and, also I believe, an act of God. At any rate, some of the defenses available to shipowners under CLC would not be available to the International Fund. There is a strong effort on the part of the delegates to use the Fund Convention to roll back shipowner liability below the CLC limits. Those who sponsor this approach cite one of the resolutions under which the Fund Convention was drafted. There are tremendous pressures, for example, to have the fund become a reinsurer of a certain part of the shipowner's liability under the Civil Liability Convention. This in effect means that the cargo interest would underwrite directly some of the shipowner's liability under CLC. There are pressures also among some of the delegates to the Fund Convention Conference to have the Fund Convention apply when it has been established that there was a spill from a vessel, but the vessel was unidentified. One can imagine that such a provision, if written into the Convention, could subject the Convention to large calls from one who saw a potful of money

raised by a tax upon receipts of oil, and who sighted that oil which he allegedly saw on a beach come from a tanker which allegedly passed by in the night, but which, unfortunately, cannot be named and identified. The limits of liability in the Fund Convention are still uncertain. At the moment, the provision is for a maximum of $30 million, less certain subtractions, with the possibility that the Council administering the fund may ultimately raise this $30 million limit if necessary.

I firmly believe that the solution to pollution liability problems is through international and uniform measures. I certainly recognize that perhaps on an interim basis other measures must be taken, and I can understand the pressure behind legislators to pass legislation like WAQUA. However, I have the greatest difficulty in seeing how they can seriously consider legislation such as S. 2770. At any rate, shipping is an international business, the movement of oil is an international business, and I think there should be viable and uniform international measures promulgated, preferably by a convention, to handle the matter of pollution liability. I think such measures should amend the existing provisions of CLC, which has the holes in it that I have mentioned. It is going to take a long time to get any uniform international solution, despite the support given by our own government for the Civil Liability Convention, which has not yet been ratified. Since I believe that it is going to take years before international solutions by convention and by law are found, I think that TOVALOP and CRISTAL are going to remain a vital part of the plans and means to reimburse victims of pollution damage.

THE REFUSE ACT AND PROTECTION OF WATER QUALITY

By Shiro Kashiwa*

In the country today there is great and growing concern directed toward maintaining and improving the quality of one of the most basic of all our resources—the free-flowing waters of the United States.

In response to this concern of our citizens, the Congress has enacted into law two important and comprehensive pieces of legislation—the Water Quality Improvement Acts of 1965 and 1970. Paralleling this important legislative response, however, an equally important development has been brought to fruition, the use of a much more venerable statute, the Refuse Act of 1899, as a broad gauged tool in our efforts to prevent the pollution of navigable waters of the United States.

It is, of course, not unusual for an old statute to be adapted to modern needs. This is especially true where the contemporary use of the statute is one which the courts may reasonably believe was within the intent, if not the precisely focused contemplation, of those who enacted the statute. Thus, for example, in the recent case of *Jones v. Alfred H. Mayer & Co.*,[1] the Supreme Court held that a statute enacted in 1866 and providing simply that all Negroes had the same right to hold and convey property as did all white persons was, in effect, an open housing statute which could be employed by prospective home buyers today. Judicial development of the provisions of the Refuse Act has been less startling, but the results in the area of water quality control are nonetheless of great importance.

I should begin by observing, as many of you no doubt know, that the Refuse Act is sweeping in scope. It makes unlawful any discharge of "any refuse matter of any kind whatever" into any navigable water of the United States. As the Supreme Court has said of these words: "More comprehensive language would have been difficult to select."[2] A few examples will illustrate the Act's scope. It is no defense to a charge of violating the statute that the material discharged has commercial value;[3] it is no defense that the discharge does not hinder or impede navigation;[4] and it is indeed a violation of the statute merely to change the physical

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1. 392 U.S. 409 (1968).
2. United States v. Standard Oil Co., 384 U.S. 224, 229 (1966).
3. *Id.* at 228. (100-Octane gasoline). *See also* United States v. Ballard Oil Co., 195 F.2d 369 (2d Cir. 1952) (fuel oil).
4. United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960).

state of a navigable waterway by discharging heated water from a power plant into it.[5]

Additional materials which have been the subject of actions under the Refuse Act include: tree pulp and bark, grape residue, lime slurry, mercury, hexavalent chromium, dye, sugar cane residue, sulfite liquors, various types of oil, and many others. The sole exception to the absolute prohibition stated in the statute is for domestic liquid sewage.[6] The statute does, however, provide that the Corps of Engineers may, under certain circumstances, issue a permit allowing certain discharges to be made, a point on which I shall have more to say in a moment.

The penalty provision of the Act[7] provides that each violation of the statute is a misdemeanor, punishable by a fine of up to $2,500 for each violation and, if the violator is an individual, up to one year in prison. These are, of course, powerful sanctions. Yet, they may be imposed only after the fact; they do not allow the Government to directly abate pollution discharges. In the landmark case of *United States v. Republic Steel Corp.*,[8] the Government sought to use the Refuse Act as the statutory basis for an injunction to abate industrial discharges which were continuous in nature. The Supreme Court held that the statute impliedly gave to the Department of Justice the power to obtain an injunction to protect any interest which the Act was designed to serve. Since one of the purposes of the Act was to protect navigable waters against befoulment, it followed that Congress intended the Government to have the power to prevent such discharges, as well as to punish them after they occurred. "Otherwise," said the Court, "we impute to Congress a futility inconsistent with the great design of this legislation."[9]

Since I became Assistant Attorney General in 1969, the Land and Natural Resources Division has employed this authority to obtain numerous injunctive decrees abating the discharge of noxious wastes into our waterways. In considering when injunctions will be sought, I have laid particular emphasis upon abating the discharges of effluent containing toxic substances. More than 50 such suits are presently pending in federal district courts throughout the United States. Many others have been terminated by consent decrees imposing rigorous conditions designed to hold such discharges to an absolute minimum. We intend to continue using both the injunctive and criminal remedies available to the Government under the Act in the ongoing federal litigative program to protect the quality of our navigable waters.

The proper construction and application of the criminal sanctions

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5. United States v. Florida Power & Light Co., 311 F. Supp. 1391 (S.D. Fla. 1970).
6. United States v. Republic Steel Corp., 362 U.S. 482 (1960).
7. 33 U.S.C. § 411 (1970).
8. 362 U.S. 482 (1960).
9. *Id.* at 492.

contained in the Refuse Act has long been well settled. However, judicial interpretation of the Refuse Act's implied injunctive remedy has been sparse because, as I have indicated, use of the remedy of injunction was infrequent until I became Assistant Attorney General in 1969 and because, since that time, actions brought by the Land and Natural Resources Division seeking injunctions have been terminated by consent decrees in which the defendant agreed to abate its pollution in a manner acceptable to the Government and consistent with the public interest.

This lack of authoritative judicial interpretation regarding the scope of injunctive relief available to the Government under the Refuse Act has now been ended by the landmark decision of *United States v. Armco Steel Corp.*[10] In *Armco*, the court, in a thorough and comprehensive opinion, considered many aspects of the powers and duties of a federal equity court in a case wherein the Government seeks an injunction, pursuant to the Refuse Act, to abate the discharge of toxic industrial discharges into navigable waterways. The industrial discharge consisted of large quantities of cyanide, phenolics, sulfides and ammonia. Based upon the Government's proof, the court found that the quantity of cyanide being discharged by the defendant in the operation of the coke plant involved in the litigation was sufficient to constitute an "actual and potential" "deadly" threat "to the existence and survival of organic and marine life in the [Houston Ship] Channel"[11] and, further, that the current in the Channel, abetted by rainfall, carried the toxic effluent into the larger bodies of water into which the Channel flows.

Based upon these findings of fact, the court held:

1. That a federal district court has equitable jurisdiction to enjoin a continuing violation of the Refuse Act;[12]

2. That the potential availability of criminal prosecution does not constitute an adequate remedy at law sufficient to bar the government from obtaining injunctive relief;

3. That waste elements such as cyanide and phenols are within the prohibition of the statute regardless of the fact that they are discharged in liquid effluent;

4. That the statute should be given a broad, liberal reading in furtherance of its salutary purpose, pursuant to the instructions in this regard found in *United States v. Republic Steel Corp.*[13] and *United States v. Standard Oil Co.*;[14]

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10. 333 F. Supp. 1073 (S.D. Tex. 1971).
11. *Id.* at 1075.
12. *Id.* at 1079. *See* United States v. Republic Steel Corp., 362 U.S. 482 (1960).
13. 362 U.S. 482 (1960).
14. 384 U.S. 224 (1966).

5. That the provisions of the Refuse Act are not modified or affected in any way by any provisions of the Federal Water Pollution Control Act;[15]

6. That the defendant's operating facilities were antiquated and inadequate to control the toxic elements contained in its discharge;

7. That in such circumstances, a federal district court, exercising its equity powers, should—and would—enjoin immediately all further discharge, by the defendant, of effluent containing toxic elements;

8. That a federal court sitting in equity has power to direct the manner in which any future discharges of effluent from defendant's plant must be made;

9. That, on the facts presented by this case, the court would, under the theory of pendent jurisdiction, condition any future discharge of toxic elements upon the defendant's satisfying various conditions for disposal set out by the federal government and the State of Texas.

This decision thus upholds the position of the Department of Justice in regard to virtually all aspects of the availability of injunctive remedies under the Refuse Act. It is a precedent we shall use extensively in the more than 50 actions for injunctive relief under the Refuse Act now pending on our dockets, and will, we are confident, be an important milestone in the developing case law sustaining the government's power to use the Refuse Act as a creative tool for the protection of our aquatic environment.

Obviously, however, all discharges of industrial by-product waste into navigable waterways cannot be terminated instantly, whether by injunction or administrative order, without damaging a large portion of the industrial production of the United States. The problem is one of reducing discharges of industrial effluent as much as possible, while not inflicting unacceptably serious injury upon the industrial capacity of the country and its ability to continue orderly production.

Litigation can accomplish this case-by-case and plant-by-plant. However, a more broadly based method of proceeding is available. As I mentioned earlier the Act gives to the Secretary of the Army, acting through the Corps of Engineers, the authority to permit such discharges into navigable waters as is determined to be consistent with the public interest. Pursuant to similar statutory authority, the Corps has for many years issued general regulations governing the discharge or deposit of refuse matter in particularized areas, such as New York Harbor. The President, by Executive Order, has directed that a comprehensive, nationwide system

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15. 333 F. Supp. 1073, 1076-77 (S.D. Tex. 1971); *accord*, 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).

of regulation be undertaken under the authority of the Refuse Act. The primary emphasis of the regulations will be on water quality maintenance. The system of regulation will involve the joint efforts of the Corps and the Environmental Protection Agency, though final authority to accept or reject an application to discharge will remain with the Corps and, ultimately, the Secretary of the Army. Detailed administrative regulations governing the operation of this new system of regulation have now been promulgated,[16] as many of you doubtlessly are aware.

The interrelationship between the regulatory scheme now established and the litigative activity of the Department of Justice will, of course, be complementary. Thus, in the event a firm or plant fails to submit an application for a permit, we will move promptly to terminate any further discharge of refuse matter by that firm or plant.

Further, the fact that a firm has an application for a permit pending with the Corps will not preclude the Department from seeking either injunctive or criminal penalties by litigation, if we determine the nature of the discharge is such as to warrant immediate action. The pendency of an application for a permit has no effect upon the Department's power to enforce the statute by litigation.[17] Of course, as the Court of Appeals for the Fifth Circuit recently held in the important case of *Zabel v. Tabb*,[18] there is no duty on the Corps to issue a permit to anyone and, as the court also held, a permit may be denied solely on the basis of ecological considerations. Further, as another court recently held, the fact that a permit application has been filed is legally irrelevant insofar as judicial power to enforce the Refuse Act is concerned.[19]

We will, however, carefully coordinate our program of litigation with the system of administrative regulation now being administered by the Corps and the Environmental Protection Agency to attempt to avoid harsh or inequitable results while, at the same time, protecting our navigable waters from highly toxic discharges.

As the newly inaugurated, nationwide system of administrative regulation under the Act unfolds, many knotty legal questions will be presented for resolution. For example, whether, and to what extent, an applicant who is denied a permit may challenge the correctness of that denial in the federal courts; whether any third party may invoke the jurisdiction of the courts to challenge the approval of an application upon the ground that the terms of the permit conflict with other statutes, for example, the National Environmental Policy Act (a problem similar to this was recently presented to the United States Court of Appeals for

16. 36 Fed. Reg. 6564 (1971), *amended*, 36 Fed. Reg. 13835 (1971).
17. Poulos v. New Hampshire, 345 U.S. 395 (1953).
18. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).
19. United States v. Pennsylvania Indus. Chem. Corp., 329 F. Supp. 1118 (W.D. Pa. 1971).

the District of Columbia in the *Calvert Cliffs* case).[20]

I will not attempt to give definitive answers to problems such as these today, for they present complex legal issues which can only be resolved through case-by-case adjudication. There is one related point, however, upon which the law is clear: The Refuse Act cannot be used as a statutory peg for a so-called "qui tam" action by an individual citizen. These ancient actions, which Judge Learned Hand once described as "odious" and "happily, nearly extinct" from all modern law,[21] are relics from early law which allow an individual citizen to bring suit *qui tam pro domino regi quam pro si ipso in hac parte sequitur*, or "He who sues on behalf of the King as well as for himself." That is, a *qui tam* action is one brought by an individual in the name of, and upon the authority vested in, the government to recover a monetary forfeiture if so provided by the statute in question.

It has been uniformly held that while the Refuse Act does provide for possible payment of one-half of the criminal fine assessed against a defendant to be paid to an individual who furnished to the government valuable information which led to the defendant's conviction, the statute does not authorize any individual to bring the action himself, as a *qui tam* plaintiff.[22] The most important reason given by the courts in explaining why a *qui tam* action will not lie under the Refuse Act is that such actions, historically viewed with disfavor by all courts, can be brought only when the words of the statute clearly and specifically authorize them, and the Refuse Act, by its terms, does not authorize such an action. On the contrary, by directing the Department of Justice to prosecute violators of the act, the statute clearly negates any intent to allow an individual to bring an action *qui tam*. Further, the Refuse Act is not a civil forfeiture statute; it is a criminal statute imposing a fine, variable in amount, for violation of its provisions. It is fundamental law, the courts have held, that no criminal fine can be imposed by resort to a civil action. Serious constitutional problems would be raised by any attempt to secure a criminal fine through civil proceedings. Equally important is the rule that a statute containing criminal sanctions may only be invoked by the government and not by a private individual. Thus, as Judge Seals of the District Court for the Southern District of Texas summarized the matter: "The informer's rights are entirely dependent upon and inseparable from the criminal proceedings brought by the Department of Justice, the only party au-

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20. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

21. United States *ex rel.* Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942), *aff'd*, 320 U.S. 711 (1943).

22. Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wis. 1971); Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Paper, 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); Matthews v. Florida-Vanderbilt Dev. Corp., 326 F. Supp. 289 (S.D. Fla. 1971); Durning v. ITT Rayonier, Inc., 325 F. Supp. 446 (W. D. Wash. 1970).

thorized to institute such suit. Clearly the *qui tam* civil action is not authorized."[23]

While it is clear, therefore, that the criminal fine provisions of the Refuse Act may not be used as the basis for a *qui tam* action, many other aspects of the possible standing of private litigants to seek judicial interpretation of the Refuse Act, and the permit program which has been instituted thereunder, are still unresolved. Some of the problems relating to the question of whether a third party can challenge the issuance of a permit may be resolved during the coming term of the Supreme Court when the Court rules upon the important "standing" case of *Sierra Club v. Morton*[24] (the "Mineral King" case). The Sierra Club litigation does not directly involve the Refuse Act. However, the Court may set forth some rules in regard to "standing" which will be applicable to various types of action instituted under the Refuse Act. We will not know the answer to questions such as these, of course, until the Court rules.

Regardless of how particular cases are eventually decided, I can confidently tell you that through the joint efforts of the administrative regulation program of the Corps and the Environmental Protection Agency and the litigation program of the Department of Justice, the Refuse Act of 1899 will continue to be in the future, as it is today, a powerful tool with which to protect our nation's most precious resource—the free-flowing waters of the United States.

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23. Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Paper, Inc., 324 F. Supp. 302, 306 (S.D. Tex. 1971).

24. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted,* Sierra Club v. Morton, 401 U.S. 907 (1971).

THE REFUSE ACT PERMIT PROGRAM: THE CORPS OF ENGINEERS' ROLE IN ENFORCEMENT AND ADMINISTRATION

By Cecil E. Reinke*

I. Introduction

The Refuse Act Permit Program is the federal government's answer to the widespread public demand for action to control the pollution of our nation's waters. Establishment of the program "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries, and the placing of such matters upon their banks" was directed by Presidential Executive Order 11574 on December 23, 1970.[1] Regulations and procedures for the Refuse Act Permit Program were developed by representatives of the Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce, Interior, and Justice, the Office of the Secretary of the Army, and the Corps of Engineers. During the developmental process, proposed regulations were published so that public comment could be received and considered. The finalized and presently controlling regulation entitled "Permits for discharges of deposits in navigable waters" was published in the Federal Register on April 7, 1971.

II. Permit Consideration

Each of the federal departments and agencies mentioned as having participated in development of the permit program, the state or interstate water pollution control agency having jurisdiction over the navigable waters at the point where the actual or proposed discharge originates, and all interested parties within the public at large, will have a voice in administration of the program. The nature and extent of participation by each entity will be consistent with: (1) the intent of the Congress as expressed in existing federal legislation; (2) direction of the President of the United States as contained in Executive Order 11574; and (3) recognition of the primary area of interest, responsibility, and expertise of the various federal departments or agencies, as expressed in the regulation implementing the Refuse Act Program.

III. The Refuse Act

The Refuse Act Permit Program has its genesis in § 13 of the River

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1. Exec. Order No. 11574, 3 C.F.R. 188 (Supp. 1971).

and Harbor Act of March 3, 1899. This seventy-plus-year-old law, commonly referred to as the "Refuse Act," says essentially that it is unlawful to discharge or deposit refuse matter of any kind whatever, except "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 thereof, without a permit from the Secretary of the Army. Section 13 is one of a triad of authorities that have been used by the Department of the Army over the years for the protection of navigable waters. Under § 10 of the same River and Harbor Act, permits have been required and under proper conditions issued for erection of structures or the undertaking of work in navigable waters. Under § 9 of this Act, permits in the form of approval by the Chief of Engineers of plans and specifications have been required, following necessary state or congressional authorization, for construction of bridges and dams across navigable waterways.

Section 13 was not used, prior to the decision of the President in December 1970, to effect a systematic approach to pollution control. This law was used for years to protect navigation—to prosecute offenders who put solid matter into the water, who released industrial discharges which resulted in shoaling, or who discharged oil from shore facilities into the navigable waterways. In recent years, it has been used to abate pollution of our waterways, and to protect fish and wildlife. Under the present program, it will be used for all three purposes. Decision as to whether or on what conditions a permit authorizing a discharge or deposit will be issued will be based upon evaluation of the impact which the proposed discharge or deposit may have on: (1) anchorage and navigation; (2) applicable water quality standards and related water quality considerations, including environmental values reflected in water quality standards; and (3) fish and wildlife values not reflected in or adequately protected by applicable water quality standards.

IV. Executive Order 11574

In directing the establishment and implementation of the Refuse Act Permit Program, the President of the United States, by Executive Order 11574, made it clear that this was to be an effort by the entire executive branch of the federal government. In addition to the Refuse Act, the President stated that the permit program should recognize and further the purposes and policies of the Federal Water Pollution Control Act of 1948, as amended by the Water Quality Improvement Act of 1970; the Fish and Wildlife Coordination Act of 1956; and the National Environmental Policy Act of 1969.

The President called upon the Council on Environmental Quality to coordinate the regulations, policies, and procedures of the federal agencies with respect to the Refuse Act Permit Program.

The Executive Order directed that the Secretary of the Army shall be

responsible for granting, denying, conditioning, revoking, or suspending Refuse Act permits. However, it further commanded that in exercise of this authority the Secretary of the Army should do as follows. First, require, in compliance of § 21(b)(1) of the Federal Water Pollution Control Act, as a prerequisite to the granting of any permit, that the applicant provide a certification from the state in which the discharge originates or will originate, or if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that there is reasonable assurance, as determined by the state or interstate agency, that the discharge will not violate applicable water quality standards. If the applicant cannot obtain the required state or interstate agency certification, unless the state or interstate agency waives its right of comment, the Executive Order directs simply that the "permit shall be denied." Second, the Secretary should accept the findings, determinations, and interpretations of the Administrator of the Environmental Protection Agency respecting water quality standards. This direction recognizes that primary responsibility at the federal level for water quality improvement lies with the Environmental Protection Agency. If the Environmental Protection Agency concludes that a particular discharge is or would be inconsistent with applicable water quality standards, a permit for the discharge will not be granted. Let me emphasize at this point the very important role played by the states and by the Environmental Protection Agency in this permit program. Each of these interests must be satisfied that a proposed discharge will conform to existing water quality standards, otherwise the permit application will be denied. If the concerned state or interstate agency is satisfied and certifies that the discharge will not violate applicable water quality standards, but EPA is not satisfied, the permit is denied. If the Environmental Protection Agency is satisfied, but the concerned state or interstate agency is not, the permit will be denied. Third, the Secretary should consult with the Departments of Interior and Commerce, with EPA, and with the agency concerned with wildlife resources of any affected state, regarding effects on fish and wildlife.

V. The Application Requirement

The Refuse Act applies to all direct and indirect discharges or deposits into navigable waters, including discharge of water at a temperature different from the receiving navigable waterway. The only exception is for matter flowing from streets and sewers and passing therefrom in a liquid state. The act applies to discharges or deposits by any person, firm, or other entity, including discharges or deposits from municipal, state, or federal facilities or installations.

The Refuse Act Permit Program is applicable to all discharges or deposits within the regulatory authority of the Act, with the following

exceptions:

> (i) Discharges or deposits into a municipal or other public sewage treatment system;
> (ii) Discharges or deposits from a municipal or other public sewage treatment system;
> (iii) Discharges or deposits of storm water runoff flowing from public or private streets;
> (iv) Discharges or deposits into a waste treatment system. (This exception does not apply to discharges or deposits from such a waste treatment system into a navigable waterway or tributary. Thus, for example, the operator (including, if applicable, agencies or instrumentalities of the Federal, State, or local governments) of a waste treatment system which receives industrial discharges and is not tied in with a municipal or other public sewage treatment system must apply for and receive a permit if the system discharges or deposits into a navigable waterway or tributary.)
> (v) Discharges or deposits which are placed on the banks of a navigable waterway or tributary where the same shall be liable to be washed into such navigable water either by ordinary or high tides, or by storms or floods whereby navigation shall or may be impeded or obstructed; (This exception does not apply to discharges or deposits placed on banks which, because of gravity or the slope of the ground on which the discharge or deposit is placed, will flow into a navigable waterway or tributary. Such discharges or deposits will require a permit under the Refuse Act Permit Program.)
> (vi) Discharges or deposits from ships or other watercraft into a navigable waterway or tributary.[2]

The Refuse Act authority is broader in scope than is the permit program. The fact that certain discharges or deposits are excepted from the permit program does not mean that this type of discharge or deposit may not be prosecuted under the Refuse Act. For example, the permit program exempts deposits or discharges from a municipal or other public sewage treatment system, but if an operable city sewage treatment system results in deposits of solid waste into navigable water, this occurrence would violate the Act and could well result in prosecution of the offender.

Applications must be filed with the District Engineer on printed ENG Form 4345, which may be obtained from Corps of Engineers District Offices. The form requires information which fully identifies the character of the discharge or deposit and describes the monitoring devices and procedures that will be used to gather information and maintain records on discharges and deposits. The information must include data pertaining to chemical content, water temperature differentials, toxins, sewage, amount and frequency of discharge or deposit, and the type and quantity of solids involved.

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2. 36 Fed. Reg. 6565 (1971), *amended* 36 Fed. Reg. 13835 (1971).

When an application for a permit is received, the District Engineer will review the form to make sure that all the information required is provided. Copies of the application with all information received will be promptly forwarded to the appropriate Regional Representative of the Environmental Protection Agency. District Engineers will accept and forward the EPA applications that are not accompanied by the required state or interstate agency certification; however, the application will not be fully processed until the applicant has provided the required certification, or unless and until the District Engineer learns that the certification required is being waived by the certifying authority. Facilities existing or under construction prior to April 3, 1970, are not required under the Federal Water Pollution Control Act to obtain a state certification until April 3, 1973. However, in instances where the certification is not required by that Act, it will, nonetheless, be the policy of the Corps of Engineers not to fully process a permit application until the applicant or the state has provided a written communication from the state describing the impact of the proposed discharge or deposit on water quality or unless and until the District Engineer learns that the state will waive opportunity for comment on the desirability of granting the permit.

After the application has been determined to be in proper order, a public notice will be issued by the District Engineer. This notice will be provided to all parties known or believed to be interested in the application, including the appropriate representative of the Department of Interior, the appropriate Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration of the Department of Commerce, navigation interests, the heads of state agencies having responsibility for water quality improvement and wildlife resources, other state, county, and municipal authorities, adjacent property owners, and conservation organizations. Copies of the public notice will also be posted in post offices and other public places in the vicinity of the site of the proposed discharge or deposit.

Applicants for Refuse Act permits will be furnished copies of all objections and will be afforded opportunity to rebut or resolve the objections. The objections to issuance of a permit along with the applicant's actions and responses thereto will be considered in determining whether the permit applied for should be issued. If the notice of a permit application invokes substantial public interest, and if in the opinion of the District Engineer, a public hearing is advisable and will probably produce information of value, a public hearing may be held. Of necessity, public hearings will be limited, but a transcript of the hearing together with all relevant documents will become a part of the permit application. Hearings are required under § 21(b)(2) and § 21(b)(4) of the Federal Water Pollution Control Act when: (1) a state, other than the state of origin, objects to the issuance of a permit and requests a hearing on its objections; and (2) the

Secretary of the Army proposes to suspend a Department of the Army permit upon notification by the certifying authority that applicable water quality standards will be violated.

VI. The Issuance of Permits

The decision as to whether or on what conditions a permit authorizing a discharge or deposit will be issued is based on an evaluation of the impact which the proposed discharge or deposit may have upon anchorage and navigation, water quality standards, and fish and wildlife resources not directly related to water quality standards. Anchorage and navigation is the historical responsibility of, and within the expertise of, the Corps of Engineers.

Development of water quality standards is, at the federal level, the primary responsibility of the Environmental Protection Agency. The Corps of Engineers will accept determinations of this agency with respect to:

> (i) The meaning and content of applicable water quality standards;
> (ii) The application of water quality standards to the proposed discharge or deposit, including the likely impact of the proposed discharge or deposit on such water quality standards and related water quality considerations;
> (iii) The permit conditions required to comply with applicable water quality standards;
> (iv) The permit conditions required to carry out the purposes of the Federal Water Pollution Control Act where water quality standards are not applicable in whole or in part;
> (v) The protection afforded fish and wildlife resources by water quality standards, if any;
> (vi) The interstate water quality effect of the proposed discharge or deposit;
> (vii) The recommended duration of a permit.[3]

Protection of fish and wildlife resources, within the federal government, is primarily the responsibility of the Department of Interior and the National Oceanic and Atmospheric Administration of the Department of Commerce. Accordingly, the Corps of Engineers and the Environmental Protection Agency will rely upon those bodies for advice as to the impact which any proposed discharge or deposit may have on fish and wildlife resources. These departments will also be relied upon to recommend conditions necessary for inclusion in permits to afford reasonable protection for fish and wildlife.

Permits issued will not be for an indefinite period, but will specify an expiration date. Usually permits will be issued subject to revalidation at the expiration of five years. Permits of shorter duration may be issued in appropriate cases, and a permit of longer duration and subject to such

3. 36 Fed. Reg. 6566 (1971), *amended* 36 Fed. Reg. 13835 (1971).

revalidation provisions as the District Engineer considers appropriate may be issued with the approval of the Environmental Protection Agency. Every permit, as a minimum, shall require compliance with the applicable water quality standards including implementation schedules adopted in connection with such standards. Permits will also include provisions requiring compliance with water quality standards changed or "updated" subsequent to the date of issuance of the permit.

VII. Conclusion

The Refuse Act permit, if granted, does not convey any property right or exclusive privilege either in real estate or material; it does not authorize any injury to private property or invasion of private rights. It does not supersede or negate any other obligation for compliance with federal, state, or local laws or regulations. All discharges or deposits to which the Refuse Act is applicable are unlawful unless and until authorized by an appropriate permit. The fact that official objection may not have been raised with respect to past or continuing discharges or deposits does not constitute authority to continue the discharge or deposit in the absence of an appropriate permit. The mere filing of an application requesting permission to discharge or deposit into navigable waters or tributaries thereof will not preclude legal action in appropriate cases for Refuse Act violations. The institution of either a civil or criminal action by the Department of Justice under the Refuse Act will not preclude the acceptance or continued processing of a permit application. However, where a civil action to restrain a discharge or deposit has been filed, and that action is disposed of other than by dismissal of the case by the court, any permit issued will include any requirements embodied in the resolution of the case. Finally, where a Refuse Act permit is issued, discharges or deposits must be consistent with the terms and conditions of the permit. Discharges or deposits not authorized are unlawful and may result in institution of legal proceedings under the Refuse Act, and may also result in the initiation of administrative proceedings to suspend or revoke the permit.

The Refuse Act Permit Program is new, initiated less than a year ago. The President wants this program to clean the nation's waters. Mr. Russell E. Train, Chairman of the Council on Environmental Quality, has described the program as "the single most important step to improve water quality that this country has yet taken." I know only that the program is an opportunity, that it is suffering growing pains, and that a lot of people are working hard to make it succeed. I hope it will do all the President wants. There is no doubt it will do some good. The most candid statement I have heard with respect to this program came from General Francis P. Koisch of the Corps of Engineers. He said quite pointedly: "If we get nothing else out of this exercise, we're finally going to know what in the hell we're dumping into our waters."

WATER QUALITY LEGISLATION: PAST AND PRESENT

By Albert C. Printz, Jr.*

I. Introduction

Today we find ourselves in an exciting era. We are trying to achieve goals established through previous legislation, conducting new programs on the basis of 72-year-old legislation, and reviewing totally new control concepts passing the Senate and awaiting House action. By today's measure of concern, the public was totally unaware of water pollution problems as Congress began enacting federal statutes to correct existing problems.

Symposiums such as this one are a necessary part of our understanding of the environmental laws. Far too few are held. I commend the University of Houston, the Texas A&M University, and the Texas Law Institute for Coastal and Marine Resources for their stimulating program. I am honored to participate and appear at this afternoon's session with Assistant Attorney General Kashiwa and other distinguished members of the legal profession.

This presentation, from the standpoint of a manager of a regulatory program, discusses the history of water quality law, present federal regulatory measures including the Permit Program, and proposed statutory changes.

II. Evolution of Federal Water Quality Law

The federal government's involvement in water pollution control is derived from the commerce clause of the United States Constitution. Congress exercises jurisdiction over those waters capable of use as highways of interstate or foreign commerce, whether interstate or intrastate. Congress has determined, as a matter of policy, the extent to which that jurisdiction would be applied in various aspects of water resource management. The federal role in water quality had hesitant beginnings. In years past, if asked about such initial legislation, one would often be referred to Public Law 845, passed in 1948 by the 80th Congress. Today, however, we know it had an earlier beginning.

A. *The Refuse Act*

Section 13 of the River and Harbor Act of 1899, known as the Refuse Act, is where it may have all begun. It prohibits the discharge or deposit into navigable waters of refuse other than liquid wastes flowing from streets and sewers without a permit, or in violation of the conditions of a

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permit. Section 13 of the 1899 Act codified Acts of 1890 and 1894, which applied to New York Harbor by enactments of 1886 and 1888. The Refuse Act was administered for many years by the Secretary of the Army (formerly the Secretary of War), acting through the Chief of Engineers, primarily in the interest of navigation. It has been held by the courts not to be limited to refuse matter which impedes or obstructs navigation, and it has been applied increasingly since 1970 as a water pollution abatement tool. The Refuse Act as an enforcement mechanism, and the Permit Program established under the Act, will be discussed later.

B. *Public Health Service Act*[1]

The Public Health Service Act of 1912 authorized investigations of water pollution relating to the diseases and impairments of man. With the transfer to the Environmental Protection Agency of the functions of the Bureau of Water Hygiene (Environmental Control Administration, Public Health Service, Department of Health, Education, and Welfare), the traditional concerns of water and human health will be more directly related to total environmental protection.

C. *Oil Pollution Abatement*

The Oil Pollution Act of 1924[2] was designed to control oil discharges from vessels into coastal navigable waters. It was not until 1966 that its coverage was extended to inland navigable waters. The same enactment transferred its administration from the Secretary of the Army to the Secretary of the Interior and made its expanded provisions very difficult to enforce because of the requirement that an oil discharge must be grossly negligent or willful before a penalty or cleanup liability would apply. The Water Quality Improvement Act of 1970 repealed the 1924 Act and added new and strengthened provisions for the control of oil pollution to the basic Federal Water Pollution Control Act.[3]

As a result of this Act, the Environmental Protection Agency is responsible for: (1) enforcement activities related to violations on all inland navigable waters of regulations on harmful discharges of oil; (2) violations of regulations for the prevention of discharges from onshore and offshore facilities, except facilities related to transportation which are assigned to the Coast Guard; and (3) the abatement of threatened oil discharges under the authority to seek injunctive relief in cases of imminent or substantial threat to the public health or welfare because of an actual or threatened oil discharge from an onshore or offshore facility. The Act prohibits oil discharges into navigable waters except as permitted by regulation. EPA

1. Public Health Service Act of 1912, ch. 288, 37 Stat. 309.
2. Ch. 316, 43 Stat. 604.
3. 84 Stat. 91 § 11, 33 U.S.C. § 1161 (1970).

regulations provide that prohibited harmful discharges include those which violate applicable water quality standards, or those which cause a film or sheen on or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or on adjoining shorelines. Discharges from a properly functioning vessel engine are excepted, but not oil accumulated in a vessel's bilges.

The oil pollution section extends the Federal Water Pollution Control Act for the first time to the waters of the Contiguous Zone, the nine-mile fisheries management zone beyond the territorial sea provided by international convention. It provides a criminal penalty only for the failure to notify the Coast Guard immediately of a prohibited discharge. Civil penalties are provided for knowingly discharging oil in harmful quantities and for violation of regulations. To date, between 40 and 50 actions have been brought under this statute. The section establishes the principle of absolute liability for the assumption of oil removal costs by the owner or operator of a vessel, an onshore facility, or an offshore facility. Proof that a discharge was caused by an act of God, an act of war, negligence on the part of the United States, or an act of omission of a third party whether negligent or not, is required to avoid liability. Limits of liability are set, but proof of willful negligence or willful misconduct within the privity and knowledge of the owner makes the owner liable for the removal costs without limitation.

D. *Comprehensive Water Quality Law*

Many bills were introduced in Congress over a period of time to establish a comprehensive water pollution control program, and on three occasions legislation neared enactment. It was not until 1948, however, that Congress gave statutory definition to the federal role and responsibility in water pollution control with the passage of Public Law 845, 80th Congress, which authorized a five-year program. It was extended for another three years by Public Law 579, 82d Congress, to June 30, 1956.

The Federal Water Pollution Control Act became permanent law on July 9, 1956, with the enactment of Public Law 660, 84th Congress. The Act has been strengthened by the Federal Water Pollution Control Act Amendments of 1961, which among other provisions extended the federal enforcement authority to navigable as well as interstate waters; the Water Quality Act of 1965, which created the Federal Water Pollution Control Administration (now part of EPA) and authorized the establishment of water quality standards for the Nation's interstate waters; and the Clean Water Restoration Act of 1966, which authorized a vastly increased level of federal assistance for municipal waste treatment facilities.

The Water Quality Improvement Act of 1970, approved April 3, 1970, strengthened the basic Federal Water Pollution Control Act in the areas of sewage from watercraft, mine drainage, lake eutrophication, pollution

problems in the Great Lakes, pesticides, pollution by activities under federal license or permit, and as just mentioned, pollution by oil and hazardous substances.

III. Today's Legal Tools

The present federal regulatory measures for water pollution abatement are derived from either the basic Federal Water Pollution Control Act or the Refuse Act. Together, these provide a variety of tools to the regulatory agency. Each tool has its advantages and each has been utilized.

A. *Federal Water Pollution Control Act*

The Water Quality Improvement Act of 1970, as I have noted, strengthens the basic Federal Water Pollution Control Act in important respects. It is now a more complex statute, in recognition of the increasing complexity of the total water quality management and environmental protection task. Section 10 provides for the abatement of pollution of interstate or navigable waters which endangers the health or welfare of persons and for the abatement of pollution which lowers the quality of interstate waters below the water quality standards established for those waters under the 1965 amendments. To date, 43 states have had their water quality standards approved in total by the federal government. The remaining states have all received partial approval. Exceptions to approval deal with specific water use criteria, implementation plan dates, and nondegradation language.

The enforcement mechanism in § 10 utilizes a three step procedure: (1) a nonadversary conference of federal, state, and any interstate water quality agency representatives; (2) a public hearing; and (3) court action. Proceedings in 57 cases have been held under this authority. Four cases have reached the public hearing stage. One case has reached court action. The conference may be called at the state's request or on federal initiative. A limitation in present law requires that the Administrator receive the request of the governor of a state before he may call a conference, if the pollution of interstate or navigable waters is solely intrastate in its effects. The Administrator may call a conference to abate intrastate pollution without the governor's request only in certain cases of pollution affecting shellfish which results in substantial economic injury. The Environmental Protection Agency's Administrator has invoked the "shellfish" provision in calling two conferences, those involving pollution of waters of Galveston Bay and Pearl Harbor in Hawaii. The Potomac River in the Washington Metropolitan Area, reaches of the Mississippi and the Missouri Rivers, the Colorado River Basin, Lake Michigan, and Lake Erie are some of the major water areas in the United States involved in federal-state enforcement conferences.

The abatement of violations under § 10 of the Federal Water Pollution Control Act is obtained through direct court action. Present law requires that a governor give consent, in the case of violations which are intrastate in effect. At least 180 days before an abatement action is initiated, the Administrator must notify the violators and other interested persons of the violation of the standards. An informal hearing is held for the purpose of seeking a basis for voluntary compliance without resort to court action. No court action has been taken to date under the water quality standards violation enforcement procedure. Thirty notices were issued recently to suburbs of Cleveland, Ohio, which itself had received a 180-day notice in December 1970, to encourage an effective regional waste treatment program to abate pollution of Lake Erie from those municipalities. The entire area has been part of the enforcement conference since 1965.

B. *The Refuse Act*

Usually, the more something is modified and strengthened the more complex it becomes. For proof of this, you have only to look at the complexity of the procedures just described and compare them with what was done in one paragraph of the Refuse Act, which in essence says: (a) it shall not be lawful to throw, discharge, or deposit any refuse matter of any kind or description whatever (other than liquid sewage from municipal sources) into any navigable water of the United States or any tributary of any navigable water of the United States; and (b) The Secretary of the Army, acting on the advice of the Corps of Engineers, may issue permits for such deposit, within limits to be defined and under conditions to be prescribed by him.

To this statutory language, add two Supreme Court decisions in the 1960's which said that the Act serves antiwater pollution as well as navigation protection goals.[4] The Refuse Act is backed up by misdemeanor fines of $500 to $2,500 or imprisonment from 30 days to a year and, most significantly, by the equity power of a federal court to enjoin violations of the Act.

Since civil remedy is generally more effective in preventing future pollution, criminal prosecution under the Act is generally not recommended except in cases of isolated or instantaneous discharges which result in serious damage. The Act was one of the bases of the federal suit filed at the request of the Secretary of the Interior on March 13, 1970, to control present and potential thermal pollution of Biscayne Bay and adjacent waters by Florida Power and Light Co. The court signed a consent decree in the case on September 10, 1971, which commits the company to stringent measures to prevent excessive heat discharges into the Bay. The cost of

4. United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960).

this program to the Company is expected to be in excess of $35 million. The Refuse Act was also the basis of 10 federal suits brought in 1970 to halt mercury discharges into navigable waters. Stipulations were entered in nine cases and in the tenth the operation was shut down. Since the establishment of EPA, the Administrator has recommended to the Department of Justice, under the 1899 Act, 31 civil actions, 5 criminal suits, and 35 cases for failure to file an application for a permit.

The 1899 Act is a useful instrument where interstate effects of pollution cannot be shown. The first case recommended for action by the Administrator, against the Armco Steel Company concerning its plant on the Houston Ship Channel, was tried in federal court and decisions favorable to the government were handed down on September 17, and October 4, 1971. EPA has also assisted in 13 civil actions and 15 criminal actions filed by the Department of Justice under the Refuse Act.

I would like to turn now to the program with which I am most familiar—the Refuse Act Permit Program. In the late summer of 1970, with the Department of the Interior announcing it would utilize the Refuse Act for all types of discharges not adequately covered by federal-state standards, the Justice Department issuing guidelines to U.S. District Attorneys on when to bring Refuse Act prosecutions, and the Army announcing it would like to initiate a Refuse Act permit program, the need for a coordinated federal program became clear to all. Such a program would have to be well-grounded legally, relate the Refuse Act permits with water quality standards in the manner contemplated in § 21(b) of the Federal Water Pollution Control Act, make the greatest impact on our national water quality problems consonant with the nature of the limits on federal authority, and address the problem of applying the program to existing discharges without creating crippling uncertainty and delays. When both Houses of Congress failed to take any action on the Administration's proposals to fill out the gaps in federal authority (principally by an extension of jurisdiction from just interstate waters to all navigable waters and a new requirement that federally approved standards extend to effluent standards), it was realized that any action on the Refuse Act Permit Program would have to start with admittedly deficient federal water quality legislation. We concluded, however, that even without these improvements there were very considerable benefits that could be achieved by drawing together all our existing water quality authorities into one coherent permit program, and starting the program before another year of debate slipped past. The culmination of this effort was Executive Order 11574, signed by the President on December 23, 1970, which initiated the Refuse Act Permit Program.

Like many Christmas presents, this Program was met at the outset with a mixed reception. There were several reasons for this: (1) Concern over the involvement of too many agencies—Corps of Engineers, Environ-

mental Protection Agency, Department of Justice, Council on Environmental Quality, Department of the Interior, and Department of Commerce; (2) All sources of pollution would not be covered by the Program; (3) The issuance of permits would complicate the simplified enforcement of the Act. It was easier to prosecute for not having a permit if there was no means by which an industry could get a permit; (4) Concern over the confidentiality of data; (5) Sporadic criminal prosecutions under the Act were felt by some to be a more potent enforcement tool than a systematic plan of permits to bring dischargers up to the mark; and (6) The states' permit programs have not eliminated pollution, so why should this one. Now as the Permit Program's first anniversary approaches, we can look back at many significant accomplishments, including: (1) The development of regulations and procedures, (2) The preparation of application forms, (3) Acquainting industry with the Program, (4) Seeking out nonfilers, (5) Receiving and reviewing applications, and (6) Issuing of a limited number of permits.

Had this program been a failure or not generated the momentum it has, the Senate would not have included in its recently passed water pollution control bill a national permit program called the National Pollutant Discharge Elimination System. This continuance of the program with expanded coverage is viewed by many, including myself, as a sign of success.

I would like to turn briefly to some of the relevant activities and statistics of the program. Our latest information is that the Corps of Engineers has received a total of 19,549 applications (Part A's), which were due by July 1, 1971. Of these, 15,356 are from "critical" industries—those falling within 20 specifically identified industrial categories—2,986 from "noncritical" industries, 712 from state and local facilities, 373 from federal facilities, and 122 from agricultural facilities.

EPA and the Corps have been working together since July to bring into compliance everyone who is covered by the Permit Program. EPA has been concerned primarily with identifying and bringing into compliance the major industrial dischargers in the country. To that end, shortly following the July 1 deadline for filing, our regional offices were instructed to identify the major industrial dischargers in their regions. Approximately 3,000 major dischargers were identified nationwide. A determination was made of those who had not filed. Armed with this anaysis, we then began to conduct on-site inspections of those companies and plants to confirm the existence of a discharge subject to the program. A sizeable number of companies initially identified as major dischargers were determined not to be subject to the Permit Program for various reasons, such as the installation of a complete recycling system or termination of operations. On September 23, we requested the Justice Department to prosecute 35 companies under the Refuse Act for nonfiling. Since that time, we have continued to pursue

companies identified as not having filed applications, and we are now confident that virtually every major discharger in the country covered by the program has a permit application on file.

We now believe that in excess of 90 percent of the total pollution caused by all industries in the country is covered by applications on file with the Corps. It is significant to note that over 1,000 applications, mostly for relatively small plants, were received in the month following EPA's announcement of the 35 cases involving nonfilers. In addition to EPA's efforts, the Corps has been continuing to identify nonfilers and refer cases directly to U.S. Attorneys. Because a large percentage of the applications that have been filed have been incomplete, both the Corps and EPA have spent a great deal of time obtaining complete applications. This has delayed the task of evaluating the applications. Nevertheless, we also have been going forward with a number of activities related to the task of deciding what permits should be issued and under what conditions.

EPA has been polling the experience of its industrial waste treatment experts, along with that provided by outside consultants, in the preparation of reports on the state-of-the-art of waste treatment in certain key industries. The results have been combined with other existing knowledge and expertise within EPA in the form of seminars designed to evaluate representative permit applications which have been submitted by the most important industrial categories. The objective of these seminars is to gain as much uniformity as possible in writing permit provisions and conditions within particular industrial categories and to provide the maximum degree of guidance possible on a national basis to the regional EPA personnel who must evaluate the applications.

We have also been developing a form for reporting self-monitored discharges pursuant to conditions set forth in permits and a manual to assist industry in establishing a self-monitoring system.

We are in the process of computerizing processing data and monitoring data. Two separate systems are being developed, one handling management information and the other handling technical data. The management system is currently operational, and the data system for technical information is under final pilot testing and is expected to be fully operational by early 1972.

The Permit Program, as many of you already know, is a very large, very complex program, but I think we have been moving forward in a positive way. In addition to explaining it to affected industries and concerned citizens, we have held numerous meetings with the states, who play a central role in the permit procedure. To a very large extent, we have been able to overcome early anxieties about duplication and unnecessary complication affecting state programs. In some states, EPA personnel have been assigned to states to assist in processing permit applications.

There have already been many positive results flowing from the Permit

Program. Industries not previously aware of the exact nature or extent of their discharge have been required to examine and report on the permit application much information not previously known or reported. In reviewing plant processes, company officials frequently locate previously unknown outfalls and sewer connections. Laboratory analyses often show that treatment systems are not operating as effectively as was believed. As a result of the Permit Program, many companies have voluntarily taken corrective measures to reduce or eliminate discharges prior to the imposition of any specific permit requirements.

Perhaps most importantly, the Permit Program has already changed the attitudes in industry and the public regarding the public's right to know the complete facts on what industries are discharging into public waterways. As this data is accumulated and analyzed, we will get a much better understanding of the nature and extent of industrial pollution in individual waterways throughout the land.

IV. Future Tools

What lies ahead remains to be seen. Thus far, only the Senate has taken affirmative steps toward passage of new water pollution control legislation.

As background for the recently passed legislation, the Subcommittee on Air and Water Pollution considered 13 bills introduced on this subject during the second session of the 91st Congress, and 19 bills introduced in the first session of the 92nd Congress. In the new legislation, the Senate proposes a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits. This change is being sought primarily because of the limited success of the water quality standards program and the difficulty associated with establishing reliable and enforceable, precise, effluent limitations on the basis of a given stream quality. Water quality standards often cannot be translated into effluent limitations which are defendable in court because of the imprecision of models for water quality and the effects of effluents on most waters. Under the Senate bill, the water quality becomes only a measure of program effectiveness and performance. Effluent limitations will be set through a national permit program which would prohibit the discharge of pollutants into the navigable waters. The objective of the legislation would be carried out in two phases to be implemented by 1976 and 1981. Phase I requires all industrial sources to apply the best practicable technology and all communities to have secondary treatment construction programs underway by June 30, 1974. In Phase II, by 1981, communities and industries will be required to apply, where the goal of "no discharge" cannot be attained, the best available technology.

The bill eliminates the existing enforcement conference technique and assigns the task of enforcing the provisions of the bill to the Administrator

of EPA. He is authorized to enforce permit violations immediately, or if a state fails to act within 30 days after receipt of a notice of violation, the Administrator may issue an order to comply or go to court against the violator. Civil and criminal penalties are provided. A second conviction shall be punished by a fine of not more than $50,000 per day of violation, or two years in prison, or both. Citizens may also go to the U.S. District Courts against either the violators or the regulators who fail to carry out nondiscretionary duties under the law.

As I said at the outset, this is an exciting era in which there is much concern and confusion over the numerous environmental laws. Seminars such as this may help point to the ways in which these various laws can be orchestrated to achieve a cleaner and lasting environment.

THE NATIONAL ENVIRONMENTAL POLICY ACT AND ITS RELATION TO OFFSHORE AND MARITIME ACTIVITIES

By Thomas C. Winter, Jr.*

Historically the federal government, like many bureaucracies, has had trouble coordinating programs between its entities. As a result, most programs have been conceived so that they fall for the most part within the jurisdiction of one agency. Over a hundred years ago the federal government decided to take a more active role in the field of agriculture, and the Department of Agriculture was created. Over a decade ago it was decided that this nation should vigorously participate in the exploration of space. The National Aeronautics and Space Administration was created to achieve this goal.

The federal government's various environmental programs are not so easily placed within one agency. If one agency was created to encompass all programs affecting the environment, there would be very little left over for the rest of the agencies to accomplish, since most federal activities are affected in a major way by environmental considerations. A truly coordinated approach is required by all federal agencies if we are to preserve and enhance our environment.

Congress set forth its strategy to achieve this coordination in the National Environmental Policy Act (NEPA) which was signed into law on New Year's Day of 1970, the first law of the new decade. NEPA's basic purpose is to insure that federal officials weigh environmental considerations along with the more familiar mission and economic considerations in policy formulation and decisionmaking. Few quarrel with this concept in theory, of course, and the words sound nice. But the challenge is to actually reach these considerations, in accordance with the spirit of the Act, in real life situations where resource limitations and other practical factors necessitate that trade-offs be made. As in the case of most other laws in our system of government, the real test as to how well the actual implementation follows the spirit of the law often occurs in the courtroom.

In a very basic sense, the functions of the government can be classified under two categories, regulatory and management. An early landmark decision concerning the implementation of NEPA and the regulatory activities of the government was handed down in *Zabel v. Tabb*.[1] The plaintiff filed for a permit from the Corps of Engineers to fill in 11 acres of tidelands for a trailer park in Boca Ciega Bay near the Tampa-St.

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1. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

Petersburg area in Florida. In the past, the Corps made its judgment based on navigation considerations, for which it has specific authority. In this case, however, the Corps decided that even though there was no navigation hazard, the permit should not be granted for ecological reasons. The plaintiff challenged this denial in federal district court on the ground that the Corps' historic statutory authority does not cover environmental considerations. A district court ruling against the Corps was overturned on appeal. Part of the appellate opinion reads:

> [N]othing in the statutory structure compels the Secretary [of the Army] to close his eyes to all that others see or think they see [damage to ecology and marine life on bottom]. [Under NEPA and the Fish and Wildlife Coordination Act] [t]he establishment was entitled, if not required, to consider ecological factors and being persuaded by them to deny . . . [the permit].[2]

The implication is that agencies can use the authority of NEPA to evaluate environmental considerations in decisions which they make under their specific statutory authority.

A second example of the interaction of NEPA with the government's regulatory functions is found in the handling of an application for a permit to build a bridge across the southern part of San Francisco Bay. On August 15, 1969, the State of California applied to the Coast Guard for the bridge permit. The Coast Guard has power to act through its basic authority dealing with navigation and ship passage. Public hearings were held on March 4, 1970. On January 5, 1971, a draft environmental impact statement was circulated for comment by the Coast Guard. Over 20 comments were received, and all opposed the bridge except one. Much of this opposition was built around environmental considerations. On August 23, 1971, the Commandant of the Coast Guard deferred the decision and denied the permit without prejudice. He did this not because of navigation objections, but due primarily to environmental objections. More specifically, he was concerned about the impact of this new bridge on the growing urbanization and land use patterns in the Bay area and also its projected effect on the Bay Area Rapid Transit System (BART), which is due to begin operation in late 1972. BART could relieve a number of environmental problems in the Bay area such as vehicle-generated air pollution, congestion, and noise. The decision on the bridge is now deferred until an opinion is rendered by the voters in a June 1972 plebiscite, and until after information is obtained from actual operation about the effect BART has on the transportation and urbanization patterns in this area.

Yet another example of the implementation of NEPA involves the Corps' Refuse Act Permit Program. The sources of pollution into our waters

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2. *Id.* at 201.

can be categorized as municipal discharges, industrial discharges, and agricultural discharges. To control the industrial discharges, the government is relying on the old Refuse Act of 1899. This law was originally conceived to safeguard navigation and is implemented by the Corps of Engineers. Over a year ago, specifically in response to the mercury problem, it was decided to utilize this authority to control industrial pollution in our waters. On December 23, 1970, Executive Order 11574 was issued to clarify the utilization of this Act to control industrial discharges and to establish a permit program for this purpose. The Corps has implemented this program in conjunction with the Environmental Protection Agency (EPA). The program's procedures basically require that in order to get a permit for an industrial discharge, the applicable state and federal water quality standards must be met. The Corps requires that all industrial dischargers have to submit certain information needed to obtain or renew this permit.

In *Businessmen for the Public Interest, Inc. v. Resor*,[3] which was decided recently, the plaintiffs contended that the Army permit program "is inconsistent with, and contrary to, the National Environmental Policy Act, and is inadequate to achieve a reversal of the deteriorating condition of Lake Michigan."[4] The plaintiffs wanted injunctive relief against the final agency rulemaking in this case. The court denied relief, ruling that the program appropriately implemented NEPA.

The previous cases dealt with federal regulatory actions. Let's look at management actions. The Department of the Interior has authority for the management of the outer continental shelves and for leasing portions of them for the recovery of resources. One recent action under this authority involved application for permits for two oil platforms in the Santa Barbara Channel. The applicants based their request on the fact that these resources are needed to meet our growing energy requirements, around which a potential crisis lurks, and thus are compatible with the President's first message to the nation on energy on June 4, 1971. Furthermore, in spite of the 1969 accident which released large quantities of oil into the channel, it was alleged that new drilling would help to minimize the oil seepage which is still occurring from the reservoir involved in the accident. The results of a report of a panel establishment by Dr. DuBridge, the President's Science Advisor in 1969, revealed that the strata overlying this reservoir are rotten and that the best way to minimize the amount which leaks up through the strata is to relieve the pressure by pumping out the underlying reservoir.

The Secretary of the Interior had to make a value judgment between these considerations and the possibility of further accidents. In September 1971, the Secretary denied the two applications. I would assume, based on

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3. 3 E.R.C. 1216 (N.D. Ill., Oct. 14, 1971).
4. *Id.*

the environmental impact statement which was prepared, that much of his reasoning was based on the fact that the rotten bottom and the susceptibility to earthquakes of this area made the accident risk factor unacceptably high.

However, in similar type actions in the Gulf Coast, the Department of Interior is going ahead and offering offshore tracts for lease. Here, of course, the risk of earthquakes is not nearly so high as off California, and the strata above the oil reservoirs appear to be sounder. On November 4, 1971, a bid involving almost 60,000 acres was held, and $98 million were pledged to the government for these acres. In a second action, a final environmental impact statement was filed on October 21, 1971, on the proposed leasing of almost 400,000 acres. The implication is that if no substantive criticism is received by the end of 30 days, the bidding for these tracts will be held, probably in December of 1971.

This oil leasing illustrates well the value judgments in which environmental considerations play a part. We are all familiar with the obvious environmental risks caused by offshore oil drilling. On the other hand, we are aware of the potential energy shortage which faces this nation and the need to use these offshore resources to help prevent that shortage. The Secretary of the Interior considered each case on its own merits in his continuing role to insure that our country will get the energy which it requires at a reasonable cost and in a manner which will minimize the adverse effects to the environment.

The basic mechanism to implement the spirit of NEPA is the environmental impact statement. This mechanism requires that federal agencies implement the basic NEPA goals of environmental consideration in planning and decisions. It further provides that these implementation actions receive "goldfish bowl" visibility. Too often in the past there have been cases where the planning considerations in many agency actions were kept from the public and were not released until after the decisions had been made. At this late time, it is extremely difficult for the informed public, particularly when they do not have the staff resources which the agencies have, to affect the decision.

An environmental impact statement is required from the prime federal agency in all actions which have significant effect on the environment, regardless of whether any of its funds are involved. The law requires that the statement address the following points: (1) the environmental impact of the proposed action; (2) any adverse impacts which cannot be avoided by the action; (3) the alternative courses of action; (4) the relation between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) a description of the irreversible and irretrievable commitment of resources which would occur if the action is accomplished. Interim implementing guidelines were issued by the Council on Environmental Quality shortly after the passage of the Act, and final guidelines were issued on April

23, 1971. These guidelines make it explicit that the draft environmental impact statement should be prepared as early as possible in the planning process. The intent is that as soon as a fair grasp of the problems involved is obtained, the draft will be prepared and circulated for comment. It is not necessary or even desirable to wait until after solutions have been worked out for these problems. It is better to get the input from the interested and informed public before solutions are worked out rather than afterward. Further, the guidelines require that no agency administrative actions will occur, with a few exceptions, for 90 days after the draft is circulated and that no actions will occur for 30 days after the final statement is made public. To date, the Council has received over 2,000 environmental impact statements.

A significant case which has bearing on the environmental impact statement mechanism involved a nuclear power plant which is under construction on Chesapeake Bay in Maryland.[5] Here the plaintiffs challenged the basic ground rules of the Atomic Energy Commission in implementing the National Environmental Policy Act. AEC was involved, of course, since they must grant licenses for the construction and operation of all nuclear power plants. The judge in his opinion made the following points:

1. The environmental impact statement mechanism and other provisions of NEPA were effective on the date that the law was signed and not on the date, 15 months later, when AEC had set up their machinery to actually implement the law.

2. AEC must consider all environmental issues and not just those in which it has expertise, such as radiation.

3. AEC must evaluate all issues, even if they have been previously certified by the federal government or states as meeting the applicable standards.

4. AEC must look at the projects whose construction licenses were granted before the date of the Act if the operating licenses were not granted until after the date of the Act.

5. The AEC blanket policy not to halt the construction of existing power plants was wrong. Each plant should be considered on its environmental merits, even if construction is underway.

In his opinion, the judge commented that the court's duty is to see "[t]hat important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[6] The lesson from this decision is that the environmental impact

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5. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).
6. *Id.* at 1111.

statement mechanism is effective from the date of the Act and that it must be followed in spirit as well as in form.

In the early cases involving NEPA, the emphasis was on whether a statement should be filed. A much publicized decision along this line concerned the haulroad connected with the Alaska pipeline. In the spring of 1970 an injunction was issued against further construction until the provisions of NEPA and the Mineral Leasing Act were complied with.

More recently, the adequacy of consideration has been a significant point in suits involving the environmental impact statement mechanism. One such case concerned the construction of Gillham Dam across the Cossatot River in Arkansas.[7] This project was approved in 1958. Project construction began in 1963 and was about two-thirds complete at the time of the trial. The Corps of Engineers, the defendant, did issue an environmental impact statement. But the plaintiffs contended that "the impact statement simply does not set forth a detailed study and examination of the important environmental factors involved."[8] In its ruling, the court made the comment that the defendant must utilize a systematic and interdisciplinary approach using natural and social sciences and environmental design arts, include discussion of the value of the river without the dam, include all environmental impacts of dam construction, explore all alternatives to dam construction, include all irreversible commitments of resources, and include comments of federal, state, and local agencies.

The important point here is that in this and similar cases, the courts are insisting that the spirit behind the environmental impact statements as laid down in NEPA be followed, and that all options be considered. However, the courts are not attempting to substitute their judgments for those made by the agencies in the executive branch.

Another provision of NEPA established the Council on Environmental Quality, my organization, in the Executive Office of the President. The Council is primarily involved in the recommendation of plans and policy. A major portion of its work concerns the environmental legislative program, its formulation, passage, and implementation. An example of this is the Marine Protection Act of 1971 which was submitted by the President to Congress in February of 1971. Basically, the bill would require that no substances can be dumped from any sources in the United States into the oceans or Great Lakes without a permit obtained from the Environmental Protection Agency. This bill was passed by the House in September with very little change. It has been reported out of the Senate Commerce Committee in the same substantive form as proposed by the Administration and is now being considered by the Senate Public Works Committee. There is a coordination problem within the Senate on this

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7. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).
8. *Id.* at 748.

in connection with the Senate's version of the Water Quality Bill, which was also first proposed by the President in February of 1971.

An example of the implementation of legislative programs concerns the Water Quality Improvement Act (WQIA) of 1970 and its objective to minimize oil pollution. The Council is closely following the activities of the Coast Guard which has the prime responsibility to implement the provisions dealing with oil pollution from ships. Basically, oil pollution from ships comes from four sources: (1) tank cleaning and ballasting operations; (2) vessel casualties, such as collisions and groundings; (3) discharge from bilges, other leaks, and fueling spills; and (4) leaks in terminals and other oil transfer points.

Since most of the oil tankers sail under foreign flags, the control of this source of pollution must largely be accomplished in the international arena. We are all aware of the increasing size of supertankers. I understand that a single tank in some models now on the drawing board holds more oil than the whole *Torrey Canyon*. The resulting pollution from a puncture of this tank in a collision or stranding accident could be disastrous.

In recognition of this possibility, the Coast Guard has spearheaded negotiations under the Intergovernmental Maritime Consultative Organization (IMCO) of the United Nations. In October of 1971 the IMCO Assembly achieved an important first step by adopting regulations governing tanker tank size and arrangement. The next step is ratification by the member countries, but the important thing is that tanker owners and designers should now see the "writing on the wall" and should be incorporating these provisions into their new designs.

The pollution effects from vessel casualties should be minimized by the provisions, originally incorporated to enhance safety, in bills before the current Congress. The Bridge-to-Bridge Communications Act, which was signed into law in August of 1971, and the Ports and Waterways Safety Act which is now being considered by Congress should provide the necessary authority to deal with vessel casualties. The Coast Guard is now preparing implementation regulations under § 11(j) of the WQIA which deal primarily with the third and fourth categories—bilge discharges, leaks, and fueling spills, and terminal and other oil transfer point leaks. The Council has been working very closely with the agencies and the congressional committees to get the necessary environmental statutory authority prepared and passed by Congress and to implement the provisions of present statutory authority, as is illustrated in the above cases.

Another major role which the Council plays is to coordinate the environmental activities of federal agencies. An example of this is the recent revision in August 1971, of the National Oil and Hazardous Substances Pollution Contingency Plan. This plan establishes federal agency jurisdiction and authority to prevent and to deal with accidents involving these substances after they do occur. Very basically, it divides the country

into two parts—inshore and offshore. The Environmental Protection Agency has the general responsibility for supervising the efforts inshore, and the Coast Guard has this responsibility offshore. In general, the concept is that the polluter, if he can be identified and if he has the means, will deal with the containment and abatement of the spill. If he cannot be identified or cannot or will not accomplish this containment and abatement, the federal government will step in and do it. The responsible party will then be billed for the cost involved. The plan provides for regional plans in close coordination with state and local officials, stockpiles of equipment and materials needed to carry out the federal role, the training of personnel and the formation of quick response teams, and a revolving fund to finance these operations.

Another area of Council involvement includes international programs dealing with the environment. We recognize that there are certain environmental situations in which pollution occurring outside the United States can have direct effect on the United States. Possible disruption of the stratosphere by SST's and the spilling of oil into our oceans are examples. Let me briefly outline some of the future milestones in the international arena.

I mentioned earlier the recent IMCO Assembly meeting which adopted the controls on tanker tank sizes and arrangement. Another international meeting of interest is the United Nations Conference on the Environment to be held in Stockholm in June of 1972. One of the items which we hope will be brought up there is the proposed convention on marine protection which the United States tabled last June. It follows the basic tenets of the Marine Protection Act which Congress is now considering.

Another milestone will be the 1973 IMCO conference. This conference will emphasize methods to implement the goals adopted by NATO last year to end all intentional discharges of oil from ships at sea by the end of the decade. It will also consider such items as ship construction specifications for oil tankers, measures to deal with the spills of cargoes of toxic substances, ship construction specification for carriers of toxic substances, and sewage disposal aboard ship.

A fourth conference of interest is the Law of the Sea Conference scheduled for 1973. It will deal primarily with the recovery of resources from the sea. Of course we are vitally interested in insuring that adequate provisions are established in this area to minimize any possible pollution.

Environmental factors have always been a big consideration in the personal lives of most of us. Now, like death and taxes, they are an integral part of our professional lives. Congress, through the National Environmental Policy Act, has established the framework to consider and implement procedures to enhance and preserve the quality of our environment. The administrators in the executive branch are beginning to implement these procedures in their decisions and actions. The decisions of the courts are strengthening the implementation of the policy established by Congress.

Some people would like to ignore or downplay environmental factors, particularly when costs are involved. But this simply cannot be done if we expect to preserve and enhance the quality of life for present and future generations. As I read the trend, the easiest way to fulfill the spirit of NEPA is to place our cards on the table and make explicit value judgments in the most objective manner possible. The problems, trade-offs, and effects must be delineated, and then decisions made. If these decisions are made in a straightforward manner, there should be no qualms about defending them. We can expect controversy since these decisions involve resource trade-offs, great financial costs, and value judgments. This is healthy.

In the past, many decisions were not made in a straightforward fashion and hence could not be defended when the public spotlight was directed toward them. At the other extreme there is the danger of people who make decisions shying away from defending them because of the hue and outcry which various extremist groups cause. We must not fall into either of these traps. As James Baldwin says, "[n]ot everything that is faced can be changed, but nothing can be changed until it is faced."