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## Environment—Availability of Qui Tam Actions to Enforce the Federal Refuse Act

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## AVAILABILITY OF QUI TAM ACTIONS TO ENFORCE THE FEDERAL REFUSE ACT

In *United States ex rel. Mattson v. Northwest Paper Co.*,<sup>1</sup> the Minnesota Federal District Court was asked to determine whether a private individual could maintain a *qui tam* action<sup>2</sup> to recover a portion of a statutory criminal penalty awarded to persons contributing information leading to the conviction of violators of the Federal Refuse Act of 1899.<sup>3</sup> The plaintiff,<sup>4</sup> alleging that defendant manu-

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1. 327 F. Supp. 87 (D. Minn. 1971).

2. 2 BOUVIER'S LAW DICTIONARY 807 (3d ed. 1914), defines *qui tam* as:

an action under a statute which imposes a penalty for the doing or not doing an act, and gives that penalty in part to whomsoever will sue for the same, and the other part to the commonwealth, or some charitable, literary, or other institution, and makes it recoverable by action. The plaintiff describes himself as suing *as well* for the commonwealth, for example, as for himself.

*See also* *United States v. Stocking*, 87 F. 857, 861 (D. Mont. 1898); *Salonen v. Farley*, 82 F. Supp. 25, 28 (D. Ky. 1949); *United States ex rel. Rodriguez v. Weekly Publications*, 74 F. Supp. 763, 765 (S.D.N.Y. 1947); *Grover v. Morris*, 73 N.Y. 473, 478 (1878); *In re Barker*, 56 Vt. 14, 20 (1884).

3. The Refuse Act, 33 U.S.C. §§ 407, 411, 413 (1970), was enacted as a portion of the Rivers and Harbors Appropriations Act of 1899, Act of March 3, 1899, c. 425, §§ 13, 16, 17, 30 Stat. 1152, and provides for criminal sanctions, in the form of fines, to be imposed upon anyone who pollutes navigable waters of the United States. It further stipulates that a part of such fine is to be awarded to informers contributing information leading to the conviction of the violator. 33 U.S.C. § 407 (1970) in full states:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in naviga-

facturers had discharged "refuse"<sup>5</sup> into the St. Louis River in Minnesota in violation of section 407 of the statute, initiated a civil suit under the authority of section 411 to enforce the criminal provisions of the Act.<sup>6</sup> In their answer, defendants moved for dismissal, asserting that plaintiff failed to state a cause of action upon which relief could be granted<sup>7</sup> and lacked capacity to sue.<sup>8</sup>

The district court held that since there was no statutory authority, express or implied, permitting a citizen informer to institute a civil

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ble waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

The criminal provisions are enumerated in 33 U.S.C. § 411 (1970):

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

While section 411 of the Refuse Act provides that one-half of the fine shall be paid to the person or persons giving information which leads to conviction, neither the statute nor cases construing it indicate specific guidelines concerning the amount or type of information the informer must contribute in order to recover. But, in *United States v. Transit-Mix Concrete Corp.*, Criminal No. 70 Cr. 844 (S.D.N.Y., Dec. 11, 1970), it was held that although the claimant did not give all (or even the greater part of) the information on which the conviction obtained was based, nonetheless the information rendered by the claimants, under the circumstances, "lead [sic] to the conviction of the defendant," within the meaning of the Act.

4. On the issue of standing, plaintiff was joined in this action by the Minnesota Environmental Control Citizens Association, a conservation group granted permission to participate *amicus curiae*.

5. The term "refuse" has been interpreted by the United States Supreme Court to include almost any foreign substance or pollutant discharged into navigable waters. *See United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966); *United States v. Republic Steel Corp.*, 362 U.S. 482, 490 (1960). *See also United States v. Esso Standard Oil Co.*, 375 F.2d 621 (3d Cir. 1967). For a more detailed enumeration of specific substances includible in this definition, *see generally United States v. Standard Oil Co.*, 384 U.S. 224 (1966); *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952); *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939); *La Merced*, 84 F.2d 444 (9th Cir. 1936); *Pile Driver No. 2*, 239 F. 489 (2d Cir. 1916); *United States v. Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1970).

6. 33 U.S.C. § 411 (1970).

7. FED. R. CIV. P. 12(b).

8. *Id.* 17(a).

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suit to recover the criminal penalty, the statute was enforceable only by governmental prosecution. Hence, plaintiff was barred from instituting his action<sup>9</sup> and defendants' motion to dismiss was granted. The court's holding reaffirms recent decisions in other jurisdictions concerning the feasibility of utilizing the doctrine of *qui tam* to enforce the Refuse Act.<sup>10</sup>

The plaintiff in *Mattson* contended that the right of an informer to initiate litigation on his own and to use such suits to collect some portion of a fine or forfeiture has been an integral part of Anglo-American legal history.<sup>11</sup> Plaintiff further asserted that the United States Supreme Court has observed that:

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9. For an in-depth treatment of the standing question in other types of environmental cases, see Murphy, *Environmental Law: New Legal Concepts in the Anti-pollution Fight*, 36 Mo. L. Rev. 78 (1971); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U.L. Rev. 304 (1971).

10. See, e.g., *Gerbing v. I.T.T. Rayonier, Inc.*, 332 F. Supp. 309 (M.D. Fla. 1971); *E. B. Mitchell v. Tennero Chemicals, Inc.*, 331 F. Supp. 1031 (D.S.C. 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695 (D. Conn.), *aff'd*, 457 F.2d 81 (2d Cir. 1971); *Lavagnino v. Porto-Mix Concrete, Inc.*, 330 F. Supp. 323 (D. Colo. 1971); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *United States, qui tam, Matthews v. Florida-Vanderbilt Dev. Corp.*, 326 F. Supp. 289 (S.D. Fla. 1971); *Durning v. I.T.T. Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970); *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala.), *aff'd*, 447 F.2d 1304 (5th Cir. 1971); *Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971).

11. Throughout English history, governmental authorities frequently relied upon "citizen participation" to aid in enforcing the law. In SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1923), the author states:

[W]e have seen that in the Middle Ages . . . it was a common expedient to give the public at large an interest in seeing that a statute was enforced by giving to any member of the public the right to sue for the penalty imposed for its breach, and allowing him to get some part of that penalty. This expedient was . . . used by the legislature in the case of . . . statutes, old and new, in which the public at large was encouraged to enforce obedience to statutes by the promise of a share of the penalty imposed for disobedience. . . .

*Id.* at 355-56. This situation was attributable, in part, to the lack of adequate police forces and proper prosecutorial administration, as well as to Parliament's uncertainty concerning the monarch's intentions to enforce the law. See 2 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1850*, at 142-47 (1957). Even during the latter part of the nineteenth century, as English police administration became more sophisticated, Professor Radzinowicz indicates that the informer's "status as an adjunct of criminal justice was

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

Relying on such language, informers on various occasions have purported to possess the requisite statutory authority to maintain *qui tam* actions; and, where express statutory authority has been found, courts have permitted such suits.<sup>13</sup> However, an acute problem is presented where a statute, such as the Refuse Act, does not explicitly confer upon the citizen-informer the right to sue the violator directly. Under such circumstances, the question is: may such authority be conferred upon the informer by implication from the provisions authorizing that one-half of the penalty is to be paid to the informer?

In support of the view that statutes neither specifically authorizing nor forbidding an informer to sue can be construed as permitting such actions, plaintiffs point to the dictum of a Supreme Court decision which would seemingly authorize such suits. In *United States*

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so generally accepted that . . . laws still continued to be enacted giving [him] powers and privileges." *Id.* at 155. For a more detailed discussion of the historical development of *qui tam*, see Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81.

12. *Marvin v. Trout*, 199 U.S. 212, 225 (1905) has been cited by plaintiff-informers to demonstrate that common informer statutes are certainly not foreign to the American legal tradition. For a list of statutes concerning the subject, see STAFF OF CONSERVATION & NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, 91st CONG., 2d SESS., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS 3-4 (Comm. Print 1970) [hereinafter cited as CONSERVATION & NATURAL RESOURCES REPORT].

13. Substantially all of these cases turned on the presence of specific, unequivocal language declaring the informer's right to initiate such judicial proceedings. In this respect the statutes were distinguishable from the Federal Refuse Act which contains no equivalent terminology. See generally *Marvin v. Trout*, 199 U.S. 212 (1905); *Adams, qui tam v. Woods*, 6 U.S. 336 (1805); *Younts v. Southwest Bell Tel. Co.*, 192 F. 200 (E.D. Ark. 1911); *United States v. Stocking*, 87 F. 857 (D. Mont. 1898); *Taft v. Stephens Lith. & Eng. Co.*, 38 F. 28 (E.D. Mo. 1899); *Pollock v. Steam Boat Laura*, 5 F. 133 (S.D.N.Y. 1880); *Southern Express Co. v. Commonwealth*, 92 Va. 59, 22 S.E. 809 (1895). But see *Williams v. Wells-Fargo*, 177 F. 352 (8th Cir. 1910); *Rosenberg v. Union Iron Works*, 109 F. 844 (N.D. Cal. 1901); *New Rochelle v. Beckwith*, 268 N.Y. 315, 197 N.E. 295 (1935); *Allen v. Craig*, 102 Ore. 254, 201 P. 1079 (1921), where statutory language similar to that found in the aforementioned cases (*i.e.*, those permitting an action) was construed in a manner denying informers the right to sue.

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*ex rel. Marcus v. Hess*,<sup>14</sup> Justice Black stated: "statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue."<sup>15</sup>

Despite such language, when construing circumstances similar to those present in the *Mattson* case, each federal district court that has had occasion to consider the validity of Black's dictum has sharply criticized and rejected his analysis of the law.<sup>16</sup> For instance, in *Bass Anglers Sportsman's Society v. U.S. Plywood-Champion Papers, Inc.*,<sup>17</sup> the court indicated that Justice Black's dictum in *Hess* stated the law too broadly:

The *qui tam* action depends entirely upon statutory authorization, as it has never found its way into the common law. The action arises only upon a statutory grant. The fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture. There must be statutory authority, either express or implied, for the informer to bring the *qui tam* action.<sup>18</sup>

But, an even more perplexing problem arises where one part of a statute expressly directs that a certain governmental official is charged with the duty of enforcement, while another section by implication, grants the informer a right to sue. Such was the dilemma facing the court in *Williams v. Wells-Fargo*.<sup>19</sup> There plaintiff charged that defendant had established a private postal service in violation of federal

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14. 317 U.S. 537 (1942), where certain federal statutes declared efforts to commit a fraud upon the government a crime punishable by fine or imprisonment; that people committing such "prohibited acts" should pay a \$2,000 fine to the government; and that suit for the fine could be instituted by "any person" in behalf of the government and, where successful, the litigant could retain one-half of the judgment. 31 U.S.C. §§ 231 *et seq.* (1863). The Supreme Court held that the informer was allowed to bring suit under authority of the statute, and in so finding rejected the appellate court's opinion that the statute should be construed "with the utmost strictness," since *qui tam* actions "have always been regarded with disfavor." 317 U.S. at 541.

15. 317 U.S. at 541 n.4, citing *Adams, qui tam v. Woods*, 6 U.S. 336 (1805).

16. *See, e.g.*, *Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971).

17. 324 F. Supp. 302 (S.D. Tex. 1971).

18. *Id.* at 306.

19. 177 F. 352 (8th Cir. 1910).

postal laws, and sought to recover the prescribed penalty of \$150.<sup>20</sup> For authority to maintain a private action, plaintiff relied on a federal statute (somewhat analogous to the Refuse Act) which provided that any penalties imposed for postal violations were recoverable, one-half to the informant and the other half to the federal government.<sup>21</sup> Defendant maintained that the informer lacked the necessary authority to initiate that action and, in support of that proposition, cited a federal statute requiring that all suits for the recovery of any forfeiture under the postal laws "shall be brought in the name of the United States."<sup>22</sup> Relying upon the principle that common informers may not maintain *qui tam* actions unless there is unencumbered statutory authority to do so, the *Williams* court held that statutory provisions which required that any suits to enforce penalties under the postal laws be brought "in the name of the United States"<sup>23</sup> and which bestowed responsibility for collecting fines upon a federal official<sup>24</sup> outweighed any inferential authority based upon language which could be regarded as providing authority for such action. It was further held that section 292 of the REVISED STATUTES displayed a legislative intent contrary to the informer's alleged right to prosecute, and that "no other person than the United States may bring and prosecute an action to recover the penalty,"<sup>25</sup> despite the apparent wording of section 4059.

While the statutory language of the Refuse Act parallels to a certain extent language found in *Williams* and in *Rosenberg v. Union Iron Works*,<sup>26</sup> it seems to present an even stronger argument in favor of

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20. REV. STAT. § 3982 (2d ed. 1878), provided that:

No person shall establish any private express for the conveyance of letters or packets . . . over any post route which is or may be established by law, or from any . . . place to any other . . . place between which the mail is regularly carried; and every person so offending . . . shall for each offense be liable to a penalty of one hundred and fifty dollars.

21. *Id.* § 4059.

22. *Id.* § 919.

23. *Id.*

24. *Id.* § 292, provided: "the . . . Auditor shall superintend the collection of all debts due the Post Office Department, and all penalties and forfeitures imposed for any violation of the postal laws. . . ."

25. 177 F. at 356.

26. 109 F. 844 (N.D. Cal. 1901), where a section of a statute which appeared to authorize *qui tam* actions, when read in conjunction with other sections of the statute, was qualified to require governmental action. The court found a clear Congressional intent that all actions be prosecuted by the District Attorney. *Id.* at 846.

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denying an informer the capacity to undertake a *qui tam* proceeding. A close inspection of section 411 of the Refuse Act will reveal the weak basis afforded informers who rely upon Justice Black's dictum in *Hess*<sup>27</sup> or the arguments set forth by plaintiff in *Williams*. Section 411 provides that violators of section 407

shall be guilty of a *misdemeanor*, and on *conviction* thereof shall be punished by a fine . . . or by imprisonment . . . or by both . . . in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to *conviction*. (Emphasis added.)<sup>28</sup>

Thus, an informer's right to recovery in a case such as *Mattson* would appear to depend upon three prerequisites: (1) a criminal proceeding brought under section 411; (2) a conviction; and (3) imposition of a fine as punishment for the offense. As a result, until successful prosecution occurs, the informer's rights and interests in recovering the reward, *i.e.*, the right upon which he predicates his standing to sue, are non-existent.<sup>29</sup>

The necessity of obtaining a conviction immediately suggests a collateral problem facing informers who desire to recover the prescribed reward. If the government fails to proceed against an offender, does the informer have any right to sue for the fine himself or does section 413 operate to deny him the right to sue on his own by vesting absolute responsibility for prosecution in the Justice Department? The presence of mandatory prosecutorial provisions, similar to those found in section 413 of the Refuse Act, have led courts to hold that such suits may be instituted only by the appropriate governmental authorities.<sup>30</sup> Courts construing section 413 concurrently with sections 407 and 411 have held that the language of this section clearly affords no opportunity for finding implied authority for an informer to utilize *qui tam* since section 413 expressly requires that "the Department of Justice shall conduct the legal proceedings necessary to enforce . . . sections 407 [and] . . . 411."<sup>31</sup>

Even if section 413 were not present in the legislation, it is clear that the informer would lack standing to sue a violator directly to

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27. 317 U.S. at 541 n.4.

28. 33 U.S.C. § 411 (1970).

29. 324 F. Supp. at 306.

30. *See, e.g.*, 324 F. Supp. at 415.

31. 33 U.S.C. § 413 (1970).

enforce the Refuse Act, due to the terminology found in section 411. This is so because the Act speaks not in terms usually prevalent in statutes permitting *qui tam* actions. Rather, it provides for "fines" and/or "imprisonment" upon conviction of an offense expressly characterized as a "misdemeanor."<sup>32</sup> Such language is indicative of sanctions of a criminal nature; and, prior case law has held that criminal statutes may not be enforced by civil actions<sup>33</sup> or by private persons.<sup>34</sup> The *Mattson* and *Bass Anglers* courts both emphasized that "serious constitutional problems are encountered in any attempt to impose criminal sanctions by way of civil procedures."<sup>35</sup>

That criminal statutes are to be enforced only by the proper governmental authorities is further illustrated by decisions such as *Smith v. United States*<sup>36</sup> and *United States v. Cox*,<sup>37</sup> which held that the executive branch, through the Justice Department and United States Attorneys, is responsible for enforcing federal criminal statutes and that it has the discretionary power to determine whether or not to prosecute.<sup>38</sup> As such it is immune from the interference of private citizens.<sup>39</sup> When considered together, these propositions seem to sug-

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32. *Id.* § 411.

33. *See, e.g.*, *United States v. Claffin*, 97 U.S. 546 (1878); *United States v. Jourden*, 193 F. 986 (9th Cir. 1912).

34. *See, e.g.*, *Keenan v. McGrath*, 328 F.2d 610 (1st Cir. 1964); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961), *cert. denied*, 374 U.S. 838 (1963).

35. 327 F. Supp. at 94; *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971), *citing Helvering v. Mitchell*, 303 U.S. 391 (1938). *See also Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. Regan*, 232 U.S. 37 (1914); *Hepner v. United States*, 213 U.S. 103 (1909).

36. 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). *See also Spellman v. United States*, 413 F.2d 527 (9th Cir.), *cert. denied*, 396 U.S. 930 (1969).

37. 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 389 U.S. 935 (1967).

38. *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), held that the discretion of the Attorney General in deciding whether or not to prosecute or to abandon prosecution once it has begun is *absolute*. *See Confiscation Cases*, 74 U.S. 454 (1868); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906, *rehearing denied*, 384 U.S. 967 (1966). *See also Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Epperson v. United States*, 371 F.2d 956 (D.C. Cir. 1967); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970); *Shipman v. United States*, 309 F. Supp. 441 (E.D. Va. 1970); *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969).

39. Such "immunity from interference" by private citizens may give rise to questions concerning the feasibility of obtaining a writ of mandamus to force such official actions, but a consideration of this point is beyond the scope of this article. For a discussion of this concept, see *Peek v. Mitchell*, 419 F.2d 575 (6th Cir.

gest that a private party is effectively precluded from enforcing sanctions such as those provided for in section 411.

Although certain state and lower federal court cases have upheld the right to invoke *qui tam* to recover a statutory penalty, without prior governmental action, these cases can all be reconciled with *Mattson*. In each case, recognition of this private right of action appears to be confined to litigation in which the informer sought to recover statutory rewards which were civil rather than criminal in nature.<sup>40</sup> In no instance have informers been given implied authority to utilize *qui tam* to collect exactions of a criminal nature.<sup>41</sup>

In addition to the arguments predicated upon legal technicalities, there exists an overriding public policy question. The utility of the Refuse Act has been increased by the passage of numerous statutes and the issuance of executive orders designed to help alleviate the pollution problem.<sup>42</sup> While it is apparent that the Refuse Act is a "broad charter of authority" as well as a potentially "powerful legal tool for preventing the pollution of all navigable waters,"<sup>43</sup> proponents of the *qui tam* approach have suggested that the federal government does not intend to fulfill its obligation to "vigorously" enforce the statute against polluters. This, they say, is evidenced by

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1970); *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965). In *Cox* the court held that neither courts nor private citizens may interfere with the free exercise of discretionary power by the Attorney General in his consideration, investigation and prosecution of criminal offenses. *See also* Comment, *Qui Tam Actions Against Polluters of Navigable Waters: An Attempted Augmentation of Refuse Act Enforcement*, 3 ST. MARY'S L.J. 278, 289 (1971).

40. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942), the United States Supreme Court sustained a *qui tam* action pursuant to 31 U.S.C. § 231, (1863), which provided for a civil forfeiture in cases of fraud perpetrated upon the government. In *Marvin v. Trout*, 199 U.S. 212 (1905), the Supreme Court permitted a *qui tam* suit by informers to collect forfeitures under state statutes which unequivocally provided that a *qui tam* suit was a civil action and that penalties specified therein were in the nature of civil exactions. *See also* *Adams, qui tam v. Woods*, 6 U.S. 336 (1805); *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.*, 250 F. 939 (2d Cir.), *cert. denied*, 248 U.S. 564 (1918); *United States v. Laescki*, 29 F. 699 (N.D. Ill. 1887).

41. *Qui tam* actions have been permitted to enforce criminal sanctions only where the statute expressly provided that such suits by the informer were authorized. *See, e.g.*, *United States v. Griswold*, 26 F. Cas. 42 (No. 15,266) (D. Ore. 1877).

42. Some of these statutes and executive orders are listed in CONSERVATION & NATURAL RESOURCES REPORT at 10.

43. *Murphy*, *supra* note 9, at 102.

the restrictive enforcement policy of the Justice Department.<sup>44</sup> And it was under such circumstances, they argue, that historically the *qui tam* action has been utilized to provide a means of enforcement in the public interest.<sup>45</sup> Finally, they reason that making the offender subject to direct action by environmental protection organizations and private citizens (stimulated by the hope of reward) will help insure against laxity of public officials in enforcing the legislation.

While such actions may serve some useful functions, certain inherent disadvantages accompany the substitution of the whims of private parties for the experienced judgment of the United States Attorney and the Department of Justice.<sup>46</sup> To permit the informer to impose a criminal penalty upon a violator of the Act would be comparable to compelling the Justice Department to prosecute even if, in its judgment, such proceedings appear to be unwarranted. Such an incursion upon the prosecutor's discretion would be incompatible with the orderly functioning of our criminal laws. Allowing the private informer to initiate his suit regardless of the government's decision would put courts in the awkward position of being forced to determine priorities between a criminal prosecution by the United States and a civil suit by an informer.

In construing the prior case law as a whole, one would have to conclude that the courts have demanded more in the nature of express statutory language than is found in the Refuse Act in order to

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44. Details of this allegedly restrictive enforcement policy are discussed in CONSERVATION & NATURAL RESOURCES REPORT at 10.

45. *Supra* note 11.

46. That such a situation was also recognized as a problem under the English experience with *qui tam* is evidenced by the writings of various English historians who indicate that as England more fully developed its law enforcement agencies the common informer procedure became discredited. In 4 SIR WILLIAM HOLDSWORTH, *supra* note 11, the author indicates:

But it was an expedient which was open to many obvious abuses. Old statutes which had been forgotten were unearthed and used as means to gratify ill-will. Litigation was stirred up simply in order that the informer might compound for a sum of money. Threats to sue were easy means of levying blackmail. . . . Further, it was resolved, "that it is inconvenient that the forfeiture upon penal laws or others of like nature should be granted to any before the same be received or vested in His Majesty by due and lawful proceedings; for that in our experience it maketh to the more violent and undue proceedings against the subject, to the scandal of justice and the offence of many."

*Id.* at 359. See also 2 L. RADZINOWICZ, *supra* note 11, at 139. As a result, the use of common informer actions ultimately ended with Parliament's repeal of all statutes permitting such actions, by its enactment of the Common Informers Act, 14 & 15 Geo. 6, c. 39 (1951).

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permit a private citizen's *qui tam* action. Although some informers have collected portions of penalties imposed upon violators of the statute, until recently, few *qui tam* suits have been brought<sup>47</sup>, and as yet, *none* have been successful.<sup>48</sup> Thus, *Mattson* represents another case in a growing series of abortive attempts at maintaining a *qui tam* action under the Federal Refuse Act.<sup>49</sup>

Jack A. Ginsberg

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47. Prior to *Mattson*, four *qui tam* suits, initiated under authority of the Refuse Act, were unsuccessful. See, e.g., *Durning v. I.T.T. Rayonier, Inc.* 325 F. Supp. 446 (W.D. Wash. 1970); *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (N.D. Ala.) *aff'd*, 447 F.2d 1304 (5th Cir. 1971); *Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971).

48. Subsequent to *Mattson*, six additional attempts at maintaining *qui tam* actions were initiated, but failed due to plaintiff's lack of standing: *Gerbing v. I.T.T. Rayonier, Inc.*, 332 F. Supp. 309 (M.D. Fla. 1971); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 330 F. Supp. 695 (D. Conn.), *aff'd*, 457 F.2d 81 (2d Cir. 1971); *Lavagnino v. Porto-Mix Concrete, Inc.*, 330 F. Supp. 323 (D. Colo. 1971); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347 (D. Neb. 1971); *Matthews v. Florida-Vanderbilt*, 326 F. Supp. 289 (S.D. Fla. 1971).

49. A bill providing statutory authority for an informer's right to sue was recently introduced in the House of Representatives. H.R. RES. 8355, 92d Cong., 1st Sess. (1971), which would amend the 1899 Refuse Act, was sponsored by Congressmen Harrington (D-Mass.) and Koch (D-N.Y.) on May 12, 1971. The bill would amend section 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 411-12 (1964), to read:

If the United States Attorney does not within 60 days after receiving from any person information concerning the violation, institute and maintain a civil or criminal action against such violator, *the person furnishing such information may institute a civil action* for such pecuniary penalty against any person subject to said penalty. (Emphasis added.)

Also provided is an increase in the minimum and maximum amounts of the penalty as well as stipulations making it clear that one who contributes information leading to the penal exactions would be entitled to and receive one-half of the pecuniary penalty imposed on the violator.

