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PRIVATE RELIEF UNDER THE REFUSE ACT

By Howard J. Lazarus*

INTRODUCTION

Recent efforts to enjoin violations of the federal Refuse Act,¹ which regulates discharges into navigable waters, have met with only limited success. While the federal courts have granted injunctive relief to the federal government,² similar relief to private parties has been denied³ for a variety of reasons.

This article will discuss the problems facing private parties who, by way of the Act, seek injunctions against unauthorized discharges into navigable waterways. As will be seen, these problems are tripartite, relating to: the purpose and scope of the Act, the remedies generally available under the Act, and the standing of private persons to litigate with respect to violations of the Act.

THE PURPOSE AND SCOPE OF THE ACT

The Refuse Act is the popular name for section 13 of the Rivers and Harbors Act of 1899.⁴ To fully understand the purpose and scope of the Refuse Act, it is necessary to examine it in relation to the other provisions of the Rivers and Harbors Act. The latter Act, based on the interstate commerce clause,⁵ applies to all navigable waters.⁶ The test for navigability, as set out by the United States Supreme Court, is:

whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.⁷
Current regulations of the Army Corps of Engineers adopt this test; they add, moreover:

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous . . . A waterway is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.\(^8\)

It should be recognized then that this test is a broad one, allowing for determinations of navigability where waterways are not, in fact, currently suitable for use in interstate commerce. The Rivers and Harbors Act, and specifically section 13, may therefore apply to a vast number of waterways in the United States. Of course, all determinations of navigability are ultimately made by the courts.\(^9\)

The Rivers and Harbors Act contains several provisions regulating a broad range of obstructions in navigable waters.\(^10\) Section 9\(^11\) of the Act requires the consent of Congress and approval of the Chief of Engineers prior to construction of any bridge, dam, or causeway, over or in any navigable waterway. Section 10\(^12\) makes unlawful the creation of any obstruction to a navigable waterway, unless there is Congressional authorization therefor. This section also prohibits commencement of any excavation or fill project that may have the effect of altering or modifying the course or navigability of any waterway, unless there is prior approval by the Secretary of the Army. Section 14\(^13\) prohibits activities that may impair the operation of any federal public works project involving a navigable waterway. Section 15\(^14\) makes it unlawful to tie up or anchor a vessel in a manner that interferes with the passage of the other vessels.

Section 13, the so-called “Refuse Act”\(^15\) is perhaps the most important provision of the Rivers and Harbors Act. It prohibits all discharges into navigable waterways, except liquid discharges flowing from streets and sewers; this exception, it should be noted, has been strictly limited to discharges of “sewage.”\(^16\) The section also makes unlawful the placing of any material on the bank of a navigable waterway in such a manner as to make it likely that the material will be washed into the waterway and thereby impede navigation. Section 13 further provides that the Secretary of the Army and the Chief of Engineers may grant permits for discharges into waterways if such discharges will not cause injury to naviga-
tion or anchorage. However, the section requires that any applica-
tion for a permit be made *prior* to actual discharge.

The Rivers and Harbors Act was a compilation of already exist-
ing laws that related to navigable waters. Section 13 itself is based
upon several pre-existing statutes. A section of the Rivers and
Harbors Act of 1886, re-enacted separately in 1888, applied
only to New York Harbor, and made unlawful the discharges of
many types of material, such as "refuse, dirt, ashes, cinders, mud,
sand dredgings, sludge, acid, or any other matter of any kind.
..." The Rivers and Harbors Act of 1890, dealing with all navigable
waterways, and not just New York's, had a less extensive prohibi-
tion. It made unlawful only those discharges of waste "which shall
tend to impede or obstruct navigation." The Rivers and Harbors
Act of 1894 prohibited all discharges of matter of any kind. Although this Act did not include any express requirement that the
discharge impede or obstruct navigation, its legislative history,
as well as its administrative interpretation, suggest that Congress
did intend this Act to be so limited.

The current "Refuse Act" became law with the Rivers and Harbors Act of 1899, and in its present form it provides:

*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 the 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 or 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 naviga-
tion will not be injured thereby, may permit the deposit of any*
material above mentioned in navigable waters within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.27 (emphasis added).

On its face, the first part of section 13 (that before the first semi-colon) appears to prohibit all discharges into navigable waterways. In other words, it can be argued that any discharge made without a permit, whether or not tending to interfere with navigation, would be unlawful. There is judicial support for this reading of section 13.

In United States v. Ballard Oil Co.,28 decided in 1952, the United States Court of Appeals for the Second Circuit held that the phrase "whereby navigation shall or may be impeded or obstructed" limits only the second part of section thirteen (that after the first semi-colon and before the "Provided" clause, and dealing with the placement of materials on riverbanks). The case was decided in summary fashion with no citation to authorities. The district court had found Ballard guilty of violating section 13 because its activities, discharging refuse without a permit, had impeded navigation. On appeal, the circuit court stated that Ballard had not violated the second part of section 12, as it had not deposited any materials on a riverbank; there was no breach of the second part even though Ballard had, without a permit and in contravention of the first part, discharged effluents into navigable waters. Ballard attempted to argue that since a finding that navigation has been impeded is necessary only for violation of the second part of section 13, and such a finding was made in the district court, the district court found a violation of only the second part. Although the court agreed with Ballard's interpretation of the section, it found the company guilty anyway. It viewed the lower court's impreciseness as nonprejudicial to Ballard.

The question whether section 13 prohibits only those discharges which create impediments to navigation was posited more precisely before the United States Court of Appeals for the Third Circuit in United States v. Esso Standard Oil Co. of Puerto Rico,29 decided in 1967. Esso was charged with allowing oil to overflow its tanks and to run into a nearby waterway. The court held that Esso did not violate the second part of section 13, as there was "no suggestion that navigation was impeded or obstructed."30 However, this
did not prevent the court from holding that Esso had violated the first part of the section, as Esso's actions constituted "indirect" discharges. Again, the issue was handled rather summarily. The court looked to *Ballard Oil* for support, as well as to an admonition in *U.S. v. Republic Steel Corp.*, discussed below, that section 13 not be given a "narrow, cramped reading."

A similar position was taken in 1971 by the United States District Court for Maine in *United States v. Maplewood Poultry Co.* Although it had been stipulated that the litigated activity did not impede navigation, the court held that the prohibitions of the first part of section 13 were applicable:

> It has long since been authoritatively settled that the Act prohibits all discharges of polluting matter (other than sewage) into navigable waters, regardless of its source or continuing nature and irrespective of its effect upon navigation.

This court cited *Ballard, Esso, and Republic Steel* as authority.

Not all courts, however, have regarded *Ballard* and its progeny as binding precedent. Several courts, looking to the wording of the entire section, its legislative history, and its placement within the broad framework of the Rivers and Harbors Act, have concluded that section 13 applies only to those discharges which tend to impede the navigability of the waterways. Limiting section 13 in this manner, however, may not be correct, for reasons to be developed below. Nonetheless, the courts have viewed the permit provisions of section 13 as an indication of a Congressional intent to prohibit only those discharges which are injurious to navigation.

The legislative history of section 13 supports such a conclusion. As noted above, this section was based on prior acts which either explicitly provided that they were applicable only to discharges obstructing navigation, or were interpreted to imply as much. Since the circumstances surrounding the passage of the Rivers and Harbors Act indicate that Congress intended to make no substantive changes in the then existing law, some persons may argue that the provisions of section 13 cannot be reasonably read as applicable to all discharges, regardless of their effects on navigation.

Additional support for the proposition that section 13 prohibits only those discharges which impede navigation, may come from the very inclusion of section 13 within the framework of the Rivers and Harbors Act. Every other provision of the Act either regulates or prohibits activities potentially destructive of navigation. Since
section 13 is a part of this broader framework, it may, arguably, be subject to the same limitation.

Whether section 13 applies only to those activities which impede navigation has not been directly decided by the Supreme Court. In *United States v. Republic Steel Corp.*, decided in 1960, the question before the Court was the scope of the exception to section 13 for matter "flowing from streets and sewers and passing there-from in a liquid state." The Court held that the exception is limited to "sewage" and does not apply to industrial wastes. The Court did not discuss the question whether it is necessary that the industrial wastes also impede navigation. However, it is clear from the record that the litigated activity in *Republic Steel* did impede navigation, as the defendant was also charged with a violation of section 10, which prohibits creation of an obstruction in a navigable waterway.

As it is unclear whether the Court considered the existence of the obstruction to be necessary for a finding of a violation of section 13, *Republic Steel* is open to two interpretations. To argue that a finding that navigation has been impeded is necessary, one might point to the existence of the obstruction in *Republic Steel*, and maintain that the Court tacitly premised its decision on that existence. On the other hand, it might be asserted that since the Court made no express reference to the obstruction in its discussion of section 13, it deemed the obstruction to be utterly non-determinative of the section's applicability. The latter interpretation was imputed to the Court by the courts in *Esso* and *Maplewood*.

In *U.S. v. Standard Oil Co.*, decided by the Supreme Court in 1966, the Court again left unanswered the question whether section 13 prohibits only that activity which impedes navigation. The Court held that commercially valuable oil is within the meaning of "refuse" in section 13, and its discharge into a waterway without a permit is therefore prohibited. The Court found support for its holding in the broad range of substances that the earlier Rivers and Harbors Acts had prohibited:

> It is plain from [the Act's] legislative history that the "serious injury" to our watercourses (S. Rep. No. 224, 50th Cong., 1st Sess., p. 2) sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution. (emphasis added)

However, as in *Republic Steel*, the existence of an obstruction in *Standard Oil* is indicated in the record. The Court noted that oil's
"presence in our rivers and harbors is both a menace to navigation and a pollutant."\textsuperscript{51} (Emphasis added.) Therefore, like \textit{Republic Steel}, \textit{Standard Oil} is also open to two interpretations. The Court’s holding may be read as being limited to an interpretation of the word "refuse" in section 13, leaving undisturbed the requirement that the refuse impede navigation. But in view of the strong language in the opinion that the section applies to both obstacles and pollution, the limited interpretation appears incorrect. As in \textit{Ballard Oil}, the existence of the obstruction in \textit{Standard Oil} should be considered non-determinative of the question whether section 13 has been violated. In this regard, it is interesting to note that the Court in \textit{Standard Oil} did cite \textit{Ballard Oil} as support for its holding that commercial oil is refuse,\textsuperscript{52} although the Court made no mention of the \textit{Ballard Oil} holding that an obstruction to navigation is not necessary for a violation of section 13.

To date, the broad interpretation of section 13, that all discharges of refuse without a permit are prohibited, has been applied only in cases where the federal government was plaintiff.\textsuperscript{53} A more restrictive reading, that only discharges impeding navigation violate section 13, has been applied where private parties have sought relief.\textsuperscript{54} The courts’ more restrictive reading is consistent with the traditional administrative interpretation of section 13; paradoxically, it may be noted that this interpretation was formulated with reference to the public character of the rights involved. An excerpt from the Corps of Engineers Regulations is illustrative:

\begin{quote}
Section 13 . . . prohibits the deposit in navigable waters generally of "refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation.\textsuperscript{55}
\end{quote}

The Supreme Court has stated that as a general proposition it gives such administrative construction "great weight,"\textsuperscript{56} and at least one district court has considered this interpretation to be an important factor in limiting the scope of section 13.\textsuperscript{57}

However, it is no longer certain whether this administrative in-
terpretation will continue to be followed even by the very organization responsible for its promulgation. A more recent regulation\textsuperscript{58} by the Corps of Engineers implements the program authorized by the Executive Order 11574,\textsuperscript{59} in which President Nixon ordered the creation of a permit program, based on section 13, to regulate the discharges of "pollutants"\textsuperscript{60} into navigable waters. The Executive Order requires that prior to issuance of a permit under section 13, consideration be given to compliance with water quality standards. This regulation does not supersede the previous one, as the former relates to the Corps' litigation policy, and the latter to the permit procedure. However, it may be taken as an indication that the Corps is now of the view that section 13 admits of a broader application. If issuance of a permit is to require more than a showing of noninterference with navigation, then the section must be interpreted as applying to more than just impediments or obstructions, i.e., to pollution in general.

The United States Court of Appeals for the Fifth Circuit evinced similar reasoning in 1970 in \textit{Zabel v. Tabb}.\textsuperscript{61} In that case the court was concerned, not with section 13, but with an application for a dredge and fill permit, required by section 10 of the Rivers and Harbors Act. The Secretary of the Army denied the permit for the reason that the project would harm the fish and wildlife resources of the bay in question. The denial was made despite the fact that the Secretary had determined that the project would not obstruct navigation. The district court,\textsuperscript{62} however, overturning the Secretary's decision and ordering him to issue a permit, held that:

Section 10 . . . does not vest the Secretary of the Army with discretionary authority to deny an application for a dredge and fill permit thereunder when he has found factually that the construction proposed under the application would not interfere with navigation.\textsuperscript{63}

But on appeal, the court of appeals reversed, holding that the terms of the Act do not require that the reasons for nonissuance of a permit be related to navigability.\textsuperscript{64} \textit{Zabel v. Tabb} thus indicates that the Corps of Engineers and the Secretary of the Army need no longer consider themselves bound by the earlier constricted interpretations of the Rivers and Harbors Act. Although \textit{Zabel} was concerned with section 10, the court's reasoning should apply with equal force to section 13. Notwithstanding the fact that section 10 refers only to "obstructions to navigation,"\textsuperscript{65} the court was able to
give that section a broader reading. Since the first part of section 13 is not qualified by any reference to obstructions, it should be even easier for a court to give that section a capacious interpretation.

To summarize, the long standing view that section 13 makes unlawful only that activity which interferes with navigation may be coming into disfavor. It may be reasonably argued that the Supreme Court, in *Standard Oil*, took a less restrictive view of what the section's purposes are. In addition, the agency responsible for the section's enforcement may itself no longer apply the strict traditional interpretation to that section. However, until the Supreme Court clearly enunciates its position, many lower courts will continue to adhere to earlier doctrine.

**Remedies to Enforce the Refuse Act**

Section 17 of the Rivers and Harbors Act authorizes the Department of Justice to conduct the legal proceedings necessary to enforce the provisions of several of the sections of the Act, including section 13. Section 17 provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections . . . [9, 10, 13, 14, and 15] of this title; and it shall be the duty of the United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated.

Violation of section 13 is made a misdemeanor by section 16 of the Act, which provides:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections . . . [13, 14, and 15] of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Read together, sections 16 and 17 indicate that section 13 was meant to define a criminal violation, and such a reading has been accepted by the courts.

However, criminal sanctions are not the most effective method
to protect navigable waterways. The Federal government has often sought injunctive relief against violations of the Act. Yet the courts are generally disinclined to permit the use of the injunction as a crime-prevention technique. Notwithstanding such disinclination, however, courts have on occasion granted injunctions, e.g., when there is a specific statutory grant of such power. Where such authorization is found, the court will issue the injunction upon a showing that the crime has occurred or is likely to occur.

It is clear that no express grant of injunctive relief is made by either of sections 13, 16, or 17. Nonetheless, the courts have implied the remedy from the wording and purpose of these sections. For example, injunctive relief against section 10 violations was found to be an appropriate remedy in Republic Steel. The Court indicated that:

Section 10 of the present Act defines the interest of the United States which the injunction serves... Congress has legislated and made its purpose clear; it has provided enough federal law in section 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

Another case that adopts this position is Wyandotte v. United States. There the government sought compensation for the cost of raising a barge that had been negligently sunk in the Mississippi in violation of section 15. The owner of the barge maintained that the criminal penalties provided by section 16 were exclusive of other remedies. To buttress this argument, it compared section 12, which expressly authorizes injunctions to require removal of structures erected in violation of section 10 and which has been interpreted as authorizing the injunctive remedy for all violations of section 10, with section 16, which makes no express authorization regarding injunctions. The absence of such an expression, Wyandotte asserted, reflects a congressional intent not to permit injunctive relief via this section.

The Court, however, disagreed. It ascribed to Congress an intent consistent with the purpose of the Statute, and found that it would be unreasonable to conclude that Congress intended the statutory remedies to be exclusive of others. As to what other remedies are available, the Court noted the general rule that the United States may sue to protect its interests. Since the Act creates in the government an authority to prevent obstructions of the nation's
waterways, the government is, of course, entitled to take action that is in accord with its authority. In view of the fact that the criminal penalties of section 16 are inadequate, the Court held that other, civil relief may be appropriate.

Although Wyandotte involved a violation of section 15, the Court's reasoning, that the purpose of the Act be given primacy, should be applicable to section 13. Since section 16 provides the penalties for violations of several sections, thirteen as well as fifteen, the Court's refusal to construe the criminal penalties of section 16 as precluding noncriminal remedies opens the way for use of a civil remedy for violations of section 13.

While such a construction may be more readily applied where the United States is plaintiff, there is language in Wyandotte which permits the inference that other, non-governmental plaintiffs may also seek injunctive relief under the Act. First, in view of the overriding purpose of the Act, the Court was unwilling to read section 16 as exclusive of other remedies. Otherwise, the Court held, the remedies to enforce the Act would often be inadequate. A similar argument can be made with respect to section 17, which authorizes the Department of Justice to institute legal proceedings for enforcement under the Act. If section 17 is interpreted as excluding private parties as plaintiffs, then there may be an inadequate number of possible plaintiffs (specifically one—the federal government) to enforce the Act. And if criminal enforcement is inadequate to the needs of the United States, it may be no less inadequate to the needs of a private citizen. Second, the Wyandotte Court upheld the government's right to relief because the government was one of the parties whose interests the Act was intended to protect: "And we have found that a principal beneficiary of the Act, if not the principal beneficiary, is the government itself." Thus, the Court seems to acknowledge the possibility that parties other than the government may have interests protected by the Act.

Since it now appears that the United States may be granted injunctions against violations of section 13, it is necessary to consider whether other parties also may be granted such relief.

Standing of Private Persons under the Refuse Act

As the Court indicated in Wyandotte, the Act recognizes an interest of the government in navigation on waterways, and that interest is the basis for an implied remedy of injunctive relief.
Without such relief, the government could not adequately protect its interest. The Act does not expressly state that the interest in navigation on waterways is exclusively a governmental interest. Other, private, parties who use the waterways also have interests protected by the Act. The protection, moreover, is not merely incidental; it is direct. The particular kinds of private interests protected will be discussed below. At this point, however, it is important to note that nothing on the face of the Act precludes recognition of other persons having an interest similar to the government’s.

If, then, as logic permits, the *Wyandotte* reasoning is made applicable to all persons arguably having interests in navigable waterways, these persons should be entitled, as is the government, to seek injunctions against violators of the Act. It was noted above that *Wyandotte* itself contains language suggestive of such a conclusion. There, the Court held that the government, as “a principal beneficiary—if not the principal beneficiary” of the Act, was entitled to seek a civil remedy.

This recognition of an expansive zone of interests to be protected by a statute is not unprecedented. For example, it has long been a commonly accepted rule in tort law that a member of a class, for whose benefit a statute was intended, may base his claim for relief upon a violation of that statute, even though the statute does not expressly provide for a private remedy. This rule frequently arises with respect to issues of negligence per se, where a prima facie case of negligence is established merely by proving the statute in question has been violated. Significantly, private plaintiffs have for many years been able to base some actions, in at least some measure on the Rivers and Harbors Act. For example, it has been held that violation of the Act gives rise to a presumption of negligence in admiralty actions. Several courts have held that while such a cause of action is not expressly provided for in the Act, it is clearly implied. In admiralty, the courts view the Act as intended for the benefit of private parties, even though the prohibitions of the Act are criminal in nature. Plaintiffs in state courts have made similar arguments, and at least one state court has taken the view that violation of the Act is negligence per se.

A number of recent Supreme Court decisions have acknowledged interests of private parties who are injured as a result of an administrator’s nonenforcement of regulatory statutes. Even in the absence of specific statutory standing provisions, the Court has
permitted such parties to seek judicial redress for their grievances. The test for standing was set out in the seminal case of *Association of Data Processing v. Camp*:

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise . . . . [the second] question is whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question.

As to the Refuse Act, at least two district courts have stated that injunctive relief is, by implication, available to private parties who are injured by violation of the Act. In order to avail themselves of such relief, private plaintiffs must of course meet both of the standing criteria, set forth in *Data Processing*; in this context, the criteria are that they use the nation's waterways for purposes of navigation, and that they suffer injury because of interference therewith. It may be noted that if a court were willing to ascribe an even broader purpose to section 13 (e.g., the maintenance of water quality by restricting polluters' discharges) the class of persons having interests thereby protected would obviously be expanded; this broader class could include swimmers, fishermen, and others who use the waters—and not just those who are navigators on the waterways. The prevailing view, however, has been that persons seeking relief for violations of section 13 must place themselves within the confines of the more narrowly defined class set out above. The case law on section 13 does not specify precise standards for determining whether a prospective plaintiff has satisfied the two criteria—being a navigator on waterways, and bearing injury because of interference therewith. Yet it is possible to take guidance from cases that have treated other sections of the Rivers and Harbors Act. For purposes of this discussion, these cases will be divided into two categories: those helpful with regard to the first requirement, that the private plaintiff be a "navigator," and those helpful with regard to the second requirement, that his navigational interest be injured.

"Navigator" Status

Since the Rivers and Harbors Act is an exercise of the Congressional power to regulate commerce, the clearest case of a plaintiff's meeting the "navigator" status required for standing is the commercial user. For example, in *Neches Canal Co. v. Miller and Vidal*
Lumber Co.,

involving construction of a dam in violation of section 9 of the Act, the plaintiff that sought injunction of this obstruction was a lumber company which used the stream to float logs to the mill. The injunction was granted, because the court found:

The lumber company, being the user of the navigable stream which was obstructed in violation of the statute, was a beneficiary of the statute forbidding its obstruction.

Here, the plaintiff was involved in active navigation of the stream, and it could show that the existence of a physical obstruction to this navigation injured him economically.

There is no express statutory basis for distinguishing between the commercial navigator and the navigator who uses waterways for pleasure purposes. The navigable waterways are open to all, and in enforcing the provisions of the Rivers and Harbors Act, the Corps of Engineers also has not differentiated the commercial from the non-commercial. The Act has, in fact, been invoked in situations where the only navigation affected was that of pleasure craft having no commercial purpose.

Plaintiffs who navigate on waterways merely for reasons of pleasure should therefore also have standing to seek relief under section 13, the Refuse Act.

A difficulty arises in determining whether a party who is not actively engaged in navigation of the waterways is nonetheless using the waterways for a purpose that is so connected with navigation as to place him within "navigator" status. For example, in H. Christiansen & Sons Inc. v. City of Duluth, decided in 1946, a defendant dock owner permitted timbers to float loose from his dock, in violation of section 13. The plaintiff was maintaining facilities for those engaged in navigation, although he himself was not similarly engaged. The court dismissed the plaintiff's claim for relief on the grounds that he lacked standing to sue under the Act. The court did not discuss what relationship the litigated activity might have had to section thirteen's reference to "anchorage." Since the section provides that a permit may be issued unless the litigated activity impedes either navigation or anchorage, the section should be read as prohibiting both types of injuries. What effect this has on the determination of "navigator" status is unclear. Christiansen simply requires that the party be personally and actively involved in use of the waterways for navigational purposes.

A similar result may obtain where a riparian landowner seeks to enjoin violations of section 13. The riparian landowner has a

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clear potential for engaging in navigation activities. However, this potential, in and of itself, has not been sufficient to give riparian landowners "navigator" status. It seems clear then that the potential plaintiff must establish actual navigational activity. Potential use, or probable future use, will not be sufficient.

Demonstration of this actual navigational activity may involve little more than ownership of a boat. For example, in the 1963 case of *Tatum v. Blackstock*, the plaintiff sought to enjoin defendants from filling in marshlands, in violation of section 9 of the Act. The plaintiff was a riparian landowner, whose property would be flooded and silted as a result of defendant's actions. It was partly as a result of the alleged damage to property that the court held that plaintiff was entitled to seek this relief. However, an additional and probably more important factor relied upon by the court was the fact that plaintiff owned a twenty-two foot boat, which he used for fishing and for pleasure purposes. The court held that this satisfied the test as set out in *Neches*, but it did not indicate the exact manner in which the plaintiff had suffered injury to his navigational activity. Apparently, the bare fact that the plaintiff was engaged in navigational activity and that this navigation in general was being obstructed was sufficient, although the court's holding in this regard is rather vague.

*Injury in Use of Navigable Waterways*

The second requirement, that there be an injury to plaintiff's navigation activities, is merely a corollary of the first requirement. If the Rivers and Harbors Act is intended to prevent injury only to navigation, then a plaintiff not engaged in navigation simply cannot suffer an injury that the Act was intended to prevent. Also in accordance with this hypothesis, a plaintiff engaged in navigation, but not suffering an injury to his navigational activity interests, cannot base his claim for relief under the Act on any other injuries.

Again, it can be seen that such reasoning stems from a limited view of the purpose of the Act. If section 13 was truly intended to prevent a broad range of injuries to waterways, injuries not necessarily limited to navigational interests, then any activity that would diminish the value of waterways, such as pollution activity, should give rise to a remedy under this section. Notwithstanding this possibility, however, the courts, consistent with the restricted
definition of the “navigator” status, have limited the types of injury actionable under section 13 to those occurring to navigation.  

On these grounds, relief was denied to an organization of fishermen who without question were “navigators” but who had alleged as their injury the pollution of waterways and a resultant decrease in numbers of fish. Relief has also been denied to plaintiffs alleging such injuries as obstruction to access to land, erosion damage to land, or damage to dock or jetty. In each of these cases, the plaintiff failed to connect an alleged violation of section 13 with an interference to his navigational interest.

That this difficulty exists is often due, in large measure, to the nature of the discharges involved. The effect of refuse matter on navigation is not always obvious or immediate. Nonetheless, it is clear that the mere presence of refuse matter in the waterways can have a deleterious effect on navigation. The United States Supreme Court has recognized this fact with respect to some pollutants, such as industrial solids, which may form a barrier to navigation. The discharge of oil into waterways has also been recognized as an impediment to navigation, presumably because of its creation of a fire hazard. Thus, the fact that a particular type of refuse has not commonly been regarded as an “obstruction” to navigation need not preclude a finding that discharge of this refuse is an impediment to navigation.

In a similar fashion, less direct, but no less adverse, effects of discharges should also be regarded as bases for injunctive relief. For example, the added cost of removing a pollutant from the exterior or interior of boats should—since it would arguably impede navigational activity—be grounds to have the polluting operations enjoined. Since the Rivers and Harbors Act is a Congressional exercise of the commerce power, the factor of additional cost, itself a burden on commerce, could be recognized by courts as an injury that the Act was intended to prevent.

**CONCLUSION**

Historically, litigation by private plaintiffs under the Refuse Act has been unavailing. Discernible now, however, is a trend to regard private litigation under the Act as being consonant with the Act’s broadly expressed purpose. Private parties seeking relief under the Act may bolster their claims by citation to several recent cases concerning the Refuse Act, as well as to other sections of the Rivers and Harbors Act.
No longer is it widely accepted by the courts that the Refuse Act applies only to activity that impedes navigation. In several recent suits, the federal government has been successful in gaining injunctions against pollution activities that are violative of the act, even though such activities have had no apparent effect on navigation. Moreover, the Corps of Engineers, in its permit program under the Act, has now specifically provided for consideration of other criteria besides effect upon navigation. Since the meaning of the Refuse Act cannot vary merely according to the public or private character of the plaintiffs litigating thereunder, those cases denying relief to private parties for reason that the Act applies only to navigational impediments are logically suspect.

The availability of injunctive relief for violations of the Refuse Act has now been firmly established. This remedy has been applied in order to advance the Act's primary purpose, prevention of obstructions to navigation and/or pollution. While thus far the only successful plaintiff in this regard has been the federal government, the same policy arguments which have allowed it to win injunctive relief should apply with equal force to the private litigant. To argue that the penal character of the Act precludes injunctive relief to private parties is to disregard the fact that equitable remedies have already been accorded to the federal government.

A major question remains as to the forms of injury to which injunctive relief will extend. Broad guidelines have already been established by the Supreme Court, in connection with its recent decisions on standing, and by lower courts, even in cases refusing relief to private parties. The general rule, that a plaintiff must suffer an injury in fact and that he must have an interest within the zone of interest protected by the statute, would mean, when applied to the Refuse Act, that the private plaintiff suffer injury in a water-use context and that he have established water-use interests. To the extent that this application relates only to activity that is injurious to navigation, it is erroneously restrictive. The Act admits of claims and remedies not only to navigational interference but also to pollution activity. A private litigant, as well as the federal government, should be able to have such pollution enjoined.

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Footnotes

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Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43, 48 (5th Cir. 1966).


Id. at 122.


Id.


Id. §401 (1970).

Id. §403 (1970).

Id. §408 (1970).

Id. §409 (1970).

Id. §407 (1970).


Id. at 486.


24 Stat. 329 (1886).


Id.

26 Stat. 453 (1890).

Id.

28 Stat. 363 (1894).

26 CONG. REC. 4376 (1894).


195 F.2d 369 (2d Cir. 1952).

375 F.2d 621 (3d Cir. 1967).

Id. at 623.

See text at notes 42–47.


Id. at 688.


See text at notes 42–47.


362 U.S. 482 (1960).

Id. at 490.

Id. at 483–84.


375 F.2d 621, 623 (3d Cir. 1967).


Id. at 228–29.

Id.

Id. at 226.

Id. at 229.

E.g., United States v. Esso Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3d Cir. 1967).


Id.


Id. at 771.

430 F.2d 199 (5th Cir. 1970).


Id. §413 (1970).

Id.


In re Debs, 158 U.S. 564 (1895).

United States v. Jolas, 409 F.2d 358, 360 (7th Cir. 1969).


362 U.S. 482 (1960).

Id. at 492.


Id. §411 (1970).
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78 Id. §406 (1970).
80 Id.
81 Id. at 201.
84 57 AM. JUR. 2d Negligence §239 (1971).
87 Id.
89 See generally, 2 AM. JUR. 2d, Administrative Law §575.
91 Id. at 152–53.
96 Puente de Reynoso, S.A. v. City of McAllen, 357 F.2d 43, 48 (5th Cir. 1966).
97 24 F.2d 763 (5th Cir. 1928).
98 Id. at 765.
100 154 F.2d 205 (8th Cir. 1946).
101 Id. at 207.
103 319 F.2d 397 (5th Cir. 1963).
104 24 F.2d 763, 765 (5th Cir. 1928).
106 Id.
109 H. Christiansen & Sons, Inc. v. City of Duluth, 154 F.2d 205 (8th Cir. 1946).