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During the 1960’s as a young lawyer in the US Army Corps of Engineers, I learned first-hand that the Corps possessed an almost unlimited number of statutory authorities going back to the early 1800’s – many of which are still on the books and have never been rescinded. Indeed one’s success as a lawyer or program manager was often demonstrated by the ability to come up with some obscure law in support of a proposed action that few others realized was within the purview of the Corps to take.

One such authority contained in the River and Harbor Act of 1899, commonly referred to as the Refuse Act, was to become a key factor in the deliberations leading to the Clean Water Act of 1972. Indeed it might be said that but for the emergence of the Refuse Act and its political impact the environmental legislation of the 1970’s might have taken a totally different approach in some of the most significant aspects.

The Refuse Act, in its original form, was enacted by the Congress in 1890 following a 1888 Supreme Court decision (Williamette Iron Bridge Co v Hatch) that stated that in the absence of any statutory law there was no US common law controlling obstructions and nuisances in navigable rivers. This decision put at risk waterway transportation an important aspect of America’s commerce, and the Congress reacted quickly to protect vital navigation interests. This was subsequently codified as Section 13 of the 1899 River and Harbor Act.
The Refuse Act prohibited the discharge or deposit of any refuse matter -- other than that flowing from streets and sewers and passing from there in a liquid state -- into any navigable waters of the United States, or into any tributary of any navigable water from which it might float or be washed into the navigable water. However, the Secretary of the Army was authorized to permit the deposit of such material in navigable waters, subject to his defined limits and prescribed conditions.

To fully understand the impact of the Refuse Act on the 1972 legislation one needs to grasp the huge fundamental changes that were in the process of occurring and the pressures that were building up to hasten these changes.

There have been various time lines drawn over the years as to the beginning of what we now describe as the Clean Water Program. Some believe that the concept started in 1948 when the Congress authorized the Surgeon General to assist and encourage State studies and plans, interstate compacts and creation of uniform state laws to control pollution and support research. The Act authorized the Department of Justice to bring suits to require an individual or firm to cease practices leading to pollution but only after notices and hearings, and only with the consent of the State.

Other people might suggest that the program really started in 1961 under the stewardship of the Secretary of Health, Education and Welfare with grant authority to local communities for sewage treatment plants, or, perhaps in 1965 when the States were given the opportunity of adopting water quality standards for their interstate waters, and plans to implement and enforce the standards as Federal standards. There was also a complex process included for the Secretary of Interior, the successor to the Secretary of HEW as the principal manager of the program, to make the final call on the establishment of water quality standards applicable to the states’ interstate waters or portions of such waters.

Those who would argue for the 1965 Act would surely note that this was the turning point in the establishment of a national policy for the prevention, control and abatement of water pollution – a far cry from what until that time was a belief that pollution was a local problem to be resolved by the relevant State and local communities.

Other significant legislation enhancing the federal role was enacted in 1966 and 1970 but the common denominator for all this legislation was the failure to have an effective enforcement methodology. The various acts established a procedure involving complex conferences, hearings and judicial review. However, actual enforcement was only after all else failed and with the approval of the involved States.

One reliable source indicated that from 1956 to 1970 the enforcement procedure to abate pollution had been invoked only 46 times of which only four had gone to hearings and only one to court action.
Oversight hearings at the Congress in the late 1960’s and the early 1970’s – both in the Senate and House of Representatives – clearly disclosed basic weaknesses in the program that needed changes. The early discussions between the two key Congressional Committees with responsibility for authorizing new legislation revealed that there was agreement that changes were necessary but the nature and the extent of the changes were in issue. In its most elementary terms the Senate preference was to create a new program based on individual permits for discharges whereas the House originally believed that the underlying concept based on water quality standards could be strengthened and improved. Nevertheless, the staffs of the two Committees and key Members were actively talking and the process for new legislation was underway.

Those of us who lived thru this period were keenly aware of the heightened public expectations in the general environmental area. Patience was not considered a worthy value by the activists who were making clean water and clean air the battle ground of the environmental movement. What many had considered to be a fast changing evolving relationship in battling pollution of our national and local waters was looked at by others as a conspiracy to stall and evade. And on top of all of this there was a fast approaching Presidential election with many of the key players in the Senate Committee expected to be prominently involved.

During this period activists both in the Congress and in the environmental movement were seeking and pursuing other parallel courses of action involving private litigation.

One of the more popular and publicized of these private suits is the so called “qui tam” actions which is a suit brought under a statute by a private party who declares that he or she is suing on behalf of themselves as well as the Government. Since there had been no permits for discharges granted by the Secretary of the Army under the Refuse Act, activists encouraged the bringing of “qui tam” court actions for discharges under this provision of law. Indeed one of the oversight Congressional committees championed this as the appropriate enforcement procedure for the Clean Water Program.

Then on December 23, 1970, two days before Christmas and without the general discussion that one would expect to go on between the Executive Branch and the Congress, President Richard Nixon signed Executive Order 11574 ordering the executive branch to implement a permit program under the Refuse Act 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 matter upon their banks.

The Secretary of the Army was directed to consult with the Administrator of the Environmental Protection Agency respecting water quality matters, and then establish a procedure for receiving, processing and evaluating applications for permits.

The Secretary would be responsible for granting, denying, revoking, or suspending Refuse Act permits. However, in making his decisions, the Secretary was directed to accept the determinations and interpretations of the Administrator with respect to applicable water quality standards and compliance with those standards. Additional
coordination was required with other Federal agencies for additional issues such as effects on fish and wildlife. The Attorney General was directed to conduct the legal proceedings necessary to enforce the Refuse Act and permits issued pursuant to it.

The reaction to the Executive Order in the Congress was immediate and almost unanimous – the Refuse Act Program was a non starter and eventually brought the House and Senate Committees into agreement that there needed to be legislation creating a new permit program based on an effective mechanism whereby effluent limitations and other requirements would be applied in a clear, direct and orderly way to municipal and industrial dischargers along with meaningful enforcement authority. It also added fuel to the debate about the need for a strong citizen suit provision. It took time and great effort to fill in the details for the new statutory program but the die was cast.

The general if not unanimous view of the House Committee Members was serious concern that the overall administration of the Refuse Act Program was in the Corps of Engineers and not EPA. Although most of the Members expressed the highest regard for the integrity and abilities of the Corps, the basic decision had been made by the President and the Congress at the time that the Environmental Protection Agency came into existence only a few years before that it would be the single agency responsible for leading the battle against pollution. Although other agencies such as the Corps should have a significant role to play in the battle, it must be a supportive role.

Another key problem for the House Members pertaining to the Refuse Act permit program was the total usurpation of enforcement of water quality control by the Federal Government. In their view this was inconsistent with the Federal-State partnership that is necessary if we are ever to have clean and safe waters. The role of the States needed to be clearly recognized. They believed that it would be impossible for the Federal government to succeed without the active co-operation of the States. A system of permits which required duplicative efforts or destroyed the initiative of the States and local government was wasteful and non-productive.

And perhaps most significantly, the Congressional Committees which historically created and nurtured the Clean Water Program were angered at the unilateral creation of a new Federal program by President Nixon without Congressional approval.

In summary, the infamous Refuse Act was doomed almost from its inception. However, its influence and impact on the shaping of the 1972 Act was enormous.

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