Crimes Against Water: The Rivers and Harbors Act of 1899

Andrew Franz*

I. INTRODUCTION

The Rivers and Harbors Act of 1899[1] (RHA), often called the Refuse Act, makes it unlawful[2] for any person or corporation to throw, discharge, or deposit any refuse matter of any kind or description from any ship, barge, or floating craft, or from any shore, wharf, manufacturing establishment, or mill into the navigable waters of the United States or their tributaries or onto banks of any such waters where the refuse shall be liable to be washed into such waters, by ordinary or high tides, storms, floods, or otherwise without a permit, or in violation

* © 2010 Andrew Franz. Assistant Professor, Criminal Justice, University of Pittsburgh at Greensburg, Pennsylvania. I would like to thank Vermont Law School for providing me the opportunity for the past two summers to study and think about issues such as the one presented here. In that regard, I would particularly like to thank Vermont Law School's Adjunct Professor, Randolph Hill, who is also at the E.P.A., for cordially allowing me to discuss the ideas in this Article with him. I would like to thank Professor Oliver Houck of Tulane Law School for his advice and encouragement. Finally, I would like to thank the National Endowment of Humanities—Rule of Law Institute Summer 2009 at the University of New England, for also providing me a place to think broadly about such matters.

1. 33 U.S.C. §§ 401-467 (2006).

2. The Refuse Act's criminal provisions are primarily at 33 U.S.C. §§ 403, 407 and 411. Section 403 prohibits obstructions. Section 407, often referred to as "§ 13," describes what is prohibited, and § 411 provides the punishment.

of a permit.[3] In clearest terms, the RHA reflects that water pollution is a crime.[4]

There is a debate, however, as to exactly what kind of water pollution Congress intended to criminalize by enacting the RHA. Most analysts assume the RHA came into wide usage in the 1960s and 70s in a manner inconsistent with the Act's original legislative intent, which was to prevent obstructions to navigation in interstate waterways.[5] One such analyst, Joseph D. Abkin, claims that because the RHA excluded sewage in a liquid state and spoke in terms of impeding or obstructing navigation, the statute could not have been formulated to cope with modern pollution.[6] Others, however, find the legislative history of the RHA consistent with its modern use.[7] For example, Peter C. Yeager and Albert E. Cowdrey indicate the Act was created in response to several factors, including: (1) the ever-present dangers of navigating boats in needlessly murky waters; (2) the deleterious history of water pollution at the dawn of the American industrial age, including prior ineffective state and federal[8] criminal and civil efforts at control; and (3) Congress taking seriously the "public trust" doctrine, whereby American commerce might be saved from its own self-destructive behavior.[9] In short, water pollution by 1899 in America was associated with diverse social, economic, aesthetic, and health harms, and it had already been criminalized by many state statutes.

---

3. Section 407 also designates the Secretary of the Army as the permit authority, but this authority is delegated to the EPA, as well. 33 U.S.C. §§ 1342(a)(4)-(5), 1345 (Supp. V 1975) (including possible § 407 permit authority to states).

4. Section 411, as amended in 1996, makes RHA convictions misdemeanors, with penalties ranging from fines of $500 to $25,000, and imprisonment for 30 to 365 days.

5. *See, e.g.*, LETTIE M. WENNER, THE ENVIRONMENTAL DECADE IN COURT 7-18 (1982); Joseph D. Abkin, *Federal Programs for Water Pollution Control*, 1 U.C. DAVIS L. REV. 71, 96-98 (1969); HARVEY LIEBER, FEDERALISM AND CLEAN WATERS: THE 1972 WATER POLLUTION CONTROL ACT 23-25 (1975).

6. Abkin mostly draws attention to where 33 U.S.C. § 407 explicitly exempts the criminalization of depositing refuse that "flow[s] from streets and sewers and pass[es] therefrom in a liquid state, into any navigable water[s]." Abkin, *supra* note 5, at 96 (citing 33 U.S.C. § 407). Abkin fails, however, to inquire into the potentially wider meaning of § 407's prohibition of discharges on banks and other such places where refuse is liable to be washed by tides, storms, floods, or otherwise into navigable waters or their tributaries. *See id.*

7. *See, e.g.*, PETER C. YEAGER, THE LIMITS OF THE LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 53-65 (1991); Albert E. Cowdrey, *Pioneering Environmental Law: The Army Corps of Engineers and the Refuse Act*, 44 PAC. HIST. REV. 331-49 (1975).

8. YEAGER, *supra* note 7, at 53-65; Cowdrey, *supra* note 7, at 331-49.

9. Prior federal legislation, which the RHA was modeled upon, was designed to protect specifically named waters—e.g., New York and Boston Harbors, Lake Michigan, and the Sacramento and San Joaquin Rivers—from various laundry lists of pollutants and obstructions. Cowdrey, *supra* note 7, at 335-36.

Early RHA cases prohibited the dumping of mud into tidal waters by persons,[10] discharging oil from vessels,[11] and throwing refuse into the water, including boxes, baskets, garbage, and wrappers.[12] The United States Supreme Court had already ruled in 1940 that the RHA was to be applied broadly to protect receiving waters from discharges where these waters were navigable or might reasonably be made navigable.[13] Lower federal courts were already holding that proof that the receiving waters were actually obstructed by the discharge was unnecessary.[14] A state court had even held that a state investigator was within the scope of his authority when he instituted a criminal action in federal court for pollution under the RHA, 33 U.S.C. § 407.[15] Despite these holdings, commentators typically claim the RHA was "rediscovered" in the 1960s following two important Supreme Court cases.[16] This is correct in the sense that rather than having to wait for new environmental legislation, aggressive U.S. Attorneys suddenly redirected their attention to an overlooked existing law. They found in the old statute a ready antipollution weapon to be used against a wide array of defendants for a wide array of conduct.[17] By 1972, when the Federal Water Pollution Control Act (FWPCA) was passed,[18] most criminal indictments to control water pollution were initiated under the RHA.[19]

---

10. United States v. Moran, 113 F. 172, 173 (C.C.S.D.N.Y. 1901). Here the owner and the master of the tug, the latter who personally dumped, were charged. *Id.* at 172.

11. La Merced, 84 F.2d 444, 446 (9th Cir. 1936). The court indicated that the Oil Pollution Act of 1924 did not eviscerate, but supplemented, the plain language of the RHA. *Id.* at 444. The RHA prohibited throwing, discharging, or depositing "from or out of any ship, barge, or other floating craft . . . any refuse matter of any kind or description."

12. United States v. The Mormacsaga, 204 F. Supp. 701, 701-02 (E.D. Pa. 1962).

13. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-27 (1940).

14. United States v. Ballard Oil Co., 195 F.2d 369, 371 (2d Cir. 1952).

15. White v. Towers, 235 P.2d 209, 214 (Cal. 1951). A state Fish and Game Commission Officer instituted the charges in federal court because the offense occurred in the littoral waters of California, which were under concurrent jurisdiction of the state and federal governments. *Id.* at 210. The court held, because he acted appropriately and consistently with his job description in pursuing the charge in a properly constituted tribunal, that the officer was entitled to immunity from civil liability for allegations of malicious prosecution made by defendants who were acquitted. *Id.* at 214.

16. The two cases are *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), and *United States v. Standard Oil Co.*, 384 U.S. 224 (1966). A sampling of the commentators includes: ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE LAW AND SOCIETY 959 (2004); LIEBER, *supra* note 5, at 24; YEAGER, *supra* note 7, at 113.

17. JAMES V. DELONG, OUT OF BOUNDS OUT OF CONTROL: REGULATORY ENFORCEMENT AT EPA 63 (2002).

18. The FWPCA, along with subsequent legislation, commonly became known as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006).

19. WENNER, *supra* note 5, at 7-8.

There were other reasons for the rise in popularity of the RHA in the 1960s and 70s. The first of these reasons was the Act's "bounty" incentive.[20] Second, though "only a misdemeanor" with criminal fines then capped at $2,500,[21] multiple-count indictments that increased the fines imposable significantly, if not massively, were not uncommon.[22] Finally, used in tandem with other environmental statutes, criminal punishments greatly in excess of the maximum fine were affirmed.[23]

Clearly, widespread use of the RHA for criminal prosecutions in the 1960s and 70s had a strong impact on the industrial community. Eventually, the American Chamber of Commerce and the National Association of Manufacturers lobbied for repeal of the Act.[24] As discussed below, a complex series of political and legal events led to the weakening of the RHA. Ultimately, the more comprehensive and more complex Clean Water Act (CWA) took over much of the RHA's criminal water pollution coverage.[25] For a time, however, the RHA was the nation's premier environmental crime statute.[26]

The events leading to weakened RHA coverage provide a criminological case study in official responses to white-collar crime and a deeper understanding of conflict theory's process of criminalization.[27] For legal historians, these same events offer insight into whether the common law is capable of protecting the public trust. For the criminal justice practitioner, despite the decline in its coverage, the RHA represents

---

20. 33 U.S.C. § 411; *see* discussion *infra* notes 53-60.

21. The maximum financial penalty was quietly raised from $2,500 to $25,000 in 1996.

22. For instance, one defendant in *United States v. Allied Chemical Corp.* was charged with 456 separate RHA counts. 420 F. Supp. 122 (E.D. Va. 1976). The court, upholding another indictment containing fifty counts, held in *United States v. Tobin Packing Co.* that each act of depositing refuse, no matter how small or how long it takes to enter the water, is punishable separately under the RHA. 362 F. Supp. 1127 (N.D.N.Y. 1973). The discussion in *Tobin* indicates that separate RHA counts are not deduced from mere size or length of time of discharge, but from discontinuity of flow, change in composition, and the varying of acts in the discharge process. *Id.* at 1130.

23. In *Allied Chemical*, Allied Chemical was convicted of numerous CWA counts, as well as pleading guilty to 456 RHA counts, and fined $13,240,000, but this amount was reduced due to the defendant making a "charitable contribution" of $8 million. 420 F. Supp. at 122, 124.

24. PLATER ET AL., *supra* note 16, at 959.

25. *Id.*

26. *Id.*

27. YEAGER, *supra* note 7, at 3-12. Conflict theory is a school of criminology, highly applicable to environmental-type crimes, holding that crime is strictly a political concept. Though there are a number of practitioners of conflict theory, the theory essentially posits that groups with competing interests vie for control of the state and hence control of the law, and that the powerful, while decriminalizing their own conduct, criminalize the conduct of the colonized, the migrant, the differentiated, and the unequal. The theory looks to the process of law making, the acts of law breaking, and the discretion of law enforcement, which together is called the process of criminalization. PIERS BIERNE & JAMES MESSERSCHMIDT, CRIMINOLOGY 387 (4th ed. 2006).

efficacy. The RHA is not dead, but still in use. Given its past reincarnations, it would not be surprising if the Act once again found a new and more vigorous life. This Article discusses the seminal events in the 1960s and 70s leading to the revolution that was the formation of modern water pollution control. It discusses what happened to the RHA following that revolution, both immediately and in the long run. The Article concludes with an analysis of how the RHA implicates present federal, state, and local law enforcement practices; how the RHA is still effective; and how it may again be reinvigorated as a powerful law enforcement tool to combat water pollution, filling gaps in the CWA.

II. THE STORY OF THE RISE AND FALL OF THE RHA, ONCE THE PREMIER LAW ENFORCEMENT TOOL AGAINST WATER POLLUTERS

At the beginning of the 1960s, strong RHA enforcement was broadly endorsed by the Supreme Court. The five-to-four ruling in *United States v. Republic Steel Corp.* concerned the type of effluent content the RHA prohibits from being discharged.[28] The Supreme Court held that Republic Steel's unpermitted discharge of industrial solid wastes (iron production deposits) suspended in liquid was an obstruction to the navigable capacity of waters.[29] Over a number of years, defendant's discharges had reduced the depth of the Calumet River Channel four to nine feet.[30] The company asserted that its discharge was lawful pursuant to the RHA's liquid sewage exception.[31] The Court held that this exception was only for solids that would decompose in the water.[32]

The second powerful Supreme Court endorsement of RHA criminal enforcement came six years later in the *United States v. Standard Oil Co.* decision.[33] There the Court held that the term "refuse" in the RHA is defined as "all foreign substances and pollutants."[34] The trial court had agreed with the defendant's proposition that the statutory term "refuse" must refer to something "valueless," and that therefore, criminal prosecution for accidental spilling of "good and valuable" jet fuel into

---

28. 362 U.S. 482, 483 (1960).

29. *Id.* at 485. It was not entirely clear whether the Court was relying on § 403, which prohibits obstructions, or § 407, which imposes a near blanket prohibition on discharges.

30. *Id.* at 484.

31. *Id.* at 491; *see, e.g.*, 33 U.S.C. § 407 (2006) (referring to the RHA liquid sewage exception).

32. *Republic Steel*, 362 U.S. at 490; *accord*, United States v. Ballard Oil Co., 195 F.2d 369 (1952).

33. 384 U.S. 224 (1966).

34. *Id.* at 230.

the water must be dismissed.[35] The Supreme Court remanded, holding that "refuse" is a shorthand substitute for an exhaustive list of substances found in the RHA's predecessor acts, which in effect includes all substances, save those "flowing from streets and sewers and passing therefrom in a liquid state."[36] The Court reasoned that unused oil has the same effect on water as used oil and that common sense dictates the RHA was not diminished, but supplemented, by listings of prohibited matter in predecessor statutes.[37]

After the decision in *Standard Oil*, it became widely apparent that any and every person or corporation who, without a permit, was discharging anything into the water could be found criminally liable. Though any unpermitted industrial water pollution was criminal, during the entire seventy-one years of the RHA's existence, only 415 permits had been sought.[38] Suddenly, more than ninety-nine percent of the estimated 40,000 industrial plants discharging effluent into U.S. waters were subject to criminal indictment.[39] At this point, Abkin claims, it might have been "unlawful to cast a stone into the navigable waters of the United States."[40] If just about everyone was potentially criminally liable under the reincarnated reading of the RHA, then the U.S. government was severely undermanned for prosecuting such crimes. Conventional wisdom had it that a large-scale civil and administrative law permit process was therefore necessary to undermine the potential RHA criminal justice juggernaut, while at the same time appearing to effectively control water pollution.[41]

Aside from the rulings in *Republic Steel* and *Standard Oil*, which greatly displeased industry, the executive branch, and much of Congress, the beginning of the end of the RHA's reign can be traced to a case where a barge loaded with 2,200,000 pounds of liquid chlorine sank in the Mississippi River and was abandoned.[42] According to the defendant in *Wyandotte Transportation Co. v. United States*, traditional maritime principles permitted owners to abandon sunken vessels without recourse.[43] The federal government determined the sunken barge posed

35. *Id.* at 226.
36. *Id.* at 229 (quoting S. REP. NO. 224 (1888)).
37. *Id.* at 226-30.
38. YEAGER, *supra* note 7, at 113.
39. *Id.*
40. Abkin, *supra* note 5, at 97.
41. *Id.*
42. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 194 (1967).
43. *Id.* at 198.

grave danger to aquatic life and to the public.[44] At considerable public expense—$3.1 million—the barge was raised and towed.[45] In reaffirming *Republic Steel*, the Court held that where criminal penalties under the RHA will not rightfully reimburse the government for its expenses, the RHA can also be used to force the polluter to clean up their pollution.[46] Immediately following *Wyandotte*, Congress sought a more reliable, proindustry permitting program.[47] Important to criminology's conflict theory, the pressure came not only from industry, insurance lobbies, and the executive branch, but also the burgeoning regulatory community and, at least for a while, the environmental movement.[48]

Meanwhile, important RHA cases and prosecutions continued in the lower courts. In 1967, the United States Court of Appeals for the Third Circuit held that a discharge of diesel oil on the ground in close proximity to the sea that flowed by gravity alone into the sea was a violation of the RHA.[49] In 1969, the District Court for the Northern District of Illinois held that defendants could not assert the defense of estoppel simply because they had complied with state water quality standards.[50] In *United States v. Interlake Steel Corp.*, the court found very small amounts of iron particles and an "oily substance," discharged into the water and reported to the Department of Justice (DOJ) by the Coast Guard, violated the RHA.[51] After this case, Congressman Reuss of Wisconsin began loudly instigating for widespread criminal and *qui tam* use of the RHA against industry as a simple, quick, and effective measure to clean up the water.[52]

As previously mentioned, the RHA has a "bounty hunters" fee, which, in the discretion of the court, allows for up to one-half of all fines

---

44. *Id.* at 194-95.

45. *Id.* at 195.

46. *Id.* at 204-05. The Court also held that future discharges could be enjoined. *Id.* at 204-05 n.15.

47. *See* Thomas B. Anderson, Jr., *Removal of Obstructions for Navigable Waters: Shipowners' Liability and the Wreck Act*, 48 N.C. L. REV. 552, 565-66 (1970); Lucian Y. Ray, *The Removal of Obstructions from Navigable Waters—Who Pays?* 34 INS. COUNSEL J. 28, 35-36 (1967); Lucian Y. Ray, *The Wyandotte Decision—Its Significance to Maritime Interests*, 38 INS. COUNSEL J. 230, 240; Walter E. Maloney, *Wyandotte and Its Effects on P & I Tower's Liability or Other Insurances: What Policy Covers?*, 43 TUL. L. REV. 567, 575 (1969).

48. NANCY FRANK, FROM CRIMINAL LAW TO REGULATION: A HISTORICAL ANALYSIS OF HEALTH AND SAFETY LAW 150-251 (1986); YEAGER, *supra* note 7, at 53-65.

49. United States v. Esso Standard Oil Co., 375 F.2d 621, 623 (3d Cir. 1967).

50. United States v. Interlake Steel Corp., 297 F. Supp. 912, 916 (N.D. Ill. 1969). In considering this holding it must be kept in mind that although state water quality standards today are often enough deficient, standards in the late 1960s were notoriously deficient.

51. *Id.* at 912-14 (holding that agents not enumerated in Section 417 of the RHA—that is, the U.S. Coast Guard—could refer matters to the DOJ for prosecution).

52. LIEBER, *supra* note 5, at 23-5; YEAGER, *supra* note 7, at 120.

imposed to go to the informer upon conviction.[53] Clearly, this "bounty" incentive played a significant role in both the reemergence and the decline of the RHA's popularity in the early 1970s. Courts have held that this "discretionary" award to the informant is actually mandatory.[54] Some notable rewards were given out. In one case, a mother and son were awarded $12,500 for reporting illegal discharges by defendant into the East River.[55] Most of the "bounty hunters" were environmental groups, who used highly standardized petitions seeking the reward.[56] Shortly after the RHA's rediscovery, those groups began attempting their *qui tam* suits against polluters under the auspices of the Act's bounty-hunter provision where prosecutors had refused to prosecute.[57] Many *qui tam* suits were tried and most of these failed, as lower courts held that the bounty-hunter provision did not mean the RHA could be used for private criminal law enforcement.[58] There are notable exceptions to the general rule of failed RHA *qui tam* actions,[59] but for the most part, the *qui tam* suits were unsuccessful unless the federal government cooperated and became actively involved in the actions.[60]

Into the early 1970s, federal prosecutors continued to bring charges under the RHA.[61] The lower courts did their part by continuing to come up with tough rulings against dischargers.[62] For instance, discharges of

---

53. 33 U.S.C. § 411 (2006).

54. *See, e.g.*, United States v. St. Regis Paper Co., 328 F. Supp. 660, 664 (W.D. Wisc. 1971).

55. United States v. Transit-Mix Cement Corp., 2 Env't Rep. Cas. (BNA) 1074, 1075 (S.D.N.Y. 1970).

56. A beautiful example of such a petition can be found at VICTOR J. YANNACONE ET. AL, ENVIRONMENTAL RIGHTS AND REMEDIES 270-82 (1972); *see also* 1 E.L.R. 10133, 10137; *EPA and the Refuse Act permit Program*, 1 ELR 10133, at 10137 (citing the *qui tam* informational program guidelines for would-be bounty hunter citizens put into effect by then Western District Pennsylvania U.S. Attorney, Richard Thornburgh).

57. PLATER ET AL., *supra* note 16, at 958-60.

58. A good example of a lower court's typical and summary dismissal of such a suit is *Reuss v. Moss-American*, 323 F. Supp. 848, 850 (N.D. Wisc. 1971).

59. Alameda Conservation Ass'n v. California, 437 F.2d 1087, 1089 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971). In the postrevolutionary era, see *Libby Rod & Gun Club v. Poteat*, 457 F. Supp. 1177, 1185 (D.C. Mont. 1978).

60. WENNER, *supra* note 5, at 68. The lower courts' rejection of citizen-initiated actions under the RHA is anomalous, however, to previous Supreme Court rulings upholding *qui tam* suits under logically similar statutes and situations. Certainly, *qui tam* citizen enforcement suits have had a significant impact on the development of American criminal law, particularly where government enforcement was novel, sporadic, weak, or where favoritism and corruption were prevalent. *See, e.g.*, Marvin v. Trout, 199 U.S. 212 (1905); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, *reh'g denied*, 318 U.S. 799 (1943); Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805).

61. *See, e.g.*, United States v. Fla. Power & Light Co., 53 F.R.D. 249, 251 (S.D. Fla. 1970); United States v. Steel Co., 333 F. Supp. 1073, 1075 (S.D. Tex. 1971).

62. *See, e.g.*, *Fla. Power & Light*, 53 F.R.D. at 251; *Armco Steel*, 333 F. Supp. at 1075.

pure water that otherwise changed the temperature of receiving waters,[63] and discharges of toxics such as cyanide, phenols, sulfites, and ammonia[64] were found to violate criminal provisions of the RHA.

On December 23, 1970, however, just a couple of weeks after he established the Environmental Protection Agency (EPA), President Nixon controversially announced that the federal government would actively use the RHA as part of a broader strategy to restrict water pollution and control and enforce water quality standards in the nation's navigable waters.[65] It is quite likely that Nixon had plans other than those he stated publicly. Nixon tried to forestall the ramped-up use of criminal and *qui tam* RHA actions and the increasingly finicky courts, while conducting discrete, back door communiqués with the industry polluters that Nixon, Congress, and the nation relied upon for their power and prestige.[66]

Rather than mounting an immediate escalation of criminal actions against industry, the Nixon strategy sought to modify the RHA with a more thorough permit process.[67] This approach was pitched to industry, regulators, and environmentalists as an attempt to rescue the weak permit program alluded to in the RHA.[68] Under the Nixon plan, industries could obtain permits from the United States Army Corps of Engineers (Corps) to discharge into navigable waters or their tributaries after identifying the types and amounts of effluents they were discharging and after certifying they were in compliance with water quality standards.[69] Implicit, but unstated, in this plan was the government's dependence on industry to provide information about its effluents.[70] The Nixon Administration further muddied the waters by bringing various regulatory agencies into the decision-making process. The EPA would review these permits and issue regulatory standards for several categories of industry; however, developing regulatory standards would take many years, not months.[71] Violations of permits, when they did occur, would be handled according to complex DOJ internal decision-making rules that might lead to civil suits—not criminal indictments.[72] As well, the Interior Department's Federal Water Quality Administration would coordinate negotiations

63. *Fla. Power & Light*, 53 F.R.D. at 251.
64. *Armco Steel*, 333 F. Supp. at 1075.
65. RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 76 (2004); LIEBER, *supra* note 5, at 24.
66. YEAGER, *supra* note 7, at 114-21.
67. *See* LIEBER, *supra* note 5, at 24.
68. *See id.* at 24-25.
69. *Id.* at 24.
70. *Id.*
71. *Id.*
72. *Id.*

between states and industry and immediately limit DOJ discretion for filing criminal charges.[73]

The new RHA permit program was to begin July 1, 1971, and more than 20,000 applications were anticipated.[74] Not unexpectedly, problems developed.[75] Applications were late being distributed.[76] When the applications did arrive, the federal agencies were swamped with them and lacked manpower for timely review.[77] Outspoken U.S. Attorneys remained zealous in their use of the RHA to criminally prosecute industry.[78] Whitney North Semour of New York's Southern District notoriously refused to clear his decisions with DOJ superiors in Washington.[79] Congressman Reuss now vociferously claimed the White House was using the RHA amendments to hamper swift prosecutions.[80] By spring of 1971, only twenty-eight suits had been brought against water polluters by the DOJ, and half of these were to halt horrific mercury emissions widely covered in the press.[81]

Despite their general lack of success with *qui tam* actions under the RHA, environmentalist groups proved more adept at bringing citizen suits against federal agencies for failing to carry out legislated mandates.[82] This is how the Nixon plan for the RHA was defeated. The environmentalists, who had first hailed the new regulatory program, came to see that the Corps was not going to issue very restrictive permits under the proposed amendments to the RHA.[83] For one thing, the permitting process proposed by the Nixon Administration provided for no public participation.[84] The Nixon plan was highly deferential to the polluting industries, who in effect would write their own permits.[85] Industries claimed the contents of their effluents, no matter how harmful, were proprietary trade secrets; their revelation would violate principles of capitalism by aiding their competitors.[86] Succumbing to this reasoning,

---

73. YEAGER, *supra* note 7, at 121-22.
74. LIEBER, *supra* note 5, at 24.
75. *Id.* at 25.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. YEAGER, *supra* note 7, at 122.
82. WENNER, *supra* note 5, at 69-70.
83. *See* LIEBER, *supra* note 5, at 24-25; WENNER, *supra* note 5, at 69-70.
84. YEAGER, *supra* note 7, at 124-5.
85. *Id.*; Neal Shover & Aaron Routhe, *Environmental Crime*, 32 CRIM. & JUST. 321, 346 (2005) (commenting that nothing has really changed in this regard; corporate interests have always played an active role in crafting the laws proscribing their conduct).
86. YEAGER, *supra* note 7, at 125.

the Nixon Administration's complex regulatory scheme enabled the overseeing agencies to withhold critical effluent content information from both the public and the states.[87] The states themselves were rather unenthusiastic about the Nixon plan by this time, too, for the new program seemed to conflict with state and local permit systems then widely in place.[88]

The first hammer blow to the RHA was a judicial decision attacking its proposed new permitting plan. In *Kalur v. Resor*, a case brought by frustrated environmentalists seeking to prevent the Corps from issuing permits to industries on the highly polluted Ohio River, the court invalidated the Nixon plan as envisioned, doing so on two broad grounds.[89] The first ground, which has largely been ignored by history, was the court's open declaration that the Nixon permit plan was a cloaked ruse whose purpose was to massively and unlawfully undermine the RHA's criminal provisions.[90] The court noted that vast numbers of criminals in industry had remorselessly flouted these provisions since 1899.[91] The court's second ground for invalidating the Nixon plan has received more attention, and this was that the Corps had not written an environmental impact statement (EIS) for each application as required under the recently passed National Environmental Policy Act of 1969 (NEPA).[92] Tellingly, though commentators widely opined that the court's NEPA deference reasoning was odd,[93] the defendants in *Kalur* did not appeal.[94] Immediately after the *Kalur* decision, however, the EPA announced the new RHA permit program was dead.[95] The announcement mentioned that it would be impossible for the government, already overburdened, to prepare the many thousands of EISs, which were

87. *Id.* at 126.

88. LIEBER, *supra* note 5, at 24.

89. 335 F. Supp. 1, 4-5 (D.C.D.C. 1971).

90. *Id.* at 12.

91. *Id.* at 11. For the opinion of one commentator who saw both rationales in *Kalur*, see Lakshman Guruswamy, *The Case for Integrated Pollution Control* 54 L. & CONTEMP. PROBS. 41, 53 (1991).

92. *Kalur*, 335 F. Supp. at 13-15. NEPA, 42 U.S.C. § 4332(2), often called the "stop and think" law, requires all federal agencies to produce EISs, assessing environmental risks and benefits as well as more environmentally friendly alternatives for all proposed major programs.

93. *See, e.g.*, Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 512-13 (1977) (criticizing the opinion's logic).

94. Defendants included the Secretary of the Army, the Administrator of the EPA, and the Chief Engineer for the Army Corps of Engineers.

95. YEAGER, *supra* note 7, at 129.

previously thought to be unnecessary, but were now mandated by the decision.[96]

The second hammer blow fell in 1973, but this time it was directly aimed at the body of the RHA. In *United States v. Pennsylvania Industrial Chemical Corp.* (*PICCO*), the Supreme Court cast doubt on its previous favorable RHA rulings.[97] A jury convicted the defendant corporation on all counts, then the Third Circuit reversed for the defendant;[98] however, the Supreme Court remanded the case to the trial court.[99] In doing so, the Court cautiously confirmed what it now saw to be a central *Republic Steel* holding that whether the discharge effects navigation is irrelevant to an RHA criminal analysis.[100] The Court also confirmed that the new water quality legislation, passed after the date of the offenses alleged, compliments the RHA's criminal enforcement provisions rather than undermines them.[101] The Court even insisted that the defendant in an RHA case would not be permitted to show the government did not have a permit program in place because the RHA absolutely prohibits polluting the navigable waters regardless of government action, and absence of a permit program cannot sanction dumping.[102] Nevertheless, the Court held that where a defendant has discharged matter that did not impede navigation, the defendant is allowed to show at trial that the agency overseeing the RHA consistently construed the Act at the time of the alleged offense to be limited to discharges affecting navigation;[103] in other words, the Court would allow a narrow exception to its previous strict liability holdings for certain defendants to show and to seek jury instructions that they had affirmatively been misled by the Corps' prior disinterest in policing waters.[104] Subsequent cases have both minimized and clarified the holding, but at the time it was a significant blow to the RHA given the

96. *Id.*
97. 411 U.S. 655 (1973).
98. United States v. Pa. Indus. Chem. Corp. (PICCO), 461 F.2d 468, 469 (3d Cir. 1972).
99. *PICCO*, 411 U.S. at 675.
100. *Id.* at 669-71 (citing United States v. Republic Steel Corp., 362 U.S. at 489 (1960)). Curiously, this issue was not central to the holding of *Republic Steel*, because due to defendant's nondissolving discharges, the depth of the Calumet River Channel had been reduced four to nine feet and navigability had been obstructed. *Republic Steel*, 362 U.S. at 484.
101. *PICCO*, 411 U.S. at 668.
102. *Id.* at 668-70.
103. *Id.* at 670.
104. LIEBER, *supra* note 5, at 25.

limited role its weak permit program had played in criminal enforcement cases.[105]

These blows, along with the creation of the EPA in 1970 and the passage of the FWPCA of 1972, ended the reign of the RHA as the dominant federal criminal law enforcement tool against water pollution. Evidence of the revolution is in the numbers. Over 400 RHA criminal indictments had been filed in the four years immediately following the 1966 *Standard Oil* case.[106] According to EPA records, there were 169 RHA criminal referrals brought between July 1971 and December 1972.[107] During all of 1973, the number of such cases dropped to fifty-seven, and by 1974 there were only twenty-two RHA criminal referrals.[108] Since 1976, the EPA has stopped reporting on RHA cases even though the DOJ continues to use the statute in certain situations.[109]

Some criminologists hypothesize that, too often, statutes criminalizing corporate behavior provide too small punishments for purposes of deterrence.[110] In bringing upon itself so much concerted, often covert, effort from so many quarters to curtail criminal actions brought under it, the RHA's efficacy must be deemed to speak for itself. If the RHA's supposedly miniscule misdemeanor penalties had such small deterrence effect, why were so many on the receiving end of these punishments vehemently opposed to the government using them? Clearly, the labeling of corporations as criminal, even as misdemeanants, gets elite attention.[111]

In one sense, the RHA brought us to a new environmental level.[112] In another sense, had the Nixon Administration and Congress, at the

---

105. The *PICCO* entrapment by estoppel defense has not been a panacea for defendants. *See* discussion and accompanying citations, *infra* notes 142-145.

106. *See* Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 TUL. L. REV. 2279, 2289 (1996).

107. YEAGER, *supra* note 7, at 265; William C. Steffin, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782, 791 (1970-71). Despite the[se] "respectable" numbers, Steffin notes that the DOJ's stated reluctance to prosecute under the RHA because it would conflict with the FWPCA was disingenuous given the FWPCA itself (at 33 U.S.C. § 1174) stated that it did not supersede or limit the RHA.

108. YEAGER, *supra* note 7, at 265.

109. Mark W. Schneider, *Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation*, 73 J. CRIM. L. & CRIMINOLOGY 642, 662 (1982) (recounting the slow early rate of prosecutions under the FWPCA and noting that it took until 1976 to get the first conviction under the Act).

110. *Id.* at 647; YEAGER, *supra* note 7, at 3-12.

111. Criminological science has shown that when it comes to the effectiveness of deterrence, certainty is more important than harshness. Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, *in* CLASSICS OF CRIMINOLOGY 373, 373-380 (Joseph E. Jacoby ed., 2004).

112. Houck, *supra* note 106, at 2291.

critical juncture, used their power to take a more aggressive approach with the criminal provisions of the RHA, today we would exist in an altogether different world regarding crimes against water.[113] Whether the public trust was best served by the turn events took depends upon one's perspective on matters such as the efficacy of the CWA and the comparative efficacy of administrative law to criminal law. It was the corporate, executive, and congressional self interests that responded so predictably, so negatively, and so powerfully to using the criminal law provisions of the RHA to protect the environment. The modern administrative civil law laissez faire approach, which protects the industrial tax base more than the public trust interest in clean water, won the day. True enough, a common law showdown between democratic legitimacy and political-economic viability was averted by the Nixon coup.[114] Two questions, however, have evaded conflict theory analysis here: (1) What was the role of the legal profession, particularly rank-and-file agency lawyers at the EPA in these events?[115] and (2) Why is there indifference, which exists to this day, in the environmentalist community toward more widespread use of the criminal law to solve environmental problems?[116] Answering these questions seems promising for expanding standard conflict theory hypotheses about criminalization.[117]

III. WHAT HAPPENED TO THE RHA AFTER THE REVOLUTION?

The EPA was founded on December 2, 1970.[118] The Kalur case was decided on December 21, 1971.[119] The CWA was introduced before Congress on October 28, 1971, and became effective on October 18,

---

113. This is the juncture where those in the legal community concerned with the environment and those in the criminal justice community concerned with the environment part ways. *See, e.g.*, RONALD G. BURNS, MICHAEL J. LYNCH & PAUL STRETESKY, ENVIRONMENTAL LAW, CRIME, AND JUSTICE 97-139 (2008); DONALD J. REBOVICH, DANGEROUS GROUND 95-99 (1992).

114. YEAGER, *supra* note 7, at 128.

115. Shover & Routhe, *supra* note 85, at 347 (looking at the numerous bureaucratic-structural motives the EPA has for not referring matters to the DOJ for criminal action).

116. Environmental Crime Prosecution: Results of a National Survey, http://www.ncjrs.gov/txtfiles/envir.txt (last visited Jan. 21, 2010) (discussing the historical antipathy of environmental groups towards criminal solutions).

117. Inquiry might examine the dynamic relationship of the practicing legal profession, the origins of bureaucracy, and even rank-and-file environmental interest group membership, to elites; *see, e.g.*, RICHARD QUINNEY, THE SOCIAL REALITY OF CRIME (1970); MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 214-21 (H.H. Gerth & C. Wright Mills eds., 1946).

118. J. Clarence Davies, III & Charles F. Lettow, *The Impact of Federal Institutional Arrangements*, *in* FEDERAL ENVIRONMENTAL LAW 138, 140 (E.L. Dolgin & T.G.P. Guilbert eds., 1974).

119. Kalur v. Resor, 335 F. Supp. 1, 1 (D.C.D.C. 1971).

1972.[120] *PICCO* was decided on May 14, 1973.[121] Despite the reduction in the number of cases being brought, RHA jurisprudence did not cease with these revolutionary events. Cases continued to be brought and to work their way through the courts, even as the CWA slowly took hold. These postrevolution RHA decisions of import can be divided into several categories: (1) the types of discharges prohibited; (2) the mens rea necessary to convict for an RHA violation; (3) the types of defendants typically found liable for RHA violations; and (4) the types of defenses asserted in RHA cases. These categories are discussed immediately below.

As to the types of discharges prohibited, courts continued to support the *Republic Steel* and *Standard Oil* holdings.[122] One postrevolution court expanded the list of unlawful substances to include titanium dioxide, calcium carbonate, as well as other chemicals and suspended and dissolved materials.[123] Despite the § 407 exclusion of criminalizing discharges of refuse "flowing from streets and sewers and passing therefrom in a liquid state,"[124] postrevolution courts also took the opportunity to expand on the language of § 407 that prohibits discharges on banks and other such places where refuse is liable to be washed by tides, storms, floods or otherwise into navigable waters or their tributaries.[125] The *United States v. American Cyanamid* and *United States v. Mackin Construction Co.* courts held that proof that the discharged materials actually reached receiving navigable waters is not necessary to sustain a conviction under the RHA; rather, the necessary proof is that the discharge was "likely" to have reached navigable waters.[126]

As to the mens rea necessary to convict for an RHA violation, postrevolution courts continued to hold that the RHA is a public welfare statute requiring offenses charged under it to be given the lowest mens rea threshold, that of strict liability. In one case the court held that *scienter* is immaterial because the RHA is a *malum prohibitum* offense.[127] In another case, the court stated that a nonintentional discharge, where employees negligently failed to close a water tap before leaving for the

120. 33 U.S.C. § 1251 (2006).

121. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 655 (1973).

122. *See* United States v. Am. Cyanamid, 480 F.2d 1132, 1134 (2d Cir. 1973); United States v. Mackin Constr. Co., 388 F. Supp. 478, 481 (D. Mass. 1975).

123. *Am. Cyanamid*, 480 F.2d at 1134. The discharge was into a small and nonnavigable tributary creek. *Id.* at 1133.

124. 33 U.S.C. § 407.

125. *Id.* at 1132; *Mackin Constr. Co.*, 388 F. Supp. at 481.

126. *Am. Cyanamid*, 480 F.2d at 1133; *Mackin Constr. Co.*, 388 F. Supp. at 481.

127. United States v. Ashland Oil, Inc., 705 F. Supp. 270, 271 (W.D. Pa. 1989). In this case, the defendant was charged with both CWA negligence and RHA crimes.

weekend, was sufficient to sustain mens rea for conviction.[128] Perhaps the most extreme instance of there being no need to establish mens rea under the RHA was a case where the defendant had no warning of the leakage, worked diligently to contain it, and paid for cleanup.[129] The appellate court nonetheless upheld the finding that the defendant corporation was strictly liable for the crime because the RHA was a public welfare statute and § 407 imposed a blanket prohibition.[130] It must be noted that the appellate circuits are far more divided, and the mens rea jurisprudence is far more complex concerning applicability of strict liability "public welfare" doctrine to CWA cases.[131]

As to the types of defendants typically held liable for RHA violations, there was unfortunately little postrevolution development toward individual liability as seen in earlier holdings like *United States v. Moran*.[132] Typical of this era is the *United States v. Allied Chemical Corp.* (the *Kepone* case) where, among multiple defendants—several of whom were persons, one of which was a municipality, and two of which were corporations—only one defendant corporation, Allied, was charged with RHA offenses.[133] In *Mackin Construction*, while both the buyer and the seller of fuel oil may have been found guilty for the same set of circumstances that led to the unlawful discharge, the court saw no difficulty in holding only the seller criminally liable.[134] The modern jurisprudence reflects that the CWA goes beyond the RHA by explicitly extending liability to "responsible corporate officers"[135] for the illegal acts of their corporations.[136] Unlike the CWA, the RHA was never concerned with who was in charge of the facility or even who was at fault, and it is very likely that use of the RHA as a prosecutorial tool declined due to the DOJ's Environmental Crimes Division postrevolution policy of prosecuting the highest-ranking corporate officer that can be reached in each case.[137]

---

128. *Am. Cyanamid*, 480 F.2d at 1132.

129. United States v. White Fuel Corp., 498 F.2d 619, 621 (1st cir. 1974).

130. *Id.* at 622.

131. *See* PLATER ET AL., *supra* note 16, at 975-76. See also the seemingly contradictory mens rea logic expressed in these important CWA and environmental crime cases: *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), *cert. denied*, 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); and *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

132. 113 F. 172, 174 (1901).

133. 420 F. Supp. 122, 123 (E.D. Va. 1976).

134. United States v. Mackin Constr. Co., 388 F. Supp. 478, 479-80 (D. Mass. 1975).

135. 33 U.S.C. § 1319(C)(3) (2006).

136. William Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645, 655 (1978).

137. PLATER ET AL., *supra* note 16, at 979.

Regarding the types of defenses asserted in RHA cases, the courts continued to offer little hope for even sophisticated defendants. In one case, the industry defendant asserted that passage of the CWA entirely barred the government from bringing criminal charges under the RHA, but the court held that the EPA can choose the laws under which it will proceed.[138] In *United States v. White Fuel*, the appellate court stated that the recognized defenses for RHA charges are: unpreventable acts of God, extreme natural disasters, third-party negligence, sabotage, and the like.[139] The same court also said a defendant is not required to take all conceivable measures to erect an impregnable fail-safe system to prevent discharges.[140] In sustaining the defendant's conviction for leaking oil into a navigable stream by seepage, however, the court in *White Fuel* held that conforming to industry-wide standards is not a defense; in other words, there is no "due care" defense for violating the RHA.[141]

In regards to estoppel defenses, such as the one raised in *PICCO*, one court held that where the discharge took place in 1967 and the government notice allegedly relied on was dated 1969, the entrapment by estoppel defense was not established.[142] In another case, the court held that RHA prosecutions could proceed despite the fact that defendant had a permit.[143] In a much later estoppel case, a court held that even though defendant had a permit to build a tank near the river, it did not have a permit to pollute into the river.[144] Eventually, the court's holding in *PICCO* of "entrapment by estoppel" came to be interpreted by the lower courts to mean that a defendant who asserts this defense must establish by a preponderance of the evidence the following: (1) a government official (2) told defendant that a certain criminal conduct was legal; (3) that defendant actually relied on the statement; and (4) the defendant's reliance was in good faith and reasonable in light of (a) who the governmental official was, (b) the point of law at issue, and (c) the substance of the government official's statement.[145]

With the revolution, new laws came into existence; with the new laws, a new defense was created—the self-report defense. Prerevolution RHA jurisprudence was largely unfamiliar with the concept of self-

138. United States v. Hudson Farms, 12 E.R.C. 1444 (E.D. Pa. 1978).
139. United States v. White Fuel Corp., 498 F.2d 619, 623 (1st Cir. 1974).
140. *Id.* at 624.
141. *Id.* at 621-22.
142. United States v. U.S. Steel Corp., 482 F.2d 439 (7th Cir. 1973).
143. United States v. Reserve Mining Co., 394 F. Supp 233 (D.C. Minn. 1974).
144. United States v. Ashland Oil, Inc., 705 F. Supp. 270 (W.D. Pa. 1989).
145. United States v. W. Indies Transp., Inc., 127 F.3d 299, 301 (3d Cir. 1997) (a widely cited CWA criminal case).

reporting. Following the enactment of the FWCPA, which required self-reporting, courts were forced to examine whether the information in the mandatory self-report could be used against the RHA defendant.[146] Though the circuits may not entirely be in agreement on this issue, it appears that the defendant's self-reporting to authorities cannot be used against it in an RHA case.[147] Postrevolution courts have held that the CWA requirement for mandatory reporting does not prohibit civil RHA penalties, but only criminal RHA penalties.[148] The Supreme Court has discussed the difference between civil and criminal fines in self-report cases and how to look to legislative intent to determine whether a fine is civil or criminal.[149] The Court in *United States v. Ward* implied that RHA fines at § 411 were criminal, which would prohibit them in cases based exclusively on self-reporting.[150] The *Ward* decision can be read to favor use of the CWA over the RHA in that the former offers more civil and administrative fine options for use against self-reporters.

In another RHA case, the court granted criminal immunity for a corporate defendant by treating them as fictional "persons in charge" who had self-reported their illegal discharges under established mandatory reporting standards.[151] In yet another case, the court held that RHA prosecution of a corporate defendant (again found to be a fictional "person in charge") could not rely solely on mandatory self-reports, nor could such self-reports be exploited.[152] The logic of the self-report defense in RHA cases is two-fold: (1) it must now be accounted that failure to report discharges in many circumstances may be criminal itself under the CWA or other federal statutes; and (2) the idea that criminal pollution might not be found out if the polluter didn't self-report, and therefore, to incentivize reporting of dangerous discharges, self-reporters must not be criminally punished.[153] This logic is curiously reserved only for white collar crimes; imagine if it applied to street criminals.[154]

---

146. *See, e.g.*, United States v. Atl. Richfield Co., 429 F. Supp. 830, 837 (E.D. Pa. 1977); United States v. Ward, 488 U.S. 242, 250 (1980).

147. PLATER ET AL., *supra* note 16, at 975 (commenting that U.S. Attorneys still frequently lean toward charging RHA violations in self-report cases).

148. *Ashland Oil*, 429 F. Supp. at 837.

149. *Ward*, 448 U.S. at 250.

150. *Id.*

151. United States v. Mobil Oil Corp., 464 F.2d 1124, 1125 (5th Cir. 1972) (citing 33 U.S.C. § 1161 (2006), predecessor to the CWA's reporting requirements at 33 U.S.C. § 1321).

152. United States v. Republic Steel Corp., 491 F.2d 315 (6th Cir. 1974).

153. *Id.* at 318.

154. *See id.*

IV. WHAT ROLE, JURISDICTIONAL AND OTHERWISE, MIGHT THE RHA HAVE IN TODAY'S POST-CWA LANDSCAPE?

Though the RHA is still in use and U.S Attorneys formulate charges under it in cases referred to them, unlike the 1960s and 70s, recent case law is sparse. The way the law is currently used, most defendants convicted of an RHA offense have no desire to appeal.[155] The general exception to this rule is where the RHA is used in supplement with CWA criminal charges.[156] As mentioned above, courts have responded to defense arguments that the CWA entirely eviscerated the possibility of RHA criminal charges by noting the EPA is granted wide discretion under which law it will choose to proceed.[157] Though the CWA may preempt and has preempted state and federal common law and state statutory civil and administrative remedies,[158] the CWA does not preempt RHA criminal remedies, which retain viability. The RHA was never found to preempt any state laws.

It is true that unlike the CWA, primary enforcement of the RHA is not delegated to the states. All reported prosecutions under the RHA have been, at the adjudicatory level, exclusively federal jurisdiction cases, though states may and do enforce laws similar to the RHA.[159] On the other hand, the RHA does not eviscerate state criminal water pollution laws. For instance, the RHA's "permitting program" would not permit a polluter to discharge effluent that would otherwise violate state laws.[160] Likewise, state laws cannot eviscerate the RHA. One federal appeals court has held that although defendant was in compliance with

---

155. Despite the fact an RHA conviction today generally indicates a negotiated plea, there are sometimes tangible strategic benefits for corporate defendants to accept these plea deals. For instance, in *Southern Dredging Co. v. United States*, 833 F. Supp. 555 (E.D.S.C. 1993), *aff'd*, 96 F.3d 1439 (4th Cir. 1996), the court held that because the RHA charge plead to was a misdemeanor whereas the CWA charge passed to the file was a felony, the defendant company saved its future rights to contract with the federal government.

156. WENNER, *supra* note 5, at 68-73.

157. United States v. Hudson Farms, 12 E.R.C. 1444 (E.D. Pa. 1978); United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 655 (1973).

158. *E.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); Milwaukee v. Illinois, 451 U.S. 304 (1981); Alexander v. Sandoval, 532 U.S. 275 (2001); R.E. Meiners et. al, *Burning Rivers, Common Law, and Institutional Choice for Water Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 54-85 (R.E. Meiners ed., 2000); JACKSON B. BATTLE & MAXINE I. LIPELES, WATER POLLUTION 687-711 (3d ed. 1998).

159. *E.g.*, Commonwealth v. CSX Transp., Inc., 653 A.2d 1327, 1331 (Pa. Commw. Ct. 1995) (finding strict liability for violation of public welfare statute, 30 PA. CONS. STAT. § 2504(a)(2) (2009), criminalizing unintentional discharge of a substance into water, here corn syrup that was harmful to fish).

160. Commonwealth v. Pa. R.R. Co., 72 Pa. Super. 353, 359 (1919) (upholding the common law crime of "maintaining a public nuisance in a navigable stream").

state standards for pollution, the federal RHA prosecution could proceed.[161] These same rules are true of CWA cases as well.[162]

Absent recent case law on the RHA, however, determining the continued efficacy of the RHA requires knowledge of the gaps in the CWA as well as certain practices of the EPA, the DOJ, and the courts.[163] For one thing, U.S. Attorneys likely find the RHA's criminal penalty process attractive because it is easier to undertake than a CWA case. Forensic testimony is less necessary in an RHA criminal case than in CWA actions, since all that is required for proof of conviction in an RHA case is a discharge of any kind.[164] In CWA cases, complex, expensive, and time-consuming expert analysis of the effluent as well as the receiving waters is usually mandatory.[165] In federal criminal practice today, the defendant frequently pleads to RHA violations, whether as charged or as lesser included offenses (LIOs), while more severe CWA violations are passed.[166] It is asserted that as many as ten to fifteen major RHA prosecutions are still filed annually in the United States.[167]

When possible, the EPA still uses the RHA for oil spills in waterways reported by the Coast Guard.[168] Using the RHA in such cases can be attractive because at least some circuits construe the CWA to permit recovery on oil spills only to the value of the boat or ship responsible for the spill, whereas the RHA has no such liability restriction.[169] Though *Ward* and the line of cases leading to it has meant that the self-reporting requirements of the CWA gut many traditional RHA criminal prosecutions, some federal prosecutors claim it is still easier to use the RHA civilly.[170] For one thing, civil use of the RHA which, under the logic of *Ward*, triggers less self-report immunity problems than do CWA civil actions, allows enjoinment of the

---

161. United States v. Pa. Indus. Chem. Corp., 461 F.2d 468 (3d Cir. 1972) *modified on other grounds*, 411 U.S. 655 (1973).

162. Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200 (4th Cir. 1986).

163. Roger J. Marzulla, *Specific Wetland Criminal Issues*, *in* ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS, 221, 231 (D.A. Carr ed., 1995); Lecture Notes of Professor Randolph Hill, Clean Water Act Course, Vermont Law School, South Royalton, VT; 20-30 July, 2009.

164. 33 U.S.C. § 407 (2006).

165. Peter J. Martinez et. al, *Environmental Crimes*, 43 AM. CRIM. L. REV. 381, 419 (2006).

166. *Id.*

167. PLATER ET AL., *supra* note 16, at 961.

168. WENNER, *supra* note 5, at 72.

169. *See, e.g.*, *id.*; *compare* United States v. City of Redwood, 640 F.2d 963 (9th Cir. 1981) (holding for recovery in RHA cases greater than value of the tug), *with* United States v. Dixie Carriers, Inc., 462 F. Supp. 1126 (E.D. La. 1978), *aff'd*, 627 F.2d 736 (5th Cir. 1980) (holding the CWA preempts recovery in RHA cases for greater than the value of the tug).

170. *See* PLATER ET AL., *supra* note 16, at 961.

defendant's conduct and forces—often at great expense—cleanup of the discharge or spill.[171]

Furthermore, two recent Supreme Court holdings have narrowed the once expansive reach of CWA criminal jurisdiction.[172] The current Court's reinterpretation of congressional power under the Commerce Clause of the United States Constitution requires a closer nexus to "navigability in fact" for the more broadly tailored CWA jurisdiction to apply.[173] However, these two recent CWA rulings, which deal with wetlands and migratory birds, would likely have little impact on traditional RHA criminal jurisdiction. This, as we have seen, is well settled and rather narrowly tailored by Congress.[174] Therefore, traditional RHA jurisdiction is probably still operating under earlier holdings that set less severe jurisdictional limitations.[175] Conceivably, criminal prosecutions now prohibited under *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* and *Rapanos v. United States* could breathe more viability back into RHA criminal cases.[176]

Undoubtedly, the CWA's permitting process has undermined the effectiveness of the RHA as a prosecutorial tool. First, CWA permits have undermined the RHA because if the polluter is in possession of a CWA permit, no court is going to convict for an RHA violation.[177] If the CWA permit has been violated, most assuredly the CWA will be used to

---

171. *Id.*

172. Solid Waste Agency of N. Cook County v. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 715 (2006).

173. *See, e.g.*, *Rapanos*, 547 U.S. at 784.

174. 33 U.S.C. § 407's (2006) language, prohibiting the discharge of any refuse

> 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, 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

is less vague, and more narrowly tailored to serve the ends of the Act.

175. *E.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

176. In *Rapanos*, the plurality's logic focused on the broader but apparently less than precise CWA language of 33 U.S.C. § 1362(7), which states, "[T]he term 'navigable waters' means the waters of the United States, including the territorial seas." *Rapanos*, 547 U.S. at 760 (citing 33 U.S.C. § 1362(7)). *SWANCC*, 531 U.S. at 160 (citing 33 U.S.C. 407), however, is more narrowly and clearly intended to be concerned with the navigability of water.

177. Adjunct Professor, Randolph Hill, E.P.A., Course Lectures at Vermont Law School, Clean Water Act Course (July 20, 2009) (personal notes); LETTIE M. WENNER, ONE ENVIRONMENT UNDER LAW: A PUBLIC POLICY DILEMMA 71-73 (1976).

remedy the situation.[178] If the offender lacks a CWA permit, but should have one, again the remedy will be seen as coming under the CWA.[179] Second, though RHA § 407 still refers to Corps permitting (a process now delegated to the EPA at § 1342(4)&(5)), in practice, RHA permits, other than for construction projects, are rarely sought.[180] Once NEPA was passed, which required all environmental permits to be based on considerations of public health and environmental quality, and the courts showed themselves willing to enforce this provision in regard to the RHA, permitting again became a nonissue for the RHA. The requirement of RHA permitting for dredge and fill activities has been judicially approved,[181] but to the extent that such activities constitute discharges under the CWA there would be no additional RHA permitting requirement.[182] Where it is possible to dredge and fill without "discharging" into navigable waters, the RHA imposes NEPA-like permit requirements, the violation of which may be criminalized.[183] Ironically, though mass RHA permitting was denied in *Kalur*, it is now standard operating procedure for the CWA.[184] In any event, though *Zabel v. Tabb* seems to create a narrow exception for criminal use of the RHA in permit cases, if we are interested in reincarnating the RHA, it is to nonpermit activity that we must look.

The great asset of the RHA is that (save for its explicit § 407 exception of refuse "flowing from streets and sewers and passing therefrom in a liquid state") it criminally prohibits any type of discharge from any source.[185] This is a significant advantage over the CWA, which cannot be used to criminalize the conduct of those deemed to be "non-point source polluters."[186] That nonpoint source discharges are not

---

178. Adjunct Professor, Randolph Hill, E.P.A., Course Lectures at Vermont Law School, Clean Water Act Course (July 20, 2009) (personal notes).

179. *Id.*; BATTLE & LIPELES, *supra* note 158, at 598; WENNER, *supra* note 177, at 71-73; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 677 (3d ed. 2000).

180. Adjunct Professor, Randolph Hill, E.P.A., Course Lectures at Vermont Law School, Clean Water Act Course (July 20, 2009) (personal notes); BATTLE & LIPELES, *supra* note 158, at 598; PERCIVAL ET AL., *supra* note 179, at 743.

181. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (almost moot, but apparently, still good law); *see also* United States v. Ashland Oil, Inc., 705 F. Supp. 270 (W.D. Pa. 1989).

182. BATTLE & LIPELES, *supra* note 158, at 598.

183. *Id.*; RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 119 (1976).

184. 33 U.S.C. § 1371(c)(1) (1982); see also the critical analysis of Lakshman Guruswamy, *Integrating Thoughtways: Re-Opening of the Environmental Mind*, 1989 WIS. L. REV. 463, 491.

185. 33 U.S.C. § 407 (2006).

186. *United States v. Plaza Health Laboratories*, 3 F.3d 643, 645-49 (2d Cir. 1993), is an important CWA case for defining the term "point source," where the court found that a person directly placing, by hand, pollutants harmful to human health, into navigable waters did not confer

covered by the CWA is widely regarded as the Act's major shortcoming. Nonpoint source dischargers are polluters exempted from the requirements of the CWA and are not required to obtain CWA permits to pollute.[187] Significant aspects of modern pollution derive from nonpoint source polluters, yet remain beyond the reach of CWA regulation.[188] Nonpoint source dischargers include: (1) landfill and septic tank polluters (significant amounts of the nation's surface waters are affected or threatened by sewage sludge from septic tanks and from landfill disposal, including the notorious coal or fly ash, which recently spilled from TVA landfill deposit sites into Tennessee's Emory and Clinch Rivers); (2) agricultural pollutants (including eroded sediments, toxic fertilizer and pesticide runoff, and waste from "smaller scale" animal feed operations—generally defined as herds smaller than 1000 head); (3) silviculture (significant amounts of the nation's surface waters are polluted through erosions caused by deforestation and logging roads in tree farming operations); (4) urban runoff (including stormwater runoff from artifacts left on roadways and embankments, runoff from commercial and industrial parking lots, and storm sewer discharges typically occurring in cities with populations greater than 100,000 in the Midwest and Northeast); (5) abandoned mines and other past resource-extraction operations (large amounts of the nation's waters are affected by acid mine wash, and CWA exempted mountain top removal deposits); and (6) construction on sites smaller than five acres (responsible for depositing considerable sediment and artifacts into the nation's waters). Also exempted from CWA criminal coverage as nonpoint sources, as decided by the case law in *United States v Plaza Health Laboratories*, are (7) individual human beings.[189]

Recall that the criminal provisions of the RHA were enhanced, not displaced or preempted, by the CWA, whereas many other state and federal civil and administrative remedies to protect waters have been preempted by the CWA. This makes the RHA the best-existing logical

---

"point source" criminal jurisdiction under the CWA. *Plaza Health* is a clear expression of the widely held doctrine that the CWA applies only to industry, not persons. Defendant's acts in *Plaza Health* would have clearly constituted a crime under RHA jurisprudence.

187. 33 U.S.C. §§ 1319(c)(2)-(3), 1362(14).

188. BATTLE & LIPELES, *supra* note 158, at 535-69.

189. 3 F.3d 643. Unlike the CWA's *Plaza Health* jurisprudence, individuals can be found criminally liable under the RHA for personally discharging pollution into the water. *See* United States v. Moran, 113 F. 172 (C.C.D.N.Y. 1901). While RHA violators are typically corporations, there is nothing in the statute indicating this must be so. *See also* Shover & Routhe, *supra* note 85, at 321 (noting private dumping by individual citizens in navigable waters, their tributaries, and banks is a massive problem in many locales, as well as an environmental justice issue, yet there have been no sustained efforts to criminalize such conduct).

solution to fight major water pollution sources otherwise exempted by the CWA.[190] If the RHA were to be used to fill these gaps in the CWA, it would send a clear and effective deterrence message to citizens, small commercial entities, and wholesale polluters whose harms are presently not enforced.[191] At the same time, current CWA prosecutions focusing on point source corporations and, more and more, their middle management and executives, would not be impeded, but supplemented. Such widespread use of the RHA could reemerge, not only under the still extant "bounty hunter" provisions of the Act,[192] but also under federal "deputization" and delegation schemes for state law enforcement authorities and green policing programs in the spirit of the *qui tam* cases, *White v. Towers* and the *Interlake Steel* holdings.[193] These holdings allowed citizens, state officials, and non-EPA federal officials to refer RHA misdemeanor cases to the DOJ and to the federal courts and federal magistrates.

These are the logical inferences for continued efficacy of this great law that time seems, once again, to have forgotten. Any efforts at renewed efficacy of the RHA will no doubt provide another case study for conflict theory in elite avoidance of criminalization and a Weberian analysis of the role of attorneys and interest groups in that process.

---

190. Though a culture of looking almost exclusively to the CWA for solving criminal water pollution problems has likely developed in the relationship between the EPA and the DOJ, there is nothing other than a lack of political will prohibiting U.S. Attorneys from bringing RHA actions brought to their attention from any source.

191. While also avoiding CWA slowdowns, such as disputes over Best Available Technology (BAT) and technicalities such as "upset," it is possible that some RHA criminal actions covering gaps in the CWA may be precluded under the exception at 33 U.S.C. § 407 (*see* Abkin, *supra* note 5, at 97) or hampered by the EPA practice of issuing TMDLs for problematic non-point-source polluted waters.

192. Shover & Routhe, *supra* note 85, at 344, 349-50. Information programs publicizing rewards and providing contact information have proven successful in reducing environmental harms; for instance in a 2002 RHA case reported by the DOJ, a $62,500 bounty hunter reward was given to two crew members who reported their vessel's oil leak to the Coast Guard. *Id.*

193. White v. Towers, 235 P.2d 209, 211 (Cal. 1951); United States v. Interlake Steel Corp., 297 V. Supp. 912, 916-17 (N.D. Ill. 1969).