

Aquaculture and Pollutants Under the Clean Water Act: A Case for Regulation

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INTRODUCTION	1013
I. THE DEVELOPMENT OF FEDERAL WATER POLLUTION CONTROLS	1014
A. <i>THE RIVERS AND HARBORS ACT</i>	1015
B. <i>THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948</i>	1016
C. <i>THE WATER QUALITY ACT OF 1965</i>	1018
II. THE CLEAN WATER ACT	1019
III. <i>ASSOCIATION TO PROTECT HAMMERSLEY, ELD, AND TOTTEN INLETS V. TAYLOR RESOURCES</i>	1021
A. <i>THE CASE</i>	1022
B. <i>THE DECISION</i>	1023
1. The “Pollutant” Question	1023
2. The “Point Source” Question.....	1026
C. <i>THE SIGNIFICANCE OF HAMMERSLEY</i>	1027
IV. AN AQUACULTURE PRIMER.....	1028
V. A CASE FOR REGULATION	1031
A. <i>THE “POLLUTANT” QUESTION</i>	1031
1. The Language of the Act.....	1031
2. Congressional Intent.....	1035
a. <i>The Principle of Integrity</i>	1036
b. <i>Eutrophication and the Clean Water Act</i>	1039
3. Human Processes and “Pollution”	1040
4. “Pollutant[s]” and the Requirement of “Identifiable Harm”	1042

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- B. *THE "POINT SOURCE" QUESTION*.....1046
 - 1. Concentrated Aquatic Animal Production Facilities.....1046
 - 2. The Question of Deference.....1047

- CONCLUSION1049

INTRODUCTION

On October 18, 2002, the thirtieth anniversary of the Clean Water Act¹ came finally to pass.² Celebrations were, at best, muted.³ Despite the Act's "objective of . . . restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters,"⁴ nearly half remained—three decades after the statute's passage—"in need of cleaning."⁵ To some, the anniversary seemed "just the moment for an aggressive push forward."⁶ Not all were so persuaded. Only two months before, a panel of the Ninth Circuit Court of Appeals announced its decision in *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources*, an opinion in which the wastes from two "mussel-harvesting facilities" were held to be beyond the reach of the Clean Water Act's provisions.⁷ The thrust of the court's reasoning was simple: because the "mussels, shells and . . . byproduct[s]" were not "waste product[s] of a transforming human process," they fell outside the category of "pollutants" defined by the statute, and were not, therefore, subject to the central permitting requirements of the Act.⁸

Despite its modest face, the Ninth Circuit's opinion is unsettling. The decision not only endorsed the unpermitted operation of mussel harvesting facilities within "the vibrant waters of Puget Sound,"⁹ but also laid precedent for all other industries wishing to so harvest aquatic species. More insidiously, the court's opinion suggests a previously undiscovered element in the Act's definition of regulated pollutants, an element unearthed by unnamed "tools of reason"—the requirement of "identifiable harm" or,

1. 33 U.S.C. §§ 1251–1387 (2000). While formally termed the "Federal Water Pollution Control Act," Congress capitulated to popular usage in the statute's 1977 Amendments, anointing references to the "Clean Water Act" with an official air. Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566, 1566 (1977).

2. See *All Things Considered: Chesapeake Bay, Maryland, on the 30th Anniversary of the Clean Water Act* (NPR radio broadcast, Oct. 18, 2002), 2002 WL 3498320.

3. See, e.g., Hillary Rodham Clinton, *White House Not Doing Enough to Maintain Clean Water*, TIMES UNION ALB., Oct. 18, 2002, at B2, 2002 WL 24169163; Misty Edgecomb, *Clean Water Act at 30: Kudos, Criticism*, BANGOR DAILY NEWS, Oct. 18, 2002, at 1, 2002 WL 23751246; Tony Freemantle, *After Three Decades, Clean Water Act's Success Questioned*, HOUS. CHRON., Oct. 18, 2002, at A18, 2002 WL 23231118; Bruce Henderson, *1 in 4 Dump Chemicals That Sicken; Troubling Report Comes at 30th Anniversary*, CHARLOTTE OBSERVER, Oct. 18, 2002, at 3B, 2002 WL 101037765; Don Hopey, *Clean Water Act Hailed at 30; But Bush Proposals Worry Environmental Groups*, PITT. POST-GAZETTE, Oct. 18, 2002, at C1, 2002 WL 101474534; Tom Meade, *Clean Water Act Turns 30h Year Facing New Challenges*, PROVIDENCE J., Oct. 18, 2002, at D28, 2002 WL 22526092.

4. 33 U.S.C. § 1251(a) (2000).

5. *The Clean Water Act at 30*, N.Y. TIMES, Oct. 22, 2002, at A30.

6. *Id.*

7. 299 F.3d 1007, 1010 (9th Cir. 2002) (Gould, J.).

8. *Id.* at 1017.

9. *Id.* at 1010.

perhaps, “appreciable or significant damage.”¹⁰ This Note seeks both to shed light upon the significance of the *Hammersley* opinion and to demonstrate the erroneousness of the court’s reasoning.

Part I of this Note discusses the evolution of the federal water pollution control program and the impact of that evolution upon the terms of the Clean Water Act. Part II sets forth the basic provisions of the statute and the purposes for which they were enacted. Part III outlines the opinion of the Ninth Circuit in *Hammersley* and is followed, in Part IV, by a discussion of aquaculture and its relation to the marine environment. Finally, Part V seeks to demonstrate the applicability of the Act to the harvesting operation at issue in the case.

I. THE DEVELOPMENT OF FEDERAL WATER POLLUTION CONTROLS

The history of federal water pollution control is one of “increasing intervention” into a realm long dominated by state control.¹¹ From the initial moment of federal intervention in 1890,¹² Congress sought to maintain what was considered an “important principle of public policy”—that the “States [would] lead the national effort to prevent, control and abate water pollution,” leaving the federal government to “support” and “assist[.]” the states in their endeavors.¹³ The conviction with which Congress

10. *Id.* at 1016.

11. Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1176 (1983). J. William Futrell has termed this slow expansion of federal authority “creeping federalization.” J. William Futrell, *The History of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY 3, 44 (Celia Campbell-Mohn ed., 1993). For a thorough history of early local, state, and federal water pollution control efforts, see N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186 (1966) [hereinafter Hines I]; N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part II: Interstate Arrangements for Pollution Control*, 52 IOWA L. REV. 432 (1966) [hereinafter Hines II]; N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part III: The Federal Effort*, 52 IOWA L. REV. 799 (1967) [hereinafter Hines III].

12. While the federal government did pass legislation attempting to control water pollution prior to 1890, those statutes—enacted in 1886 and 1888—dealt only with the waters of New York Harbor. *See infra* note 16 and accompanying text (discussing the Rivers and Harbors Act of 1890 and its more limited predecessors). Despite the narrowness of the legislation, it seemed to spur some nascent commitment to water pollution control. Between 1886 and 1967, “[m]easures to control water pollution [were] introduced in all but six Congresses.” Hines III, *supra* note 11, at 803.

13. S. REP. NO. 92-414, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669; *see also* Hines III, *supra* note 11, at 838 (“In tracing the evolution of federal involvement in the water quality management field, it is seen that, although the emphasis may shift from time to time, federal effort substantially has been concentrated on both phases of pollution control: enforcement and financial assistance.”). President Eisenhower, in vetoing a 1960 bill with the modest aim of increasing federal grants for water treatment facilities, demonstrated the conviction with which some maintained this sentiment. Reasoning from the false premise that water pollution is a “uniquely local blight,” Eisenhower declared that the “primary responsibility for solving the

maintained this principle was remarkable. As the decades of the twentieth century dissolved, it became increasingly apparent that the states were not “lead[ing] the national effort” to maintain water integrity,¹⁴ but rather shunning the movement’s terms.¹⁵

A. THE RIVERS AND HARBORS ACT

Congress first addressed the integrity of the nation’s waters, albeit indirectly, through the Rivers and Harbors Act of 1890.¹⁶ The statute’s provisions declared unlawful “[t]he creation of any [unauthorized] obstruction . . . to the navigable capacity of any waters” within the jurisdiction of the United States.¹⁷ Less than a decade later, Congress expanded the breadth of the Act with the passage of the Rivers and Harbors Appropriation Act of 1899, which extended the statute’s prohibition to the “throw[ing], discharg[ing], or deposit[ing] . . . [of] any refuse matter of any kind or description . . . into any navigable water of the United States,” unless the refuse was of the kind “flowing from streets and sewers and passing therefrom in a liquid state.”¹⁸

While the Rivers and Harbors Act seems, in retrospect, a remarkable piece of stewardship by a legislature working at the close of the nineteenth

problem lies not with the Federal Government but rather must be assumed and exercised, as it has been, by state and local governments.” H.R. REP. NO. 86-346, at 1 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1542, 1542-43.

14. S. REP. NO. 92-414, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669.

15. See *infra* note 36 and accompanying text (noting the limited promulgation of water quality standards by states and the near total lack of standard enforcement).

16. See 33 U.S.C.A. § 403 annot. (West 2000) (setting forth the original provisions of the Rivers and Harbors Act of 1890 and the revised text of 1899). Prior to the enactment of the Rivers and Harbors Act, two statutes—the first enacted in 1886 and the second in 1888—limited the dumping of refuse into the waters of New York Harbor alone. *United States v. Standard Oil Co.*, 384 U.S. 224, 226-27 (1966). The Rivers and Harbors Act of 1890, and the subsequent Rivers and Harbors Appropriation Act of 1899, sought to consolidate these statutes and make their terms applicable to all the navigable waters of the United States. *Id.* at 227.

17. 33 U.S.C.A. § 403 annot. The act rested primarily upon criminal sanctions:

[e]very person and every corporation . . . guilty of creating or continuing any such unlawful obstruction . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court.

Id. The original provisions of the Act also permitted “any circuit court [district court] exercising jurisdiction in any district in which such [an] obstruction . . . [was] threatened or . . . exist[s]” to “prevent[]” or “remove[] [it] by . . . injunction.” *Id.* The 1899 revision altered these terms only slightly, requiring that the fine “not exceed[] \$2,500 nor [be] less than \$500.” 33 U.S.C. § 406 (2000). While the Act, once revised, made no mention of the use of injunctions to prevent threatened obstructions, the Ninth Circuit Court of Appeals, in *United States v. Wishkah Boom Co.*, 136 F. 42 (9th Cir. 1905), held that the text of the original Act was not superseded by the revision in this regard. 33 U.S.C.A. § 403 annot.

18. 33 U.S.C. § 407.

century, the statute's purpose was more economic than environmental.¹⁹ Its provisions were, in short, crafted in order to clear "obstruction[s]" from waters of the United States and, thus, assure their navigability.²⁰ Still, the Act was a watershed, one later interpreted broadly—after being disinterred by a "bit of legal archeology"²¹—to prohibit the discharge of "industrial solids"²² and "aviation gasoline"²³ into American rivers. Of even greater importance, perhaps, was the statute's embrace of effluent limitations²⁴ and their influence on the formation of the Clean Water Act nearly a century later.²⁵

B. THE FEDERAL WATER POLLUTION CONTROL ACT OF 1948

In 1948, the United States Congress adopted its first comprehensive statute directly addressing the mounting problem of water pollution—the Federal Water Pollution Control Act.²⁶ Under the statute's terms, states were handed the fundamental authority to develop and enforce water quality standards, leaving the federal government with the "very secondary position"²⁷ of advising state authorities and funding their efforts.²⁸ While

19. See *Standard Oil*, 384 U.S. at 228–29 ("It is plain from [the Act's] legislative history that the 'serious injury' to our watercourses . . . sought to be remedied was caused in part by obstacles that impeded navigation and in part by pollution.") (citation omitted); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1149 (1995) (stating that the Act "was not inspired by environmental concerns" but was rather driven by Congress's desire "to prevent barriers to navigation on the waterways").

20. 33 U.S.C. § 403.

21. 117 CONG. REC. 38,833 (1971) (statement of Sen. Baker).

22. *United States v. Republic Steel Corp.*, 362 U.S. 482, 483 (1960). The solids at issue in the case, though never enumerated specifically, were those discharged from a mill that produced "iron and related products." *Id.*

23. *Standard Oil*, 384 U.S. at 225.

24. Effluent limitations are "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged . . . into navigable waters." 33 U.S.C. § 1362(11). Effluent limitations stand in contrast to ambient water quality standards which, rather than restricting the amount of permissible discharge, "specify[] the acceptable levels of pollution" in a body of water. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). The line between effluent limitations and water quality standards is not only mechanical; the two approaches stem from disparate environmental philosophies. Advocates of water quality standards commonly argue that "[w]ater is meant to be used . . . , and one legitimate function is the assimilation of wastes." Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10,329, 10,331 (1997). Those seeking effluent limitations often take a different line, arguing, as did the drafters of the Clean Water Act, that waters should not be used to "dispose of . . . wastes," but rather to "support . . . life and health." S. REP. NO. 92-414, at 3672 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674. Thus, the effluent lobby has argued, discharges of waste into the environment should be the exception, not the expectation. *Id.*

25. See generally 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.1 (1986).

26. Pub. L. No. 80-845, 62 Stat. 1155 (1948).

27. Hines III, *supra* note 11, at 810.

