

Clean Water at Forty
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It is a pleasure to have the opportunity to put the 1972 Clean Water Act in historical perspective, perhaps providing an insight that comes from being there during its birthing. Hopefully, this discussion will be useful not only because of the direction of current environmental debates but also because of the profound changes that we have witnessed in our national policy dialogue.

Forty years ago many of you in this room had not yet been born and, I suspect, the overwhelming majority had not yet graduated from high school. And yet we had already written the most innovative and revolutionary public law on the books, the Clean Air Act. And, we were well on our way to finalizing its cousin, the Clean Water Act.

I mention this not to show how old I really am but, in part, to contrast our legislative process then with what it has become. To a degree, forty years ago, we weren't so much "bipartisan" as we were not partisan. Except in the final couple of months before November in even numbered years, there was little focus on either election contests or party politics in the United States Senate.

For Senators, elections were more deadlines for legislative action, than for partisan political gamesmanship. This is not to say that we didn't have sharp partisan disagreements – like the amount and the funding mechanism for the Clean Water Act – but at the same time we had clearly did not have a partisan alignment on the regulatory structure of that law. From my perspective, these differences reflected fundamentally different visions of governance rather than partisan political disagreements.

Six of seven of our Committee Republicans opposed using contract authority to fund the 1972 Act but they all voted for final passage in the Committee and the Senate. In fact, so strong was the support for the Clean Water Act that it passed the Senate 86-0. The Senators met 44 times to draft this bill. It's no wonder no one challenged it.

I should note that, in 1972, legislation was still written behind closed doors. This allowed open debate among Members without the threat of political reprisal. And Senator Muskie refused to move a provision or a bill until EVERY Senator had uttered their last word. (My colleague, Tom Jorling always believed this worked because the Members wanted to hide from the Viet Nam war demonstrators.)

The House later passed its version of the bill 380-14, and the Conference report was approved 74-0 in the Senate and 366-10 in the House. President Nixon's veto was overridden by a huge bipartisan majority. As an aside, I don't know how many times it has been reported that the Clean Water Act was a product of the Nixon Administration. I keep trying to correct that myth.

The veto override vote, which occurred after midnight in the Senate and House on the evening of adjournment, was 52-12 in the Senate and 247-23 in the House. And, by the way, that was the first Nixon veto overridden.

I was in the House Gallery when the override vote was taken. So politically popular was the issue of clean water that, when the motion was made to override, the House Minority Leader, Gerald Ford, left the floor and was not recorded on the veto.

Part of the reason for those pluralities was the time and attention the Members of each Committee gave to fashioning a bill. We met with our counterpart conferees on forty-five separate occasions to resolve our differences. Let me repeat that number: 45 Member-attended conference committee meetings to resolve our differences. And this does NOT count the endless hours of staff meetings with our House colleagues to lay the ground work for the Members.

In those seemingly endless hours of debate and disagreement Members focused on every issue in great detail. Much of our work focused on the NPDES permit program, not only its scope but how it fit with the Federal-state structure of clean water law. We were forced to address this issue because of a judicial interpretation of the 1899 Refuse Act. That law prohibited any discharge of pollution into the navigable waters of the United States. And, there was a bounty to any person who identified a violator.

The Administration, through the Council on Environmental Quality, had drafted a regulatory permit program applicable to the hundreds of thousands of now illegal discharges of pollution. Senator Muskie saw this coincidence of judicial decision and regulatory initiative as an opportunity to inject the Federal government more fully into the campaign for clean water. He took full advantage of this opportunity to significantly expand not only regulatory policy but the waters to which that policy would apply.

That may be why we spent endless hours, in conference, on the definition of “navigable waters” deciding only in the final hours of that seemingly endless conference, to be vague. House Counsel Les Edelman said, “Why don’t we just define “navigable waters” as “the waters of the United States” and let the Courts decide the scope of Federal jurisdiction.” The Senate staff wanted a more encompassing definition but we were unable to reach any other agreement, and clearly in uncertain constitutional territory, we accepted Les’s suggestion and recommended it to the Members.

They, in turn, were not satisfied with the vagueness of our recommendation and there ensued extensive Member debate on what waters would not be included as “navigable.” The conferees finally agreed that those waters designated as “navigable” pursuant to the Northwest Ordinance, the Federal Power Act, and other Federal navigation and flood control statutes, and the waters and wetlands connected to or drained by them would be subject to Federal jurisdiction.

The debate focused specifically on California’s Lake Tulare, which was alleged to be a free standing lake that was groundwater fed and did not discharge into any other waters, and “prairie potholes” that periodically filled with rain water but, again, were not connected to other free flowing streams.

Thus you might not be surprised that Tom Jorling, my minority counterpart, and I have taken comfort from the Supreme Court’s interpretation of “waters of the United States.” They did not, in our view, narrow our intent even though they may not have expanded the definition as broadly as some might have hoped. In this context, it is important to note that, prior to the Refuse Act decision and the 1972 Act, Federal water pollution jurisdiction was limited to “interstate waters” which accounted for less than 48 percent of the nation’s waters. As now supported by SCOTUS,

95 percent of US waters are deemed navigable and thus subject to Federal jurisdiction.

Tom and I are both sympathetic to those who have tried to expand the scope of Federal jurisdiction and certainly would have enjoyed a more fulsome definition by the Court. But, the plain fact is, at the time, we could not make a case for a broader, constitutionally defensible interpretation.

And then there was the issue of water quality standards. The Senate had decided that technology-based “effluent limitations” ought to be the enforceable control mechanism to eliminate the discharge of pollution by industry and municipalities.

We had further decided that “water quality standards” ought to be a measure of the success or failure of the effluent control programs, NOT the basis for establishing Federal effluent limits. It should be noted that Sec. 303, which relates to water quality standards, has virtually no reference in other parts of the law, particularly the enforcement or permit provisions. That is the result of the switch from water quality to effluent limits as the basis for regulation.

We went further by not establishing a regulatory mechanism for “non-point” sources of pollution. It is true that we were preoccupied with “point source” discharges as a result of the Refuse Act decision but, too, we could not identify a politically viable mechanism to impose Federal controls on non-point sources.

We did try to create a mechanism that would force focus on these pollution sources at the local level in Sec. 208 but, at the time, some in EPA questioned the value and propriety of this provision and, clearly, the OMB did not want to fund it.

My greatest disappointment associated with implementation of the 1972 law was abandonment of Sec. 208. It was truly a farsighted provision. It attempted to foster the idea that clean water was an integral element of local and regional land use decisions. It attempted to provide a mechanism to deal with the panoply of non-point source issues that EPA is now trying to leverage through a strained and stretched use of Sec. 303.

While I am aware that EPA has tried to bootstrap Federal regulation of non-point sources through creative interpretation of Sec. 303, I am equally satisfied that it was not the Senate's intent that this water quality standards provision become a basis for Federal intervention but rather retained as a mechanism that states could use to achieve clean water results not available via point source controls.

I know there are many in the advocacy community who would disagree with my perspective, on both navigable waters and water quality standards but, then, they were not in the room when compromises were made. Moreover, much has been learned and new needs identified in the last 40 years which make other interpretations preferable.

My response is simple: we did the best we could with the politics and constitutional interpretations that then prevailed. We may not have addressed all the issues that are now before us and we may have made decisions based on what was politically feasible at the time. Whatever the case, expanding the scope of the Clean Water Act either with respect to waters covered or sources of pollution to be controlled, calls for new law, not re-interpretation of existing law.

I personally wish we would have been more imaginative; that we would have been able to see further over the horizon; that we could have anticipated the limitations of our works. Perhaps we could have had better constitutional law advice. I also wish the Federal government would have maintained the financial commitment we made to the construction of publicly owned waste treatment infrastructure particularly with respect to storm water and advanced waste treatment.

The Clean Water Act was, uniquely, a compact between the Federal government, states, and municipalities. We committed the Federal government to a significant contribution to achieving waste water treatment objectives in return for a radical change in the financial and regulatory investment by state and local government in these programs. That promise has not been fully kept by either Democrats or Republicans, in the White House or in Congress.

The American people still think water is a "free good" to which they are entitled. They also believe, now, that clean water is part of that entitlement. In 1972 we said that water is not a free good which can be used

to carry waste to the sea. We codified the fact that clean water is an entitlement. We told both citizens and industry that America's navigable waters belonged to the people of the United States and that pollution was a temporary option until technology allowed its elimination.

As my wife and I travel around the country we are impressed by the waterfronts in so many communities that have been revitalized. Surely, part of the reason for these improvements has been changing our rivers from open sewers to fully functioning aquatic ecosystems. There is a personal thrill in viewing this transition, almost as great as when Senator Muskie was able to witness the return of Atlantic sea-run salmon to the Bangor Pool. Or his feeling of success when Lake Erie was no longer closed to water contact sports and eastern rivers no longer caught fire.

Today too many Americans seem to appreciate the price of everything and the value of nothing. Our challenge is to continue the progress we have made, expand the tools available to achieve clean water, broaden the coverage of the programs intended to achieve those objectives, and agree that a clean environment has a price to which we all must contribute if future generations are to enjoy the fruits of our labors over the last forty years.

I would like to end with a couple of observations on our current political/public policy dilemma. I am asked often how we could have constructed such landmark and unprecedented legislation like the Clean Air and Clean Water laws in a competitive political environment while maintaining the degree of unanimity and collegiality so obviously present at the time.

We were successful because there was an acceptance of the division between policy and politics, between ideology and responsibility. My boss and the principle sponsor of these laws, Senator Edmund S. Muskie, a Maine Democrat, worked very hard to engage with his GOP counterparts on his committees. He had a Senate-wide reputation for building bridges with his ranking member irrespective of committee. And it was a mutual effort.

His closest ally and most innovative colleague was Senator Howard Baker, a Republican from Tennessee. Baker was the source of the concept of strict liability that formed the basis for Federal oil pollution law and Superfund. He also initiated the idea of technology standards in the Clean Air Act that became the predicate for technology based effluent limits in the

Clean Water law. And you all know that he went on to become the Republican leader in the Senate and chief of staff to President Reagan.

Perhaps the lack of sharp partisanship is best captured by Sen. Jim Buckley's comments on the Senate version of the 1972 water pollution bill. Buckley was elected as a member of the New York Conservative Party and organized with the GOP.

In his "Supplemental Views" on 1972 bill, he made the following observation:

"In closing, I would like to say something rather personal. I am the only member of the Committee on Public Works who has not had previous legislative experience. I have had rather definite points of view on a number of provisions which, at one time or another, have appeared in the drafts of the legislation which is now before the Senate. But I know of no situation in private life where a newcomer would have been accorded greater consideration or where differences of opinion who have been given a fairer hearing than that which was characteristic of both the Committee on Public Works and the Subcommittee on Air and Water Pollution. I feel particularly fortunate to be a member of both and to have been able to work with the two Chairmen and the committee staff, who have made so great an effort to accommodate differences of approach to common objectives."

This, from the brother of William Buckley who founded the National Review, from the only Conservative member of the United States Senate, is the best example I can site that juxtaposes the Senate of 40 years ago with the Senate today.

Senator Muskie conducted endless hearings in Washington and around the country trying to educate himself and his colleagues on the problems and potential solutions to air and water pollution. Their engagement during these hearings, together with the time they spent together in various cities across the country, fostered not only good fellowship but permanent friendships. And they developed common understandings of the nature of the problems they investigated.

It was Muskie's view that, if he could get his colleagues to agree that a problem existed, they could then work to fashion a solution. But it was not just achieving agreement that a problem existed, it was also essential to get agreement as to the appropriate Federal policy role. Today we have what

appears to be an unbridgeable gulf on whether a particular problem even exists. We don't even get to the debate on the Federal role, if any.

Senator Muskie also appreciated that successful resolution of complex political and institutional problems required finding a political center. He often said, "If I can define the extremes, I can define the middle ground." My task was to help articulate those extremes.

These principles may not apply today. When a controlling minority refuses to even recognize a problem exists, much less that there is a Federal role in solving it, the opportunities for compromise, for defining a middle ground, do not exist.

We are, rather, engaged in a great debate on the role of the Federal government, the rights of the several states, and the responsibility of government to address the needs of people. That debate will only be resolved politically, by the people of this country who take the trouble to vote.

This is a conflict of ideologies not witnessed since the beginning of the Great Depression at which time it was resolved by the electorate and gave birth to the New Deal. The earlier conflict of this magnitude was resolved by the War Between the States. Both conflicts were premised on fundamental economic divisions, one resolved by arms, the other by voters.

I hope and trust that our current political stalemate will be resolved peacefully, by the voters and that we can once again see debate focused on developing consensus rather than confrontation. I do not expect the deeply held views of either side to diminish. It is not unreasonable, however, to expect our elected officials to engage in civil debate at least to determine if problems exist and then what viable solutions might be available.

And the end of the day compromise is never very palatable but it is essential to our democracy. I refuse to be pessimistic about the future but I am challenged to see a light at the end of the tunnel.

Thank you.

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