

# ESSAY

## Written on the Water

Oliver A. Houck\*

*There is a river whose streams make glad the city of God,  
The holy dwelling places of the Most High.  
God is in the midst of her, she will not be moved;  
God will help her when morning dawns.*

—Psalms 46:4-5

Here, on the campus of Tulane, we are a few hundred meters from the great river of the continent, carrying nearly two-thirds of the waters of the United States. Just across town is Lake Pontchartrain, the largest lake in the lower forty-eight states, where waters of the Gulf of Mexico lap against the shore. Upstream from New Orleans, for the next seventy miles, is the biggest concentration of heavy industry in America,<sup>1</sup> more than 100 “major emitting facilities.”<sup>2</sup> Four of these plants alone discharge more pollution than all the plants in the state of New Jersey,<sup>3</sup> which as a polluter is no virgin. Every glass of tap water we drink, by average, has gone through at least one industrial process.<sup>4</sup> South Louisiana has the most petrochemical facilities,<sup>5</sup> the largest volume of navigation,<sup>6</sup> and the most extensive complex of oil and gas pipelines, access canals, and drilling platforms in the country.<sup>7</sup> And at the mouth of

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1. Frederic T. Billings, III, *Cancer Corridors and Toxic Terrors—Is It Safe To Eat and Drink?*, 116 TRANSACTIONS AM. CLINICAL & CLIMATOLOGICAL ASS’N 115, 119-20 (2005).

2. 42 U.S.C. § 7439 (2000) (defining “major emitting facility”).

3. This statistic is based upon the author’s review of the Toxic Release Inventory, located at <http://www.epa.gov/tri>. The author reviewed individual facilities in Louisiana and compared quantities of discharges from them to the quantities discharged in the entire state of New Jersey.

4. JOSHUA I. BARZILAY ET AL., *THE WATER WE DRINK: WATER QUALITY AND ITS EFFECTS ON HEALTH* 23-33 (1999) (discussing water quality in the context of health risks).

5. La. Div. of Admin., *About Louisiana—History & Culture: Louisiana Industry*, [http://www.doa.state.la.us/about\\_industry.htm](http://www.doa.state.la.us/about_industry.htm) (last visited Sept. 15, 2007).

6. Port of New Orleans, *Port of New Orleans Overview*, [http://www.portno.com/pno\\_pages/about\\_overview.htm](http://www.portno.com/pno_pages/about_overview.htm) (last visited Sept. 15, 2007).

7. See MANUEL LAM, LA. DEP’T OF NATURAL RES., *LOUISIANA ENERGY FACTS ANNUAL 2006* (2006), available at [http://dnr.louisiana.gov/sec/execdiv/techasmt/energy\\_facts\\_annual/LEF\\_2006.pdf](http://dnr.louisiana.gov/sec/execdiv/techasmt/energy_facts_annual/LEF_2006.pdf) (reviewing oil and gas infrastructures).

the river is one of the largest dead zones in the world, 8000 square miles of oxygen deprived water, for which we can thank the runoff from a dozen farm states upstream.<sup>8</sup>

All of which is to say that down here in Louisiana waterkeeping matters.

Thinking back, I have been in waterkeeping most of my life. I grew up near the Hudson River, birthplace of the waterkeeper movement. I skipped stones on the Hudson's surface west of the City, and crossed it on special occasions with my father, on the open ferries from New Jersey to Manhattan, the men with their faces to the breeze, enjoying like lab mice the only contact with nature they would have all day before disappearing into their office buildings. They stood there on the decks in their business suits, hats off, adventurers in their minds, later day Henry Hudsons, momentarily happy, feeling the grandeur of that river and its vista. No matter the trash bags, raw garbage and other unidentifiables floating by. We took that for granted in those days. Waters just looked that way. When you fell in, you went to the doctor for a tetanus shot. That was just the way rivers were.

In college, at the radio station, I met Pete Seeger, already a legend and about to launch a revolutionary project to clean up the Hudson on the Sloop John B. A few years later, I was a federal prosecutor in the District of Columbia and began bringing charges against some waste dumpers into the Potomac. I went on to work for the National Wildlife Federation, and my very first case brought me to New Orleans to try to save a great swamp west of here, the Atchafalaya. It took eighteen years, but in the end we changed the plans of the Army Corps of Engineers, and if either that agency or I, two run-of-the-mill sinners, ever get into heaven it will be by citing the Atchafalaya and hoping for the best.<sup>9</sup> For me, it has always been about water.

What is striking, on further reflection, is the extent to which all environmental awareness, and then policy and law, arose from the sea. At about the same time that Rachael Carson wrote *Silent Spring*,<sup>10</sup> which had its own aquatic cast, she also published *The Sea Around Us*, and it was a story of water in peril.<sup>11</sup> Thor Heyerdahl began his Ra expeditions, from which one of his most chilling descriptions took place hundreds of

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8. *Report: Gulf's Low-Oxygen "Dead Zone" Growing*, MSNBC, July 17, 2007, <http://www.msnbc.msn.com/id/19798001>.

9. *See, e.g.*, Oliver Houck, *Atchafalaya Is Heaven on Earth*, 17 NAT'L WILDLIFE 43 (Oct.-Nov. 1979) (noting the importance of the Atchafalaya and the debate surrounding it).

10. RACHAEL CARSON, *SILENT SPRING* (1962).

11. RACHAEL CARSON, *THE SEA AROUND US* (1951).

miles at sea, where he encountered choking oil slicks and rafts of debris that extended to the horizon.<sup>12</sup> Then came Jacques Cousteau, whose ocean voyages and television programs became so celebrated that the French government enlisted him to lead its delegation to the famous Stockholm Conference on the Environment in 1972.<sup>13</sup> Once there, feeling constrained by politics, Cousteau resigned from the delegation and organized his own convention of environmental organizations instead.<sup>14</sup> Together they embarrassed and pressured the attending nations into making environmental pledges that they'd never intended,<sup>15</sup> and that they now struggle to keep.<sup>16</sup> Environmental awareness came from the ocean.

It also came from fresh water. It was the cascades of the Yosemite and Hetch Hetchy valleys that captivated John Muir, and the fight to save Hetch Hetchy from a huge dam converted Muir's little collection of weekend hikers (men in suit coats and ladies in full skirts carrying wicker picnic baskets up the slopes of the Sierra, imagine) into a hard charging and first-ever environmental lobby, the Sierra Club.<sup>17</sup> Half a decade later the Club would be tested yet again by another dam, even bigger, Glen Canyon on the Colorado River. The fight to save this stretch of river led the IRS to cancel the Sierra Club's tax-exempt status,<sup>18</sup> which it has never recovered.<sup>19</sup> Water projects were among the first environmental controversies in America.

Then came the Santa Barbara oil spill and the unprecedented closure of California beaches;<sup>20</sup> Cleveland's Cuyahoga River caught fire;<sup>21</sup> the Houston Ship Channel caught fire;<sup>22</sup> the water of New Orleans was

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12. THOR HEYERDAHL, *RA EXPEDITIONS* (1971).

13. Personal Conversation with Jacques Cousteau in New Orleans, La. (Sept. 26, 1983). The author had the honor of introducing Mr. Cousteau at a presentation at Tulane University, which was a little like introducing the Beatles—no introduction necessary.

14. *Id.*

15. *Id.*

16. U.N. ENV'T PROGRAMME, *GLOBAL ENVIRONMENT OUTLOOK 3 (GEO-3)*, at 6 (2002), available at <http://www.unep.org/geo/geo3/english/pdfs/chapter1.pdf>.

17. TOM TURNER, *SIERRA CLUB: 100 YEARS OF PROTECTING NATURE* 47-80 (1991).

18. *Id.* at 172.

19. Karen Paget, *The Big Chill: Foundations & Political Passion*, AM. PROSPECT, Nov. 30, 2002, [http://www.prospect.org/cs/articles?article=the\\_big\\_chill](http://www.prospect.org/cs/articles?article=the_big_chill).

20. See LIZ JURCIK, *BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES* (1972).

21. U.S. Geological Survey, *The Cuyahoga River Watershed: Restoring an American Heritage River*, <http://water.usgs.gov/owg/cleanwater/success/cuyahoga.html> (last visited Sept. 15, 2007).

22. *Pollution Can Be Licked*, U.S. NEWS & WORLD REP., Feb. 7, 1977, at 48.

pronounced unfit to drink;<sup>23</sup> Lake Erie was pronounced dead;<sup>24</sup> a jetport was proposed for the Everglades;<sup>25</sup> and on the Hudson River there was trouble over a pump storage plant at Storm King Mountain.<sup>26</sup> It was all water, coming to a boil.

It is also striking how environmental law in particular came out of the water, hit the land and never looked back. The law was written by the litigation over Storm King, from a remarkable alliance between blue-blood aristocrats welded to the scenery of the Hudson Valley and blue-collar Striped Bass fishermen who did not give a fig for what Con Ed did to the top of that mountain, but cared a great deal about the bodies of dead bass piled up on the intake grates of power plants like so much trash.<sup>27</sup> Together they went to war and out of that war came many things, including the Hudson River Fisherman's Association, the Hudson Riverkeeper, the Highlands Conservancy, the Natural Resources Defense Counsel, Robert Kennedy Jr. and the Pace Environmental Litigation Clinic, and from the United States Court of Appeals for the Second Circuit, a seminal legal precedent. Ordinary citizens, it ruled, had the right to sue their government over environmental decision-making.<sup>28</sup> That principle still boggles the mind of government agencies, the business world, and their adherents on the bench, including members of the United States Supreme Court. It was the crucial issue in the Court's recent decision on climate change, *Massachusetts v. EPA*.<sup>29</sup> After much cavil, the Court affirmed that environmentalists had standing to sue by the vote of a single justice.<sup>30</sup> It brings to mind the famous get-well card from the office urging a speedy recovery, by a vote of five to four. This fight is far from over.

Nobody at the time appreciated how big a bang Storm King would create. As it happens, I was returning from service in Korea at the time

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23. T.A. DeRouen & J.E. Diem, *The New Orleans Drinking Water Controversy: A Statistical Perspective*, 65 AM. J. PUB. HEALTH 1060, 1060-62 (1975), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1775999&blcbtype=pdf>.

24. Casey Bukro & William Jones, *Pollution Siphoning Off Lake Erie Life*, CHI. TRIB., Aug. 25, 1967, at 1. It is said numerous headlines pronounced, "Lake Erie is dead."

25. See U.S. Dep't of Interior, Environmental Impact of the Big Cypress Swamp Jetport (Sept. 1969), available at <http://sofia.usgs.gov/publications/reports/jetportimpact/jetportimpact.pdf>.

26. See generally ALLAN R. TALBOT, POWER ALONG THE HUDSON: THE STORM KING CASE AND THE BIRTH OF ENVIRONMENTALISM (1972) (reviewing events of the Storm King Mountain case).

27. See *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965) (contesting licensure of hydroelectric project).

28. *Id.*

29. 127 S. Ct. 1438 (2007).

30. *Id.* at 1458.

and stopped off to see a former college friend in New York.<sup>31</sup> He was staying up late that evening writing the briefs in an obscure case about administrative procedure. It concerned a power plant on the top of a mountain and some fish and it seemed so abstract I could barely stifle a yawn. I did not appreciate until years later that he and the Storm King case were laying the foundation for my life in environmental law.

Think for a moment about the explosions that followed, coming out of the water like Polaris rockets. First there was the Calvert Cliffs lawsuit which arose from concerns over the effects of thermal discharges on Chesapeake Bay and which established the rigorous demands of the newly-minted National Environmental Policy Act.<sup>32</sup> Then came a series of lawsuits against Corps of Engineers water projects, including the Cross Florida Barge Canal,<sup>33</sup> Meramec Dam,<sup>34</sup> the Cache River/Bayou Deview,<sup>35</sup> and the Atchafalaya Floodway.<sup>36</sup> These precedents were followed by yet more water project fights in other parts of the country, each of them a legend, *TVA v. Hill* in Tennessee,<sup>37</sup> Mono Lake of California,<sup>38</sup> Dickey Lincoln in Maine,<sup>39</sup> the Everglades in Florida,<sup>40</sup> and a running tab of lawsuits to save the salmon and their river systems of the Pacific Northwest.<sup>41</sup> All out of the water.

At the same time, a new kind of environmental organization was beginning to enforce pollution control statutes, none more than the Storm King-generated NRDC, which made it a point to follow every deadline,

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31. The attorney was Albert Kahn Butzel, then a member of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, which represented the plaintiffs in *Scenic Hudson Preservation Council v. Federal Power Commission*, 453 F.2d 463 (2d Cir. 1971).

32. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1972).

33. *See* *Envtl. Def. Fund Inc. v. U.S. Corps of Eng'rs*, 324 F. Supp. 878 (D.D.C. 1971) (arguing that the Cross Florida Barge Canal violated NEPA).

34. *See* *Sierra Club v. Fraehlke*, 534 F.2d 1289 (8th Cir. 1976) (seeking to enjoin the Corps from building the Meramec Dam).

35. *See* *Envtl. Def. Fund Inc. v. Hoffman*, 566 F.2d 1060 (8th Cir. 1977) (seeking to enjoin the Corps from realigning the Cache River).

36. *See* *S. La. Env'tl. Council, Inc. v. Sand*, 629 F.2d 1005 (5th Cir. 1980) (concluding the Corps appropriately considered the environmental impact).

37. 437 U.S. 153 (1978) (providing injunctive relief to ensure survival of an endangered species).

38. *Nat'l Audubon Soc'y v. Dep't of Water*, 869 F.2d 1196, 1198-99 (9th Cir. 1988) (describing the Mono Lake issue).

39. *See, e.g.*, 131 CONG. REC. E378 (daily ed. Feb. 6, 1985) (statement of Rep. Snowe) (speaking to deauthorize the Dickey Lincoln School Dam Project).

40. Ctr. for Responsive Politics, *The Politics of Sugar: The Battle of the Everglades*, [http://www.opensecrets.org/pubs/cashingin\\_sugar/sugar09.html](http://www.opensecrets.org/pubs/cashingin_sugar/sugar09.html) (last visited Sept. 15, 2007).

41. Blaine Harden, *U.S. Says It Won't Remove Dams*, WASH. POST, Sept. 1, 2004, at A17.

standard, and major permit of the newly born Clean Water Act (CWA).<sup>42</sup> Look up the cases on CWA technology standards alone. EPA issued 250 guidelines for categories of industries in a five-year period.<sup>43</sup> Industry sued to oppose every one, 250 lawsuits.<sup>44</sup> For the most part there was only one environmental counterforce, suing to strengthen the proposed standards or simply to maintain them—NRDC.

The movement could not be contained within the United States. Water protection and its primary tool, citizen enforcement, was moving abroad like the idea of democracy itself, and no matter how much U.S. administrations hostile to this notion tried to pull back on every aspect of environmental protection at home, the genie was out of the bottle. Water-based lawsuits popped up in the most unlikely places—countries not known for activism, independent judicial systems, or environmental concerns. In Spain, they defeated a collection of more than 100 projects designed to drain the north to build desert resorts in the south.<sup>45</sup> In Greece, they have stalled a massive diversion draining the western mountains so that farms in the east would not have to treat their wastes.<sup>46</sup> In India, M.C. Mehta's Herculean petitions have begun to clean up the Ganges River, perhaps the most sacred body of water in the world.<sup>47</sup> And in Canada, they produced an agonizing trilogy of decisions out of the Supreme Court, the last one a hydro electric project of such ambition it would flood out the homeland of the entire Cree nation.<sup>48</sup> One may remember the flotilla that paddled from Quebec province down the Hudson River in kayaks and canoes, to rally in Central Park of New York City and persuade the State to cancel its power contracts and keep their

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42. See *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 673 F.2d 400 (D.C. Cir. 1982) (challenging EPA permit regulations).

43. See, e.g., 39 Fed. Reg. 12,502 (Apr. 5, 1974) (publishing guidelines for effluent limitations for plastics and synthetics).

44. See *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976) (lawsuit over effluent limitations for plastics).

45. See Giles Tremlett, *Developers Panic as Spain Scraps River Project*, GUARDIAN, June 18, 2004, <http://www.guardian.co.uk/spain/article/0,2763,1241636,00.html>.

46. See *Hellenic Ornithological Soc'y v. Minister of Nat'l Econ. & Tovista, Areios Pagos* [AP] [Supreme Court] 2759/1994 ¶ 10 (Greece) (discussing massive dam and channeling project in Greece).

47. See, e.g., Shubhranshu Choudhary, *The Ganga Could Run Dry*, HINDU, Oct. 9, 2005, at 13, available at <http://www.hindu.com/thehindu/mag/2005/10/09/stories/2005100900130200.htm> (discussing the plight of the Ganges).

48. *Quebec v. Can. Nat'l Energy Bd.*, [1994] S.C.R. 159.

rivers free.<sup>49</sup> Which New York then did. The combination of water and people and litigation was proving quite potent.

These wins duly noted, the water fight continues against long odds. Much of the resistance is about money, but it is also psychological. At one point, during a hearing on the Atchafalaya, an exasperated Corps attorney turned to me and said, “The thing that’s wrong with you is that you just like running water!” Of course, the man was absolutely right. But what was so startling about his statement was that he could not conceive of such a person. To him, what he was saying to me was a huge insult. And what his outburst told me was that saving waters and keeping rivers goes up against a mindset so alien—and to which we, water-keepers, are so alien—that it is a challenge to find the bond. Where pollution is the issue, we have managed to forge that bond. The country has now reached sufficient maturity to view pollution as bad, and from that consensus we can now move to abate it. But where water use and what is called “water management” are concerned, we are little closer to finding common ground than we were fifty years ago.

Fortunately, we still have legal tools to work with. As you may remember, when Speaker of the House Newt Gingrich announced his “Contract with America” in the early 1990s he provided a list of federal laws that he and his new majority would amend on a crash basis. Seven of the laws were environmental, and at the top of the list was the Clean Water Act.<sup>50</sup> It turned out to be a huge tactical mistake. People care about clean water and, after wasting much capital, the Contract’s first intended hit ended up on the rocks.<sup>51</sup> Even the current Administration, with its patent aversion to environmental protection, has not tried to put the Clean Water Act back onto the chopping block. The Administration will not implement it, nor will it enforce it, but it will leave it alone. We still have that law.

We also still have the right to sue, and it is worth noting that, prior to *Mass. v. EPA*, the most recent case on citizen standing in the Supreme Court, a case that stemmed the tide of years of erosion, was a Clean Water Act enforcement case, *Friends of the Earth v. Laidlaw*.<sup>52</sup> Laidlaw’s

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49. William Claiborne, *Canadian Indians Battle Massive Hydro Project: Protesters Paddle to NYC to Spotlight Quebec Dams Aimed at Generating Power for U.S.*, WASH. POST, Apr. 3, 1990, at A12.

50. David Helvarg, *Congress Plans an American Clearcut: Defoliating Our Green Laws*, NATION, Dec. 4, 1995, at 699.

51. See *Key House Votes*, ST. LOUIS POST-DISPATCH, Oct. 8, 1996, at 9B.

52. 528 U.S. 167 (2000); see also William W. Buzbee, *The Story of Laidlaw: Standing and Citizen Enforcement*, in ENVIRONMENTAL LAW STORIES 201 (Richard J. Lazarus & Oliver A. Houck eds., 2005) (providing a legal history of *Laidlaw*).

record was so bad that a majority of justices decided to draw the line and allow citizens enforcement, as Congress had intended.<sup>53</sup>

For these two reasons—law to apply and the right to enforce it—work on pollution control has every chance of success. But there is a more troubling water story too, written in levees, navigation canals, pumps, drains, chains of massive dams, and diversion structures the size of interstate highways that continue to treat water as a beast to be tamed, and, once tamed, a God-given right to every liquid drop lest, God-forbid, any water escape to remain in the riverbed or reach the sea. These challenges are an order of magnitude greater than those with pollution, which is, after all, at bottom, only about spending a little more money for pollution controls. The psychology of water projects is quite opposite. While nobody these days boasts about dumping 2,000 tons of phosphorous into the Apalachicola Bay, every politician worth his salt wants his name on a dam. The Hoover Dam, the Thomas Beville Lock, the J. Bennett Johnston Waterway (whose traffic is less than ten percent of the benefits projected<sup>54</sup>—but to whom does that matter?). We are changing landscapes, building monuments, doing big things. This is what real men do.

There is also a different role of the government here. It is not the solution, it is the problem. These projects are the products of federal agencies and the U.S. Congress, which is tied by philosophy and campaign financing to water users and water builders. Conserve water? Who in the world makes money doing that? No agency ever increased its budget and no member of Congress ever got reelected for not building something.

Finally there is the nasty fact of the law. Water law, unlike pollution control, does not harmonize use with anything else. It does not even try. It does not consider environmental impacts; fish are irrelevant and rivers are irrelevant. In the parts of the United States where water is the scarcest, the more one consumes, the more legal right one has to consume.<sup>55</sup> The only sin is leaving water where God put it. Which is called waste. This is a law for settlers and pioneers. It is as anomalous today as indentured servitude. Whatever law we needed 200 years ago, we need something quite different, quite soon, before we go the way of

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53. Buzbee, *supra* note 52, at 203.

54. See Stephen Spruiell, *Soft Corps: The Recent, Sad Story of the Army Corps of Engineers*, NAT'L REV., Oct. 10, 2005, at 22.

55. See, e.g., Bonnie G. Colby, *Water Reallocation and Valuation: Voluntary and Involuntary Transfers in the Western United States*, in *WATER LAW: TRENDS, POLICIES AND PRACTICES* 112 (K.M. Carr & J.D. Crammond eds., 1995) (documenting Western water values).



the Anasazi. Until we change it, however, water law and the mindset it defends is one of the biggest obstacles to waterkeeping in America.

Yet, I have hope. I have always had hope for water, and it rises from another well-spring too deep to be denied. It is said that a Sultan was once asked to name the three most beautiful sounds on earth. He replied that they were: the sound of coins tinkling, the sound of a loved one laughing, and the sound of water falling-in reverse order. The major religions of the world respond in the same way. Water is spiritual. It is where millions of believers in dozens of faiths go to wash their sins. It is where Siddhartha goes to transcend and die. It is where Norm McLean goes fly fishing, and, at the end of *A River Runs Through It*, he describes in words that are simply drenched with spirituality:

Then in the Arctic half-light of the canyon, all existence fades to a being with my soul and memories and the sound of the Big Blackfoot River and a four count rhythm and the hope that a fish will rise.

Eventually, all things merge into one, and a river runs through it. The river was cut by the world's great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words, and some of the words are theirs.

I am haunted by waters.<sup>56</sup>

We too are haunted by waters. It freshens our lives and allows us to believe that, when we finally pass through this dark passage of treating the earth like a throw-away toy and stop looking at inhabiting the moon as a way out, we will always have water, to renew ourselves, to leave as a legacy, to lie down beside, and transcend.

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56. NORMAN MCLEAN, *A RIVER RUNS THROUGH IT* 104 (1983).