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Book Review: Water Wasteland

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Abstract

Water Wasteland, reviews federal water pollution control programs of the last fifteen years and provides a useful insight into the decline and fall of American rivers.

KEYWORDS: book review, David Zwick, Marcy Benstock

Book Review

Water Wasteland. By David Zwick and Marcy Benstock. New York: Grossman. 1971. Pp. xviii, 495. $7.95.

Not so long ago I spent an evening with a friend who practices law with a neighborhood legal services group where he puts in most of his time on landlord-tenant disputes. The conversation inevitably came around to the topic of environmental protection and what, if anything, it will do for the city resident and especially the ghetto dweller. I pointed immediately to air and water pollution and asked why it shouldn't be possible to walk down to the East River and plunge in happily on any hot summer day. My query was laughingly dismissed by reference to the importance of the jobs which depend on polluting the river. Forty years ago neighborhood children could swim in the shadow of the Queensboro Bridge without apparent danger to their health. More has happened since then than a growth of industry along the East River.

What has really happened is that no one now takes seriously the notion that major American rivers can be clean enough to swim in. The newspapers are full of advance accounts of a Nixon Administration study showing that an environmental clean-up program will have very little real effect on GNP and economic growth.[1] But even if such reports receive wide publicity and credence, the more deepseated problem will remain. In the course of recent decades we have come to believe that our waters are unusable for the pleasures of daily life. Mr. Justice Holmes' remark that "[a] river is more than an amenity, it is a treasure,"[2] now seems no more than the nostalgic musing of a nineteenth century naturalist.

Water Wasteland, which reviews federal water pollution control programs of the last fifteen years, provides a useful insight into the decline and fall of American rivers. It contains the expected accounts of industry's reluctance to take pollution problems in hand when it foresees costs to its competitive position as well as tales of the usual bureaucratic bungling and incompetence. Its real strength and interest, however, lies in the quiet emergence of three themes which go a long way toward explaining the problems of most administrative schemes devised for coping with environmental destruction: (1) the conceptual problem of the type of standard to employ; (2) the thorny political thicket of federal-state relations; and (3) the ultimate question of enforcement.

1. Newsweek, Jan. 17, 1972, at 13.
2. New Jersey v. New York, 283 U.S. 336, 342 (1931).

In both air and water pollution, the ultimate standard that one wants to achieve is an ambient standard. In other words, a body of water should be fit for fish and for drinking or at least free of disease-carrying organisms. The flip-side of the problem is the fact that effective enforcement requires an effluent discharge standard. The law should clearly warn a manufacturer what he can put in the river and impose a penalty on him if he discharges more. Effluent discharge standards are the simple and obvious way to do this. The disadvantage of discharge standards is, of course, that if manufacturers may discharge a set amount of pollutants from one site, they can exceed the single site standard by multiplying discharge points. The major fault of the recent federal water program[3] lies in its failure to reach a satisfactory combination of the ambient and effluent discharge standards. In the last few years the federal government has been actively using the ambient water quality standards established by the Federal Water Quality Administration under 1965 legislation[4] and the Draconian effluent discharge standards of the 1899 Rivers and Harbors Act,[5] also known as the Refuse Act, which prohibits all industrial discharges without a permit from the Army Corps of Engineers. The Corps has issued virtually no permits.[6] These statutes were not drafted to operate in harness together and the year long effort to harmonize them by expanding and developing the Refuse Act Permit Program came to a crashing halt with the District Court for the District of Columbia's decision in *Kalur v. Resor*[7] which held that the regulations implementing the Refuse Act Permit Program are invalid to the extent that they allow the issuance of permits to discharge refuse matter into non-navigable waterways. The present guess is that the impasse will be broken by yet another major water bill this spring or summer, the third in sixteen years. The question remains whether any bill can successfully wed effluent and ambient standards.

Federalism has been a persistent problem posed by the federal water program. The Refuse Act takes the strongest position on the extent of

3. Federal Water Pollution Control Act, 33 U.S.C. § 1151-75 (1970).

4. Act of Oct. 2, 1965, Pub. L. No. 89-234, § 1(a), 79 Stat. 903, as amended 33 U.S.C. § 1151-1175 (1970).

5. Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152, as amended 33 U.S.C. § 407 (1970).

6. D. Zwick and M. Benstock, Water Wasteland 286 (1971). But see Note, The Refuse Act: Its Role Within The Scheme of Federal Water Quality Legislation, 46 N.Y.U.L. Rev. 304, 327 (1971).

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

the federal government's power to assert jurisdiction over national water problems. The Act covers discharges into any navigable water of the United States or any tributary thereto.[8] A more recent act[9] is more timid, setting up distinctions between interstate and intrastate waters and then complicating the jurisdictional divisions with exceptions such as giving greater federal power over pollution problems affecting shellfish and certain other species.[10]

The deep and abiding concern which recent Congresses have shown for the interests of the states seems totally misplaced. In this age of personal and corporate mobility, any state concerned about its industrial base may be quick to relax its environmental protection measures if companies threaten to move. In states where economic power is concentrated in a few industries, corporations can often win concessions by flexing their economic muscle. The fight waged by copper companies over air pollution regulations in the western states is a striking example. It should also be noted that state officials, frequently through no fault of their own, are more susceptible to the subtle pressures concerning the special interest of polluters. They work with the companies on a professional basis and fraternize with their executives on a social basis.

Fractured responsibility and labyrinthine schemes of federal-state conferences have also assured that progress marches at the pace of a funeral procession. Emphasis on "federalism" in this context is nothing more than a useful political theory run wild. Water pollution, as *Water Wasteland* makes clear, is not a unique local phenomenon. It is ubiquitous, and until the United States is willing to attack it on a national basis we can expect a continuation of the "slippage," timidity and inadequacy of enforcement that have made the last fifteen years of the water program a disaster.

The point of enforcement is the place where push comes to shove. But under the recent federal acts, the government shoves very gently. One act provides a 180 day warning and notice period for the polluter before the case can be brought to court.[11] This guarantees that there will be very little use of the stick on those who are not attracted by the carrot. Like the federalism issue, this cautious and timorous approach represents a long retreat from the Refuse Act which imposed criminal fines for illegal

8. 33 U.S.C. § 407 (1970).
9. Federal Water Pollution Control Act, 33 U.S.C. § 1151-75 (1970).
10. Id. §§ 1161(b)(3), 1161(d).
11. Id. § 1160(c)(5).

discharges and encouraged the apprehension of illegal dischargers by providing that informers were entitled to half the fine in cases where conviction was obtained.[12]

David Zwick and Marcy Benstock provide the reader with facts by the shovelful and an analysis which amply demonstrates the weakness and failures of the present water program. But the country needs something more than facts. It also needs the belief that its rivers can and will be made clean and clear. Only such a belief can spark the modern legislation which will speak with the force of the Refuse Act. A proposed 1972 water bill has the potential to move in that direction. It will do so only when there is a determination sufficient to cope with the problems and assure wide federal jurisdiction, a strong enforcement program, and an imaginative modern solution to the problem of ambient and/or effluent discharge standards. These are problems which any water program must face. They must be dealt with openly and forcefully; there must be the strong conviction that we will make our rivers treasures once again. If we all look anew at the amenities around us and realize that the scenic Hudson flows past Manhattan as well as Storm King, we may once more find the resolution which will assure that our children will be able to swim in the shadow of the Queensboro Bridge.

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12. 33 U.S.C. § 411 (1970).

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