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FISHABLE WATERS

A bill to fulfill the promise of the Clean Water Act.

By Ted Williams

Fly Rod & Reel, April 2001

All water everywhere—even that contained in Simple Simon’s pail—is “fishable,” but when Congress used the word in the Clean Water Act of 1972 it meant catching and, if one insisted, safely eating. In this context the Clean Water Act was supposed to make all water bodies in the US fishable by July 1, 1983, but 18 years after the deadline about a third don’t qualify. Twenty thousand are still considered “polluted,” including 300,000 river and shoreline miles and five million lake acres. On some fronts we’re even backsliding. In the past 15 years, for example, rivers impaired by such “non-point” pollution sources as runoff from livestock operations and overflow from open pipes that carry both sewage and storm water have increased from 26 percent of all rivers to 36 percent.

The Clean Water Act has succeeded reasonably well in controlling point-source pollution—that which issues from industry and from sewage treatment plants, for example—but it has failed at controlling non-point. It’s one thing to force a rich paper company to stop making a salmon river smell like rotten New England boiled dinner. It’s quite another to go after, say, a dairy farmer who is barely making the payments on his manure spreader. That strategy doesn’t work and doesn’t play—especially with the kind of Congresses we’ve had in recent years.

So four years ago some of the nation’s most respected fisheries scientist/activists — practical, politically savvy professionals who wanted to strike a major blow for fish restoration before they closed out their careers—convened at Craig, Montana, on the banks of the Missouri River. There was talk of hatching a new statute, but then Jim Range, the Washington, DC attorney who helped write the Clean Water Act and who was hosting the meeting at his ranch, said: “Hell, we’ve already got a law that calls for fishable waters; let’s make it work.”

Out of this meeting and many others with more fisheries people throughout the country, and with steady input from a coalition of nine conservation organizations and two farm-support groups, there emerged a Clean Water Act amendment introduced in April 2000 by Sen. Kit Bond (R-MO) and Rep. John Tanner (D-TN). The “Fishable Waters Act,” as the bill is called, didn’t go anywhere because Congress got tangled up with appropriations, but by the time you read this Bond and Tanner will have reintroduced it. Traditionally, fish advocates haven’t been much involved in debate about the Clean Water Act. That’s why EPA and state enforcers have concentrated on chemical purity rather than biological integrity, and that’s why they’ve set a “worst first” priority for cleanup. Grossly polluted urban waterways should, of course, be aggressively worked on, but so should marginally polluted ones in beautiful settings where modest effort can quickly produce dramatic results measurable by more fish.

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While conservation groups traditionally have not been able to use federal money as matches to qualify for other federal funds, an exception would be made here. Councils could use Fishable Waters Act dollars as part of the required local matches for projects approved under Wallop-Breaux, Conservation Reserve, Wetland Reserve, Environmental Quality Incentives, Wildlife Habitat Incentives, Cooperative Forestry Assistance and 13 other programs. If a state or tribe didn't want to make a commitment to the Fishable Waters Act, it wouldn't have to. It just wouldn't have access to the new funds.

Perhaps the best recommendation for the legislation is a list of the conservation organizations backing it: the American Sportfishing Assoc. (ASA), Trout Unlimited, Izaak Walton League of America, American Rivers, Bass Anglers Sportsman Society, American Fisheries Society, International Assoc. of Fish and Wildlife Agencies, American Fly-Fishing Trade Assoc. and Pacific Rivers Council. Not a front or fringe group in the lot—just mainstream conservation outfits that slug it out in the trenches and get things done; they call themselves “the Fishable Waters Coalition.” “The strength of the Fishable Waters Act is the depth and range of its support,” declares Mike Hayden, leader of the coalition and ASA president. “Farmers, anglers, conservationists, private citizens, even industry . . . They all think that this common-sense approach is the way to go about improving our water and fish resources.”

The coalition's two agricultural-interest members are the National Corn Growers Assoc. and the National Council of Farmer Cooperatives. “Any time we unite 20 million sportsmen and two million farmers we have an alliance so unusual that it breaks through the clutter of the normal rhetoric in Washington,” says Bruce Knight, of the National Corn Growers Assoc. “When Trout Unlimited and the Corn Growers walk into a room and say, ‘We want this and we have worked out the differences for you,’ suddenly politicians pay attention.” Ag interests are attracted to the bill because it doesn't rely on what they call traditional “command and control,” but the important thing for environmentalists to remember is that existing provisions for command and control would in no way be replaced or weakened. There will always be bad actors who need to be punished, and while the existing Clean Water Act has few teeth to deal with them effectively, such teeth should be inserted.

That, however, might not happen in our lifetimes. Although the Clean Water Act is supposed to be reauthorized every five years, it's such political nitroglycerin that no one's touched it since 1987. And six years ago the House of Representatives tried to do away with it by voting 240 to 185 to support HR 961, introduced by Transportation and Infrastructure Committee chairman Bud Shuster (R-PA) and known in environmental circles as “the Dirty Water Act.” Should we just wait to see what Congress might or might not insert into the Clean Water Act to force non-point polluters into line? And should we hold off on Fishable-Waters-Act-style legislation because politicians who don't do anything now might seize upon it as an excuse for not doing anything in the future? I put the question to Jim Range, who likes to describe himself as a “fisherman with a law degree.” “Well, we talked about it,” he told me, “and we all said, ‘That's crazy as hell.’ Why in the world should we sit around and wait for something that all of us think realistically is not going to happen for the next 10 years when we've got a program that we know can produce humongous on-the-ground benefits right now?”

But what about the local watershed councils? Can they really be effective? Can they be trusted to fix their lakes and rivers? Won't they just haul out a few shopping carts, organize a few canoe trips and, in the process of whooping it up for their river or lake, convince the public that non-point polluters are doing good things when they're not? No. Because, for the first time, the watershed councils will have the means to really accomplish something. Moreover, they won't have to fight anyone, because your average non-point polluters have a lot to gain by participating. Not only will most of the cost be picked up for them, but they already know that the best way to avoid the penalties associated with command-and-control regs is to stop polluting.

On a recent trip to Lake Apopka, in central Florida, I was reminded both of the work that confronts watershed councils and their potential to get it done. Jim Thomas, the wildlife biologist who founded the 400-member Friends of Lake Apopka, showed me around the 31,000-acre lake. Apopka used to be the second largest lake in Florida, offering a trophy bass fishery that supported 29 fishing lodges and attracted anglers from all over the

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world. The water was crystalline, the bottom carpeted with grasses and other native vegetation. Then, in 1942, farmers were allowed to dike off and drain sections of the lake, converting the exposed bottom to "muck farms" where the farmers grew vegetables, soon with massive fixes of DDT and other chlorinated hydrocarbons. Eventually, muck farms metastasized across 19,000 acres of lake bottom, shrinking Apopka to the fourth largest lake in Florida. Because the farms were lower than the lake surface, pumps were continually employed to suck up a vile cocktail of seepage, nutrients and poison and spew it into Apopka.

Sewage from the City of Winter Garden and waste from citrus processors added to the nutrient loading. Algae and alien water hyacinths cut off sunlight, killing submerged vegetation. When the water hyacinths were killed by herbicides sprayed at the insistence of the fishing camp operators, they coated the bottom with their decayed tissue. Bass all but disappeared, and in their place came a plague of algae-eating gizzard shad, which the state also attempted to control with poison. But instead of removing the dead fish, it left 30 million pounds of them to fester in the lake, further speeding nutrient recycling. In the 1970s the Clean Water Act shut down the point sources of sewage and orange pulp, but agriculture, designated a non-point source, was exempt. Muck-farm waste increased until, by the late 1980s, five million gallons of effluent a day was being pumped into what had become Florida's dirtiest lake.

Lake Apopka hadn't healed much by the time I saw it in March 1999. The methane was so bad that when you stirred up the bottom silt with an outboard motor you had to wear a surgical mask. During the previous winter, fish-eating birds had been dying by the thousands, particularly white pelicans and great blue herons but also great egrets, ring-billed gulls and wood storks. Apparently, they'd been poisoned by old pesticides leaching out of the soil now that fallow fields were being flooded as part of a lake restoration effort by the St. Johns River Water Management District. I found carcasses, and dying birds that could barely walk.

Making the loss of Apopka's fishery all the more heartbreaking was the richness and beauty of the ecosystem Thomas and I encountered along the lake's north shore. Ospreys, some clutching gizzard shad, sliced across the azure sky. Curled like truck tires, alligators sunned themselves along the big, water-collecting canals, and Florida red-bellied turtles floated between water hyacinths, surveying us with banker's eyes. Yellow-rumped and palm warblers blew out of thick willows; coots and moorhens stalked across dollar weed; and northbound tree swallows swirled like coal smoke over the muck farms that had just been purchased and shut down by the St. Johns water district with help from the US Dept. of Agriculture's Wetlands Reserve Program.

The Friends of Lake Apopka are pushing hard for full restoration of the lake and its poisoned wetlands. Thanks largely to their public education efforts and intense lobbying, the muck farms were purchased from farmers at fair-market value. A large element of the environmental community had loathed that idea. Why should the people who caused the problem in the first place be rewarded, it demanded? But Thomas and his group weren't interested in what seemed fair or unfair—only what would restore their lake. They understood the political reality that if the agricultural community wasn't on board, the lake was going to stay dead. So they formed an alliance with the farmers—just the sort of alliance built by the Fishable Waters Act. Five years from now the St. Johns water district will complete a 3,500-acre "marsh flow-way"—an artificial kidney of cattails and other wetland plants to replace the natural one destroyed by the muck farms. When the whole project comes on line, all the water in the lake will be pumped through the flow-way twice a year.

Meanwhile, Friends is helping the St. Johns water district with littoral zone plantings of such native vegetation as pickerelweed, bullrushes, water lilies, spatterdock and sagittaria. It is building a lake-restoration education center on 100 acres it purchased beside the West Orange Trail, which runs along the lake and is used by about 60,000 people per month. With the aid of a professional planner it has put together development guidelines for the Apopka basin, including a proposal for no new lakefront lots. (At least one developer loves the idea, acknowledging that a greenbelt along the shoreline would make his back lots more attractive.) Finally, Friends has procured funding for storm-water treatment on two tributaries. Such projects—on a far larger scale—are precisely what the Fishable Waters Act would encourage and underwrite. All across the country there are thousands of groups like Friends of Lake Apopka, most as rich in energy as they are bereft of resources.

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The Clean Water Act has a provision whereby the states, with EPA approval, can set a "total maximum daily load" (TMDL) for a water body and, if it's exceeded, move unilaterally to control non-point pollution. But the provision remains essentially unimplemented. Last year—when EPA responded to a broadside of environmentalist lawsuits by proposing to have the states enforce TMDLs—there was enormous backlash from non-point polluters. Although EPA finalized the TMDL regs, polluters and their allies pushed through a rider that blocks implementation for a year and a half, after which period anything could happen, including continued non-enforcement through state torpor or Congressional intervention.

The battle over TMDLs spooked an element of the environmental community—mainly the Natural Resources Defense Council (NRDC) and, to a lesser extent, the Sierra Club. As a result, there has been no support for the Fishable Waters Act from the Clean Water Network, an organization that purports to be "an alliance of more than 1,000 organizations that endorse . . . strong clean water safeguards to protect human health and the environment" but which is based at NRDC's Washington, DC headquarters. Basically the reasoning was this: Although the Fishable Waters Act would in no way prevent strict regulations for non-point pollution in the next reauthorization of the Clean Water Act (if and when it happens), Congress might flaunt the voluntary, incentive-based provisions as an alternative to command and control. In other words, polluter-friendly politicians might say, "See, see. We've already addressed non-point pollution."

Jessica Landman—who last year ran NRDC's clean water project and co-chaired the Clean Water Network—had this to say when I interviewed her in November: "Since the councils are voluntary it would be in the interests of a polluter to stack the membership with its own partisans and get weakening provisions adopted." But the bill stipulates that each council be "fairly balanced in terms of the points of view represented." "Under the current Clean Water Act," continued Landman, "there is plenty of authority right now to achieve these [Fishable Waters Act] goals. The problem is really implementation and enforcement." Exactly. TMDLs have never been implemented or enforced, and there's no indication that they ever will be. Landman and her colleagues strongly objected to the USDA being the lead funding agency. But, politically, there wasn't a choice. Congress won't tolerate another EPA program or even another Fish and Wildlife Service program. Besides USDA, through its Natural Resources Conservation Service, is already out there on the ground working with watershed councils and managing Farm Bill programs on which the act heavily depends.

The Fishable Waters Coalition worked hard to fix aspects of the bill that NRDC, et al found offensive. The original draft had an excellent provision called "innovative solutions," which allowed a point polluter who, for example, had cleaned up 95 percent of his phosphorus to take, say, the \$1 million it would have cost him to remove the last five percent and give it to the watershed council, which would then spend it on projects that would remove many times that amount of phosphorus by creating, say, wetlands to catch and treat runoff from watershed farms. NRDC, et al didn't like "innovative solutions," so the coalition took it out of the bill. NRDC, et al fretted that someone might use the Fishable Waters Act to build a dam, so the coalition wrote a provision specifically forbidding dams. They fretted that someone might use the act to put in a fishermen's access road through a roadless area, so the coalition wrote a provision specifically forbidding access roads through roadless areas.

NRDC does lots of terrific stuff. But like so many environmental groups it needs to get out into the real world and find out what flies in Washington, DC and what works on the ground for fish and wildlife. If it can force command and control down the throat of Congress, the conservation groups in the Fishable Waters Coalition would be delighted. But they're not taking any bets and they're not about to sit around and see what happens. Jim Banks, the Washington, DC attorney who drafted the language of the Fishable Waters Act, used to work for NRDC. "I know how they think, and I understand how they can be concerned about something like this," he told me. "But the day is coming when the arsenal of things one can do about clean water and habitat has to be broadened, and they have to accept that and embrace it."

The environmental community keeps saying it needs to work with sportsmen for common goals such as clean water, but all the talk never seem to beget action. "Environmentalists don't reach out to sportsmen," remarks Chris Potholm, professor of government and legal studies at Maine's Bowdoin College, who 21 years ago founded The Potholm Group, a national polling-and-strategic-advice company that has engineered 60 environmental referenda victories in 30 states. "If they did, they'd be invincible. Whenever sportsmen combine with environmentalists, you have a minimum of 65 percent of the population, an absolutely irresistible coalition. If we can get environmentalists and sportsmen working together, we can win anywhere."

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The upcoming campaign for the Fishable Waters Act provides a superb opportunity for NRDC, the Sierra Club and other members of the Clean Water Network to start forging a lasting alliance with sportsmen. This is especially important in light of the bitterness many sportsmen currently feel toward that element of the environmental community that helped emasculate the Conservation and Reinvestment Act (CARA), a bill that would have annually allocated \$2.8 billion in federal offshore oil-and-gas royalties to conservation [Conservation, July/Aug 2000]. If the Network supports the Fishable Waters Act, it can soothe a lot of hurt feelings, and it can then look to sportsmen to help it reauthorize a stronger Clean Water Act. Meanwhile, the fish need help now.