

PROTECTING OUR WATER COMMONS: INTERVIEW WITH ROBERT KENNEDY, JR.

Sarah van Gelder[©]

Whose job is it to protect our waterways? Water quality laws and enforcement are only as strong as the popular movements that press for them. Unless we stand up, those who would privatize, pollute, or divert our waters get away with it. That's the message of Robert Kennedy Jr., founder of the international Waterkeeper Alliance and chief prosecutor of the New York-based Riverkeeper, which helped lead the successful movement for the restoration of the Hudson River.



Sarah van Gelder: When did it first occur to you that ordinary people might be the best protectors of their waterways?

Robert Kennedy Jr.: I started working with Riverkeepers in 1984 when it was still called the Hudson River Fishermen's Association. It was a blue-collar coalition of commercial and recreational fishermen who mobilized to reclaim the river from its polluters. In 1966, Penn Central Railroad was vomiting oil from a four-and-a-half-foot pipe in the Croton-Harmon Rail Yard 30 miles north of New York City, blackening the beaches, and making the shad taste of diesel. The people of the village of Crotonville, N.Y., were mainly commercial fishermen, and about 300 of them—a large number of whom were former Marines from Korea and World War II—came together in an American Legion Hall. They talked about blowing up pipes on the Hudson and stuffing a mattress up the Penn Central Pipe or floating a raft of dynamite into Indian Point Power Plant, which was killing a million fish a day and taking food off their family tables.

A guy named Bob Boyle, another Korean War vet, came to the meeting. Two years before, he'd written an article for *Sports Illustrated* about angling in the Hudson. Researching that article, he discovered an ancient navigational statute called the 1888 Rivers and Harbors Act that made it illegal to pollute any waterway in the United States and included a bounty provision that said

that anybody who turned in a polluter got to keep half the fine. The law had never been enforced in 80 years, but it was still on the books. Boyle stood up in front of this gathering of people who were all talking about violence, and he said, “We shouldn’t be talking about breaking the law. We should be talking about enforcing it.” They resolved that night to start a group they called the Hudson River Fishermen’s Association and to go out and track down and prosecute every polluter on the Hudson.

van Gelder: When did you get involved?

Kennedy: I came along in 1984. I was doing volunteer work for the association, and a guy came into the office one day and said, the whole city of Newburg, N.Y., [then a poor, predominantly black city north of New York City—Ed.] was being overrun with pollution. I offered to go over there with him, and we ended up walking seven and a half miles up the Quassaick Creek, and we found 24 different illegal polluters.

van Gelder: When you were slogging up that polluted creek, did it ever occur to you that this is no job for a Kennedy—that you should be sitting in a law office?

Kennedy: No. I actually got lawn chairs and I sat next to pipes all night. At one point I crawled into a big discharge pipe into a dye factory and saw where they were dumping vats of dye into the creek. I swam across a pool in the middle of the night to take samples from another pipe that was illegally discharging from a textile house. We found 24 polluters, and I set to work suing every one of them. Everything they were doing was illegal, but the state and federal agencies had essentially been captured by the polluters that they were supposed to regulate, and they weren’t doing what they were charged with doing. I didn’t know much about environmental law at the time, but I learned it as I prepared the lawsuits.

van Gelder: How important is the public trust doctrine in enforcing the idea that the waters are a commons and that ordinary people have a right to it?

Kennedy: There are two ancient laws that underlie all modern environmental laws: One is the nuisance doctrine that essentially says you can use your property any way you want, but if you pollute and it escapes your property and goes onto somebody else’s property, you’re violating the law. The other is the public trust doctrine, which says you can’t do anything that is going to diminish the commons, which includes any property that is not susceptible to private property ownership, like air, water, the fisheries, wetlands, wildlife, the wandering animals, rivers, streams, shorelines, aquifers, underground rivers, etc. Everybody has the right to use the commons, but nobody can use them in a way that diminishes their use and enjoyment by others. This is ancient law that goes back to Roman times when every citizen—rich or poor, humble or noble, African or European—had a right to cross the beach, throw in a net, and take out a share of the fish. And the emperor himself couldn’t stop them.

The first thing that happens in a tyranny is the privatization of the public trust by powerful entities. So, when Roman law broke down in Europe, the local kings and feudal lords began privatizing public trust assets. For example, in England, King John said the deer—which were an important food source to the poor—could only be hunted by the wealthy; that’s what got him in trouble with Robin Hood. And he privatized all of the fisheries of the Thames and the other rivers of England. This caused the public to rise up and confront him at the Battle of Runnymede, where he was forced to sign the Magna Carta, the first exercise in constitutional democracy. The Magna Carta includes chapters on free access to navigable waters and fisheries.

When we had the revolution in this country, those rights went to the states. So, the constitution of every state says that the people of the state own the fisheries and the waterways of the state. Those ancient rights were basically codified by the Clean Water Act in 1972.

On the first Earth Day, 20 million people, 10 percent of our population, came out in the street, which made Earth Day the largest national demonstration in U.S. history. People were upset about air pollution, but mainly about water pollution, about the Cuyahoga River burning, the Santa Barbara oil spill, and the fact that you couldn't swim or fish in the Hudson, the Potomac, the Charles, and the major rivers of our country.

van Gelder: What is your assessment of the Barack Obama presidency so far in terms of these issues?

Kennedy: It's a huge and refreshing sea change from the previous administration. They're restoring a lot of the damage that the Bush administration did to our environmental statutes, like the Clean Water Act. But, I'd say the biggest single accomplishment is putting the brakes on mountaintop removal.

van Gelder: They're still issuing permits, aren't they?

Kennedy: They just issued new standards that are going to make it very difficult for anybody to qualify for another permit.

van Gelder: If you were to advise someone who wanted to protect their own watershed, what would you say would be a good place to start?

Kennedy: I'd say contact the Waterkeepers, and we'll help you do it. We're the largest water protection group in the country and probably the world. We have 200 Waterkeepers; each one has a patrol boat; each one has a full-time paid keeper. We litigate on behalf of the community against polluters, and we protect local waterways from people who would injure them. Anybody who's interested in starting one should contact us, and we'll show you how to start your own Waterkeeper.