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Casting Pearls Before Swine: Why the Public's Darling Right to Pollute Should Have Been Overturned in Recent SCOVA Decision

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CASTING PEARLS BEFORE SWINE: WHY THE PUBLIC'S *DARLING* RIGHT TO POLLUTE SHOULD HAVE BEEN OVERTURNED IN RECENT SCOVA DECISION

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INTRODUCTION

The oyster has had a long and complicated history with Virginia's waters.[1] Many towns and cities along the Nansemond River once knew a time, decades past, when their oysters were some of the best around.[2] Now, few people know the taste of a Nansemond River oyster.[3] Throughout the years, oyster farmers in Virginia have become all too familiar with the periodic closures of the river to farmers. These closures usually follow the State Health Commissioner's assessment that the river quality has degraded so much that any oysters grown along the beds would be unsafe to eat.[4] And as oyster farmers struggled to farm quality shellfish in the Nansemond River, they struggled, too, to gain any sort of recompense from the state officials causing those very same polluted waters.[5]

The Court's opinion from a case decided over one hundred years ago marked the beginning of this struggle.[6] In *Darling v. City of Newport*

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[1] *See generally* David M. Shulte, *History of the Virginia Oyster Fishery, Chesapeake Bay, USA*, FRONTIERS IN MARINE SCI., May 9, 2017.

[2] *See* Patricia Keppel, *Everything You Need to Know About Virginia's Oysters*, VA.'S TRAVEL BLOG (Feb. 1, 2022), https://blog.virginia.org/2016/08/virginia-oysters/ [https://perma.cc/SC4C-8CFM].

[3] *Cf. id.* (stating how pollution in the mid-twentieth century has made oysters rare and inedible around the Virginia area and work has recently begun only around the Chesapeake Bay area to reduce such effects of pollution).

[4] *See* VA. CODE ANN. § 28.2-803 (West) (tasking the State Health Commissioner with analyzing the water and sediment qualities near oyster grounds for signs of pollution); Johnson v. City of Suffolk, 851 S.E.2d 478, 483–84 (Va. 2020) (showing how the statutes explicitly contemplate and plan for the condemnation of oyster beds following a finding of unsafe levels of pollution or sanitary conditions).

[5] *See infra* Parts II–IV.

[6] *See* Darling v. City of Newport News, 96 S.E. 307, 307 (Va. 1918).

News, oyster farmers in Newport News brought suit against the city for disposing of wastewater directly into the James River.[7] The Petitioners alleged the city's actions were polluting the waters and damaging the farmers' oysters.[8] The Supreme Court of Virginia ruled in that case that the oyster farmers were not due "just compensation" as a taking,[9] because the State had a right to pollute, superior to any alleged rights of the oyster farmers.[10] This ruling was further affirmed by the Supreme Court of the United States[11] and has since been duly upheld by the lower courts of Virginia.[12]

The Supreme Court of Virginia was again recently faced with an issue that was strikingly similar to that in *Darling* in *Johnson v. City of Suffolk*, wherein oyster farmers brought another takings claim against the city for the damage caused by the polluted waters of the Nansemond River to their oysters.[13] Plaintiffs argued that the court should overturn the public's superior right to pollute established by Virginia case law, set out in *Darling*.[14] A case decided at the turn of the century, it acknowledges that "[w]hatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin [referring to the ocean]."[15]

With an almost ironically clear reference to the court's lack of scientific understanding of their actions' consequences at the time, it seemed a clear answer that the case should have been overturned.[16] However, the court, in affirming the lower court's decision to grant the Defendants' demurrer,[17] casually sidestepped the issue of whether or not the *"Darling*

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[7] *See id.*
[8] *See id.*
[9] *See generally* VA. CONST. art. I, § 11 ("No private property shall be damaged or taken for public use without just compensation to the owner thereof.").
[10] *See Darling*, 96 S.E. at 309.
[11] Darling v. City of Newport News, 249 U.S. 540, 543–44 (1919).
[12] *See infra* Part IV.
[13] *Darling*, 249 U.S. at 543–44; Johnson v. City of Suffolk, 851 S.E.2d 478, 480 (Va. 2020).
[14] *See* Brief of Appellants at 11, *Johnson*, 851 S.E.2d (No. 191563).
[15] *Darling*, 249 U.S. at 542–43.
[16] *See id.*
[17] A demurrer is "[a] pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer." *Demurrer*, BLACK'S LAW DICTIONARY (11th ed. 2019). More often called a "motion to dismiss" in most jurisdictions, Virginia is one of the few states who still use this term in legal proceedings. *See* Lee E. Berlik, *Motions Craving Oyer in Virginia*, VA. BUS. LITIG. BLOG (May 16, 2020), https://www.virginiabusinesslitigationlawyer.com/motions-craving-oyer-in-virginia/ [https://perma.cc/6SU4-G2AG].

right" was still good case law. The court decided instead to center its dismissal on the farmers' property rights.[18] In one fell swoop, the oyster farmers of the Nansemond River were denied just compensation and cities were allowed to continue raising this archaic defense.[19] This Note will use *Johnson v. City of Suffolk* as a case study and illustrative example of why the municipality's argument using *Darling*, alleging its superior public right to pollute, should have been overturned given an evaluation of similar cases following *Darling*, changed regulations, and evolved understandings of the Court's rationale.

This Note calls for the Virginia Supreme Court to recognize that a city's right to freely pollute the public waterways is no longer valid under the Virginia Constitution, and to recognize that the line of *Darling* cases granting municipalities the public right to pollute waterways should have been overturned.

Part I will set out the foundation for this Note.[20] It will discuss the background of *Johnson v. City of Suffolk*, laying the context for this Note's discussion.[21] Part II will engage in an analysis of the rationale for *Darling*. It will contextualize and compare it to current understandings of the relevant doctrines.[22] Part III will then assess how courts applied the *Darling* right in cases in light of changed environmental regulations and statutes.[23] Lastly, Part IV will analyze *Johnson*, and discuss how the *Darling* right should have been applied, as opposed to how it was in fact applied.[24]

I. CONTEXT AND THE *JOHNSON* CASE

Recently decided by the Virginia Supreme Court is *Johnson v. City of Suffolk*, a case with several striking similarities to the original *Darling* case with aggrieved oyster farmers seeking remedies for damage caused by a city allowing untreated sewage to flow into a local river.[25] In *Johnson*, Petitioners leased their oyster-farming grounds along the bed of the Nansemond River from Defendant City of Suffolk pursuant to Virginia statute.[26] Petitioners brought their claim against the city and

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[18] *See Johnson*, 851 S.E.2d at 483.
[19] *See id.* at 480.
[20] *Infra* Part I.
[21] *See infra* Part I.
[22] *Infra* Part II.
[23] *Infra* Part III.
[24] *Infra* Part IV.
[25] Johnson v. City of Suffolk, 851 S.E.2d 478, 480 (Va. 2020).
[26] *See* VA. CODE ANN. § 28.2-603 (West); Petition for Declaratory Judgment at 7, *Johnson*, 851 S.E.2d (No. 191563).

Defendant Hampton Roads Sanitation District ("HRSD") who jointly operate Suffolk's sewage waste system.[27] The wastewater system was designed to, at times, allow untreated sewage overflow into the Nansemond River, damaging Petitioners' oysters.[28]

Petitioners' appeal rested on two main arguments: first, the trial court erroneously focused on federal case law applying the United States Constitution because the Petitioners' claim was based on the Virginia Constitution; and second, the trial court erroneously relied on obsolete case law in deciding that the city had a right to pollute, and that it did not owe Petitioners just compensation.[29] This Note will focus on the second of these arguments, much as the Supreme Court of Virginia did.[30] Defendants in response argued that they cannot be held liable, relying heavily on *Darling*.[31] Defendants alleged that the right of the public to use rivers to discharge sewers is superior to oyster farmers' rights to their property.[32]

However, despite the fact that all parties seemed to focus mainly on the question of whether or not *Darling* was still good law, the Supreme Court of Virginia decided to turn its decision on how the oyster farmers' property rights were to be characterized.[33] Focusing on the limited property interests of the oyster farmers,[34] the court was able to distinguish Plaintiffs' property rights from those of other cases' plaintiffs, wherein the court held that the state actors would be required to pay just compensation.[35] The court acknowledged the changes in federal and state environmental laws, but declined to comment further on the argument.[36] Instead, the opinion pivoted sharply to focus on the scope of the oyster farmers' property rights and whether or not the state is subject to statutory just compensation requirements only in that respect.[37]

The court went on to say that there was no legal justification to the argument that the oyster farmers as mere lessees of the river beds were owed clean water. As such, the Defendants' actions were not subject

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[27] Petition for Declaratory Judgment, *supra* note 26, at 7.
[28] *Id.* at 7–8.
[29] *See* Brief of Appellants, *supra* note 14, at 2.
[30] *Johnson*, 851 S.E.2d at 481.
[31] *See generally* Appellee Brief of Hampton Roads Sanitation Dist., *Johnson*, 851 S.E.2d (No. 191563).
[32] *See id.* at 19.
[33] *See generally Johnson*, 851 S.E.2d (focusing eight out of eleven pages of the opinion on characterizing the limited property interest of the oyster farmers).
[34] This will be discussed in Section II.A, *infra*.
[35] *See Johnson*, 851 S.E.2d at 484.
[36] *See id.* at 483.
[37] *Id.*

to consequence.[38] The court points to the existence of state statutes outlining a process for river closures or relief from rent payments due to such events following findings of unsafe levels of pollution or other unsanitary conditions.[39] The court reasons that because the state planned for the possibility of polluted waters, and polluted waters have been a problem faced by oyster farmers for centuries, this enables the city to continue to purposefully, or negligently, allow untreated wastewater to flow into the Nansemond River.[40] In other words, because the oyster farmers chose such land to grow their oysters, they assumed the risk of polluted waters, which then allows the city to pollute those waters without compensating the farmers for any resulting harm.[41]

In a classically indulgent rationale, Suffolk was allowed to continue its deplorable actions because that is how it has always been done.[42] In this way, the court again relied upon and upheld the city's "*Darling* right" to pollute. The city was allowed to continue negligently discharging its wastewaters into the Nansemond River that flows around it.

II. THE *DARLING* RATIONALE AND THE DEVELOPMENT OF VIRGINIA'S TAKINGS CASE LAW

As will be discussed later, this Note argues that the rationale upon which both the Supreme Court of the United States and the Supreme Court of Virginia base their decisions for *Darling* is no longer applicable in the modern context.[43] The courts, in both of their opinions, affirmed the superiority of the public's right to pollute based partly on the understanding at the time that lessees of oyster farming grounds held property rights that were very strictly limited to exclude the water above the river beds, as well as the quality of the water.[44] This Part will explain the doctrine and rationale behind the *Darling* decisions. It will further explain how the current understandings evolved over time due to a change in the understanding of implied rights through leases to farm and harvest oysters,

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[38] *Id.* at 483–44.
[39] *See* VA. CODE ANN. §§ 28.2-803–807 (West 2022).
[40] *See Johnson*, 851 S.E.2d at 484.
[41] *See id.*
[42] A commonly expressed criticism of stare decisis is the worry that it may create legal inertia, preventing courts from adapting appropriately to changing social values and norms. *See* Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 538 (2008).
[43] *See infra* Part IV.
[44] *See* Darling v. City of Newport News, 96 S.E. 307, 310 (Va. 1918); Darling v. City of Newport News, 249 U.S. 540, 543–44 (1919).

as well as a broader interpretation of the "damaged or taken" requirement in the Virginia Constitution following since-enacted legislation.[45]

A. Characterization of Private Property Rights

In Virginia, property for eminent domain proceedings is defined as "land and personal property, and any right, title, interest, estate or claim in or to such property."[46] The Court has held that any takings action must first meet the threshold requirement that the plaintiffs have a legally cognizable property interest, under either the Virginia Constitution or United States Constitution.[47] This is because for plaintiffs to allege that they are due just compensation, they must first show that there has been a dislocation of a specific right within the owner's "bundle of rights."[48]

An owner's property rights are often characterized by legal scholars and practitioners as a "bundle of sticks."[49] These so-called sticks include rights such as possession, future interest, use, use of the property only in certain ways, and more.[50] Having the "full bundle of sticks" is referred to as having a "fee simple" interest in the property.[51] Following this analogy, only certain sticks potentially within a person's ownership are protected by the Fifth Amendment.[52]

This has implications that could go either way for a potential plaintiff of an inverse condemnation action—a person does not need the full bundle of sticks to be owed just compensation, nor does a person having some property interests mean they are necessarily due just compensation.[53]

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[45] *See* VA. CONST. art. I, § 11.
[46] VA. CODE ANN. § 25.1-100 (2018).
[47] *See* Johnson v. City of Suffolk, 851 S.E.2d 478, 481 (Va. 2020); Va. Const. art. I, § 11; U.S. Const. amend. V. *See also* Colvin Cattle Co. v. United States, 468 F.3d 803, 806 (Fed. Cir. 2006) ("[U]nder our regulatory takings analysis . . . the threshold question is 'whether the claimant has established a "property interest" for the purposes of the Fifth Amendment.'") (citations omitted); Air Pegasus of D.C. Inc. v. United States, 424 F.3d 1206, 1213 (Fed. Cir. 2005) (stating that before considering whether or not a taking has occurred, a cognizable property interest must first be identified).
[48] *See* Byler v. Virginia Elec. & Power Co., 731 S.E.2d 916, 921 (Va. 2012).
[49] Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 FED. LAW. 30, 31 (2007).
[50] *See id.*
[51] *See* Matter of Kansas Star Casino, L.L.C., No. 121,469, 2021 WL 2021829, at *14 (Kan. Ct. App. May 21, 2021) ("The fee simple interest of real estate consists of every stick in the bundle of rights.").
[52] *See* Tardiff, *supra* note 49, at 31.
[53] *See id.* However, it is also important to note that the oyster farmers' case may have

In *Johnson*, the court pointed to statutory provisions that have historically limited the property interests of oyster farmers in Virginia.[54] The court pointed to the language used in *Darling*:

> [T]he lease is made only "for the purpose of planting and propagating oysters thereon," and it is for this purpose alone that the planter is authorized to use and occupy such ground, that is to say, that while any citizen might have taken oysters therefrom before the grant, afterwards he only may do so, and all others are excluded from either planting or taking oysters from such ground during his term. This marks the limit of his right, for there is nothing to indicate that any other public or private right is withdrawn, limited, or curtailed.[55]

The court held that because the river beds are leased from the state, the oyster farmers do not have fee simple title over the river beds, and instead have only the right to farm oysters upon them.[56] As leaseholders, only their oysters were considered Plaintiffs' personal property by fee simple, which would be due just compensation if taken or damaged.[57] Instead, the oyster farmers' property rights were to be construed strictly against them as the lessees and for the lessor, the state.[58] Accordingly, their rights were limited strictly to what is explicitly stated in the statute, reserving every other right to the public.[59]

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been an uphill battle from the beginning, as the riparian context tips the balancing test for takings claims against the plaintiffs.

> [T]he nature of riparian rights makes it difficult for private parties to prevail in a takings claim. In cases when courts do find that the government has taken a water right, it is usually the case that the entire right was destroyed; it is exceedingly uncommon for a plaintiff to win a takings case when the government has merely interfered with the water right.

Noah D. Hall & Benjamin C. Houston, *Law and Governance of the Great Lakes*, 63 DEPAUL L. REV. 723, 765 (2014).

[54] Johnson v. City of Suffolk, 851 S.E.2d 478, 482 (Va. 2020).

[55] *Id.* at 483 (quoting Darling v. City of Newport News, 96 S.E. 307, 308 (Va. 1918)).

[56] *See, e.g.*, United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

[57] Town of Cape Charles v. Ballard Bros. Fish Co., 107 S.E.2d 436, 440 (Va. 1959).

[58] *See* Working Waterman's Ass'n v. Seafood Harvesters, Inc., 314 S.E.2d 159, 165 (Va. 1984) (citing *Darling*, 96 S.E. at 308).

[59] *Id.*

B. Jus Publicum

Similarly, common law understanding of the public trust at the time would have stated that oyster farmers have a limited property interest being only lessees of the riverbed instead of fee simple title holders. Accordingly, this meant they would be "subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea."[60] The *jus publicum*, or public trust, is understood as a form of property interests reserved for the state arising from the state's sovereignty and its duty to serve the public's interest by limiting private property interests.[61] Legal doctrine and Virginia case law indicate that although relatively few public uses are included in this reserved list of *jus publicum*, one commonly acknowledged right is the right to dispose of wastewater into rivers.[62] Accordingly, though plaintiffs may lease the river beds and have fee simple title to the oysters themselves, the court held that the river beds, the water above the beds, and the waters themselves "are owned and controlled by the state, for the use and benefit of all the public . . . ." The Supreme Court of Virginia interpreted the latter part to include the right to direct the flow of untreated wastewater into the river.[63]

"[T]he oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters . . . ."[64] However, the Supreme Court of Virginia in previous cases has ruled that oyster bed leases, among other riverbed leases for the purpose of farming, convey rights by necessary implication, which would necessarily include the right to harvest.[65] This is the common law understanding of riparian rights and the nature of the public trust upon which the Supreme Court's decision in *Darling* was based. Other cases have similarly affirmed the superiority of the public's right to "lawful pollution . . . for sewage disposal."[66]

However, some legal scholars have provided arguments as to why the public's right to pollute should be excluded from the *jus publicum*.[67]

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[60] *Darling*, 96 S.E. at 309.
[61] Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 916 (1982).
[62] *Id.*
[63] *Darling*, 96 S.E. at 307.
[64] *Id.* at 309.
[65] Working Waterman's Ass'n v. Seafood Harvesters, Inc., 314 S.E.2d 159, 164–65 (Va. 1984).
[66] Ancarrow v. Richmond, 600 F.2d 443, 446 (4th Cir. 1979).
[67] Robin Kundis Craig, *Defining Riparian Rights As "Property" Through Takings Litigation: Is There A Property Right to Environmental Quality?*, 42 ENV'T L. 115, 153 (2012).

One such idea points to the claim, successfully pled in some cases in other jurisdictions, that public property rights should include the right to a property interest in a certain minimum level of environmental or water quality.[68] In those cases, the court held that a state water law held an important role in defining the property interest at issue to find that a physical taking had taken place.[69] Notably, there is underdeveloped but existing case law, especially in some eastern states, recognizing the right to access to water of a certain quality.[70] North Carolina has even explicitly stated the riparian owners' right to "undiminished and unimpaired [] quality" of water.[71]

Although too few and far between to call a trend, these instances of courts recognizing the importance of maintaining water of a certain quality should be noted as a reflection of the change in public opinion and understanding of wastewater disposal since *Darling*.

C. Statutory Changes and Scientific Understandings

It is also important to note that the public right to pollute is not limitless, which is clearly acknowledged in the opinion of the *Darling* case itself.[72] The Supreme Court clarified that not all pollution is permissible according to *Darling*—only that which does not "create a nuisance that so seriously interfere[s] with private property as to infringe Constitutional rights."[73] The opinion also conditioned the decision on the scientific understandings of the effects of discarding sewage disposal into

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[68] *See id.*; *see, e.g.*, International Paper, Co. v. United States, 282 U.S. 399, 407–08 (1931); Dugan v. Rank, 372 U.S. 609, 614, 616 (1963); Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313, 314, 324 n.7 (Fed. Cl. 2001); Casitas Municipal Water District v. United States, 543 F.3d 1276, 1284 (Fed. Cir. 2008).

[69] Craig, *supra* note 67, at 127.

[70] *See, e.g.*, Collens v. New Canaan Water Co., 234 A.2d 825, 831 (Conn. 1967); Montelious v. Elsea, 161 N.E.2d 675, 678 (Ohio Ct. C.P. 1959); Harrell v. City of Conway, 271 S.W.2d 924, 926 (Ark. 1954); Jessup & Moore Paper Co. v. Zeitler, 24 A.2d 788, 790 (Md. 1942); Fackler v. Cincinnati N.O. & T.P. Co., 17 S.W.2d 194, 195 (Ky. Ct. App. 1929); Smith v. Town of Morganton, 123 S.E. 88, 89 (N.C. 1924); Johns v. City of Platteville, 157 N.W. 761, 761 (Wis. 1916) (quoting Winchell v. City of Waukesha, 85 N.W. 668, 670 (Wis. 1901)); Mills Power Co. v. Mohawk Hydro-Electric Co., 140 N.Y.S. 655, 656 (N.Y. App. Div. 1913).

[71] *See* L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth., 712 S.E.2d 146, 150 (N.C. Ct. App. 2011); *see also* Coastal Plains Utils., Inc. v. New Hanover Cnty., 601 S.E.2d 915, 927 (N.C. Ct. App. 2004). *Contra* Biddix v. Henredon Furniture Indus., Inc., 331 S.E.2d 717, 721 (N.C. Ct. App. 1985) (allowing for "diminution in the quantity and quality of a watercourse that is consistent with the beneficial use of the land").

[72] *See* Darling v. City of Newport News, 249 U.S. 540, 542–43 (1919).

[73] *Id.* at 543.

public waters held by the court at the turn of the twentieth century.[74] More recent cases tackling the issue of states' right to pollute have acknowledged the various changes in scientific understandings, as well as federal laws, since *Darling* was decided over one hundred years ago.[75] A major point on which the *Darling* courts' decisions turned was the lack of explicit legislative intent at the time to limit the state's ability to convey its right to pollute its waters to the municipalities.[76] The Virginia court specifically stated that the decision is based, in part, on the fact that one could not have assumed, at the time, that the legislature intended to limit the public's common law right to pollute due to the absence of a "clear and explicit statute indicating such purpose."[77]

Several statutes have been enacted, both at the state and federal levels, since the *Darling* cases were decided, thereby invalidated that leg of the court's rationale.[78] It is especially important to note here, therefore, that a "validly enacted federal law can, of course, preempt any state law, including a provision of a state constitution in proper instances."[79] The Virginia Constitution tasks the Commonwealth with protecting its environment for the general welfare of its people, to allow the people to have "clean air" and "pure water."[80] Section 21-218 of the Virginia Code further explicitly prohibits the discharge of any sewage into the waters of Virginia.[81] It specifies that neither city nor other public body shall be allowed to pollute the waters in such a way.[82] Virginia Code Sections 62.1-44.4(1) and 62.1-44.3(1) also prohibit the state or any of its subdivisions from the right to discharge waste into any state waters.[83] Lastly, Section 62.1-44.4 further prohibits any party from continuing any existing

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[74] *See id.* at 542–43.
[75] *See infra* Part IV.
[76] *See* Darling v. City of Newport News, 96 S.E. 307, 307, 308–09 (Va. 1918).
[77] *See id.* at 308–09.
[78] *See* VA. CONST. art. XI, § 1 ("Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."); *see also* 33 U.S.C.A. § 1251 (West).
[79] Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1207 (4th Cir. 1986) (ruling the riparian landowners were entitled to recover costs).
[80] *See* VA. CONST. art. XI, § 1.
[81] *See* VA. CODE ANN. § 21-218 (West) ("No county, city, town or other public body, or person shall discharge, or suffer to be discharged, directly or indirectly into any tidal waters of the district any sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any tidal waters of the district.").
[82] *Id.*
[83] *See* VA. CODE ANN. §§ 62.1-44.4, 62.1-44.3 (West 2022); Wilson v. United States, 425 F. Supp. 143, 144 (E.D. Va. 1977).

degradation of state water quality.[84] It explicitly precludes any claim to have acquired a right to continue degrading state water quality by past discharge of wastewaters through past discharges.[85]

Other courts have also considered the effects of federal legislation on the common law doctrine, specifically following the enactment of the Federal Water Pollution Control Act (hereinafter "Clean Water Act" or "CWA").[86] Specifically, the Fourth Circuit in *Stoddard v. Western Carolina Regional Sewer Authority*[87] found that the cases such as *Darling* which affirm the public's right to pollute are no longer valid in the case of sewage disposal into navigable waters, when harm is inflicted on private property owners.[88] The court in that case stated that although the discharge of sewage can still be a legitimate practice of the government's police power in some limited circumstances, the Clean Water Act "imposes a severe limitation on the right to discharge sewage or other pollutants into the nation's waterways."[89]

These statutes are very clearly attempts by both the federal and state legislatures aimed to strictly prohibit the Commonwealth or other states from contaminating waters with sewage.[90] This extends to preventing them from conveying that right to municipalities or other publicly owned or operated facilities, such as wastewater treatment plants.[91]

The self-imposed limits on the public's right to pollute by the *Darling* courts also has to be re-examined from a more modern lens following the changed legislations.[92] The Clean Water Act was enacted in response to growing public awareness and concerns about water pollution.[93] These concerns were the result of increases in knowledge and scientific understanding of the effects of discharging sewage into waterways.[94] Although many uncertainties about several technical aspects of the Clean Water Act enforcement remain, the legislature felt there was now sufficient scientific understanding to enact a statutory scheme

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[84] *See* VA. CODE ANN. § 62.1-44.4 (West 2022).
[85] *See id.*
[86] *See* 33 U.S.C.A. § 1251 (West 2022).
[87] Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1205 (4th Cir. 1986).
[88] *See id.*; *infra* Part III.
[89] *See Stoddard*, 784 F.2d at 1205.
[90] *See* Darling v. City of Newport News, 96 S.E. 307, 308–09 (Va. 1918).
[91] *See id.*
[92] Darling v. City of Newport News, 249 U.S. 540, 542–43 (1919).
[93] *See* HISTORY OF THE CLEAN WATER ACT, EPA, https://www.epa.gov/laws-regulations/history-clean-water-act [https://perma.cc/5KR9-Y7CV] (last updated May 27, 2021).
[94] *See id.*

aimed to address the problems currently and potentially posed by continued water pollution.[95]

Further, the discharge of wastewater overflows into public waterways now has more significant impacts on water quality and environmental degradation than it did one hundred years ago, when *Darling* was decided.[96] This is due to the different contaminants in the wastewaters, which now include industrial wastes, chemicals, stormwater run-off, and other, more harmful pollutants.[97] The Environmental Protection Agency ("EPA") has acknowledged that sewer run-off and wastewater systems designed to allow overflow into waterways pose significant risks to health, aquatic life, water habitability, and general usability.[98] There are studies that have recognized that sewer run-off is a major source of water pollution.[99]

Although Petitioners' rights are limited as leaseholders of public riverbeds, Defendants' so-called right to pollute into Nansemond River should not make Petitioners ineligible for just compensation for damage to their oysters.[100] The limits of the rationale of the *Darling* decision itself and modern peremptory federal statutes no longer support Defendants' arguments about the superiority of the public's right to pollute, especially at the cost of damage to private property.[101]

III. FURTHER CONSIDERATION IN CASES OF COMMON LAW RIGHT OF PUBLIC TO POLLUTE

Several municipalities across the United States, and especially around coastal Virginia, have been brought to court by aggrieved private parties since *Darling* was decided at the turn of the century.[102] These plaintiffs, as will be discussed below, have generally argued that cities should not be allowed to continue to pollute public waters with untreated sewage.[103] Although the states' pollution was clearly to the detriment of the surrounding populations, the municipalities still somehow claimed it was

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[95] *See id.*
[96] *See* Laurel A. David, *The EPA's Combined Sewer Overflow Abatement Methods: Do They Comply with the Clean Water Act?*, 35 URB. LAW. 533, 534 (2003).
[97] *See id.*
[98] *See id.*
[99] *See* BLACK, CROW AND EIDSNESS, INC., WATER QUALITY OFF., EPA, STORM AND COMBINED SEWER POLLUTION SOURCES AND ABATEMENT, ATLANTA, GEORGIA 11 (1971).
[100] *See* Darling v. City of Newport News, 96 S.E. 307, 308 (Va. 1918).
[101] *See id.*
[102] *Id.*
[103] *See infra* Sections III.A–C.

justified as a police power for the benefit of the public.[104] Unfortunately, the majority of these cases have not been decided in favor of the private plaintiffs.[105] Even in cases where the plaintiffs were awarded damages, the courts have upheld the *"Darling* right" by distinguishing those cases from previous case law.[106] This section will analyze how the *Darling* cases have been interpreted and applied in subsequent cases regarding municipalities' public right to pollute.[107] It will explain how, and why, these subsequent cases can or should no longer be applied now.[108]

A. Du Pont Rayon Co. v. Richmond Industries, Inc.

Du Pont was a case appealing from the District Court of the United States for the Eastern District of Virginia.[109] The Plaintiff, Du Pont Rayon Co. ("Du Pont"), a large rayon and cellophane manufacturing company, brought suit to enjoin Defendant, Richmond Industries, from discharging the dye waste from its large plant into the James River.[110] While the wastewater was not discharged directly through the sewers of the City of Richmond, the Defendant was connected to the city water lines and admitted that its purpose was to discharge its wastewater through the city, which would come to flow through Du Pont's plant.[111]

The court acknowledged the existence of a general right of the public to make reasonable use of the water, but that this right is subject to the *jus publicum*.[112] As such, the court stated, the right of the public to pollute and dispose of sewage water is superior to the private property right in the waters.[113] The court made this decision, emphasizing that a municipal corporation has the right to use the waters for the purpose of discharging its wastes, because the use of tidal waters for the discharge of sewage is unquestionably a public use.[114]

The court seemed to expand its reasoning to reach across any property rights in the riverbeds, stating that "the mere ownership of a

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[104] *See id.*
[105] *See id.*
[106] *See infra* Section III.C.
[107] *See infra* Sections III.A–C.
[108] *See infra* Sections III.A–C.
[109] *See* Du Pont Rayon Co. v. Richmond Industries, Inc., 85 F.2d 981, 982 (4th Cir. 1936).
[110] *See id.*
[111] *See id.*
[112] *See id.* at 982 ("[T]his right on tidal, navigable waters is subject to the jus publicum, or right of the public, to use the waters for sewerage purposes.").
[113] *See id.*
[114] *See Du Pont Rayon Co.*, 85 F.2d at 983.

tract of land under the salt water would not be enough . . . to give a right to prevent the fouling of the water as supposed."[115] Important to note in the opinion, is that the court again seems to condition the holding on the currently existing laws and legislative intent at the time.[116]

The opinion shows a dated way of thinking about the issues presented in the case in several ways. First, the court stated that there is "nothing unreasonable" in a city allowing the free discharge of industrial wastes into city water lines, without any consideration of the effects on human health and surrounding animal life.[117] The court demonstrated its lack of scientific understanding about the effects of discharging wastewaters into public waterways in this manner, as acknowledged by the court in *Darling*.[118]

The court also stated its policy for coming to this holding: "for it is clear under the law of Virginia that neither the public health nor the industrial development of its tidewater cities, both of which are dependent upon sewage disposal, can be subordinated to the rights of a riparian owner to make use of public waters for private purposes."[119] Again, this justification no longer holds in current law because of statutes enacted after *Du Pont* that demonstrate a clear intent by the federal and Virginia legislatures to prioritize human health and environmental quality by minimizing the pollution of waters.[120]

B. Ancarrow v. City of Richmond

In this case, Plaintiffs were private property owners of a marina who filed suit against the City of Richmond for the city's continued pollution of the James River.[121] The city operated a sewage treatment plant located near the Plaintiffs' property.[122] Plaintiffs alleged that the pollution rendered their property valueless, and as such entitled them to damages as a taking under the Fourteenth Amendment.[123] The circuit

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[115] *See id.*
[116] *See id.* at 984 ("[F]or it is clear under the law of Virginia that neither the public health nor the industrial development of its tidewater cities, both of which are dependent upon sewage disposal, can be subordinated to the rights of a riparian owner to make use of public waters for private purposes.").
[117] *See id.*
[118] *See* Darling v. City of Newport News, 249 U.S. 540, 542–43 (1919).
[119] *See Du Pont Rayon Co.*, 85 F.2d at 984.
[120] *See* 33 U.S.C.A. § 1251 (West 2022); VA. CONST. art. XI, § 1; VA. CODE ANN. §§ 21-218, 62.1-44.3, 62.1-44.4 (West 2022).
[121] *See* Ancarrow v. City of Richmond, 600 F.2d 443, 444 (4th Cir. 1979).
[122] *See id.*
[123] *See id.*

court judge held that the superior public right to pollute was applicable for the City of Richmond in this case, relying mainly on *Du Pont*,[124] and decided for Richmond.[125]

Plaintiffs argued that *Du Pont* was no longer controlling due to changes in Virginia law which occurred after *Du Pont* was decided.[126] In that way, Plaintiffs attempted to extend the argument by claiming that the new statutory limitations on the public's right to pollute would give Plaintiffs a new right superior to that of the public.[127]

Unfortunately, the point the court focused on, and the point on which the *Darling* question ultimately turns, was the second portion of the argument—that the Plaintiffs had a new riparian right by implication.[128] The court denied what is, admittedly, the clearly attenuated argument that the statute grants a new riparian right to private property owners but declines to discuss any further the possible effects of the newly enacted statutes on the right to pollute.[129]

This lack of consideration is unfortunate because the court itself referred to the statute whose plain language, on its face, would make the City of Richmond's actions an unlawful pollution of the James River.[130] Further consideration of this issue may have also shown multiple statutes enacted to further demonstrate the General Assembly's clear intent to prevent the Commonwealth from allowing the discharge of untreated sewage and other harmful wastewater into public waters, as discussed earlier in this Note.[131]

This case takes the same unfortunate turn as *Johnson v. City of Suffolk* will, over forty years later. The court focused on the characterization of the plaintiff's property rights rather than the validity of the *Darling* right asserted by the defendants.[132]

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[124] *See Du Pont Rayon Co.*, 85 F.2d at 983.
[125] *See Ancarrow*, 600 F.2d at 448.
[126] *See id.* at 446.
[127] *See id.*
[128] *See id.*
[129] *See id.* at 446–47.
[130] VA. CODE ANN. § 62.1-44.4(1) (West 2022) ("No right to continue existing quality degradation in any state water shall exist nor shall such right be or be deemed to have been acquired by virtue of past or future discharge of sewage, industrial wastes or other wastes or other action by any owner.").
[131] *See* 33 U.S.C.A. § 1251 (West 2022); VA. CONST. art. XI, § 1; VA. CODE ANN. §§ 21-218, 62.1-44.3, 62.1-44.4 (West 2022).
[132] *See Ancarrow*, 600 F.2d at 447 ("Va. Code § 62.1-44.4, relied on by plaintiffs, . . . does not by its terms purport to grant a new riparian right to private property owners which

C. Stoddard v. Western Carolina Regional Sewer Authority

In this case, riparian landowners brought suit against the Western Carolina Regional Sewer Authority ("Sewer Authority"), alleging property damage and devaluation caused by Sewer Authority's discharge of sewage onto Plaintiffs' property.[133] The trial court found that there had been a taking, due to the conditions caused on the Plaintiffs' property by the sewage discharge.[134] The Sewer Authority, on appeal, argued that it should not be held liable for damages to the Plaintiffs' property.[135] It argued that its sewage discharge was a legitimate exercise of its police power, and there was therefore no "taking" that had occurred.[136]

In arguing against the trial court's decision, Sewer Authority relied heavily on the common law public's superior right to pollute.[137] The court conceded that a discharge of sewage could be, at times, a legitimate exercise of police power.[138] However, this court placed a heavier emphasis on the existence of the Clean Water Act, and the effects of the changed regulation.[139] The court engages in a discussion on the standards of preemption of federal-state legislations:

> A validly enacted federal law can, of course, preempt any state law, including a provision of a state constitution in proper instances. . . . Before the Supreme Court finds that state law has been preempted, however, a clear and manifest congressional purpose must be found . . . . The [Clean Water] Act specifically provides that pollution be controlled by state law if that law satisfies the federal act. South Carolina has adopted just such a statute, the South Carolina Pollution Control Act.[140]

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is superior to a city's state-regulated right to lawfully pollute public waters.") (internal citations omitted).

[133] Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1202 (4th Cir. 1986).

[134] *Id.* at 1204.

[135] *Id.* at 1202, 1205.

[136] *Id.*

[137] *See id.*

[138] *Id.*

[139] *Stoddard*, 784 F.2d at 1205.

[140] *Id.* at 1207 (citations omitted).

The court also spoke to the nuisance limitation mentioned in by the *Darling* court.[141] The court stated that "'a governmental body, although otherwise immune from liability, loses that immunity if the danger which caused the harm is in fact a nuisance.'"[142] The court stated that a party could recover damages from the state if the government body does cause a nuisance that interferes with a private property interest.[143]

This case demonstrates an unfortunately uncommon example of a court giving the Clean Water Act due consideration in the discussion of a takings case, instead of inordinately focusing on the characterization of property rights.[144]

IV. ASSESSMENT OF THE *JOHNSON* CASE WITH AN UPDATED PERSPECTIVE ON *DARLING*

The rationales that the courts in the cases above[145] relied upon are echoed in the opinion for the Supreme Court of Virginia's *Johnson v. City of Suffolk*.[146] The court focused and decided the case on one main aspect of Plaintiffs' appeal. Plaintiffs argued that the trial court should not have relied on obsolete case law in deciding that the city had a right to pollute and did not owe Petitioners just compensation.[147] Defendants in response argued that they could not be held liable, relying heavily on *Darling*, alleging the right of the public to use rivers to discharge sewers is superior to oyster farmers' rights to their property.[148] Both Plaintiffs and Defendants focused most of their pleadings and court briefs on the question of whether or not *Darling* was still good law. Despite this, again, as seen in both *Du Pont* and *Ancarrow*, the Supreme Court of Virginia decided to turn its decision on the characterization of the farmers' property interests in the riverbeds.[149]

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[141] *See* Darling v. City of Newport News, 249 U.S. 540, 543 (1919).
[142] *Stoddard*, 784 F.2d at 1206 (citing Teaque v. Cherokee County Memorial Hospital, 252 S.E.2d 296, 297 (1979)).
[143] *See id.*
[144] *Contra* Tardiff, *supra* note 49, at 35 ("The importance of identifying, defining, and understanding a plaintiff's property interests to the ultimate resolution of a takings claim cannot be overemphasized.").
[145] *See Stoddard*, 784 F.2d at 1205; Ancarrow v. City of Richmond, 600 F.2d 443, 446 (4th Cir. 1979); Du Pont Rayon Co. v. Richmond Industries, Inc., 85 F.2d 981, 981 (4th Cir. 1936).
[146] *See* Johnson v. City of Suffolk, 851 S.E.2d 478, 480 (Va. 2020).
[147] *See* Brief of Appellants, *supra* note 14, at 2.
[148] *See* Appellee Brief of Hampton Roads Sanitation Dist., *supra* note 31, at 19.
[149] *See generally Johnson*, 851 S.E.2d.

The court focused on the statutes that granted the city the authority to lease, and only lease, the riverbeds to farmers for the purpose of farming oysters and other shellfish.[150] The court then used this limited characterization of the oyster farmers' property interests to hold that no taking had occurred, for no property interest had been dislocated.[151] The court was also able to use this limited scope of property interests to distinguish Plaintiffs' property rights from other plaintiffs in cases where the court had found a taking had indeed occurred.[152]

The court only shortly acknowledged the changes in federal and state environmental law and declined to discuss any further implications of it.[153] The court conceded only that Plaintiffs were correct in asserting that many changes had occurred in the statutory landscape since *Darling* had been decided.[154] Instead, the court again pivoted to place the focus back onto the discussion on the scope of the oyster farmers' property rights, and in doing so, upheld the obsolete and archaic law of *Darling*, not even considering the limitations considered by the court back in 1919.[155]

CONCLUSION

The Supreme Court of Virginia should have followed the rationale that *Stoddard* court took.[156] The Supreme Court of Virginia should have instead considered the implications of such regulations on the legality of Defendants' actions in negligently allowing untreated sewage to flow into the waters above Plaintiffs' oysters.[157] *Stoddard*'s discussion was more holistic in its consideration of the issue at hand and properly considered the changes in not only the legal landscape, but of environmental science, the understanding of the public trust, and the idea of the public's right to clean water.[158]

Instead, the court went on to say there was no sound justification to Plaintiffs' arguments that the oyster farmers were owed clean water,

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[150] *See id.* at 483 (quoting Darling v. City of Newport News, 96 S.E. 307, 308 (Va. 1918)).
[151] *Id.* at 483–84.
[152] *See, e.g.*, AGCS Marine Ins. Co. v. Arlington Cty., 293 Va. 469 (2017); Livingston v. Virginia Dep't of Transp., 284 Va. 140 (2012); Hampton Rds. Sanitation Dist. v. McDonnell, 234 Va. 235 (1987).
[153] *Johnson*, 851 S.E.2d at 483.
[154] *Id.*
[155] *Id.*
[156] *See* Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1205 (4th Cir. 1986).
[157] *See id.*
[158] *See supra* Parts II–III.

simply because they are lessees of the riverbeds.[159] The court looked to the existence of state statutes outlining processes in the case of unsanitary conditions and river closures to justify that the Plaintiffs are not owed clean water.[160] The court erroneously assumes that because the oyster farmers entered into the leasehold knowing the state planned for the possibility of polluted waters, it enables the city to continue to purposefully, or negligently, allow untreated wastewater to flow into the Nansemond River.[161] This assumption, however, conveniently ignores the original intent of the legislators in drafting the statute that specifically reserves the fee simple interest to the state, and only the state.[162] The intent of the statute, and the origin of the public trust doctrine, show that these reserved rights are a duty for state use to serve and for the benefit of the public.[163] Instead, the court uses the existence of precautionary statutes as an excuse to allow the city to continue discharging wastewater into the Nansemond River, damaging not only the farmers' oysters, but the health and welfare of its residents as well. And so, the court again upheld the city's *"Darling* right" to pollute and sheltered the city from the consequences of its environmentally degrading actions.[164]

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[159] *Johnson*, 851 S.E.2d at 483–44.
[160] *See* VA. CODE ANN. §§ 28.2-803–807 (West 2022).
[161] *See Johnson*, 851 S.E.2d at 484.
[162] *Johnson*, 851 S.E.2d at 483 (quoting Darling v. City of Newport News, 96 S.E. 307, 308–09 (Va. 1918)).
[163] *See* Butler, *supra* note 61, at 884–86.
[164] *See id.* at 911.