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## Issues & Overview

### Water's Time

For the past 30 years, U.S. law has addressed environmental issues by developing narrow programs designed to deal with specific concerns. While this rifle-shot strategy has been quite effective in tackling problems like end-of-pipe discharges, it has unnaturally limited our ability to creatively confront other, more complex challenges. Perhaps nowhere have our conceptual horizons become more restricted than in our perception of the range of "Water Issues" that we face today.

Until recently, water pollution control seemed to focus primarily on the permitting of pollutants-coming-from-pipes-into-rivers. While that is the target of one portion of the Clean Water Act, it only skims the surface of the ways in which water's presence is felt in our nation today. Water as a shared resource; water as a commodity; water as habitat; water as a vehicle for exercising regulatory control – we encounter the new Water Issues in each of these guises.

By way of example, rivers and lakes are now being protected on a watershed basis, rather than just from individual municipal and industrial discharges. Waterways are affected not only by those point source discharges, but also by agriculture, urban runoff, re-suspension of sediments, air deposition of pollutants, instream biodegradation, and a host of other sources of stress and renewal. Programs are springing up to manage the impacts of each unique pollutant source in a way that allows it to contribute to the overall health of the river – e.g., by allowing sources to establish and trade credits where pollutants can be dealt with more economically by one user than by another. Surely this evolving watershed-wide vision of stream protection reaches more interests and presents more opportunities for creative resource management than did the narrow "pollutant from a pipe" model that we all grew up with.

Streams themselves are coming to be considered the sources of pollutants under Superfund's Natural Resource Damages provisions. There, public trustees drive restoration projects designed to address historic sediment deposits in order to restore pre-industrial resource values. Certainly any inventory of Water Issues in the new century would include this Superfund-driven attention to stream sediments.

Water Issues also are coming to define land use. Beyond historic issues of water quantity (which become more acute every year), recent assertions of federal jurisdiction over tiny, largely isolated waters threaten to shrink the land areas capable of development for human use. Based on a key Supreme Court decision in 2001, many had thought that the Water Act's wetlands program might reach only to wetlands on or near waters that were actually navigable. When courts began to

opine on this point, however, they tended to reach the opposite conclusion, confirming, for example, that roadside ditches are “jurisdictional waters” entitled to full wetlands protections. While developers historically did not think themselves seriously constrained by Water Issues, they now focus harder on intelligently managing those issues than on any other environmental challenge.

In the same vein, coastal development now runs flush against the competing needs of tidal wetlands and endangered species. Where previously it was enough to ensure that the structure of the coastline was protected, developers in those areas are now finding that they need to take on the characteristics of wildlife managers as they design and build their projects. There, too, Water Issues are calling the tune.

In their turn, agriculture and water supply utilities are facing increasing pressure under the Water Act’s NPDES permitting program. Large scale animal feeding operations have already been subjected to nationwide discharge standards and permitting. While agricultural runoff itself is specifically exempted from permitting under the Water Act, and a great reach is required to extend permit requirements to water management agencies (such as agricultural drainage districts), numerous courts have begun to make that reach by addressing the issue of water-to-water transfers. Water Issues are at the core of these potentially historic expansions of regulatory control.

States, of course, have recognized the expanding scope and importance of the new Water Issues and have begun to engage the public. ASIWPCA and America’s Clean Water Foundation, for example, have invited public and private organizations from around the world to join with them in sponsoring “World Water Monitoring Day” on October 18, 2004. This annual event inspires individuals and organizations to collect water quality samples at key locations, with the intention of educating the world community on the central, vital importance of clean waters.

In line with that effort, the industrial and municipal communities are recognizing that Water Issues in all of their new and more complex manifestations are at the root of many of the challenges that they will face in the coming years. For years, concerns about water quality have been pigeonholed and managed as narrow permitting questions. Today it is clear that Water Issues arise under more statutes, affect broader interests, and define rights in ways that our historic understanding of them never contemplated. Fortunately, these intertwined issues also present greater opportunity for creative solutions. This, truly, is water’s time.

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