Dealing with the Clean Water Act
Pending Reauthorization

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Just when you thought you had a handle on your National Pollutant Discharge Elimination System (NPDES) permits and were on your way to understanding the new storm water requirements—BANG—the Clean Water Act is up for reauthorization. Planning for upcoming regulatory changes is an especially difficult task for Federal facilities where budgets must be requested and defended a year to several years in advance.

The Clean Water Act is on a five-year reauthorization schedule. Last reauthorized in 1987, Congress is just a bit behind in getting a bill to the President for signing. All expectations had a joint bill out of Congress this summer. However, other legislative priorities along with several sensitive issues, that have yet to be resolved, delayed final action on Clean Water Act reauthorization bills in both the House and Senate.

We expect to see in the Clean Water Act reauthorization an emphasis on controlling smaller sources of pollution with larger scale planning taking into account all pollution media.

The 1992 National Water Quality Inventory Report to Congress cited one-third of the assessed Nation's waters to be impaired to some degree. This report, although not unexpected, continues to point toward pollution sources that have not traditionally been regulated as major obstacles of achieving the goals in the Clean Water Act.

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<th>Rank</th>
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<td>5</td>
<td>Industrial Point Sources</td>
<td>Onsite Wastewater Disposal</td>
<td>Resource Extraction</td>
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Source: 1992 Report to Congress

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Congress is recognizing more and more of these non-traditional pollution sources in the issuing of new water quality control laws. In the 1987 Clean Water Act reauthorization, Congress sent directives to the EPA to implement regulations to control polluted storm water runoff discharged from storm water conveyance systems. Complementing the regulation of point source discharges of polluted storm water, in 1990 Congress passed the Coastal Zone Act Reauthorization Amendments (CZARA) addressing pollution of runoff resulting from non-point sources.

The current reauthorization efforts undoubtedly will continue the trend toward attempting to solve the nation's water quality problems by directing EPA to regulate more sources of pollution.

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Source: 1992 Report to Congress

Federal facilities, as a piece of the water pollution puzzle, will be called upon to a greater degree than ever before to enter into water quality planning, especially as localities look toward watershed planning. The type of facility and activities undertaken will dictate the involvement required. Until a joint bill is sent for the President's signature, it is hard to determine what new requirements will be imposed on Federal facilities. Further, until EPA issues new regulations, it is impossible to predict new permitting requirements. However, several issues repeatedly appear in House and Senate bills, President Clinton's Clean Water Initiative, and in the media. From these often repeated issues we can draw some conclusions as to what might be in the final bill and eventual law. Predominant in the discussions are non-point source issues, watershed management, new enforcement mechanisms and an assortment of smaller issues that will have indirect effects on Federal facilities.
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Non-Point Source Issues

States and localities consistently report non-point source pollution as the major obstacle in meeting the goals of the Clean Water Act for fishable, swimmable waters. Non-point source pollution is addressed by § 319 of the Clean Water Act and CZARA. The major feature of § 319 requires states produce a management plan aimed at controlling non-point sources of pollution. CZARA directed EPA to publish detailed technological baselines to guide state programs while states were directed to have enforceable policies and mechanisms to protect coastal waters from non-point source pollution.

Seven hundred-one (701) million acres (29 percent of the land in the United States) is public land administered by the Federal government. In addition, Federal agencies are responsible for issuing permits, licenses, or funds for activities on other lands that could result in non-point source pollution if not conducted properly.

Non-point Source Control

Both the President's recommendations and the leading Senate bill require the control of non-point sources at Federal facilities and Federal lands. The President's recommendation strengthens the ties between Federal facilities and the states and municipalities in which they are located. Local implementing measures are expected to specifically address the Federal facilities and all enforcement measures will apply. States are asked to identify Federal lands and activities that are inconsistent with non-point source goals. Federal agencies are required to implement the same watershed management measures to the same extent as non-Federal entities. The President reserves the right to exempt facilities from these requirements in the "paramount interest of the United States." The Senate bill requires the President to direct the heads of Federal agencies to implement, within three years of passage, management measures to control non-point sources of pollution, and further directs that within five years all permits, leases, contracts, etc. for activities on federal land incorporate management measures.

Pollution Trading

Benefits of controlling non-point source pollution appear to be significant. However, costs associated with the controls are also significant. One estimate places an $8.8 billion tag on controlling non-point source pollution associated with just agriculture and forestry sources, not including operations and maintenance costs. Another estimate cited a range of $43 to $325 per pound to remove phosphorous entering the Chesapeake Bay from non-point sources while the costs of removing it from point sources ranged from $39 to $71 per pound.
To counter the seemingly high costs of non-point source pollution control, the President and House bill propose trading techniques be recognized, promoted, and developed between point and non-point sources into the same water body.

**Watershed Management Issues**

Watershed management combines the efforts to control point and non-point sources of pollution with emphasis on ecosystem preservation. This type of management requires planning as a major component of pollution control. As a result, watershed management must be a local effort, although it requires the input of many local, state, and Federal agencies. Localities and even states will find watershed management a difficult task because, with the exception of a few places, regulatory authorities are not necessarily drawn along natural watersheds. Watershed approaches involve a cooperative effort on the part of all the stakeholders. The stakeholders include the regulating agencies, dischargers, public, environmental groups, planners, etc. Federal agencies take two sides at the stakeholders' table, as regulators and dischargers.

**Watershed Planning**

The President's proposal directs Federal agencies to participate in watershed management and implement their own programs to promote watershed management to the maximum extent practicable in accordance with state programs. Federal agencies should provide states with information on non-water quality considerations, such as energy development and transportation for appropriate consideration in planning. In areas without a state watershed program, federal facilities should, to the maximum extent practicable, use a watershed approach in implementing their programs. States would also be given the authority to certify whether Federally issued permits and licenses comply with the state watershed plan. The Senate bill requires Federal agencies within a watershed with an approved plan to follow the plan to the maximum extent practicable. The President may exempt facilities with a determination of "paramount interest of the United States."

**NPDES Permits**

In order to evaluate all pollutants discharged in the watershed as a whole, all current major proposals—House, Senate, and Presidential—authorize states with approved watershed programs, at their discretion, to grant a one-time extension of NPDES permits in order to align permits within a watershed. Aligning permits within a watershed is likely to encourage pollution trading opportunities. The primary difference between the proposals is the time frame of the extension. The House bill allows a five-to-eight year extension, the Senate bill allows four years, and the Presidential proposal allows up to ten years.
Enforcement Issues

Enforcement is the only way to guarantee regulated entities comply with the often very expensive control and monitoring provisions of the Clean Water Act. Although compliance with the Clean Water Act is very important to Federal facilities, in the past, details of enforcement mechanisms have not attracted much attention. Congress set in motion the waiving of sovereign immunity with the Federal Facilities Compliance Act (FFCA) of 1992, that waived sovereign immunity under the Resource Conservation and Recovery Act (RCRA). Water law watchers expected the same waiver to be included in the Clean Water Act reauthorization. With the waiving of sovereign immunity, it is important for all Federal facilities to become aware of enforcement measures included in the Act and subsequent regulations.

Sovereign Immunity Waiver

All major proposals include an express waiver of sovereign immunity with respect to the Clean Water Act. The House proposal, however, retains a Presidential exemption and specifically adds the authority to exempt military properties. The President's proposal specifies that the waiver is for violations occurring after the effective date of the amendments. The various proposals would put in place the following structure for enforcement actions against Federal facilities.

- The proposals require the amending of § 309 to establish an administrative enforcement process based on § 3008 of the RCRA and the FFCA that allows EPA to issue compliance orders to Federal facilities, enforce the orders through the administrative hearing process, and assess penalties against Federal facilities for violations of the Clean Water Act and orders issued under the Act.

- The administrative provisions are to mirror the RCRA enforcement provision and a single administrative process would be created for RCRA and the Clean Water Act enforcement at Federal facilities.

- The provision would ensure that Federal facilities have an opportunity to contest administrative orders through an administrative hearing process established in 40 CFR Part 22, thus granting Federal entities access to a formal hearing process similar to the judicial hearings available to non-Federal entities.

- The respondent Federal agency should have an opportunity to confer with EPA prior to an order or field citation against the Federal facility becoming final, as is provided in the FFCA.
Citizen actions would be precluded if the EPA Administrator or the Secretary of the Army had initiated and was pursuing or had completed an administrative enforcement action against the Federal facility for the same violation. In administrative actions, interested persons would be noticed and have the opportunity to comment on and, in certain circumstances, intervene in the actions. The preclusion of citizen actions would not apply if there was imminent and substantial threat that was not being addressed by the EPA Administrator.

All funds collected by the state from a Federal agency could only be used to improve or protect the environment or to defray the cost of environmental protection or enforcement.

None of the proposals change the existing provisions of the Clean Water Act relating to civil and criminal liabilities of Federal employees and agencies.

- Federal employees are not personally liable for civil penalties resulting from acts or omissions within the scope of their official duties, and
- Federal employees, but not Federal departments or agencies, can be subject to criminal sanctions.

**Civil Penalties**

The President's proposal seeks to remedy the situation where fines do not offset the economic benefit of non-compliance. To that end, the President has a series of proposals to increase fines and give courts additional enforcement options and mandates. These proposals are not included in either the major House or Senate bills. In assessing civil penalties, the penalty must, at a minimum, recover the economic benefit derived from non-compliance, even if the benefit derived exceeds the statutory maximum of $25,000 per day.

The maximum civil penalty may also be exceeded in issuing orders that assess the cost of compliance and require environmental clean up. Courts must allow EPA to comment on clean-up orders to ensure net environmental benefit and consistency with other environmental statutes.

The President further proposes to the increase the statutory maximum penalty for the release of a barrel of oil, or a reportable quantity of hazardous substance, from $1,000 per barrel or reportable quantity and $25,000 per day of violation, to $3,000 per barrel or reportable quantity and $100,000 per day, whichever is greater. Releases that result from gross negligence or willful misconduct carry a higher penalty of not less than $500,000 per day or violation and $5,000 per barrel of oil or reportable quantity, whichever is greater.
Courts would be required to issue a compliance order with every finding of liability, unless a high probability exists that violations will not recur.

Modifications have been proposed to allow the recovery of enforcement costs; however, this will not be allowed against Federal facilities.

Additionally, the proposal authorizes reward not to exceed 45 percent of the penalty imposed in situations where a citizen or organization provides information instrumental to the assessing of a civil or administrative penalty.

The President further requests clarification of the Army Corps of Engineers authority to bring enforcement actions against unpermitted dischargers of dredged and fill materials. As it stands now, the Clean Water Act only specifies that the Secretary of the Army may bring actions against discharges of dredged and fill materials that are in violation of a permit.

Other Issues

Several other minor amendments will have indirect and direct impacts on Federal facilities. The issues mentioned in this section are not all inclusive of the proposed amendments to the Clean Water Act but are those with the broadest applicability to all areas of the country.

Domestic Sewage Exclusion

Wastes that would be otherwise regulated under RCRA as hazardous wastes currently may be discharged to Publicly Owned Treatment Works (POW) under the RCRA Domestic Sewer Exclusion. Concerns as to whether these wastes are adequately treated or whether the hazardous components are just transferred to the sludge or into the wastewater at the POTW have been raised. The Presidential and Senate proposals address the issue by prohibiting the discharge of hazardous waste except in controlled conditions or de minimis amounts. The following provisions would allow the discharge of RCRA hazardous wastes to a POTW:

1) The source must be subject to and in compliance with an applicable categorical standard or subject to a general pretreatment standard established to regulate waste having the hazardous characteristics of the waste discharged.

2) The waste stream and source are subject to come under new or revised pretreatment standards within five years.

3) The waste is introduced in de minimis amounts by households, noncommercial entities, government office buildings, or similar sources only. The Senate bill limits the discharge to households or other facilities discharging only domestic wastewater.
4) The pollutant and source are in compliance with a local limit regulating the hazardous constituents or a reliable indicator for the hazardous constituents.

5) The pollutant and source are in compliance with a technology based local limit established by the pretreatment approval authority (for sources discharging to non-pretreatment POTWs).

6) The waste stream and source will be subject, in accordance with a statutory schedule, to a Toxics Reduction Action Plan,\(^1\) as defined by the statute, developed by the POTW to reduce discharges of hazardous wastes and toxic pollutants.

7) The Senate bill additionally requires the EPA to determine that the hazardous waste is biodegradable, and the pretreatment approval authority has determined that the POTW receiving the waste operates at a certain treatment efficiency.

Pollution Prevention
More and more pollution prevention is being recognized as the most cost-effective means of achieving environmental objectives. Recently the Great Lakes Systems Water Quality Guidance document included a requirement that permittees develop and conduct a pollutant minimization program for all water quality-based effluent limitations that were below the analytical levels of detection.

To this end, the President proposes that permitting authorities be granted the authority to require pollution planning as a condition of NPDES permits, as well as the authority to impose Best Management Practices for point sources to ensure compliance with the goals of the Clean Water Act. This authority would include the ability to address operating and maintenance practices, such as cleaning and maintenance schedules.

Innovative Technologies
Cost effective pollution control is generally recognized as a vital element of the Clean Water Act. Most parties also recognize that the way the Clean Water Act is crafted, with stringent water quality based effluent limits and technologically based effluent limits, discourages dischargers from developing new control technologies. The President recommends EPA be allowed to establish short-term schedules granting temporary waivers from technologically based limits, not to exceed water quality-based limits, to encourage experimentation with process changes to reduce source contributions, reduce wastewater flow, or reduce energy consumption or obtain an overall reduction in treatment costs. During the temporary waiver, the dischargers would be protected from citizen suits as long as they comply with the terms of the schedule and interim limits. The House bill

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\(^1\)POTWs will be required to develop Toxics Reduction Action Plans for commercial users not subject to categorical standards.
carries a similar provision but limits the innovative system to achieving an overall reduction in pollution emissions to all media rather than just a cost reduction. The Senate bill, also similar to the President's, limits the waiver to not exceed 90 days, while both the House and President allow up to three years.

The House bill carries a separate authorization for EPA to enter into cooperative agreements with state permitting authorities and Federal facilities for the demonstration of innovative and alternate practices, methods, and technologies for the prevention of water pollution.

**Ground Water**

Traditionally, the Clean Water Act has been concerned with regulating surface waters—those defined as 'navigable waters' of the United States. However, the separation of ground waters from the oversight of the Clean Water Act has been called into question by the public, environmentalists, and courts. Ground water discharge(s) into surface waters; studies in the Everglades and Chesapeake indicate that ground water discharges into surface waters are a significant sources of surface water contamination. To remedy the regulatory disconnect, the President has proposed that the protection of ground water supplies be added to the goals of the Clean Water Act and he encourages coordinating the ground water protection elements of the Safe Drinking Water Act with the watershed protection elements of the Clean Water Act.

Most of the major changes to the Clean Water Act have been discussed in the Congressional hearings this past year, but undoubtedly modifications to these and new initiatives will continue to unfold as the various bills meander their way to the floors of the House and Senate. The Senate and House cite the same reasons for the delay in reporting a bill out of committee—consideration of unfunded federal mandates, private property takings, and a risk-based standards approach to water quality standards. Of the three, unfunded mandates and takings are politically very difficult for Congress to address and are the primary cause of the delay. The most sensitive issue under consideration is the regulation of wetlands because of the takings issue.

In early August, with six to eight working weeks left in this Congressional session, it is unlikely a complete Clean Water Act reauthorization bill will be sent to the President. Some Senators have suggested that a scaled-down bill, affectionately dubbed "Clean Water Lite," may make it out this session. However, other Senators oppose this concept, wanting a whole bill or nothing at all.

If the reauthorization goes into the next Congressional session, the bills will have to be reintroduced and start the committee rounds again. A conservative turn of both Houses is expected in the next election and this will color the legislation issued.
### Clean Water Act Reauthorization
#### Congressional Bills and President’s Initiative

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<td>President</td>
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