Getting to the (Non)Point: Private Governance as a Solution to Nonpoint Source Pollution

I. INTRODUCTION

Chances are that today you have already unwittingly advanced the slow but steady demise of America's freshwater supply. The sausage and egg biscuit you ate for breakfast, the half-empty bottle of Drano you dumped into your backyard, and the quick trip to the grocery store—these seemingly innocent actions each significantly

degrade American watersheds.[1] In response to this systemic and persistent assault on water quality, Congress enacted the Federal Water Pollution Control Act of 1972.[2] More commonly known as the Clean Water Act ("CWA"), this legislation attempted to take an aggressive and comprehensive approach to improving water quality.[3]

To achieve its sweeping goal of "restoring[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," the CWA established a bifurcated regulatory scheme.[4] The first prong of the this scheme prohibits "the discharge of any pollutant" into "navigable waters from any point source."[5] Like the drain-cleaning chemical you dumped into your backyard, a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[6] This program is complicated but effective.[7]

By contrast, the CWA's mechanism to regulate nonpoint sources, the other major source of water pollution, is largely ineffective.[8] A nonpoint source is defined as "any source of water

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1. U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS 10–11 (2009) (itemizing and analyzing comprehensively data from the 2004 reporting cycle and noting that "major pollutant source categories" include "agriculture" such as "feedlots," "urban-related runoff" including "highway and road runoff," and "municipal discharges/sewage"). Section 305(b) of the Clean Water Act requires states to provide biennial "description[s] of the water quality of all navigable waters in such State during the preceding year" and "a description of the nature and extent of nonpoint sources of pollutants and recommendations as to the programs which must be undertaken to control each category of such sources, including an estimate of the costs of implementing such programs." Clean Water Act § 305(b), 33 U.S.C. § 1315(b) (2012).

2. Federal Water Pollution Control Act of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816–904 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)); *see* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 645 (6th ed. 2009).

3. PERCIVAL ET AL., *supra* note 2, at 645.

4. Clean Water Act § 101(a). This section, the "Congressional declaration of goals and policy," is breathtaking because of its ambitious goal of "[eliminating] the discharge of pollutants into the navigable waters [of the United States] by 1985." *Id.*

5. *Id.* § 301 (prohibiting such discharge); *id.* § 502(12) (providing the relevant definitions); *see also* PERCIVAL ET AL., *supra* note 2, at 647–48 (explaining the operation of the CWA).

6. Clean Water Act § 502(14). Note that this definition explicitly exempts "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

7. *See* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 591 (2004) ("The CWA has produced a great deal of progress during the past thirty years. The discharge of organic wastes from publicly-owned waste treatment facilities has dropped 46%, while similar discharges from industry have fallen 98%.").

8. Andreen, *supra* note 7, at 593 ("The CWA has never addressed non-point source pollution in a straightforward comprehensive way . . . . Approximately 82% of the rivers and streams that fail to meet water quality standards and 77% of such lakes are impaired because of [non-point source pollution.]"). The most recent data confirms that nonpoint source pollution is

pollution that does not meet the legal definition of 'point source' in section 502(14) of the Clean Water Act."[9] In other words, nonpoint source pollution is anything that cannot be traced to a single discernable point—chemical runoff from construction sites, excess fertilizers from farmers' fields, etc. Although the CWA evinces a clear intent to control nonpoint source pollution,[10] the CWA's mechanism to achieve that goal has fallen disappointingly short.[11] This failure has far-reaching consequences. Indeed, nonpoint source water pollution is responsible for impairing[12] the vast majority of rivers, streams, and lakes that cannot achieve the Act's quality goals.[13]

A new approach is desperately needed. To that end, a market-driven system known as "private governance" shows great promise.[14] Put simply, private governance relies on *private* institutions to solve *public* problems—such as social welfare, prisons, and food safety—that stem from public regulatory inefficiencies and failures.[15] Private governance programs have been particularly successful in addressing persistent environmental and sustainability dilemmas.[16] This Note

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still the largest obstacle to attaining water quality standards. U.S. Envtl. Prot. Agency, *National Summary of State Information*, WATERSHED ASSESSMENT, TRACKING & ENVTL. RESULTS, http://ofmpub.epa.gov/tmdl_waters10/attains_nation_cy.control#total_assessed_waters (last updated Oct. 2, 2013). Agriculture- and urban-related runoff are the first and fifth greatest source of river and stream impairment; the third and tenth greatest sources of lake, reservoir, and pond impairment; eighth and ninth great source of bay and estuary impairment; and the eighth and fourth greatest source of coastal shoreline impairment. *Id.*

9. U.S. Envtl. Prot. Agency, *What Is Nonpoint Source Pollution?*, WATER HOME, http://water.epa.gov/polwaste/nps/whatis.cfm (last updated Aug. 27, 2013).

10. *See* Clean Water Act § 101(a)(7) ("[I]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.").

11. *See* U.S. Envtl. Prot. Agency, *supra* note 9 (demonstrating that nonpoint source pollution is largely uncontained and mostly responsible for the impairment of U.S. waters).

12. See *infra* note 80 for a discussion of the meaning of "impaired" and "threatened" in the context of water quality.

13. *See* Andreen, *supra* note 7, at 593 (pinpointing nonpoint source water pollution as responsible for eighty-two percent of river and stream impairment and seventy-seven percent of lake impairment).

14. *See, e.g.*, Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORN. L. REV. (forthcoming 2013) (detailing the development of private governance and developing a holistic framework for its application to environmental law).

15. *See infra* Part IV for an extensive discussion of private governance.

16. A twelve-member Steering Committee composed of international business and civil society leaders and academic experts recently announced:

> In the past five years, the number of new standards and certification programs has increased exponentially . . . . The breadth of focus of these systems has grown as well, to include sectors and resources such as water, mining, carbon and climate, tourism, and aquaculture. It is likely that a key driver of this growth is a recognition that early standards systems have succeeded in carving out a highly visible place in the marketplace, which other initiatives seek to emulate.

demonstrates that private governance could play an important role in reducing nonpoint source pollution by bridging the regulatory gap left by the CWA.[17]

This Note proceeds in three parts. Part II explores the history of water pollution in the United States and lays out the contours of the CWA's regulatory scheme. This history is particularly instructive because it demonstrates that this country is already accustomed to using heavy doses of both voluntary and mandatory regulatory programs to neutralize water pollution. Part III analyzes the successes and failures of the CWA, with an emphasis on nonpoint pollution controls. This Part also examines judicial and state responses to the CWA's inability to reduce nonpoint pollution. Part IV evaluates private governance as a solution to the government's regulatory ineptitude. In particular, this Part examines two potential schemes. One is a wholly private solution—a private organization acting as a clearinghouse for private companies whose production processes generate substantial nonpoint source pollution. The other is a hybrid solution—the Environmental Protection Agency ("EPA") acting as a clearinghouse for private companies whose production processes generate substantial nonpoint pollution, like the Energy Star program.[18] Ultimately, this Note concludes that private governance holds promise as an important piece of the water quality regulatory puzzle, but it is insufficient to solve the problem on its own. Supplementing public regulations with private governance schemes is a low-risk, high-reward approach to ameliorating nonpoint source pollution. Part V concludes.

STEERING COMMITTEE OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS AND CERTIFICATION, RESOLVE, INC., TOWARDS SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION 8 (2012), *available at* http://www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf.

17. *Id.* at 72 ("It seems that the extent of impacts differs considerably from case to case.").

18. *See generally* U.S. Envtl. Prot. Agency, *About ENERGY STAR*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=about.ab_index (last visited Oct. 3, 2013). The Energy Star program serves as a successful model of a public-private hybrid-labeling program. The EPA and Department of Energy jointly administer the program, which offers an "Energy Star" label to household products (such as washing and drying machines) that reduce energy usage beyond a certain threshold. *Id.*

II. POLLUTION, POLLUTION EVERYWHERE: THE CLEAN WATER ACT AS A RESPONSE TO RUNAWAY WATER POLLUTION

A. Pre-Clean Water Act Attempts at Water Quality Control

The first attempts at water quality control in this country were common-law nuisance claims brought by states and private actors.[19] Two early twentieth-century cases from the U.S. Supreme Court are illustrative. In *Missouri v. Illinois*, Missouri sued to enjoin Chicago's discharge of sewage into the Mississippi River.[20] Missouri alleged that Chicago's sewage sent "1,500 tons of poisonous filth daily into the Mississippi."[21] Similarly, in *New York v. New Jersey*, New York sued to prevent New Jersey from dumping refuse into a shared bay.[22] States had to bring tort suits to abate water pollution because policymakers at the time viewed water pollution control as a *local* responsibility.[23]

On the rare occasion that Congress created national water policy, water *quality* was not a priority.[24] For example, the Rivers and Harbors Appropriation Act of 1899 aimed to "prevent interferences with navigation."[25] The Act did impose fines for discharging "refuse" into navigable waters,[26] which evolved into the first federal water

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19. *See* PERCIVAL ET AL., *supra* note 2, at 643 (citing early cases of bringing nuisance actions to enjoin water pollution).

20. 200 U.S. 496, 517 (1906). The Court dismissed Missouri's claim on the ground that Missouri could not prove its increased disease incidence was a result of Chicago's discharges. *Id.* at 525–26 ("The presence of causes of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.").

21. *Id.* at 517.

22. 256 U.S. 296, 298–99 (1921). As they did in *Missouri v. Illinois*, the Court dismissed the plaintiff's claim for want of causation. *Id.* at 312–13:

> [W]e must conclude that the complainants have failed to show . . . that the sewage which the defendants intend to discharge into Upper New York Bay . . . would so corrupt the water of the bay as to create a public nuisance by causing offensive odors or unsightly deposits on the surface or that it would seriously add to the pollution of it.

23. *See* PERCIVAL ET AL., *supra* note 2, at 643 ("Even though states asked the Supreme Court to umpire interstate sewage disposal disputes, water pollution control was considered largely a local responsibility.").

24. *See* Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 528–29 (2005) (noting that the legislation was designed to facilitate interstate commerce); *see also* PERCIVAL ET AL., *supra* note 2, at 643 ("[Early federal legislation] was not to protect water quality but to prevent interferences with navigation, the lifeblood of American commerce then.").

25. PERCIVAL ET AL., *supra* note 2, at 643.

26. Rivers and Harbors Appropriation Act of 1899 (Refuse Act of 1899), ch. 425, § 13, 30 Stat. 1121, 1152 (codified as amended at 33 U.S.C. § 407 (2012)). The initial iteration of the

quality control device; however, there is no indication that Congress originally intended to regulate water quality.[27] Rather, the Rivers and Harbors Appropriation Act only sought to maintain the navigability of waterways.

In 1948, Congress finally passed legislation expressly designed to combat water pollution and improve water quality, though the federal government's regulatory role was still largely peripheral.[28] The Federal Water Pollution Control Act of 1948 authorized the federal government to act in a "very secondary position in relation to the states in water quality matters."[29] The Act, among other things, provided federal funding for water pollution research, new water treatment facilities (via loans), and state-administered water quality programs.[30] Though notable for its comprehensiveness, the Act still represented a baby step as Congress explicitly stated that it was intended to "recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution."[31] Even the authorization for independent federal action was heavily circumscribed; the federal government could only proceed with a public nuisance action after securing approval from state officials and issuing "a complicated series of notices, warnings, hearings, and conference recommendations."[32]

As the century progressed, so did the federal government's efforts to combat water pollution. Congress bolstered the Federal Water Pollution Control Act with amendments in 1956 and 1961.[33] The 1956 amendment created direct funding (in place of the loan program) for municipal treatment facilities, while the 1961

Refuse Act imposed penalties of between $500 and $2500 and between thirty days and one year imprisonment, per violation. *Id.* § 16. In 1996, a maximum penalty of up to $25,000 per day replaced the minimum fine and the prison penalties remained unchanged. Water Resources Development Act of 1996, Pub. L. No. 104-303, § 218(a), 110 Stat. 3658, 3696 (codified as amended at 33 U.S.C. § 411 (2012)).

27. *See* Murchison, *supra* note 24, at 529–30 (noting that the Refuse Act "was important in shaping modern legislation.").

28. *See id.* at 529 ("Congress delayed significant federal pollution control legislation until the middle of the twentieth century."); *see also History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/laws-regulations/history-clean-water-act (last updated Apr. 17, 2013) ("The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution.").

29. N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part III: The Federal Effort*, 52 IOWA L. REV. 799, 810 (1967).

30. Federal Water Pollution Control Act of 1948, Pub L. No. 80-845, §§ 2–8, 62 Stat. 1155–59.

31. *Id.*

32. Murchison, *supra* note 24, at 531; *see also* Federal Water Pollution Control Act of 1948 § 2.

33. Murchison, *supra* note 24, at 531–32.

amendment increased funding for existing programs and expanded the reach of the statute to include coastal waters.[34] Although these amendments broadened the previously paltry federal role in water pollution control, the legislation had a modest effect at best.

The Water Quality Act of 1965 took another step in the direction of expanding the federal government's regulatory authority over water pollution.[35] Most notably, the Water Quality Act forced states to create and administer water quality standards for interstate waters.[36] To enforce this requirement, Congress required water quality standards to be approved by the newly minted Federal Water Pollution Control Administration ("FWPCA").[37] Unfortunately, this mechanism lacked real teeth—if a state failed to adopt an adequate standard, the FWPCA could only adopt its own standards "after a lengthy and difficult process."[38] Still, the legislation signaled Congress's desire to devote federal resources to water pollution issues.

Congress amended the Federal Water Pollution Control Act two more times before 1972.[39] However, these relatively minor amendments left the regulatory environment essentially unchanged, and many states failed to establish water quality standards.[40]

Despite this slow but steady expansion of federal authority, water pollution control efforts gained little traction prior to the CWA.[41] Federal attempts to rein in water pollution were so impotent that in 1971, the Senate Committee on Public Works concluded that "the national effort to abate and control water pollution has been

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34. Federal Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub L. No. 87-88, 75 Stat. 204. The most significant change was broadening the definition (and thus scope of the Act) of "interstate or navigable waters" to encapsulate all coastal waters. § 9, 75 Stat. at 210. For a more complete description of these amendments, see Murchison, *supra* note 24, at 531–32.

35. Water Quality Control Act of 1965, Pub L. No 89-234, 79 Stat. 903; *see also* PERCIVAL ET AL., *supra* note 2, at 644 (noting that the Water Quality Control Act of 1965 "strengthened [the] provisions" of the Federal Water Pollution Control Act).

36. *See* PERCIVAL ET AL., *supra* note 2, at 644 ("[These provisions] requir[ed] states to adopt water quality standards for interstate waters . . . .").

37. Water Quality Act, 75 Stat. at 908; PERCIVAL ET AL., *supra* note 2, at 644.

38. PERCIVAL ET AL., *supra* note 2, at 644.

39. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.

40. *See* Murchison, *supra* note 24, at 533 ("The legislation did not, however, change the basic structure of water pollution control regulations."). The 1966 amendment primarily expanded several grant programs and established incentives for state compliance with the federal water quality standards requirements. *Id.* The 1970 amendment, responding to a pair of oil spills, created a system of strict liability for oil spills in American waters. *Id.*

41. PERCIVAL ET AL., *supra* note 2, at 644 (noting that "[b]y 1972 only about one-half of the states had water quality standards").

inadequate in every vital aspect."[42] At the time, the federal government had only brought a *single* Federal Water Pollution Control Act enforcement action.[43]

Fortunately for the nation's waters, important legal and political changes were already underway. First, a pair of Supreme Court decisions in the 1960s laid the groundwork for the CWA. The Refuse Act (originally the enforcement tool of the Rivers and Harbors Appropriation Act of 1899) authorized fines and imprisonment for those who dumped refuse into "navigable waters."[44] To compensate for the weakness of the Federal Water Pollution Control Act, the Department of Justice ("DOJ") began prosecuting polluters under the Refuse Act as a means to improve water *quality*, even though the legislation was intended to facilitate *transportation* (by preventing refuse from clogging the nation's waterways).[45] In response, aggrieved polluters twice challenged this application of the Refuse Act, and twice the Court sided with the DOJ.[46] Both opinions were authored by Justice Douglas, greatly expanded the scope of the Refuse Act and partially filled the gap left by the Federal Water Pollution Control Act.[47] These decisions cemented the transformation of the Refuse Act into a powerful new pollution control tool.

Shortly thereafter, Congressman Reuss followed Justice Douglas's lead. Seeking to capitalize on the Court's environmentally favorable reading of the Refuse Act, Congressman Reuss leveraged his position as chairman to persuade the House Subcommittee on Conservation and Natural Resources to issue a report recommending increased use of the *qui tam* provisions of the Refuse Act.[48] To

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42. S. REP. NO. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N 3668, 3674.

43. *Id.*

44. § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407 (1970)); *see supra* notes 25–27 and accompanying text (describing the Refuse Act of 1899 in greater detail).

45. § 13, 30 Stat. at 1152; Murchison, *supra* note 24, at 534–35.

46. United States v. Standard Oil Co., 384 U.S. 224, 230 (1966) ("The word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse."); United States v. Republic Steel Corp., 362 U.S. 482, 485 (1960) ("[T]he industrial deposits placed by respondents in the Calumet have . . . created an 'obstruction' within the meaning of [section 10] of the Act . . . .").

47. *See* Murchison, *supra* note 24, at 534–36 (detailing how these decisions allowed the DOJ to prosecute polluters via the Refuse Act). The twin decisions took different approaches to expanding the Refuse Act. In *Republic Steel Corp.*, Justice Douglas interpreted the Refuse Act's exemption for liquid sewage from sewers and streets narrowly. 362 U.S. at 490–91. In *Standard Oil Co.*, Justice Douglas interpreted the term "refuse" broadly, to expand the Refuse Act's reach. 384 U.S. at 225–26. By reading the exemptions narrowly and construing mandates broadly, Justice Douglas almost single-handedly turned the Refuse Act into a pollution reduction tool.

48. PERCIVAL ET AL., *supra* note 2, at 644 ("Congressman Henry Reuss . . . saw the Refuse Act's promise as a tool for dramatic action against the growing water pollution problem."). The

generate momentum, Reuss publicized a list of 270 companies that were regularly discharging refuse without a permit.[49]

President Nixon responded to this building wave of political and social pressure in December of 1970. Executive Order 11,574 instituted a regulatory program administered by the Army Corps of Engineers whereby a permit would be required to discharge any substance (except unadulterated water) into a navigable water.[50] Over twenty-three thousand permit applications flooded the Corps in the following months.[51]

In sum, in the early 1970s, the federal government's role in regulating water pollution consisted of various piecemeal judicial, congressional, and executive responses. In an effort to untangle this morass, Congress passed the Federal Water Pollution Control Act Amendments of 1972—better known as the Clean Water Act.[52]

B. The Clean Water Act

The CWA represents an ambitious and comprehensive effort to eliminate "the discharge of pollutants into the navigable waters by 1985."[53] Though the CWA includes dozens of ancillary "support" provisions, such as funds for research,[54] grants for construction of treatment facilities,[55] and state grants,[56] the heart of the scheme is a bifurcated program for regulating pollutant discharges. Indeed, Congress declared that "it is the national policy that programs . . . be developed and implemented in an expeditious manner so as to enable

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qui tam provisions provide "a common law remedy allowing citizens to prosecute crimes and keep half the fines paid." *Id.*

49. *See* Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 486–89 (1972) (detailing how "Congressman Reuss began to forward to the Department of Justice information of discharges committed without an immunizing permit").

50. 35 Fed. Reg. 19,627 (Dec. 25, 1970); *see* Potter, *supra* note 49, at 489–90 (announcing that "that the Army Corps of Engineers would institute a comprehensive regulatory program for issuing permits under section 13 of the R&HA of 1899, a program which would apply to all discharges of any matter other than pure water"); *see also id.*, at 489–90 (explaining the effect of the executive order). President Nixon's executive order, building off the work of Justice Douglas and Congressman Reuss, located its authority in section 13 of the Rivers and Harbors Appropriation Act of 1899—the Refuse Act.

51. PERCIVAL ET AL., *supra* note 2, at 645.

52. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816–904 (codified as amended at 33 U.S.C. §§ 1251–387 (2012)).

53. Clean Water Act § 101(a)(1). Though this goal predictably fell short, it demonstrated Congress's intent to seriously reduce water pollution.

54. *Id.* § 105.

55. *Id.* § 201.

56. *Id.* § 601.

the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution."[57]

Though point sources are not the subject of this Note, a brief description of the regulatory device for this type of pollution is useful because it provides a contrast with how the CWA treats nonpoint sources. Point sources are defined as "any discernible, confined and discrete conveyance."[58] Point source discharges are subject to the most stringent controls in the CWA.[59] The starting point is section 301, which requires "nationally uniform, technology-based limits on point source discharges."[60] To achieve this, section 301 sets liquid waste (known as "effluent") limitations, which are essentially constraints on the amount of a pollutant that any point source can legally discharge.[61] To implement these limitations, section 402 created the National Pollution Discharge Elimination System ("NPDES").[62] The NPDES issues permits that contain technology-based effluent limitations designed to reduce or eliminate pollutant levels in each discharge. Point source polluters who do not first receive an NPDES permit face stiff financial and criminal penalties. The end result is a rigid command-and-control scheme that forces polluters to comply or suffer serious consequences.[63]

Comparatively, the nonpoint source regulatory program is quite lenient. Three sections of the CWA specifically target nonpoint source pollution. First, section 208 encourages states to develop and implement plans to reduce certain nonpoint source pollutants in return for funding and technical support.[64] Second, Congress added section 319 to the CWA in 1987, which offers federal financial and

57. *Id.* § 101(a)(7). This provision was added as an amendment in 1987. PERCIVAL ET AL., *supra* note 2, at 648.

58. *See* PERCIVAL ET AL., *supra* note 2, at 648–49 ("While the [CWA] concentrates its regulatory firepower on pollution from point sources, [Congress later added a section articulating goals for nonpoint sources].").

59. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2012). Examples of point sources "includ[e] but [are] not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*

60. PERCIVAL ET AL., *supra* note 2, at 649.

61. Clean Water Act § 301.

62. *Id.* § 402.

63. *See* Andreen, *supra* note 7, at 549–50 ("The CWA also created a wide array of federal sanctions for violations of the Act. In doing so, Congress gave EPA enormous power to enforce the Act through the use of administrative compliance orders, administrative penalties, civil suits for injunctive relief and civil penalties, and even criminal sanctions.").

64. Clean Water Act § 208; *see also* Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. ENVTL. L. & LITIG. 179, 187 (2000) ("[Congress] relegated nonpoint source management to general area-wide waste management planning.").

technical assistance incentives to states that create their own plans to control nonpoint source pollution.[65] The final piece of the CWA nonpoint scheme is section 303, which establishes the Total Maximum Daily Load ("TMDL") program.[66] The TMDL program requires states to set water quality standards for all navigable bodies of water within their borders.[67] A TMDL sets daily limits on the total amount of a given nonpoint pollutant that can be added to a body of water.[68] To effectuate the daily limits, states create a "load allocation" for each type of nonpoint source, such as agriculture or urban runoff.[69] The TMDL program has certainly been the CWA's most effective nonpoint pollution control device, though it leaves much to be desired, as will be explained in Part III.[70]

III. PLUGGING THE GAPS: JUDICIAL AND STATE RESPONSES TO THE CLEAN WATER ACT'S SHORTCOMINGS ON NONPOINT SOURCE POLLUTION

A. A Glass Half Full: How Nonpoint Source Water Pollution Presents a Troubling Exception to the Otherwise Effective Clean Water Act

In most areas, the CWA has been a success story, with some environmental law scholars even hailing it as "one of the greatest successes in environmental law."[71] Broadly speaking, the CWA represented a paradigm shift in environmental regulation. It made command-and-control (as opposed to voluntary) regulation a palatable policy prescription. Specifically, the CWA required private polluters to install effective pollution reduction technologies regardless of cost, an approach that was emulated by the Clean Air Act and several other

65. Clean Water Act § 319.

66. *Id.* § 303.

67. *Id.*

68. Craig, *supra* note 64, at 187–88.

69. Corey Longhurst, Note, *Where is the Point? Water Quality Trading's Inability to Deal with Nonpoint Source Agricultural Pollution*, 17 DRAKE J. AGRIC. L. 175, 179–80 (2012) ("With the priority schedule in place, states must establish TMDLs for each pollutant impairing each water according to the schedule . . . . Once the sources are identified, the TMDL is a plan to ratchet down pollution through 'wasteload allocations' for point sources and 'load allocations' for nonpoint sources.").

70. *See* PERCIVAL ET AL., *supra* note 2, at 739 ("TMDLs have become the true 'sleeping giant' of the [CWA]."); *see also* Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ENVTL. L. REP. 10469, 10471 (1999) ("TMDLs are now taking the field and forcing a showdown on the last water quality frontier, non-point source pollution.").

71. James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012, 5:20 AM), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.single.html.

major environmental statutes.[72] Thus, although the CWA is technically focused on the nation's water supply, the Act has had a profound influence in other arenas and represents a triumph for those who advocate for a stronger federal role in environmental regulation in general.

In addition to initiating a shift in federal environmental regulatory policy overall, the CWA also made significant headway in achieving its stated goal of improving the quality of American waters.[73] Water quality analyses help to illustrate the "truly extraordinary progress" made since the CWA was enacted.[74] Publicly owned waste treatment facilities are emitting forty-six percent less organic waste while industry sources are emitting ninety-eight percent less organic waste.[75] Nationwide, the number of waters meeting or exceeding water quality goals has almost doubled.[76] Statistics aside, these successes are visible to the naked eye: Watersheds in Kansas City, Cleveland, and Hartford (among others) that were formerly awash in pollution are now the centerpieces of economic redevelopment initiatives.[77]

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72. *See id.*:

> [T]he act took a completely new approach to environmental protection. The law flatly stated there would be no discharge of pollutants from a point source (a pipe or ditch) into navigable waters without a permit. No more open sewers dumping crud into the local stream or bay. Permits would be issued by environmental officials and require the installation of the best available pollution-control technologies.

Many of these "landmark" principles reappeared in later federal environmental regulation. For example, the Clean Air Act imposes an analogous technology mandate while the Resource Conversation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) both adopted a similar command and control regulatory approach. *Id.*

73. *See* Andreen, *supra* note 7, at 591 ("The Clean Water Act has produced a great deal of progress during the past thirty years.").

74. *Id.*

75. *Id.*

76. Salzman, *supra* note 71.

77. *See id.* ("Once a convenient dumping ground for all manner of filth, rivers now represent an urban gem. Hartford, Conn.; Kansas City, Kan.; Cleveland; and other cities have based much of their redevelopment around their now clean and inviting waters, with waterfront parks and the lure of fishing and trails along the water's edge."); *see also* Andreen, *supra* note 7, at 591–92:

> Truly extraordinary progress, therefore, has been experienced in places as diverse as the Delaware estuary and the Chattahoochee River, New York Harbor, and the Potomac estuary. The progress, moreover, is not limited to just conventional pollutants, but includes heavy metals and toxic water pollutants. As a result, Pittsburghers today enjoy their three rivers as a place for picnics and boating and summer arts festivals, and from Boston to Baltimore to Savannah, Americans are finding beauty and recreation along their restored harbors.

Despite these laudable achievements, the CWA is at best a "glass half full."[78] By a wide margin, American watersheds are still either "threatened" or "impaired."[79] According to the best estimates available, more than half of the rivers and streams, more than two-thirds of the lakes and ponds, about two-thirds of the bays and estuaries, and nearly four-fifths of all wetlands are either impaired or threatened.[80] Even these startling statistics can mask the true extent of impairment; oftentimes watersheds are too toxic for even basic usages, such as fishing or swimming.[81]

So what explains the CWA's promising but limited results? The answer lies in the difference between point source and nonpoint source pollution. The CWA has been very effective at controlling point source discharges and comparatively ineffective at reducing nonpoint source discharges. In fact, about eighty-two percent of rivers and streams and seventy-seven percent of lakes qualify as "impaired" solely because of nonpoint source pollution.[82] The largest obstacle to attaining water quality goals for the vast majority of American waters is finding a way to rein in nonpoint source pollution.[83]

There are several distinct difficulties that hinder efforts to reduce nonpoint source water pollution. Most importantly, nonpoint

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78. *See* Salzman, *supra* note 71 ("But the glass is only half full, for major challenges remain.").

79. *See* U.S. Envtl. Prot. Agency, *supra* note 9. "Threatened waters" are defined as "waters . . . [that] currently support all of their designated uses [recreation, drinking, etc], but one or more of those uses may become impaired in the future . . . if pollution control actions are not taken." "Impaired waters" are defined as "[waters for which] any one of its uses is not met." *Id. See* Salzman, *supra* note 71 ("The EPA estimates that about half of our rivers and streams, one-third of lakes and ponds, and two-thirds of bays and estuaries are 'impaired waters,' in many cases not clean enough for fishing and swimming.").

80. U.S. Envtl. Prot. Agency, *supra* note 9. There is an important caveat to these calculations. At the time of reporting, water quality data was only available for sixteen percent of the nation's rivers and streams (in terms of mileage), twenty-nine percent of the nation's bays and estuaries (in terms of surface area), and thirty-nine percent of the nation's lakes and ponds (in terms of acreage). PERCIVAL ET AL., *supra* note 2, at 638. Despite the fairly limited number of water bodies for which data is available, the NSSI is the most comprehensive, accurate, and unified body of data on the state of the nation's collective watersheds.

81. *See* Salzman, *supra* note 71 (noting that waters are "in many cases not clean enough for fishing and swimming"). The process of determining a "designated use" is complicated and subject to extensive EPA regulations. *See* Water Quality Standards Handbook—Chapter 2: Designation of Uses, 40 C.F.R. § 131.10 (2013), *available at* http://water.epa.gov/scitech/swguidance/standards/handbook/chapter02.cfm#section1.

82. Andreen, *supra* note 7, at 593.

83. Agriculture and urban-related runoff (two major nonpoint sources of water pollution) are the first and fifth greatest source of river and stream impairment; the third and seventh greatest sources of lake, reservoir, and pond impairment; seventh and eleventh great source of bay and estuary impairment; and the fourth and fifth greatest source of coastal shoreline impairment. U.S. Envtl. Prot. Agency, *supra* note 9.

source pollution is fundamentally harder to control than point source pollution. While the NPDES permit program can target discrete point sources, nonpoint source discharges "come[ ] from farms, cities, forests, mining operations, and construction sites."[84] Devising a permitting program to control the discharge from each household (e.g., chemicals, cleaners), farm (e.g., fertilizers, pesticides), and road (e.g., oil, gas, antifreeze) presents a difficult[85] and potentially expensive[86] task. Moreover, nonpoint source discharges are usually addressed at the local level given the need to target individual sources (specific fields, cars/roads, households, etc.).[87] Unfortunately, the incentives for control are misaligned at the local level. Because nonpoint pollution seeps into groundwater, it is eventually exported to other states and localities. Thus, the brunt of the negative consequences are felt elsewhere, and local governments lack the motivation to reduce their respective nonpoint source discharges.[88]

Strong industry interests also stand in the way of establishing effective nonpoint source regulatory controls. To ensure sufficient congressional support from farm states, the CWA categorically exempts "agricultural stormwater discharges and return flows from irrigated agriculture" from the NPDES permitting requirements that apply to other point sources.[89] This effectively shifts agricultural runoff—the *single largest source* of watershed impairment[90]—from the rigorous NPDES program to the comparatively lax and ineffective regulatory scheme for nonpoint sources.

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84. Longhurst, *supra* note 69, at 180 (citation omitted).

85. *See* Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV., 479, 479 (1989) ("Nonpoint pollution comes from a variety of sources that require different types of controls.").

86. *See id.* ("Nonpoint sources resist controls because they are expensive, and the expense is not easily passed on to consumers.").

87. *See id.* ("Nonpoint source controls are difficult to coordinate because they are usually administered by local rather than state governments.").

88. *See id.* ("Local governments do not have an incentive to adopt nonpoint source controls because their nonpoint source pollution usually is exported elsewhere.").

89. Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2012); *see* Longhurst, *supra* note 69, at 182–83 ("Because nonpoint source pollution is not covered under the NPDES permit requirement, agricultural pollution is largely unregulated under the CWA. In fact, point sources are defined to explicitly exclude 'agricultural stormwater discharges and return flows from irrigated agriculture.' " (citations omitted)); Salzman, *supra* note 71 ("To gain sufficient congressional support from farm states in 1972, the Clean Water Act largely exempted runoff from agricultural fields and irrigation ditches.").

90. *See* U.S. Envtl. Prot. Agency, *supra* note 9; *see also* James Boyd, *The New Face of the Clean Water Act: A Critical Review of the EPA's New TMDL Rules*, 11 DUKE ENVTL. L & POL'Y F. 39, 45 (2005) (pointing out that agricultural runoff is the largest source of water pollution in the United States); Longhurst, *supra* note 69, at 176 ("Agricultural pesticides, fertilizers, and manure are the largest contributors to water pollution in the United States.").

Finally, the voluntary nature of the CWA's nonpoint regulatory scheme reduces its effectiveness. Standing in stark contrast to the CWA's compulsory permitting requirements and coercive technology controls for point sources, the Act's nonpoint source pollution controls are completely voluntary.[91] The CWA's major nonpoint source regulatory provisions, including section 208[92] (providing funds to states to incentivize nonpoint source management programs) and section 319 (same),[93] lack any enforcement provisions should a state enact inadequate regulations or simply refuse to participate at all.[94]

Even the CWA's most robust nonpoint source control device, the TMDL program in section 303(d), has done little to reduce pollution discharges.[95] TMDLs only require states to follow best management practice ("BMP") requirements (which the CWA fails to proscribe) and voluntary enforcement schemes.[96] In sum, the CWA fails to prescribe a mandatory, enforceable control regime for nonpoint sources in the same way that it does for point source discharges.

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91. *See* Chelsea Congdon et al., *Economic Incentives and Nonpoint Source Pollution: A Case Study of California's Grasslands Region,* 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 215, 221 (2008):

> [T]he CWA still does not require s[t]ates to implement nonpoint source regulatory programs. Nor does it authorize the EPA to promulgate a federal program in the absence of an adequate state program. In sum, while Congress expressed the clear intent to address nonpoint source pollution, the language of the CWA fails to ensure effective nonpoint source pollution control.

(citations omitted).

92. *See* Craig, *supra* note 64, at 186–89 (describing the section 208 regulatory mechanism). Section 208 provides that state governors should designate "local management authorities" for areas with nonpoint source water pollution issues.

93. *See id.* at 189–91 (describing the section 319 regulatory mechanism). Section 208 represents the CWA's original attempt to reduce nonpoint source water pollution. In 1987, responding to § 208's failure to produce any meaningful reduction in nonpoint source discharges, Congress added § 319. Even though Section 319 creates a more robust regulatory device (states must submit nonpoint source pollution reduction plans to the EPA to receive federal funding for them), it "provides no real means of enforcement." *Id.* at 190.

94. The basic division of point source and nonpoint source regulatory authority between the federal government and state governments, respectively, presents an interesting and important federalism question. Unfortunately, such a discussion is outside the purview of this paper. For a more thorough discussion of this issue, see Craig, *supra* note 64, at 181–84 (discussing federalism in the context of the CWA's regulatory division).

95. *See id.* at 228 (discussing the consequence of the TMDL program).

96. *Id.* Though the CWA's text does not define or require specific BMPs, EPA regulations characterize BMPs as "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States, BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." 40 C.F.R. § 122.2 (2013).

B. Judicial Responses

Despite the CWA's shortcomings, several key developments in the judiciary breathed new life into federal regulation of nonpoint source pollution. Initially, during the early years of the CWA, section 303(d) fell by the wayside.[97] However, by the 1980s and 1990s, environmental groups sought to revive the TMDL program.[98] A series of lawsuits filed by these groups claimed that state TMDLs were either inadequate or never created at all.[99] Adverse judicial decisions eventually compelled the EPA to set TMDL production schedules for over twenty states.[100] At this point, it became clear that the EPA was required to produce TMDLs for waters impaired by *both* point and nonpoint source discharges, but a critical question remained: were TMDLs mandatory for waters polluted *solely* by nonpoint source runoff?[101]

In 2002, the Ninth Circuit answered this question in the affirmative in *Pronsolino v. Nastri*.[102] In that landmark case, a California family (the Pronsolinos) and several agricultural interest groups[103] sought to block implementation of the TMDL for the Garcia River, a body of water polluted only by nonpoint sources.[104] For the Pronsolinos, the load restrictions in the Garcia River TMDL cost them $750,000 per year by restricting their ability to chop down trees on their land.[105] The Ninth Circuit, however, readily sided with the EPA, finding their construction of section 303(d) "considerably more

97. *See* Roger Flynn, *New Life for Impaired Waters: Realizing the Goal to "Restore" the Nation's Waters Under the Clean Water Act*, 10 WYO. L. REV. 35, 46–47 (2010) (describing the rebirth of the TMDL program during the 1980s and 1990s).

98. *See id.* (describing this evolution).

99. *See id.* (laying out the arguments the environmental groups advanced); Longhurst, *supra* note 69, at 185–86 ("But a series of lawsuits filed by environmental groups in the 1980s and 1990s contended that the EPA had a duty to prepare TMDLs, because the TMDLs prepared by states were either inadequate or constructively inadequate because of the failure of a state to create a TMDL in first place.").

100. HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW 808 (5th ed. 2008).

101. The context for this question comes from the fact that 303(d) is silent on this point and the CWA explicitly exempts agricultural runoff from the NPDES permitting requirement, potentially supporting a construction of 303(d) that would only permit creation of TMDLs for waters subject to both point and nonpoint source pollution.

102. *See* Pronsolino v. Nastri, 291 F.3d 1123, 1137–41 (9th Cir. 2002) (holding that the best construction of CWA section 303(d) requires the calculation of TMDLs for water bodies impaired only by nonpoint sources of water pollution).

103. These groups were a collection of local, state, and national agricultural and farm interest groups. Specifically, the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation. *Id.* at 1129–30.

104. *Id.*

105. *Id.* at 1129–31.

convincing."[106] The EPA and state environmental agencies were permitted (and even required, in certain circumstances) to formulate and implement TMDLs for waters impaired exclusively by nonpoint source pollution.[107] Theoretically, the Ninth Circuit's decision in *Prinsolino* made section 303(d) TMDLs a powerful tool in stemming the flow of nonpoint source water pollution.

Unfortunately, like the CWA's other nonpoint source devices, the TMDL program continues to fall short.[108] Even with its judicially installed teeth, section 303(d) lacks any real bite because TMDLs are merely an "informational tool" to help states plan and implement their own control mechanisms for nonpoint source discharges.[109] As such, the only penalty for not implementing a TMDL is the loss of federal grant money.[110] So even if a state or the EPA is judicially obliged to *create* a TMDL, nothing in section 303 compels them to *implement* or *enforce* that TMDL.[111]

C. State Responses

To plug this regulatory gap and account for the difficulties of controlling nonpoint source water pollution at the federal level, some states have responded, but they have achieved limited levels of success.[112] States attempt to stem the flow of nonpoint source water

106. *Id.* at 1139. In so finding, the Ninth Circuit focused on § 303(d)'s broad language, which mandates listing and computation of TMDLs for "those waters . . . which the effluent limitations [which are generally found in NPDES point source permits] . . . are not stringent enough to implement any water quality standard applicable to such waters." *Id.* at 1135 (citing Clean Water Act § 303(d)(1)(A)).

107. *Id.*

108. *See* Longhurst, *supra* note 69, at 188 (explaining that "in isolation TMDLs are not self-implementing," and highlighting courts' attempt to increase their efficacy). *But see* Friends of Pinto Creek v. U.S. Envtl. Prot. Agency, 504 F.3d 1007, 1014 (9th Cir. 2007). In *Pinto Creek*, the Ninth Circuit essentially construed EPA regulations to require consideration of TMDL water quality limitations when granting new NPDES (point source) permit authorizations. *Id.* Thus, if a water is impaired, the EPA must either reduce effluent allocations for point sources or require nonpoint source pollution reductions. *Id.* The effect of this can obviously be quite powerful.

109. *See* Pronsolino v. Nastri, 291 F.3d 1123, 1140 (9th Cir. 2002) (characterizing TMDL as an "informational tool"); Longhurst, *supra* note 69, at 187 ("The creation of the TMDL, however, does not by itself require states or the EPA to implement the TMDL's loading restrictions.").

110. *See* Longhurst, *supra* note 69, at 187 (quoting *Pronsolino*, 291 F.3d at 1140) (noting that the only penalty for failing to effectuate a TMDL is loss of federal grant money for water quality control programs).

111. Clean Water Act § 303, 33 U.S.C. § 1313 (2012); Longhurst, *supra* note 69, at 187.

112. *See* Longhurst, *supra* note 69, at 183–85 ("Some states have taken it upon themselves to control nonpoint source pollution."). *Pronsolino* supplies a model example of this dilemma. There, TMDL restrictions for nonpoint source runoff were very stringent because California decided to enforce the TMDLs with a heavy hand. *Id.* This case might never have occurred in another state since many lack robust regulatory programs to effectuate TMDL recommendations. *See*

pollution in a variety of ways. California is perhaps the most aggressive.[113] All point and nonpoint source dischargers in California are governed by the Porter-Cologne Act, which requires nonpoint dischargers to file a report for discharges.[114] Then, for each discharge, a Regional Water Quality Control Board can take one of three actions: issue an effluent limitation, require a BMP designed to maintain the applicable ambient water quality standard, or exempt the discharge altogether.[115] Thus, California's control scheme for nonpoint sources attempts to mirror the CWA point source program: permits are required for each discharge and are grounded in either effluent or ambient water quality limitations.

On the other end of the spectrum is Minnesota's approach to nonpoint source pollution.[116] Rather than trying to regulate every nonpoint discharge like California, Minnesota primarily employs voluntary devices to encourage reductions in nonpoint source discharges.[117] These devices include financial incentives, technical aid from state agencies, education programs, and federal funding opportunities.[118] When this largely voluntary approach fails, Minnesota occasionally steps in and imposes a mandatory regulatory program to force reductions, although this is rare.[119]

Between California's heavy-handed scheme and Minnesota's minimalist approach states use a wide array of individualized methods to rein in nonpoint source water pollution.[120] Wisconsin, for example, requires farmers and livestock facilities to comply with statutory BMPs.[121] Oregon can force landowners to abide by state-

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Pronsolino, 291 F.3d at 1129–30 (estimating compliance with state requirements would "cost the Pronsolinos $750,000.").

113. *See* Longhurst, *supra* note 69, at 183–85 (describing a variety of state approaches including California's).

114. CAL. WATER CODE § 13260 (West 2013); STATE WATER RES. CONTROL BD., CAL. ENVTL. PROT. AGENCY, POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM 3 (2004), *available at* http://www.waterboards.ca.gov/water_issues/programs/nps/docs/oalfinalcopy052604.pdf; *see also* Longhurst, *supra* note 69, at 183–84 (explaining California's nonpoint source pollution control program).

115. STATE WATER RES. CONTROL BD., *supra* note 114, at 3–4; *see also* Longhurst, *supra* note 69, at 183–84 (describing this process).

116. *See* James M. McElfish, Jr. et al., *Inventing Nonpoint Controls: Methods, Metrics and Results*, 17 VILL. ENVTL. L.J. 87, 158–60 (2006) (laying out the contours of Minnesota's nonpoint source regulatory program and emphasizing its voluntary nature).

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Longhurst, *supra* note 69, at 183–85 (surveying a host of state regulatory schemes).

121. *Id.* at 184.

created and state-administered water quality management plans.[122] And many states employ versions of the Minnesotan model, preferring to rely on voluntary programs.[123]

In any case, it is clear that assigning states the responsibility to control nonpoint source pollution has borne little fruit. Nonpoint source pollution is still pervasive and represents the primary source of water impairment throughout the country.[124] It is often difficult to measure the relative success rates of these various state approaches due to different pollutants prevailing in different states, differing measurement methods, and a host of other factors.[125] However, many scholars agree that even the state programs with the most potential are " 'fragmented and poorly implemented' due to a lack of resources or political will."[126] As a result, "nonpoint source regulation varies among states, territories, and tribes in both scope and types of controls required."[127]

To summarize, the CWA has been successful at checking point source discharges but feeble in the face of nonpoint source runoff. The judicial and state efforts to fill this gap have been laudable but futile. The localized nature of nonpoint source runoff demands a control mechanism tailored to each specific discharge. At the same time, a successful regulatory device must also create incentives for producers of nonpoint source runoff—homeowners, farmers, and the like—to temper their discharges. Given this country's past and current regulatory failures, a new approach is needed to stem the persistent tide of nonpoint source pollution. Private governance would effectively supplement the CWA's nonpoint source regulatory scheme and address many of its most significant shortcomings.

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122. *Id.*

123. *See, e.g.*, McElfish et al., *supra* note 116, at 164–65 (Maryland).

124. *See* U.S. Envtl. Prot. Agency, *supra* note 9 (demonstrating that nonpoint source pollution is pervasive and largely responsible for the impaired state of many of the nation's waters).

125. *See supra* notes 93–95, 118–21 and accompanying text (describing voluntary nature of CWA and Minnesota approaches). *But see* McElfish et al., *supra* note 116, at 164 (finding that Minnesota's program likely reduced municipal and industrial point source discharges but largely failed to reduce rates of agricultural runoff and other nonpoint source pollution). This is perhaps unsurprising, given that Minnesota's approach is similar to the CWA's—stringent controls for point sources and largely voluntary controls for nonpoint sources.

126. Longhurst, *supra* note 69, at 185 (quoting JESSICA DEXTER, ENVTL. LAW & POLICY CTR., CULTIVATING CLEAN WATER 4 (2010)).

127. Craig, *supra* note 64, at 190–91. Professor Craig concludes that "[w]ithout a mechanism to make the TMDL directly enforceable against nonpoint sources that contribute to violations of the applicable water quality standards, section 303(d) does little to fundamentally shift the federalism balance between the states and the federal government. Nor does it render nonpoint sources accessible to citizen suits." *Id.* at 228.

IV. A PRIVATE SOLUTION TO A PUBLIC PROBLEM: USING PRIVATE GOVERNANCE TO TACKLE NONPOINT SOURCE POLLUTION

Sometimes traditional public regulatory programs achieve their enumerated goals quickly and efficiently. But oftentimes this is not the case, and government regulators are left scratching their heads. In response to these failures, administrative law scholars have become increasingly interested in what one commentator calls "the private life of public law."[128] The growing popularity of private governance has not been confined to academia. Thousands of private governance programs have sprung up in recent years across all levels of government.[129] Each instance of private governance is unique and tailored to tackle a different problem, so there are a variety of different devices currently being deployed.

A. What is Private Governance?

Private governance can take several forms.[130] A familiar example is the privatization of traditionally public programs, such as social security or prisons.[131] These instances of private governance usually involve a government entity (local, state, or federal) formally contracting with a private party to provide public services.

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128. Professor Michael Vandenbergh of Vanderbilt University Law School coined the "private life of public law" moniker in Michael Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2029–31 (2005), explaining the phrase in the context of private governance as a response to traditionally public regulatory problems.

For scholarship on this topic, see Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003) (emphasizing that the difference between "the idea" of public and private is collective and individually defined purposes); Symposium, *Thirty-Third Annual Administrative Law Issue Agencies, Economic Justice, and Private Initiatives*, 53 DUKE L.J. 389 (2003) (examining the involvement of private parties in achieving government objectives); and Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 U.C.L.A. L. REV 1687 (2002) (discussing private and public dynamics in the context of globalization).

129. *See* STEERING COMMITTEE, *supra* note 16 ("In the past five years, the number of new [private] standards and certification programs has increased exponentially. As an indicator of this expansion, the formal participation of standards systems in the ISEAL Alliance has grown from eight systems in 2005 to more than 30 in 2011.").

130. *See* Vandenbergh, *supra* note 129, at 2031–32 (listing several types of private responses to public regulatory problems).

131. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229–31 (2003) (surveying a wide variety of instances where conventionally public functions such as schools, prisons, welfare, and social services have been privatized); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–71 (2003) (surveying the same); *see also* Becca Aaronson, *How Privatized Social Security Works in Galveston*, N.Y. TIMES (Sept. 17, 2011), http://www.nytimes.com/2011/09/18/us/how-privatized-social-security-works-in-galveston.html?pagewanted=all&_r=0 (describing the recent traction of social security's privatization as a major issue).

Alternatively, private governance can take the form of a governmental entity working with private actors to create and implement state-established regulatory standards.[132]

Although many different private governance programs are available, this Note focuses on one particular type: labeling/certification systems.[133] Such programs take two distinct forms. The first is a purely private approach where the program is developed, implemented, and enforced without any sort of government oversight or intervention.[134] Well-known examples include fair trade coffee, UTZ Certified tea, and certifications for fish that are sustainably harvested or caught.[135] While purely private labeling and certification systems are perhaps the most prevalent, hybrid public-private programs also exist—most notably, the U.S. Energy Star program between the U.S. Department of Energy ("DOE"), the EPA, and private appliance manufacturers.[136]

The vast majority of labeling/certification programs operate in the same fundamental fashion.[137] First, the organization running the program sets the relevant standard based on the goals of the organization and its mission.[138] Generally, the organization wants to make a certain practice more sustainable by establishing a context-specific standard, such as only fishing during a specific time of year or

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132. *See, e.g.*, Vandenbergh, *supra* note 129, at 2031–32 (describing this phenomenon); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285–88 (2003) (noting how norms inherent in public programs are often effectuated via these public-private arrangements); *see also* Philip J. Harter & George C. Eads, *Policy Instruments, Institutions, and Objectives: An Analytical Framework for Assessing "Alternatives" to Regulation*, 37 ADMIN. L. REV. 221, 227–30 (1985) (developing an analytical framework for evaluating these schemes).

133. *See, e.g.*, Mark A. Cohen & Michael P. Vandenbergh, *The Potential Role of Carbon Labeling in a Green Economy*, 34 ENERGY ECON. S53, S53–54 (2012), *available at* http://uscib.org/docs/cohen.pdf (describing private labeling and certification programs in the context of carbon labeling schemes); STEERING COMMITTEE, *supra* note 16, at 6 ("Standards and certification systems may have many objectives, but at their most basic they provide a framework through which different entities [usually private] can cooperate using a common language to deliver more sustainable practices.").

134. *See* STEERING COMMITTEE, *supra* note 16, at 6–8 (detailing the development of several purely private labeling and certification schemes such as the Forest Stewardship Council).

135. *Id.* at 9.

136. *See* Cohen & Vandenbergh, *supra* note 133, at S55 ("Perhaps one of the most studied programs is the U.S. Energy Star label, a public-private partnership in which the U.S. Department of Energy certifies consumer product that meet certain energy-efficient criteria.").

137. *See* STEERING COMMITTEE, *supra* note 16, at 10 ("Although there are many variations in the structure of standards and certification systems, most systems have the same basic components carried out by a similar set of organizations . . . .").

138. *Id.* However, "[o]ther stakeholders are often engaged directly in the governance of the standard setter." *Id.*

planting a tree for every one felled.[139] Once the goals and concrete standards are promulgated,[140] the certification body creates a system for compliance, often relying on audits, reviews, and assessments to evaluate companies seeking the certification/label.[141] From there, complementary and ancillary activities begin, such as capacity building to help interested enterprises obtain certification and public advocacy to further the issues that the program cares about.[142] The end result is usually a label (generally created by a third party not associated with the relevant industry)[143] that appears on approved products. Ultimately, the labels aim to modify consumer behavior by acting as informational tools that signal a superior product to prospective purchasers. Superiority is measured against the program's goal. For example, "fair trade" coffee is supposedly superior due to its labor-friendly production methods, and "organic" produce purports to be healthier because it is grown without the heavy use of pesticides.

Labeling/certification programs hold the greatest potential for reducing nonpoint source water pollution for two primary reasons. First, labeling/certification requirements are uniquely capable of targeting individual instances of nonpoint source runoff *at the point of discharge*, and second, other voluntary devices, such as technical assistance and financial incentives, have already been tried under the CWA to little or no avail. The remainder of this Part investigates two specific examples of labeling/certification programs in more detail—the Forest Stewardship Council certification scheme (a purely private program) and the Energy Star labeling scheme (a hybrid public-private program)—and then considers how these approaches could be adapted to the problem of nonpoint source pollution.

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139. *See id.* at 10–12 (describing a variety of sustainability goals for commodities such as forests, coffee, tea, cocoa, and fish).

140. There are several different kinds of standards, ranging from "threshold standards" (meeting all "critical" criteria and X percentage of other criteria) to "continuous improvement models" (producers must meet entry requirements initially and additional criteria over time). *See id.* at 12–13 (describing these different mechanisms more thoroughly).

141. *Id.* Several options for assessment and compliance exist, including self-assessment by the producer (first-party), assessment by a trade association or another interested party (second-party), and assessment conducted by an independent third party (third-party). *Id.* Issues of auditor competence and independence are also crucial. *See id.* (detailing compliance and assessment issues and mechanisms).

142. *See id.* at 13 (detailing these complementary activities).

143. *See, e.g.*, *id.* at 78 (describing Energy Star's "independent, third-party certifiers"). Sometimes individual producers or trade associations create these labeling schemes, as opposed to a third party advocacy group. *See, e.g.*, *id.* at 52 (noting issues with S.C. Johnson's self conferred "Greenlist™ insignia"). However, such schemes are more susceptible to allegations of "greenwashing," which is when "consumers perceive certification as an attempt by businesses to mislead the public about their sustainability performance." *Id.* at 51.

B. Potential Models

Two labeling/certification schemes are particularly instructive here. The Forest Stewardship Council ("FSC") certification program is representative of the more common purely private model. FSC manages two certification programs: Forest management certification and chain-of-custody certification.[144] Private and governmental entities in charge of forests across the globe are potentially eligible for forest management certification,[145] while companies that manufacture or trade wood products can seek chain-of-custody certification.[146] FSC will withhold certification if, for example, there is evidence of illegally harvested wood, wood harvested from "high conservation value" forests, or wood harvested in violation of civil rights.[147] For both programs, the FSC developed a certification process and then delegated authority to various "certifying bodies" such as PricewaterhouseCoopers and the Rainforest Alliance.[148] In other words, the relevant standards are established by the FSC itself, while the FSC-approved certifying bodies make certification decisions and enforce the standards.

In many regards, the FSC certification programs have been quite successful. FSC's early popularity and success spawned analogous worldwide efforts like the Sustainable Forestry Initiative ("SFI," an industry effort) and the Pan-European Forest Certification ("PEFC," the FSC's European analog).[149] Over 174 million forest acres

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144. *See Become Certified,* FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/become-certified.198.htm (last visited Dec. 20, 2013) (laying out the process for the two certification programs).

145. *See Forest Management Certification*, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/forest-management-certification.225.htm (last visited Dec. 20, 2013) (describing the requirements for forest management certification).

146. *See Chain-of-Custody Certification*, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/chain-of-custody-certification.201.htm (last visited Dec. 20, 2013) (describing the requirements for chain-of-custody certification).

147. *See Controlled Wood*, FOREST STEWARDSHIP COUNCIL, http://us.fsc.org/controlled-wood.203.htm (last visited Dec. 20, 2013) (listing wood products and practices that violate the FSC standard).

148. *See Certifying Bodies in the US*, FOREST STEWARDSHIP COUNCIL, https://us.fsc.org/certifying-bodies-in-the-us.221.htm (last visited Dec. 20, 2013) (listing various certifying bodies).

149. *See* STEERING COMMITTEE, *supra* note 16, at 7:

> The FSC also stimulated the development of alternative certification programs. These additional programs include the Sustainable Forestry Initiative (SFI), initiated by the American Forest & Paper Association (an industry association), and the Pan-European Forest Certification (PEFC), originally created by European forest owner associations. The PEFC ultimately was renamed the Programme for the Endorsement of Forest Certification . . . .

and 4,300 companies have achieved FSC certification,[150] and approximately nine percent of global forests fall under the aegis of either FSC or PEFC standards.[151] However, the FSC is not without its critics. The FSC has been attacked for failing to maintain appropriately high standards as the program has grown—a problem that plagues many certification programs.[152] A *Wall Street Journal* investigation resulted in FSC publicly revoking certification for a group it had previously approved,[153] while independent reports have alleged that corporations successfully lie about their timber practices to attain FSC certification.[154] Some prominent groups have responded by removing their support for FSC.[155] Despite these shortcomings, experts still consider FSC and its progeny to be successful certification/labeling systems.[156]

Another instructive certification scheme is the Energy Star program. Unlike many certification initiatives, Energy Star is a joint public-private effort.[157] The DOE and EPA certify and test consumer products (mostly appliances like refrigerators, dishwashers, and washing machines) to determine if they outperform market metrics for certain indicators of sustainability, such as energy efficiency and water conservation.[158] If a privately manufactured product meets or exceeds the DOE/EPA standards, then the product may display the Energy Star label.[159] To enforce program requirements, the agencies

150. *Facts & Figures*, FOREST STEWARDSHIP COUNCIL (Sept. 2013), http://us.fsc.org/facts-figures.219.htm.

151. STEERING COMMITTEE, *supra* note 16, at 9.

152. *See* Jeremy Hance, *FSC Has 'Failed the World's Forests' Say Critics*, MONGABAY.COM (Mar. 26, 2008), http://news.mongabay.com/2008/0325-hance_fsc.html (noting that the "[t]imber certification body [is] under attack from environmentalists for slipping standards").

153. *See id.* (explaining how the WSJ report resulted in a public revocation of Asia Pulp & Paper Company's certification).

154. *See* ENVTL. INVESTIGATION AGENCY & TELAPAK, BORDERLINES: VIETNAM'S BOOMING FURNITURE INDUSTRY AND TIMBER SMUGGLING IN THE MEKONG REGION 18–19 (2008), *available at* http://www.eia-international.org.php5-20.dfw1-1.websitetestlink.com/wp-content/uploads/reports160-11.pdf (detailing companies' efforts to evade and lie about FSC certification).

155. *See, e.g.*, Hance, *supra* note 152 (describing how the Swedish Society for Nature Conservation withdrew its support for the FSC).

156. *See* STEERING COMMITTEE, *supra* note 16, at 7–8 ("[E]arly standards systems [such as the FSC standard] have succeeded in carving out a highly visible place in the marketplace, which other initiatives seek to emulate.").

157. *See id.* at 77 (noting that "[i]n the case of the Energy Star program, the regulator and the certification program reside in the same government institutions").

158. *See About ENERGY STAR*, *supra* note 18 (describing the basic elements of the Energy Star program); *see also* STEERING COMMITTEE, *supra* note 16, at 77 ("Energy Star certifies that labeled products perform better than market standards on specified dimensions of sustainability [such as energy and water consumption] . . . ").

159. *See See About ENERGY STAR*, *supra* note 18 ("In order to earn the label, ENERGY STAR products must be third-party certified based on testing in EPA-recognized laboratories.").

require products to be tested in an EPA-approved laboratory and mandate that Energy Star–approved manufacturers submit to verification programs administered by approved certification bodies.[160]

Like FSC certification, the Energy Star program has been generally effective, but not without flaws. By EPA estimates, Energy Star eliminated over 345 million metric tons of greenhouse gas emissions in 2010 and saved consumers and businesses $21 billion in the form of lower utilities bills.[161] Energy Star achieved these results via extensive market penetration of the Energy Star label and a focus on increasing consumer awareness of the cost savings from energy efficiency.[162] Some independent analyses, however, dispute these numbers, finding less substantial reductions in greenhouse gas emissions and less consumer and business savings.[163] Experts have also questioned whether the Energy Star program itself can be credited with driving energy efficiency improvements in consumer goods since most *noncertified* products still meet the Energy Star efficiency criteria.[164] The EPA and DOE responded to these and other charges[165] by instituting the aforementioned enforcement and verification programs.[166]

In short, FSC and Energy Star both use labeling/certification processes to reach their respective goals. Unlike many public regulatory programs that *mandate* or *proscribe* certain behaviors with the force of law, these certification organizations seek to *voluntarily*

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160. STEERING COMMITTEE, *supra* note 16, at 77–78.

161. U.S. ENVTL PROT. AGENCY, ENERGY STAR AND OTHER CLIMATE PROTECTION PARTNERSHIPS 2 (2010), *available at* http://www.energystar.gov/ia/partners/publications/pubdocs/2010%20CPPD%20Annual%20Report.pdf?c277-3d6d.

162. *See* STEERING COMMITTEE, *supra* note 16, at 77–78 ("Most experts agree that the Energy Star program has improved energy savings, increased consumer awareness of energy efficiency, and provided some impetus for manufacturers and property owners to improve energy efficiency."); Cohen & Vandenbergh, *supra* note 133, at 6–7, 10 ("All of these estimated reductions are based on the market penetration of Energy Star labels and engineering-based estimates of product usage and emissions.").

163. *See* Cohen & Vandenbergh, *supra* note 133, at 10 (detailing academic and EPA Inspector General reports resulting in more conservative greenhouse gas and efficiency savings from the Energy Star program).

164. *See* STEERING COMMITTEE, *supra* note 16, at 77–78 (describing the Government Accountability Office and EPA/DOE audit findings).

165. Several other criticisms have been leveled against the Energy Star program, including whether its standards are sufficiently rigorous, whether it "crowds out" more efficient energy efficiency gains by setting the prevailing standard too low, and whether adequate fraud controls are in place. Ultimately, the expert consensus is that even taking stock of these concerns, the Energy Star program is net positive. *See id.* (detailing these concerns and noting that Energy Star has been "a positive effort to shift the market's expectations regarding energy efficiency").

166. *See id.* ("Responding to these issues, the [Energy Star] program instituted third-party certification based on testing in an EPA-recognized lab, and required Energy Star manufacturing partners to participate in verification testing programs run by recognized certification bodies.").

modify consumer behavior. Their labels act as an informational device, signaling to buyers that the certified product is superior in some way to comparable consumer goods.

C. Applying Private Governance to Nonpoint Source Water Pollution

Both FSC or Energy Star provides a valuable model for crafting a private governance solution to nonpoint source water pollution. Regardless of which design is chosen, a private governance program for nonpoint source pollution would function in a very similar fashion.

Most importantly, a certification body would need to formulate a dual set of sustainability standards. First, agricultural runoff is the single largest source of nonpoint source water pollution, so one bundle of sustainability criteria should be designed for water-intensive agricultural products such as cereals, fruit, and vegetables. Then, another set of sustainability standards would be established for other consumer goods that contribute to nonpoint source water runoff, like car oil, cleaning products, and certain plastics.[167] To construct the applicable criteria, the certifying organization would identify manufacturing and growing practices that have been successful in reducing nonpoint source runoff. Agricultural goods and household products that achieve these standards would earn the right to display a label on their goods announcing this fact. Moreover, to reduce fraud and ensure compliance, the certification body would need to fashion a randomized testing and verification regime similar to the Energy Star program.

The internal organization of a private governance program for nonpoint source pollution could track either the FSC or Energy Star design. A program modeled after the FSC would be purely private, without any governmental role. A nongovernmental organization ("NGO") like the International Water Association or the World Water Council[168] would develop and enforce the relevant certification standards. On the other hand, under the Energy Star model, a governmental body would fashion and implement the certification standards and labeling scheme. The most likely design would be a

167. This pollution usually falls under "urban runoff" or "stormwater discharges" when examining the NSSI. As the EPA notes, "[a]lthough individual homes might contribute only minor amounts of NPS [nonpoint source] pollution, the combined effect of an entire neighborhood can be serious." ENVTL. PROT. AGENCY, MANAGING NONPOINT SOURCE POLLUTION FROM HOUSEHOLDS, *available at* http://water.epa.gov/polwaste/nps/outreach/point10.cfm.

168. For a more thorough listing of potential nongovernmental organizations that might be suitable for running such a program, see *Water & Wastewater International NGOs*, ECOGATEWAY LINK CTR., http://www.ecoiq.com/onlineresources/center/water/ngos.html (last visited Dec. 20, 2013).

partnership between the EPA and the U.S. Department of Agriculture ("USDA").[169]

While the identity of the certifying body (private versus public) is not vital to the success of a certification scheme for nonpoint source pollution, the choice might influence the program's reputability and cost. A governmentally run program could generate more legitimacy but at increased cost to the taxpayer.[170] Ultimately, a hybrid program is probably preferable. The relatively modest dip into the public coffers that occurs with hybrid programs is likely outweighed by valuable legitimacy and publicity gains conferred by governmental involvement. The ubiquity of Energy Star provides strong evidence of this fact. Unfortunately, the current climate of fiscal austerity in the federal government makes creation of such a program unlikely at best.

So what are the costs and benefits of a public-private certification program for nonpoint source pollution, and would it actually work? There are numerous benefits. Most importantly, a private governance approach has the unique ability to resolve the two largest roadblocks to stemming nonpoint source pollution: targeting discharges at the source and incentivizing polluters[171] to stop discharging. Private governance accomplishes both tasks by creating a system that differentiates between goods that are produced in a water-friendly manner (by minimizing nonpoint source pollution during production, manufacturing, growing, or shipping) and goods that are not. This differentiation generates an important market signal—the label on approved products—that illustrates to consumers that certified products are better for protecting their drinking water, ocean views, and favorite boating and swimming spots. As certified products grow in popularity, sellers are incentivized to switch to more water quality–friendly processes so they too can obtain an eco-friendly label.[172] The end result is that individual generators of nonpoint

169. This is a natural partnership, like the EPA/DOE joint administration of the Energy Star program. The EPA has the necessary expertise to run most facets of this hypothetical program but the USDA's subject-matter experience with agriculture pollution will be essential.

170. Running Energy Star jointly cost the DOE and EPA approximately $290 million from 2007 to 2011. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-888, ENERGY STAR: PROVIDING OPPORTUNITIES FOR ADDITIONAL REVIEW OF EPA'S DECISIONS COULD STRENGTHEN THE PROGRAM 9 (2011), *available at* http://www.gao.gov/new.items/d11888.pdf.

171. The connotation of the word "polluter" in ordinary parlance sometimes assumes that the individual/entity discharging the pollutant is not engaging in a socially beneficial or acceptable behavior. Thus, someone using a household cleaning solution or a farmer applying a fertilizer might not fall under this understanding of the term. For the purposes of this Note, however, those actions and individuals are precisely what "polluter" is intended to cover.

172. As noted previously, this can be done by utilizing a superior production process with less chemicals, applying less or different fertilizers, and so forth.

source pollution—producers, growers, households, etc.—are encouraged to eliminate their specific discharges.

In fact, there is empirical evidence that the market responds to labeling programs dedicated to protecting the environment. Three out of four consumers who bought Energy Star–labeled products, for instance, indicated that the Energy Star designation was an "important factor" in their purchasing decision.[173] About seventeen percent of coffee, eight percent of tea, and seven percent of fish harvested globally comply with a certification and labeling program, underscoring the strong consumer demand for these certified goods.[174] Thus, private governance can succeed—where previous attempts have failed—by employing a market mechanism targeted at both consumers (by creating a device that signals a superior and more environmentally friendly product) and producers (by incentivizing cleaner production and growing processes).

Not only can private governance potentially resolve the two most stubborn barriers to meaningfully reducing nonpoint source water pollution, but such a scheme offers several important ancillary benefits as well. Unlike more onerous command-and-control regulatory approaches, private governance provides a softer regulatory touch. This is particularly important in the context of nonpoint source runoff because of the strong agricultural and industry interests that would fight off any more direct or draconian alternatives.[175] In fact, the development of a ubiquitous label could even result in producers and growers *embracing* the private governance scheme; the recent development of an organic food market supplies a prime example of how producers can take advantage of a certification scheme to differentiate themselves in an otherwise homogenous market.[176] Private governance also imposes little to no *mandatory* costs on either producers or consumers. Given that any compulsory regulatory device would be virtually certain to impose such costs, this is an important advantage. Of course, a successful scheme will likely ask consumers to pay a price premium for certified

173. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 170, at 77 ("Consumer surveys show that among those who knowingly bought Energy Star-labeled products, 75 percent said the label was an important factor in their choice . . . .").

174. *Id.* at 9.

175. This is why agricultural runoff is wholly exempted from the CWA's point source permit and technology requirements.

176. *See, e.g.*, STEERING COMMITTEE, *supra* note 17, at 9 (describing the substantial market share for several organic commodities such as coffee, tea, and cocoa).

goods.[177] However, the widespread success of sustainability certification programs, despite a price premium, suggests this effect will be modest at most.[178]

There are, however, other potential problems pertaining to the administration of a certification program for nonpoint source pollution. First, it will be difficult to devise appropriate sustainability standards for thousands of individual consumer goods; each fruit, vegetable, cleaning solution, and home product possesses a unique chemical makeup and thus has a different effect on water quality. There are also concerns about greenwashing (i.e., the use of certification to deflect or replace stricter regulation), particularly if the program is devised and implemented by a trade group or nonprofit with close ties to the industry. Finally, many certification programs provide tangible benefits to consumers, such as electricity savings (Energy Star) or health benefits (organic food);[179] however, consumers who primarily drink bottled water or who live in landlocked areas may not appreciate reductions in water pollution. Thus, many consumers may not realize the utility of a water quality labeling scheme.

These obstacles are far from insurmountable. First, a complementary informational campaign highlighting how nonpoint source pollution impairs individuals' drinking water (bottled or otherwise) and their favorite boating, swimming, or vacation locales would muster public support for the labeling program. Sustainability movements in other developed countries demonstrate how informational campaigns can be successful in shaping public opinion.[180] Second, to head off allegations of greenwashing, the program could be administered in partnership with the USDA and DOE, which would also help ensure compliance and promote the program's legitimacy. Even a purely private program, however, can avoid charges of greenwashing by staying sufficiently independent of industry and trade organizations. Finally, the administrative burden of devising individual product standards can be eased by consulting with NGOs focused on water quality, as well as other certification

177. *See id.* (detailing the price premiums consumers pay for other certified commodities such as cocoa, coffee, and tea).

178. *See id.* (describing the ubiquity and major market share of products that have complied with certification programs).

179. *See* Cohen & Vandenbergh, *supra* note 133, at 11 (holding out Energy Star as an example of a program that offers "a very significant 'private' component to it even without any 'warm glow' or altruism.").

180. *See* Daniel A. Farber, *Sustainable Consumption, Energy Policy, and Individual Well-Being*, 65 VAND. L. REV. 1479, 1512 (2012) (listing efforts in countries such as Japan, Germany, Portugal, and Sweden, to implement "communications campaigns encouraging more sustainable consumption").

programs that have already integrated water quality metrics into their sustainability criteria.

V. CONCLUSION

Although a private governance approach to the stubborn problem of nonpoint source water pollution is far from perfect, it holds significant promise and minimal risk. Unlike past attempts to rein in nonpoint source pollution, private governance will cost little to implement. And, by relying on the market to drive pollution reduction, private governance can engender the support of both consumers and producers, while targeting specific discharges at their source and generating real incentives for pollution reductions. Private governance is no panacea, but it can and should be part of a serious effort to tackle the final frontier of water impairment. The costs are low, the stakes are high, and the potential for success is substantial.

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