

Restoring Our Nation's Waters Through Public Land Law

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This Note addresses a pervasive problem with the Clean Water Act—its lack of enforceable standards that regulate nonpoint sources. While scholars have paid considerable attention to this issue, this Note concentrates specifically on nonpoint sources within public lands, where the federal government has authority to regulate water quality outside the Clean Water Act. First, this Note outlines how weaknesses of current regulatory controls under the Clean Water Act fail to address our nation’s nonpoint source problem. Next, it discusses how federal land management agencies—in particular, the Bureau of Land Management and the Forest Service—address water quality when making permitting and planning decisions. Greater Yellowstone Coalition v. Larson provides a vivid example of these agencies’ exclusive reliance on the CWA to permit the expansion of a mining operation that will continue to pollute already polluted waters.

This Note argues that these agencies should employ the multiple use mandates in their organic statutes to take a more aggressive approach toward water restoration. These mandates require the Bureau of Land Management and Forest Service to balance competing resources, including watersheds, in a sustainable manner. While these agencies have promulgated regulations to address water quality in specific contexts, they have not articulated a sufficiently comprehensive policy to guide decisions. Thus, this Note argues for a multiagency planning rule that would require the consideration of water restoration under a multiple use and sustainable yield framework for every planning and permitting decision.

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INTRODUCTION

In 1972, Congress enacted the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹ Congress intended to achieve these goals by eliminating pollutant discharges into navigable waters and achieving water quality standards to preserve the beneficial uses of our waterways.² Forty years later, we are still far from achieving the CWA’s restoration goals. According to the Environmental Protection Agency’s (EPA) most recent assessment,³ 44 percent of rivers and streams, 64 percent of lakes, and 30 percent of bays and estuaries do not meet water quality standards established by the CWA.⁴

These “impaired waters”⁵ remain pervasive largely because the CWA has not given regulators the proper tools to address diffuse sources of pollution.⁶

1. 33 U.S.C. § 1251(a) (2006).

2. The nation was to attain these goals by 1985 and 1983, respectively. 33 U.S.C. §§ 1251(a)(1), (2).

3. The report includes states’ assessments of 16 percent of the nation’s 3.5 million miles of rivers and streams, 39 percent of the nation’s 41.7 million acres of lakes, ponds, and reservoirs, and 29 percent of the nation’s 87,791 square miles of bays and estuaries. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS: 2004 REPORTING CYCLE, 1–2 (2009) [hereinafter “EPA NATIONAL WATER QUALITY INVENTORY”].

4. *Id.*

5. Impaired waters are waterbodies that contain pollutant levels exceeding water quality standards despite complete application of technology-based standards. See *Water: Total Maximum Daily*

The CWA's limited success is largely the product of technology-based regulations, which prevent industries from dumping pollutants indiscriminately into rivers, streams, and lakes, but apply only to "point sources."⁷ However, a huge amount of pollution comes from sources not included in the statutory definition of a point source. Regulating these "nonpoint" sources of pollution poses logistical, technical, and political challenges.⁸ Rather than tackling these issues directly, the federal government has left the regulation of nonpoint sources largely in the hands of states and has failed to employ an effective federal enforcement structure.⁹ Because state governments have also largely failed to take the action necessary to address nonpoint source pollution,¹⁰ the CWA's restoration goal remains elusive for approximately half of our nation's assessed waterbodies.¹¹

Water quality impairment from nonpoint sources is a significant problem on lands owned by the federal government. Because the federal government owns approximately one-third of U.S. land, effective regulation of nonpoint sources on public lands could contribute significantly to water restoration on a national level. The Forest Service and the Bureau of Land Management (BLM) play key roles in the management of public lands because they have the authority to issue permits for mining, forestry, grazing, and other pollution-causing activities on public lands.¹² When making permitting decisions, statutes require the BLM and Forest Service to comply with "multiple-use mandates" by balancing competing resources, including watersheds, and ultimately deciding what land uses will best serve the interests of the American people.¹³

However, in practice these agencies rarely consider their mandates when addressing water quality issues; instead, they simply apply the CWA.¹⁴ The Ninth Circuit's decision in *Greater Yellowstone Coalition v. Larson* is a dramatic example.¹⁵ In this case, the Forest Service and the BLM permitted a mining operation in Idaho's Caribou National Forest to expand its operations, thus also permitting the mine to continue polluting waters that already fell below water quality standards.¹⁶ When issuing the permit for the mine's

Loads (303d): Glossary, ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/glossary.cfm#303dthreatenedimpairedwaters> (last visited Apr. 26, 2011).

6. See *infra* Part I.C.

7. 33 U.S.C. § 1311.

8. See *infra* Part I.C.

9. *Id.*

10. *Id.*

11. See EPA NATIONAL WATER QUALITY INVENTORY, *supra* note 3.

12. See *infra* Part III.B

13. See 16 U.S.C. § 531 (2006); 16 U.S.C. § 1604(e); 43 U.S.C. § 1712(c)(1) (2006).

14. See *infra* Part II.B.

15. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010).

16. *Id.* at 1148.

expansion, both agencies failed to employ their statutory mandates to regulate water quality more strictly than the CWA requires.¹⁷

This Note argues that federal land management agencies should employ their multiple use mandates as a basis for enacting robust nonpoint source pollution controls on public lands. The BLM and Forest Service should break their tradition of relying completely on the CWA when considering issues of water quality, as the CWA fails to regulate a significant portion of pollution sources on public lands. Enacting stricter controls would improve national water quality not only because public lands contribute significantly to our nation's water resources,¹⁸ but also because practical mechanisms developed in the public lands context could serve as a model for state-level programs.

Part I of this Note discusses the federal government's current approach to regulating nonpoint sources under the CWA and the rationale for leaving nonpoint source pollution control in the hands of the states. Part II focuses on nonpoint source pollution in the public lands context and analyzes the recent Ninth Circuit decision in *Greater Yellowstone Coalition* as an example of how the CWA fails to effectively promote water restoration. Part III describes the permitting authority of the BLM and Forest Service and identifies the statutory and regulatory authority the BLM and Forest Service may use to require stronger regulation of water quality on public lands. Finally, Part IV proposes a regulatory strategy for implementing this authority through a multiagency planning rule.

I. THE CLEAN WATER ACT'S RESTORATIVE GOALS AND NONPOINT SOURCE REGULATION

The CWA's regulatory framework, which distinguishes between "point" and "nonpoint" sources of pollution and employs separate regulatory standards for each, has significantly undermined the CWA's goal to "restore and maintain" the Nation's waters.¹⁹ Congress chose to regulate nonpoint and point sources differently because it thought nonpoint sources were more difficult to monitor and regulate.²⁰ Although scientists and policy makers have made considerable progress toward controlling nonpoint source pollution since passage of the CWA, this distinction continues to impair the CWA's

17. See *infra* Part III.D.

18. National Forest System lands contain 400,000 miles of streams, 3 million acres of lakes, and many aquifer systems that together serve as the source of drinking water for more residents of the United States than any other source. National forests alone provide 18 percent of the nation's water and over half the water in the West. National Forest System Land Management Planning, 76 Fed. Reg. 8480, 8491 (Feb. 14, 2011) (to be codified at 36 C.F.R. pt. 219).

19. 33 U.S.C. § 1251(a) (2006).

20. See *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution.").

effectiveness.²¹ Today, approximately 40 percent of the nation's impaired watersheds are polluted exclusively by nonpoint sources.²²

A. Distinguishing Point and Nonpoint Pollution

The CWA defines a point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."²³ This definition expressly includes pollutant discharge from "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or floating craft."²⁴ Courts have further interpreted this definition to include a wide variety of conveyances that collect or channel polluted water.²⁵

The CWA prohibits the "discharge of any pollutant" from any "point source" into navigable waters of the United States unless the source complies with various requirements.²⁶ These requirements are largely enforced by the EPA's administration of the National Pollutant Discharge Elimination System (NPDES) permitting process, which requires that point sources meet technology-based standards based on the industry and type of pollutant.²⁷ Data suggests that these point source controls have considerably reduced the discharge of pollutants from these sources.²⁸ However, additional progress depends on addressing the regulation of sources that do not fall neatly within this more easily monitored sphere.

While courts and the EPA have defined "point source" broadly,²⁹ this definition excludes many significant pollution-causing activities. These "nonpoint" sources include polluted runoff from activities associated with

21. Technologies such as "shelter-belts, nutrient caps, [and] retention ponds . . . are anything but unknown, complex, technologically difficult, or even very costly." OLIVER HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION, 87 (2d ed. 2002).

22. Only 10 percent of the impaired watersheds in the United States are polluted by point sources alone. U.S. FOREST SERV., U.S. DEP'T OF AGRIC., WATER QUALITY PROTECTION MEASURES IN THE US FOREST SERVICE: IMPLICATIONS OF THE NEW REQUIREMENTS FOR TMDL, available at <http://www.fs.fed.us/publications/policy-analysis/water-quality-protection-measures.pdf>.

23. 33 U.S.C. § 1362(14).

24. *Id.*

25. Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1152 (9th Cir. 2010) ("[S]ome type of collection or channeling is required to classify an activity as a point source."); *see also* Trs. for Alaska v. Envtl. Prot. Agency, 749 F.2d 549 (9th Cir. 1984) (overflow from mining soil pile); Natural Res. Defense Council v. U.S. Envtl. Prot. Agency, 279 F.3d 1180, 1182–84 (9th Cir. 2002) (log transfer facilities); United States v. Lucas, 516 F.3d 316, 333–34 (5th Cir. 2008) (septic system).

26. 33 U.S.C. § 1311. These requirements are outlined in sections 302, 306, 307, 318, 402, and 404 of the Act.

27. *Id.* § 1312.

28. William Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 546 (2003) ("The data reveals tremendous improvements in water quality below point source discharges.").

29. *See supra* note 25.

mining, construction, logging, agricultural production, and grazing.³⁰ Today, the top sources of water pollution in the United States include nonpoint sources such as agriculture, hydromodification,³¹ and urban runoff.³² Fertilizers, pesticides, sediment, and other pollutants from these sources cause a myriad of negative affects on impacted waters, including erosion and the destruction of wildlife and streamside vegetation.³³ Despite serious impacts, the NPDES program regulates none of these sources.

B. State-Level Nonpoint Source Control

In addition to the NPDES end-of-pipe pollution regulations, the CWA requires states to set water quality standards (WQS), which limit overall levels of pollutants that may enter specific waterbodies. WQS are particularly important for nonpoint source pollution because they allow states to monitor, and theoretically control, sources that are otherwise essentially unregulated by the CWA.³⁴

States develop WQS by first designating use classifications for all surface waters.³⁵ These “uses” may include water supply, habitat for aquatic life, recreation, or navigation.³⁶ Next, states set pollutant limits required to sustain these uses, and identify waterbodies that exceed applicable WQS.³⁷ If a body of water violates WQS despite full compliance with NPDES requirements,³⁸ it is designated as impaired and listed on a national 303(d) list.³⁹ For these waters, states must establish Total Maximum Daily Loads (TMDLs) that allocate the maximum input (or “load”) of every pollutant that an impaired water body can tolerate from each source without exceeding the WQS for that pollutant.⁴⁰

After states set these standards, CWA section 319 requires them to develop management programs for controlling nonpoint source pollution and improving the quality of impaired waters and submit them for the EPA’s approval.⁴¹ However, states need only develop these programs “to the maximum extent practicable.”⁴² The EPA cannot sanction states that fail to

30. See EPA NATIONAL WATER QUALITY INVENTORY, *supra* note 3 at 6–7. Other common sources of nonpoint source pollution include atmospheric deposition of pollutants and unchanneled urban storm water runoff. *Id.* at 6.

31. The term “hydromodification” includes activities such as “[p]ond construction, channelization, dam construction, dredging, flow alterations from water diversions, flow regulation, hydropower generation, streambank destabilization and modification, [and] upstream impoundments.” *Id.* at 7.

32. *Id.* at 12.

33. Andreen, *supra* note 28, at 555–558, 563.

34. See 33 U.S.C. § 1311(b)(1)(C) (2006).

35. 40 C.F.R. § 131.10 (2011).

36. See *id.* § 131.10(a).

37. 33 U.S.C. §§ 1313(b), (d)(1)(A).

38. *Id.* § 1313(d)(1)(A).

39. *Id.* § 1313(d).

40. *Id.* § 1313(d)(1)(C).

41. 33 U.S.C. § 1329(b)(1).

42. *Id.* § 1329(b)(4).

develop or implement a plan, nor can it step in and replace an inadequate state program.⁴³ In the absence of effective federal oversight, states have developed a patchwork of mostly voluntary water management programs.⁴⁴ Some states have created enforceable mechanisms,⁴⁵ many of which are site- or industry-specific.⁴⁶ Nevertheless, most nonpoint source programs today are voluntary,⁴⁷ and scholars generally agree that the section 319 program “has not made great strides in controlling pollution from nonpoint sources.”⁴⁸ Thus, the CWA is seriously flawed because while it provides tools for identifying impaired waters through WQS and TMDLs, it fails to require effective regulation of the nonpoint sources that pollute them.

C. Traditional State Authority as a Challenge to Federal Nonpoint Source Control

States have retained supreme authority over nonpoint source pollution because effective control at the federal level presents a number of challenges, including interference with traditional areas of state regulation. Nonpoint sources are undoubtedly more difficult to monitor and control than point sources and generally require a holistic regulatory approach.⁴⁹ Thus, opponents of federal nonpoint source regulation argue that any effective strategy would require land use planning, which traditionally falls within the ambit of state and local government authority.⁵⁰ Indeed, one of the CWA’s goals is “to recognize, preserve, and protect the primary responsibilities and rights of the States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”⁵¹

43. See *Id.* §§ 1329(d)(2), (3).

44. ENVTL. LAW INST., PUTTING THE PIECES TOGETHER: STATE NONPOINT SOURCE ENFORCEABLE MECHANISMS IN CONTEXT 1 (2002), available at <http://www.elistore.org/Data/products/d10-05.pdf>.

45. These include “discharge prohibitions, direct enforcement of water quality standards, pollution abatement orders, required operating practices, nuisance and misdemeanor prosecutions, civil and administrative penalties.” *Id.*

46. See generally ENVTL. LAW INST., ALMANAC OF ENFORCEABLE STATE LAWS TO CONTROL NONPOINT SOURCE WATER POLLUTION (1998), available at <http://www.elistore.org/Data/products/d8.07.pdf>.

47. Edward B. Witte & Natalia Minkel-Dumitt, *Nonpoint Source Pollution Control*, in THE CLEAN WATER HANDBOOK 202 (Mark A. Ryan, ed. 2011).

48. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 696 (4th ed. 2003).

49. The Ninth Circuit in 1990 described flaws in the pre-CWA water-quality-standard-based pollution control scheme:

First, the mechanism of enforcement was cumbersome. Regulators had to work backward from an overpolluted body of water and determine which entities were responsible; proving cause and effect was not always easy. Second, the scheme failed to provide adequate incentives to individual entities to pollute less; an entity’s dumping pollutants into a stream was ignored if the stream met the standards.

Natural Res. Defense Council v. U.S. Envtl. Prot. Agency, 915 F.2d 1314, 1316 (9th Cir. 1990).

50. William K. Reilly, *The Issues and the Policy: View from EPA*, in ENVIRONMENTAL POLICY LAW (Holly Doremus, et al. eds. 2011) 11–953; see also *Rapanos v. United States*, 547 U.S. 715 (2006).

51. 33 U.S.C. § 1251(b) (2006).

This argument has persuaded many courts to uphold the primacy of states to regulate nonpoint source pollution. The Supreme Court utilized this argument in *Rapanos v. United States*, when it struck down what it considered an overly expansive definition of waters subject to U.S. Army Corps of Engineer regulations.⁵² The Court found the Army Corps' broad definition misread the language of the CWA because it shifted "development and use . . . of land and water resources" from state to federal control.⁵³ The Ninth Circuit also addressed this issue in *Pronsolino v. Nastri*, where the plaintiffs argued that by applying TMDLs to waters impaired only by nonpoint sources, "the EPA has upset the balance of federal-state control established in the CWA by intruding into the states' traditional control over land use."⁵⁴ The Ninth Circuit disagreed with the plaintiffs, but only because states retained complete discretion over implementation and enforcement of TMDLs.⁵⁵

While the need to balance state and federal authority carries considerable weight in determining the level at which nonpoint source regulation should occur, there is one important context in which state authority over land use planning does not apply: land that is owned and administered by the federal government.

II. WATER POLLUTION ON PUBLIC LANDS

The federal government owns and manages approximately one third of the United States' total land area.⁵⁶ The majority of these "public lands" fall under the authority of the BLM and the Forest Service.⁵⁷ The BLM has jurisdiction over about 260 million acres of public lands⁵⁸ and the Forest Service controls approximately 193 million acres of national forests and grasslands.⁵⁹ Many permitted activities on public lands, including timber harvesting, livestock grazing, road building, and mining are significant nonpoint sources of water pollution.⁶⁰ Although federal land management agencies comply with the CWA to address water quality concerns on public lands, the CWA is unable to effectively regulate this pervasive nonpoint source pollution issue.

52. See *Rapanos*, 547 U.S. at 737, 745.

53. *Id.* at 737.

54. *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002).

55. *Id.*

56. ROBERT L. GLICKSMAN & GEORGE C. COGGINS, MODERN PUBLIC LAND LAW IN A NUTSHELL, 1–2 (2001).

57. *Id.*

58. *Id.* at 2.

59. National Forest System Land Management Planning, 76 Fed. Reg. 8480 (Feb. 14, 2011) (to be codified at 36 C.F.R. pt. 219).

60. NAT'L SCI. & TECH. CTR., U.S. DEP'T OF AGRIC., WATER QUALITY LAW SUMMARY, CHAPTER FIVE: NONPOINT SOURCE WATER POLLUTION, CWA § 319, AND BEST MANAGEMENT PRACTICES 1, available at <http://www.blm.gov/nstc/WaterLaws/pdf/Chapter5.pdf>.

A. The Extent of the Problem

Most surface and mineral uses on public lands have the potential to damage watershed quality if not managed correctly.⁶¹ For example, cattle grazing, which creates excrement and accelerated runoff, is the primary source of water pollution in the West.⁶² In 1978, Congress acknowledged that “vast segments of the public rangelands . . . [were] in an unsatisfactory condition” in part due to a lack of “water and soil conservation.”⁶³ These unsatisfactory conditions continue to “negatively impact the quality and availability of scarce western water supplies [and] threaten important . . . fish and wildlife habitat.”⁶⁴ Further, timber harvesting results in sediment runoff from logging roads,⁶⁵ while mining on public lands can cause toxic chemicals to seep into rivers and streams.⁶⁶

The CWA has relatively little to say about water pollution on federal lands. It does contain a general requirement that federal agencies “engaged in any activity which may result in the discharge or runoff of pollutants” comply with applicable state and local water quality standards.⁶⁷ Unfortunately, as discussed in Part I, the CWA’s requirements are insufficient to adequately reduce nonpoint source pollution.

B. Applying the Clean Water Act to Public Lands: *Greater Yellowstone Coalition v. Lewis*

A recent Ninth Circuit case highlights the CWA’s deficiencies and illustrates the custom of public land management agencies to defer to the CWA despite its shortcomings. In *Greater Yellowstone Coalition v. Lewis*, a divided court upheld a BLM and Forest Service decision to allow expansion of a mining operation even though it would continue to impair the quality of streams that already fell below WQS.⁶⁸ The court found that because no state regulations required the restoration of these impaired waters, the BLM and Forest Service could allow continued pollution so long as toxin levels did not get worse.⁶⁹

61. Public lands support a number of potentially damaging extractive industries; federal coal leases alone cover 800,000 acres of federal land, national forests provide approximately half of the country’s softwood timber supply, and about 270 million acres of public lands are devoted partially or primarily to livestock grazing. GLICKSMAN & COGGINS, *supra* note 56, at 9–10.

62. HOUCK, *supra* note 21, at 95.

63. 43 U.S.C. § 1901(a)(1) (2006).

64. *Id.* § 1901(a)(3).

65. HOUCK, *supra* note 21, at 96.

66. See *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1146–47 (9th Cir. 2010).

67. 33 U.S.C. § 1323(a) (2006).

68. 628 F.3d at 1146–47, 1153.

69. *Greater Yellowstone*, 628 F.3d at 1149 (agreeing with agencies’ finding that “mine expansion would not result in increased selenium pollution in violation of Idaho law.”). The shortened form “*Greater Yellowstone*” used herein indicates *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1143 (9th Cir. 2010). *Greater Yellowstone Coalition v. Larson*, 641 F. Supp. 2d 1120, 1126 (2009), will always be cited in full.

The dispute in *Greater Yellowstone* centered on a mining operation in the Caribou National Forest, which is home to over three hundred animal species and a wide range of aquatic life.⁷⁰ For decades, the Forest Service and the BLM have permitted the Smoky Canyon mine to extract phosphate ore in this Idaho forestland.⁷¹ During the extraction process, the mine produces waste rock with high concentrations of selenium, which is toxic at elevated levels.⁷² This waste rock is then used to fill excavated pits.⁷³ During the rainy season, precipitation percolates through this rock, gathers toxins, and contaminates nearby groundwater, surface water, and vegetation.⁷⁴ As a result, Idaho's 303(d) list identifies twenty-four miles of streams surrounding the Smoky Canyon Mine as impaired due to high selenium concentrations.⁷⁵

In 2003, the defendant, J.R. Simplot Company, applied to both the BLM and Forest Service for permits to develop two new open mining pits.⁷⁶ Simplot argued that the expansion would not worsen the condition of area streams because any new pollution would be offset by reclamation efforts in other parts of the mine.⁷⁷ Further, Simplot would cap new waste rock pits with an engineered cover designed to reduce the amount of selenium that percolates through waste rock and into surrounding groundwater.⁷⁸ Because the polluted runoff originating from the new pits was not channeled through a "confined, discrete conveyance," and thus not a point source, Simplot did not need to apply for an NPDES permit.⁷⁹

Following the approval of an Environmental Impact Statement,⁸⁰ the BLM and Forest Service each issued decisions allowing the mine to expand as

70. U.S. FOREST SERV., U.S. DEP'T OF AGRIC., REVISED FOREST PLAN FOR THE CARIBOU NATIONAL FOREST, 1-1 (2003) [hereinafter "USFS CARIBOU FOREST PLAN"], available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5229166.pdf.

71. The Caribou National Forest contains more than fifty leases for the recovery of phosphate, which cover over 25,000 acres. Federal Appellees Response Brief at 7, *Greater Yellowstone*, 628 F.3d 1143 (No. 09-35729), 2009 WL 4922587. The BLM has jurisdiction over all phosphate mining leases on federal land and the Forest Service may grant special use permits for mining operations on forest system lands. See *Greater Yellowstone*, 628 F.3d at 1146 (citing 30 U.S.C. § 211 (2006) and 36 C.F.R. § 251 (2011)).

72. *Greater Yellowstone*, 628 F.3d at 1146. Selenium poisoning has been linked to reproductive, developmental, and immune deficiencies in aquatic wildlife. Julian E. Spallholz & David J. Hoffman, *Selenium Toxicity: Cause and Effects in Aquatic Birds*, 57 AQUATIC TOXICOLOGY 32–33 (2002).

73. *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1126 (D. Idaho 2009).

74. Appellants' Brief at 8, *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120 (D. Idaho 2009) (No. 09-35729), 2009 WL 4089605.

75. *Greater Yellowstone*, 628 F.3d at 1154. This figure has since risen to approximately twenty-seven miles. See IDAHO DEP'T OF ENVTL. QUALITY, IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY FINAL 2010 INTEGRATED REPORT 65 (2010).

76. *Greater Yellowstone*, 628 F.3d at 1146.

77. *Id.* at 1147.

78. *Id.*

79. *Id.* at 1153.

80. BUREAU OF LAND MGMT., U.S. DEP'T OF AGRIC. & U.S. FOREST SERV., U.S. DEP'T OF AGRIC., SMOKY CANYON MINE, PANELS F & G: FINAL ENVIRONMENTAL IMPACT STATEMENT (2007) available at http://www.blm.gov/id/st/en/fo/pocatello/planning/smoky_canyon_mine.html.

long as Simplot performed the proposed water pollution mitigation measures.⁸¹ The agencies grounded their decision in CWA regulations, finding that relevant nonpoint source standards only required polluters to use best management practices to avoid further impairment to area streams.⁸²

The district court upheld the agencies' permit decisions based on Idaho WQS, which require that where waters are listed as impaired pursuant to section 303(d), activities must be restricted "as necessary to prohibit further impairment of . . . designated or existing beneficial uses."⁸³ In a 2-1 decision, the Ninth Circuit also approved the permit decisions, affirming the lower court's decision that the BLM and Forest Service acted within the parameters of the applicable laws.⁸⁴ The court held that the agencies lawfully permitted Simplot's mining expansion so long as it did not "exacerbate the current selenium exceedences."⁸⁵ Thus, under the CWA, the permits needed only comply with the rather feeble state standards by maintaining existing levels of pollution in nearby streams.

Greater Yellowstone shows that the CWA simply does not provide courts with adequate regulatory tools to enforce the restoration of waters impaired by nonpoint sources. Moreover, it shows that public land agencies perpetuate this deficiency by deferring to the CWA in permitting decisions. Therefore, as this Note argues in Part IV, public land management agencies should look to their own statutory mandates to protect and restore the public watershed resource.

III. PUBLIC LAND LAW: STATUTORY AUTHORITY OVER WATERSHED RESTORATION

Apart from the CWA, the BLM and the Forest Service enforce additional statutes and regulations that govern the regulation of water quality on public lands. Instead of relying on the highly ineffectual CWA, these agencies can and should use their own laws to require effective restoration of waters polluted by nonpoint sources.

81. BUREAU OF LAND MGMT., U.S. DEP'T OF AGRIC., RECORD OF DECISION: ENVIRONMENTAL IMPACT STATEMENT: SMOKY CANYON MINE, PANELS F & G 10 (2008) [hereinafter "BLM SMOKY CANYON MINE EIS ROD"] available at http://www.blm.gov/pgdata/etc/medialib/blm/id/plans/smoky_canyon_mine.Par.85134.File.dat/BLM_SCROD_Panels%20F%20and%20G.pdf; U.S. FOREST SERV., U.S. DEP'T OF AGRIC., SMOKY CANYON MINE PANELS F AND G AUTHORIZATION FOR OFF-LEASE ACTIVITIES RECORD OF DECISION 12 (2008) [hereinafter "USFS SMOKY CANYON MINE ROD"], available at http://www.blm.gov/pgdata/etc/medialib/blm/id/plans/smoky_canyon_mine.Par.95391.File.dat/FS_SCROD_Panels%20F%20and%20G.pdf.

82. BLM SMOKY CANYON MINE EIS ROD, *supra* note 81, at 44; USFS SMOKY CANYON MINE ROD, *supra* note 81 at 55.

83. *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1130 (D. Idaho 2009) (quoting IDAHO ADMIN. CODE r. 58.01.02.054.05 (2011)).

84. The court found that the permits did not violate the CWA or NFMA. *Greater Yellowstone*, 628 F.3d at 1149. The plaintiffs also raised claims under NEPA that were likewise denied. *Id.* at 1150–52.

85. *Id.* at 1149.

A. Multiple Use Mandates and the Watershed Resource

Multiple use and sustained yield mandates require the Forest Service and the BLM to balance a variety of resource interests when issuing permits for commercial activities on federal land.⁸⁶ These mandates are found in statutes including the Multiple-Use Sustained-Yield Act (MUSYA),⁸⁷ the Federal Land Policy and Management Act (FLPMA),⁸⁸ and the National Forest Management Act (NFMA). In each of these iterations, the multiple use mandate specifically discusses the protection of water as a public resource.⁸⁹

MUSYA, the first application of a multiple use mandate to public lands, requires the Forest Service to balance competing interests—recreation, grazing, timber production, watershed management, and wildlife and fishing preservation—to best meet the needs of the American people.⁹⁰ The statute explicitly instructs the Forest Service to minimize impairment to land and not to necessarily select “the combination of uses that will give the greatest dollar return or the greatest unit output.”⁹¹ Despite these provisions, the Forest Service’s implementation of MUSYA has traditionally tilted “toward commodity production rather than toward the protection of ecological integrity.”⁹²

In addition to MUSYA, the Forest Service and BLM derive authority to address environmental considerations from their own organic statutes: NFMA and FLPMA, respectively. Recognizing that public lands must be managed for the benefit of all Americans, multiple use mandates require the Forest Service and BLM to consider an array of environmental factors, including water preservation, in their decision-making processes.

Enacted in 1976 to further incorporate environmental values into the Forest Service’s multiple use mandate, NFMA⁹³ requires the agency to protect forest resources, including watersheds.⁹⁴ Forest Service regulations promulgated under NFMA require it to consider “opportunities for the national forests and grasslands to contribute to . . . [the] maintenance or restoration of watershed function.”⁹⁵ Additionally, when revising a forest plan, the Forest

86. GLICKSMAN & COGGINS, *supra* note 56, at 190.

87. 16 U.S.C. § 531 (2006).

88. 43 U.S.C. § 1701(a)(8) (2006).

89. 16 U.S.C. § 1604(g)(3)(A).

90. *Id.* § 528.

91. *Id.* § 531.

92. Robert L. Glicksman, *Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principal*, 44 TULSA L. REV. 147, 159 (2008).

93. *Id.* at 160; 16 U.S.C. § 1604(g)(3)(A).

94. The use of the term “watershed” in multiple-use statutes is somewhat ambiguous, and there is some debate surrounding whether the aim of watershed resource management should be to protect water yield, water quality, or both. George Coggins argues that Congress’ use of “watershed” addresses both, “encompass[ing] protection of noncommodity values and ecological stability.” George C. Coggins, *Watershed as a Public Natural Resource on Federal Lands*, 11 VA. ENVTL. L.J. 10 (1991).

95. 36 C.F.R. § 219.4(b)(2)(ii) (2011).

Service must “[i]dentify specific watersheds in need of protective or restoration measures.”⁹⁶

The BLM’s multiple use mandate is defined in FLPMA, which requires the BLM to prevent impairment of environmental quality⁹⁷ and to “weigh long-term benefits to the public against short-term benefits.”⁹⁸ The statute explicitly addresses the protection of water quality, requiring BLM to “protect . . . environmental, air and atmospheric, [and] water resource . . . values” on public lands.⁹⁹

B. Federal Land Use Planning and Permitting

The BLM and Forest Service manage public lands through comprehensive planning procedures. Forest land planning occurs on national, regional, and site-specific levels and involves a process of identifying issues, developing data, and proposing actions.¹⁰⁰ The Forest Service develops “forest plans” with which all subsequent agency action must be consistent,¹⁰¹ and then monitors and evaluates the implementation of these plans.¹⁰² The Forest Service thus has authority to issue special use permits for activities such as agriculture, recreation, grazing, and mining, provided they are consistent with forest plans.¹⁰³ Similarly, the BLM must develop resource management plans with which “all future resource management authorizations and actions,” including special use permits, must conform.¹⁰⁴

When an outside entity submits a proposal for use or development of resources on public lands, the BLM or Forest Service must determine whether the action conforms to its applicable land use plan.¹⁰⁵ Also, if the activity will have a significant environmental impact, the agency must comply with the National Environmental Policy Act (NEPA) by preparing an Environmental Impact Statement and submitting it for public comment.¹⁰⁶ After consideration of impacts, alternatives, and public input, the agency then issues a Final Environmental Impact Statement and announces its decision publicly in a Record of Decision.¹⁰⁷ Thus, the BLM and Forest Service must demonstrate

96. *Id.* § 219.9(b)(6).

97. 43 U.S.C. § 1702(c) (2006).

98. *Id.* § 1712(c)(7).

99. *Id.* § 1701(a)(8).

100. 36 C.F.R. §§ 219.3(b), (d).

101. 16 U.S.C. § 1604 (2006).

102. 36 C.F.R. § 219.11.

103. 16 U.S.C. § 1604(i).

104. 43 U.S.C. § 1712; 43 C.F.R. § 1610.5-3(a) (2011).

105. BUREAU OF LAND MGMT., U.S. DEP’T OF AGRIC., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK, H-1790-1, at 6 (2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

106. 40 C.F.R. § 1506.6(b) (2011); *see also* 42 U.S.C. §§ 4321-4370h (2006).

107. 40 C.F.R. §§ 1502.9(b), 1505.2.

that all final actions are consistent with relevant laws, regulations, and land use plans.¹⁰⁸

C. Regulation of Pollution-Causing Activities: Mining, Forestry, and Grazing

To shape the contours of their broad multiple use mandates, the BLM and Forest Service have promulgated regulations that address specific activities that contribute to water pollution on the public lands including grazing,¹⁰⁹ forestry,¹¹⁰ and mining.¹¹¹

The BLM and Forest Service have both passed regulations in an attempt to ensure that mining activities do not unduly impair water quality.¹¹² The BLM has promulgated minerals management regulations designed to “avoid, minimize or correct damage to the environment . . . [including] land, water and air.”¹¹³ Also, developers of mineral resources on the public lands must “minimize or prevent adverse impact[s] upon plants, fish, and wildlife . . . and their habitat.”¹¹⁴ Forest Service regulations similarly require miners to “minimize adverse environmental impacts on National Forest System surface resources,”¹¹⁵ and to take “all reasonable provisions” necessary to “prevent obstruction, pollution, or deterioration of water resources.”¹¹⁶

The Forest Service may also limit logging permits to protect water quality. Under NFMA, timber may only be harvested where “soil, slope, or other watershed conditions will not be irreversibly damaged” and where “protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water . . . where harvests are likely to seriously and adversely affect water conditions or fish habitat.”¹¹⁷

Finally, the BLM’s ability to issue grazing permits is subject to arguably the most robust standards. Under the Clinton administration, the BLM strengthened its role in water quality management with the Fundamentals of Rangeland Health initiative.¹¹⁸ These regulations require the BLM to develop standards and guidelines to ensure “watersheds are in, or are making significant progress toward, properly functioning physical condition.”¹¹⁹ In addition, the

108. See, e.g., BLM SMOKY CANYON MINE EIS ROD, *supra* note 81, at 42–46.

109. The Taylor Grazing Act authorizes the Secretary of the Interior to create grazing districts on public lands, to issue permits, and to “preserve the land and its resources from destruction or unnecessary injury.” 43 U.S.C. § 315(a)(b).

110. Under NFMA, the Forest Service manages forestry through issuance of timber contracts and promulgation of silviculture standards. 16 U.S.C. § 1604(g)(3)(E)–(F) (2006).

111. The Mineral Leasing Act authorizes the BLM to issue leases for the exploration, development, and utilization of mineral deposits subject to rules and regulations promulgated by the Secretary of the Interior. 30 U.S.C. § 192 (2006).

112. See 43 C.F.R. § 3590.0-1 (2011); 36 C.F.R. § 251.15(a)(5) (2011).

113. 43 C.F.R. § 3590.0-1.

114. *Id.* § 3802.3-2(e).

115. 36 C.F.R. § 228.1.

116. *Id.* § 251.15(a)(5).

117. 16 U.S.C. § 1604(g)(3)(E)(i), (iii) (2006).

118. 43 C.F.R. § 4180.

119. *Id.* § 4180.1(a).

BLM must ensure that water quality achieves, or makes “significant progress toward achieving, established BLM management objectives such as meeting wildlife needs.”¹²⁰ Moreover, these regulations allow the BLM to revise grazing permits by restricting the number or location of cattle when grazing threatens a watershed.¹²¹

D. Watershed: The “Forgotten Resource”

Although numerous statutes and regulations establish watershed restoration as a priority of public land management, these regulations in practice rarely impact the planning and permitting decisions of public land management agencies. In fact, public lands scholar George Coggins calls watersheds the “forgotten resource” because the agencies charged with balancing priorities under multiple use mandates have done so little to effectuate this priority.¹²² That these agencies do not generally employ their statutory mandates to protect water quality was made evident by the manner in which the Forest Service and the BLM squared their decisions in *Greater Yellowstone* with FLPMA and NFMA.

In the *Greater Yellowstone* controversy, the BLM’s Record of Decision for the permit approval referred to FLPMA by emphasizing the agency’s duty to manage public lands “within the principles and concepts of multiple-use and [s]ustainable [d]evelopment.”¹²³ The BLM found Simplot’s proposed action complied with FLPMA because “unnecessary or undue environmental degradation” would not occur.¹²⁴ However, the BLM could have convincingly argued that, because undue degradation of water quality had already occurred, the proposed activity violated FLPMA absent a concrete plan to bring streams into compliance with WQS.¹²⁵

The Forest Service in its *Greater Yellowstone* permitting decision similarly recognized a duty under NFMA to ensure its decision was made in accordance with the Caribou Forest Plan.¹²⁶ The Forest Plan, in turn, required that “within legal authorities, [the Forest Service] must ensure that new proposed management activities within watersheds containing 303(d) listed waterbodies improve or maintain overall progress toward beneficial use attainment for pollutants which led to listing.”¹²⁷ While the Forest Service could have read the Forest Plan to require some showing that progress would be made toward attaining these uses prior to approving the permit, neither the

120. *Id.* § 4180.1(c).

121. Joseph M. Feller, *The BLM’s Proposed New Grazing Regulations: Serving the Most Special Interest*, 24 J. LAND RESOURCES & ENVT'L L. 241, 245 (2004).

122. Coggins, *supra* note 94, at 1.

123. BLM SMOKY CANYON MINE EIS ROD, *supra* note 81, at 42.

124. *Id.*

125. See 43 U.S.C § 1701(a)(8) (2006); 43 C.F.R. § 3590.0-1.

126. USFS SMOKY CANYON MINE ROD, *supra* note 81, at 54.

127. USFS CARIBOU FOREST PLAN, *supra* note 70, at 4–50.

Record of Decision nor the Environmental Impact Statement for the mine expansion directly analyzed this requirement.¹²⁸

IV. PUTTING THE LAW TO WORK: IMPLEMENTING FEDERAL AUTHORITY

While the Forest Service and the BLM may invoke numerous sources of authority to require the restoration of impaired waters on federal lands,¹²⁹ *Greater Yellowstone* makes it clear that these agencies are not using this authority to restore our nation's waters.¹³⁰ This Part looks critically at the effectiveness of existing policies and regulations and explores the contours of a new planning regulation that would bring these agencies' authority to bear on the issue of water quality.

A. *Guidance and Policy Documents: Limited Effectiveness*

Federal agencies have recognized that water quality is an issue that bears consideration in a variety of decision making contexts. The following two examples illustrate agencies' attempts to address water quality at a single and multiagency level. While these policies are considerably broader than existing activity-specific regulations, they generally lack effectiveness because of their nonmandatory language.

In 2000, eight federal agencies¹³¹ promulgated a policy addressing the need to work affirmatively to achieve water restoration through the course of land and resource management.¹³² Recognizing the role of federal land managers in “accelerat[ing] the restoration of degraded water resources,” the policy provides a framework to help resource management agencies achieve the CWA’s restoration goals.¹³³ The policy directs agencies to assess watersheds, use these assessments to guide planning and management activities, and assist states in developing and implementing TMDLs.¹³⁴ Although this policy indicates that water quality is a priority, its terms lack the mandatory authority

128. These documents each contain a perfunctory assurance that the project is in accordance with the relevant land and resource management plans. BUREAU OF LAND MGMT., U.S. DEP’T OF AGRIC., SMOKY CANYON MINE, PANELS F & G: FINAL ENVIRONMENTAL IMPACT STATEMENT 2-105 (2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/id/plans/smoky_canyon_mine.Par.8741.File.dat/Chapter%202.pdf; BLM SMOKY CANYON MINE EIS ROD, *supra* note 81, at 42, USFS SMOKY CANYON MINE ROD, *supra* note 81, at 58.

129. This authority includes MYUSA, FLPMA, NFMA, PRIA, and the agency regulations promulgated under these statutes.

130. See *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2010).

131. Office of the Secretary, U.S. Dep’t of Agric.; National Oceanic and Atmospheric Administration, U.S. Dep’t of Commerce; Office of the Secretary, U.S. Dep’t of Defense; Office of the Secretary, U.S. Dep’t of Energy; Office of the Secretary, U.S. Dep’t of the Interior; Office of the Administrator, Envtl. Prot. Agency; Resource Stewardship, Tenn. Valley Auth.; Office of the Assistant Secretary of the Army for Civil Works, U.S. Army Corps of Eng’rs.

132. Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management, 65 Fed. Reg. 62,566–72 (Oct. 18, 2000).

133. *Id.* at 62,566.

134. *Id.* at 62,570.

to bring about robust, widespread change.¹³⁵ The BLM, a policy signatory, notably did not consider this policy during the permitting decision at issue in *Greater Yellowstone*.¹³⁶ Further, the policy does not explicitly direct agencies to go farther than what the CWA already requires to achieve the CWA's unattained goals.

Four years later, the Forest Service issued its own watershed protection and management guidelines, which call for the agency to take specific, affirmative steps to restore impaired watersheds within national forest lands.¹³⁷ The guidelines arguably go farther than the CWA, requiring the agency to "identify problems . . . and develop integrated resource management prescriptions to improve watershed condition."¹³⁸ The agency is further authorized to "curtail resource use on [a] project area, if necessary" for watershed improvement.¹³⁹ However, because the guidelines do not require the Forest Service to protect watersheds in all of its permitting decisions, its effects have been constrained.¹⁴⁰

Hence, as with the CWA, existing public lands law has repeatedly identified the need for water quality restoration, but has failed to implement effective solutions to this pressing issue.

B. Planning Rule Approach

Since prior informal approaches to water quality management have largely failed to affect agency behavior, the BLM and Forest Service should promulgate a new planning rule that incorporates specific requirements for water quality restoration into the planning process.¹⁴¹ Both agencies have authority to promulgate regulations to guide their respective planning processes,¹⁴² and have done so.¹⁴³ A new, more effective planning rule should address water quality with the mandatory language necessary to ensure that agencies prioritize water restoration in applicable decisions. This rule would ensure a more holistic approach to water restoration because planning rules

135. "In contrast to a regulation, which would establish legally enforceable requirements, the United Federal Policy asserts goals and aspirations consistent with existing laws and regulations." *Id.* at 62567.

136. See BLM SMOKY CANYON MINE EIS ROD, *supra* note 81, at 42–45.

137. U.S. FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL, CHAPTER 2520: WATERSHED PROTECTION AND MANAGEMENT, AMENDMENT NO. 2500-2004-1 (2004), available at <http://www.fs.fed.us/im/directives/fsm/2500/2520.doc>.

138. *Id.* § 2522.2.

139. *Id.* § 2522.21(3).

140. Tellingly, the Forest Service did not consider these guidelines in its *Greater Yellowstone* permitting decision. See USFS SMOKY CANYON MINE ROD, *supra* note 81.

141. This would require these agencies to publish a draft rule in the Federal Register, provide notice and allow time for interested parties to comment, and issue a final rule only after responding to all relevant input. 5 U.S.C. § 553 (2006). These notice and comment requirements may slow down the rule-making process and spark opposition from industry and their allies in Congress.

142. 16 U.S.C. § 1604(g) (2006); 43 U.S.C. § 1712 (2006).

143. 43 C.F.R. § 1610 (2011); 36 C.F.R. § 219 (2011).

have a wide scope and all subsequent permitted activities must be consistent with such a rule.¹⁴⁴

Current planning regulations are deficient because, like the aforementioned guidance documents, they address water quality with non-binding language. According to current Forest Service planning regulations, the official responsible for the forest plan “should” consider “maintenance or restoration of watershed function.”¹⁴⁵ Yet, that official “has the discretion to determine, at any time, whether and to what extent [such] an issue is appropriate for consideration.”¹⁴⁶ The BLM land use planning handbook requires consideration of section 303(d) impaired water lists and TMDLs that “could require new land use plan decisions.”¹⁴⁷ However, these BLM requirements also lack effective enforcement mechanisms; while “land use plans must identify specific goals and objectives, there are currently “no procedural or approval requirements for an implementation strategy” to obtain these objectives.¹⁴⁸

To overcome these current deficiencies, the BLM and Forest Service should promulgate a joint planning rule that explicitly requires water quality to be considered in all land use plans and subsequent permitting decisions.¹⁴⁹ This rule should limit the discretion of agency officials by requiring them to incorporate predefined water quality measures whenever an EIS determines that an agency action may adversely affect an impaired waterbody. The rule should then require agencies to adjust permits for pollution-causing activities as needed to make discernible progress toward achieving WQS and removing the affected waters from the section 303(d) list. Finally, the rule should set up a mechanism for monitoring the progress of polluted waters and allow agencies to further limit the terms of permits if no improvement is shown.¹⁵⁰

This planning rule could reach beyond the public lands context by creating incentives for states and nonpoint source polluters to effectively address restoration of impaired waters. A recent case study found that states are more likely to implement effective nonpoint source management plans where government agency involvement and stakeholder interests were high.¹⁵¹ These suggested federal permitting requirements would foster stakeholder interests by making permits for economically beneficial activities, such as mining,

144. See 36 C.F.R. § 219.1 (2011); 43 C.F.R. § 1610.5-3(a).

145. 36 C.F.R. § 219.4(b)(2)(ii).

146. *Id.* § 219.4(b).

147. BUREAU OF LAND MGMT., U.S. DEP’T OF AGRIC., LAND USE PLANNING HANDBOOK, H-1601-1, 38 (2005).

148. *Id.* at 31, 12.

149. For an example of an interagency joint planning rule, see Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536).

150. For similar reporting and monitoring requirements in the NPDES program, see 40 C.F.R. § 122.41(l) (2011).

151. Brian Benham et al., *Lessons Learned from TMDL Implementation Case Studies*, 2 WATER ENV’T FED’N 1, 5 (2008).

contingent upon implementation of TMDLs and other nonpoint source controls.¹⁵² Specifically, planning regulations could allow agencies to grant permits more easily if states have already developed an EPA-approved nonpoint source control strategy, such as a nonpoint source control plan under CWA section 319.¹⁵³ Thus, by making the development and implementation of state water restoration plans a factor in the approval of permits for pollution-causing activities on federal lands, public land agencies could create incentives for states, local governments, and nonpoint source polluters to collaborate and achieve the CWA's stated, yet unattained goals.

CONCLUSION

Because the CWA lacks the mandatory requirements to achieve its restoration goals, the federal government should explore alternative routes toward achieving water quality. To do so, public land agencies can and should take affirmative steps to restore water quality of waterbodies on federal lands. Because public land law governs the permitting process for many nonpoint sources of water pollution on public lands and encompasses statutory mandates that protect water resources, it can be used to bridge the current gap between identifying and restoring impaired waters on federally owned lands. The best way to address nonpoint source pollution is to target water quality directly by using a joint planning rule for federal lands, enforceable through the BLM's and the Forest Service's permitting processes.

The likelihood that these agencies will take the necessary action to restore impaired waters on public lands is ultimately a question of executive branch political will. The objectives of various presidential administrations have traditionally had huge impacts on how public land management agencies balance economic and environmental concerns.¹⁵⁴ Luckily, evidence suggests that the Obama administration would support a more aggressive federal stance

152. This effect would be particularly strong in western states with large areas of federally-owned land.

153. To qualify for section 319 funds, states must

(1) identify the geographical extent of the watershed to be covered by the plan, (2) provide a schedule for developing the watershed plan, and (3) estimate the Section 319 funds that will be used for developing the watershed plan. . . . After revising the draft plans with guidance from the regional USEPA offices, states then resubmit their final work plans and grant applications, which are either awarded by the USEPA, or sent back to the states for further revision.

Scott D. Hardy & Tomas M. Koontz, *Reducing Nonpoint Source Pollution Through Collaboration: Policies and Programs Across the U.S. States*, 41 ENVTL. MGMT. 301, 306 (2008) (citation omitted).

154. During the Reagan administration, for example, the Forest Service actually worked to undermine the water quality provisions of the CWA. In 1985, the EPA refused to approve Idaho's water quality standards because the state had exempted a broad range of timber management activities from its antidegradation policy, largely at the urging of the Forest Service and timber industry. Richard Whitman, *Clean Water or Multiple Use? Best Management Practices for Water Quality Control in the National Forests*, 16 ECOLOGY L.Q. 909, 926 (1989). Under the Clinton administration, the Forest Service and the BLM passed some of the most proactive, proenvironment planning rules to date. See Feller, *supra* note 121 at 245.

on water quality. In a 2009 executive order on the restoration of the Chesapeake Bay,¹⁵⁵ President Obama called on the federal government “to lead a renewed effort to restore and protect the nation’s largest estuary and its watershed.”¹⁵⁶ The subsequent EPA guidance document “provides guidance regarding practices that may be used to reduce nonpoint source pollution in the Chesapeake Bay and other waterbodies.”¹⁵⁷ In this same vein, a revised public lands planning rule could expand the federal government’s ability to control pollution and provide concrete steps for doing so. With executive support, now is an ideal time for public land agencies to tackle the nonpoint source pollution that they have the authority to control.

Despite potential political challenges, addressing water restoration on federal lands through a public lands approach would be a pragmatic executive decision for a number of reasons. First, it avoids the need for legislative action, which is extremely unlikely to come from a Congress that is largely hostile to environmental initiatives.¹⁵⁸ Second, this approach avoids the state sovereignty objection to federal water quality controls because it does not threaten state authority over land use issues.¹⁵⁹ Most importantly, a public land law approach to water quality restoration addresses a goal of the CWA that has remained elusive for forty years—restoration of the nation’s waters.¹⁶⁰

155. Executive Order 13,508—Chesapeake Bay Protection and Restoration, 74 F.R. 93 (2009).

156. ENVTL. PROT. AGENCY, GUIDANCE FOR FEDERAL LAND MANAGEMENT IN THE CHESAPEAKE BAY WATERSHED 1-1 (2010), available at nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1007C39.txt.

157. *Id.* at 1-3.

158. See e.g. John M. Broder, *E.P.A. Limit on Gases to Pose Risk to Obama and Congress*, N.Y. TIMES (Dec. 30, 2010), <http://www.nytimes.com/2010/12/31/science/earth/31epa.html>.

159. See *supra* Part I.C.

160. 33 U.S.C. § 1251(a) (2006).

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