COMMENTS

REVIVING FEDERAL COMMON LAW TO REMEDY NONPOINT SOURCE POLLUTION

by Connor Sakati

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> Below our fields, twisting and winding, ran the clear blue waters of the Illinois River. The banks were cool and shady. The rich bottom land near the river was studded with tall sycamores, birches, and box elders. To a ten-year-old country boy it was the most beautiful place in the whole wide world, and I took advantage of it all.
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> —Wilson Rawls, *Where the Red Fern Grows*[1]

The Illinois River begins at a remote headwaters in Arkansas, meanders westward through mountains and agricultural lands, and flows into Oklahoma.[2] Once the river crosses the border, it snakes through the Oklahoma Ozarks, where Wilson Rawls set his rural coming-of-age story, *Where the Red Fern Grows*.[3] Finally, it empties into Tenkiller Lake, described as "the emerald jewel in Oklahoma's crown of lakes."[4] The lake and river form the foundation for a regional tourism economy based on fishing, wildlife, and recreation.[5]

In 1961, the year Rawls published his novel, the Illinois River and downstream lakes were still as "crystal clear" as they had been during his childhood.[6] But today, in Oklahoma's portion of the watershed, algal blooms cloud the once-blue waters. "Hundreds of thousands of tons of poultry litter," a noxious mixture of decaying chicken production waste, wash along the riverbanks each year. And fish suffocate beneath the decomposing agricultural waste.[7]

Although water quality regulations have become significantly more stringent over the past six decades, over that same period the Illinois River's pollution problem has worsened.[8] Those regulations do little to manage the pernicious sludge clogging the river, a form of pollution legally categorized as nonpoint source pollution. The Clean Water Act (CWA), the country's major water quality statute, is largely concerned with pollution from "discernible, confined and discrete conveyance[s]" called point source pollution.[9]

Nonpoint source pollution is everything else; the catch-all category includes "runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification," and the agricultural runoff poisoning the Illinois River.[10] The CWA largely devolves regulation for nonpoint source pollution to the states.[11] Therefore, although Oklahoma manages its portion of the river as a scenic river, attempting to protect its own waters,[12] federal law leaves upstream Arkansas free to set looser rules; as a result, poultry producers use the river as a free garbage disposal.

Oklahoma's nonpoint source pollution problem is not unique. Nonpoint source pollution is "the leading remaining cause of water quality problems" in the country.[13] Approximately "half of all water pollution" choking our rivers comes from nonpoint sources, degrading at least "80,000 miles of rivers and streams" and "2.5 million acres of lakes and reservoirs."[14]

Author's Note: The views expressed here are the author's own, and not those of any institutional affiliation.

1. Wilson Rawls, Where the Red Fern Grows 18 (1961).
2. Doug Thompson, *Almost 18 Years Later, Oklahoma Wins Lawsuit Against Arkansas Poultry Firms Over Illinois River Pollution*, Nw. Ark. Democrat Gazette (Jan. 20, 2023), https://www.nwaonline.com/news/2023/jan/20/almost-18-years-later-nwoklahoma-wins-lawsuit/.
3. *Id.*
4. U.S. Army Corps of Engineers, *Tenkiller Lake Recreation*, https://www.swt.usace.army.mil/Locations/Tulsa-District-Lakes/Oklahoma/Tenkiller-Lake/Tenkiller-Lake-Recreation/ (last visited Sept. 11, 2025).
5. *Id.*
6. Oklahoma ex rel. Drummond v. Tyson Foods, Inc., 653 F. Supp. 3d 937, 946 (N.D. Okla. 2023).
7. *Id.*
8. *Id.*
9. 33 U.S.C. §1362(14).
10. U.S. Environmental Protection Agency (EPA), *Basic Information About Nonpoint Source (NPS) Pollution*, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last updated Nov. 22, 2024).
11. *See* 33 U.S.C. §1329 (describing state responsibilities for nonpoint source pollution regulation and federal incentives to adopt best management practices).
12. Grand River Dam Authority, *Illinois River*, https://grda.com/illinois-river/ (last visited Sept. 11, 2025).
13. Kevin DeGood, *A Call to Action on Combating Nonpoint Source and Stormwater Pollution*, Ctr. for Am. Progress (Oct. 27, 2020), https://www.americanprogress.org/article/call-action-combating-nonpoint-source-stormwater-pollution/.
14. *Id.*

While nonpoint source pollution can take many forms, nutrient and sediment runoff are the most prevalent.[15] However, heavy metals, pesticides, oils, and other chemicals also leach into groundwater and waterways across the country,[16] while land modification and urban runoff worsen water quality, too.[17] All this pollution, intrinsically harmful, causes second- and third-order effects, like the algae blooms and fish kills the Illinois River has suffered.[18] Though states may disagree on the proper degree of regulation that pollution requires, water pollution does not stop at state borders; loosely regulated states still impair their neighbors' water quality.

The federal common law of nuisance can help address the nonpoint source pollution problem. By reviving this tort, the states would regain a powerful tool to defend their environments from out-of-state harm. Part I of this Comment discusses a recent decision upholding this approach in Oklahoma. Part II explains how, prior to the CWA, federal courts resolved interstate disputes and compensated states for harm out-of-state actors caused to their citizens, but how after the Act's passage, the U.S. Supreme Court retreated, finding that the Act preempted federal common law.

Part III notes the CWA's many shortcomings, including its failure to regulate nonpoint source pollution. Part IV argues that reviving federal common-law nuisance could provide states an effective tool, under certain conditions, to combat nonpoint source pollution emanating from outside their territory, and that this approach makes sense legally and would complement existing regulation. Part V concludes.

I. Oklahoma Takes Action, Reviving Federal Common-Law Nuisance

In 2005, to clean up the Illinois River, Oklahoma's attorney general filed suit in federal court against Arkansas poultry producers, including Tyson Foods, alleging legal responsibility for the river's deterioration.[19] Buried among a litany of other alleged violations, Oklahoma asserted that Arkansas poultry pollution constitutes a "federal common-law nuisance," a tort states once utilized to hold each other accountable for transboundary environmental harm.[20]

Federal common-law nuisance evolved to fulfill the Supreme Court's duty to resolve interstate water disputes. The Court once placed great importance on providing a forum for states to settle these disputes, reasoning that water issues, if arising "between independent sovereignties, might lead to war."[21] In nuisance cases like the dispute between Oklahoma and Tyson, where the "ecological rights of a state" were harmed "from sources outside the State's own territory," judge-made federal common law governed.[22] States sued each other—or each other's citizens—for unreasonable interference with the public's rights, relying on neutral federal law to enjoin harmful transboundary pollution.[23]

However, the Supreme Court apparently killed off this federal cause of action four decades ago.[24] With the passage of the CWA, the U.S. Congress created a complex water pollution regulatory scheme, introducing new statutory law into a field previously regulated under the federal common law.[25] Because the CWA now "comprehensively" regulated water pollution, a pair of 1981 Supreme Court cases seemed to hold that the Act extinguished the doctrine of federal common-law nuisance as applied to interstate water pollution disputes.[26]

In 2023, after years of litigation, Judge Gregory Frizzell of the U.S. District Court for the Northern District of Oklahoma charted a different course, dusting off this old tort and putting it back to work. The court found the defendant corporations liable "for federal common law nuisance with respect to . . . their conduct in the Arkansas portion of the [Illinois River watershed],"[27] and distinguished the two 1981 Supreme Court cases.[28] The interstate disputes in those two cases stemmed from point source pollution, while Oklahoma's current degraded water quality stems from the nonpoint source pollution that Tyson and its co-defendants have caused.[29] The district court determined that since the CWA does not comprehensively regulate nonpoint source pollution, instead leaving regulation largely to the states, federal common-law nuisance still exists as a cause of action in nonpoint source pollution cases.[30] As a result, Arkansas defendants must now develop remedial measures to undo the harm they inflicted on Oklahoma's scenic river.[31]

To help plug the nonpoint source pollution leaks in the CWA's regulatory façade, federal courts should follow the Northern District of Oklahoma's lead, revive federal common-law nuisance, and allow plaintiffs to put this regulatory tool to use. Far from conflicting with the CWA, reviving the old tort would support the Act's ambition to "prevent, reduce, and eliminate pollution" in the nation's waters by ensuring polluters can no longer hide behind

15. Office of Water, U.S. EPA, Nonpoint Source Pollution: The Nation's Largest Water Quality Problem (1996), https://nepis.epa.gov/Exe/ZyPDF.cgi/20004PZG.PDF?Dockey=20004PZG.PDF.
16. *Id.*
17. *Id.*
18. Oklahoma ex rel. Drummond v. Tyson Foods, Inc., 653 F. Supp. 3d 937, 946 (N.D. Okla. 2023).
19. *Id.* at 1045.
20. *See generally* Robert Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 Ala. L. Rev. 717, 719-60 (2004) (describing the history of federal common-law nuisance before preemption).
21. Missouri v. Illinois, 200 U.S. 496, 518 (1906).
22. Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91, 100 (1972).
23. *Id.* at 105-08.
24. *See, e.g.*, Percival, *supra* note 20, at 768 (noting the "demise" of the tort, because "the federal common law of nuisance has been preempted in interstate water pollution disputes").
25. Illinois v. Milwaukee (*Milwaukee II*), 451 U.S. 304, 317-18 (1981).
26. *Id.*; Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).
27. Oklahoma ex rel. Drummond v. Tyson Foods, Inc., 653 F. Supp. 3d 937, 1051-54 (N.D. Okla. 2023).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

loose state laws when their harm traverses borders.[32] As the Supreme Court once declared, no state should be "compelled to lower itself to the more degrading standards of a neighbor."[33] Federal common-law nuisance would give the states and their citizens a powerful tool to protect their water quality.

II. Old Solutions: The History of Federal Common-Law Nuisance

Nuisance law originated centuries ago to punish "infringement of the rights of the crown," slowly developing into the doctrine plaintiffs invoke today to defend their legal rights.[34] The original nuisance crime protected against "interference with the interests of the community at large," such as public health, public safety, and common natural resources such as streams.[35] This evolved into the modern public nuisance tort, which remedies "an unreasonable interference with a right common to the general public."[36] Importantly, the law treats unreasonable "pollution of surface waters, ground waters, or water in watercourses and lakes" that causes an "invasion of one's interest in the use and enjoyment of land or water" as a nuisance.[37]

Although originally only government plaintiffs could bring nuisance actions, that limitation has long since eroded away. Private actors now readily bring "private nuisance" claims for particularized harms they suffer.[38] While the traditional rule that only governments can bring a nuisance claim on behalf of the public has also softened,[39] governments are still more likely to obtain injunctions putting an end to pollution entirely.[40]

Private plaintiffs usually only receive damages in public nuisance suits, significantly reducing their incentive to bring a lawsuit.[41] Since the particularized harm private plaintiffs suffer may be quite small, even if overall harm to the community is quite large, these plaintiffs may only receive small damages awards in public suits.[42] Depending on the jurisdiction, standing doctrine's requirement for particularized harm may frustrate private plaintiffs from bringing public nuisance suits at all.[43]

Unlike many modern regulatory strategies, nuisance law does not prospectively ban conduct, instead compensating victims for harm they suffer or, in the case of a public plaintiff, enjoining future harm.[44] Thus, in comparison with other forms of regulation that proscribe specific kinds of conduct, nuisance law is flexible enough to address new types of pollution because it remedies pollution's effects. In economic terms, nuisance compensates victims for the externalities pollution imposes.[45]

Because only unreasonable interferences with rights or interests can constitute a nuisance, polluters may, under certain circumstances, cause some small amounts of harm without liability (so long as their conduct is not a nuisance as a matter of law).[46] But when their actions do constitute a nuisance, polluters face either an injunction or damages, forcing them to internalize their costs. In theory, even absent an injunction, damages should incentivize polluters to abate their pollution.[47]

A. *The Rise of Federal Common-Law Nuisance*

The federal judiciary's duty to settle interstate water disputes arises from the idea that the states, having ceded their sovereign rights to resolve disputes diplomatically, require a tribunal where they can litigate disputes. After all, the Supreme Court noted, when the first 13 states united, they made the "forcible abatement of outside nuisances impossible."[48] The states thus require some "possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in [the Supreme Court]."[49] Analogizing the states to small European countries, the Supreme Court noted that if an upstream "State upon a navigable river like the Danube" caused pollution harm downstream, such harm would "amount to a *casus belli*," a legally sufficient justification for war in international law.[50] Therefore, federal law provided a forum so "a [s]tate with high water-quality standards may well ask that its strict standards be honored and that [the state] *not be compelled to lower itself to the more degrading standards of a neighbor*."[51]

The idea that the states, as quasi-sovereigns, require access to the federal courts to settle environmental harms echoes still today in modern case law. In a climate change suit, the Supreme Court noted that, "when a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, [and] it cannot negotiate an emissions treaty with China or India . . . ."[52] The Court thus granted Massachusetts "special solicitude" to sue the federal government, despite potentially failing traditional standing analysis.[53]

To discharge this duty, the Supreme Court has for nearly two centuries created federal common law to resolve

32. 33 U.S.C. §1251.
33. *Milwaukee I*, 406 U.S. 91, 107 (1972).
34. Restatement (Second) of Torts §821(b) (Am. L. Inst. 1979).
35. *Id.*
36. *Id.*
37. *Id.* §832.
38. Robin Kundis Craig et al., Water Law: Concepts and Insights 223-24 (2017).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *See* Percival, *supra* note 20, at 774 ("the common law of nuisance performed primarily a kind of 'zoning' function by encouraging dischargers to relocate to areas where they would cause less damage").
45. Keith N. Hylton, The Economics of Public Nuisance Law and the New Enforcement Actions 43-47 (2010).
46. *See* Craig et al., *supra* note 38, at 222 (comparing nuisance law to riparian doctrines balancing the reasonableness of water uses).
47. *Id.* at 224.
48. *Milwaukee I*, 406 U.S. 91, 104 (1972).
49. *Id.*
50. *Id.* at 107.
51. *Id.* (emphasis added).
52. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 520 (2007).
53. *Id.*

transboundary water cases between the states.[54] Due to the "uniquely federal concern . . . [of] the resolution of interstate controversies," the *Erie* doctrine's admonition against federal common-law creation is inapplicable to interstate water law.[55] The Court has developed several interrelated common-law doctrines that "are inherently and fundamentally similar."[56]

One doctrine is federal common-law nuisance, which the Court first formally applied in 1901 to resolve a water pollution case between Missouri and Illinois.[57] The Court created another long-standing "close cousin" doctrine, equitable apportionment, to resolve water diversion and water quantity cases.[58] These lines of cases overlap; whether a case is decided on equitable apportionment or federal common-law nuisance grounds can be a "matter of perspective."[59] Importantly, in all of its interstate water cases, the Court has stressed that "equitable principles, rather than each state's own water law," applies, providing the states a neutral set of dispute resolution rules.[60]

The federal common-law nuisance strand of this interrelated web of doctrines found its most resounding (and final) endorsement in a 1972 case, *Illinois v. Milwaukee* (*Milwaukee I*). In that case, the Court reaffirmed that "when we deal with air and water in their ambient or interstate aspects, there is a federal common law."[61] When handling interstate pollution disputes under the federal common law, the Court "has spoken in terms of a public nuisance."[62] In these cases, the Court has "no fixed rules that govern" besides the "informed judgment of the chancellor" to ensure that "a State with high water-quality standards" will have "its strict standards . . . honored."[63] The Court drew on historic nuisance and equitable apportionment cases to support the idea that states that suffer an environment "destroyed or threatened by the act or persons beyond its control" must have a remedy through federal common-law nuisance.[64]

B. Milwaukee II, Sea Clammers, and the End of Federal Common-Law Nuisance

In 1972, the same year the Supreme Court decided *Milwaukee I*, Congress amended the Federal Water Pollution Control Act (FWPCA), creating the modern CWA.[65] These amendments were "a total restructuring and complete rewriting of the existing water pollution legislation."[66] Through the Act, Congress intended to establish "a comprehensive long-range policy for the elimination of water pollution."[67]

While the CWA announced the lofty goal of eliminating water pollution, the Supreme Court used the Act as a justification for striking federal common-law nuisance from the books.[68] In 1981, the Supreme Court heard an appeal in the still-ongoing *Illinois v. Milwaukee* litigation (*Milwaukee II*). The Court reversed its previous *Milwaukee I* decision, determining that "no federal common law remedy was available to the states for water pollution" because Congress, by passing the 1972 amendments to the FWPCA, had enacted "an all-encompassing program of water pollution regulation" precluding a tort remedy.[69] In *Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, the Supreme Court reiterated that "the federal common law of nuisance in the area of water pollution is *entirely* pre-empted."[70]

In reaching the *Milwaukee II* decision, the Court relied heavily on two facts. First, the CWA explicitly regulates point source pollution. Second, the U.S. Environmental Protection Agency (EPA) had regulated the Milwaukee pollution at issue through point source pollution permitting. Under the CWA, the Court noted, "every point source discharge is prohibited unless covered by a permit."[71] The overflows at issue in that case were "point source discharges and, under the Act . . . prohibited."[72] Thus, there was no longer a regulatory role for federal common-law nuisance, as Illinois could now petition EPA to deny or modify a permit if its citizens were harmed by out-of-state point source pollution.[73]

In *Sea Clammers*, a vigorous dissent argued that *Milwaukee II* had not actually preempted federal common-law nuisance, but instead had made CWA compliance a "complete defense" to federal common-law nuisance.[74] In doing so, the majority had, in the dissent's eyes, contradicted CWA legislative history clarifying that "compliance with requirements under this Act would not be a defense to a common law action for pollution damages."[75]

If the *Sea Clammers* dissenters correctly characterized *Milwaukee II* as creating a CWA compliance defense to federal common-law nuisance, then a later case, *International Paper Co. v. Ouellette*, made compliance with state nuisance law a defense, too. After a New York paper mill began emptying waste through a pipe "ending a short distance before the state boundary" into Lake Champlain, which straddles the border between New York and Ver-

54. The Court applied federal common-law nuisance to resolve interstate river disputes as far back as 1851. One case involved a Virginia bridge that blocked Pennsylvanian ships. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 621 (1851).
55. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); Percival, *supra* note 20, at 769.
56. Craig et al., *supra* note 38, at 173.
57. Missouri v. Illinois, 180 U.S. 208, 218-48 (1901).
58. Craig et al., *supra* note 38, at 174.
59. *Id.* at 172.
60. *Id.* at 176.
61. *Milwaukee I*, 406 U.S. 91, 103 (1972).
62. *Id.* at 106.
63. *Id.* at 107-08.
64. *Id.* at 104-05.
65. *Milwaukee II*, 451 U.S. 304, 317-18 (1981).
66. *Id.*
67. *Id.* at 318-19.
68. Some justices' personal papers suggest they found interstate environmental suits too complex and unwieldy and were happy to kill off the tort. *See generally* Percival, *supra* note 20, at 717.
69. *Milwaukee II*, 451 U.S. at 318.
70. 453 U.S. 1, 22 (1981) (emphasis added).
71. *Milwaukee II*, 451 U.S. at 318.
72. *Id.* at 320.
73. *Id.* at 326.
74. *Sea Clammers*, 453 U.S. at 31 (Stevens, J., dissenting).
75. *Id.*

mont, the lake filled with "foul, unhealthy, and smelly" pollutants rendering it "unfit for recreational use."[76]

Vermont landowners sued in Vermont court, alleging a violation of Vermont's continuing nuisance doctrine.[77] The New York company appealed the suit to the Supreme Court, alleging that the CWA preempted all state nuisance law but the polluting state's law.[78] Despite the combined efforts of Vermont's attorney general, 13 other state attorneys general, and the U.S. solicitor general supporting the landowners, the Court agreed with the mill.[79] No state submitted an amicus brief supporting the mill.[80]

The Court reached its conclusion that any court "must apply the law of the State in which the point source is located" by relying on *Milwaukee II*.[81] The Court first noted its previous decision that "federal legislation now occupied the field, pre-empting all *federal* common law."[82] Then, it determined that the CWA's regulatory framework envisions state control over that state's territorial water but a "much lesser role for states" over shared water bodies.[83] The CWA's comprehensive regulatory framework "left no room for supplementary state regulation."[84] The Court feared that applying the law of the state affected by pollution would "override . . . the policy choices made by the source state"[85] and that "the application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty."[86]

The result of the *Milwaukee II*, *Sea Clammers*, and *International Paper Co*. series of cases is to offer states a federal forum for dispute resolution,[87] but to apply the law of the state where the pollution is emitted. CWA compliance and state law compliance are, in effect, complete defenses for a nuisance causing transboundary harm.

III. New Problems: The CWA and Nonpoint Source Pollution

No matter how "comprehensive" the *Milwaukee II* Court may have found the CWA, the Act leaves nonpoint source pollution outside the scope of its core provisions. The Act ambitiously aims to eliminate pollution, or the "man-made or man-induced alteration of the chemical, physical, biological, and radiological activity of the water."[88] Nevertheless, its main enforcement provision, §301, more narrowly commands that "the discharge of any *pollutant* by any person shall be unlawful," except with certain types of permits.[89] "Discharge of a pollutant" is a term of art that only applies to the "addition of any *pollutant* to navigable waters from any *point source*."[90] Point sources are limited to "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[91]

Any pollution not falling within this definition is nonpoint source pollution. Section 301 does not regulate any pollution that does not both enter the hydrosphere through a point source and meet the definitional limitations of "pollutant."[92] Indeed, some courts have characterized nonpoint source pollution as "nothing more than a water pollution problem not involving a discharge from a point source."[93]

Since the federal government lacks "the authority to control non-point source discharges through a permitting process," regulation is mostly a state responsibility.[94] CWA §319 devolves regulatory responsibility for nonpoint source pollution to the states.[95] That section does not "require states to penalize nonpoint source polluters who fail to adopt best management practices."[96] Instead, it limits the federal government's regulatory authority to offering the states incentives and encouragement.[97] Congress has traditionally considered nonpoint source pollution "an issue addressed by state and local governments."[98]

Although some other CWA sections touch on nonpoint source pollution, none truly regulate it at the federal level. Section 303 of the Act requires the states to set additional safeguards, called "total maximum daily loads," for water bodies that fail to meet certain water quality standards.[99] Total maximum daily loads limit "the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined," including nonpoint sources.[100] Yet, courts have held that "while the CWA requires states to designate water standards and identify bodies of water that fail to meet these standards, nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources."[101]

Despite nonpoint source pollution's exclusion from §301 regulation, it constitutes the largest source of pollution clogging our country's rivers. Nonpoint source pollution includes pollution that winds its way into our watersheds from deposition, runoff, and snowmelt. Agricultural run-

76. International Paper Co. v. Ouellette, 479 U.S. 481, 484 (1987).
77. *Id.*
78. *Id.*
79. *Id.* at 483.
80. *Id.*
81. *Id.* at 487.
82. *Id.* at 489 (emphasis added).
83. *Id.* at 490.
84. *Id.* at 491.
85. *Id.* at 496.
86. *Id.*
87. *Id.* at 500.
88. 33 U.S.C. §1362(19).
89. *Id.* §1311 (emphasis added).
90. Pollutants are limited to "spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* §1362(6) (emphasis added).
91. The term does not include "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* §1362(14).
92. Indeed, some cases have even found that fish killed by a dam are not pollutants, so dams need not be regulated under 33 U.S.C. §1311. National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988).
93. Defenders of Wildlife v. Environmental Prot. Agency, 415 F.3d 1121, 1124 (10th Cir. 2005).
94. *Id.*
95. 33 U.S.C. §1329.
96. Natural Res. Def. Council v. Environmental Prot. Agency, 915 F.2d 1314, 1318 (9th Cir. 1990).
97. *Id.*
98. Craig et al., *supra* note 38, at 229.
99. 33 U.S.C. §1313.
100. Defenders of Wildlife v. Environmental Prot. Agency, 415 F.3d 1121, 1124 (10th Cir. 2005).
101. *Id.*

off dumps leftover "fertilizers, herbicides, and insecticides" into rivers, poisoning wildlife, unbalancing nutrient cycles, and contributing to algae blooms.[102] Rainfall in urban areas pushes litter, petrochemicals, and the toxins omnipresent in industrial society into waterways.[103] Forestry and construction increase sediment erosion.[104] Abandoned mines leach acids and industrial chemicals into the water.[105] Human alterations to channels, banks, and stream flows, including damming, change water flow patterns.[106]

As climate change worsens, so too will nonpoint source pollution problems. Climate change increases precipitation volatility, and thus fewer precipitation events may occur, in some regions. When precipitation does occur, it will be more severe, causing more erosion and jolting pollution into waterways. As temperatures increase, scientists expect algae blooms to become larger, releasing cyanotoxins into the water and poisoning ecosystems. Research is uncovering new types of pollution dangerous to human health that can enter waterways through nonpoint sources. Per- and polyfluoroalkyl substances (PFAS), which cause increased risks of cancer and infertility, often percolate into groundwater.[107]

IV. Reviving Federal Nuisance Law to Remedy Nonpoint Source Pollution

Federal courts should follow the Northern District of Oklahoma's lead and continue recognizing the federal common-law nuisance tort for cases involving nonpoint source pollution. Specifically, courts should acknowledge that, since *Milwaukee II* and *Sea Clammers* both involved point source pollution, the CWA does not preclude nonpoint source pollution federal common-law nuisance suits.

A. *Federal Nuisance Suits Would Help Close the CWA's Nonpoint Source Loophole*

Reviving the federal common-law nuisance tort would offer states and their citizens another legal tool to reduce the nonpoint source pollution in their water. Under the current framework, states with strict nonpoint source pollution rules must endure their more loosely regulated neighbors' actions. Courts will apply pollution source-state law wherever plaintiffs sue them; so long as polluter conduct is legal where it occurred, polluters are immunized from liability.

Recognizing the limits of *Milwaukee II* and *Sea Clammers* would grant pollution victims a neutral, equity-based law to apply, so polluters would no longer be able to hide behind loose state pollution laws when their harm impacts out-of-state residents. Additionally, while federal common-law nuisance suits cannot directly require loosely regulated states to regulate more, states suffering from pollution could use the tort to force out-of-state polluters to internalize the costs of their actions, incentivizing abatement or enjoining the harmful conduct altogether, thereby reducing nonpoint source pollution in loosely regulated states.

As a legal matter, the *Sea Clammers* declaration that "the federal common law of nuisance in the area of water pollution is *entirely* pre-empted" must be hyperbole.[108] Federal common-law nuisance is entangled with equitable apportionment, which remains on the books. The two doctrines are in some circumstances difficult to distinguish, for the water quantity issues that equitable apportionment often handles can overlap significantly with the water quality issues federal common-law nuisance law regulates.

Because some nonpoint source pollution issues could also be equitable apportionment issues, federal common law still regulates some nonpoint pollution under equitable principles. Take dam construction and water diversion. While both acts can cause nonpoint source pollution, these acts can also form the basis for an equitable apportionment suit.

B. *The Causation Conundrum: Some Polluters May Escape Liability*

This reform would be most effective at combatting highly concentrated nonpoint source pollution that can be attributed to a single actor or group of actors. Federal common-law nuisance is unlikely to be able to effectively regulate nonpoint source pollution caused by numerous identical, dispersed sources. Even if federal common-law nuisance is an equitable cause of action without formal elements, fairness requires that, before a polluter can be held liable, any harm suffered must be connected to that polluter's conduct.

This became a major issue in the *Oklahoma v. Tyson Foods* case due to the sheer number of poultry producers emitting nonpoint source pollution: how much damage could be fairly attributed to each?[109] Non-livestock agricultural runoff mainly contributes nutrients to waterways; pinpointing which farm a molecule of herbicide came from, when many farms use the same herbicide, is scientifically and legally impossible. Similarly, much nonpoint source pollution is urban runoff; tracing oil back to a specific car, for example, is impossible, too.

However, despite causation challenges, many nonpoint source polluters can still be held accountable with this tort. Livestock waste, as in the *Oklahoma v. Tyson Foods* case, can still be attributed to a specific subset of farms. Abandoned mines may leach specific (so, traceable) heavy metals

102. U.S. EPA, *supra* note 10.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

108. Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (emphasis added).
109. Oklahoma ex rel. Drummond v. Tyson Foods, Inc., 653 F. Supp. 3d 937, 1046-49 (N.D. Okla. 2023).

into groundwater. PFAS runoff can be attributed to military bases and fire departments that use those chemicals.[110] Sedimentation may be traceable to specific water diversions or silviculture sites. The more unique the type of pollution, the smaller the number of polluters of a given pollutant, or the more highly concentrated the pollution discharge, the easier causation will be to prove. Moreover, causation will pose less of a burden if pollution's victims are located closer to a river's headwaters or in smaller watersheds with fewer upstream polluters.

V. Conclusion

Federal judges should follow the Northern District of Oklahoma's lead and revive the old federal common-law nuisance tort to combat nonpoint source pollution. Federal nuisance law, far from conflicting with the CWA, would support the Act's ambition to "prevent, reduce, and eliminate pollution" in the nation's waters by ensuring polluters can no longer hide behind lax local state laws when they cause harm across borders.[111] This reform would also help plug capacious nonpoint source gaps in the CWA's regulatory scheme.

Nevertheless, this revived tort would not be a panacea for the nonpoint source pollution problem. Some classes of polluters, due to thorny causation issues, will likely escape liability. Nevertheless, nonpoint source pollution remains the largest water quality issue our country faces, and this tort would help stem at least some of that pollution. The nonpoint source pollution problem is only likely to become worse in the coming years as we discover new water pollution threats like PFAS, microplastic pollution, and pharmaceutical contamination. Federal common-law nuisance may provide the states a new tool to combat these threats, to the extent these pollutants enter the hydrosphere through nonpoint sources and then sneak across state lines.

The protagonist in *Where the Red Fern Grows*, Billy, grew up and left his home on the Illinois River's banks. Yet, decades later, Billy dreamed he could "go back—back to those beautiful hills . . . to walk again on trails I walked in my boyhood days . . . to face a mountain breeze and smell the wonderful scent of the redbuds, and papaws, and the dogwoods."[112] Thanks to the Northern District of Oklahoma's decision to revive the federal common-law nuisance tort, Billy's children may one day see the same "clear blue waters of the Illinois River" their father loved, too.[113]

110. Perry Beeman, *Scientists Find "Forever Chemicals" Near CR Airport, Push for Widespread Testing*, Iowa Cap. Dispatch (Apr. 1, 2021), https://iowacapitaldispatch.com/2021/04/01/scientists-find-forever-chemicals-near-cr-airport-push-for-widespread-testing/.
111. 33 U.S.C. §1251.
112. Rawls, *supra* note 1, at 581.
113. *Id.* at 18.