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Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States

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Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States

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I. INTRODUCTION

The Outstanding National Resource Waters (ONRW) provision of the Clean Water Act (CWA or "the Act") is an important tool that provides for the protection of our Nation's most treasured water bodies.¹ This provision provides that "[w]here high quality waters constitute an outstanding National resource, such as waters of National Parks, State parks and wildlife refuges, and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."² Designation of a water body as an ONRW is important because it provides the maximum amount of protection to water quality under the CWA. ONRW classification ensures that no permanent degradation of water quality can occur.³ This maximum level of water quality protection is essential to the

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1. 40 C.F.R. § 131.12(a)(3) (1998).
2. *Id.*
3. EPA REGION VIII, GUIDANCE: ANTIDEGRADATION IMPLEMENTATION 11 (Aug. 1993) (hereinafter REGION VIII GUIDANCE).

long-term health of the watersheds of the Northern Rocky Mountains. However, the provision is often underutilized and few citizens or clean water advocates have sought to invoke ONRW protection.

In the Northern Rocky Mountain States of Montana, Idaho, and Wyoming, water quality has been, and continues to be, degraded from land management activities such as logging, mining, road building, grazing, and oil and gas development; from unmitigated development; and from dams and water diversions. This Article discusses the potential for the public to use the ONRW provision to protect the Regions' outstanding ecological and recreational waters from further degradation and impairment.

The public plays an essential role in the designation of ONRWs in the Northern Rocky Mountain States. As discussed later in this Article, it is the public that initiates the ONRW designation process by petitioning the state for designation of a water body as an ONRW. This public participation is significant because it enables the public to work proactively for the protection of important watersheds. The ONRW designation procedures established by the Environmental Protection Agency (EPA) and by individual states differ by EPA Region and by state.

Part II outlines the Clean Water Act's antidegradation policy, which houses the ONRW provision. Part III then discusses the ONRW designation procedures for the Northern Rocky Mountain states of Montana, Idaho and Wyoming.

II. AN INTRODUCTION TO THE CLEAN WATER ACT SCHEME

The Clean Water Act (CWA) was enacted to protect and restore the Nation's water resources.⁴ The Act's goals are "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."⁵

To achieve these goals, the CWA establishes a two-pronged approach to water quality protection and restoration. The first prong places limits on effluent emissions from point sources.⁶ The National Pollutant Discharge Elimination System (NPDES) enforces these limits by requiring a permit for any discharge of a pollutant from a point source into the waters of the

4. Federal Water Pollution Control Act of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. § 1251-1387 (1994)).

5. 33 U.S.C. § 1251(a) (1994).

6. 33 U.S.C. § 1311 (1994). "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agriculture stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (1994).

United States.⁷ This permitting system is designed to eventually require polluters to use the “best available technology,” to eliminate discharges as technology improves.⁸

The second prong provides additional protections not covered by the technologically based NPDES requirements. The Act and the EPA regulations require states to develop water quality standards that protect public health and welfare, provide protection for fish and wildlife, and enhance water quality.⁹ The ONRW provision is found in the water quality standards regulations.

Water quality standards are administered through the federal-state partnership embodied throughout the CWA. States develop the standards and programs required under the Act. States then submit their standards and programs to the EPA, who must ensure compliance with the Act. If a state fails to develop adequate water quality standards, the EPA must step in and develop standards that provide the protection required by the Act.¹⁰ Any time a state revises or adopts new standards, the EPA must again review the new or revised standards to ensure compliance with the Act.¹¹

A. Water Quality Standards

The state’s water quality standards must contain at least three elements:

1. Designated uses for different classes of water;¹²

7. § 1311.

8. § 1311(b)(2)(A); *see also* § 1311(b)(1)(A); Steve Mashuda, Clean Water Act: Water Quality Standards, Antidegradation Policy and TMDLs, Natural Resource Laws & Public Lands Protection Conference, June 12-13, 1998.

9. 33 U.S.C. § 1313(a) (1994); 40 C.F.R. § 131 (1998).

10. § 1313(a). In addition, Indian tribes may assume administration of a water quality standards program if the tribe can be “reasonably expected to . . . carry out the functions of an effective water quality standards program.” 40 C.F.R. § 131.8 (1998). Tribal authority extends only to the Reservation. A Tribe’s jurisdiction solely reaches “water resources which are within the borders of the Indian reservation.” § 131.8(a)(3). In order to support tribal governments in assuming authority to manage water quality, the EPA cooperates with the tribes to resolve any deficiencies in their program. Once the EPA determines that a tribe qualifies to administer its own standards program, the tribe is subject to the same CWA requirements and EPA regulations as states. U.S. EPA, WATER QUALITY STANDARDS HANDBOOK 1-17 (2d ed., August, 1994) (Hereinafter, HANDBOOK).

11. § 1313(c)(2)(A).

12. 40 C.F.R. §§ 131.6(a), .10(a) (1998). When designating uses, the states must take into consideration “the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.” § 131.10(a).

There is a distinction, important to antidegradation policy, between existing and designated uses: Designated uses are “those uses specified in water quality standards for each water body or segment whether or not they are being attained.” 40 C.F.R. § 131.3(f) (1998). Existing uses are those uses actually attained in the water body on or after November 28, 1975 (the date of EPA’s initial water quality regulation), whether or not they are included in water quality standards. § 131.3(e). “Designat-

2. Specific water quality criteria “based on sound scientific rationale” designed to ensure the preservation of the designated uses,¹³ and
3. An antidegradation policy regarding water quality standards and procedures for implementation to prevent the further degradation of the states water quality.¹⁴

Whenever a state reviews, revises or adopts new water quality standards, the state must provide the public with information regarding these changes and an opportunity to be heard.¹⁵ Public participation is an important part of a state’s water quality standards program, because it enables the public to have a voice in, and to be informed of, the water quality standards of

ed uses focus on the attainable condition while existing uses focus on the past or present condition. [The regulation] then links these two broad categories in a manner which intends to ensure that states and tribes designate appropriate water uses, reflecting both the existing and attainable uses of each water body.” 63 Fed. Reg. 36,742, 36,780 (1998) (to be codified at 40 C.F.R. pt. 131); § 131.10.

13. 40 C.F.R. §§ 131.6(c), .11(a)(1998). Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. *Id.* Water quality criteria may be expressed either numerically or narratively. Narrative criteria may be used where numerical criteria cannot be established or to supplement numerical criteria. § 131.11(b)(2). Narrative criteria are descriptions of conditions necessary for the water body to attain its designated use. 63 Fed Reg. at 36,762. For example, a narrative criterion might require all waters to be “free from suspended solids or other substances that enter the waters as a result of human activity and that will settle to form putrescent or otherwise objectionable sludge deposits, or that will adversely affect aquatic life.” John Harleston, *What is Antidegradation Policy: Does Anyone Know?*, 5 S.C. ENVTL. L.J. 33, 35 (1996). “Water quality criteria are levels of individual pollutants or water quality characteristics, or descriptions of conditions of a water body that, if met, will generally protect the designated use of the water . . . Water quality criteria are developed to protect aquatic life and human health, and in some cases wildlife, from the deleterious effects of pollutants and other effects of pollution.” 63 Fed. Reg. at 36,762.

14. 40 C.F.R. § 131.12 (1998); HANDBOOK, *supra* note 10, at 4-2. Antidegradation policy is not delineated in the text of the CWA. The only explicit reference made to “antidegradation” in the CWA states, “For waters . . . where the quality of such waters equals or exceeds levels necessary to protect the designated use . . . any effluent limitation . . . may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.” 33 U.S.C. § 1313(d)(4)(B) (1994). The first antidegradation policy statement was developed by the Secretary of the Interior in 1968 and was included in EPA’s first Water Quality Standards Regulations. 40 Fed. Reg. 55340-41 (Nov. 28, 1975); HANDBOOK, *supra* note 10, at 4-1. The present regulation is a refinement of that policy, which was promulgated by the EPA in 1983. 48 Fed. Reg. 51402 (1983). The 1987 Amendments to the Clean Water Act incorporate EPA’s antidegradation policy by reference in 33 U.S.C. § 1313(d)(4)(B). *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 705 (1994). EPA has developed non-binding guidelines which outline and interpret the requirements of the antidegradation policy. See HANDBOOK, *supra* note 10, at 4-1 to -13; REGION VIII GUIDANCE, *supra* note 3, at 5-8; Mashuda, *supra* note 8, at 4.

15. EPA regulations require states to “hold a public hearing for the purpose of reviewing water quality standards[.] . . . proposed water quality standards revisions and supporting analyses shall be made available to the public prior to the hearing.” 40 C.F.R. § 131.20(b) (1998). The CWA requires that a state “shall, from time to time hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.” § 1313(c)(1); HANDBOOK, *supra* note 10, at 6-1.

the state.¹⁶

B. Antidegradation Policy--An Important Component of Water Quality Standards

The EPA's antidegradation regulation specifies the framework to be used by states when making decisions regarding changes in water quality.¹⁷ The regulation delineates three "tiers" of water.¹⁸ Each tier offers a different degree of water quality protection.¹⁹ The state's implementation procedures must be designed to achieve the different degrees of protection by prohibiting any degradation in some waters, minimizing the impacts of degrading activities in other waters, and assuring that existing uses are maintained in all water bodies.²⁰ "The antidegradation implementation procedures specify how the State will determine on a case-by-case basis whether, and to what extent, water quality may be lowered."²¹

EPA's antidegradation regulation also requires public participation in any decision by the state to change water quality.²² The EPA allows the states to decide how best to receive public comment--states may hold public hearings or provide public notice and the opportunity for the public to request a hearing.²³ Public participation in antidegradation decisions ensures the public will be aware of, and can provide comment on, any lowering of water quality before the changes are made.²⁴ Through public comment and hearings, citizens can pressure the state to implement an

16. At a minimum, states are required to hold a public hearing when reviewing, revising and adopting new water quality standards. However, "[s]tates are urged to involve the public more actively in the review process. Involvement of the public includes the involvement of citizens affected by standards decisions, the regulated community . . . , and inter-governmental coordination with local, State, and Federal agencies, and Indian Tribes with an interest in water quality issues. This partnership will insure the sharing of ideas, data, and information, which will increase the effectiveness of the total water quality management process." HANDBOOK, *supra* note 10, at 6-3.

17. 63 Fed. Reg. at 36,780.

18. *Id.*

19. *Id.*

20. Mashuda, *supra* note 8, at 5.

21. HANDBOOK, *supra* note 10, at 4-2.

22. "Antidegradation, as with other water quality standards activities, requires public participation and intergovernmental coordination to be an effective tool in the water quality management process. [The regulation] contains explicit requirements for public participation and intergovernmental coordination when determining whether to allow lower water quality in high quality waters." *Id.* at 4-13. "Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary . . ." 40 C.F.R. § 131.12(a)(2) (1998).

23. HANDBOOK, *supra* note 10, at 4-13.

24. "It is inconsistent with the water quality standards regulation to 'back-door' changes in standards through actions on EIS's, waste load allocations, plans, or permits." *Id.*

aggressive antidegradation policy to prevent the lowering of water quality.

1. Tier One: The Water Quality "Floor"

Tier One establishes as the floor for water quality, the protection and maintenance of existing uses and the level of water quality necessary to protect them.²⁵ Tier One classification applies a minimum level of protection to all waters, which protects even seriously degraded water bodies, by prohibiting any additional pollution that would affect existing uses.²⁶

2. Tier Two: Protection of High Quality Waters

The Tier Two classification adds a second layer of water quality protection to the "floor" of the existing use protection provided by Tier One. Tier Two applies to high quality waters--water bodies where the water quality exceeds the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water.²⁷ The water quality of a Tier Two water body can not be lowered unless it is "necessary to accommodate important economic or social development in the area in which the waters are located."²⁸ This limited exception is intended to apply only in extraordinary circumstances.²⁹ Before any lowering of water quality can occur, the state must conduct an antidegradation review with full public participation.³⁰

25. § 131.12(a)(1).

26. HANDBOOK, *supra* note 10, at 4-3 to -4. "No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards . . . Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed." HANDBOOK, *supra* note 10, at App. G.

27. § 131.12(a)(2).

28. "In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." *Id.*

29. "This provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for fishable/swimmable water, and both cannot be achieved. The burden of demonstration on the individual proposing such activity will be very high. In any case, moreover, the existing use must be maintained and the activity shall not preclude the maintenance of a 'fishable/swimmable' level of water quality protection." HANDBOOK, *supra* note 10, at 4-7; Mashuda, *supra* note 8, at 4.

30. "An Antidegradation Review is the process by which the state determines that antidegradation requirements are satisfied for a given regulated activity that may have some effect on surface water quality." REGION VIII GUIDANCE, *supra* note 3, at 6. "[T]here must be an antidegradation review consisting of: a finding that it is necessary to accommodate important economic or social development in the area in which the waters are located . . .; full satisfaction of all inter-governmental coordination and public participation provisions . . .; and, assurance that the highest

3. Tier Three: Outstanding National Resource Waters (ONRW)

Tier Three provides additional protection for "high quality waters [that] constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance."³¹ These waters are referred to as Outstanding National Resource Waters (ONRWs).³² While ONRWs are often regarded as having the highest quality water, this is not a requirement. Waters that are of exceptional recreational and/or ecological significance need not have particularly high water quality to be provided status as an ONRW.³³

Tier Three provides the highest level of protection to water bodies by prohibiting the lowering of water quality.³⁴ The water quality of an ONRW must be "maintained and protected."³⁵ The only exception to this is for activities that result in short-term and temporary changes in the

statutory and regulatory requirements for point sources . . . and best management practices for nonpoint source pollutant controls are achieved . . ." HANDBOOK, *supra* note 10, at 4-7; § 131.12(a)(2).

31. § 131.12(a)(3).

32. "The rationale for this provision is that some water bodies are of such high quality or of such exceptional ecological significance that the commonly applied designated uses such as warm water fishery and primary contact recreation and criteria to protect those uses are not suitable or may not provide adequate protection to maintain the high water quality or ecological significance in a given water body." 63 Fed. Reg. at 36,786.

33. Waters of exceptional significance are water bodies "that are important, unique, sensitive ecologically, but whose water quality as measured by the traditional parameters such as dissolved oxygen or pH, may not be high or whose characteristics can not be adequately described by these parameters, such as wetlands." 48 Fed. Reg. 51400, 51403 (1983); HANDBOOK, *supra* note 10, at 4-10. EPA Region VIII makes it clear that outstanding water quality is not a prerequisite for ONRW designation. "The only requirement is that the segment have outstanding value as an aquatic resource." REGION VIII GUIDANCE, *supra* note 3, at 9.

34. 63 Fed. Reg. at 36,786.

35. § 131.12(a)(3). "The EPA . . . interprets the 'water quality to be maintained and protected' provision of the regulation as requiring no new or increased discharges to ONRWs and no new or increased discharges to tributaries to ONRWs that would result in lower water quality in the ONRWs. The only exception is for short-term and temporary changes. In contrast, some States, Tribes and EPA Regions have interpreted this provision to allow new discharges as long as the water quality is either maintained or improved. Alternatively, some States, Tribes and Regions have interpreted water quality in terms of the characteristics for which the water body was selected to be an ONRW and have strictly maintained those characteristics while allowing other characteristics to become degraded. The EPA has also allowed a proposed activity that will result in a new or expanded source where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity. This offset is generally called trading . . . This variability in interpretation has created ONRWs across the Nation that vary in terms of the stringency of point source controls, and types of water bodies considered to be ONRWs. Restrictions on physical changes have also been implemented in an inconsistent manner. The EPA is considering whether the existing ONRW protection program is addressing an appropriate universe of waters and whether the flexibility provided under the regulation, in terms of coverage and protection requirements, needs to be further restricted, maintained, or expanded." 63 Fed. Reg. at 36,786-87.

water quality of the ONRW.³⁶ In order to meet the antidegradation policy's objective to maintain and protect existing water quality of ONRWs, the state may not issue a permit for an activity that will *permanently* lower the water quality of an ONRW.³⁷

EPA Region VIII, which includes Montana and Wyoming, provides guidance on the maintenance and protection of the water quality of ONRWs. This guidance prohibits any activity that would result in a new or expanded *direct* source of pollutant to an ONRW,³⁸ and on any activity that would result in a new or expanded *indirect* (e.g. upstream) source of pollutant to an ONRW.³⁹ A direct or indirect source of pollution may be authorized only if the effect on ONRW water quality is temporary and limited.⁴⁰

III. CITIZEN NOMINATION AND DESIGNATION OF ONRWs

The public's infrequent use of the ONRW provision means there are few water bodies designated as ONRWs in the United States.⁴¹ While the current regulations require that each state's antidegradation policy provide a Tier Three (ONRW) level of protection, there is no requirement that any water body be designated as an ONRW outside of National and State parks and wildlife refuges,⁴² nor any direction as to how to do so.⁴³

36. HANDBOOK, *supra* note 10, at 4-10; 63 Fed. Reg. at 36,786. While there is no specific direction regarding the meaning of "temporary" and "short term," EPA views them as limiting water quality degradation for weeks or months, but not years. Region VIII guidelines state "[a]s a *non-binding* rule of thumb, activities with durations less than one month *and* resulting in less than 5% change in ambient concentration will be deemed to have temporary and limited effects." REGION VIII GUIDANCE, *supra* note 3, at 11 (emphasis added). The Guidance provides a list of factors upon which decisions on individual proposed activities may be based.

37. REGION VIII GUIDANCE, *supra* note 3, at 12.

38. *Id.* at 10. "This prohibition applies to new sources, expansion of existing sources in which treatment levels are maintained, and expansion of existing sources in which treatment levels are increased to maintain existing pollutant loading levels. Regardless of effluent quality, any new or expanded direct source is prohibited." *Id.*

39. *Id.* The exception to this is "where such source would have *no effect* on the existing quality of the downstream ONRW segment. Effects on ONRW water quality resulting from upstream sources will be determined based on appropriate techniques and best professional judgment." *Id.* The Guidance provides a list of factors that may be considered in judging whether ONRW quality would be affected. The Guidance also provides for "trading" when there is a proposed activity that will result in a new or expanded upstream source of pollution, "where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity." *Id.* at 10-11. Region VIII "does not believe that an ONRW designation at the middle or bottom of a watershed should prohibit all upstream new or increased sources, *regardless* of water quality effects on the ONRW segment . . . it is reasonable and appropriate to first determine whether ONRW quality will be compromised." *Id.* at 51.

40. *Id.* at 11.

41. "Several States have been reluctant to adopt ONRWs because of concerns regarding the process for adopting ONRW classifications and the level of protection afforded to a water once it is classified as an ONRW." 63 Fed. Reg. at 36,786.

42. See 40 C.F.R. § 131.12(a)(3) (1998). States that have designated ONRW's outside of

Many states do not currently have a Tier Three, ONRW level of protection.

The Northern Rocky Mountain region states cover parts of two EPA Regions--Regions VIII and X. EPA Region VIII, which includes Montana and Wyoming, does provide some guidance for designating ONRWs, which includes public participation. Region X, which includes Idaho, does not provide guidance for ONRW designation. There is no nationwide EPA guidance regarding designation of ONRWs.

EPA Region VIII guidance provides that the public may nominate any state water for ONRW protection at any time by written request. The written request should explain why ONRW designation is warranted based on one or more of the following factors:

(a) *Location*: Is the water body on federal land such as a national park, national wilderness area, or national wildlife refuge?

(b) *Previous Special Designations*: Is the water body currently classified as a wild and scenic river?

(c) *Existing Water Quality*: Is the current quality of the water pristine or naturally-occurring?

(d) *Ecological Value*: Are any threatened, endangered, or sensitive species present?

(e) *Recreational or Aesthetic Value*: Is a special recreational use present such as an outstanding fishery or exceptional rafting or boating?

(f) *Other Factors that Indicate Outstanding Ecological or Recreational Resource Value*: Are rare or valuable wildlife habitats present?⁴⁴

These criteria are not absolute, and citizens are encouraged look to any factor that justifies ONRW status.

Each state may also provide their own ONRW designation process, as long as it is consistent with the federal regulations.⁴⁵ Both Montana and Idaho outline a process for citizen designation of ONRWs.⁴⁶ Wyoming does not currently provide for ONRW designation, however the state is

National and State parks and wildlife refuges include North Carolina (Chatooga River Outstanding Resource Water Area, Henry Fork Outstanding Resource Water Area, Alligator River Area), Louisiana (57 water bodies designated), and Iowa (49 water bodies designated). Jeff T. Darrow, *Protecting Water of Recreational and Ecological Significance: An Analysis of State Practices (1995)* (unpublished M. of Agriculture thesis, Texas A&M University) (on file with author).

43. See 63 Fed. Reg. at 36,786. The EPA recognizes this lack of direction and may address the issue in its revised water quality standards regulation. "One way to address this issue may be for EPA to amend the regulation to require States and Tribes to establish a nomination process with criteria guidelines in which the public could petition the State or Tribe for designation of certain waters as ONRWs." *Id.*

44. REGION VIII GUIDANCE, *supra* note 3, at 9.

45. See § 131.12(a)(3).

46. See *infra* part III.A. & III.B.

currently proposing revisions to its water quality standards which delineates a process for citizen designation of ONRWs.⁴⁷

A. Montana

In Montana, ONRWs are identified as Outstanding Resource Waters (ORWs). Montana defines ORWs as:

all state waters that are located in national parks, national wilderness or primitive areas. ORW also means state waters that have been identified as possessing outstanding ecological, or domestic water supply significance and subsequently have been classified as an ORW by the board.⁴⁸

The "board" to which the definition refers is the Montana Board of Environmental Review.⁴⁹

To get a water body designated as an ORW, the public must submit a petition to the board.⁵⁰ The board may only classify a water body as an ORW if it accepts a petition and finds that the water body identified in the petition constitutes an ORW based on specific criteria,⁵¹ the classification is necessary to protect the ORW, and there is no other effective process available that will achieve the necessary protection.⁵² The board then recommends its findings to the Montana State Legislature who ultimately decides whether or not to designate the water body as an ORW.⁵³ There are no provisions in Montana law for the board or the legislature to make an independent designation of an ORW without a citizen petition.

47. See *infra* part III.C.

48. MONT. ADMIN. R. 17.30.702(18) (1999).

49. The board consists of seven members drawn from across the state who are appointed by the Governor and possesses "quasi-judicial" power. MONT. CODE ANN. § 2-15-3502(2), (4) (1997). In compliance with Montana law, the current board is comprised of an attorney, a public health officer, a local government planner, a hydrologist, a scientist, and a member of the public. § 2-15-3502(2).

50. MONT. CODE ANN. § 75-5-316(3)(a) (1997). "A person may petition the board for rulemaking to classify waters as outstanding resource waters. The board shall initially review a petition against the criteria identified in subsection (3)(c) to determine whether the petition contains sufficient credible information for the board to accept the petition." *Id.*

51. "The board shall consider the following criteria in determining whether certain state waters are outstanding resource waters. However, the board may determine that compliance with one or more of these criteria is insufficient to warrant classification of the water as an outstanding resource water. The board shall consider: (a) whether the waters have been designated as wild and scenic; (b) the presence of endangered or threatened species in the water; (c) the presence of an outstanding recreational fishery in the water; (d) whether the waters provide the only source of suitable water for a municipality or industry; (e) whether the waters provide the only source of suitable water for domestic water supply; and (f) other factors that indicate outstanding environmental or economic values not specifically mentioned." § 75-5-316(4).

52. § 75-5-316(3)(c).

53. "A rule classifying state waters as outstanding resource waters under this section may be adopted but is not effective until approved by the legislature." § 75-5-316(8).

There are numerous problems with Montana's ORW program. Since its inception in 1995, the board has not received any ORW petitions. The reason for the lack of petitions to nominate water bodies as ORWs may be the burden placed on the public to meet the extensive petitioning requirements. These requirements make it extremely difficult to successfully petition for the designation of ORWs. In addition to requiring the public to show necessity and the availability of no other effective process to protect the waterbody, the board must require the preparation of an environmental impact statement when classification as an ORW "may cause significant adverse impacts to the environment, including adverse impacts to social or economic values."⁵⁴

In addition, there are no assurances that if the water body meets all of the criteria, it must be designated as an ORW. Even if a petition is filed, both the board and the legislature have unlimited discretion in deciding whether to approve designation of a water body as an ORW.⁵⁵

Other than the petitioning process, there is no other avenue for public participation such as public hearings and comment during the ORW designation process. Therefore, other than the petitioners, the general public has no say in the designation of water bodies as ORWs. The exception is if an environmental impact statement is required. In that case, under Montana law, public participation is also required.⁵⁶ Participation of the general public is important during the board and/or legislative review periods. Public hearings and comment enable the citizens of Montana to demonstrate to the board and the legislature their support, or lack of support, for protection of the petitioned water body as an ORW, and provides the opportunity for the board and legislature to address the questions and concerns of the public.

In addition to the procedural impediments to designating ORWs, in 1995, the Montana Legislature attempted to undermine the strong protections afforded to ORWs by allowing for the degradation of the water quality of ORWs.⁵⁷ The EPA, however, recently declared that these pro-

54. § 75-5-316(5).

55. See *supra* note 51. The laws and regulations provide no guidance for, nor restrictions on, the legislature.

56. See MONT. CODE ANN. §§ 75-1-201(1)(c); 2-3-103 (1997).

57. Montana attempted to undermine the effectiveness of the ORW designation by declaring activities identified as "nonsignificant" as exempt from antidegradation review and inapplicable to ORWs. MONT. CODE ANN. § 75-5-317 (1997). Some of the activities that Montana attempted to exempt from the protections of its ORW provision include: all nonpoint sources existing before 1993, all nonpoint sources since 1993 that utilize reasonable, land, soil, and water conservation practices, coal, uranium, oil, and gas prospecting, and metallic and nonmetallic mineral exploration. § 75-5-317(2)(a)-(r). In addition, Montana defines "degradation" as "a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be non-significant pursuant to 75-5-301(5)(c)." MONT. CODE ANN. § 75-5-103(5) (1997). As

visions violate the CWA.⁵⁸ Although EPA's regulations allow the State to keep these illegal provisions on the books until corrected provisions are adopted, they will eventually be removed from Montana's Water Quality Act.⁵⁹

Despite the difficult ORW petitioning process, and the lack of assurances that a petitioned water body will be designated as an ORW, the public should not be deterred from petitioning for the designation of a water body as an ORW. Because the board has never received a petition, it is not clear whether the process will work, nor whether the board and legislature will actually designate a petitioned water body as an ORW. If the process is tried unsuccessfully, it is up to the public to put pressure on the legislature and the Montana Department of Environmental Quality to create a friendlier ORW designation process.

B. Idaho

The ONRW designation process in Idaho is similar to that of Montana. The public petitions the Board of Health and Welfare (board) to consider a stream segment for designation as an outstanding resource

applied to ORWs, this definition of degradation allows for the lowering of water quality of ORWs and exempts certain activities from compliance with the requirement that the water quality of ORWs be maintained and protected. See Region VIII EPA letter to Governor Marc Racicot regarding EPA partial action on amendments to Montana's water quality standards, p. 3-5 (Dec. 1998) (on file with author).

58. In disapproving these provisions EPA states:

Although non-significant changes in water quality can be exempted from Tier 2 antidegradation review under 40 C.F.R. 131.12(a)(2), this is not an option for protection of [ORWs]. Montana's antidegradation policy and procedure must provide for maintenance and protection of water quality in ORWs consistent with 40 C.F.R. 131.12(a)(3). The Region disapproves the application of the definition of degradation at MCA Section 75-5-103(4) because it potentially would allow changes to the water quality of [ORWs] to be lowered [sic.]. The State should revise its water quality standards such that the water quality of [ORWs] is maintained and protected in a way that will not allow even non-significant, permanent changes in water quality.

Region VIII EPA Letter, *supra* note 57, at 6. Because these regulations have been disapproved by the EPA, the State must revise them. These regulations are in place until such revisions are completed.

59. The Montana legislature recently revised their water quality standards to bring them into compliance with the CWA as required by the EPA. The 1999 revision of the Montana Water Quality Act removes the provision that provides for the exemption of nonsignificant activities from ORW protections. MONT. CODE ANN. § 75-5-316(1). This means that the Montana Water Quality Act no longer specifically allows for the degradation of ORWs from actions--both non-point and point source--considered nonsignificant. In addition, the revision adds a section prohibiting any new or increased point source discharge that would result in a permanent change in the water quality of an outstanding resource water. MONT. CODE ANN. § 75-5-316(2)(b). This new provision specifically protects ORWs from degradation by point sources. What the revisions do not do is to protect ORWs from new or expanded non-point pollution. By not specifically prohibiting degradation from non-point pollution, the Legislature may have opened the door for ORWs to be degraded by nonpoint pollution whether it is considered significant or not. It is now up to the EPA to determine whether the new provisions meet the CWA requirements.

water (ORW).⁶⁰ These waters are defined as

a high quality water, such as water of national and state parks and wild-life refuges and water of exceptional recreational or ecological significance, which has been so designated by the legislature. It constitutes an outstanding national or state resource that requires protection from point source and nonpoint source activities that may lower water quality.⁶¹

The petitioning process in Idaho is not as great a burden on the petitioner as in Montana. Idaho does not require the board to find that ORW classification is necessary to protect the ORW, nor that there are no other effective processes available that will achieve the necessary protection. It is, therefore, much easier for a water body to meet the requirements for ORW designation.

In addition, Idaho does provide for public participation in the nominating process. The board is required to provide public notice that a water body is being considered for recommendation to the legislature as an ORW.⁶² Public comments regarding the potential designation are accepted by the board for at least forty-five days after public notice.⁶³ The board has discretion as to whether to hold a public hearing.⁶⁴ The board then recommends to the legislature those streams with the potential for ORW designation.⁶⁵ It is ultimately up to the legislature to determine whether to

60. IDAHO CODE § 39-3617 (1998).

The nomination shall include the following information:

- a. The name, description and location of the stream segment;
- b. The boundaries upstream and downstream of the stream segment;
- c. An explanation of what makes the segment a candidate for the designation;
- d. A description of the existing water quality and any technical data upon which the description is based as can be found in the most current basin status report;
- e. A discussion of the types of nonpoint source activities currently being conducted that may lower water quality, together with those activities that are anticipated during the next two (2) years, as described in the most current basin status reports; and
- f. Any additional evidence to substantiate such a designation.

Idaho Admin. Code 16.01.02.055.01 (1998).

61. IDAHO CODE § 39-3602(16) (1998).

62. Idaho Admin. Code 16.01.02.055.02.

63. *Id.*

64. Idaho Admin. Code 16.01.02.55.03.

65. IDAHO CODE § 39-3617 (1998).

The Board shall review the stream segments nominated for ORW designation and based on the hearing or other written record, determine the segments to recommend as ORWs to the legislature. The Board shall submit a report for each stream segment it recommends for ORW designation. The report shall contain the information specified in Subsection 055.01 and information from the hearing record or other written record concerning the impacts the designation would have on socio-economic conditions; fish, wildlife and recreational values; and other beneficial uses. The Department shall then prepare legislation for each segment that will be recommended to the legislature as an ORW. The legislation shall provide

designate these stream segments as ORWs.⁶⁶ There is no specific provision in Idaho law for the board or the legislature to make a designation of an ORW independent of a citizen petition.

While the Idaho ORW designation process sounds relatively simple, in practice it has been impossible for the public to successfully petition for the designation of an ORW.⁶⁷ Despite approval by the board, the legislature has refused to designate any of the over 60 water bodies nominated as ORWs. As in Montana, there is no requirement that the board or the legislature designate a water body as an ORW if it meets the criteria. Both the board and the legislature have unlimited discretion of whether to approve designation of a water body as an ORW.

Once designated, ORWs are protected from degradation from new nonpoint sources of pollution by the development and implementation of "outstanding resource water best management practices" (BMPs) which will assure that the water quality of an ORW is not lowered.⁶⁸ Existing activities may continue so long as they maintain and protect the current water quality of the ORW. Short-term or temporary nonpoint source activities which do not alter the essential character or special uses of the ORW are allowed.⁶⁹ It is unclear how effective the ORW BMPs are at protecting Idaho's ORWs from permanent degradation because the first hurdle of successful designation has yet to be accomplished.

C. Wyoming

Currently, Wyoming's antidegradation program is not consistent with the federal three-tiered structure because the State does not provide a Tier Three ONRW provision. However, in the current triennial review,⁷⁰ the

for the listing of designated segments in these regulations without the need for formal rule-making procedures . . .

Idaho Admin. Code 16.01.02.055.04.

66. "The legislature shall determine by law which such stream segments to designate as outstanding resource waters." IDAHO CODE § 39-3617 (1998).

67. Since 1991, the Idaho Conservation League has made numerous attempts to petition for the designation of ORWs in Idaho. The streams petitioned for ORW designation include 46 Idaho stream segments containing bull trout, the Selway River and five tributaries, and the Middle Fork of the Salmon River and 15 tributaries. Despite board approval, the legislature has repeatedly denied ORW designation to all of the petitioned water bodies.

68. IDAHO CODE §§ 39-3618 to -3620 (1998). While the definition of ORW states that it requires protection from both point source and nonpoint source activities that lower water quality, there are no regulations detailing restrictions on point sources of pollution as there are for nonpoint source activities. There is, however, a separate water quality designation called 'special resource waters', which directly addresses point source pollution. The relationship between the two is unclear, but it appears that special resource waters are afforded slightly less protection against degradation than are ORWs.

69. IDAHO CODE § 39-3618.

70. The CWA requires states to review and, as appropriate, revise and adopt water quality

Wyoming Department of Environmental Quality is proposing changes to the state's water quality standards rules which include the addition of an ONRW level of water quality protection.

Wyoming's proposed rules establish ONRWs as Class 1, Outstanding Aquatic Resources (OARs). OARs are defined as:

[t]hose surface waters which have been determined to have outstanding environmental, ecological, recreational, aesthetic, or economic value. To the greatest extent possible, the water quality and physical and biological integrity which existed on the water at the time of designation will be maintained and protected.⁷¹

Unlike Montana and Idaho, the Wyoming legislature will not make the final decision of whether to designate a water body as an OAR under the proposed rules. Instead, the Environmental Quality Council (Council) makes the decision.⁷² The proposed OAR designation process provides that the public may petition the Environmental Quality Council to designate a water body as an OAR.⁷³ The petition is made through the administrator of the Water Quality Division.⁷⁴

standards at least once every three years. 33 U.S.C. § 1313(c)(1) (1994).

71. Wyo. Surface Water Quality Standards (to be codified in Dep't of Envtl. Quality, Water Quality, Quality Standards—Surface Waters, Chap. 1, § 4(a) Weil's Code Wyo. R.) (Draft Aug. 4, 1998).

72. "Class 1 waters are those waters that have been specifically designated by the Environmental Quality Council." *Id.* § 4(e).

73. The proposed regulations provide that:

Any person may petition the Environmental Quality Council to designate a water as Class 1. A petition to designate a Class 1 water must demonstrate that the water constitutes an outstanding aquatic resource based on one or more of the following criteria:

- (i) The water has been designated as wild and scenic, or has been designated as eligible for wild and scenic status under the federal Wild & Scenic Rivers Act;
- (ii) The water is within a designated or proposed research natural area, special interest area, area of critical environmental concern or has been designated as a reference stream;
- (iii) The presence of endangered, threatened, rare or sensitive species in, or supported by, the waters;
- (iv) The presence of an outstanding fishery;
- (v) The presence of outstanding recreational opportunities associated with the waters;
- (vi) The presence of outstanding scenic value associated with the waters;
- (vii) The presence of an outstanding ecological value associated with the waters;
- (viii) The waters provide the only source of suitable domestic or municipal drinking water;
- (ix) Other factors that indicate outstanding environmental, ecological, recreational, historic or economic values not specifically mentioned.

Id. § 34(b); *see also* § 34(c), (d).

74. "A petition for Class 1 designation shall be made through the administrator of the Water Quality Division . . ." *Id.* § 34(c).

The process provides for public participation by requiring the administrator to request information from other interested parties, and to notify the general public of the receipt of the petition and provide for public comment.⁷⁵ The Council receives a copy of the petition and the record, as well as an analysis from the Department of Environmental Quality of the merits of the petition for designation as an OAR.⁷⁶

When making the determination of whether to designate a petitioned water body as an OAR, the Council is required to consider numerous aspects of the water body, including water quality, aesthetic, scenic, recreational, ecological, agricultural, municipal, industrial, and historical uses, fish and wildlife, the presence of significant quantities of developable water and other values of present and future benefit to the people, and the economic consequences relative to the designation.⁷⁷ The proposed regulations do not say to what extent the economic and development considerations outweigh the outstanding resource considerations.

The proposed regulations provide for the protection and nondegradation of OARs through applicable water quality permits and the

75.

After a determination that a petition is complete, the administrator shall circulate copies of the petition to, and request submissions of relevant information from, other interested governmental agencies, interveners, persons with an interest of record in the water, property owners and other persons known to the administrator to have an interest in the water. The administrator shall also notify the general public of the receipt of the petition and request submissions or relevant information by a newspaper advertisement Beginning immediately after a complete petition is filed, the administrator shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the Council. The administrator shall make the record available for public inspection

Id. § 34(e) (ellipses in text).

76. "The Director shall submit a copy of the complete petition and record to the Council with the Department's analysis of the merits of the petition for designation as a Class 1 water." *Id.* § 34(f).

77.

Class 1, or 'outstanding aquatic resources,' are waters that have been determined to have outstanding environmental, ecological, recreational, aesthetic, or economic value. In designating Class 1 waters, the environmental Quality Council shall consider water quality, aesthetic, scenic, recreational, ecological, agricultural, botanical, zoological, municipal, industrial, historical, geological, cultural, archaeological, fish and wildlife, the presence of significant quantities of developable water and other values of present and future benefit to the people. The Council shall also consider economic consequences relative to the designation.

* * *

Outstanding water quality is not necessarily a prerequisite for Class 1 designation. The principal requirement may be that the segment has outstanding value as an aquatic resource, which may derive from the presence of exceptional scenic or recreational attributes, exceptional fisheries value or from the presence of unique or sensitive aquatic species or ecosystems, including those that may have naturally low water quality for some parameters, low flows, or flows of a non-perennial nature.

Id. § 34(a).

application of best management practices.⁷⁸ Because the triennial review is not complete, and the final rules and regulations have not been promulgated, these draft provisions may change. The final rules and regulations must comply with the CWA and EPA regulations. Once the new or revised rules are adopted by the State, the EPA is required to review the final regulations in order to ensure their compliance.⁷⁹ If the EPA determines that the revised rules are not consistent with the Act, the EPA must notify the state of the necessary changes.⁸⁰

IV. CONCLUSION

ONRW designation is essential to the long-term health of the watersheds of the Northern Rocky Mountain states. No other provision of the CWA ensures that water quality will not be permanently degraded. The ONRW provision provides the maximum protection of water quality of ecologically and recreationally significant water bodies under the Clean Water Act, preserving healthy watersheds for future generations.

The ONRW designation process is important because it involves the public in the protection of water quality. In fact, it is the only provision of the Act to provide for proactive citizen action in the protection of water quality. While other provisions allow for public comment and review of water quality management decisions, such as changes to water quality standards, the ONRW petitioning process requires direct public action to protect those water bodies most important to them.

78. The proposed water quality standards provide the following protections for Class 1 waters:

(a) Except as authorized in paragraph (b), no new point sources other than dams, may discharge, and no existing point sources, other than dams, may increase their quantity of pollution discharge, to any water designated as Class 1.

(b) Storm water and construction-related discharges of pollution to Class 1 waters may be authorized and shall be controlled through applicable water quality permits, Section 401 certifications and/or by the application of best management practices. Such discharges shall not degrade the quality of any Class 1 water below its existing quality or adversely affect any existing use of the water. Temporary increases in turbidity that are within the limits established in Section 23 of these regulations and that do not negatively affect existing uses can be permitted. For purposes of this section, temporary increases in turbidity shall not exceed the actual construction period. The Department shall impose whatever controls and monitoring are necessary on point source discharges to Class 1 waters and their tributaries to ensure that the existing water quality and uses of the Class 1 water are protected and maintained.

(c) Nonpoint source discharges of pollution to Class 1 waters or tributaries of Class 1 waters shall be controlled by application of best management practices adopted in accordance with the Wyoming Continuing Planning Process. For Class 1 waters, best management practices will maintain existing quality and water uses.

Id. § 7(a)-(c).

79. 33 U.S.C. § 1313(c)(2)(A) (1994); 40 C.F.R. § 131.21(a) (1998).

80. § 1313(c)(3).

However, the use of this important water quality protection tool in the Northern Rocky Mountain states is limited by the lack of state implementation of procedures for ONRW designation, the difficulty of state petitioning procedures, and the refusal of state legislatures to designate any ONRWs. The failure to adequately implement the ONRW program eliminates this maximum level of protection for water quality from state water quality programs, leaving important waters vulnerable to degradation.

One reason for the states' reluctance to adopt an effective ONRW program is the level of protection afforded to a water body once it is classified as an ONRW. The fear is that ONRW classification will unreasonably restrict or prohibit all development and management activities (such as logging, mining, road building, and grazing). However, this fear is unfounded. While ONRW classification will likely restrict development and management activities in the watershed of the ONRW, it will not necessarily prohibit nor unreasonably restrict these activities. Effective BMPs and responsible management practices can adequately prevent water quality degradation. In addition, current land management practices are allowed so long as they do not degrade water quality.

According to the EPA regulations, ONRW classification is automatically provided to waters of National and State parks and wildlife refuges. In addition, ONRW classification is reserved for water bodies of outstanding recreational and or ecological significance. These water bodies are important to the public who use them for recreational purposes, and for the long-term protection and restoration of aquatic species. Protection of water bodies for recreation or ecological purposes provides economic benefits outside of development and land management. The ecological and socioeconomic health of the Northern Rocky Mountain region is dependent on its water quality. People come from around the world to recreate and experience the cold, clean water of the Northern Rockies. The economic benefits of recreation and native fish are well known, and should provide incentives for states to provide for ONRW protection.

Wyoming, Idaho and Montana must be motivated to protect ecologically and recreationally important water bodies through effective ONRW programs. Currently, the legislatures of both Idaho and Montana have unlimited discretion to deny ONRW designation even if the petitioned water body meets all of the criteria. Therefore, politics can triumph over ecological and recreational importance. The state legislatures should be required to designate ONRWs if the petitioned water body meets all or some of the criteria delineated in each state's ONRW regulations. Such a requirement can come from the EPA, and/or can be added to the state's ONRW provision. The public should pressure both the EPA and the states to include this requirement in the ONRW regulatory provisions.