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Antidegradation: A Lost Cause or the Next Cause

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ANTIDegradation: A LOST CAUSE OR THE NEXT CAUSE[‡]

KENT MODESITT^{‡‡}

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INTRODUCTION

Antidegradation policy, despite its single and seemingly circumscribed reference in the Federal Water Pollution Control Act ("Clean Water Act"),¹ potentially provides a powerful means of ensuring the quality of our nation's waters. Until recently, it has existed as a little used and often misunderstood provision.² However, increased attention by the government,³ environmental advocates,⁴ and environmental litigators⁵ signals the vitalization of antidegradation policy as an environmental protection tool. Like the 1996–1997

1. Federal Water Pollution Control Act, § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (1994). Certain effluent limitations and water quality standards "may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." *Id.*

2. The EPA recognized both the potential benefits and the current underuse of antidegradation policies in its recent Advance Notice of Proposed Rulemaking regarding water quality standards regulation. Advance Notice of Proposed Rulemaking, Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36780 (1998) [hereinafter ANPRM, WQS Regulation]. "EPA's current thinking is that the antidegradation policy is significantly underused as a tool to attain and maintain water quality and plan for and channel important economic and social development that can impact water quality." *Id.*; see John Harleston, *What is Antidegradation Policy: Does Anyone Know?*, 5 S.C. ENVTL. L.J. 93 (1996); Alessandro G. Olivieri, Note, *New York's Antidegradation Policy: An Analysis of its Compliance with Federal Standards and its Vulnerability to Legal Challenges*, 17 COLUM. J. ENVTL. L. 205 (1992); cf. United States Environmental Protection Agency Region VIII, Water Management Division, *EPA Region VIII Guidance: Antidegradation Implementation 47* (Aug. 1993) [hereinafter Region VIII Guidance]. A study by the National Wildlife Federation concluded: The "EPA's [antidegradation] policy has failed." NATIONAL WILDLIFE FEDERATION, *WATERS AT RISK: KEEPING CLEAN WATERS CLEAN* at vii (May 1992) [hereinafter NWF STUDY] (concentrating solely on the highest water classification scheme, Outstanding National Resource Waters, of antidegradation policy). Furthermore, antidegradation has received very little scholarly attention, comprising the principal subject of only two law review articles.

3. Recent statements by the Clinton Administration and the EPA indicate that antidegradation will develop into a powerful tool to protect the nation's waters. In the *Clean Water Action Plan: Restoring and Protecting America's Waters*, the Clinton Administration released its designs for the future of water protection, including a call to strengthen antidegradation applicability to non-point sources of pollution. United States Environmental Protection Agency, *Clean Water Action Plan: Restoring and Protecting America's Waters*, at ch. II (last modified Feb. 14, 1998) <<http://www.epa.gov/cleanwater/action/c2c.html>> [hereinafter *Clean Water Action Plan*] (presenting plan produced by the Department of Agriculture to Vice-President Al Gore). As discussed *infra* Part III.C., this policy change would represent a significant deviation from traditional antidegradation policy by expressly seeking to apply it to non-point sources. Furthermore, the EPA's Advanced Notice of Proposed Rulemaking concerning water quality standards regulation seeks comments on a number of measures that would strengthen antidegradation policy. ANPRM, WQS Regulation, *supra* note 2, at 36, 779–87.

4. See generally NWF STUDY, *supra* note 2 (evaluating state implementation of antidegradation policy).

5. Administrative decisions addressing antidegradation have increased substantially since 1994, and judicial decisions have increased, although at a lesser pace, since 1996.

"explosion"⁶ of litigation that challenged state implementation of Total Maximum Daily Load ("TMDL") requirements,⁷ litigation in the next few years may well utilize the protections of antidegradation policy to improve the rivers, streams, and lakes of this country.

The Clean Water Act seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸ Based on the "spirit, intent, and goals"⁹ of the Clean Water Act, antidegradation policy works within the water quality standards framework of the Act: use designations establish goals for a waterbody; water quality criteria define the conditions needed to achieve those goals; and antidegradation policy provides the decision-making framework to evaluate decreases to water quality endangering those goals. While federal Clean Water Act regulations charge the states with promulgation and implementation authority for antidegradation policy,¹⁰ the federal government retains strong oversight powers through the establishment of minimum antidegradation requirements¹¹ and review and approval authority.¹² Under this federal

6. Dianne K. Conway, Note, *TMDL Litigation: So Now What?*, 17 VA. ENVTL. L.J. 83, 97 (1997). Conway documents the early unsuccessful attempts to compel state TMDL statutory and regulatory compliance in the late 1970s; the birth of the "constructive submission" doctrine in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984); and recent successful litigation in Idaho and Georgia, followed by the "explosion in TMDL litigation" in 1996 and 1997. *Id.* at 93-96.

7. See generally Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (1994); 40 C.F.R. § 130.7 (1998).

8. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1994).

9. United States Environmental Protection Agency, *Water Quality Standards Handbook*, at § 4.1 (2nd ed. Aug. 1994) [hereinafter *WQS Second Edition*].

10. 40 C.F.R. § 131.12(a) (1998).

11. As set forth in the regulations, the federal government retains strong oversight powers over state antidegradation implementation. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12 (1998). The federal antidegradation policy states:

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed 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 to accommodate important economic or social development in the area in which the waters are located. 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.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

direction, states must assign classification tiers to waterbodies, develop standards of protection within each of these tiers, and ensure that all regulated activities comply with these protection standards.¹³

The following discussion examines antidegradation policy as set forth in the Clean Water Act, state statutes, pertinent regulations, case law, and agency guidelines. Part I addresses the historical development of antidegradation policy, providing insight into the driving forces which ultimately shape its application by the states. Part II discusses the operation of antidegradation policy, examining the triggering circumstances, the waterbody classification scheme, and the applicable protection standards for each classification. Part III examines important issues affecting the future of antidegradation policy as an environmental protection tool through an analysis of state approaches to the antidegradation policy prescribed by the federal government.

I. HISTORICAL EMERGENCE OF ANTIDEGRADATION POLICIES

Antidegradation policy predates the Federal Water Pollution Control Act of 1972,¹⁴ having first emerged as a Department of the Interior policy guideline addressing the water quality standards of the Water Quality Act of 1965 ("WQA").¹⁵ "The water quality standards proposed by a state should provide for . . . [t]he maintenance and protection of quality and use or uses of waters now of a high quality or of a quality suitable for present and potential future uses."¹⁶ In his 1968 press release,¹⁷ Secretary of the Interior Stewart Udall fortified antidegradation policy as a component of water protection by requiring states to include an antidegradation provision in the water quality standards required under the WQA.¹⁸ While the 1965 act

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the [Clean Water Act].

40 C.F.R. § 131.12.

12. 40 C.F.R. § 131.21 (1998).

13. *Id.* § 131.12.

14. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)).

15. Pub. L. No. 89-234, 79 Stat. 903 (1965) (superseded by the FWPCA). While these guidelines did not use the term "antidegradation" or "nondegradation," they articulated the basis for what would later become antidegradation policy.

16. ANPRM, WQS Regulation, *supra* note 2, at 36,779 (quoting the Department of Interior policy guidelines).

17. United States Dept. of the Interior, Federal Water Pollution Control Administration, *Compendium of the Interior Statements on Non-Degradation of Interstate Waters 1-2* (Aug. 1968) [hereinafter *Compendium*] (reprinting Secretary Udall's February 8, 1968 Press Release); cf. John Harleston, *What is Antidegradation Policy: Does Anyone Know?*, 5 S.C. ENVTL. L.J., 33, 39-48 (1996) (providing one of the few articles extensively addressing antidegradation, but arguing antidegradation policy emerged with Udall's 1968 press release).

18. *Compendium*, *supra* note 17, at 1-2. Secretary Udall articulated the criteria which would form the basis of antidegradation policy. He provided:

contained no explicit reference to antidegradation, the Secretary considered the act's "spirit, intent, and goals,"¹⁹ articulated in the Declaration of Purpose,²⁰ sufficient justification for providing the establishment of an antidegradation policy. This antidegradation policy was included in the EPA's Water Quality Standards Regulation in 1975²¹ and refined in the 1983 regulations.²² Congress did not explicitly recognize antidegradation statutorily until the 1987 Clean Water Act amendments,²³ when it required satisfaction of antidegradation requirements prior to the issuance or revision of water quality standards, TMDLs, and effluent discharge permits.²⁴

The early manifestations of antidegradation policy revealed two competing interests which shaped both the formulation and implementation of current antidegradation policy: ensuring the future

I have concluded that in order to be consistent with the basic policy and objective of the Water Quality Act a provision in all State standards substantially in accordance with the following is required:

Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at their existing high quality. These and other waters of a State will not be lowered in quality unless and until it has been affirmatively demonstrated to the State water pollution control agency and the Department of the Interior that such change is justifiable as a result of necessary economic or social development and will not interfere with or become injurious to any assigned uses made of, or presently possible in, such waters. This will require that any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters will be required, as part of the initial project design, to provide the highest and best degree of waste treatment available under existing technology, and, since these are also Federal standards, these waste treatment requirements will be developed cooperatively.

Id.

19. WQS Second Edition, *supra* note 9, at § 4.1; see *Compendium*, *supra* note 17, at 1 (reprinting Secretary Udall's Press Statement).

20. The Declaration of Purpose stated: "The purpose of this Act is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution." Water Quality Act of 1965, § 4, Pub. L. No. 89-234, 79 Stat. 903 (1965) (amending the Federal Water Pollution Control Act of 1948, 62 Stat. 1155 (1948)).

21. 40 C.F.R. § 130.17(e) (1975) (requiring states to develop antidegradation policies and implementation procedures).

22. 40 C.F.R. § 131.12 (1983). The 1983 revisions to the antidegradation regulations contained only four textual modifications. However, three of those changes merely clarified previous articulations. The fourth alteration substantively changed the protection standard of Outstanding National Resource Waters ("ONRW"), the highest classification, from "[n]o degradation shall be allowed" to "water quality shall be maintained and protected." Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (1983). In commenting on the reasons for this change, the agency expressed concern that "waters which properly could have been designated as ONRW were not being so designated because of the flat no designation provision . . ." *Id.*

23. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

24. These three activities constitute the minimum "triggering activities" expressly required by the statute for antidegradation review. For a discussion of these triggers, see *infra* Part II.B.

quality of the nation's waters²⁵ and avoiding the "stifl[ing of] further economic development in areas where interstate waters are of high quality."²⁶ The policy protected waters from further degradation, but also allowed some degree of water quality diminishment upon compliance with procedural steps and a showing of economic or social need.²⁷ Current state policies reflect this dichotomy: they balance water quality protections against the maintenance of continued economic growth, manifesting, in the actual operation of the policies, state reticence to provide stringent water quality protections due to fear of limitations on future growth.

II. OPERATION OF ANTIDEGRADATION POLICIES

The Clean Water Act²⁸ and its regulations²⁹ control the implementation and operation of antidegradation policy by establishing federally mandated minimum requirements that state antidegradation policies must meet or exceed.³⁰ The Clean Water Act requires that revisions to prescribed regulated activities³¹ comply with the antidegradation policy.³² The regulations expand on this mandate

25. In articulating the protection interest, Secretary Udall stated, "it is imperative that there be no compromise with the Declaration of Policy as now set forth in the [WQA]." *Compendium, supra* note 17, at 2. While the Clean Water Act's current declaration of congressional goals redefines the purpose of the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the EPA recognized the continued consistency of an antidegradation policy with the redefined purposes of the Clean Water Act. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1994); *see* WQS Second Edition, *supra* note 9, at § 4.1 ("Antidegradation was originally based on the spirit, intent, and goals of the Act, especially the clause "... restore and maintain the chemical, physical and biological integrity of the Nation's waters" [sic] (utilizing current statement of policy to support origination of antidegradation policies)); Harleston, *supra* note 17, at 45 (arguing the change in policy articulation provided greater statutory authority for antidegradation policies).

26. *Compendium, supra* note 17, at 2. The Secretary noted the "imperative" nature of considering this conflicting interest. *Id.*; *cf., e.g., id.* at 23-26 (providing discussion between Secretary Udall and Representative Cramer concerning the impact of antidegradation on industry); *id.* at 27-35 (providing discussion between Secretary Udall and Representatives Cramer and McEwen concerning the impact of antidegradation on industry). Certain states' adoption of a fourth tier classification, Tier 2.5, provides one example of the continued fear of stifling economic growth. As noted by the EPA, one of the principle rationales behind the adoption of the fourth tier was the states' fear that utilization of the most stringent tier would prevent them from acting on important social and economic development interests. WQS Second Edition, *supra* note 9, at 4-2.

27. For an expansion of these procedural steps, and the economic or social need showings, *see infra* Part II.B.

28. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (1994).

29. 40 C.F.R. §§ 131.1-131.37 (1998).

30. *Id.* § 131.12(a).

31. This article addresses these triggering activities, *infra* Part II.B.

32. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B). The full text of this provision provides:

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a [TMDL] or other waste load allocation

by laying out the minimum level of antidegradation protections³³ and the procedural requirements necessary to implement the policy.³⁴ The following discussion explores the operation of antidegradation policies³⁵ through an examination of: (A) the antidegradation water classification scheme and the protection standard applicable to each classification tier; (B) the activities triggering antidegradation review; and (C) the relationship between the federal and state governments in the promulgation and implementation of antidegradation policies.

A. DETERMINING APPLICABLE WATER DESIGNATION AND APPLICATION OF THE PROTECTION STANDARD

The foundation of antidegradation policy is the establishment and implementation of a water classification and protection framework. States must develop a classification scheme (the tier system)³⁶ which classifies a waterbody according to the quality of its water or other considerations. Additionally, states must develop protection standards for each of these classifications. The federal government established a base level antidegradation framework in the regulations.³⁷ However, states maintain the discretion to apply more rigorous standards. The following discussion outlines the classification schemes of each tier of the federal antidegradation policy and the appropriate protection standard for each tier.

1. Tier 3—Outstanding National Resource Waters

Tier 3, Outstanding National Resource Waters ("ONRW"), represents the most protective of the antidegradation designations. The federal antidegradation policy, however, provides little assistance to the states in defining the parameters of this designation. As stated in the regulations: "Where high quality waters constitute an outstanding National resource, such as waters of Nation and State parks and wildlife refuges and waters of exceptional recreation or ecological significance, that water quality shall be maintained and

established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

Id.

33. 40 C.F.R. § 131.12.

34. *See id.* § 131.20 (state review and approval); § 131.21 (EPA review and approval); § 131.22 (EPA promulgation procedures for recalcitrant states).

35. This analysis focuses on the minimum antidegradation policy as set forth by the federal government in 40 C.F.R. § 131.12. While states may adopt antidegradation statements more protective than those set forth by the federal government, the states may not impose less restrictive provisions. *Id.*; WQS Second Edition, *supra* note 9, at § 4.3.

36. The term "Tier" is the federal articulation of classification levels. Many states have adopted this term, while others use different terminology. In the interest of clarity, this article will utilize the federal terminology when referring to state antidegradation policies.

37. 40 C.F.R. § 131.12.

protected."³⁸ EPA Region VIII recommends that the following factors be utilized in an ONRW inquiry:

(a) location (e.g., on federal lands such as national parks, national wilderness areas, or national wildlife refuges), (b) previous special designations (e.g., wild and scenic refuges), (c) existing water quality (e.g., pristine or naturally-occurring), (d) ecological value (e.g., presence of threatened or endangered species during one or more life stages), (e) recreational or aesthetic value (e.g., presence of an outstanding recreational fishery), and (f) other factors that indicate outstanding ecological or recreational resource value (e.g., rare or valuable wildlife habitat). Where determined appropriate, the ONRW designation may be applied to an entire category of waters (e.g., a wilderness area or areas).³⁹

Both nationwide EPA and Region VIII guidance recognize that the quality of water is an important factor in the designation of a water body as an ONRW. Indeed, the EPA recognized quality-based designation as the "thrust" of the federal antidegradation plan.⁴⁰ Antidegradation policy also permits ONRW classification for waters that are not necessarily of high quality, but waters that retain some "exceptional ecological significance . . . [and] water bodies that are important, unique, or sensitive ecologically."⁴¹ For example, Iowa designated the Mississippi and Missouri Rivers as Tier 3 waterbodies,⁴² subject to the most stringent protections⁴³ despite their failure to

38. *Id.* § 131.12(a)(3).

39. Region VIII Guidance, *supra* note 2, at 9 (footnote omitted); see also David Moon, *Antidegradation Implementation: What are the Issues and Options?*, at 3-4 (1996) (prepared for the Multi-Regional Meeting of the EPA on Water Quality Standards and Criteria, July 22-24, 1996) (listing factors).

40. As stated by the EPA:

ONRWs are often regarded as highest quality waters of the United States: This is clearly the thrust of [section] 131.12(a)(3). However, ONRW designation also offers special protection for waters of 'exceptional ecological significance.' These are water bodies that are important, unique, or sensitive ecologically, but whose water quality, as measured by the traditional parameters . . . may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands).

WQS Second Edition, *supra* note 9, at § 4.7; see also Region VIII Guidance, *supra* note 2, at 9 (model implementation procedure provides that: "Outstanding water quality is not a prerequisite for ONRW designation.").

41. WQS Second Edition, *supra* note 9, at § 4.7.

42. See IOWA ADMIN. CODE r. 567-61.2(2)(d) (1997) ("The Mississippi River and Missouri River do not meet the criteria of 61.2(2) 'c' but nevertheless constitute waters of exceptional state and national significance. Water quality management decisions will be made in consideration of the exceptional value of the resource.").

43. See *id.* r. 567-61.2(2)(g). As provided in the Iowa regulations:

For those waters of the state designated as high quality or high quality resource waters and the Mississippi and Missouri Rivers, any proposed activity that will adversely impact the existing physical, chemical, or biological integrity of that water will not be consistent with Iowa's water quality standards. Mitigation will not be allowed except in highly unusual situations where no other project alternatives exist. In these cases, full mitigation must be provided by the applicant and approved by the department.

Id.

achieve standards associated with high quality waters.

Antidegradation policy protects those waters classified as Tier 3 waterbodies by requiring that their "water quality shall be maintained and protected."⁴⁴ EPA interprets this protection standard as an absolute prohibition on the imposition of new or increased discharges to ONRWs or upstream waters if the discharges would lower the water quality in an ONRW.⁴⁵

The 1983 amendments to the antidegradation regulations changed the phrase, "[n]o degradation shall be allowed,"⁴⁶ to "water quality . . . shall be maintained and protected."⁴⁷ This change created a limited exception for temporary or short-term changes in water quality.⁴⁸ EPA guidance clarifies the temporal scope of this exception by providing that it consists of weeks or months rather than years.⁴⁹ Application of one such state standard occurred in Washington where short term modifications to water quality standards compliance, including the state's antidegradation policy, were allowed. The code provision provides that temporary degradation may occur

when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest, even though such activities may result in a temporary reduction of water quality conditions below those criteria and classifications established by this regulation. Such activities must be conditioned, timed, and restricted (i.e. hours or days rather than weeks or months) in a manner that will minimize water quality degradation to existing and characteristic uses. In no case will any degradation of water quality be allowed if this degradation significantly interferes with or becomes injurious to characteristic water uses or causes long-term harm to the environment.⁵⁰

The Washington Pollution Control Hearings Board applied this regulation to deny a company's requested variance to the state's antidegradation policy and other water quality standards. The company sought to apply copper compounds to a lake as an algae control measure.⁵¹ The Board found that "impairment of swimming

44. 40 C.F.R. § 131.12(a)(3) (1998).

45. WQS Second Edition, *supra* note 10, at § 4.7.

46. 40 C.F.R. § 35.1550 (1982) (amended by 40 C.F.R. § 131.12(a)(1) (1984)).

47. 40 C.F.R. § 131.12(a)(1).

48. 48 Fed. Reg. 51,400, 51,403 (1983).

49. WQS Second Edition, *supra* note 10, at § 4.7. The EPA provided further guidance as to the scope of "temporary or short-term" by recognizing that: "If a construction activity is involved, for example, temporary is defined as the length of time necessary to construct the facility and make it operational." *Id.*

50. WASH. ADMIN. CODE § 173-201A-110 (1998); *see also, e.g.*, FLA. ADMIN. CODE ANN. r. 62-4.242(3)(a)(2) (1998) (incorporating the Outstanding Florida Resource Water temporary degradation provision); *id.* r. 62-4.242(2)(a)(2)(b). This provision allows extensions to the thirty day limitations upon a showing of unavoidability and the development of management practices designed to limit water quality degradation. *Id.*

51. *See Allied Aquatics v. State of Washington*, PCHB No. 96-193, 1997 WL 234806, at *2 (Pollution Control Hearings Board March 4, 1997) (order denying petition for reconsideration).

and fishing and speculative harm to wildlife⁵² did not satisfy the "necessary" requirement and, furthermore, the potential damage to the lake contravened the public interest.⁵³

2. Tier 2—High Quality Waters

The Tier 2 classification, for high quality waters, applies to waterbodies exhibiting water quality "exceed[ing] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."⁵⁴ According to the EPA, "[i]t is presumed that a very large majority of state waters qualify for Tier 2 protection."⁵⁵ Tier 2 designation differs from Tier 3 in three major respects: Tier 2 designation (1) generally consists of waters of lower quality; (2) provides more guidance on which waters fall within this designation; and (3) allows a more expansive exception for those activities demonstrably resulting from economic and social necessity. Unlike the more indeterminate factorial approach utilized in ONRW designations, the Tier 2 classification mechanism requires a more exacting methodology to determine which waterbodies constitute high quality water. Two means of making this determination exist: a waterbody-by-waterbody (or designational) approach, whereby the quality of a waterbody is evaluated as a whole utilizing both qualitative and quantitative tests;⁵⁶ and a parameter-by-parameter (or pollutant-by-pollutant) approach, which examines individual pollutants for compliance with established water quality criteria.⁵⁷ The EPA recommends the use of the parameter approach, believing it comports more precisely with the Clean Water Act's goal of restoring and maintaining the integrity of the nation's waters⁵⁸ by providing the state with the discretion to adopt any approach which satisfies "the statutory

52. *Id.*

53. *Id.*

54. 40 C.F.R. § 131.12(a)(2); see Region VIII Guidance, *supra* note 2, at 14-15 (Model implementation plan recommends a consideration of four factors: (1) existing aquatic life uses; (2) existing recreational or aesthetic uses; (3) existing water quality for all parameters; (4) the overall value of the segment from an ecological and public use perspective).

55. Region VIII Guidance, *supra* note 2, at 15.

56. *Id.* at 70.

57. See *id.* at 69-70 (providing brief description of the parameter approach); see, e.g., ARIZ. ADMIN. CODE § R18-11-107(A) (1998). In addition to pure application of either the parameter or waterbody method, some states utilize hybrid approaches. Under one such hybrid approach, a designated number of pollutants satisfying water quality criteria compels the classification of the water segment as a high quality water. See Region VIII Guidance, *supra* note 2, at 54 (providing limited survey of different hybrid approaches adopted by the states as of 1993). Colorado antidegradation implementation procedures exemplify this hybrid approach by recognizing a presumptive Tier 2 designation unless the waterbody satisfies Tier 3 (ONRW) criteria or Tier 1 criteria. 5 COLO. CODE. RECS. § 1002-31.8(1)(b) (establishing presumption); *id.* § 1002-31.8(2)(b)(i)(B). Tier 1 criteria is stated as "[t]he existing quality for at least three of the following parameters is worse than that specified in [regulations] for the protection of aquatic life class 1, recreation class 1, and (for nitrate) domestic water supply uses." *Id.*

58. WQS Second Edition, *supra* note 10, at § 4.5.

and regulatory intent of the antidegradation policy."⁵⁹

Like the Tier 3 protection standard, Tier 2 protection requires the maintenance and protection of water quality,⁶⁰ but provides an exception. The exception requires a showing of: (1) an important economic or social need;⁶¹ (2) satisfaction of procedural standards including "intergovernmental coordination and public participation;"⁶² (3) achievement of statutory and regulatory requirements including "new source performance standards" for point sources and best management practices for nonpoint source pollutant controls;⁶³ and (4) compliance with a maximum degradation requirement established by the agency in charge of antidegradation review and implementation.⁶⁴ The EPA intends this exception

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.⁶⁵

The Ohio Supreme Court's decision in *Columbus & Franklin County Metropolitan Park District v. Shank*⁶⁶ exemplifies the limited nature of this exception. The Ohio Environmental Protection Agency issued two

59. *Id.* The EPA recommends the parameter approach because they believe it eliminates the potential that a large number of waters will be free of antidegradation protection, which is contrary to the goals of the Clean Water Act. *Id.* (recognizing the goal of the Clean Water Act is to "restore and maintain the integrity of the Nation's waters."). EPA Region VIII, on the other hand, promotes a "modified waterbody-by-waterbody approach," believing the parameter approach could result in Tier 2 application to waters not able to attain fishable/swimmable goal uses. Region VIII Guidance, *supra* note 2, at 54.

60. 40 C.F.R. § 131.12(a)(2) (1998).

61. *Id.* ("allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located."). EPA intends this requirement to indicate the general level of social and economic development necessary to justify the change in water quality. WQS Second Edition, *supra* note 9, at § 4.5. The 1983 rule promulgation inserted the word "important" and deleted the word "significant." 48 Fed. Reg. 51,400, 51,403 (1983) (preamble to antidegradation policy). This change represented an attempt to increase the necessity showing required for the Tier 2 need exception. *Id.* ("Although common usage of the words may imply otherwise, the correct definitions of the two terms indicate that the greater degree of environmental protection is afforded by the word 'important.'").

62. 40 C.F.R. § 131.12(a)(2) (providing for "full satisfaction of the intergovernmental coordination and public participation provisions . . .").

63. *Id.*; WQS Second Edition, *supra* note 10, at § 4.5. This provision serves as a mechanism to prevent lowering water quality standards and undercutting the Clean Water Act's point and nonpoint source requirements. Furthermore, by requiring compliance with the statutory and regulatory controls, "there is less chance that a lowering of water quality will be sought to accommodate new economic and social development." *Id.*

64. 40 C.F.R. 131.12(a)(2).

65. WQS Second Edition, *supra* note 9, at § 4.5.

66. *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992).

"permits to install" wastewater treatment facilities along a Tier 2 waterbody. However, the court enjoined these issuances because the director failed to satisfy the criteria of part one—the important economic and social need prong, and part two—the procedural standards requirement, of the four-part exception.⁶⁷ The court remanded the proceeding for a public hearing.⁶⁸ The court also articulated considerations to evaluate in a social or economic need inquiry, including: (1) an examination of the economic and social effects on the greater, as opposed to the local, community; (2) congressional intent to promote centralization of wastewater treatment plants; (3) present and future local, state, and federal infrastructure investment; and (4) the objective of the Clean Water Act "that rivers and streams are not to be conduits for wastewater."⁶⁹ Even upon satisfaction of this element, the court further required the director to ensure "that the most stringent statutory and regulatory controls for waste treatment be employed."⁷⁰

3. Tier 1—Existing Uses

Tier 1 protection "provides the absolute floor of water quality in all waters of the United States"⁷¹ by requiring the maintenance and protection of "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses."⁷² The regulations define "existing uses" as "those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards."⁷³ EPA guidance expands on this definition in the context of antidegradation policy by recognizing an existing use

67. *Id.* at 1057–60.

68. *Id.* at 1057.

69. *Id.* at 1057–59. Illinois' regulations provide specific guidance on the inquiries required in making a social or economic need determination:

A demonstration [of antidegradation policy compliance] will address the following elements pertaining to anticipated important economic and social development:

- A) The extent to which employment will be increased in the area;
- B) The extent to which production levels will increase in the area;
- C) The extent to which the proposed change will avoid otherwise anticipated reduction in employment or production levels;
- D) The extent to which the activity will be providing economic or social benefit to the area;
- E) The extent to which the activity will be correcting an environmental or public health problem.

ILL. ADMIN. CODE tit. 35, § 352.900(b)(1) (1998).

70. *Columbus & Franklin*, 600 N.E.2d at 1059-60.

71. WQS Second Edition, *supra* note 9, at § 4.4; see also ANPRN Water Quality Standards, *supra* note 2, at 36,781.

72. 40 C.F.R. § 131.12(a)(1) (1998).

73. *Id.* § 131.3(e). This should be contrasted with designated uses which are "those uses specified in water quality standards for each water body or segment whether or not they are being attained." *Id.* § 131.3(f). The distinction is important because the regulations permit a state to reclassify waters and remove a designated use, which is not an existing use, if the state demonstrates that attainment of the designated use is not feasible. *Id.* § 131.10(g).

upon a demonstration that "water quality is suitable to allow the use to be attained."⁷⁴ By its terms, the regulation allows degradation only to the point that an existing use would no longer be attainable.

4. Tier 2.5—Outstanding State Resource Waters

Some states institute a fourth classification. Tier 2.5 (often referred to as Outstanding State Resource Waters ("OSRW")) classifications provide protection less stringent than that afforded to ONRWs but more stringent than the high-quality Tier 2 waters.⁷⁵ In its antidegradation guidance literature, the EPA accepts this additional tier as permissible under Clean Water Act § 510 (state authority provision), because it represents "a more stringent application of the Tier 2 provisions of the antidegradation policy"⁷⁶ The rationale behind the development of Tier 2.5, according to the EPA, lies in the fear that the strict protections afforded to Tier 3 would dissuade states from designating very high quality waters as ONRWs.⁷⁷ Thus, with the adoption of this intermediate tier, states would grant lowered, yet still high levels of protection that otherwise may not be exercised.

The designation characteristics of an OSRW waterbody mirror those of ONRWs in Region VIII's Model Implementation Plan.⁷⁸ This appears consistent with the states that have adopted the Tier 2.5 designation. For example, Michigan establishes a high water quality designation when, "for individual pollutants, the quality of the waters is better than the water quality standards prescribed by these rules."⁷⁹ Beyond that, the Department of Environmental Quality may further designate a waterbody as an OSRW.⁸⁰ The difference between an ONRW and OSRW designation appears to lie, not in the characteristics of the waterbody, but in the state's ultimate goals with respect to that waterbody.

B. TRIGGERING ACTIVITIES

The Clean Water Act expressly establishes three activities that trigger antidegradation analysis: 1) scheduled water quality standards review; 2) the revision of effluent limitations based upon the TMDL process; and 3) the revision of other permitting schemes.⁸¹

74. WQS Second Edition, *supra* note 9, at § 4.4. This Guidance exemplified the suitability expansion of existing uses to areas where shellfish propagate and survive, and are suitable for harvesting despite the absence of such harvesting. *Id.* The EPA argues that a contrary interpretation "would be to say that the only time an aquatic protect use 'exists' is if someone succeeds in catching fish." *Id.*

75. *Id.* at § 4.2.

76. *Id.*

77. *Id.*

78. Compare Region VIII Guidance, *supra* note 2, at 9 (ONRW qualification criteria), with Region VIII Guidance, *supra* note 2, at 11-12 (OSRW qualification criteria).

79. MICH. ADMIN. CODE r. 323.1098 (1998).

80. See *id.* r. 323.1098(6).

81. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (1994). Section

Additionally, section 401 state certification requirements, while not statutorily recognized as a trigger, allow states to evaluate federal permits for compliance with, among other things, antidegradation requirements, thereby indirectly triggering antidegradation review.⁸² These four triggering activities represent a minimum set of actions necessitating antidegradation review. However, states maintain the right to require other activities to trigger this review, such as non-point source pollution.⁸³ The following discussion addresses the operation of these four triggering mechanisms to antidegradation review.

1. Scheduled Water Quality Standards Review

The Clean Water Act and its regulations establish a system of federal oversight of state water quality standards. States must submit new or revised standards,⁸⁴ or at a minimum submit these standards on a triennial basis,⁸⁵ to the EPA for review and approval.⁸⁶ Antidegradation policy maintains two distinct roles within this regime. First, it is a water quality standard⁸⁷ and therefore EPA must review and

303(d)(4)(B) provides in pertinent part: "[A]ny effluent limitation based on a [TMDL] or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy" *Id.*; WQS Second Edition, *supra* note 9, at § 4.8; *see also* Harleston, *supra* note 17, at 52-65. EPA also recognized that a "demonstration of need for advanced treatment" or a special study as requested by individuals or agencies would trigger antidegradation review. WQS Second Edition, *supra* note 10, at § 4.8.

82. *See* Clean Water Act § 401(a), 33 U.S.C. § 1341(a) (1994).

83. *See* Region VIII Guidance, *supra* note 3, at 47 ("EPA Region VIII emphasizes that states . . . may apply their antidegradation requirements to any activity that has the potential to affect existing water quality, and that states . . . have authority to define broadly the universe of activities subject to antidegradation review requirements."); *see also* ANPRM, WQS Regulation, *supra* note 2, at 36,780 (recognizing the four minimum triggering conditions, and further recognizing the ability of states to require antidegradation review beyond these activities). The nonpoint source trigger will be addressed *infra* Part III.C.

84. Clean Water Act § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1994). ("Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [EPA].").

85. 40 C.F.R. § 131.20 (1998) (requiring states to review their water quality standards at least every three years and submit the results of the review to the EPA for approval).

86. State review and submission of water quality standards to the EPA must occur when states revise those standards, *id.*, or at a minimum on a triennial basis. Clean Water Act § 303(c)(1), 33 U.S.C. § 1313(c)(1); 40 C.F.R. 131.20(a). States must make the results of the review available to the EPA within thirty days of the final state action adopting the revised standard, or within thirty days of the completion of the review if no revisions are necessary. 40 C.F.R. § 131.20(c). EPA must either: (1) within sixty days, approve the revisions and notify the state, *id.* § 131.21(a)(1), or (2) within ninety days, disapprove the revisions with an accompanying explanation of the reason for disapproval and specified changes necessary to bring the standards within compliance. *Id.* § 131.21(a)(2).

87. *See, e.g.*, 40 C.F.R. § 131.6 (1998) (requiring antidegradation policies to be included in state water quality standards submissions to the EPA); National Wildlife Fed'n v. Browner, 127 F.3d 1126, 1127 (D.C. Cir. 1997); *cf.* PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700, 705-06 (1994) (recognizing antidegradation policies fall within the state water quality standards mandated by Clean Water Act § 303, 33

approve new or revised antidegradation policies for compliance with the federal antidegradation policy.⁸⁸ Second, it is also a substantive requirement which other water quality standards, such as TMDLs and use designations, must satisfy during their scheduled review and approval procedures.⁸⁹ The distinction is important because separate claims exist under each approach: litigants may argue a state's antidegradation policy is invalid for non-compliance with federal minimums or litigants may argue that a component of a state's water quality standards is invalid for failure to comply with the state's antidegradation policy.

Two cases illustrate the different claims associated with the distinct roles of antidegradation policy: *Raymond Proffitt Foundation v. United States EPA*⁹⁰ and *Miccosukee Tribe v. United States*.⁹¹ In *Raymond Proffitt*, Pennsylvania submitted its antidegradation policy to the EPA under the triennial review and approval procedures,⁹² but the EPA concluded that it did not comport with federal minimum standards.⁹³ After Pennsylvania failed to modify its antidegradation policy and the EPA failed to promulgate a policy in its stead, an environmental organization challenged EPA's inaction, arguing that the Clean Water Act required the agency to establish an antidegradation policy for Pennsylvania as a recalcitrant state.⁹⁴ The court agreed and recognized Pennsylvania's failure to bring its antidegradation policy to the minimum level prescribed by federal law as late as 588 days after the disapproval notification generated a mandatory duty upon the EPA to establish an acceptable antidegradation policy for the state.⁹⁵ This

U.S.C. § 1313 (1994)).

88. 40 C.F.R. § 131.20; *id.* § 131.6 ("The following elements must be included in each State's water quality standards submitted to EPA for review: . . . An antidegradation policy consistent with § 131.12."); *see* ANPRM, WQS Regulation, *supra* note 2, at 36,781 ("The antidegradation policy itself is expressly required by 40 C.F.R. § 131.20(c) . . .").

89. *See* Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (water quality standards must comply with antidegradation policies).

90. *Raymond Proffitt Found. v. United States EPA*, 930 F. Supp. 1088, 1097-99 (E.D. Pa. 1996). This case has important implications for the relationship between the federal and state governments in the promulgation and implementation of antidegradation policies, an issue discussed in more detail, *infra* Part II.C.

91. *Miccosukee Tribe v. United States*, 105 F.3d 599, 602 (11th Cir. 1997).

92. *Raymond Proffitt*, 930 F. Supp. at 1092.

93. *Id.* The EPA refused to approve the policy, noting that the Pennsylvania plan improperly linked existing use protection to the state agency's rulemaking process, improperly defined Tier 2 waters, and failed to provide stringent enough protections to Tier 3 waters. *Id.* at 1092-93. For expansion of these review and approval procedures, *see supra* note 86.

94. *Raymond Proffitt*, 930 F. Supp. at 1095.

95. *Id.* at 1105. The court not only recognized the existence of this mandatory duty, but also ordered EPA to federally promulgate an antidegradation policy for Pennsylvania. *Id.* at 1105; *see* 40 C.F.R. § 131.32 (1998) (EPA's promulgation of water quality standards for Pennsylvania); *see also* Water Quality Standards for Pennsylvania, 61 Fed. Reg. 64,816, 64,816-22 (1996) (providing explanation of the interactions between Pennsylvania and EPA Region III that resulted in the federal promulgation of antidegradation standards).

evidences a claim under the first approach to antidegradation policy, as a water quality standard, challenging the policy itself through the federal review and approval procedures.

The Eleventh Circuit's recent decision in *Miccosukee Tribe v. United States*⁹⁶ illustrates a challenge under the second approach to antidegradation policy: a claim challenging not an antidegradation policy itself but a state's failure to comply with its own antidegradation policy in revising other state water quality standards. In 1994, Florida enacted the Everglades Forever Act ("EFA"),⁹⁷ an action the plaintiff Indian Tribe argued effectively altered the state's water quality standards without complying with the state's antidegradation provisions.⁹⁸ This effective revision, the Tribe argued, triggered the EPA's duty to review and approve those revised standards for substantive compliance with the state's antidegradation policy.⁹⁹ Thus, the plaintiffs challenged the substantive requirement with which other state water quality standards must comply.

2. Load Allocations, Waste Load Allocations, and TMDLs

A second antidegradation review triggering activity is the total maximum daily load ("TMDL") process utilized by the Clean Water Act to address the problem of non-complying waters. Non-complying waters are those waters that do not satisfy established water quality standards despite conformity with section 301 effluent standards. Under the TMDL process, states must identify non-complying waters and establish TMDLs¹⁰⁰ for certain pollutants necessary to achieve applicable water quality standards.¹⁰¹ Based upon those determinations, states must establish load allocations ("LA"—the amount of pollutant input from non-point sources which will still satisfy water quality standards)¹⁰² and waste load allocations ("WLA"—the amount of pollutant input from point sources which will still satisfy water quality standards)¹⁰³ and include them in permits so that water quality standards can be achieved. Pursuant to the Clean Water Act, any revision to the TMDL, LA, and/or WLA process triggers

96. *Miccosukee Tribe*, 105 F.3d at 602.

97. FLA. STAT. ANN. §§ 373.4592-45926 (West Supp. 1998).

98. *Miccosukee Tribe*, 105 F.3d at 601-02.

99. *Id.*

100. TMDL is "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(i) (1998).

101. Clean Water Act § 303(d)(1)(A), (C), 33 U.S.C. § 1313(d)(1)(A), (C) (1994); 40 C.F.R. § 130.7 (1998).

102. Load allocation is "[t]he portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 C.F.R. § 130.2(g). Loading capacity is "[t]he greatest amount of loading that a water can receive without violating water quality standards." *Id.* § 130.2(f). Loading is "to introduce matter or thermal energy into a receiving water." *Id.* § 130.2(e).

103. Wasteload allocation is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." *Id.* § 130.2(h).

antidegradation review, requiring compliance with state and federal antidegradation policy.¹⁰⁴ No administrative or judicial cases challenge an aspect of the TMDL process as inconsistent with antidegradation requirements, presumably due to the scarcity of completed TMDLs. However, the following discussion of permitting standards provides insight into the use of the TMDL as a triggering mechanism by illustrating how permits are subjected to the antidegradation review process.

3. NPDES and Other Permits

The final statutorily recognized antidegradation trigger consists of "any other permitting standard."¹⁰⁵ This broad language applies antidegradation review to a wide range of regulatory activities,¹⁰⁶ including the issuance of National Pollutant Discharge Elimination System ("NPDES") permits established under section 402 of the Clean Water Act.¹⁰⁷ NPDES permits regulate the "discharge of pollutants" from a "point source" into "navigable waters"¹⁰⁸ by prescribing technology-based effluent limitations for discharges. In developing the numerical criteria comprising the effluent limitations, permitting authorities must comply with antidegradation policy protection standards as well as any procedural requirements required under state

104. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B).

105. *Id.*

106. See ANPRM, WQS Regulation, *supra* note 2, at 36,780 (articulating a very broad application of antidegradation review: "It is the position of EPA that, at a minimum, States and authorized Tribes must apply antidegradation requirements to activities that are 'regulated' . . . (i.e., any activity that requires a permit . . .).")

107. Clean Water Act § 402, 33 U.S.C. § 1342. Another important permitting scheme also subject to antidegradation review is § 404 dredge and fill permits. Clean Water Act § 404, 33 U.S.C. § 1344. The application of antidegradation policy to deny a section 404 dredge and fill permit occurred administratively in *In re Department of the Army*, DIA No. 97DNR-2, 1997 WL 900837, at *12 (Iowa Dept. of Inspections and Appeals Aug. 5, 1997) (proposed decision). The Army Corps of Engineers sought both an NPDES and a section 404 dredge and fill permit for a project which would deposit material on an island in the Mississippi River. See *id.* at *1. In an administrative appeals hearing, Iowa affirmed a previous denial of a section 401 certification for the permits finding the proposed plan violated the state's antidegradation policy; specifically, the plan improperly degraded a Tier 1 waterbody. While the Army Corps of Engineers argued that the proposed plan adequately mitigated any degradation, the hearing body rejected this argument, noting that "[t]he state's antidegradation policy does not allow mitigation of adverse effects, except in highly unusual situations This case does not present a highly unusual situation." *Id.* at *13 (referring to IOWA ADMIN. CODE r. 567-61.2(2)(g) (1996)).

108. Clean Water Act § 402, 33 U.S.C. § 1342. The statutory definitions of these terms and subsequent judicial interpretations represent very broad definitional constructions which, in turn, produce the very broad applicability of NPDES permitting requirements. See Clean Water Act § 502(6), (7), (12), (14), 33 U.S.C. § 1362(6), (7), (12), (14). Like antidegradation policy itself, the EPA may grant authority to states to issue NPDES permits, *id.* § 402(b), 33 U.S.C. § 1342(b), subject to the agency's review and approval, *id.* § 402(c), 33 U.S.C. § 1342(c). As of 1997, EPA granted permitting authority to forty states. See Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 *ECOLOGICAL Q.* 393, 416 n.118 (1997).

or federal antidegradation policy.

The Ohio Supreme Court's decision in *Columbus & Franklin County Metropolitan Park District v. Shank*,¹⁰⁹ discussed earlier in the context of Tier 2 protection standards,¹¹⁰ exemplifies the operation of this "other permitting standard" triggering device. The Ohio Environmental Protection Agency ("OEPA") issued "[permits] to install"¹¹¹ to two companies that intended to build sewage treatment plants which would discharge effluent into a Tier 2 waterbody.¹¹² Upon appeal by an affected park district, the Ohio Environmental Board of Review upheld the issuance of the permit, finding that the proposed effluent discharge would not violate Ohio's antidegradation policy because it would not interfere with applicable use designations.¹¹³ The Ohio Supreme Court found the OEPA violated antidegradation policy both procedurally and substantively. Procedurally, the Ohio antidegradation policy requires notice of the intended action and a public hearing addressing the economic and social costs of the permitted activity prior to the issuance of an effluent limitation permit involving a Tier 2 waterbody.¹¹⁴ Having found the OEPA failed to engage in the appropriate public participation requirements of the Ohio antidegradation policy, the court remanded the action for appropriate hearing procedures. Furthermore, issuance of the "permit to install" failed to satisfy the substantive requirements of the Ohio antidegradation policy because the OEPA improperly considered degradation of a high quality waterbody permissible, provided that degradation did not interfere with designated uses.¹¹⁵ Instead, the court read the Ohio antidegradation policy Tier 2 protections as preventing any perceptible degradation of water quality regardless of continued compliance with designated use numerical criteria,¹¹⁶

109. *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992).

110. See *supra* notes 66–70.

111. See *Columbus & Franklin*, 600 N.E.2d at 1049. Pursuant to Ohio law, "permit[s] to install" are required before the installation of new or modified sewage disposal systems. OHIO ADMIN. CODE § 3745-31-02(A)(1) (West 1998); see OHIO REV. CODE ANN. § 6111.01(G) (defining disposal systems). The application for a permit to install must contain a plan for the disposal system, and approval of the permit constitutes approval of this plan. OHIO ADMIN. CODE § 3745-31-02(A)(1).

112. "Tier 2" utilizes the federal antidegradation articulation of the applicable Ohio standard of protection at the time of the *Columbus & Franklin* decision, which provided: "Waters in which existing water quality is better than the criteria prescribed in these rules . . . shall be maintained and protected." *Id.* § 3745-1-05(B) (1994) (amended 1996) (mirroring the federal antidegradation policy). The 1996 amendments to Ohio's antidegradation policy provide a significantly more detailed approach. See *id.* § 3745-1-05 (1998). The following discussion of the *Columbus & Franklin* decision will reference the Ohio antidegradation policy as it existed at the time of decision.

113. See *Columbus & Franklin*, 600 N.E.2d at 1050–51 (reviewing the Board's findings of fact and law).

114. See *id.* at 1057–59 (citing Ohio's antidegradation policy, OHIO REV. CODE ANN. § 3745-1-05(C)(3), (6)).

115. See *id.* at 1056.

116. See *id.* at 1056–57.

finding the OEPA approach "would eviscerate the [antidegradation] rule . . . [by allowing] . . . a clear degradation of water quality to be considered nondegradation."¹¹⁷ *Columbus & Franklin* illustrates the issuance of a permit as triggering antidegradation review. It also illustrates application of procedural and substantive aspects of the policy to determine the propriety of that permit.

4. Section 401 Certification

Section 401 of the Clean Water Act allows states to evaluate proposed federal permits "which may result in any discharge into the navigable waters"¹¹⁸ of the state for compliance with federal and state water protection requirements.¹¹⁹ This certification must include, among other things, "a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."¹²⁰ Thus, under this provision, states may effectively bar the issuance of a federal permit for failure to comply with the state's antidegradation policy. Furthermore, the certification may contain conditions "necessary or desirable with respect to the discharge of the activity" to ensure compliance with state "effluent limitations and other limitations."¹²¹

Section 401 certification should be considered not a direct, but an indirect antidegradation review trigger for two reasons. First, unlike the water quality standards review, TMDL, and other permitting mechanism triggers, certification involves the evaluation of proposed regulated activity, not the regulatory action itself. Second, states may waive section 401 certification through inaction.¹²² Thus, certification indirectly acts as a fourth antidegradation review triggering activity by allowing states to evaluate proposed federal permits for compliance with state water quality standards, including antidegradation policy.¹²³

While some dispute existed concerning the extent of a state's ability to condition permits based upon antidegradation policy, the

117. *Id.* at 1056.

118. Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994).

119. *Id.* Specifically, section 401 allows states to evaluate whether the proposed activity will satisfy sections 301, 302, 303, 306, and 307 of the Clean Water Act. *Id.*

120. 40 C.F.R. § 121.2(3) (1998).

121. *Id.* § 121.2(4); Clean Water Act § 401(d), 33 U.S.C. § 1341(d).

122. Section 401 certification should not be considered a direct trigger for two related reasons: first, the other direct triggers—water quality standards review, TMDLs, and other permitting mechanisms—focus on a regulated activity, as opposed to section 401 certification which is an *evaluation* of regulated activity; and second, states may waive section 401 certification through inaction. Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a)(1).

123. *Id.* As stated in the Clean Water Act:

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306, and 307] of [the Clean Water Act].

Id.

Supreme Court recently set the matter to rest in *PUD No. 1 v. Washington Department of Ecology*,¹²⁴ a decision significantly strengthening antidegradation policy as a means to protect the nation's waters. In that case, a city utility district sought a federal license to build a hydroelectric project, thereby giving rise to Washington's section 401 right to review the license.¹²⁵ The state certified the proposed license but imposed a number of conditions. These conditions included the maintenance of a minimum stream flow requirement which, the state argued, was needed to ensure compliance with Washington's antidegradation policy protections of its Tier 3 waterbodies.¹²⁶ Specifically, the failure to maintain minimum flow requirements would interfere with one of the designated uses of the Tier 3 waterbody, salmon spawning and migration, by impeding the salmon's ability to travel upstream to their spawning ground.¹²⁷

The applicant district argued that the stream flow requirements were unrelated to the specific discharges that concededly would arise from the activity¹²⁸ and that state section 401 conditioning authority did not extend beyond conditions placed upon discharges.¹²⁹ The Supreme Court rejected this argument through their interpretation of section 401(d) which "provides that any certification shall set forth 'any effluent limitations and other limitations . . . necessary to assure that any applicant' will comply with various provisions of the Act and appropriate state law requirements."¹³⁰ The Court found that the text of 401(d) refers to compliance by the applicant and not to the discharge itself. The Court recognized that section 401 certification conditioning based on state water quality standards may include minimum flow requirements.¹³¹ Prior to the *PUD No. 1* decision, state certification procedures provided a powerful means for states to ensure the protection of their waters through either the denial or

124. *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

125. *Id.* at 708-09.

126. *Id.* at 709. Washington's antidegradation policy provides that "[w]ater quality shall be maintained and protected in waters designated as outstanding resource waters." WASH. ADMIN. CODE § 173-201A-070(3) (1997).

127. *See PUD No. 1*, 511 U.S. at 714. The proposed project sought to completely block the river, divert 75% of the water along a one mile stretch of the river, utilize the water to generate electricity, and ultimately return that water to the river. *See id.* at 708-09.

128. These discharges included the release of dredge and fill material during construction, and the discharge of water following its use to generate electricity. *See id.* at 711.

129. *Id.* The petitioner based this argument on the text of section 401(a) which allows states to certify that "discharge[s] will comply" with the Clean Water Act provisions. Clean Water Act § 401(a), 33 U.S.C. § 1341(a); *PUD No. 1*, 511 U.S. at 711. The Supreme Court recognized the potential validity of this argument as applied to section 401(a), but rejected the argument through an analysis of section 401(b). *Id.* (discussing Clean Water Act § 401(a), (d), 33 U.S.C. § 1341(a), (d) (1994)).

130. *Id.* (quoting Clean Water Act § 401(d), 33 U.S.C. § 1341(d)). The Court recognized that the petitioner's argument maintains validity as to section 401(a), but fails when considered against section 401(d). *Id.*

131. *Id.* at 713-21; *see also* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGICAL Q.* 201 (1996) (providing discussion of *PUD No. 1*).

conditioning of permits. By recognizing the antidegradation policy's role in this determination, the Supreme Court further strengthened both section 401 and the antidegradation policy itself as environmental protection tools.

C. FEDERAL-STATE RELATIONSHIP

Antidegradation policy reflects an integration of duties and responsibilities on both the federal and state level: the federal government establishes minimum antidegradation policy criteria,¹³² the states promulgate and implement state antidegradation policies consistent with the federal criteria,¹³³ and the federal government retains review and approval authority over those state policies.¹³⁴ Much of the litigation surrounding antidegradation policy is centered on this structure as litigants seek to compel the EPA to enforce the provisions of the Clean Water Act. The following discussion examines two aspects of the federal-state relationship: first, federal promulgation of antidegradation policy for recalcitrant states; and second federal review of water quality standards' compliance with antidegradation policy.

1. Federal Review and Promulgation of State Antidegradation Policies

The EPA retains "clear authority to review and approve or disapprove and promulgate an antidegradation policy for a State."¹³⁵ While this review authority is limited to examining whether the policies or procedures will sufficiently implement the minimum elements of the federal policy, the EPA retains authority to disapprove and "federally promulgate" any portion of a state implementation procedure "if, in the judgment of the Administrator, the State's process (or certain provisions thereof) can be implemented . . . as to circumvent the intent and purpose of the antidegradation policy."¹³⁶ Authority to compel federal promulgation of a state antidegradation policy based upon state recalcitrance may reside in three sources: the Clean Water Act citizen suit provision,¹³⁷ and two provisions of the federal Administrative Procedure Act (APA).¹³⁸ The following discussion examines differing approaches to the propriety of the citizen suit provision as a means to compel EPA action, and of the various APA claims.

132. 40 C.F.R. § 131.12(a).

133. *Id.*

134. For an outline of the review and approval procedures, see *supra* note 86.

135. WQS Second Edition, *supra* note 9, at § 4.3.

136. *Id.* This authority exists through the operation of Clean Water Act § 303(c)(4), 33 U.S.C. § 1313(d)(4) (1994). See WQS Second Edition, *supra* note 9, at § 4.3.

137. Clean Water Act § 505(a)(2); 33 U.S.C. § 1365(a)(2) (1994).

138. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1944) (codified as amended in scattered sections of 5 U.S.C.).

a. Citizen Suit Provision

Section 505(a)(2) of the Clean Water Act¹³⁹ authorizes a citizen to commence a suit, *inter alia*, "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."¹⁴⁰ Thus, any attempt to compel the EPA to promulgate a regulation for a recalcitrant state under the authority of the Clean Water Act's citizen suit provision requires the existence of a non-discretionary duty.

Courts have come to very different conclusions as to the existence, or lack thereof, of a duty to federally promulgate a state's antidegradation policy pursuant to section 303(c)(4) of the Clean Water Act.¹⁴¹ In *Defenders of Wildlife v. Browner*,¹⁴² the court refused to recognize the existence of an EPA mandatory duty to "promptly" promulgate an antidegradation policy for Arizona after the state failed to modify its antidegradation policy to comport with federal minimum standards.¹⁴³ The plaintiffs brought action under the Clean Water Act's citizen suit provision to compel EPA promulgation of those changes.¹⁴⁴ This action required the court to determine whether section 303(d)(4) imposes a non-discretionary duty on the EPA—an inquiry focused solely on "whether the agency failed to comply with a date-certain statutory deadline."¹⁴⁵ The court refused to find such a mandatory duty, reasoning that the statutory mandate to act "promptly" did not represent the "clear-cut agency violations and defaults" required to invoke the citizen suit provision.¹⁴⁶

Other jurisdictions, such as the Pennsylvania court in *Raymond Proffitt Foundation v. United States EPA*,¹⁴⁷ discussed earlier in the context of scheduled water quality standards review,¹⁴⁸ adopt a very different approach by recognizing that section 303(c)(4) creates a non-discretionary duty.¹⁴⁹ Upon Pennsylvania's submission of its

139. Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2).

140. *Id.*

141. Clean Water Act § 303(c)(4), 33 U.S.C. § 1313(c)(4). This provision states in pertinent part:

The Administrator shall promptly prepare and publish proposed [and final] regulations setting forth a revised or new water quality standard for the navigable waters involved . . . if a revised or new water quality standard submitted by [a] State . . . is determined by the Administrator not to be consistent with the applicable requirements of this chapter

Id.

142. *Defenders of Wildlife v. Browner*, 888 F. Supp. 1005 (D. Ariz. 1995) [hereinafter *Defenders of Wildlife I*].

143. *Id.* at 1008–09.

144. *Id.* at 1006.

145. *Id.* at 1008.

146. *Id.* at 1008–09 (utilizing method of analysis set forth in *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)).

147. *Raymond Proffitt Found. v. United States EPA*, 930 F. Supp. 1088 (E.D. Pa. 1996).

148. *See supra* notes 92–95 and accompanying text.

149. *Raymond Proffitt*, 930 F. Supp. at 1097–99 (expressly rejecting *Defenders of Wildlife* approach). Another court explained that:

antidegradation policy pursuant to the triennial review requirements of the Clean Water Act,¹⁵⁰ the EPA disapproved certain standards as inconsistent with the federally mandated minimums.¹⁵¹ Pennsylvania failed to alter its standards as late as 588 days after EPA disapproval notification, prompting the plaintiff to bring an action to compel EPA promulgation under the Clean Water Act's citizen suit provision.¹⁵² Utilizing a traditional statutory interpretation analysis, the court concluded that the plain meaning of section 303(c)(4) established a mandatory duty,¹⁵³ finding the use of the word "shall" particularly instructive.¹⁵⁴ While acknowledging the relative vagueness of the term "promptly," the court found that "one or two years is clearly too long when matched with the section's stated deadlines and the provisions for review of a state's standard every three years."¹⁵⁵ Thus, the EPA's failure to promulgate an antidegradation policy for Pennsylvania violated its mandatory duty, prompting the court to order promulgation of the appropriate regulations.¹⁵⁶

b. Section 706(1) of the Administrative Procedure Act

In addition to the Clean Water Act's citizen suit provision, section

Section 303(c)(3) uses mandatory language, stating "the Administrator shall promulgate such standard pursuant to [Section 303(c)(4)]." The same mandatory language appears in Section 303(c)(4): "The Administrator [of the EPA] shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard "if a state fails to adopt regulations within the specified period. There is no case law suggesting Section 303(c) leaves the Administrator any discretion to deviate from this apparently mandatory course.

Idaho Conservation League, Inc. v. Russell, 946 F.2d 717, 720 (9th Cir. 1991); see Idaho Conservation League v. Browner, 968 F. Supp. 546, 548-49 (W.D. Wash. 1997) ("By the plain language of the statute, and under the cited authorities, the EPA's duty under § 1313(c)(4)(A) is mandatory.").

150. See *supra* note 86 (providing overview of review and approval requirements of 40 C.F.R. § 130).

151. *Raymond Proffitt*, 930 F. Supp. at 1092. Specifically, EPA contended that the Pennsylvania plan improperly linked existing use protection to the state agency's rulemaking process, improperly defined Tier 2 waters, and failed to provide stringent enough protections to Tier 3 waters. *Id.* at 1092-93.

152. *Id.* at 1092-1100.

153. *Id.* at 1096-98.

154. *Id.* at 1097 (citing numerous cases that recognized the word "shall" as indicative of a mandatory duty including *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words [than 'shall'] to express its intent that forfeiture be mandatory in cases where the statute applied . . .").

155. *Id.* at 1100. In examining the scope of the term "promptly," the court noted that a statutory analysis should "construe that statute in such a fashion that every work has some operative effect." *Id.* Thus, the court found that "Congress expected the Administrator to begin preparing and publishing the regulations without undue delay." *Id.*

156. *Id.* at 1105; see 40 C.F.R. § 131.32 (1998) (EPA's promulgation of water quality standards for Pennsylvania); see also *Water Quality Standards for Pennsylvania*, 61 Fed. Reg. 64,816, 64,816-22 (1996) (providing explanation of the interactions between Pennsylvania and Region III of the EPA that resulted in the federal promulgation of antidegradation standards).

706(1) of the APA¹⁵⁷ may provide a mechanism by which to seek an order compelling EPA to promulgate an antidegradation policy for a recalcitrant state. Section 706(1) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."¹⁵⁸ An inquiry into a claim based upon this APA provision must examine whether an agency violated a statutory mandate by failing to act.¹⁵⁹ While courts use a number of approaches, the most exacting of these tests examines four factors:

(1) the length of time that has elapsed since the agency came under a duty to act; (2) the reasonableness of the delay in the context of the statute that authorizes the agency's action; (3) the consequences of the agency's delay; and (4) the agency's need to balance priorities in the face of limited resources.¹⁶⁰

In addition to the Clean Water Act citizen suit claims, both *Raymond Proffitt* and *Defenders of Wildlife*¹⁶¹ addressed EPA's failure to promulgate antidegradation policies in the context of APA section 706(1). In *Raymond Proffitt*, application of the first two factors prompted the court to recognize that a 588-day delay was unreasonable in light of the context of the statute which contained sixty and ninety-day deadlines¹⁶² and triennial review procedures.¹⁶³ The third factor, consequences of the delay, supported a finding of violation of section 706(1) because the regulations provided that state antidegradation policies remain in effect, despite EPA disapproval, until the agency promulgates a new policy.¹⁶⁴ Court decisions addressing this factor indicate that a strong argument for the existence of negative consequences needs factual support for assertions of actual degradation as a result of the delay.¹⁶⁵

157. 5 U.S.C. § 706(1) (1994).

158. *Id.*

159. *Oregon Natural Resource Council v. Turner*, 863 F. Supp. 1277, 1283 n.7 (D. Or. 1994) (citing *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981); see also *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1345-46 (D. Ariz. 1995) [hereinafter *Defenders of Wildlife II*] (citing a number of tests, all of which involve an assessment of the reasonableness of the delay in the context of the statute which authorizes the agency's action).

160. *Defenders of Wildlife II*, 909 F. Supp. at 1345-46 (citing *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992)); see also *Raymond Proffitt*, 930 F. Supp. at 1102; *Oregon Natural Resource Council*, 863 F. Supp. at 1283; *Hells Canyon Preservation Council v. Richmond*, 841 F. Supp. 1039, 1044 (N.D. Cal. 1993).

161. After dismissing the plaintiff's Clean Water Act citizens suit claim in *Defenders of Wildlife I*, the court granted plaintiff's motion to file an amended complaint alleging a violation of section 706(1) of the APA. *Defenders of Wildlife I*, 888 F. Supp. 1003 (D. Ariz. 1995). The subsequent decision in *Defenders of Wildlife II*, 909 F. Supp. 1342 (D. Ariz. 1995), addresses the APA claim.

162. Clean Water Act § 303(c)(3), 33 U.S.C. § 1313(c)(3) (1994).

163. *Raymond Proffitt*, 930 F. Supp. at 1102.

164. As stated in the regulations: "A State water quality standard remains in effect, even though disapproved by EPA, until the State revises it or EPA promulgates a rule that supersedes the State water quality standard." 40 C.F.R. § 131.21(c) (1998).

165. *Raymond Proffitt*, 930 F. Supp. at 1103 (citing specific example of the issuance of

An inquiry into the fourth factor,¹⁶⁶ the need to balance priorities, recognizes a degree of deference to agency prioritization, allowing an agency, without specific timetables, "broad discretion . . . to set its own agenda, establish its own priorities, and distribute its resources on tasks it deems most pressing."¹⁶⁷ In *Defenders of Wildlife II*, the EPA argued this discretion rendered their delay in policy promulgation reasonable, given its "limited resources, the greater environmental significance of its other projects, and the lack of immediate risk or harm to human health or aquatic environment in Arizona."¹⁶⁸ The *Defenders of Wildlife II* decision, however, illustrates some constraints on the applicability of this deference to section 303(c) actions. First, while section 303(c) does not establish a rigid timetable, the temporal limitation of "promptly" differs from statutes that are silent on timeframe and those statutes that invoke more discretionary language such as "from time to time."¹⁶⁹ Second, an agency's discretion to construe "promptly" must exist within the context of the statutory provision in question. Since section 303(c) establishes short time periods for EPA review of water quality standards, the deference argument loses force. As noted by the court in *Defenders of Wildlife II*, according an agency great deference in priority balancing in this area would nullify the statute's short time frames and undermine the triennial review procedure.¹⁷⁰ Having found the factorial test favored the plaintiffs, the courts in *Defenders of Wildlife II* and *Raymond Proffitt Foundation* granted summary judgment for the plaintiffs and ordered the federal promulgation of proposed water quality standards for the states pursuant to section 303(c).¹⁷¹

c. Section 706(2) of the Administrative Procedure Act

Section 706(2) also provides a potential avenue through which a party can compel the EPA to promulgate an antidegradation policy for a state in light of a state's failure to respond to EPA denials.¹⁷² Section

a permit); *Defenders of Wildlife II*, 909 F. Supp. at 1350 (citing poor Water Quality Assessment as indicative of Arizona's inability to adequately protect the state's waters and evidencing a negative consequence of the delay).

166. The defendants in *Raymond Proffitt* failed to include evidence supporting their position with respect to the fourth factor in the administrative record, prompting the court to disregard this factor. *Raymond Proffitt*, 930 F. Supp. at 1103. As such, discussion of this fourth factor will examine the arguments presented in *Defenders of Wildlife II*.

167. *Defenders of Wildlife II*, 909 F. Supp. at 1350 (citing *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987)); see *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987).

168. *Defenders of Wildlife II*, 909 F. Supp. at 1350.

169. *Id.*

170. *Id.* The court further noted that if "the statutory timelines are unrealistic, or counterproductive to public policies for state and federal cooperation, the EPA must look to Congress for relief." *Id.*

171. *Id.* at 1351; *Raymond Proffitt*, 930 F. Supp. at 1103-05; see generally 40 C.F.R. 131.32 (1998) (EPA's promulgation of water quality standards for Pennsylvania); 61 Fed. Reg. 64,816, 64,816-22 (1996) (providing explanation of the interactions between Pennsylvania and EPA that resulted in the federal promulgation of antidegradation standards).

172. 5 U.S.C. § 706(2) (1994) delineates actions for which specific claims may be

706(2)(A) provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁷³ While courts grant substantial deference to an agency's interpretation of its regulations,¹⁷⁴ failure to comply with those regulations constitutes an action (or more properly, a decision not to act) which is arbitrary, capricious and "not in accordance with law."¹⁷⁵ To satisfy the standards set forth under section 706(2)(A) of the APA in the face of agency inaction, a plaintiff need only show that the regulations required agency action and the agency did not perform those actions.¹⁷⁶ In addressing the section 706(2)(A) claim, the *Raymond Proffitt* court found that EPA's inaction violated explicit agency regulations, stating that "[i]f the State does not adopt the changes specified by the Regional Administrator within 90 days . . . the Administrator shall promptly propose and promulgate such standard."¹⁷⁷

D. Federal Review of State Water Quality Standards' Compliance with Antidegradation

Pursuant to the Clean Water Act and associated regulations, states must submit new or revised water quality standards to the EPA for substantive review and approval—a review that must include an inquiry into compliance with federal and state antidegradation policy.¹⁷⁸ The recent decision in *Miccosukee Tribe v. United States*¹⁷⁹ significantly

brought against a government agency: § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); § 706(2)(B) ("contrary to constitutional right, power, privilege or immunity"); § 706(2)(C) (in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law"). While each of these provisions represent separate causes of action, the arbitrary and capricious standard generally controls the outcome of claims arising under section 706(2) and, therefore, will be emphasized in the following discussion.

173. 5 U.S.C. § 706(2)(A).

174. See *Martin v. OSHA*, 499 U.S. 144, 150–51 (1991); *Raymond Proffitt*, 930 F. Supp. at 1104.

175. *Raymond Proffitt*, 930 F. Supp. at 1104 (citing *Frisby v. United States Dep't of Hous. & Urban Dev.*, 755 F.2d 1052, 1055–56 (3rd Cir. 1985)).

176. See *Raymond Proffitt*, 930 F. Supp. at 1104. In the context of claims asserting that the EPA failed to promulgate an antidegradation policy for a recalcitrant state, the timing element will be of particular importance. Thus, claims under sections 706(1) and 706(2)(A) would seem to be roughly equivalent. But as the *Raymond Proffitt* decision indicates, other considerations, beyond the timing element, enter into the section 706(2)(A) determination. See *id.* (noting both the temporal failure to comply with the regulations and the failure of Pennsylvania to initiate proceedings to address the EPA concerns).

177. *Id.* (quoting 40 C.F.R. § 131.22(a) (1996)).

178. Clean Water Act § 303(d)(4)(B), 33 U.S.C. § 1313(d)(4)(B) (1994) (water quality standards must comply with antidegradation policies); 40 C.F.R. §§ 131.20–21 (setting forth the review and approval procedures); see also *supra* note 86.

179. *Miccosukee Tribe v. United States*, 105 F.3d 599 (11th Cir. 1997). For a discussion of *Miccosukee Tribe* in the context of the water quality standards review triggering activity, see *supra* notes 96–99 and accompanying text.

increases EPA's review and approval duties by, in effect, expanding the definition of state "submission" to include the failure to submit.

As discussed previously, Florida established the Everglades Forever Act ("EFA"),¹⁸⁰ but, having decided that the EFA did not alter state water quality standards, the state did not submit the EFA to the EPA for approval.¹⁸¹ The EPA accepted Florida's "no revision" assessment and did not require the state to submit the water quality standards, nor did the agency review the act for compliance with antidegradation policy.¹⁸² The plaintiff argued the EFA altered water quality standards and that the EPA improperly refused to review the act for compliance with antidegradation policy.¹⁸³ The Eleventh Circuit agreed, utilizing a variation of the "constructive submission" approach adopted by the Seventh Circuit in *Scott v. City of Hammond*.¹⁸⁴ The court found that the Clean Water Act imposed a mandatory duty on the EPA to review state water quality standards even in the *absence* of state submission, if an alteration of state water quality standards *actually* occurred.¹⁸⁵ The existence of this possibility of a change in water quality standards necessitated a factual inquiry by the EPA, or by the trial court, into whether a change actually occurred.¹⁸⁶

While the Eleventh Circuit can be commended for their expansive approach to antidegradation review, it is unlikely that other jurisdictions will follow their lead for two reasons. First, the theoretical underpinnings of the *Miccossukee Tribe* decision are suspect. *Scott* applied the constructive submission doctrine to the states bordering Lake Michigan, who, contrary to statutory mandates,¹⁸⁷ failed to submit

180. FLA. STAT. ANN. §§ 373.4592–45926 (West Supp. 1994).

181. *Miccossukee Tribe*, 105 F.3d at 601; *see supra* notes 96–99 and accompanying text.

182. *Id.* at 601.

183. *Id.*

184. *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). *Scott* applied the constructive submission doctrine to the TMDL context. *Scott*, 471 F.2d at 994.

185. *Miccossukee Tribe*, 105 F.3d at 602–03 ("Florida's failure to submit any new or revised standards cannot circumvent the purposes of the CWA." (citing *Scott*, 741 F.2d at 998)). The D.C. Circuit refused to address the "constructive submission" issue in *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1131 n.8 (D.C. Cir. 1997). However, the situation in *National Wildlife Fed'n* differed in that the plaintiffs challenged Michigan's rejection of a petition to designate Lake Superior as an ONRW. *Id.* at 1127–28. The plaintiffs claimed this refusal, and the resulting submission refusal, constituted a constructive submission and therefore invoked EPA's mandatory review duties. *Id.* at 1128. The court recognized that EPA was not under a mandatory duty to review unchanged water quality standards and, therefore, dismissed the citizen suit for lack of subject matter jurisdiction. *Id.* at 1131.

186. The court ruled that since the jurisdiction question was intertwined with the merits of the claim, the defendant's motion to dismiss should have been treated as a "factual attack rather than a facial attack . . . for lack of subject matter jurisdiction." *Miccossukee Tribe*, 105 F.3d at 603.

187. The Clean Water Act requires a state to "identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters," Clean Water Act § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A) (1994), and provide the EPA with a list of those TMDLs.

any list of TMDLs to the EPA, and had *no* TMDLs in place.¹⁸⁸ The court reasoned that this absence of state action could indicate a decision that Lake Michigan did not necessitate the implementation of the TMDL process—essentially a submission of a list containing no TMDL applicable waters—thereby triggering EPA's non-discretionary duty to review the propriety of the "empty" list. Unlike the *Scott* situation involving complete state inaction, Florida had water quality standards in place, but determined that an action did not revise those standards. Florida even invited EPA input on its decision if the agency disagreed with their "no revision" determination,¹⁸⁹ further distinguishing the situation from *Scott*.

A second reason future courts are unlikely to import the constructive submission doctrine to antidegradation policy review involves the practical implications of such a move. The TMDL process involves a relatively formalized structure: the EPA promulgates a list of pollutants to be utilized in TMDL determinations. The states establish TMDLs for waterbodies unable to satisfy water quality criteria for those pollutants and then submit a list of those TMDLs to the EPA for review and approval.¹⁹⁰ Unlike this formalized TMDL structure, potential alterations to water quality standards may occur through a wide range of activity not specifically addressed by the Clean Water Act or its regulations. Applying the constructive submission doctrine to water quality standard revision/no revision review would potentially open the EPA to non-discretionary review of a plethora of state actions with no means of filtering legitimate and illegitimate claims of constructive submission. Given the difficulties in applying constructive submission to this area, and the distinguishable circumstances between *Scott* and *Miccosukee Tribe*, it is unlikely other courts will adopt the expansive approach of the Eleventh Circuit.

III. THE FUTURE OF ANTIDEGRADATION

The future of antidegradation policy as an environmental protection tool depends in large part on the resolution of some key issues arising in both state antidegradation policies and federal moves to alter the existing standards. The following discussion examines *de minimis* degradation, classification designations, and the application of antidegradation review to non-point sources.

A. DE MINIMIS DEGRADATION: THE DEGREE OF SIGNIFICANCE NEEDED FOR ANTIDEGRADATION REVIEW

One issue common to an analysis of antidegradation protection standards involves the issue of *de minimis* degradation (or

188. *Scott*, 741 F.2d at 997.

189. See *Miccosukee Tribe*, 105 F.3d at 601.

190. This presentation of TMDLs represents a very abbreviated version of the workings of the process. For a more precise treatment, see Conway, *supra* note 6; discussion *supra* Part II.A.2.

significance).¹⁹¹ While a strict reading of the federal antidegradation policy requires antidegradation review for *any* decrease in water quality,¹⁹² Region VIII expressly supports the use of a significance determination as a "valuable means of focusing state resources appropriately."¹⁹³ A number of states have promulgated regulations that define the point at which the lowering of water quality invokes the protections of antidegradation review.¹⁹⁴ These regulations define degradation in varying ways, from any lowering of the water quality to complex analyses directed at whether a discharge or change in water quality represents a significant change requiring antidegradation review.¹⁹⁵

The Supreme Court recognized the propriety of a significance determination in *Arkansas v. Oklahoma*.¹⁹⁶ The dispute arose after EPA issued a permit to an Arkansas sewage treatment plant, prompting downstream Oklahoma to challenge the permit as violative of its water quality standards. The standards allowed "no degradation" of the upper Illinois River.¹⁹⁷ The Tenth Circuit reversed the lower court's determination that no detectable violation occurred, noting that since the Illinois River was already degraded, any effluent would contribute to the river's deterioration even if it did not noticeably affect the water quality.¹⁹⁸ The Supreme Court reversed the Tenth Circuit and sanctioned the use of *de minimis* determinations, finding the "no degradation" language of Oklahoma's antidegradation policy did not necessarily prohibit any new discharge. Instead, "no degradation"

191. Some states limit this inquiry to Tier 2 waterbodies. See, e.g., 5 COLO. CODE REGS. § 1002-31(3)(c) (1997) (Colorado's antidegradation implementation policy—Significance Determination provision).

192. See 40 C.F.R. § 131.12(a)(2) (1998) ("that quality shall be maintained and protected unless" the state follows the public participation and need inquiry requirements); 48 Fed. Reg. 51, 400, 51,403 (1983) (preamble stating that Tier 2 provisions allow "some limited water quality degradation after extensive public involvement.").

193. Region VIII Guidance, *supra* note 3, at 55. At the same time the Region VIII Guidance stated that the significance test "should screen out only those activities that would result in truly insignificant water quality effects." *Id.* To that end, Region VIII's model implementation policy utilized a low significance threshold which would require antidegradation review for most activities. *Id.*

194. The allowance of an insignificance determination to avoid Tier 2 protections appears to contravene the purpose and language of the policy; however, as evidenced by the Region VIII guidance statement, many states recognize a *de minimis* level of degradation which does not implicate Tier 2 protections. The EPA's approval of these implementation policies, with the significance provisions, indicates EPA's acceptance of this approach. See *id.* at 72-75 (discussing certain state "significance" approaches); see also Harleston, *supra* note 2, at 43-45, 57-59 (recognizing *de minimis* degradation as an "unresolved issue").

195. See Region VIII Guidance, *supra* note 3, at 72-75 (discussing various approaches adopting certain state "significance" determinations); see, e.g., 5 COLO. CODE REGS. § 1002-31(3)(c) (Colorado's antidegradation implementation policy—Significance Determination provision).

196. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

197. *Id.* at 91.

198. *Id.*

would apply to discharges demonstrably producing adverse effects.¹⁹⁹

States explicitly addressing the significance determination²⁰⁰ appear to agree with the "measurable" standard as a minimum requirement for significance²⁰¹ but vary on the maximum amount of water quality deterioration that can still be classified as *de minimis* (or insignificant) degradation, such that antidegradation review is not required. For example, Ohio's antidegradation policy originally provided for a very high degree of degradation before requiring antidegradation review: "the director may allocate to existing sources eighty percent of the pollutant assimilative capacity as determined by appropriate total maximum daily load procedures without further antidegradation review."²⁰² In *Rivers Unlimited, Inc. v. Schregardus*,²⁰³ the court rejected this "significance provision," finding that "the unambiguous meaning of the . . . federal rules is that any deterioration of high quality violates the policy."²⁰⁴ The eighty percent of assimilative capacity significance standard promulgated by Ohio, and rejected by the court, represents an extreme example of the use of an initial significance to limit antidegradation review.

While the "detectable or measurable" standard makes practical sense to describe the amount of degradation needed to invoke antidegradation review, *de minimis* provisions moving beyond this standard contradict the purpose of antidegradation policy, and therefore should be drafted and construed strictly. Congress created antidegradation policy to force entities to engage in a balancing between the need to protect water quality and the need to facilitate economic and social growth. The sole effect of these provisions is to remove discharges from the antidegradation review process and thereby eliminate the balancing determination. Furthermore, neither the Clean Water Act nor the regulations provide express support for allowances for *de minimis* degradation also requiring strict construction

199. *Id.* at 110-12 (requiring "actually detectable or measurable" change).

200. Considerable variation exists among the states in defining significance. Compare MONT. ADMIN. R. 17.30.715, .716 (1995) (providing detailed lists of the categories of activities that cause nonsignificant water quality changes), with WIS. ADMIN. CODE § 207.05 (1998) (providing detailed scientific procedures and tests for determining whether a discharge is deemed significant), with 5 COLO. CODE REGS. § 1002-31.8(3)(c) (using both a parameter-by-parameter and waterbody approach to the significance determination).

201. See, e.g., N.J. ADMIN. CODE tit. 7, § 9B1.5(d)(6)(iii) (1998) (protecting Tier 3 waters from "any measurable changes (including calculable or predicted changes) to the existing water quality.").

202. OHIO ADMIN. CODE § 6111.12(A)(3) (1997).

203. *Rivers Unlimited, Inc. v. Schregardus*, 685 N.E.2d 603 (Ohio Ct. C.P. 1997).

204. *Id.* at 611 (quoting *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d at 1061-62). In *Columbus & Franklin*, the Ohio Supreme Court rejected the Ohio EPA's interpretation of degradation for purposes of invoking antidegradation review, as not including "deterioration to a point short of interference with the designated use." *Columbus & Franklin*, 600 N.E.2d at 1054. The court indicated a stringent limitation on the significance/*de minimis* issue by noting that Ohio's antidegradation implementation policies clearly intended to prevent "perceptible change in water quality." *Id.* at 1055.

of *de minimis* provisions and construal of their terms.

B. Classification Designations

Effective classification designations represent a fundamental component of antidegradation policy implementation. Water not placed in the appropriate tier does not receive the appropriate protections. States, however, subject only to the very broad mandates of the federal antidegradation policy's direction,²⁰⁵ maintain a great deal of discretion over the timing of classification designations and the criteria utilized to make the classification determinations. The discretionary nature of classifications, in those states without objective tier classification schemes, makes a challenge to those classifications very difficult. Therefore, despite the importance of this aspect of antidegradation policy in protecting the nation's waters, successful challenges to tier classifications occur infrequently.

One example of this difficulty arose in *In re Petition of Town of Sherburne*,²⁰⁶ when the State Water Resources Board reclassified a river segment from a Tier 2 waterbody to Tier 1 upon petition by the town.²⁰⁷ In affirming the Board's decision, the Supreme Court of Vermont analyzed the Board's action under the "arbitrary and capricious" standard of review commonly used to assess the propriety of agency decisions.²⁰⁸ Under this deferential standard, a court deems an agency's decision reasonable if "the decision makes sense to a reasonable person, even if the reviewing court might have weighted the factors differently."²⁰⁹ The court, however, improperly applied the economic and social necessity evaluation to the reclassification context, as opposed to individual degradation allowance determinations,²¹⁰ thereby allowing substantially more degradation than would be permitted under strict application of the antidegradation policy decision-making framework. Furthermore, the court improperly evaluated the existing uses by focusing on the current attainment of recreational uses as opposed to the "uses actually

205. See 40 C.F.R. § 131.12.

206. *In re Town of Sherburne*, 581 A.2d 274 (Vt. 1990).

207. *Id.* at 276–77.

208. *Id.* at 278–79.

209. *Id.* at 279. The court further elaborated on the scope of the arbitrary and capricious standard by recognizing that:

We will not disturb the Board's findings of fact if there is substantial evidence in the record to support them. The Board held a *de novo* hearing in this matter. It took testimony from numerous witnesses, assessed their credentials, weighed their opinions, and, based upon all the evidence before it, found the facts that support its judgment. We are an appellate court, not a fact-finding agency; we must defer to the Board when its findings are supported—even if the record contains contradictory evidence—and when its conclusions are rationally derived from its findings and based on a correct interpretation of the law.

Id. at 280 (quoting *In re Southview Assocs.*, 569 A.2d 501, 504 (Vt. 1989)).

210. *Sherburne*, 581 A.2d at 281–82.

attained in the water body on or after November 28, 1975²¹¹ mandated by the regulations.

Current antidegradation policy fails to address classification problems in three respects.²¹² First, beyond the "necessary to support propagation of fish, shellfish, and wildlife" language for Tier 2 classification,²¹³ the federal policy does not adequately clarify for the states the criteria that states must follow in establishing waterbody classifications. With respect to ONRW classification, the EPA has stated that "there is no requirement that any water body be so designated or any specificity as to how that is to be done."²¹⁴ Given the tension between water quality protection and economic development that has shaped antidegradation policy from the beginning,²¹⁵ it is not surprising that a National Wildlife Federation study found only minimal use of the ONRW designation. Second, the federal antidegradation policy does not require states to systematically classify all the waterbodies in the state, allowing, instead, piecemeal tier assignment at the time activities trigger individual waterbody antidegradation review.²¹⁶ This potentially clouds the decision-making process by allowing interests other than those associated with the goals for the waterbody to enter the classification determination. Third, the EPA review provisions do not include the authority to review state antidegradation designations of waters beyond the broad language of the federal antidegradation policy's Tier 2 classification language.²¹⁷ Especially with respect to ONRWs, this raises concerns as to whether the highest quality waterbodies are receiving adequate protections as states attempt to avoid Tier 3 designations in favor of the more lenient and flexible protections afforded to Tiers 2 and 2.5.

C. Non-Point Source Regulation

The most important issue facing the future effectiveness of antidegradation policy as an environmental protection tool, and the

211. 40 C.F.R. § 131.3(e) (1998); *see* 40 C.F.R. § 131.12 (1998) ("In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully . . .").

212. The EPA presumably recognizes some deficiencies in this aspect of antidegradation policy in their advanced notice of proposed rulemaking by requesting comment on whether classification guidance should be increased. *See* ANPRN WQS Regulation, *supra* note 2, at 36,785 (Tier 2); *id.* at 36,787 (Tier 3).

213. 40 C.F.R. § 131.12(a)(2).

214. ANPRN WQS Regulation, *supra* note 2, at 36,786.

215. *See supra* notes 25-27 (discussing the competing interests which led to the initial formulation of antidegradation policy in 1967).

216. *See* NWF STUDY, *supra* note 2, at 13-17 & tbl. 3-2 (providing survey of state designation authority, including the use of an inventory process).

217. *See* Clean Water Act § 303(c), 33 U.S.C. § 1313(c) (1994) (providing authority to review new or revised water quality standards, but not referencing classification designation); 40 C.F.R. § 131.20-22 (1998); NWF STUDY, *supra* note 2, at 4 ("EPA has narrowly interpreted its authority to protect [ONRWs]. The EPA Office of General Counsel has interpreted EPA's regulations to deny EPA any role in overseeing state's designation of [ONRWs] or in requiring the development of equivalent state programs." (emphasis omitted)).

future of water protection attempts in general, is the treatment of nonpoint source pollutant regulation. "Nonpoint source," while not defined in the Clean Water Act, refers to the addition of pollutants, such as agricultural and construction run-off, to a waterbody by means other than "a discernible, confined, and discrete conveyance."²¹⁸ Nonpoint source pollution is the most significant source of water pollution today.²¹⁹ However, the Clean Water Act and its regulations do not impose any regulatory scheme for the control of this pollution source. Instead, the federal government delegates authority to the states to address the problem, requiring only state satisfaction of procedural mechanisms such as the state assessment report.²²⁰

The federal antidegradation policy requires states to implement policies that "achieve[] 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."²²¹ Thus, any non-point activity *regulated* by a state triggers antidegradation review and must conform to that state's policy.²²² Application of this trigger has yet to occur, however, due to the lack of regulatory requirements addressing nonpoint sources within the states. While nonpoint source control is difficult since "output sources cannot be pinpointed for measurement,"²²³ effective water quality protection requires both the federal and state governments to address the control of nonpoint source pollution in a more comprehensive manner, adopting enforceable standards which, in turn, will strengthen antidegradation policy as a water quality protection mechanism.

CONCLUSION

Antidegradation policies have seldom been used as an aspect of the Clean Water Act, despite the statutory/regulatory breadth of its coverage (applying to both effluent limits and water quality standards). Yet, this statutory and regulatory breadth, combined with the mandatory nature of many of the duties prescribed by antidegradation policies, provide a powerful tool to protect the waters of this nation. By establishing a decision-making framework to evaluate the advisability of activities which may lead to further degradation of our waterbodies, antidegradation policy forces decision-makers to choose our nation's water values—whether we value increased economic

218. 40 C.F.R. § 122.2 (1998) (defining "point source").

219. See David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 515 (1996).

220. See Clean Water Act § 319, 33 U.S.C. § 1329 (1994).

221. 40 C.F.R. § 131.12(a)(1) (1998).

222. See ANPRN WQS Regulation, *supra* note 2, at 36,780 (listing "any activity subject to State or Tribal nonpoint source control requirements or regulations" as an antidegradation review trigger).

223. Clare F. Saperstein, *State Solutions to Nonpoint Source Pollution: Implementation and Enforcement of the 1990 Coastal Zone Amendments Reauthorization Act Section 6217*, 75 B.U. L. REV. 889, 890 (1995).

development, protection of water quality, or a compromise between the two. The importance of antidegradation policy lies in that choice and the decision must be a considered one. Demonstration of need to allow further degradation must be complete and persuasive. Like the relatively recent growth of TMDL claims, actions brought under antidegradation policies potentially represent the next wave of environmental litigation in the water protection area. However, that potential depends upon the judicial, legislative, and executive decisions of today.