

# University of Michigan Journal of Law Reform

---

Volume 32

---

1999

## Keeping Clean Waters Clean: Making the Clean Water Act's Antidegradation Policy Work

John A. Chilson  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), [Legislation Commons](#), [Natural Resources Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

John A. Chilson, *Keeping Clean Waters Clean: Making the Clean Water Act's Antidegradation Policy Work*, 32 U. MICH. J. L. REFORM 545 (1999).

Available at: <https://repository.law.umich.edu/mjlr/vol32/iss3/5>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mLaw.repository@umich.edu](mailto:mLaw.repository@umich.edu).

## KEEPING CLEAN WATERS CLEAN: MAKING THE CLEAN WATER ACT'S ANTIDegradation POLICY WORK

---

John A. Chilson\*

*This Note stresses the importance of making the Clean Water Act's antidegradation policy work in order to avoid a system of national waters of equally mediocre quality. The Nation's highest quality and most important waters are not receiving appropriate protection under the Act because the antidegradation policy contains vague definitions, the states fail to review water quality standards every three years and to entertain citizens' petitions, and the Environmental Protection Agency has not taken an active role in ensuring compliance with federal standards. This Note examines the schemes of the Great Lakes States and Florida and hypothesizes that similar provisions might improve the Clean Water Act's effectiveness by bolstering the currently stagnant federal antidegradation policy.*

Maintaining and enhancing our environment, passing on a clean world to future generations, is a sacred obligation of citizenship. We all have an interest in clean air, pure water, safe food, and protected natural treasures. Our environment is, literally, our common ground.<sup>1</sup>

In 1972, Congress enacted the Clean Water Act (CWA or Act)<sup>2</sup> to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>3</sup> The objective of the Act is twofold: to clean up polluted waters<sup>4</sup> and to keep clean waters clean.<sup>5</sup> To facilitate pollution clean-up, the Act requires each state to institute federally-approved comprehensive water quality standards that set

---

\* Article Editor, *University of Michigan Journal of Law Reform*, Volume 32, 1999. B.S. 1991, United States Naval Academy; J.D. 1999, University of Michigan Law School. I would like to thank the editorial board, particularly Kendra Cheves, for their excellent edits and hard work on this Note, Professor Neil Kagan for his advice, and especially my family for their invaluable support and encouragement.

1. President William J. Clinton, *Protecting Public Health and Our Environment* (visited Feb. 15, 1999) <<http://www.whitehouse.gov/WH/SOTU98/enviro.html>> (proposing a new Clean Water Initiative to fulfill the promise of the Clean Water Act on Mar. 19, 1997).

2. 33 U.S.C. § 1251 (1994).

3. *Id.* § 1251(a).

4. "In 1972, . . . [t]he Potomac River was clogged with algae blooms and unsafe to swim. Lake Erie was dying. The Cuyohoga River was so polluted it burst into flames. Many rivers and beaches were little more than open sewers." *Gore Launches New Strategy to Protect America's Waters*, U.S. NEWSWIRE, Oct. 18, 1997, available in 1997 WL 13913782 (describing the advances made in cleaning up pollution in America's waters since the passage of the CWA).

5. See 33 U.S.C. § 1251(a).

goals for all intrastate waters.<sup>6</sup> States must designate uses of their navigable waters (including all lakes, rivers, streams, ponds, and marshlands) and develop water quality criteria based upon those designated uses.<sup>7</sup> The CWA requires that these “state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.”<sup>8</sup> The Environmental Protection Agency’s (EPA or Agency) implementing regulations promulgate a federal antidegradation policy<sup>9</sup> and require state water quality standards to include “a statewide antidegradation policy” to ensure that the “level of water quality necessary to protect the existing uses shall be maintained and protected.”<sup>10</sup>

The federal antidegradation policy establishes three tiers of protection.<sup>11</sup> The Tier III designation, exclusive to the Nation’s most

---

6. See *id.* §§ 1311(b)(1)(C), 1313. The CWA assigns responsibility for administering its provisions to the Environmental Protection Agency. See *id.* § 1251(d). The EPA was created in 1970 as part of Reorganization Plan No. 3. See Pub. L. No. 98-80, § 2(a)(2), (b)(2), (c)(2)(C), 84 Stat. 2086, 2086–87 (codified as amended at 5 U.S.C. §§ 1–7 (1994)). The Agency produced its finalized implementing regulations in 1975. See EPA, WATER QUALITY STANDARDS HANDBOOK INT-2 (2d ed. 1994) [hereinafter HANDBOOK].

7. See § 1313(c)(2)(A). Water quality criteria “are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.” HANDBOOK, *supra* note 6, at GLOSS-3.

8. PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 705 (1994) (citing § 1313(d)(4)(B)).

9. The EPA inherited its federal antidegradation policy from the Department of the Interior, which was previously responsible for environmental matters and had revealed its policy of antidegradation on February 8, 1968. See EPA, QUESTIONS AND ANSWERS ON: ANTI-DEGRADATION I (1985) in HANDBOOK, *supra* note 6, at APP. G, [hereinafter QUESTIONS AND ANSWERS]. The antidegradation policy was included in the EPA’s first water quality standards regulations, 40 Fed. Reg. 55,340–41 (1975), but the CWA did not originally contain an explicit reference to a federal antidegradation policy. See 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, 206 (1992) (citing Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.)). A 1987 amendment to the CWA, the Water Quality Act, formally included this existing antidegradation policy in the CWA for the first time. See *id.* at 206–07; see also QUESTIONS AND ANSWERS, *supra*, at I. The Water Quality Act, 33 U.S.C. § 1313(d)(4)(B), amended the CWA to provide that, where the quality of waters identified under § 1313(d)(1)(A) “equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards [promulgated by the EPA] . . . [its water quality standard] may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.” § 1313(d)(4)(B).

10. 40 C.F.R. § 131.12(a)(1)–(3) (1996); see also PUD No. 1 of Jefferson County, 511 U.S. at 705 (discussing state obligations under the federal antidegradation scheme) (citing 33 U.S.C. §§ 1311(b)(1)(C), 1370; 40 C.F.R. § 131.4(a) (1996)).

11. See 40 C.F.R. § 131.12(a)(1)–(3). All waters are designated within the three tier system. The lowest level of protection, Tier I, necessarily applies to all bodies of water unless they have received Tier II or Tier III designation. Tier I, therefore, establishes a minimum level of water quality for all waters in the United States. See *id.* § 131.12(a)(1). The Tier II designation applies to waters that already exceed the levels “necessary to support propaga-

pristine and highest quality waters, provides the greatest level of protection against pollution.<sup>12</sup> Tier III waters, also known as Outstanding National Resource Waters (ONRWs), generally may not be degraded for any reason.<sup>13</sup>

Although much attention has centered around the effort to clean up polluted waters since the CWA's passage,<sup>14</sup> the statute's mandate to preserve the quality of clean waters has been largely ignored.<sup>15</sup> The federal antidegradation policy's procedure has failed because states have designated fewer than one-half of one percent of America's river miles as ONRWs.<sup>16</sup> Without ONRW protection, some of our Nation's highest quality waters have been allowed to deteriorate.<sup>17</sup> The remaining pristine waters need immediate protection to prevent their deterioration.<sup>18</sup>

tion of fish, shellfish, and wildlife and recreation in and on the water," and only allows a reduction in quality when "necessary to accommodate important economic or social development." *Id.* § 131.12(a)(2).

12. *See id.* § 131.12(a)(3).

13. *See id.* The only exception allows temporary changes in quality. *See* Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (1983).

14. *See, e.g., Gore Launches New Strategy to Protect Americas Waters, supra* note 4; Wythe Keever, *On the Rebound: Lake Erie's Recovery is Substantial*, HARRISBURG PATRIOT & EVENING NEWS, Apr. 2, 1990, at A4 (describing the recovery of Lake Erie); John Lancaster, *The Potomac's 'Remarkable Improvement'; Plants, Fish Come Back and Some Spots Are Clean Enough for Swimming*, COG SAYS, WASH. POST, May 14, 1987, at D1 (describing the recovery of the Potomac River).

15. *See* NATIONAL WILDLIFE FEDERATION, WATERS AT RISK: KEEPING CLEAN WATERS CLEAN I (1992) [hereinafter WATERS AT RISK] (on file with the *University of Michigan Journal of Law Reform*) (explaining that the EPA and state environmental agencies have spent billions of dollars on the clean-up effort while ignoring the equally important goal of antidegradation).

16. *See id.* at 4. The statistics used throughout this Note are derived from a National Wildlife Federation study. *See id.* at 13-18. The NWF surveyed all state environmental agencies, asking them to determine, among other things, the extent to which "states have actually identified and designated eligible waters." *Id.* at 13. The NWF requested that each state estimate the percentage of "stream miles" and surface acreage of lakes that are designated as federal and state outstanding resource waters. *See id.* at Appendix B, 38-39. The NWF uses the term "river miles" in its discussion of the percentages of state waters that have received either federal or state ONRW protection. *See id.* at 17-18.

17. *See id.* at vii.

18. *See id.*

[O]ur national fixation on cleaning up the nation's most polluted water resources to minimally acceptable standards has blinded us to the imminent decline of existing pristine water bodies. If the current course remains unchanged, the consequence of continued neglect of outstanding water resources in the United States will be *equally mediocre water quality everywhere*. . . . Federal and state governments' laissez-faire policies have placed at risk the fate of such notable natural wonders as Lake Superior, Flathead Lake in Montana, the coastal waters of Acadia National Park in Maine, and the Florida Keys.

This Note argues that the federal antidegradation scheme is ineffective because: (1) the policy contains vague definitions; (2) states fail to review water quality standards every three years and to entertain citizens' petitions; and (3) the EPA has not taken an active role in ensuring compliance with federal standards.<sup>19</sup> States may impose more stringent water quality controls than required by the federal regulations,<sup>20</sup> but they may not adopt lower standards or fail to revise water quality assessments when necessary.<sup>21</sup> Although the EPA must review revisions to a state's existing antidegradation scheme<sup>22</sup> and any newly-instituted water quality standards,<sup>23</sup> the Agency has historically sidestepped its duty to review existing state antidegradation policies.<sup>24</sup> Because existing state standards, which have proven ineffective in maintaining water

---

*Id.*; see generally Christie C. Morgan, *Challenges and Opportunities in Protecting Outstanding National Resource Waters*, NAT. RESOURCES & ENV'T, Spring 1991, at 30, 30 (describing the viability of the federal ONRW concept).

19. See WATERS AT RISK, *supra* note 15, at 2.

20. See 33 U.S.C. §§ 1311(b)(1)(c), 1370 (1994). The federal antidegradation policy effectively establishes the absolute minimum water quality standards which may be adopted in the United States. See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 705 (1994) (stating that "[a]t a minimum, state water quality standards must satisfy [the] conditions" of the "antidegradation policy established under the [CWA]" (citing 33 U.S.C. § 1313(d)(4)(B) (1994))).

21. See §§ 1311(b)(1)(c), 1370.

22. The CWA requires a state to review its existing water quality standards at least every three years and to revise those standards as appropriate. See § 1313(c)(1) ("The Governor of a State . . . shall from time to time (but at least once each three year period . . .) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting those standards."). The EPA's regulations require the Agency to review and approve standards. See 40 C.F.R. § 131.20(c)(1996) ("The State shall submit the results of the review . . . to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.").

23. See 40 C.F.R. § 131.20(c)(1996).

24. See Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (holding that the EPA's reasonable interpretation of its own regulations must be given deference by the court); *Env'tl. Defense Fund v. Costle*, 657 F.2d 275, 293 n. 53 (D.C. Cir. 1981) (holding that since the seven states in the Colorado River Basin—Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming—had not yet submitted revised or new water quality standards for salinity, the EPA was under no duty to prepare and publish proposed regulations as required by the CWA, 33 U.S.C. § 303(c)(4)(A) (1994)); *Natural Resources Defense Council (NRDC) v. Fox*, 909 F. Supp. 153, 161 (S.D.N.Y. 1995) (holding that New York's 1992 submission of revised water quality standards did not trigger the mandatory duty to review by the EPA required under the CWA, 33 U.S.C. § 1313(c)(2) (1994), despite a challenge by the NRDC that New York's revised standards did not include an adequate antidegradation policy as required by 40 C.F.R. § 130.6 (1996)).

quality, are not reviewed by the EPA, states have no immediate incentive to revise and improve the quality of their bodies of water.<sup>25</sup>

Part I of this Note describes the legislative and administrative framework of the antidegradation policy. It explores the EPA's effort to implement and manage the mandates of the CWA and the EPA's antidegradation regulations.

Part II examines the weaknesses of the regulatory framework outlined in Part I by discussing three interrelated problems with the current antidegradation policy. First, the EPA's antidegradation policy fails to adequately define ONRW.<sup>26</sup> That failure creates implementation problems for state agencies tasked with managing the antidegradation policy<sup>27</sup> and allows states to prioritize economic development and conservation of diminishing monetary resources over designation, maintenance, and protection of ONRWs.<sup>28</sup> Second, although the CWA establishes the right of citizen interest groups to petition state environmental agencies to designate water bodies as ONRWs,<sup>29</sup> it does not require agencies to respond to those requests.<sup>30</sup> Third, the EPA is only required to review new or revised state policies.<sup>31</sup> The current policy creates a strong incentive for state administrators to maintain the status quo in order to avoid involvement by the EPA.<sup>32</sup> As a result, states too often fail to revise their standards when their water bodies deserve a higher designation.<sup>33</sup> These three regulatory weaknesses have resulted in unworkable and ineffective management of the CWA's antidegradation policy.

Part III provides specific CWA reform proposals and suggests how the courts may improve the Act's effectiveness. It examines the schemes of the Great Lakes States and Florida and hypothesizes that similar provisions might bolster the federal

---

25. The only incentive a state has under the current antidegradation policy is the desire to protect its own waters. This Note assumes that good intentions, alone, are not enough to make the policy work.

26. See 40 C.F.R. § 131.12(a)(3) (1996); Morgan, *supra* note 18, at 31.

27. See discussion *infra* Part II.

28. See Morgan, *supra* note 18, at 32.

29. See 33 U.S.C. § 1365(a), (b) (1994).

30. Organized interest groups have a greater chance of influencing administrative outcomes. See John Tierney, *Organized Interests and the Nation's Capitol*, in *THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED* 216-17 (Mark P. Petracca ed., 1992) (describing the ways that organized interests make a difference in congressional politics and policymaking).

31. See § 1313(c)(2)(A), (c)(3); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997).

32. See discussion *infra* Part II.B.

33. See Brief for Appellant at 22, *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997) (No. 96-5366) [hereinafter Appellant's Brief] (on file with the *University of Michigan Journal of Law Reform*).

antidegradation plan. First, the Act should include a specific working definition for the term ONRW, currently described only by ambiguous examples. States will then be able to objectively determine whether a water body fits within the definition. Second, the CWA's provision for citizens' petition rights should require state agencies to reply to petitions within six months. Third, to diminish the current incentive states have to avoid revising their existing policies, Congress should amend the CWA to require states to submit water quality review results at least every three years and to require the EPA to review those results, whether or not states have elected to revise their standards. Courts can hold the states and the EPA accountable for failing to comply with the CWA's reporting requirements by recognizing a constructive submission doctrine.<sup>34</sup> By establishing a clear, bright-line definition of ONRW and by requiring a more proactive and protective stance by state environmental agencies and the EPA, in the form of periodic reviews of existing standards and mandated responses to citizen petitions, the CWA's second goal will finally be attainable.

## I. THE LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK

In 1972, Congress responded to the dangerous pollution levels in U.S. lakes, rivers, and coastal waters by passing the CWA.<sup>35</sup> The CWA requires states to establish water quality standards for every body of water within their borders.<sup>36</sup> States must: (1) designate uses, such as recreational, agricultural, or industrial, for each body of water; (2) set specific limits on the levels of pollutants allowable in light of those designated uses; and (3) promulgate an antide-

---

34. This doctrine, crafted in response to state failures to submit required reports, "allow[s] EPA to take federal action without relying upon a submission by the states." *Nat'l Wildlife Fed'n. v. Browner*, No. CIV.A./95-1811, 1996 WL 601451 (D.D.C. 1996), at \*3 n.4 (recognizing that states sometimes need additional incentives to comply with federal requirements).

35. See 1 SENATE COMM. ON PUBLIC WORKS, 93d CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1419-28 (Comm. Print 1973); Statement of Current Policy & Advance Notice of Proposed Rulemaking, 43 Fed. Reg. 29,588 (1978); Sen. Edmund S. Muskie, *A Legislator's View of Impending Amendments to the Water Pollution Control Act*, 13 B.C. INDUS. & COM. L. REV. 629, 629 (1972); see also Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1180-86 (1983) (discussing the legislative history of the CWA); *Gore Launches New Strategy to Protect America's Waters*, *supra* note 4.

36. See 33 U.S.C. § 1313 (1994).

gradation policy designed to protect existing uses and preserve the present condition of the waters.<sup>37</sup>

### A. The Antidegradation Scheme

The EPA's implementing regulations include a pyramid-style antidegradation structure<sup>38</sup> with three general levels of protection for water bodies.<sup>39</sup> Tier I establishes the minimum level of water quality that must be maintained in every body of water.<sup>40</sup> Specifically, Tier I provides for the protection and maintenance of the water quality necessary to preserve all existing uses of a water body.<sup>41</sup> For example, a lake used for fishing, boating, and drinking water must maintain qualities which preserve those uses.

Tier II provides the protection "necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water" to waters whose quality already exceeds the Tier I level and allows a reduction in quality only when "necessary to accommodate important economic or social development."<sup>42</sup> Tier II waters receive more protection than Tier I waters to maintain their higher quality unless a state determines during a water quality standards review that it needs to reduce water quality to foster some type of important development.<sup>43</sup>

Tier III applies to select water bodies of very high quality. The designation prohibits any degradation of existing water quality standards, except on a temporary basis.<sup>44</sup>

---

37. See 40 C.F.R. § 131.10-.12 (1996).

38. See *id.* § 131.12(a)(1)-(3); Morgan, *supra* note 18, at 30. Essentially, the pyramid demonstrates the rough percentages of waters which should be grouped within the three tiers. Tier I waters occupy the base and represent all waters not receiving a higher designation. Tier II waters, occupying the middle of the pyramid, represent a large number of water bodies, but fewer than those in the first tier. Tier III waters occupy the pinnacle of the pyramid, enjoying the maximum amount of antidegradation protection. The pyramid's pinnacle category necessarily contains the fewest number of qualifying waters. See *id.*

39. See 40 C.F.R. § 131.12(a)(1)-(3).

40. See *id.* § 131.12(a)(1).

41. See *id.*

42. *Id.* § 131.12(a)(2). Interests which might be considered important for economic or social development include attracting or retaining industry along the banks of a lake and developing a new lakeside condominium complex.

43. See *id.*

44. See *id.* § 131.12(a)(3); Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (1983). The concept of a third tier to protect outstanding water resources originated from the proposal of an environmental public interest group during the EPA's original public notice and comment phase preceding the promulgation of its first antidegradation regulations. See N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clear Air and Clean Water*, 62 IOWA L. REV. 643, 678-79 (1977). The



### B. The Federal and State Balance

Passage of the CWA created a system of "cooperative federalism"<sup>45</sup> between federal and state governmental agencies responsible for environmental regulation.<sup>46</sup> Congress established a system subjecting state water quality programs, including antidegradation policies, to federal review.<sup>47</sup>

The CWA requires states to review their water quality standards at least once every three years (triennial review).<sup>48</sup> States must submit the results of this review to the EPA,<sup>49</sup> which is responsible for reviewing any new or revised standards adopted by the states to determine whether the states have placed water bodies within appropriate antidegradation tiers.<sup>50</sup> If the EPA disapproves the standards, states have ninety days to revise and resubmit them.<sup>51</sup> If they fail to resubmit compliant standards, the EPA becomes obligated to promulgate standards for the states.<sup>52</sup>

States remain ultimately responsible for their own pollution clean-up and antidegradation programs, however.<sup>53</sup> The EPA's role is simply to ensure compliance with federal standards, not to decide what water quality standards states should adopt.<sup>54</sup> While the EPA may not want to intrude upon state sovereignty, reviewing state water quality standards to ensure federal compliance is not an abuse of federal regulatory power. In fact, the EPA's failure to re-

ONRW designation was added to the Department of Interior's original, generic concept of an antidegradation policy, first mentioned in a report on interstate pollution in 1968. *See id.*

45. Mark T. Pifher, *The Clean Water Act: Cooperative Federalism?*, NAT. RESOURCES & ENV'T, Summer 1997, 34, 34 (1997) (discussing the tensions that exist between the EPA and state governments concerning implementation of the CWA's water quality standards and antidegradation provisions). By essentially adopting Interior's existing policy, which relied exclusively on state implementation, the EPA became the overseer of a federal antidegradation policy that to this day relies primarily on state interpretation and enforcement. *See Hines, supra* note 44, at 697-700 (discussing "the degree of reliance that can be placed on the states to implement the policy faithfully").

46. "[I]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . ." Pifher, *supra* note 45, at 34 (quoting 33 U.S.C. § 1251(b)); Gaba, *supra* note 35, at 1167 (quoting 33 U.S.C. § 1251(b)).

47. *See* Pifher, *supra* note 45, at 34; Gaba, *supra* note 35, at 1168.

48. *See* 33 U.S.C. § 1313(c)(1) (1994).

49. *See id.* § 1313(c)(2)(A).

50. *See id.* § 1313(c)(2)(A), (c)(3). The EPA's antidegradation pyramid serves as the minimum standard for each tier of waters. *See* discussion *supra* Part I.A.

51. *See* § 1313(c)(3), (4).

52. *See id.*; *see also* Pifher, *supra* note 45, at 34.

53. *See* § 1313(c)(3), (4).

54. *See* Gaba, *supra* note 35, at 1188.

view state standards may result in compliance problems with federal law.<sup>55</sup>

## II. IMPLEMENTATION AND MAINTENANCE PROBLEMS

The CWA does not clearly define the antidegradation policy.<sup>56</sup> States, attempting to comply with the federal policy, have been forced to interpret the policy individually, define terms, and balance antidegradation policy interests with other important regulatory objectives.<sup>57</sup>

### A. No Workable Definition of ONRW in the CWA

The CWA's implementing regulations provide little guidance to help states identify ONRWs. The regulations suggest that ONRWs must be "high quality waters" constituting "outstanding National resource(s)" and give examples of ONRWs as "waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance."<sup>58</sup> Essentially the regulations define Tier III waters as higher quality waters than those designated as Tier II waters.<sup>59</sup> Therefore, ONRWs are those bodies of water whose quality exceeds "levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water."<sup>60</sup>

1. *Instituting Uncertain Requirements*—The EPA uses examples to define Tier III "high quality" waters. While some examples are sufficiently narrow and specific,<sup>61</sup> the broadest and most

---

55. See discussion *infra* Part II.C.

56. The only mention of a federal "antidegradation policy" in the CWA was added through a 1987 amendment which served the purpose of making clear that the original Act's reference to maintaining the integrity of the country's waters contained what was previously only implicit—an antidegradation policy. See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 705 (1994). The Act permits downward revisions of state water quality standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B).

57. See discussion *infra* Parts II.A.1, II.A.2. See also Pifher, *supra* note 45, at 36.

58. 40 C.F.R. § 131.12(a)(3) (1996).

59. Compare § 131.12(a)(2) (defining Tier II waters), with § 131.12(a)(3) (defining Tier III waters).

60. § 131.12(a)(2).

61. The examples of "waters of National and State parks and wildlife refuges" are adequately specific. § 131.12(a)(3).

comprehensive examples<sup>62</sup> fail as vague attempts to provide objective guidance. As a consequence, states attempting to comply with the EPA's ONRW antidegradation category do not have a clear understanding of which waters demand Tier III protection. In fact, states have responded with their own definitions of ONRW,<sup>63</sup> a result contrary to achieving consistency among state water quality standards.

Environmental groups have encouraged states to rely on language in the EPA regulation's preamble to expand the scope of the ONRW definition.<sup>64</sup> The preamble describes the ONRW designation as a protection of the highest quality waters for which ordinary use classifications and water quality criteria are inadequate.<sup>65</sup> It also advises that ONRWs may include "waters of 'ecological significance' . . . which are important, unique or sensitive ecologically, but whose water quality as measured by the traditional parameters (dissolved oxygen and pH, etc.) may not be particularly high or whose character cannot be adequately described by these parameters."<sup>66</sup> The regulation's preamble suggests that waters with special ecological qualities may qualify as ONRWs, even if they do not exhibit high quality by traditional parameters.<sup>67</sup> While the preamble's additional criterion theoretically increases the number of waters that might qualify for the designation, it continues to lack specificity because the terms "important," "unique," and "sensitive" are also vague.

A particularly destructive interpretation of the term "high quality" in the ONRW regulation originated within one of the EPA's regional offices.<sup>68</sup> Region IV EPA officials have interpreted the term "high quality" waters, for ONRW purposes, to have the same level of water quality as Tier II waters.<sup>69</sup> This definition not only undermines the rationale behind a pyramid antidegradation structure but also renders the ONRW designation insignificant because

---

62. The examples of "waters of exceptional recreational or ecological significance," *id.*, are inadequate.

63. See *infra* Part III.A.2 for a discussion of Florida's solution.

64. See Morgan, *supra* note 18, at 31.

65. See Preamble to Part 131, 48 Fed. Reg. 51,400, 51,403 (1983); 40 C.F.R. § 131.12.

66. Preamble to Part 131, 48 Fed. Reg. 51,400, 51,403 (1983).

67. See Morgan, *supra* note 18, at 31.

68. The EPA has ten regional offices which are accountable to the EPA Administrator and are responsible for all EPA activities within their geographic regions. See EPA (last modified Dec. 29, 1998) <<http://www.epa.gov/epahome/locate2.htm>>.

69. See REGION IV, U.S. EPA, QUESTIONS AND ANSWERS ON IMPLEMENTATION OF TIER III OF THE FEDERAL ANTI-DEGRADATION POLICY: PROTECTION OF OUTSTANDING NATIONAL RESOURCE WATERS (April 20, 1989). The EPA's Region IV jurisdiction includes Georgia, Florida, Tennessee, Kentucky, Alabama, North Carolina, Mississippi, and South Carolina. See EPA (last modified Dec. 29, 1998) <<http://www.epa.gov/epahome/locate2.htm>>.

states are likely to choose, all things being equal, to place a water body in the lower tier which imposes fewer restrictions on the future use of that water body.<sup>70</sup>

Both the structure and wording of the EPA's ONRW regulation contradict this interpretation.<sup>71</sup> It is redundant to classify Tier III waters as equivalent to Tier II waters. Certainly the EPA, which drafted the CWA implementing regulations, would have either referred to Tier II waters in its ONRW provision or incorporated the Tier II language into the ONRW subsection had it intended the two antidegradation categories to be equivalent.<sup>72</sup> The pinnacle position that ONRWs occupy in the antidegradation pyramid, combined with the regulation's mandate that states implement federally compliant antidegradation schemes, indicates that the ONRWs' "high [water] quality" requirement be both honored and maintained at a level above that of Tier II waters.<sup>73</sup>

Because states cannot easily decipher the EPA's cryptic ONRW definition and may be reluctant to expand the definition to correlate with the preamble,<sup>74</sup> the solution is to define very specifically in a CWA amendment what waters qualify for ONRW status and to implement identification and enforcement processes<sup>75</sup> to ensure that qualifying waters actually receive the designation. The ONRW definition should emphasize ecological significance by defining specific water quality standard parameters that, if met, automatically place a water body within the top tier.<sup>76</sup>

2. *Economic Considerations*—Economic opportunity costs accompany the ONRW classification because ONRWs benefit from a total or near total ban<sup>77</sup> on new or increased

---

70. Unless a state chooses to place a premium on very high water quality, an unlikely event in light of existing empirical evidence which indicates that most states' ONRW categories are rated as less protective than the federal ONRW standard and that few waters receive the designation, the highest quality waters will likely be placed in a lower tier. See discussion *infra* Part II.A.2. Environmental concerns are hampered by typical collective action problems. Although citizens who live next to bodies of water or use them for recreation might desire high antidegradation protection for those waters, the majority of people are unlikely to take actions necessary to accomplish such a result. Governments want the flexibility to accept industrial proposals and tax dollars. See *id.*

71. See 40 C.F.R. § 131.12(a)(3) (1996).

72. See Morgan, *supra* note 18, at 31.

73. See *id.*

74. See *id.* (describing Alabama's rejection of just such a definition).

75. See discussion *infra* Part III.

76. See discussion *infra* Part III.A.1.

77. The extent of the ban depends on which interpretation of the ONRW definition one chooses to adopt. Although an official EPA version exists that allows no new discharges,

discharges.<sup>78</sup> The ONRW classification constructively prevents new industry from locating along a water's shores and prohibits existing industries from expanding their output. The ban creates an economic disincentive for state regulators to advocate for the ONRW classification.

In a 1992 survey of state environmental agencies,<sup>79</sup> the National Wildlife Federation (NWF) discovered that states have designated approximately 0.37 percent of the Nation's river miles as ONRWs within the federal classification and another 3.16 percent under state outstanding resource waters (ORW) designations.<sup>80</sup> The federal antidegradation guidelines do not provide objective guidelines for states to apply in their own classification schemes.<sup>81</sup> As a result, state ORW designations may or may not be as protective as the federal ONRW designation.<sup>82</sup> The low numbers in the survey indicate that either states have failed to classify deserving waters as ORWs or ONRWs or that the designations are underinclusive.

The NWF asked the states with state ORW classifications to compare their programs with the federal ONRW designation.<sup>83</sup> Of the twenty-eight states with state classification schemes, only two rated their programs "more protective" than the federal designation.<sup>84</sup> Thirteen rated their programs "as protective," and ten rated their programs "less protective."<sup>85</sup> The NWF discovered, upon further examination, that the ten states rating their state ORW designations as "less protective" than the federal ONRW standard were, ironically, the same states reporting the highest numbers of rivers miles protected under state ORW designations.<sup>86</sup> Thus, many waters designated ORWs under state schemes do not receive protection equivalent to the federal ONRW requirements. For this

---

many states have modified that interpretation to allow certain new or expanded discharges. See Morgan, *supra* note 18, at 33 (discussing Florida's decision to allow discharges that, with new technology, enhance the water quality of ONRWs) (citing FLA. ADMIN. CODE ANN. r. 17-4.242(3)(b)) (1999).

78. See 40 C.F.R. § 131.12(a)(3) (1996).

79. The NWF learned that, of the forty-six states that responded to the survey, eight states utilize the federal ONRW classification, twenty states utilize a "state outstanding resource waters classification," and eight states utilize both the federal classification and a state classification. WATERS AT RISK, *supra* note 15, at 13-14. Eight states indicated that they have no legal authority to designate outstanding resource waters. See *id.* The answers of the other two states reflected uncertainty. See *id.*

80. See *id.* at 17.

81. See discussion *supra* Part II.A.1.

82. See WATERS AT RISK, *supra* note 15, at 17.

83. See *id.*

84. See *id.* at 18.

85. See *id.*

86. See *id.*

reason, Congress should amend the CWA to include a more specific ONRW definition so that the EPA can more readily determine whether state ORW classifications are at least as protective as the federal ONRW designation.<sup>87</sup>

The current federal antidegradation policy makes it much easier for state officials to maintain the status quo than to update their water quality standards. State officials understand and appreciate the value of their states' pristine waters, but such an appreciation of natural resources, by itself, cannot protect waters that deserve to be ONRWs. Congress recognized that a protective water quality designation scheme is the necessary and appropriate solution.<sup>88</sup> A pristine water body may be empirically qualified for the ONRW designation, but political considerations such as the attraction of new industry to the area may argue against its inclusion in the protective class. Even states that are identified with tourism and water activities are vulnerable to competing interests.<sup>89</sup>

The federal antidegradation scheme, buttressed by the EPA's interpretation of its enforcement role as a passive one,<sup>90</sup> provides state legislatures and executives the tools with which to circumvent the most protective designation. While state programs must contain antidegradation policies and designations which are consistent with the federal program, they are consistent in name only because the federal regulations do not contain percentage guidelines or objective definitional requirements.<sup>91</sup> In other words, states must have a program which contains Tier I, Tier II, and Tier III waters, but no provision or check exists for the EPA to ensure that states actually place water bodies within these appropriate designations<sup>92</sup> or that waters placed within the antidegradation tiers are protected as strictly as the EPA's regulations require.<sup>93</sup>

Therefore, states may rationalize that the only distinction between the three tiers concerns the accompanying restrictions on new and increased pollution discharge limitations.<sup>94</sup> A state deciding how to classify one of its most pristine bodies of water could

---

87. See discussion *infra* Part II.C for a discussion of the problems associated with the EPA's review of state water quality submissions.

88. See discussion *supra* Part I.

89. For example, Michigan, Minnesota, and Wisconsin have refused a NWF request to consider placing Lake Superior into the ONRW category. See *infra* text accompanying note 104.

90. See discussion *infra* Part III.C.

91. See discussion *supra* Part I.

92. See *infra* Part II.C for a discussion of the ineffective EPA triennial review requirement.

93. See *supra* notes 80–89 and accompanying text.

94. See discussion *supra* Part I.A.

rationality label that water body as a Tier II water in order to reserve the possibility of locating a new industry on the banks of that water body. The state could, therefore, entice new industry without creating potential discharge permit problems because the water quality of Tier II waters may be degraded "to accommodate important economic . . . development in the area in which the waters are located."<sup>95</sup>

Some state legislatures have avoided challenges to their failure to utilize the Tier III designation by further bifurcating their antidegradation schemes.<sup>96</sup> Michigan created a Tier II 1/2<sup>97</sup> classification "to provide a very high level of water quality protection without precluding unforeseen future economic and social development considerations."<sup>98</sup> In *NWF v. Browner*,<sup>99</sup> the D.C. Circuit approved Michigan's failure to designate Lake Superior as an ONRW,<sup>100</sup> because Michigan had afforded Lake Superior Tier II 1/2 protection.<sup>101</sup> By adopting a midpoint designation that is more protective than the federal Tier II standard and less protective than the federal Tier III standard,<sup>102</sup> Michigan was able to avoid the potential economic hamstring of a Tier III water designation. The *Browner* case created precedent for court approval of state avoidance of the ONRW designation.

### *B. No Response to Citizen Petitions to Designate Waters for Antidegradation Protection*

*NWF v. Browner* was born of a haphazard response by the State of Michigan to a request that it revise its water quality standards.<sup>103</sup> On February 1, 1991, the NWF asked Michigan, Minnesota, and Wisconsin to consider designating Lake Superior as an ONRW during

---

95. 40 C.F.R. § 131.12(a)(2) (1996).

96. See, e.g., MICH. ENVTL., HEALTH & SAFETY REGS. r. 323.1098(7)(1996) (creating a Tier II 1/2 between high quality waters and ONRWs); OHIO ADMIN. CODE § 3745-1-05(A)(9) (1998) (creating five antidegradation levels called "General high quality waters," "Superior high quality waters," "State resource waters," ONRWs, and "outstanding high quality waters").

97. See MICH. ENVTL., HEALTH & SAFETY REGS. r. 323.1098(7); see also Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1127 (D.C. Cir. 1997).

98. *Browner*, 127 F.3d at 1127 (quoting HANDBOOK, *supra* note 6, at 4-2).

99. No. CIV.A/95-1811, 1996 WL 601451, at \*1 (D.D.C. Oct. 11, 1996), *aff'd*, 127 F.3d 1126 (D.C. Cir. 1997).

100. See *Browner*, 127 F.3d at 1126.

101. See *id.* at 1127 (citing HANDBOOK, *supra* note 6, at 4-2).

102. See MICH. ENVTL., HEALTH & SAFETY REGS. r. 323.1098(7) (1996).

103. See *infra* note 107 and accompanying text.

their triennial reviews.<sup>104</sup> After receiving no reply, the NWF formally petitioned each state to designate Lake Superior as an ONRW on October 25, 1994.<sup>105</sup> Shortly thereafter, the NWF requested that the Michigan Department of Natural Resources (MDNR) seek public comment and conduct hearings prior to any decision on the ONRW proposal.<sup>106</sup> The MDNR refused to consider the request.<sup>107</sup> Subsequently, the EPA refused to entertain a NWF request to approve or disapprove of Michigan's rejection of the ONRW designation for Lake Superior.<sup>108</sup> The NWF countered by filing a citizen suit<sup>109</sup> against the EPA,<sup>110</sup> which alleged that the EPA, pursuant to its CWA implementing regulations,<sup>111</sup> was under a mandatory duty to review and either approve or disapprove of state decisions to maintain existing water quality standards.<sup>112</sup>

In *Browner*, Michigan informed the NWF of its intention not to hold public hearings on its petition,<sup>113</sup> but neither the CWA nor the EPA's regulations require *any* response by a state to a citizen petition. A state's failure to entertain a citizen's petition to review an existing water quality designation is problematic for two reasons. First, state environmental agencies are not accountable to the public for their inaction. Second, a water body's antidegradation designation becomes totally dependent upon the EPA's unfettered discretion whether or not to review the state's decision to maintain the status quo. Without a legislative mandate that directs states to respond and provide specific feedback to the petitioners regarding the reasons for rejection in a timely manner, other states may

---

104. See Appellant's Brief, *supra* note 33, at 5.

105. See *id.*

106. See *id.* at 6.

107. See *id.* In February, 1995, Michigan denied the petition, writing to the NWF that the state "does not think it is appropriate or necessary to hold public hearings to discuss your request . . . since we do not intend to proceed with the designation." *Id.*

108. See *id.* at 6-7. Plaintiffs NWF, Great Lakes United, and Michigan United Conservation Clubs sought to compel the EPA to review and evaluate Michigan's water quality standards. See *Nat'l Wildlife Fed'n v. Browner*, No. CIV.A/95-1811, 1996 WL 601451, at \*1 (D.D.C. Oct. 11, 1996).

109. See 33 U.S.C. § 1365(a), (b) (1994) (allowing citizen suits against the EPA for failure to fulfill statutory nondiscretionary duties under the CWA); 40 C.F.R. § 135.2 (1996) (including the same citizen suit provision).

110. The suit was brought pursuant to 33 U.S.C. § 1365(a)(2)(1994), which allows suits by private citizens "where there is alleged a failure of the [EPA] Administrator to perform any act or duty under [the Act] which is not discretionary with the Administrator." *Id.*

111. The NWF relied on the language in 40 C.F.R. § 131.20(c)(1996) to make the argument that the EPA has a mandatory duty to examine the results of all triennial review results "for review and approval." See Appellant's Brief, *supra* note 33, at 9.

112. See *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1127-28 (D.C. Cir. 1997), *Browner*, 1996 WL 601451 at \*6.

113. See *supra* note 107 and accompanying text.



follow Michigan's lead and refuse to consider requests by citizens to review water quality standards.

*C. No Review of "Existing" State Antidegradation Programs  
Despite Deteriorating Waters*

Arguing a theory of constructive submission,<sup>114</sup> the NWF alleged in *Browner* that the CWA imposes a non-discretionary duty upon the EPA to review Michigan's failure to act because such a failure is tantamount to a final decision to refuse to redesignate Lake Superior as a Tier III water.<sup>115</sup> The EPA countered that it had no mandatory duty to review the results of states' triennial water quality standards submissions which maintain the status quo.<sup>116</sup> First, the Agency argued that the duty to review new and revised water quality decisions was created under the EPA's own regulations, and was therefore, not a proper basis for a CWA citizen suit.<sup>117</sup> Alternatively, the EPA argued that, even if the Agency does have a mandatory duty to review existing water quality standards submitted as part of a state's triennial review, its regulation provides that the state does not have to submit the results of its review until the review is complete.<sup>118</sup> The EPA admitted, however, that it enforces no specific deadlines upon states to complete and submit their tri-

---

114. The theory, discussed *supra* note 34, was originally crafted to allow the EPA to review state pollutant discharge levels when states failed to submit required reports under 33 U.S.C. § 1313(d) (1994). Section 1313(d) governs the maximum level for daily discharge of pollutants, called total maximum daily loads (TMDLs), into certain waters. *See* § 1313(d). The TMDL framework is identical to the framework for water quality standards. States must establish TMDLs and then submit them to the EPA for approval, triggering a mandatory duty to approve or disapprove those standards by the EPA. *See id.* § 1313(d)(1), (2). The constructive submission theory was applied in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), where the court found the theory necessary because it was unwilling to allow "[s]tate inaction amounting to a refusal to act... [to] stand in the way of successfully achieving the goals of federal anti-pollution policy." *Id.* at 998; *see also* *Sierra Club v. Browner*, 843 F. Supp. 1304, 1312 (D. Minn. 1993); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422, 1424 (W.D. Wash. 1991). As discussed, *supra* Part I, both the antidegradation policy and the anti-pollution policy are included under the CWA's water quality standards umbrella. Therefore, the NWF argued in *Browner*, the constructive submission doctrine should be equally applicable to both policies. *See Browner*, 1996 WL 601451, at \*4; *see also Browner*, 127 F.3d at 1128 (D.C. Cir. 1997).

115. *See Browner*, 127 F.3d at 1128 (D.C. Cir. 1997); *see also Browner*, 1996 WL 601451, at \*4.

116. *See Browner*, 127 F.3d at 1127-28.

117. *See* Brief for Appellee at 12, *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997) [hereinafter Appellee's Brief] (on file with the *University of Michigan Journal of Law Reform*).

118. *See id.* at 10 (citing 40 C.F.R. 131.20(c)).

ennial reviews and that states have no obligation to submit individual decisions as they are made.<sup>119</sup> In sum, the EPA's position was that states are required to submit triennial review results, but not every three years as long as a review is ongoing, and that when triennial review results are submitted, those that maintain the status quo are only reviewable at the EPA's discretion.

Citing administrative deference, the appellate court refused to apply the constructive submission doctrine because it believed that the EPA's decision not to evaluate existing state water quality standards was purely discretionary.<sup>120</sup> Consequently, *Browner* illuminates some serious practical problems in the enforcement of the federal antidegradation policy. Under the CWA, states have an affirmative duty to conduct triennial reviews of their water quality standards<sup>121</sup> and to submit them to the EPA for review.<sup>122</sup> The EPA has a duty to review triennial review submissions that adopt new or revised water quality standards to determine if they are consistent with the CWA and the EPA's regulations within sixty days,<sup>123</sup> and the Agency must notify the state "not later than the ninetieth day after the date of submission" of a standard that is inconsistent with the federal standard and specify the changes necessary to meet federal requirements.<sup>124</sup> Because the CWA does not explicitly require the EPA to review state triennial submissions that maintain the status quo,<sup>125</sup> however, the EPA's argument that it has no affirmative duty to review such submissions unfortunately has merit.

Therefore, according to the EPA and the D.C. Circuit, a state can refuse to comply with the public notice and petition provisions of the Act and its regulations,<sup>126</sup> can ignore triennial review

---

119. *See id.* ("The statute and regulations require the states to hold public hearings at least every three years to review their standards, but there is no specific deadline for completion of that review. . . . [T]he citizens' suit provision is limited to enforcement of clear-cut and readily ascertainable mandatory duties." (citing *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987))).

120. *See Browner*, 127 F.3d. at 1128-29. The question left unanswered was whether citizen suits may challenge an agency's failure to comply with a mandatory regulatory duty as well as a failure to comply with a mandatory statutorily-created duty, which is of course required. *See* 33 U.S.C. § 1365(a)(2) (1994) (allowing citizen suits against the EPA for failure to fulfill statutory nondiscretionary duties under the CWA).

121. *See* 33 U.S.C. § 1313(c)(1) (1994).

122. *See id.* § 1313(c)(1), (2) (providing the EPA with statutory oversight authority over the states' triennial reviews).

123. *See id.* § 1313(c)(3).

124. *Id.*

125. *See id.*

126. *But see id.* § 1313(c)(1) ("The Governor of a State . . . shall . . . hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards."); 40 C.F.R. § 131.20(a) (1996) ("The State shall . . . hold public hearings for the purpose of reviewing applicable water quality standards . . .").

requirements,<sup>127</sup> and has no duty to submit results to the EPA.<sup>128</sup> Despite evidence of water quality deterioration or citizen interest in revising standards, a state may ignore both the procedural requirements and the practical goals behind the EPA's own antidegradation policy, with express EPA approval.

Because the CWA does not delineate specific deadlines with which states must comply in submitting the results of their triennial reviews, states never have to submit results to the EPA if they are always in the midst of an on-going triennial review. For example, since the creation of the triennial review process in 1973, Michigan has completed and submitted results for only *one* triennial review.<sup>129</sup> Nevertheless, the D.C. Circuit found that the EPA was under no duty to review Michigan's water quality designations because Michigan had not submitted either new or revised standards.<sup>130</sup> Despite the EPA's concession that states are required to submit existing water quality standards to the EPA upon completion of triennial reviews,<sup>131</sup> the D.C. Circuit concluded that "states are only required to submit existing water quality standards to the EPA to enable it to make an informed decision about whether to exercise its discretion [under § 303(c)(4)(B)] to supplant the state standards."<sup>132</sup>

The EPA argued in its brief that it does not have time to review the existing water quality standards of fifty states.<sup>133</sup> If the EPA is overwhelmed with existing mandatory duties, it certainly must not have time to conduct discretionary reviews of existing antidegradation standards, which may not have been revised since the 1970s.<sup>134</sup> By accepting the EPA's interpretation of its "non-existent duty" to review existing standards, regardless of the status, viability, and effectiveness of those standards, the courts

---

127. *But see* § 1313(c)(1) ("The Governor of a State . . . shall from time to time (but at least once each three year period beginning with October 18, 1972) . . . review[] applicable water quality standards . . .").

128. *But see* 40 C.F.R. § 131.20(c) (1996) ("The State shall submit the results of the review . . . to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or *if no revisions are made as a result of the review*, within 30 days of the completion of the review." (emphasis added)).

129. *See* Appellant's Brief, *supra* note 33, at 19.

130. *See* Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997).

131. *See* 40 C.F.R. § 131.22(b) (1996).

132. 127 F.3d at 1130.

133. *See* Appellee's Brief, *supra* note 117, at 15 ("If the agency were compelled to review every state's decision to preserve existing water quality standards and make approval decisions within the timeframes NWF submits are required, EPA would be overwhelmed by the vast scope of such an obligation.").

134. *See supra* note 129 and accompanying text.

have allowed the Agency to undermine the intentions of the CWA's antidegradation policy.<sup>135</sup>

### III. PROPOSED REFORM

Congress' goal of keeping clean waters clean is failing on three fronts. First, states lack adequate guidance in implementing and managing state antidegradation programs.<sup>136</sup> An amendment to the CWA that provides states with specific, objective definitions of waters deserving the ONRW designation can provide the certainty states need.

Second, states are not held accountable for failing to comply with the CWA's requirements to conduct triennial water quality hearings and reviews.<sup>137</sup> A second amendment to the CWA requiring states to meet specific triennial review submission deadlines and requiring state agencies to make detailed replies to citizen petitioners will hold states accountable for noncompliance.

Third, the EPA is not currently accountable for ensuring that states comply with the CWA's water quality standards submission requirements.<sup>138</sup> A CWA amendment requiring the EPA to review new, revised, and *existing* state water quality standards every three years will hold the EPA accountable for state noncompliance. An amendment to the CWA will prevent the EPA from arguing, as it did in *Browner*,<sup>139</sup> that citizen suits may not be filed to force the EPA to follow agency regulations.

#### *A. Creating an Objective ONRW Definition*

The EPA's antidegradation regulations require states to adopt plans that are consistent with, or more protective than, the requirements for each Tier in the EPA's antidegradation pyramid.<sup>140</sup> States have had difficulty interpreting the federal definition of the ONRW, forcing them to independently define the

---

135. See *supra* note 24.

136. See discussion *supra* Part II.A.

137. See discussion *supra* Part II.B.

138. See *id.*

139. See *supra* notes 117-118 and accompanying text.

140. See discussion *supra* Section I.B.

term.<sup>141</sup> In recent years, the Great Lakes States and Florida have endeavored to achieve clearer antidegradation definitions in order to protect water quality.<sup>142</sup> Because all of America's waters are dependent upon the cooperation and consistency of all the states' water quality policies, the Great Lakes Initiative (GLI) and Florida's Water Quality Standards provide models worthy of emulation.

1. *The Great Lakes Initiative Approach*—The GLI, which aspires to improve the water quality of the Great Lakes, is the most recently publicized effort at antidegradation definition uniformity.<sup>143</sup> Concerned with the effectiveness of the EPA's water quality regulations of the Great Lakes, Congress enacted the Great Lakes Critical Programs Act of 1990.<sup>144</sup> The Act amended § 118(c)(2) of the CWA to require the EPA to publish new guidance on water quality standards and implementation procedures for the Great Lakes.<sup>145</sup> This guidance, commonly called the GLI, is officially known as the "Final Water Quality Guidance for the Great Lakes System."<sup>146</sup> As required by the CWA, the GLI establishes minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes.<sup>147</sup>

The GLI's antidegradation policy requires that "water quality cannot be degraded below the level protecting existing uses, which are defined as any uses that a water body has actually supported since 1975."<sup>148</sup> For example, if a water body maintained a fishery at any time since 1975, even if the fishery is no longer in existence, no discharges are allowed into the water that would impact the water quality level needed for a fishery.<sup>149</sup>

The GLI's antidegradation policy prohibits increased discharges of chemicals into ONRWs but allows discharges in all other waters that exceed the minimum quality standard of "fishable/swimmable"

---

141. See discussion *supra* Part II.A; see also Final Water Quality Guidance for the Great Lakes System, 60 Fed. Reg. 15366, 15413 (1995) [hereinafter GLI] (adopting a new definition of ONRW in an effort to establish consistency in antidegradation schemes of states bordering the Great Lakes); FLA. ADMIN. CODE ANN. r. 17-4.242, 302.200-302.700 (1999).

142. See GLI, *supra* note 141; FLA. ADMIN. CODE ANN. r. 17-4.242, 302.200-302.700 (1999).

143. See Lisa K. Kunkle, Comment, *Interstate Water Quality Conflicts and the Great Lakes Initiative: Is it the Solution to Calming the Waters?*, 25 U. Tol. L. Rev. 457, 468 (1994).

144. Pub. L. No. 101-596, 104 Stat. 3000, 3000-04 (1990).

145. See 33 U.S.C. § 1251 (1994).

146. GLI, *supra* note 141, at 15366.

147. See *id.*; see also 58 Fed. Reg. 20,802, 20,823 (1993) (proposed Apr. 16, 1993).

148. John Knox, Comment, *The EPA's Proposed Water Quality Guidance for the Great Lakes System: A Uniform and Stringent Solution*, 4 DICK. J. ENVTL. L. & POL'Y 89, 99 (1994) (citations omitted).

149. See *id.*

only if states follow detailed procedures to demonstrate that discharges are necessary for important social and economic development.<sup>150</sup> This provision reduces the flexibility the Great Lakes States enjoyed under the EPA's antidegradation regulations to develop intermediate levels of protection in their antidegradation schemes. By requiring states to satisfy detailed procedures to obtain the EPA's permission to increase discharges, the GLI's policy limits the ability of states to favor economic interests that conflict with a water body's antidegradation level.

The GLI expands the definition of ONRW. It states:

Waters that may be considered for designation as Outstanding National Resource Waters include, but are not limited to, water bodies that are recognized as:

Important because of protection through official action, such as Federal or State law, Presidential or secretarial action, international treaty, or interstate compact; Having exceptional recreational significance;

Having exceptional ecological significance;

Having other special environmental, recreational, or ecological attributes; or waters whose designation as Outstanding National Resource Waters is reasonably necessary for the protection of other waters so designated.<sup>151</sup>

The expanded ONRW definition includes important waters recognized by federal and international authorities and provides additional examples of potentially qualifying water bodies. It preserves the requirement that absolutely no degradation of such waters is allowed except for rare short-term (i.e., weeks or months) exceptions.<sup>152</sup> Although the GLI does not include a provision that requires states to consider upgrading waters to higher tiers,<sup>153</sup> the GLI antidegradation scheme diminishes the incentive to avoid the ONRW designation by requiring states to satisfy a strict test to gain

---

150. See GLI, *supra* note 141, at 15414 (requiring states to submit an "antidegradation demonstration" that includes a "pollution prevention alternatives analysis," an "alternative or enhanced treatment analysis," an "important social or economic development analysis," and a "special provision for remedial actions" report).

151. *Id.* at 15413.

152. See *id.* For example, a state might receive permission to temporarily degrade water quality while repairing an aging bridge.

153. Notice that the GLI's definition of ONRW lists types of waters that "may," as opposed to "shall," be designated as ONRWs. See *supra* text accompanying note 151.

approval from the EPA to diminish the water quality of *any* water that exceeds minimum standards.<sup>154</sup>

The Council of Great Lakes Governors was particularly unhappy with the GLI's definition of "High Quality Water[s]" (HQW),<sup>155</sup> waters which are afforded protection to "support the propagation of fish, shellfish, and wildlife; and recreation in and on the water."<sup>156</sup> The Governors were critical of the definition because each state had developed its own HQW definition when implementing its antidegradation pyramid scheme.<sup>157</sup> As a result, the GLI required each state to make adjustments to its existing policy to accommodate the GLI's uniform antidegradation policy, thus expanding the scope of the EPA's governing regulations and limiting states' flexibility.<sup>158</sup>

Although the GLI's antidegradation approach is encouraging, it may not go far enough to ensure that the nation's most pristine waters are adequately protected under the ONRW umbrella. For instance, Michigan never formally considered the NWF's Lake Superior ONRW proposal.<sup>159</sup> *Browner*, a post-GLI case involving a Great Lakes State, indicates that states may still view the ONRW label as the equivalent of economic suicide with regard to luring industry dollars to the state. States may approve new discharge permits for Tier II waters as long as the future discharge will not lower water quality below that required to maintain a post-1975 designated use.<sup>160</sup> Even if the discharge may lower the water quality below such a threshold, states may still gain the EPA's approval to grant the permit if they satisfy the detailed procedures outlined in the GLI.<sup>161</sup> In short, ONRWs remain bodies of water which allow no long-term degradation. The incentive to avoid such a designation, although diminished somewhat, exists and will remain until states are required to fit qualifying waters into the designation. This can be accomplished by adopting an objective definition for waters of "exceptional recreational or ecological significance" and requiring states to identify and place qualifying waters into the ONRW designation.

---

154. See GLI, *supra* note 141, at 15414.

155. See *id.* at 15413 ("High quality waters are water bodies in which, on a parameter by parameter basis, the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.").

156. *Id.*

157. See Kunkle, *supra* note 143, at 474-76 (discussing the different HQW definitions used by Ohio, Michigan, and Wisconsin).

158. See *id.* at 476.

159. See discussion *supra* Part II.B.

160. See GLI, *supra* note 141, at 15412-13.

161. See *id.* at 15414.

2. *Florida's Approach*—Florida's antidegradation scheme goes further than the GLI in providing protection to its high quality waters.<sup>162</sup> The Florida regulations<sup>163</sup> successfully add substance to the EPA's ONRW regulation in at least two ways.<sup>164</sup> First, Florida's ONRW regulation defines "exceptional recreational and ecological significance."<sup>165</sup> Recreationally significant waters must be of "unusual value as a resource for outdoor recreation activities."<sup>166</sup> Ecologically significant waters must be a part of an "ecosystem of unusual value."<sup>167</sup> Both must be such that "water quality should be maintained and protected under [almost] all circumstances."<sup>168</sup> These definitions are improvements because they provide more detailed examples than the federal definition.

Second, the Florida regulations require an ONRW designation to contain a favorable cost-benefit analysis which weighs environmental, social, and economic benefits against related costs.<sup>169</sup> Although no body of water is automatically included in the ONRW category, Florida does have definite guidelines and procedures that assess water quality in terms of opportunity costs.<sup>170</sup> Florida has also improved upon the EPA's presumption against new or expanded discharges into ONRWs by creating an incentive for aspiring industrial leaders to develop and utilize technology that improves water quality.<sup>171</sup> A discharge exception allows increased or new discharges if water quality is *enhanced* by those discharges.<sup>172</sup>

3. *A New ONRW Definition*—Congress should look to the antidegradation approaches of the GLI and Florida to re-define ONRW. The GLI provides an expanded definition of ONRW and

162. See Morgan, *supra* note 18, at 5, 32–35 (describing Florida's ONRW policy).

163. See FLA. ADMIN. CODE ANN. r. 62-4.242, 302.200–302.700 (1999).

164. Florida's environmental regulations give its equivalent to the EPA, the Environmental Regulation Commission (ERC), the authority to designate ONRWs rather than merely to recommend such a designation to the Florida legislature. See *id.* r. 62-302.400(8), 302.700(6). The obvious benefit of this provision is that, because the ERC, unlike the Florida legislature, is only concerned about environmental matters, its decisionmaking is theoretically free from accommodating other non-environmental interests. While this approach is recommended to all states, it is not suggested in the reform section of this Note because the Note's focus concerns proposals for reforming the CWA which could not contain such a mandate to the states without raising serious state sovereignty issues.

165. *Id.* r. 62-302.200(10), (11). Although, these definitions are still somewhat vague, they are more specific than those in the federal standard. Cf. 40 C.F.R. § 131.12(a)(3) (1996).

166. FLA. ADMIN. CODE ANN. r. 62-302.200(11).

167. *Id.* r. 62-302.200(10).

168. *Id.* r. 62-302.200(18).

169. See *id.* r. 62-302.400(9), 302.700(6)(c).

170. See *id.*

171. See *id.* r. 62-4.242(3)(b).

172. See *id.*



makes it harder for states to allow increased pollutant discharges into protected waters. Florida's regulations provide an even more specific ONRW definition, incorporate a cost-benefit analysis into the ONRW designation process, and empower its state environmental agency to designate ONRWs. An improved hybrid of these two approaches, which includes objective criteria, will solve the problems associated with the vague and uncertain federal ONRW provision.

The new definition of ONRW should be quantifiable so that states can objectively classify their waters. The new ONRW definition should contain specific numeric benchmarks for important pollutants so that, when a water body's quality meets these objective criteria, states must automatically place it within the ONRW category. Because the EPA has already established numeric criteria for numerous pollutants in the GLI as part of its two-tiered methodology to protect aquatic life, wildlife, and human health in the Great Lakes,<sup>173</sup> the Agency is more than capable of developing such benchmarks.<sup>174</sup> In addition to providing specific guidance with which states can comply, the new ONRW definition would also improve the EPA's reviews of state water quality submissions because the Agency could quickly and easily determine whether states have placed their waters in the appropriate antidegradation categories. Congress should amend the CWA to require the EPA to establish numeric pollution benchmarks for waters that deserve ONRW protection.

*B. Amending the Citizen Suit Provision to Include a Timely Reply Requirement and Publication of Specific Findings*

The regulation governing citizen petitions for ONRW designations is inadequate in light of *Browner's* holding that a state is under no obligation to review, hold hearings, or reply to antidegradation redesignation requests.<sup>175</sup> The *Browner* decision conflicts

---

173. See GLI, *supra* note 141, at 15373-75, 15386-412 (listing numeric criteria to protect aquatic life for 15 pollutants, numeric criteria to protect human health for 18 pollutants, and numeric criteria to protect wildlife for four pollutants).

174. It is beyond the scope of this Note to recommend which pollutants (and their appropriate benchmarks) should be included within the new ONRW definition. The GLI includes, among many others: Benzene, Chlorine, pH, Salinity, and quantity of suspended solids. See *id.* at 15386-412.

175. See *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1128 (D.C. Cir. 1997). *But see* 40 C.F.R. § 131.20(b) (1996). EPA's regulations governing procedures for review and revision of water quality standards mandate that states "shall hold a public hearing for the purpose

with the CWA and EPA's implementing regulations which require states to conduct public hearings during their triennial reviews to assess the *adequacy* of existing water quality standards in light of improvements in technology, newly-distributed EPA guidance, and legal developments.<sup>176</sup>

The *Browner* court's view can be nullified, however, with an amendment to the CWA which requires states to entertain citizen petitions by holding public hearings *within six months* of a petition's submission. The new CWA provision should also require states to reply to petitioners with their specific findings concerning water quality designations at the conclusion of this six month period after the public hearings are conducted to discuss the merits of each petition. The amendment should require states to submit results of all petitions considered during a three year period to the EPA upon completion of the triennial review process. States should be required to conduct reviews of all water quality standards for all water bodies within their borders every three calendar years. This review can be a continuous process during that three year time period as long as each water body's antidegradation designation is reviewed once in that timeframe.<sup>177</sup>

Courts should ensure that states strictly comply with the proposed amendments. The federal antidegradation policy, bolstered by strong, specific CWA requirements and enforcement, will provide an adequate incentive to states to fully and faithfully comply with their duties to conduct meaningful triennial reviews of their water quality standards.

### *C. Requiring the EPA to Review the Results of All State Triennial Reviews*

Congress should amend the CWA to require states to submit water quality review results to the EPA at least every three years and to require the EPA to review those results, whether or not states

---

of reviewing water quality standards" and that "[t]he proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing." *Id.*

176. See HANDBOOK, *supra* note 6, at 6-23. See also Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1277 (5th Cir. 1980) (describing the triennial review as a means to adjust and upgrade water quality standards).

177. The EPA could review state water quality submissions in cycles of three, by requiring each state to submit the water quality standards of 1/3 of its waters every year or by requiring 1/3 of the states to submit their entire water quality standard reviews each year. Either procedure would require states to submit their entire standards once every three years.

have elected to revise their standards. Additionally, courts should recognize the constructive submission theory<sup>178</sup> to trigger an EPA duty to review daily pollution discharge levels following a state's long-term refusal to establish and submit water quality standards.<sup>179</sup> Recognizing the doctrine would either promote action by both the states and the EPA or provide a necessary mechanism for interested parties to hold them accountable for a failure to act.

A state's failure to review its water quality standards for any body of water within three years should be interpreted as an automatic decision to maintain the status quo. The EPA should then be required to review that inaction in a light most favorable to the designation of a higher antidegradation category. This presumption would provide an additional incentive for states to conduct meaningful reviews. The EPA should give special consideration to water bodies that were subjects of citizen redesignation petitions during the triennial review period to encourage the participation of concerned citizens in the preservation of natural resources.

The amendment and the EPA's use of the constructive submission doctrine will ensure that the EPA conducts thorough and conscientious reviews of state antidegradation programs every three years. This cooperative framework will help reduce the current economic incentive to maintain the status quo and to avoid the upward redesignation of quality waters within the antidegradation pyramid. This new accountability will also force the EPA to recognize that its duty to review is not discretionary.

## CONCLUSION

Since passage of the Clean Water Act [twenty six] years ago, government and industry have undertaken a massive national effort to clean up pollution of [lakes, rivers, wetlands, and estuaries]. While much remains to be done, significant progress has been made and many once-polluted waters now comply with *minimum* standards. The Clean Water Act established a two-track national policy: *attain* minimum standards in pol-

---

178. See discussion *supra* Part II.C.; see also *Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984).

179. The framework for the establishment of total maximum daily loads (TMDLs), see 33 U.S.C. § 1313(d)(1),(2) (1994), is analogous to the framework for the establishment of water quality standards. A state must establish TMDLs and submit them to the EPA for review. See *id.* The EPA must either approve or disapprove the TMDLs within thirty days of the state's submission and must promulgate new TMDLs for the state in the event of disapproval. See *id.*

luted waters; and *maintain* high water quality in pristine lakes, rivers, estuaries, and coastal waters.<sup>180</sup>

Maintaining the quality of America's most pristine bodies of water is a national priority.<sup>181</sup> Yet, empirical evidence shows that the CWA's antidegradation policy is not keeping clean waters clean.<sup>182</sup> The ultimate result of this failure will be a national system of waters meeting only minimum water quality standards.<sup>183</sup> To prevent such a consequence, the federal antidegradation policy must become a workable procedure in which waters are both initially placed in the appropriate protective category and subsequently monitored to avoid deterioration. A CWA amendment and the EPA's use of the constructive submission doctrine will empower the federal antidegradation policy.

By providing more specific definitions for water quality categories and by adding statutory mandates for the states and the EPA, Congress can empower the currently stagnant antidegradation policy. Timely state submissions of water quality standards, involvement of interested citizen groups, and review of revised and existing standards by the EPA will ensure that the CWA's antidegradation policy achieves its goal of keeping clean waters clean.

---

180. *WATERS AT RISK*, *supra* note 15, at Forward (quoting Jay D. Hair, former President of the National Wildlife Federation (May, 1992)).

181. *See* 33 U.S.C. § 1251(a) (1994).

182. *See* discussion *supra* Part II.A.2.

183. *See* discussion *supra* Part I.B.

