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CleanWaters, Wild Forests

A Citizen Manual for Designating Outstanding Waters in the Wild Forests of the Western United States

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MISSION STATEMENT
WildEarth Guardians protects and restores the
wildlife, wild places and wild rivers of the American West.

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Cover Photos *(left column, top to bottom)*: fisherman, WildEarth Guardians: Sand hill cranes and waterfall, Jess Alford

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Executive Summary

Water is one of America's most precious resources as are the forests that capture, hold, filter and deliver this lifeblood of our communities, agriculture, businesses and recreational activities. Much of this water comes from undeveloped forests in the West and millions acres of roadless areas on the National Forest System still lack permanent protection. These unprotected but wild forests are critical refugia for wildlife, are valued recreational assets and are vital for our Nation's drinking water supplies. For too long these wild forests have been battered by the political winds. Roadless forests deserve lasting security as a critical buffer against climate change and significant producer of pristine water. We've identified an alternative line of defense for these wild forests that does not require action from Washington D.C. but rather from local citizens and state government. This manual will present the concept of Outstanding National Resource Waters and will provide step-by-step directions for citizens and conservation organizations to use this underemployed provision of the Clean Water Act to protect pristine waters and roadless forests in each of 13 western states.

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Introduction

America's pristine and undeveloped forests are the source of much of our water for drinking, agriculture and recreation. The U.S. Forest Service, which manages nearly 400,000 miles of streams, 3 million acres of lakes, and many aquifer systems, provides drinking water for more U.S. residents than any other entity. In the west to a large portion of that water is generated from Wilderness and inventoried roadless lands.

After nearly protecting 59 million acres of roadless national forest lands through President's Clinton's 2001 Roadless Rule, the reality is that this landmark conservation initiative is far from finished. On May 5th 2005, the U.S. Forest Service finalized a new planning framework that strips away protections for roadless areas and requires western governors to decide whether or not they will do the work to protect roadless areas themselves. The new framework is expensive and difficult, and even if successful, can be over ridden by federal decree. Only the most conservation-minded governors will attempt to protect every eligible acre in their state. In 2009, the 9th U.S. Circuit Court of Appeals upheld the 2001 Roadless Rule and the Rule is currently under appeal in the 10th Circuit. On May 31, 2011, Agriculture Secretary Tom Vilsack announced that he would renew an interim directive regarding inventoried roadless areas within our National Forests and Grasslands for an additional year. The interim directive provides decision-making authority to the Secretary over proposed forest management or road construction projects in roadless areas.

However, tremendous popular support still exists for protecting the 59 million acres of roadless areas in our national forests. There is a simple but effective alternative for gaining permanent protections for these roadless lands and their waters. By linking clean water as defined by the Clean Water Act to roadless area protection, we have unique opportunities to re-affirm the popular support for roadless protection and a novel avenue for citizen action and political initiative.

Water can provide the strategic and tactical framework to advance roadless protection in a manner that is not dependent on the political whims of state or federal administrations. There is a more powerful, more permanent designation– the Clean Water Act's Outstanding National Resource Waters ("ONRW") designation.

The process for designating waters as ONRW is described in the Clean Water Act. The Clean Water Act and each state's water quality standards and regulations explicitly allow for citizens to petition the relevant state agency to modify a state's water quality standards for ONRW at any time. Once designated, land managers are forever prohibited from allowing activities that

pollute these ONRWs and hence provides additional protections to the roadless forests in which they are found.

Under the Clean Water Act states are required to establish water quality standards and are delegated the authority to enforce those standards. Therefore states may have slightly different criteria for ONRW designation as well as different standards for enforcement and each of 11 western states with the majority of the roadless lands are presented individually below.

The Clean Water Act

Purpose of the Clean Water Act

The Clean Water Act (CWA), 33 U.S.C. §§1251-1387, began as the "Federal Water Pollution Control Act of 1972". Evolved over the years through amendments, the CWA still serves as the United States' primary authoritative power regarding surface water quality protection. (EPA, 2008) The CWA's overall stated objective is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[2] Among other changes, two large-scale shifts happened in the execution of the CWA's objective. First, an initial focus on the chemical integrity goal gave way to more concentration on the physical and biological integrity goals in the last 10 years. (EPA, 2008) Second, while the original thought behind pollution sources sat with traditional point sources, new attention has been given to addressing pollution from sources such as urban runoff, agriculture, construction, etc., otherwise referred to as nonpoint sources. (EPA, 2008 and BLM, 2007)

The main tenet of the CWA that addresses water quality protection states that no person may discharge any pollutant, with exception of those activities in compliance with other sections of the CWA.[3] "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source".[4] While this prohibition specifically addresses point source pollutants, nonpoint source pollutants are generally left for States and Tribes to address. (BLM, 2007)

Designation of Authority to States

The CWA designates to the Environmental Protection Agency the task of guiding States and Tribes to create and implement appropriate water quality

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[2] 33 U.S.C. §1251(a) (2008).

[3] 33 U.S.C. §1311(a) (2008).

[4] 33 U.S.C. §1362(12) (2008). The CWA does not address ground water quality issues or water quantity issues.

standards and plans for their individual territories. (BLM, 2007) According to the CWA, State Implementation Plans (SIPs) or Tribe Implementation Plans (TIPs) (collectively, "Plans") are required to be submitted to the EPA every 3 years.[5] These Plans contain the State's "blueprint" for water quality standards. The EPA will then either approve or disapprove the Plans.[6] In the latter situation, the EPA will step in to promulgate water quality standards for that State or Tribe if proposed changes are not adopted.[7]

States and Tribes, as a result of retaining authority over their own waters, have an array of specific responsibilities when creating SIPs or TIPs. The State must adopt:

a. Designated uses, or goals, for their waters.
b. Necessary water quality criteria to protect those designated uses.
c. An antidegradation policy to protect existing water quality and especially those with existing high water quality.
d. Any general policies as appropriate for application and implementation of standards, at their discretion. (EPA, 2011)

Further, States and Tribes have responsibilities pertaining to the implementation of their water quality standards. They must monitor and assess the water quality status, and issue discharge permits when delegated. (EPA, 2011)

Designated Uses

Under the CWA States and Tribes are to adopt designated uses for their waters.[8] These designated uses serve to define what role a specific water body has both for humans and for ecosystems. (EPA 2011) A designated use is essentially a goal for the water, prescribing such activities as recreation, water supply, or industrial use. These are designated whether or not those uses are currently being attained. (EPA 2011) The CWA expressly provides that uses must at least provide for the protection and propagation of fish, shellfish, and recreation in and on the water, when attainable.[9] Further, §303(c)(2)(a) requires adoption of standards to "protect public health or welfare, enhance the quality of the water and serve the purposes of [the CWA] AND, in establishing such standards, consider their use and value for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial, and navigation and other purposes."

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[5] 33 U.S.C. §1313 (2008).
[6] 33 U.S.C. §§1313(a)(3)(B) - (C) (2008).
[7] 33 U.S.C. §1313(a)(3)(C) (2008).
[8] 33 U.S.C. §1313(c) (2008).
[9] 33 U.S.C. § 1251(a)(2) (2008).

A water body can also be designated a use other than the ones discussed above. These other purposes can include wildlife protection, ceremonial uses, and Outstanding National Resource Waters. While the State or Tribe can create their own uses, they may not have a designated use for waste transport or waste assimilation. (BLM, 2007)

Water Quality Criteria

Water quality criteria limit the amounts of chemicals and other pollutant conditions in a water body to assure that the designated uses of that water will be attained. The EPA issues recommendations for criteria that States or Tribes can adopt into their standards, but special conditions may elicit them to adopt their own criteria as well. (BLM, 2007) However, the CWA does require States and Tribes to adopt criteria for priority pollutants, as identified by the EPA.[10]

Water quality criteria are based on scientific data and expert judgment. Factors that are considered in setting designated uses (social and economic cost, technological feasibility) are not taken into consideration of setting water quality criteria. (EPA, 2008)

Criteria can be articulated through two methods, numeric (quantitative) or narrative (qualitative). Numeric criteria set specific levels of chemicals or pollutants that must be met for each water body, while narrative criteria consist of descriptive statements regarding appropriate contaminant levels. (EPA, 2008 and BLM, 2007) Most criteria follow a numeric format, especially for toxic pollutants. This allows measurable means to track the quality of a water body. When pollutants cannot be measured, narrative criteria are used. The EPA's recommendation is for States and Tribes to use both numeric and narrative criteria. (EPA 2011)

Antidegradation policy

After designated uses are assigned to waters, and water quality criteria are established, the State or Tribe is then responsible for policing existing and future activities on those waters. An antidegradation policy essentially sets rules by which the State allows or disallows activity on a water body to prevent degradation of water quality. (EPA, 2011 and BLM, 2007) Antidegradation policies can address both point and non-point sources. (EPA, 2011) However, the EPA is only allowed to require point source control programs since the CWA does not specifically authorize non-point

[10] 33 U.S.C. §1313(c)(2)(B) (2008).

source control programs. (EPA, 2011) Further, State or Tribes are required to involve the public in reviews for proposed activities in or on waters. (EPA, 2011) The review should be documented and allowed public notice and comment.

The EPA requires water quality standards to provide protection for three levels of water quality, generally referred to as tier 1, tier 2, and tier 3.[11] Tier 1 involves protecting water quality for existing uses, tier 2 protects waters with quality that exceeds that necessary for the protection of fish, wildlife, and recreation, and tier 3 protects high quality waters, or generally those that constitute Outstanding National Resource Waters (ONRWs).[12]

Outstanding Waters & Roadless Areas

Outstanding Natural Resource Waters

Tier III waters

Outstanding Natural Resource Waters (ONRWs) are also known as Tier III waters. (EPA, 2011) This designation is reserved for those waters having unique characteristics that are deemed necessary to be protected, including exceptional ecological, recreational, or environmental assets.[13] For Tier III waters, the EPA advises that absolutely no degradation of the existing water quality be allowed. (EPA, 2011) Temporary lowering of water quality, however, is permitted for activities such as facility repairs or short-term construction projects. (EPA, 2011) While States and Tribes are required to include all tiers of water quality in their antidegradation policies, they are given discretion with regards to actual designation of waters. (EPA, 2011) States and Tribes, therefore, can choose not to designate any waters as ONRWs if they feel the EPA-imposed restrictions are too high. (BLM, 2007) Therefore, many States and Tribes have designations that are comparable to ONRW, but are more flexible with water quality assessments. (BLM, 2007) Such designations include "Outstanding Natural Resource Waters," "Outstanding State Resource Waters," or "Exceptional Waters." (EPA, 2011) This “mid-way” designation between the federal version of ONRWs and the State’s version is sometimes referred to as “tier 2.5”. (BLN, 2007)

[11] 40 C.F.R. § 131.12 (2011).
[12] 40 C.F.R. § 131.12 (2011).
[13] 40 C.F.R. § 131.12 (2011).

Roadless Areas

Roadless areas within the National Forest System contain all or portions of 354 municipal watersheds contributing drinking water to millions of citizens. Inventoried roadless areas make up one-third of all National Forest System lands, or approximately 58.5 million acres and are found within at least 30% of the nation's major watersheds providing innumerable social and ecological benefits. Maintaining these areas in a relatively undisturbed condition saves downstream communities millions of dollars in water filtration costs.

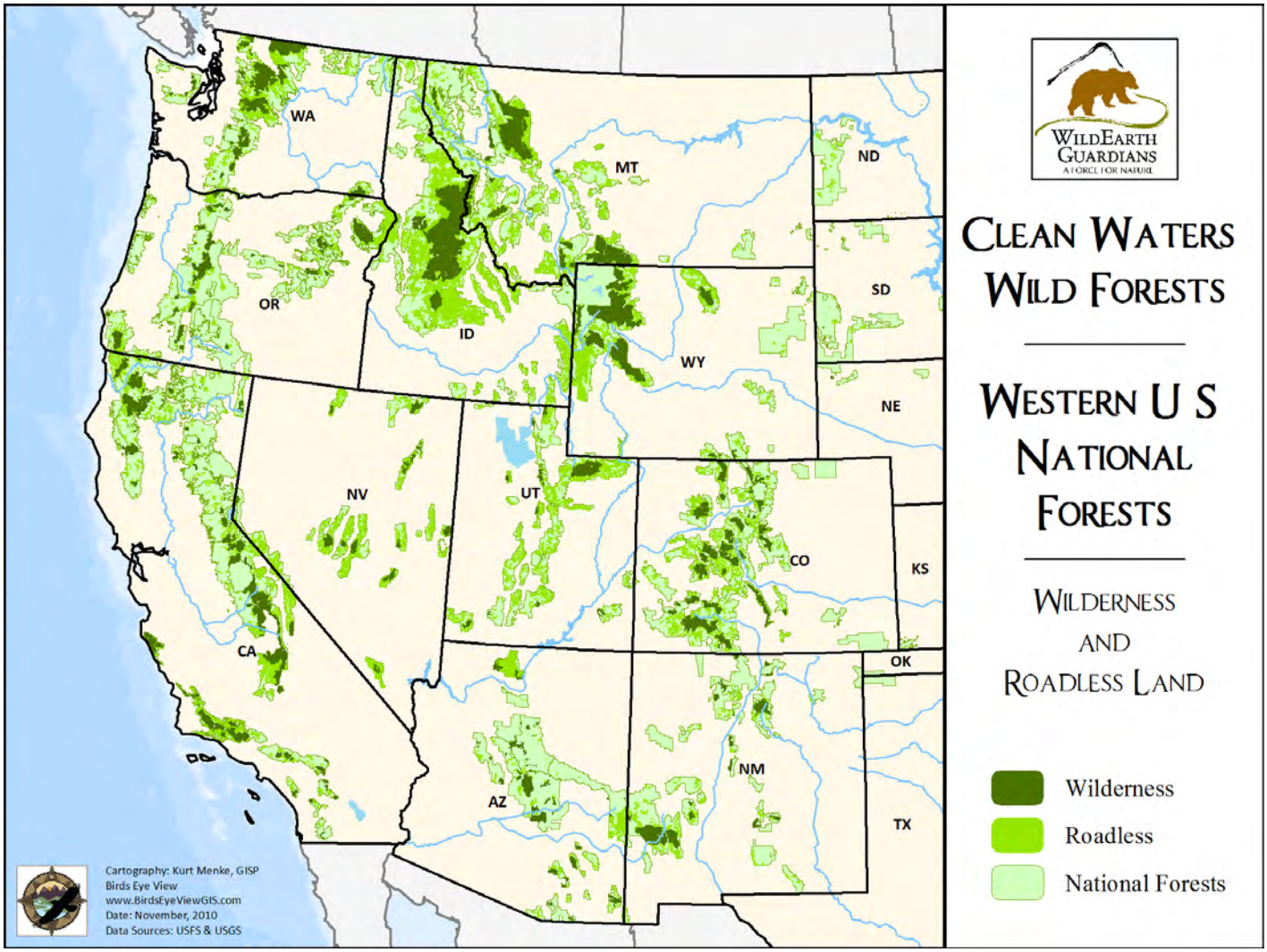
These roadless areas are still lacking permanent protection from the federal government, yet they contain critical habitat for wildlife, are valued recreational assets and are vital for our Nation's drinking water supplies. Although President Clinton issued an administrative rule that offered some degree of protection for roadless forests, that rule has been the subject of legal actions and remains unenforced. An alternative route for protection of these forests lies in the waters that run through them. Such waters, with their exceptional recreational, ecological, and environmental value, are the perfect candidates for the ONRW designation. Healthy watersheds capture, store, purify and deliver water over time, protect downstream communities from flooding; provide unpolluted water for domestic, agricultural, and industrial uses; maintain abundant and healthy fish and wildlife populations; and support outdoor recreation. However, as mentioned above, the decision to designate ONRWs lies with the States and Tribes themselves.

Protection Potential of ONRW's - Roadless Forests

Primary Land Uses in the West and ONRW Implications

In 2000, the U.S. Forest Service proposed to adopt new regulations for the protection of roadless areas in the National Forest system. Their final rule was later adopted, and became effective March 13, 2001. In keeping with rulemaking procedures, they published a Draft Environmental Impact Statement (DEIS) in May 2000 for Roadless Area Conservation in National Forests. Within this document, the Forest Service surveys various human uses of land in roadless areas across the U.S. The main uses highlighted by the Forest Service include timber harvest; recreation, including primitive, semi-primitive non-motorized, semi-primitive motorized, roaded natural, rural, and urban types; recreation special uses, or those that generally require use of a permit, such as hunting, fishing, and ski areas; scenic quality; heritage resources; wilderness; real estate management; and minerals and geology, including locatable, leasable, and salable minerals, abandoned and

inactive mines, geological and Paleontological resources, and fire suppression.



State Guides

Arizona

i. Statutory Framework

Arizona does not mention Outstanding Arizona Waters in their statutes. However §49-202, Arizona Statutes, designates the Department of Environmental Quality as the agency for all purposes of the Federal Clean Water Act.

ii. Designation Process

The Arizona Administrative Code addresses how a surface water is classified as an Outstanding Arizona Water (OAW). The Director of the Arizona Department of Environmental Quality (ADEQ) is ultimately responsible for an OAW designation.[14] He or she accomplishes this via administrative rule, generally after receiving a nomination from an interested person or party. This nomination must include:

1. A map and a description of the surface water;
2. A written statement in support of the nomination, including specific reference to the applicable criteria for an OAW classification prescribed in subsection (D);
3. Supporting evidence demonstrating that the criteria prescribed in subsection (D) are met; and
4. Available water quality data relevant to establishing the baseline water quality of the proposed OAW.[15]

Once the Director receives a nomination, a few steps must be taken in order to designate the surface water as an OAW. First, the Director must hold at least one public meeting in order to solicit public comment regarding the nomination.[16] This meeting must take place in the local area of the nominated surface water.[17]

Second, the Director may, but is not required to, use the following criteria, to determine whether a surface water should be designated as an OAW:

[14] §49-202(A) Arizona Statutes (2010); R18-11-112(A) Arizona Administrative Code (2010).
[15] R18-11-112(C) Arizona Administrative Code (2010).
[16] R18-11-112(E) Arizona Administrative Code (2010).
[17] *Id.*

1. The surface water is a perennial or intermittent water;
2. The surface water is in a free-flowing condition. …;
3. The surface water has good water quality. … A surface water that is listed as impaired under R18-11-604(E) is ineligible for OAW classification; and
4. The surface water meets one or both of the following conditions:
a. The surface water is of exceptional recreational or ecological significance because of its unique attributes, such as the geology, flora and fauna, water quality, aesthetic value, or the wilderness characteristic of the surface water;
b. An endangered or threatened species is associated with the surface water and the existing water quality is essential to the species' maintenance and propagation or the surface water provides critical habitat for the threatened or endangered species. …[18]

Finally, various factors must be considered by the Director when making a decision on whether or not to designate. These factors include:

1. Whether there is the ability to manage the surface water and its watershed to maintain and protect existing water quality;
2. The social and economic impact of Tier 3 antidegradation protection;
3. The public comments in support of, or in opposition to, an OAW classification;
4. The timing of the nomination relative to the triennial review of surface water quality standards;
5. The consistency of an OAW classification with applicable water quality management plans; and
6. Whether the nominated surface water is located within a national or state park, national monument, national recreation area, wilderness area, riparian conservation area, area of critical environmental concern, or it has another special use designation (for example, Wild and Scenic River).[19]

If a nominated surface water is designated as an OAW, the Director may additionally adopt a site-specific standard for water quality to maintain and protect existing values of the surface water.[20]

The Arizona Department of Environmental Quality has also recently released a document entitled "Draft Antidegradation Implementation Procedures"

[18] R18-11-112(D) Arizona Administrative Code (2010).
[19] R18-11-112(F) Arizona Administrative Code (2010).
[20] R18-11-112(B) and R18-11-115 Arizona Administrative Code (2010).

(April 2008).[21] These procedures are aimed at providing guidance to those intending to conduct regulated discharges into surface waters, and therefore may reduce the existing water quality of those waters.[22] The document points out that these "guidance" procedures are not to be substituted for any existing statutes, rules, or regulations. [23] According to these procedures, the Department considers all nominations for OAWs during their triennial review of surface water quality standards.[24] Further, the nominating party has the burden of establishing the basis for designating a surface water as an OAW.[25]

iii. Antidegradation Rules

Once a surface water becomes designated as an OAW, Tier 3 antidegradation protection automatically applies to that water's quality. This level of protection only applies to OAWs.[26] The main antidegradation rules for Tier 3 waters are:

> 1. Tier 3 antidegradation protection applies only to an OAW listed in R18-11-112(G).
> 2. A new or expanded point-source discharge directly to an OAW is prohibited.
> 3. A person seeking authorization for a regulated discharge to a tributary to, or upstream of, an OAW shall demonstrate in a permit application or in other documentation submitted to the Department that the regulated discharge will not degrade existing water quality in the downstream OAW.
> 4. A discharge regulated under a § 404 permit that may affect existing water quality of an OAW requires an individual § 401 water quality certification to ensure that existing water quality is maintained and protected and any water quality impacts are temporary. Temporary water quality impacts are those impacts that occur for a period of six months or less.[27]

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[21] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.
[22] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 1 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.
[23] *Id.*
[24] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 2-3 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.
[25] *Id.*
[26] R18-11-107(D) Arizona Administrative Code (2010).
[27] R18-11-107.01(C) Arizona Administrative Code (2010).

Other various antidegradation rules also apply to OAWs. For general permit review, the Director must do an individual review when the Notice of Intent is submitted when the discharge may degrade existing water quality in an OAW.[28] In relation to variances to water quality permits, the Director is not authorized to grant these for a point source discharge to an OAW.[29]

The ADEQ's Antidegradation Implementation Procedures discuss Tier 3 degradation. These guidelines suggest that while long-term degradation is not allowed, short-term or temporary degradation will be accepted on a case-by-case basis as determined by ADEQ's Director.[30] Degradation is defined as "temporary" if it lasts 6 months or less, and applicants must make efforts to minimize these temporary impacts by all practical means.[31] Further, in accordance with §305(b) of the Federal Clean Water Act, each state is required to submit to the US EPA a biennial report describing water quality of all surface waters in the state.[32] Those waters that are reviewed and subsequently found to not meet water quality standards are deemed "water quality limited waters" or "impaired waters", and thus are listed in §303(d) of the CWA.[33] In Arizona, if a §305(b) assessment reveals long-term degradation, ADEQ may conduct a special study of the extent and source(s) of degradation and explore possible remedial action.[34] They may also develop an action plan when possible for addressing the degradation by providing technical and other assistance to probable sources of degradation to implement appropriate management practices, award priority points for grant or other funding programs targeted at water quality protection, amend permits or water quality certification conditions, and work with stakeholders to support actions needed to protect and restore water quality.[35] Currently, Arizona follows both numeric and narrative water quality standards.[36]

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[28] R18-11-107.01(F) Arizona Administrative Code (2010).

[29] R18-11-122(J) Arizona Administrative Code (2010).

[30] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. vii, 3, 2-6, 7, 2-1, and 3-7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[31] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 3-7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[32] CWA §305(b)

[33] CWA §303(d)

[34] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[35] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[36] R18-11-108, R18-11-108.01, R18-11-108.02, R18-11-108.03, and R18-11-109 Arizona Administrative Code (2010).

In reference to permitting, the Antidegradation Implementation Procedures also provide guidance on discharges affecting OAWs. For individual Arizona Pollutant Discharge Elimination System (AZ PDES) permits (non storm water), discharges in OAWs cannot degrade existing water quality unless it is short-term, must meet individual ADEQ antidegradation review requirements, cannot cause violation of water quality standards, must protect existing uses, and an analysis of alternatives may be required.[37] For general AZ PDES permits, no degradation of existing water quality is allowed unless it is short-term, and the discharge cannot cause violation of water quality standards.[38] Finally, regarding 404 and 401 permits and certifications, discharge must not degrade existing water quality unless it is short-term, cannot violate water quality standards, and existing uses must be protected.[39]

The Antidegradation Implementation Procedures further addresses the review process afforded to OAWs, or Tier 3 waters, when discharges are proposed that would impact their existing water quality. New or expanded direct discharges to OAWs are expressly prohibited.[40] It seems, therefore, that existing discharges and essentially "grandfathered" in and would be allowed. Additionally, indirect discharges to OAWs (those that occur upstream of or on the tributaries of an OAW) will be controlled by ADEQ as well.[41] Antidegradation reviews for regulated discharges affecting OAWs will include consideration of the following factors:

> The length of time during which the water quality will be lowered;
> The percent change in ambient concentrations and the parameters affected;
> The likelihood for long-term water quality benefits to the segment (e.g., as may result from dredging of contaminated sediments);
> The degree to which achieving applicable water quality standards during the proposed activity may be at risk; and
> The potential for any residual long-term impacts or influences on existing uses.[42]

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[37] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 2-6 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[38] *Id.*

[39] *Id.*

[40] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 3-7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

[41] *Id.*

[42] Arizona Department of Environmental Quality, Water Quality Division: Draft Antidegradation Implementation Procedures, p. 3-7 (April 2008). This document can be accessed at: http://www.azdeq.gov/environ/water/standards/download/draft_anti.pdf.

The review shall determine if the discharge is temporary or not. If it is, it may be authorized and those findings will be documented and public participation activities will be initiated.[43] If the discharge would not be temporary, it will be denied.[44]

Additionally, a review is necessary to determine whether a proposed discharge will degrade the existing water quality of an OAW. This review includes looking at the following factors:

> Change in ambient concentrations predicted at the appropriate critical flow condition(s)
> Change in loadings (i.e., the new or expanded loadings compared to total existing loadings to the segment)
> Reduction in available assimilative capacity
> Nature, persistence and potential effects of the parameter
> Potential for cumulative effects
> Degree of confidence in the various components of any modeling technique utilized (e.g., degree of confidence associated with the predicted effluent variability).[45]

If these factors are initially viewed in favor of allowing the discharge, the review findings must be documented and public participation activities initiated.[46] However, if the factors indicate a likely degradation of existing water quality in a downstream OAW, ADEQ will deny the proposed discharge.[47]

TIER 2 WATERS

For those waters that are not OAWs but have existing water quality that is better than applicable water quality standards, Tier 2 antidegradation rules apply. For these waters, the existing water quality must be maintained but the Director is allowed to create exceptions for degradation if the following is found to be true:

> 1. The water quality necessary for existing uses is fully protected and water quality is not lowered to a level that does not comply with applicable water quality standards,
> 2. The highest statutory and regulatory requirements for new and existing point sources are achieved,
> 3. All cost-effective and reasonable best management practices for nonpoint source pollution control are implemented, and

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

4. Allowing lower water quality is necessary to accommodate important economic or social development in the area where the surface water is located.[48]

However, a degradation is not qualified as "significant" when a.) The regulated discharge consumes less than 20 percent of the available assimilative capacity for each pollutant of concern, and b.) At least 50 percent of the assimilative capacity for each pollutant of concern remains available in the surface water for each pollutant of concern.[49]

Further, any person proposing a new or expanded regulated discharge under an individual AZPDES permit that may cause significant degradation to a Tier 2 water shall provide the Department with the following information:

a. Alternative analysis.
i. The person seeking authorization for the discharge shall prepare and submit a written analysis of alternatives to the discharge. The analysis shall provide information on all reasonable, cost-effective, less-degrading or non-degrading discharge alternatives. Alternatives may include wastewater treatment process changes or upgrades, pollution prevention measures, source reduction, water reclamation, alternative discharge locations, groundwater recharge, land application or treatment, local pretreatment programs, improved operation and maintenance of existing systems, seasonal or controlled discharge to avoid critical flow conditions, and zero discharge;
ii. The alternatives analysis shall include cost information on base pollution control measures associated with the regulated discharge and cost information for each alternative;
iii. The person shall implement the alternative that is cost-effective and reasonable, results in the least degradation, and is approved by the Director. An alternative is cost-effective and reasonable if treatment costs associated with the alternative are less than a 10 percent increase above the cost of base pollution control measures;
iv. For purposes of this subsection, "base pollution control measures" are water pollution control measures required to meet technology-based requirements of the Clean Water Act and water quality-based effluent limits designed to achieve compliance with applicable water quality standards;

b. Social and economic justification. The person shall demonstrate to the Director that significant degradation is necessary to accommodate important economic or social development in the local area. The person seeking authorization for the discharge shall prepare a written

[48] R18-11-107(C) Arizona Administrative Code (2010).
[49] R18-11-107.01(B)(2) Arizona Administrative Code (2010).

social and economic justification that includes a description of the following:
i. The geographic area where significant degradation of existing water quality will occur;
ii. The current baseline social and economic conditions in the local area;
iii. The net positive social and economic effects of development associated with the regulated discharge and allowing significant degradation;
iv. The negative social, environmental, and economic effects of allowing significant degradation of existing water quality; and
v. Alternatives to the regulated discharge that do not significantly degrade water quality yet may yield comparable social and economic benefits;
c. Baseline characterization. A person seeking authorization to discharge under an individual AZPDES permit to a perennial water shall provide baseline water quality data on pollutants of concern where no data exist or there are insufficient data to characterize baseline water quality and to determine available assimilative capacity. A discharger shall characterize baseline water quality at a location upstream of the proposed discharge location.[50] ("Pollutant of concern" means a pollutant with either a numeric or narrative water quality standard.)[51]

To complete an antidegradation review for Tier 2 waters as described above, the Director must also provide public notice and an opportunity to comment, and shall provide an opportunity for a public hearing under A.A.C. R18-9-A908(B).[52] These public hearing requirements are as follows:

1. The Director shall provide notice and conduct a public hearing to address a draft permit or denial regarding a final decision if:
a. Significant public interest in a public hearing exists, or
b. Significant issues or information have been brought to the attention of the Director during the comment period that was not considered previously in the permitting process.
2. If, after publication of the notice under R18-9-A907, the Director determines that a public hearing is necessary, the Director shall schedule a public hearing and publish notice of the public hearing at least once, in one or more newspapers of general circulation where the facility is located. The notice for public hearing shall contain:
a. The date, time, and place of the hearing;

[50] R18-11-107.01(B)(3) Arizona Administrative Code (2010).
[51] R18-11-107.01(B)(4) Arizona Administrative Code (2010).
[52] R18-11-107.01(B)(5) Arizona Administrative Code (2010).

b. Reference to the date of a previous public notice relating to the proposed decision, if any; and
c. A brief description of the nature and purpose of the hearing, including reference to the applicable laws and rules.
3. The Department shall accept written public comment until the close of the hearing or until a later date specified by the person presiding at the public hearing.[53]

iv. Current Designations

Arizona has designated 22 Outstanding Arizona Waters to date. These OAWs are listed in the Arizona Administrative Code under rule R18-11-112(G). The current list of OAWs includes all or portions of the following surface waters: The West Fork of the Little Colorado River, Oak Creek, West Fork of Oak Creek, Peeples Canyon Creek, Burro Creek, Francis Creek, Bonita Creek, Cienega Creek, Aravaipa Creek, Cave Creek, South Fork of Cave Creek, Buehman Canyon Creek, Lee Valley Creek, Bear Wallow Creek, North Fork of Bear Wallow Creek, South Fork of Bear Wallow Creek, Snake Creek, Hay Creek, Stinky Creek, KP Creek, Davidson Canyon, and Fossil Creek.[54] Together, these listed OAWs account for 281.05 river miles.

California

i. Statutory Framework

California's primary legislation addressing water quality is the Porter-Cologne Water Quality Control Act in the California Water Code. This Act gives water quality control in the state to the State Water Resources Control Board (state board) and the California regional water quality control boards (regional boards).[55] While the state board is responsible for setting California's water quality control policy, the regional boards have the power to adopt regulations to carry out the state board's guidelines. The Water Code does not mention Outstanding Natural Resource Waters in either the state board's powers or the regional boards' powers. However §13225 states that each regional board has the responsibility to coordinate with the state board and other regional boards on water quality control measures, such as prevention and abatement of water pollution. Other specific regional board powers can be found in §13223 et. seq. of the California Water Code (2009).

The California Water Code and the Porter-Cologne Act also prescribe methods in which the regional boards are to control water quality issues. §13241, California Water Code, mandates each regional board to create a

[53] R18-9-A908(B) Arizona Administrative Code (2010).
[54] R18-11-112(G) Arizona Administrative Code (2010).
[55] §13100 California Water Code (2009).

water quality control plan that will "ensure the reasonable protection of beneficial uses and the prevention of nuisance." The factors to be considered by the regional board in setting control plans shall include, but are not limited to:

> (a) Past, present, and probable future beneficial uses of water.
> (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
> (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
> (d) Economic considerations.
> (e) The need for developing housing within the region.
> (f) The need to develop and use recycled water.[56]

These plans can be approved only after a publicly noticed public hearing is held.[57] Further, the state board must also approve a plan or a revision to the plan before it becomes effective.[58] The state board has 60 days from the regional board's submission of the plan, or 90 days from the resubmission, to act upon a pending plan or plan revision.[59] The approved water quality control plans must be followed and complied with by state offices, departments, and boards unless a statute allows otherwise.[60]

ii. Designation Process

California has not yet adopted a formal procedure for designating an ONRW. However, ONRWs may be designated as part of an adoption or revision of water quality control plans, according to California's antidegradation guidance. Currently, the state board is developing a procedure for additional ONRW designations.

iii. Antidegradation Rules

California's State Water Resources Control Board passes resolutions as part of the state's policy for controlling water quality, which are binding on state agencies as described in the California Water Code, reviewed above. Resolution 68-16, "Policy with Respect to Maintaining Higher Quality Waters in California" holds California's antidegradation policy with respect to surface waters. This policy is incorporated into all regional water quality

[56] §13241 California Water Code (2009).
[57] §13244 California Water Code (2009).
[58] §13245 California Water Code (2009).
[59] §13246(a) California Water Code (2009).
[60] §13247 California Water Code (2009).

control plans, and is codified in the California Code of Regulations under 23 CCR §2900.

Resolution 68-16 somewhat differs from the Federal antidegradation policy. The California antidegradation rules apply to surface water and groundwater, but only to those with a water quality meeting or exceeding the current objectives (Tier II). It also applies to all uses of water, such as existing, potential, instream and offstream. Additionally the California policy applies to the degradation of water quality since 1968, when the resolution was passed. California incorporates other tenets from the Federal policy where applicable.

Waters are qualified as Tier I or Tier II based on a pollutant-by-pollutant approach. If a water is Tier I, existing instream uses must be protected according to a 1975 baseline, or whichever year after that if water quality has improved. However, if the water is Tier II, then other standards apply. Proposed activities on Tier II waters are reviewed qualitatively to determine possible degradation of the water quality. The analysis focuses on whether the proposed activity will result in a significant increase in mass emissions. The depth of the analysis corresponds to the degree of potential water quality degradation. Accordingly, when degradation will be temporary, minor, or local, a complete analysis is not required.

The text of Resolution 68-16 provides that degradation of water quality is only permitted when:

> 1.) Change is consistent with maximum benefit to people of state, will not unreasonably affect present and potential beneficial uses, and will not result in water quality lower than applicable standards, and
> 2.) Waste discharge requirements for proposed discharge will result in the best practicable treatment or control of the discharge necessary to assure:
>
> a.) No pollution or nuisance
> b.) Highest water quality consistent with maximum benefit to people of the State

However, guidance of this resolution suggests that where a complete analysis of a proposed activity is required, degradation of water quality will only be allowed when necessary for important economic or social development. The requirements from Resolution 68-16, cited above, must be met as well. For this analysis, the proposed discharger has the burden of proving that either degradation will not occur or that the activity is necessary.

iv. Current Designations

California only has 2 current Outstanding Natural Resource Water designations – Lake Tahoe and Mono Lake. However, California does treat marine areas of special biological significance similarly to ONRWs.

Colorado

i. Statutory Framework

Colorado addresses water quality in the Colorado Water Quality Control Act, found in §25-8-101, et. seq., Colorado Statutes. A Water Quality Control Commission was created by this Act, which has the responsibility of developing and maintaining a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state. Specifically, the Commission must promulgate water quality standards based on both quantitative and qualitative factors. The Commission may also promulgate water quality control regulations.

Colorado also specifically mentions Outstanding Waters in their statutes. §25-8-209 states that the Commission may adopt a water quality designation of "Outstanding waters", as opposed to use-protected waters and reviewable waters. Use-protected waters are those with the next highest classification of water quality behind Outstanding waters. Use-protected waters are those with existing water quality that is "not better than necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." Reviewable waters are all other waters, and water quality shall be maintained unless determined that it is "necessary to accommodate important economic or social development" in the surrounding area.

Additionally, the Commission is required to issue criteria for each designation. Pertaining to Outstanding waters, existing water quality must be maintained and protected. Further, segments shall not be designated as Outstanding unless the Commission determines that:

1.) The quality of the waters is better than necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water;
2.) The waters constitute an outstanding natural resource; and
3.) Protection of such resource requires protection in addition to that provided by the combination of water quality classifications and standards and the protection afforded reviewable waters.

ii. Designation Process

The Code of Colorado Regulations sets forth rules regarding water quality-based designations, including Outstanding waters. Assigning a water

classification must be done via rule, following a rulemaking hearing. Classification review must take place at least every three years. Any person interested in assigning or changing a water classification may petition the Commission, who may also act on its own motion regarding a classification. Aside from considering evidence presented at the public hearing, three determinations are required for the Commission to designate water as Outstanding:

> (i) The existing quality for each of the following parameters is equal to or better than that specified in tables I, II, and III for the protection of aquatic life class 1, recreation class P and (for nitrate) domestic water supply uses:
>
> > Table I: dissolved oxygen, pH, *E. coli*
> > Table II: chronic ammonia, nitrate
> > Table III: chronic cadmium, chronic copper, chronic lead, chronic manganese, chronic selenium, chronic silver, and chronic zinc
>
> The determination of existing quality shall be based on adequate representative data, from samples taken within the segment in question. Data must be available for each of the 12 parameters listed; provided, that if *E. coli* samples from within the segment are infeasible due to its location, and a sanitary survey demonstrates that there are no human sources present that are likely to impact quality in the segment in question, *E. coli* data will not be required. "Existing quality" shall be the 85th percentile of the data for ammonia, nitrate, and dissolved metals, the 50th percentile for total recoverable metals, the 15th percentile for dissolved oxygen, the geometric mean for *E. coli* , and the range between the 15th and 85th percentiles for pH. In addition, the foregoing notwithstanding, this test shall not be considered to be met if the Commission determines that, due to the presence of substantial natural or irreversible human-induced pollution for parameters other than those listed above, the quality of the waters in question should not be considered better than necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.
>
> (ii) The waters constitute an outstanding natural resource, based on the following:
>
> > (A) The waters are a significant attribute of a State Gold Medal Trout Fishery, a National Park, National Monument, National Wildlife Refuge, or a designated Wilderness Area, or are part of a designated wild river under the Federal Wild and Scenic Rivers Act; or

(B) The Commission determines that the waters have exceptional recreational or ecological significance, and have not been modified by human activities in a manner that substantially detracts from their value as a natural resource.

(iii) The water requires protection in addition to that provided by the combination of water quality classifications and standards and the protection afforded reviewable water under section 31.8(3).

iii. Antidegradation Rules

In addition to providing the procedure for designating waters, the Code of Colorado Regulations also addresses water quality protection in 31.8(1), the Antidegradation Rule. This states that the highest level of water quality protection, which requires the maintenance and protection of existing water quality, applies to Outstanding waters.[61] A lower, intermediate level of protection applies to reviewable waters. New or increased regulated activities on these waters that may degrade the existing water quality are subject to the antidegradation review process. The prevailing question in this review is whether or not the activity will likely result in a significant degradation of water quality, both under numeric and narrative standards. Use-protected waters do not receive protections of the antidegradation review. The only applicable water quality protection standard for use-protected waters is that found in the Colorado Statutes §25-8-109(4), as mentioned in the statutory framework section above.

iv. Current Designations

Colorado's current Outstanding waters are designated according to basin. There are 14 total, which include: Upper Arkansas River Basin, Upper Gunnison River Basin, North Fork of the Gunnison River Basin, Uncompahgre River Basin, San Miguel River Basin, White River Basin, Upper South Platter River Basin, Bear Creek Basin, Clear Creek Basin, Boulder Creek Basin, St. Vrain Creek Basin, Big Thompson River Basin, Cache La Poudre River Basin, and the Laramie River Basin. Each of these basins includes a description of the portions designated as Outstanding waters.

Idaho

i. Statutory Framework

Unlike many other Western states, a variety of Idaho statutes address Outstanding Resource Waters (ORWs) in conjunction with the Idaho Administrative Code. §39-3617 sets forth the designation process, giving power to the Board of Environmental Quality to recommend proposed

stream segments to the state legislature for adoption of the Outstanding Resource Water designation. The legislature then determines by law which segments will be designated. Once designated, §39-3619 provides that existing activities on ORWs may continue, yet the current water quality must be maintained and protected. Short-term and temporary activities are generally excepted from this requirement. §39-3618 alludes that these existing activities include both point and non-point source activities, since "new" nonpoint source activities are specifically addressed. Idaho statutes provide further guidance for ORWs in §39-3620, specifically on Best Management Practices (BMPs) for nonpoint source activities on or affecting ORWs. BMPs are required for "reasonably foreseeable" new nonpoint source activities within six months of an ORW designation by the legislature.

ii. Designation Process

The Idaho Administrative Code supplements the Idaho Statutes with provisions regarding the designation of Outstanding Resource Waters. Rule 58.01.02 covers water quality standards, and section 055 addresses ORWs. This states that any person may request in writing to the Board of Environmental Quality (the Board) that a particular stream segment be considered for designation as an ORW. These nominations are due to the Board by the later date of April 1 or 10 days after the adjournment sine die of that year's regular session of the legislature. They will be considered during the legislature's next regular session. The required elements of a nomination include name, description, and location of the stream segment, the upstream and downstream boundaries, a description of existing water quality (including technical data), types of nonpoint source activities currently on the water that may lower water quality, plus those anticipated in the next two years, and any other relevant information to the designation.

The Board must give public notice of stream segments being proposed to the legislature of ORW designation, or if a public hearing is being held. Hearings are not required, but may be given at the Board's discretion based on factors such as if the water is in a national or state park, or is generally recognized as waters of exceptional recreational or ecological significance. The Board must accept public comments on the proposed designation for at least 45 days. Once public comments are collected and any public hearings are held, the Board will review the nominations and will, in turn, nominate to the legislature those stream segments that they feel should be designated as ORWs. For each nominated segment, the Board will also submit a report to the legislature containing information as included in the public's nomination to the Board, that collected during public comment and hearings, and fish, wildlife, and recreational values and other beneficial uses.

iii. Antidegradation Rules

Idaho's antidegradation policy, set forth in section 051 of rule 58.01.02, requires maintenance of existing uses for all waters. However, it also requires that the water quality supporting those existing uses be maintained as well. Specifically, in relation to Outstanding Resource Waters, water quality must be maintained and protected from both point and nonpoint source activities.

The Idaho Administrative Code also addresses the rule for mixing zones in Outstanding Resource Waters. A mixing zone is an area downstream from an upstream dischage containing man-caused pollutants resulting from nonpoint source activities. Therefore, the area may not meet all water quality standards applicable to the ORW, but shall still be protected for existing beneficial uses. The Department of Environmental Quality, after considering comments from interested parties, will determine the size, configuration and location of mixing zones that are necessary to meet the requirements of these rules.

Waters that aren't designated as ORWs but have special significance in the state may be designated as Special Resource Waters. This designation acknowledges at least one of the following traits:

a. The water is of outstanding high quality, exceeding both criteria for primary contact recreation and cold water aquatic life;
b. The water is of unique ecological significance;
c. The water possesses outstanding recreational or aesthetic qualities;
d. Intensive protection of the quality of the water is in paramount interest of the people of Idaho;
e. The water is a part of the National Wild and Scenic River System, is within a State or National Park or wildlife refuge and is of prime or major importance to that park or refuge; or
f. Intensive protection of the quality of the water is necessary to maintain an existing, but jeopardized beneficial use.

iv. Current Designations

Idaho has yet to designate any Outstanding Resource Waters.[62] While the Board has submitted several nominations to the legislature, none have been legislatively approved.

Montana

i. Statutory Framework

[62] Idaho Department of Environmental Quality, Water Quality Standards. Found at: http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/standards.cfm

The Montana Statutory Code recognizes Outstanding Resource Waters (ORWs) as those that are of a certain environmental, ecological, or economic value and therefore are necessary to protect in terms of existing water quality. Montana provides ORWs the "greatest protection feasible under state law".[63]

ii. Designation Process

Montana Statutes also provide most of the guidance on rules and procedures for ORWs. The designation process is addressed in §75-5-316(3). Any person may petition the Department of Environmental Quality's Board of Environmental Review (the Board) for rulemaking to designate a state water as an ORW.[64] However, potentially high costs are associated with the role of Petitioner, as evidenced below. The Board then reviews the petition to see if it contains "sufficient credible information" to accept it.[65] To make this determination, the Board looks at these factors:

> (i) the waters identified in the petition constitute an outstanding resource based on the criteria provided in subsection (4) [see below];
> (ii) the increased protection under the classification is necessary to protect the outstanding resource identified under subsection (3)(a) because of a finding that the outstanding resource is at risk of having one or more of the criteria provided in subsection (4) [see below] compromised as a result of pollution; and
> (iii) classification as an outstanding resource water is necessary because of a finding that there is no other effective process available that will achieve the necessary protection.[66]

If the Board reviews these factors and determines not to accept a petition, then it must put this decision into writing and explain the petition's deficiencies.[67] If the Board accepts a petition, then it must produce a written finding explaining why the water meets the above three criteria.[68] This reasoning must be based on a preponderance of the evidence standard.[69] Specifically, the written finding must:

> (i) identify the criteria provided in subsection (4) that the board believes serve as justification for the determination that the water is

[63] §75-5-315 Montana Statutes (2010).
[64] §75-5-316(3)(a) Montana Statutes (2010).
[65] *Id.*
[66] *Id.;* §75-5-316(3)(c) Montana Statutes (2010).
[67] §75-5-316(3)(b) Montana Statutes (2010).
[68] §75-5-316(3)(c) Montana Statutes (2010).
[69] *Id.*

an outstanding resource;
(ii) specifically identify the criteria that are at risk and explain why those criteria are at risk; and
(iii) specifically explain why other available processes, including the requirements of §75-5-303 [the Nondegradation Policy], will not achieve the necessary protection.[70]

Subsection (4) of §75-5-316 provides criteria from which the Board can determine whether or not a water constitutes an ORW. These criteria are:

(a) whether the waters have been designated as wild and scenic;
(b) the presence of endangered or threatened species in the waters;
(c) the presence of an outstanding recreational fishery in the waters;
(d) whether the waters provide the only source of suitable water for a municipality or industry;
(e) whether the waters provide the only source of suitable water for domestic water supply; and
(f) other factors that indicate outstanding environmental or economic values not specifically mentioned in this subsection (4).

Other Rulemaking Procedures are required by the Montana Statutes before the Board can designate a water as an ORW. §75-5-316(5) provides that a notice and description of the petition must be published in a local newspaper of the area of concern and make available to the public copies of the petition. Further, a 30-day comment period must be allowed prior to a public hearing, where more comments will be collected. Once these are completed, the Board must issue a proposed decision including 1) the written finding based on the first three factors cited above (from §75-5-316(3)(c)) and 2) the Board's acceptance or rejection of the petition. Another 30-day comment period must be allowed subsequent to the proposed decision before the Board issues its final decision. This must include responses to the received public comments and copies of the decision must be made available for the public.

Montana requires even more procedures before a designation for an Outstanding Resource Water is made. Once the Board accepts a petition, they must then instruct the Department of Environmental Quality (the Department) to conduct an Environmental Impact Statement (EIS), as included in §75-1-201, et al, for which the petitioner must pay all associated costs.[71] Further, the Board must consult with other state agencies and

[70] §75-5-316(3)(d) Montana Statutes (2010).

[71] §75-5-316(6) Montana Statutes (2010). An estimated amount of the associated costs must be paid by the Petitioner before the Department can initiate the EIS process. If the actual cost exceeds the payment, the difference must be reimbursed to the Petitioner, and vice versa. Full payment must be received before a water is designated as an ORW.

relevant county governments in their decision.[72] After this consultation and EIS procurement, the Board may still deny the petition for ORW if it finds:

> (i) the requirements of subsection (3)(c) have not been met; or
> (ii) based on information available to the board from the environmental impact statement or otherwise, approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts.[73]

Denial of a petition must be accompanied by the Board's reasoning for that action.[74] If a petition is granted, then the Board must initiate rulemaking to designate the water as an ORW.[75] Once a rule is adopted, it is not effective unless approved by the legislature.[76]

iii. Antidegradation Rules

The Montana Statutory Code also provides a Nondegradation Policy in §75-5-303. Aside from a general nondegradation policy for all existing water qualities, Montana specifically provides that the Board may not issue an authorization to degrade the water quality of an Outstanding Resource Water.[77] This rule is echoed in the Administrative Rules of Montana, in rule 17.30.705(c) (2010). It does not appear that either the Statutory Code or the Administrative Rules provides for an exception to this rule. Degradation of other "high quality waters" is allowed, however, under special circumstances.[78] High quality waters, as defined by the Montana Statutory Code, are all state waters, with the exception of:

> (a) ground water classified as of January 1, 1995, within the "III" or "IV" classifications established by the board's classification rules; and
> (b) surface waters that:
> (i) are not capable of supporting any one of the designated uses for their classification; or
> (ii) have zero flow or surface expression for more than 270 days during most years.[79]

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[72] §75-5-316(7) Montana Statutes (2010).
[73] §75-5-316(8)(a) Montana Statutes (2010).
[74] §75-5-316(8)(b) Montana Statutes (2010).
[75] §75-5-316(8)(c) Montana Statutes (2010).
[76] §75-5-316(9) Montana Statutes (2010).
[77] §75-5-303(7) Montana Statutes (2010).
[78] §75-5-303(3) Montana Statutes (2010); Administrative Rules of Montana, r. 17-30-705 and 17-30-708 (2010).
[79] §75-5-103(13) Montana Statutes (2010).

In order for degradation of high quality waters to be approved, the Board must find, based on a preponderance of the evidence standard, that:

> (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;
> (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;
> (c) existing and anticipated use of state waters will be fully protected; and
> (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.[80]

Other administrative procedures are required to allow or disallow degradation of water quality on these high quality waters, including public notice, public comment, and periodic 5 year reviews.[81]

iv. Current Designations

Rule 17-30-617 of the Administrative Rules of Montana designates all state waters that are wholly contained within designated National parks or wilderness areas as of October 1, 1995 as Outstanding Natural Resource Waters. No other waters are currently designated in Montana.

Nevada

i. Absence of Outstanding Natural Resource Waters

Nevada does not mention Outstanding Natural Resource Waters (ONRWs) in either their statutes or administrative rules. Lake Tahoe, which is shared with California and there carries an ONRW designation, has been deemed a "water of extraordinary ecological or aesthetic value" by Nevada yet still has other beneficial uses such as irrigation and idustrial, municipal or domestic supply.[82] Since there are no ONRWs in Nevada, the following information will pertain to antidegradation policies in general for the surface waters of Nevada.

ii. Classification of Nevada Surface Waters

[80] §75-5-303(3) Montana Statutes (2010).
[81] §75-5-303(4)-(6) Montana Statutes (2010).
[82] Nevada Administrative Code, r. 445A.1905 (2010).

Nevada prescribes four levels of waters in their Administrative Code. These are distinguished as Class A, B, C, and D waters, with Class A being the highest quality, and therefore having the highest water quality criteria.[83] Specifically, Class A waters are those with little to no human presence, no industrial development and no intensive agriculture.[84] Class B waters are similar but allow some human interaction, little industrial presence and little intensive agriculture activities.[85]

iii. Antidegradation Rules

The State Environmental Commission of Nevada (the Commission) is charged with establishing water quality standards in order to protect the designated beneficial uses for each water.[86] These standards are to be based on both numeric and narrative water quality criteria.[87] The criteria must allow conditions that "support, protect and allow the propagation of fish, shellfish and other wildlife" and, if possible, to allow recreation in and on the water.[88]

As for higher quality waters, or those that have a water quality exceeding the prescribed standard for that area, Nevada Statutes provide that the water quality must be maintained at these higher levels.[89] Therefore, no discharges are allowed which would lower the water quality.[90] However an exception is allowed for discharges that are "justifiable" for economic or social reasons.[91]

Those parties who plan to contribute a new or increased source of pollution to a water of higher quality must comply with the following as part of their initial planning process:

> (a) If the discharge will be from a point source, the highest and best degree of waste treatment available under the existing technology, consistent with the best practice in the particular field under the conditions applicable, and reasonably consistent with the economic capability of the project or development.
> (b) If the discharge will be from a diffuse source, such measures, methods of operation or practices as are reasonably calculated or designed to prevent, eliminate or reduce water pollution from the

[83] Nevada Administrative Code, r. 445A.124, 445A.125, 445A.126, and 445A.127 (2010).

[84] Nevada Administrative Code, r. 445A.124(1) (2010).

[85] Nevada Administrative Code, r. 445A.125(1) (2010).

[86] Nevada Revised Statutes §445A.520(1) (2010).

[87] Nevada Revised Statutes §445A.520(2) (2010).

[88] *Id.*

[89] Nevada Revised Statutes §445A.565(1) (2010).

[90] An exception is made for "normal agriculture rotation, improvement, or farming practices", thus allowing discharges that lower water quality for these activities.

[91] Nevada Revised Statutes §445A.565(1) (2010).

source, under the circumstances pertaining to the particular place, in order to achieve control over water pollution which is reasonably consistent with the economic capability of the project or development.[92]

Further specific protections are provided to Lake Tahoe, due to it's special designation as discussed above. These regulations are found in §445A.170, et al., Nevada Revised Statutes, and r. 445A.1912, et al., Nevada Administrative Code.

New Mexico

i. Statutory Framework

New Mexico addresses water quality issues in their "Water Quality Act", found in Chapter 74, Article 6 of the New Mexico Statutes Annotated. While the statutes do not specifically discuss Outstanding National Resource Waters (ONRWs) in New Mexico, they do establish the Water Quality Control Commission (the Commission), associated duties and powers, and administrative procedures, discussed below.

ii. Designation Process

Rule 20.6.4.9 of the New Mexico Administrative Code discusses the applicable procedures for ONRW designation. First, a nomination is made to the Commission in a filed petition containing required information, such as a map, water quality data, activities around the water's locality, scientific evidence, and affidavit of public notification.[93] Subsequent to receipt of the petition, the Commission makes a determination of designation based on the criteria described in rule 20.6.4.9(B). The Commission must first find that the designation is beneficial to the state, and either:

1. The water is a significant attribute of a state special trout water, national or state park, national or state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act; or
2. the water has exceptional recreational or ecological significance; or
3. the existing water quality is equal to or better than the numeric criteria for protection of aquatic life and contact uses and the human health-organism only criteria, and the water has not been significantly modified by human activities in a manner that substantially detracts from its value as a natural resource.[94]

[92] Nevada Revised Statutes §445A.565(2) (2010).

[93] New Mexico Administrative Code, r. 20.6.4.9(A) (2010).

[94] New Mexico Administrative Code, r. 20.6.4.9(B) (2010).

Once these criteria are met, the Commission may designate the petitioned surface water as an ONRW.[95] The Commission's published Hearing Guidelines details the specific procedures in regard to: the powers and duties of the Commission and hearing officer; document requirements; prehearing procedures; hearing procedures; and appeals and stays. (Water Quality Commission, 1993.)

iii. Antidegradation Rules

New Mexico's antidegradation rules are based primarily on the objective to protect existing instream uses of surface waters in the state, including the applicable water quality level to maintain those uses.[96] Further, a higher water quality level than necessary on a particular water body shall be maintained unless the Commission otherwise determines that lowering would be "necessary to accommodate important economic and social development in the area in which the water is located".[97]

Subject to exceptions, New Mexico provides that no degradation will be allowed to the water quality of ONRWs.[98] The exceptions given include lowering, with certain specifications, for 1) temporary and short-term degradation, 2) emergency response actions, and 3) pre-existing land-use activities subject to state or federal law and controlled by best management practices (BMPs), which do not introduce new or increased discharge after the ONRW designation.[99]

Generally, the antidegradation standard does not preclude those activities resulting in restoration or maintenance of the chemical, physical or biological integrity of the water.[100]

In addition to the antidegradation policy set by the New Mexico Administrative Code, the State of New Mexico Continuing Planning Process is heavily linked to ONRW regulations as well. The published Antidegradation Policy Implementation Procedure, in Appendix A to the Continuing Planning Process, discusses "other provisions" for Tier 3 ONRW waters in Section IV, subsection 4. (New Mexico Water Quality Control Commission, 2010). These are:

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[95] New Mexico Administrative Code, r. 20.6.4.9(C) (2010).

[96] New Mexico Administrative Code, r. 20.6.4.8(A)(1) (2010).

[97] New Mexico Administrative Code, r. 20.6.4.8(A)(2) (2010).

[98] New Mexico Administrative Code, r. 20.6.4.8(A)(3) (2010).

[99] *Id.*

[100] New Mexico Administrative Code, r. 20.6.4.8(A)(4) (2010).

a) The permittee may be required in permit conditions to monitor its discharge to ensure that no pollutant load is added to the ONRW in order that water quality degradation does not occur and the essential character or special use that makes the water an ONRW is not altered.
b) For permitted discharges that originate outside of and upgradient of the ONRW designated area (including private inholdings within federal or state lands), discharges will be evaluated during CWA permit issuance to ensure that the discharge will not result in lower water quality in the downstream ONRW and that any temporary discharge complies with requirements of Paragraphs 2 and 3 above (Temporary and Short-Term Degradation; Permitted Activities That Result in Restoration or Maintenance of the Chemical, Physical or Biological Integrity of Surface Waters).
c) For any CWA Section 402 or 404 regulated discharge or activity within an ONRW, the permittee must obtain an activity-specific state certification that water quality standards will be met prior to discharge pursuant to Title 40, Part 121 of the Code of Federal Regulations.
d) Permitted discharges to impaired waters listed on the state's most recent 303(d) List and located within an ONRW must be fully controlled to meet permit conditions or TMDL waste load allocations that mitigate the contribution by the discharge to the impairment. NMED shall have primary responsibility to determine the source(s) of an impairment.
e) Pursuant to 20.6.2.3109.H(2) NMAC, no ground water discharge permit shall be issued if the discharge will cause a violation of the Antidegradation Policy in 20.6.4.8.A NMAC.
f) The Department shall provide notice of activities approved by the commission pursuant to 20.6.4.8.A(3)(a) NMAC and of activities conducted pursuant to 20.6.4.8.A(4) NMAC by posting a brief description, location, and timeframe for such activities on a dedicated Department website.

Another source of supplementary guidance on ONRWs is contained in Appendix G of the 2009 New Mexico Nonpoint Source Management Program. (New Mexico Water Quality Bureau, 2009). This Appendix discusses nonpoint sources of pollution and their application to ONRWs, such as to those exceptions discussed in the New Mexico Administrative Code. Further, the Appendix covers nonpoint source pollution from new activities, approved after designation of the water body as an ONRW. Such activities are to be evaluated on a case-by-case basis to determine their effect on the water quality, specifically whether applicable best management practices (BMPs) will suffice in preventing degradation. Additionally, the review applies to pre-existing activities if new or increased discharges occur. The appendix also exempts two activities from new regulations due to ONRW status: 1)

acequia operation, maintenance, and repairs; and 2) approved pesticide applications.

iv. Current Designations

A lengthy list of New Mexico's current Outstanding National Resource Water designations is contained in rule 20.6.4.9(D) of the New Mexico Administrative Code. Currently, the ONRW designation applies to approximately 700 miles of 192 perennial rivers and streams, 29 lakes, and approximately 6,000 acres of wetlands. (New Mexico Water Quality Bureau, 2011).

North Dakota

i. Statutory Framework

North Dakota does not mention their Outstanding State Resource Waters (OSRWs) program in their statutes, called the North Dakota Century Code. All other laws concerning Control, Prevention, and Abatement of Pollution of Surface Waters are contained in section 61-28 of the Code, however. These include regulations concerning the State Water Pollution Control Board (the Board), the general statement that the Department of Health (the Department) may adopt rules and standards relating to water quality, and prohibitions related to pollution of water via discharges.[101]

ii. Designation Process

The North Dakota Administrative Code contains rules related to Outstanding State Resource Waters in chapter 33-16-02.1, entitled Standards of Quality for Waters of the State. While the antidegradation policy (discussed below) is listed in rule 33-16-02.1-02, the accompanying antidegradation implementation procedure is found in Appendix IV. This sets forth the regulations regarding eligibility, nomination, the review process, and the implementation process for OSRWs.

Outstanding State Resource Waters are classified as Category 3 waters of the state. This is the highest classification of state waters and provides the highest level of protection of water quality. North Dakota provides that OSRWs may only be designated Category 3 protection after they have been determined to have "exceptional value for present or prospective future use for public water supplies, propagation of fish or aquatic life, wildlife, recreational purposes, or agricultural, industrial, or other legitimate beneficial uses." Factors used to determine this value include:

[101] North Dakota Century Code §61-28-03, 61-28-04, 61-28-05, and 61-28-06 (2010).

a) location,
b) previous special designations,
c) existing water quality,
d)physical characteristics,
e) ecological value, and
f) recreational value.

In order for a water to become designated as an OSRW, any person may submit a written nomination to the Department. The nomination must include the specific location of the water, its present uses, and why it has "exceptional value" for current or potential future beneficial use. Once a water is nominated, the Department and the State Water Commission (the Commission) will review the water and will subsequently provide:

1) a verification of the uses, properties, and attributes that define the proposed "exceptional" value;
2) an evaluation of the current and historical condition of the water with respect to the proposed value using the best data available; and
3) an estimate of likely regulatory measures needed to achieve the desired level of protection.

If the Department and the Commission determine that the water is eligible for designation, is clearly defined, and beneficial uses of exceptional value for the water are identified, then they must open the issue to public comment and/or hold a public hearing. After gathering public comments, the Board will then review the nomination and make a recommendation to the Department. The Department and the Commission use the recommendation to make a decision regarding designation. If they decide to designate the water as an OSRW, that recommendation is sent to the State Health Council as part of the water quality standard revision process. If the designation is made, it may be reviewed periodically.

iii. Antidegradation Rules

Generally, the North Dakota Administrative Code provides that "waters of the state having unique or high quality characteristics that may constitute an outstanding state resource shall be maintained and protected."[102] Narrative and numeric standards for water quality are both used, and antidegradation is based off of the existing water quality as it was in 1967, or a later year if an improvement has been recorded.[103]

The antidegradation implementation procedures give protection to existing

[102] North Dakota Administrative Code, r. 33-16-02.1-02(2)(b) (2010).

[103] North Dakota Administrative Code, r. 33-16-02.1-08, 33-16-02.1-09, and 33-16-02.1-02(2)(a) (2010).

uses on water bodies, which are those that were attained on or after 1967, whether or not it is included in the water quality standards. However, the procedures permit new or expanded sources of pollutants on Category 3 waters where appropriate restrictions are used to maintain and protect existing water quality. Degradation of water quality is allowed only when temporary and negligible. Considerations of whether the water quality will be affected include the following factors:

a) percent change in ambient concentrations predicted at the appropriate critical conditions;
b) percent change in loadings;
c) percent reduction in available assimilative capacity;
d) nature, persistence, and potential effects of the parameter;
e) potential for cumulative effects; and
f) degree of confidence in any modeling techniques utilized.

iv. Current Designations

North Dakota has yet to designate any state water as an Outstanding State Resource Water.

South Dakota

i. Statutory Framework

The South Dakota Codified Laws do not mention Outstanding State Resource Waters (OSRWs). These laws do set forth provisions regarding classification of state waters and water quality standards. §34A-2-10 provides that the Water Management Board (the Board) must set classifications with the purpose of protecting the beneficial uses of the water, both present and future. Additionally, §34A-2-11 requires the Board to establish water quality standards. In setting these standards, the Board must consider a variety of factors (environmental, technical, social, and economic), present use, affected persons, natural background waters in regards to contaminants and pollutants, existing degradation, and other human-derived conditions of the water. The goal of the standards is to protect public health and welfare, use of the waters for public water supply, propagation of fish and aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.

ii. Designation Process

South Dakota Administrative Rules specifically address Outstanding State Resource Waters on a limited basis. Rule 74:51:01:39 sets forth the general authority on OSRWs. This allows the Board to designate state surface waters as OSRWs if they have high water quality or exceptional recreational or

ecological significance. Anyone is allowed to submit a petition to designate a water as an OSRW, but the petition requirements in §1-26-13, South Dakota Codified Laws, must be followed.[104] These require the petition to contain the "text or substance" of any new rule sought, the reasons, and the name and address of the petitioner.[105] Once the petition is received, a 30 day allowance is provided to either deny the petition (which must be in writing and must state the reasons for denial) or to initiate rulemaking procedures.[106] §1-26-4 sets forth these rulemaking procedures. §34A-2-17 further provides that the Board must review water classifications, water quality standards, and effluent standards periodically, but not more than every 3 years.

iii. Antidegradation Rules

Rule 74:51:01:39, South Dakota Administrative Rules, states the general antidegradation standard for Outstanding State Resource Waters, that the existing water quality must be maintained and protected. The administrative rules do not further discuss OSRWs specifically. However, rule 74:51:01:34 sets forth the antidegradation policy for all surface waters of the state. Aside from protection of existing water quality and existing uses, and other applicable provisions, this rule also allows lowering of water quality to levels established under the designated beneficial use if it is necessary for important economic or social development in the local area.[107]

iv. Current Designations

South Dakota has not designated any surface waters as Outstanding State Resource Waters at this time.

Oregon

i. Statutory Framework

Oregon's statutes do not mention their Outstanding Resource Waters (ORWs) policy. However, the Water Pollution Control policy is contained in Chapter 468B of the Oregon Revised Statutes. These provisions give authority to the Oregon Environmental Quality Commission (the Commission) over water pollution regulations within the state, as well as set forth the state's policy on pollutants and water quality. This policy, to protect public health and welfare, wildlife, fish and aquatic life, and many beneficial uses of the state's waters, sets goals for water pollution as:

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[104] South Dakota Codified Laws §1-26-13 (2010).

[105] *Id.*

[106] *Id.*

[107] South Dakota Administrative Code, r. 74:51:01:34 (2010).

(1) To conserve the waters of the state through innovative approaches, including but not limited to the appropriate reuse of water and wastes;
(2) To protect, maintain and improve the quality of the waters of the state for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, municipal, recreational and other legitimate beneficial uses;
(3) To provide that no waste be discharged into any waters of this state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters;
(4) To provide for the prevention, abatement and control of new or existing water pollution; and
(5) To cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives.[108]

ii. Designation Process

Rule 340.041.0004 of the Oregon Administrative Rules addresses the rules regarding antidegradation of water quality. Subsection (8) introduces the Oregon Outstanding Resource Waters (ORWs) policy. This describes ORWs as those existing high quality waters that are extraordinary resource waters, critical habitat areas, or otherwise an outstanding state or national resource.[109] The water quality of these waters are to be maintained and protected.

The Commission has the responsibility of designating ORWs, while the Oregon State Department of Environmental Quality (the Department) has the responsibility of developing a screening process and a list of nominated waters for ORW designation in the Biennial Water Quality Status Assessment Report (305(b) Report).[110] Certain waters of the state have priority to become nominated, which include:

(A) Those in State and National Parks;
(B) National Wild and Scenic Rivers;
(C) State Scenic Waterways;
(D) Those in State and National Wildlife Refuges; and
(E) Those in federally designated wilderness areas.[111]

[108] Oregon Revised Statutes, §468B.015 (2009).
[109] Oregon Administrative Rules, r. 340.041.0004(8) (2010).
[110] Oregon Administrative Rules, r. 340.041.0004(8)(a) (2010).
[111] *Id.*

During each triennial Water Quality Standards Review, the Department must give the Commission a list of water bodies that have been proposed for ORW designation.[112] The Commission may also set water quality values to be protected and provide a process for determining what activities are allowed that would not affect the outstanding resource values while designated a water as an ORW.[113]

iii. Antidegradation Rules

Generally, the purpose of Oregon's antidegradation policy is to prevent unnecessary degradation of existing water quality via new or increased point or nonpoint sources.[114] Further, the state aims to protect existing beneficial uses of the state's water by maintaining and enhancing water quality.[115]

Once the Commission designates a water as an Outstanding Resource Water, they are not to allow activities that may lower water quality below the established water quality.[116] Short term degradation is permitted, however, when related to a public health or welfare emergency, or in order to obtain a long-term improvement in water quality.[117] Oregon follows both narrative and numeric criteria for water quality.

The next highest classification of waters in the state are deemed "High Quality Waters" (HQWs), and the policy afforded to them is set forth in subsection (6) of the antidegradation rule.[118] These waters have an existing water quality that is equal to or greater than that necessary to support fish, shellfish, wildlife, recreation, and other beneficial uses.[119] The water quality shall be maintained and protected for these waters, however more exceptions to this antidegradation standard are provided than are for ORWs. The rule gives the Commission to permit a lowering of water quality if found that:

> (a) No other reasonable alternatives exist except to lower water quality; and

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[112] Oregon Administrative Rules, r. 340.041.0004(8)(b) (2010).
[113] Oregon Administrative Rules, r. 340.041.0004(8)(c) (2010).
[114] Oregon Administrative Rules, r. 340.041.0004(1) (2010).
[115] *Id.*
[116] Oregon Administrative Rules, r. 340.041.0004(8)(c) (2010).
[117] *Id.*
[118] Oregon Administrative Rules, r. 340.041.0004(6) (2010).
[119] *Id.*

(b) The action is necessary and benefits of the lowered water quality outweigh the environmental costs of the reduced water quality…[120];
(c) All water quality standards will be met and beneficial uses protected; and
(d) Federal threatened and endangered aquatic species will not be adversely affected.[121]

According to a Department internal document, the Oregon DEQ Implementation Management Internal Directive for NPDES Permits (the Directive), ORWs must also qualify as High Quality Waters.[122]

The Directive also provides guidance on the antidegradation review process for proposed activities on surface waters. This includes the determination of whether the proposed activity will result in a significant lowering of water quality, for which the Directive uses the standard of "any measurable change."[123] If a lowering of water quality is likely to occur from issuance of a permit, the classification of the water (ORW, HQW, or Water Quality Limited) is considered to determine any affect it may have on the review process.[124] The Directive cites to the antidegradation rules discussed above, but provides guidance on whether an individual proposed activity would qualify for an exemption.[125] These decisions may be based on:

a) the length of time during which water quality will be lowered (e.g. no more than one month);
b) the percentage change in ambient conditions (e.g. no more than 5%);
c) the water quality parameters affected (e.g. magnitude of impact on the most sensitive beneficial uses);
d) the likelihood that long-term water quality benefits will accrue to the waterbody (e.g. an increase in sediments or turbidity resulting from removal of a culvert to allow for fish passage);
e) the degree to which achieving applicable water quality standards during the proposed activity may be at risk; and
f) the potential for any residual long-term influences on existing

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[120] This evaluation will be conducted in accordance with DEQ's "Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and section 401 water quality certifications," pages 27, and 33-39 (March 2001) incorporated herein by reference.

[121] Oregon Administrative Rules, r. 340.041.0004(6) (2010).

[122] Oregon Department of Environmental Quality, Oregon DEQ Implementation Management Internal Directive for NPDES Permits, p. 6 (March 2001).

[123] Oregon Department of Environmental Quality, Oregon DEQ Implementation Management Internal Directive for NPDES Permits, p. 16 (March 2001).

[124] Oregon Department of Environmental Quality, Oregon DEQ Implementation Management Internal Directive for NPDES Permits, p. 10 (March 2001).

[125] Oregon Department of Environmental Quality, Oregon DEQ Implementation Management Internal Directive for NPDES Permits, p. 19 (March 2001).

uses.[126]

For proposed activities that would potentially lower the water quality of an ORW via an upstream source, then the Directive prescribes additional factors for consideration of the activities' affects:

a) predicted percentage change in ambient conditions during critical periods;
b) comparisons of predicted new or expanded loading with existing loading;
c) percentage change in assimilative capacity;
d) characteristics of the pollutant parameter (e.g. persistence, toxicity, potential impacts);
e) potential for cumulative effects; and
f) the degree of confidence in modeling, if utilized.[127]

iv. Current Designations

There are currently no waters in Oregon that are designated as Outstanding Resource Waters.

Utah

i. Absence of Outstanding Natural Resource Waters

Both the Utah Code and Administrative Code do not contain any provisions on Outstanding Natural Resource Waters. However, the Administrative Code provides for three classifications of waters based on quality. Category 1 waters are those with the highest quality, and are most similar to Outstanding waters in other states. The following provisions on water quality regulations in Utah are focused on these Category 1 waters, with some mention of Category 2 waters.

ii. Statutory Framework

The Utah Code creates various policymaking boards within the Department of Environmental Quality (the Department).[128] This includes the Water Quality Board (the Board), which is given authority and responsibility over many facets of water pollution in the state.[129] The first listed duty of the Board is to develop programs to prevent, control, and abate new and existing

[126] *Id.*

[127] Oregon Department of Environmental Quality, Oregon DEQ Implementation Management Internal Directive for NPDES Permits, p. 20 (March 2001).

[128] Utah Code, §19.1.106 (2010).

[129] Utah Code, §19.5.103 (2010).

pollution of state waters.[130] Other duties and powers relate to classification of waters, and regulation of activities on waters.[131]

The statutes set further regulations on the Board's classification of waters in §19.5.110. Classifications are grouped based on existing reasonable uses, and may be changed if practical and in the public interest.[132] Further, the Board is permitted to establish each classification's standard of quality based on the most reasonable existing and future water uses.[133] These standards are also subject to modification.[134]

iii. Designation Process

The Utah Code provides certain procedures that must be followed by the Board when classifying state waters, setting quality standards, or modifying or repealing them. Public hearings are required, for which a notice shall be issued. This notice must identify the water(s) at issue, the hearing information (date, time, place), and must be published at least twice in a circulated newspaper of the area.[135] To designate a Category 1 water, the Utah Administrative Code states that the Board must find it to be of "exceptional recreational or ecological significance", or it requires protection as a State or National resource.[136]

iv. Antidegradation Rules

Section 317.2.3 of the Utah Administrative Code contains the state's antidegradation policy. Subsection 3.2 contains rules related to Category 1 Waters. As stated above, these are waters that the Board has determined to be of exceptional significance and therefore have an existing high water quality which must be maintained. New point source discharges of wastewater are prohibited in these waters, while existing sources of discharge as of the designation date are allowed to continue.[137] Nonpoint source discharges of pollution are controlled in other administrative rules[138],

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[130] *Id.*

[131] *Id.*

[132] Utah Code, §19.5.110(2) (2010).

[133] Utah Code, §19.5.110(3)(a) (2010).

[134] *Id.*

[135] Utah Code, §19.5.110(c)-(d) (2010). The legal notice requirements of §45.1.101 must also be followed.

[136] Utah Administrative Code, r. 317.2.3 (2010).

[137] Utah Administrative Code, r. 317.2.3(3.2) (2010).

[138] Protection of such segments from pathogens in diffuse, underground sources is covered in R317-5 and R317-7 and the Regulations for Individual Wastewater Disposal Systems (R317-501 through R317-515).

but are generally controlled "to the extent feasible" via best management practices or other regulations.[139]

Category 2 waters are similar to Category 1 waters, and also have a high water quality. However, in these waters a point source discharge is allowed if it will not degrade the existing water quality.[140]

In relation to antidegradation review of proposed activities, the Administrative Rules only provide that for Category 1 and 2 waters, the review shall be consistent with the requirements in sections 3.2 and 3.3, as discussed above.[141] Utah's antidegradation reviews have two levels, Level I and Level II. Level I ensures protection of existing uses of the water, while Level II is only required in certain circumstances.[142] Examples of activities that are exempt from Level II review include those where water quality will not be lowered, or it will be lowered only temporarily.[143] As for the antidegradation review process, several determinations are required:

(1) Will all Statutory and regulatory requirements be met?
(2) Are there any reasonable less-degrading alternatives?
(3) Special Procedures for 404 Permits.
(4) Does the proposed activity have economic and social importance?
(5) Any submitted proposals by the applicant for mitigation of the activity's adverse environmental effects.
(6) Will water quality standards be violated by the discharge?
(7) Will existing uses be maintained and protected?
(8) If a situation is found where there is an existing use which is a higher use (i.e., more stringent protection requirements) than that current designated use, the Division will apply the water quality standards and anti- degradation policy to protect the existing use.[144]

Washington

i. Statutory Framework

The Revised Code of Washington does not address their Outstanding Resource Water (ORW) designation. However, Washington's controls on water pollution are contained in §90.48 of the Revised Code. This section gives Washington's Department of Ecology the power to create rules and

[139] Utah Administrative Code, r. 317.2.3(3.2) (2010).
[140] Utah Administrative Code, r. 317.2.3(3.3) (2010).
[141] Utah Administrative Code, r. 317.2.3(3.5)(a)(2) (2010).
[142] Utah Administrative Code, r. 317.2.3(3.5) (2010).
[143] Utah Administrative Code, r. 317.2.3(3.5)(b) (2010).
[144] Utah Administrative Code, r. 317.2.3(3.5)(c) (2010).

regulations regarding water pollution controls. Aside from such rules that are found in the Washington Administrative Code, the Revised Code does set a broad antidegradation standard by prohibiting all pollution for waters of the state.[145]

ii. Designation Process

The water quality standards for surface waters are found in Chapter 173-201A, Washington Administrative Code, and Part III addresses antidegradation rules. Three designations for water quality are created by these rules, similar to the federal guidelines set forth in the Clean Water Act.[146] Tier III waters, also referred to in the rules as Outstanding Resource Waters, are designated as those waters deserving protection for both water quality and designated uses.[147] Tier III waters are further distinguished into two categories: Tier III(A), for which "any and all future degradation" is prohibited, and Tier III(B), for which de-minimus degradation from well-controlled activities is permitted.[148]

The Washington Administrative Code sets forth the administrative procedures for designating a state water as an Outstanding Resource Water. A request must be sent to the Department of Ecology (the Department).[149] Once received, the Department has 60 days to respond to the request with a decision on the eligibility of the proposed water to become an ORW.[150] This decision is based on a few factors, one or more of which should apply:

> (a) The water is in a relatively pristine condition (largely absent human sources of degradation) or possesses exceptional water quality, and also occurs in federal and state parks, monuments, preserves, wildlife refuges, wilderness areas, marine sanctuaries, estuarine research reserves, or wild and scenic rivers;
> (b) The water has unique aquatic habitat types (for example, peat bogs) that by conventional water quality parameters (such as dissolved oxygen, temperature, or sediment) are not considered high quality, but that are unique and regionally rare examples of their kind;
> (c) The water has both high water quality and regionally unique recreational value;
> (d) The water is of exceptional statewide ecological significance; or
> (e) The water has cold water thermal refuges critical to the long-term protection of aquatic species. For this type of outstanding resource

[145] Revised Code of Washington, §90.48.080 (2010).
[146] Washington Administrative Code, r. 173-201A-300 (2010).
[147] Washington Administrative Code, r. 173-201A-330 (2010).
[148] Washington Administrative Code, r. 173-201A-330(5)(a)-(b) (2010).
[149] Washington Administrative Code, r. 173-201A-330(3) (2010).
[150] Washington Administrative Code, r. 173-201A-330(3)(a) (2010).

> water, the nondegradation protection would apply only to temperature and dissolved oxygen.[151]

If these eligibility requirements are met, the designation process then allows for an additional consideration as to whether the water should become an ORW.[152] Consideration factors for this determination include the level of difficulty involved in preventing degradation of the current quality of the water.[153] Another factor is the social and economic impact of a designation on the local area.[154] The rules provide that a water should not be designated if these impacts are negative, substantial, and imminent, unless those in the local community provide overwhelming support for the designation.[155] Once all of these factors are considered, the Department will make a final determination on designation.[156]

iii. Administrative Rules

Once a water is designated as an ORW, a ban on all further degradation of the water quality applies.[157] Some exceptions are given by the administrative code:

> (a) Temporary actions that are necessary to protect the public interest as approved by the department.
> (b) Treatment works bypasses for sewage, waste, and stormwater are allowed where such a bypass is unavoidable to prevent the loss of life, personal injury, or severe property damage, and no feasible alternatives to the bypass exist.
> (c) Response actions taken in accordance with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as amended, or similar federal or state authorities, to alleviate a release into the environment of substances which may pose an imminent and substantial danger to public health or welfare.
> (d) The sources of degradation are from atmospheric deposition.[158]

Aside from these exceptions, Tier III(B) waters also allow degradation when it is minor and it comes from highly controlled activities on the water.[159] The

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[151] Washington Administrative Code, r. 173-201A-330(1) (2010).

[152] Washington Administrative Code, r. 173-201A-330(3)(a) (2010). The review will include a public process and consultation with recognized tribes in the geographic vicinity of the water.

[153] Washington Administrative Code, r. 173-201A-330(3)(b) (2010).

[154] *Id.*

[155] Washington Administrative Code, r. 173-201A-330(3)(b) (2010).

[156] Washington Administrative Code, r. 173-201A-330(3)(c) (2010).

[157] Washington Administrative Code, r. 173-201A-330(4) (2010).

[158] *Id.*

[159] Washington Administrative Code, r. 173-201A-330(5)(b) (2010).

administrative code provides that this degradation should not be measurable, either individually or cumulatively.[160] Further, new or expanded point sources in Tier III(B) waters are required to use advanced waste treatment and control measures to reduce degradation to immeasurable levels, if nondegradation is not possible.[161] For nonpoint sources, all applicable BMPs must be used.[162]

The Administrative Code also sets rules for Tier II waters, which are those with higher water quality than that of the applicable standards.[163] Among other rules, the main antidegradation rule regarding Tier II waters is that any measurable change in water quality must be necessary and "in the overriding public interest".[164] This finding must be based on certain factors. As to whether the degradation is in the overriding public interest, a statement of the benefits and costs of the social, economic, and environmental effects associated with the lowering of water quality is analyzed.[165] Information that identifies and selects the best combination of site, structural, and managerial approaches that can be feasibly implemented to prevent or minimize the lowering of water quality is reviewed to determine if degradation is necessary.[166]

iv. Current Designations

At this time, it appears that Washington has not yet designated any waters as Outstanding Resource Waters. However, the Department of Ecology has indicated that they expect waters to become nominated in the near future, according to a "Frequently Asked Questions" document.[167] It also indicates that waters likely to be designated are those found in federal or state parks, monuments, preserves, wilderness areas, or wild and scenic rivers.[168]

Wyoming

i. Statutory Framework

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[160] Washington Administrative Code, r. 173-201A-330(5)(b)(i) (2010).

[161] Washington Administrative Code, r. 173-201A-330(5)(b)(ii) (2010).

[162] *Id.*

[163] Washington Administrative Code, r. 173-201A-320 (2010).

[164] Washington Administrative Code, r. 173-201A-320(1) (2010).

[165] Washington Administrative Code, r. 173-201A-320(4)(a) (2010).

[166] Washington Administrative Code, r. 173-201A-320(4)(b) (2010).

[167] Washington Department of Ecology, Water Quality Program, High Quality Waters Frequently Asked Questions, p. 2 (January 2008). This document can be found at: http://www.ecy.wa.gov/pubs/0810001.pdf

[168] Washington Department of Ecology, Water Quality Program, High Quality Waters Frequently Asked Questions, p. 5 (January 2008). This document can be found at: http://www.ecy.wa.gov/pubs/0810001.pdf

The Wyoming Code, §35-11-3 et. seq. contains various water quality provisions, including a general prohibition on polluting the state's waters.[169] According to the Code, Wyoming's Department of Environmental Quality, its Director, the Advisory Board of the Water Quality division, and the Administrator of the Water Quality Division all share responsibilities in creating rules and regulations that govern the protection of the state's water quality.[170] Besides this framework, the Wyoming Code does not go into further detail on water classifications or antidegradation rules for waters of the state.

ii. Designation Procedures

The Wyoming Department of Environmental Quality (the Department) issued rules and regulations for surface water quality standards in 2007.[171] Section 4 creates various water quality classifications and uses. Class 1 waters, also designated Outstanding Waters, are those that the state allows no degradation of existing water quality from point sources.[172] However, a broad exemption for degradation occurring from dams is given.[173]

The Wyoming Code creates an "independent environmental quality council" (the Council) which is a separate, independent operating agency of the state government.[174] The Surface Water Quality Standards address further designation procedures, which give the Council the responsibility of determining the classification status of a state water, including Outstanding Class I waters.[175]

Section 33 of the Surface Water Quality Standards states that any person can petition either the Department or the Council to change the classification of a surface water.[176] Further, while the Administrator of the Water Quality Division may normally lower or raise a classification, the Standards

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[169] Wyoming Code, §35-11-301(a) (2010).

[170] Wyoming Code, §35-11-302(a) (2010).

[171] Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Wyoming Surface Water Quality Standards (April 2007).

[172] Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 4(a), Wyoming Surface Water Quality Standards (April 2007).

[173] *Id.*

[174] Wyoming Code, §35-11-111 (2010).

[175] Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 4(a), Wyoming Surface Water Quality Standards (April 2007).

[176] Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 33(a), Wyoming Surface Water Quality Standards (April 2007).

specifically state that this power does not apply to Class 1 designations.[177] The regulations that do apply are instead found in the Environmental Quality Act, the Wyoming Administrative Procedures Act, and Section 4(a) of the Standards.[178] These various regulations are discussed below.

The Environmental Quality Act in the Wyoming Code provides, in relation to the creation of water quality regulations, that the Administrator of the Division of Water Quality will recommend decisions to the Director of the Department.[179] Before doing so, the Administrator must collect public comment on the issue and must receive input from the Division of Water Quality's Advisory Board.[180] In making decisions regarding the reasonableness of the pollution, both the Administrator and the Advisory Board are required to take into consideration all relevant facts and circumstances, including specific factors:

> (A) The character and degree of injury to or interference with the health and well being of the people, animals, wildlife, aquatic life and plant life affected;
> (B) The social and economic value of the source of pollution;
> (C) The priority of location in the area involved;
> (D) The technical practicability and economic reasonableness of reducing or eliminating the source of pollution; and
> (E) The effect upon the environment.[181]

Wyoming's Administrative Procedures Act is found in §16-3-101, et. seq., of the Wyoming Code. This provides that an agency must give 45 days notice of an intended action and include all relevant information, such as factual details of the proposed rulemaking, the opportunity for public comment, and the proposed rulemaking's meeting of state statutory requirements.[182] The statutes in the remainder of this Act provide other details on rulemaking procedures.

Section 4(a) of the Standards also addresses the Council's role in designation of Outstanding Waters. In making a designation, the Council must consider a number of factors: water quality, aesthetic, scenic, recreational, ecological, agricultural, botanical, zoological, municipal, industrial, historical, geological, cultural, archaeological, fish and wildlife, the presence of significant

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[177] Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 33(e), Wyoming Surface Water Quality Standards (April 2007).
[178] *Id.*
[179] Wyoming Code, §35-11-302(a) (2010).
[180] Wyoming Code, §35-11-302(a) (2010).
[181] Wyoming Code, §35-11-302(a)(vi) (2010).
[182] Wyoming Code, §16-3-103(a)(i) (2010).

quantities of developable water and other values of present and future benefit to the people.[183]

iii. Administrative Rules

Section 7 of Wyoming's Surface Water Quality Standards address antidegradation rules for Class 1 waters. The main rule prohibits any new point source discharges, as well as any increase of pollution from existing point source discharges.[184] Both situations, however, allow an exception for discharges from dams.[185] Additionally, the Standards allow for authorization of stormwater and construction related discharges to Class 1 waters.[186] These are controlled with water quality permits, 401 certifications, and applicable Best Management Practices.[187] Still, these discharges must not reduce the existing water quality, and must not have an adverse effect on any existing use of the water.[188] Some temporary increases in turbidity are also allowed.[189] In regards to nonpoint source discharges, the Standards allow for maintenance through Best Management Practices.[190]

iv. Current Designations

Appendix A of Wyoming's Surface Water Quality Standards lists the current Outstanding Water, or Class 1, designations. These are: all surface waters located within the boundaries of national parks and congressionally designated wilderness areas as of January 1, 1999, the main stems of the Snake River, the Green River, the Wind River, the North Platte River, Sand Creek , the Middle Fork of the Powder River, the Tongue River, the Sweetwater River, the Encampment River, and the Clarks Fork River, all waters within Fish Creek, the main stem of Granite Creek, Fremont Lake and the wetlands adjacent to the listed Class 1 waters.

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183 *Id.*

184 Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 7(a), Wyoming Surface Water Quality Standards (April 2007).

185 *Id.*

186 Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 7(b), Wyoming Surface Water Quality Standards (April 2007).

187 *Id.*

188 *Id.*

189 *Id.*

190 Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Chapter 1, Section 7(c), Wyoming Surface Water Quality Standards (April 2007).

Conclusion

The state's antidegradation policies provide citizens a powerful tool to provide strict protections to waters with exceptional ecological and recreational significance through ONRW designation. In many states these waters include headwaters often found in Wilderness and Forest Service roadless areas. ONRW can provide a powerful tool to protect these waters and their surrounding pristine forests.

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