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WEST VIRGINIA'S ANTIDEGRADATION POLICY FOR STATE WATERS: FROM THEORETICAL CONSTRUCT TO IMPLEMENTATION PROCEDURES

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I. INTRODUCTION

An area of environmental regulation that is currently generating hotly contested rulemakings and impassioned debates among stakeholder groups in various states is the development and implementation of a plan for preserving and improving water resources that are of superior quality. This concept, known as "antidegradation," presents the classic confrontation between economic development and environmental protection that has become the accustomed backdrop for so much of our nation's environmental discourse for the last three decades.

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The purpose of this article is to discuss the evolution of the antidegradation plan for West Virginia’s waters at a time when the final chapter of the plan is still under construction. Section II will map out the history of federal antidegradation policy, while Section III will cover West Virginia’s history of dealing with the federal rules and guidelines. In Section IV the article will review West Virginia’s efforts to develop an implementation procedure that meets EPA approval. Section V will discuss the issues to be resolved in the finalization of the plan. Many of these issues mirror those that have been the center of controversy in other states. As in other states, the contestants in this struggle are: the state regulatory agencies, the federal government, regulated entities (including groups seeking to avoid regulation), environmental organizations, and private citizens. For good measure in West Virginia there is one additional issue thrown into this cauldron that raises the temperature of the debate even higher, and that is the future of the mountaintop surface mining of coal, which will be discussed in Section VI. Antidegradation has been one of the weapons wielded by opponents of this type of mining and may well play a pivotal role in the ultimate resolution of this issue.

II. ORIGIN OF ANTIDEGRADATION UNDER FEDERAL LAW


The concept of antidegradation was first raised at the federal level through the Water Quality Control Act of 1965.1 Although the term degradation is not specifically mentioned in that statute, the Water Quality Control Act required all states to adopt standards to protect the quality of waters within or on their borders.2 These standards consisted primarily of use designations assigned to water bodies, e.g., public water supply, propagation of fish and aquatic life, recreation, and the appropriate level of water quality, i.e., the criteria, necessary to protect those uses.3 In 1968, the Department of the Interior expanded on this concept by adopting a policy which required that where existing water quality was better than the established standards, that level of water quality had to be maintained and protected.4 The lowering of water quality in such waters would be allowed only where it could be demonstrated that such a change was “justifiable” as a result of

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2 See FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03(1)(a), at 3-72, 73, Lexis Publishing (1999).
3 See id.
necessary economic or social development. The policy was first announced by Secretary of the Interior, Stewart Udall, on February 8, 1968, and stated, in part, as follows:

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

The federal government was aware at the time that this policy would force the consideration of two competing interests: economic development and the protection of water quality.

With the passage of the Federal Water Pollution Control Act Amendments of 1972, through later amendments to become known as the "Clean Water Act," the responsibility for overseeing the quality of the nation's waters was transferred to the newly created United States Environmental Protection Agency ("EPA"). At the same time, Congress established the goals "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." As a means to achieve these ends, the Clean Water Act established the national goal of the elimination of discharges of pollutants into navigable waters by 1985, and the interim goal of attaining water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and for recreation in or on the water, to be achieved by July 1, 1983. This latter goal is known as the "fishable/swimmable" goal of the Clean

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5 DEPARTMENT OF INTERIOR COMPENDIUM, supra note 4.
6 Id. at 1-2.
7 See Kent Modesitt, Antidegradation: A Lost Cause or the Next Cause, 2 U. DENV. WATER L. REV. 189, 193-194 (1999).
Water Act.

EPA's initial regulations establishing water quality standards under the Clean Water Act incorporated the concepts addressed in the nondegradation policy statement of the Department of Interior.11 These regulations were revised in 1983, including the antidegradation provisions in substantially their current form.12

The EPA relied upon the general goals of Section 101 of the Clean Water Act as its authority in adopting, as a regulation, the antidegradation policy. 13 However, it was not until 1987 that the term “antidegradation” actually appeared in the Clean Water Act, through amendments to subsection 303(d) in the 1987 Water Quality Act (“WQA”).14 The WQA prohibits the relaxation of effluent limitations based upon best professional judgment or water quality based standards in the renewal, reissuance, or modification of permits.15 This concept is referred to as


(1) Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses is allowable.

(2) Existing high quality waters which exceed those levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, shall be maintained and protected unless the State chooses, after full satisfaction of the intragovernmental national and public participation provisions of the State’s continuing planning process to allow lower water quality as a result of necessary and justifiable economic or social development. In no event, however, may degradation of water quality interfere with or become injurious to existing instream water uses. Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters of National and State Parks and Wildlife Refuges and waters of exceptional of or ecological significance. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and feasible management or regulatory programs pursuant of § 208 of the “Clean Water Act” for nonpoint sources, both existing and proposed. In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing methods shall be consistent with § 316 of the “Clean Water Act.”


13 Policies and Procedures for Continuing Planning Process, 40 Fed. Reg. at 55336. Supra note 11. It has been noted that the Clean Water Act provided clearer authority for an antidegradation policy than the Water Quality Control Act of 1965 because the former included the goal of “restoration and maintenance” of water quality, whereas the latter mentioned only “enhancement” of water quality. See Harleson, supra note 4, at 45. But see Commonwealth Edison Co. v. Train, 649 F.2d 487, 487 (7th Cir. 1980) (Pell dissenting) (The EPA’s 1975 “regulation imposing an antidegradation policy requirement is wholly without statutory authority, and is therefore without any legal force or effect.”)


"antibacksliding" and is incorporated into the National Pollutant Discharge Elimination System ("NPDES" permitting) provision of the Clean Water Act. 16 To ensure consistency between the water quality standards process and the NPDES antibacksliding requirements the WQA added a new section, section 303(d)(4), to the water quality standards provisions of the Clean Water Act. 17

Section 303(d) of the Clean Water Act requires states to identify those waters within their jurisdiction for which existing effluent limitations were not stringent enough to assure compliance with any water quality standard applicable to such waters, i.e. where the fishable/swimable goals were not being achieved. 18 Through this identification process, each state must develop a list of waters commonly referred to as the 303(d) list, or the listing of "impaired waters." 19 For impaired waters, Congress required the states to establish maximum daily pollutant load caps for the water body that would assure the attainment of the water quality standards for that water body. 20 These total allowable pollutant loadings (also known as "TMDLs"), once determined, would provide a basis for permit limitations for sources discharging to the impaired water body. 21

The antibacksliding provision of the WQA prohibits the renewal, reissuance, or modification of NPDES permit conditions which are less stringent than the comparable effluent limitations in the previous permit, except in certain narrowly-defined circumstances. 22 One such exemption from the antibacksliding requirement is where the renewed, reissued, or modified effluent limitations are in compliance with section 303(d)(4). 23

Section 303(d)(4) is captioned "Limitations on Revision of Certain Effluent Limitations" and is subdivided between waters where the water quality standards are attained and not attained. 24 The WQA invokes the antidesgregation

21 See Oliver A. Houch., TMDLs, Are We There Yet?: The Long Road Toward Water-Quality Based Regulation Under the Clean Water Act, 27 ENVTL. L. REP. 10391 (Aug. 1997).
23 See id.
24 See 33 U.S.C. § 1313(d)(4) (1994). For waters where the water quality standard has not been attained, an "effluent limitation based upon a total maximum daily load or other waste load allocation established under" section 303 may be revised to be less stringent than the effluent limitation under the previous permit under only two circumstances. See 33 U.S.C. § 1313(d)(4)(A) (1994). First, the effluent limitation may be relaxed if the cumulative effect of the revised effluent limitations based on TMDLs will assure the attainment of the water quality standard. See id. Second, the effluent limitation may be revised if the designated use of the receiving waters that is not being attained is removed in accordance with the
policy where the water quality of the receiving waters equals or exceeds the applicable water quality standard or levels necessary to protect the actual or designated uses of the receiving waters.\(^\text{25}\) For discharges in these waters, the effluent standard based upon a “total maximum daily load or other waste load allocation established [under section 303], or any water quality standard established under [section 303], or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.”\(^\text{26}\)

The only other statutory reference to antidegradation is in the 1990 Great Lakes Critical Program Act.\(^\text{27}\) This Act required EPA to publish guidance with regard to minimum requirements for water quality programs within the Great Lake states.\(^\text{28}\)

B. The Current Federal Antidegradation Policy.

The federal antidegradation policy requires each state to develop a counterpart state policy and to identify methods and procedures for implementing that policy.\(^\text{29}\) Each state’s policy and its implementing methods must be consistent with the federal antidegradation policy.\(^\text{30}\) Although state antidegradation policies are required to be at least as stringent in application as the federal policy, under the Clean Water Act a state may choose to be more stringent than the federal counterpart regulation.\(^\text{31}\) If EPA disapproves all or part of a state’s antidegradation policy or implementation procedures the Clean Water Act requires EPA to provide written notification to the state describing the specific deficiencies in the disapproved provisions.\(^\text{32}\) If the state fails to cure the identified deficiencies within ninety days of such notification, EPA is required to “promptly” initiate rulemaking

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\(^\text{26}\) Id.


\(^\text{28}\) See id.

\(^\text{29}\) See 40 C.F.R. § 131.12(a)(2000).


\(^\text{31}\) See id. See also, 33 U.S.C. §1370 (1994). Note, however, that W. VA. CODE § 22-1-3(c) requires rules that have a counterpart federal regulation to incorporate by reference, “to the greatest degree practicable,” the counterpart federal regulation. Where a rule deviates from its federal counterpart, a statement setting forth the differences between the rules must be provided. These requirements are applicable to rulemaking by the Environmental Quality Board. See W. VA. CODE § 22-1-3(b)-(c) (1994). There is, however, no counterpart federal regulation to the antidegradation implementation procedures.

to adopt a substitute version of the disapproved provisions.\textsuperscript{33} Upon final promulgation, the EPA version of the regulations will become directly enforceable on the state.\textsuperscript{34}

The current federal antidegradation policy, as reflected in 40 C.F.R. § 131.12, establishes three tiers of water quality protection.\textsuperscript{35} The first tier ("Tier 1") sets a base level of protection that must be applied by the appropriate regulatory agencies to all waters.\textsuperscript{36} This threshold protection level requires that existing uses be maintained and protected and that water quality be maintained at least at a level necessary to protect those uses.\textsuperscript{37} In practical terms this means that any agency action taken with respect to a Tier 1 water body must protect the existing uses of that water body. Where, however, through agency action a specific use has been assigned to a water body and the existing use is different than the assigned ("designated") use, the level of protection applied must be raised to protect the existing use.\textsuperscript{38} The protection that may be applied could be in the form of limitations on the amount of specific pollutants that may be discharged under a permit or restrictions on activities that may impact the quality of Tier 1 waters, such as sediment control structures or limitations on the duration of the activities.\textsuperscript{39}

The second level of protection, Tier 2, applies to those waters where the "quality of the water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in or on the water," i.e., the "fishable/swimmable" goals of the Clean Water Act.\textsuperscript{40} Tier 2 waters are commonly referred to as "high quality waters" because the water quality of these waters exceeds the levels necessary to support the fishable/swimmable goals.\textsuperscript{41} The antidegradation policy requires that the quality of Tier 2 waters "be maintained and protected" unless "the State finds that allowing lower water quality is necessary to accommodate important economic or social development in the areas in which the waters are located."\textsuperscript{42} In these cases, the water quality can be lowered as long as it "is adequate to protect existing uses fully."\textsuperscript{43} Lastly, in allowing degradation or a

\textsuperscript{33} See 33 U.S.C. §1313(c)(4)(1994).
\textsuperscript{34} See GRAD, supra note 2, at § 3.03(4)(f).
\textsuperscript{35} See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.2.
\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} An example would be a stream that has been designated as suitable for swimming and fishing (the "designated uses") but not as a public water supply and a new user begins to extract water from the stream to supply drinking water to a community. Because there is now an existing use that was not present previously, the use of the stream as a drinking water source must be protected and maintained.
\textsuperscript{40} See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.4, at 4-6.
\textsuperscript{41} 40 C.F.R. § 131.12(a)(2) (2000).
\textsuperscript{42} See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.2, at 4-6.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
lowering of water quality, the policy must be applied in such a manner that “there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”

The third level of protection, Tier 3, applies to those special waters whose location, character, or use qualifies them as an outstanding resource and imposes greater restrictions on activities that may impact the quality of such waters. These waters are known as “Outstanding National Resource Waters (“ONRW”). The federal policy mandates that the quality of these waters be maintained and protected. However, the policy does allow for some limited activities to impact these waters, but only where those impacts will be temporary and short term. These limited impacts will be allowed only if existing uses are not impaired and the essential character or specific use that makes the water an ONRW is not compromised.

Some states, including West Virginia, have adopted a fourth level of protection known as “Tier 2½” or “Tier 2.5.” These four tiers have no counterpart in the federal antidegradation policy, but EPA has accepted them because the states are free to impose greater restrictions on activities that may impact Tier 2.5 waters than are applied to Tier 2 waters. Moreover, States may be motivated to include a Tier 2.5 category in a state antidegradation policy to provide an additional tool that can be used to address special high quality waters deserving a higher level of protection but which may not qualify as ONRW. An additional reason to include a 2.5 category is to address a concern that the ONRW designation is so stringent that it would prohibit activities of great social or economic value. A Tier 2.5 designation allows states to provide a high level of water quality protection without precluding important development altogether. As a practical matter, however, where the Tier 2.5 designation allows no degradation of ambient water quality

44 Id.
46 See id.
48 See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.2, at 4-1.
49 See id. “In effect, Tier 3 protection prohibits virtually all discharges.” Id.
50 See id. at 4-2 (“EPA accepts this additional tier in State antidegradation policies because it is clearly a more stringent application of the Tier 2 provisions of the antidegradation policy and, therefore, permissible under section 510 of the [FWPCA].”).
51 See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION VIII, WATER MANAGEMENT DIVISION, ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE: ANTIDEGRADATION IMPLEMENTATION, REQUIREMENTS, OPTIONS, AND ENVIRONMENTAL PROTECTION AGENCY RECOMMENDATIONS PERTAINING TO STATE/TRIBAL ANTIDEGRADATION PROGRAMS, Executive Summary at V. (Aug. 1993) (hereinafter ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE).
52 See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.2, at 4-2.
53 See id.
conditions, the standard typically applied to Tier 2.5 waters, there is little distinction between the activities that may occur in Tier 2.5 or Tier 3 waters.54

III. HISTORY OF WEST VIRGINIA’S ANTIDEGRADATION POLICY

The statutory authority for an antidegradation policy in West Virginia is set forth in the State Water Pollution Control Act ("SWPCA").55 The SWPCA was initially adopted in 1964 and delegated to the State Water Resources Board the authority to promulgate all implementing regulations.56 In 1969, the SWPCA was amended to expressly authorize the State Water Resources Board to issue regulations “setting standards of water quality to be applicable to waters of this state.”57 It should be noted that the name of the State Water Resources Board was changed to the Environmental Quality Board in 1994.58

Although records relating to early rulemakings by the State Water Resources Board are limited, it appears that the Board was diligent in discharging its responsibility with respect to rulemaking under the SWPCA. The newly constituted board issued its first regulations in 1965.59 These regulations included general prohibitions on the types of materials that could be deposited into state waters which would adversely affect the quality of those waters.60 Further, in 1967 the State Water Resources Board issued regulations that established seven water use categories and assigned specific water uses and water quality criteria for all the major streams and tributaries in West Virginia.61

Prior to EPA’s initial promulgation of its antidegradation policy in 1975,

54 See ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE, supra note 51, § V.B., at 12.
59 See West Virginia Administrative Regulations, State Water Resources Board, Chapter 20, Articles 5 and 5A, W. VA. CODE, Series I, effective April 8, 1965, “Requirements Governing the Discharge of Sewage, Industrial Wastes and Other Wastes, Into the Waters of the State.”
60 See id. at § 3.
61 See West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Series II, Section 6 (June, 1967), “Requirements Governing the Discharge of Sewage, Industrial Wastes and Other Wastes, Into the Waters of the State and Establishing General Water Use Categories and Water Quality Standards for the Waters of the State.” The original water use categories were: Water Contact Recreation; Water Supply, Public; Water Supply, Industrial; Water Supply, Agricultural; Propagation of Fish and Other Aquatic Life; Water Transport, Cooling and Power; and Treated Wastes Transport and Assimilation.
the Water Resources Board adopted an antidegradation policy that closely followed the Department of the Interior’s 1968 policy statement. The West Virginia policy appeared in rules that became effective April 15, 1974, and was included without special designation within the section captioned “General Conditions Not Allowable in State Waters.” The provision read as follows:

Waters whose existing quality is better than the established standard will not be lowered in quality unless and until it has been affirmatively demonstrated to the Chief of the Division of Water Resources, Department of Natural Resources, that such change is justifiable as a result of necessary development and will not interfere with or become injurious to any present or future assigned uses of such waters. In special cases where the facts warrant, more stringent standards or exceptions thereto may be established. In implementing the policy of this paragraph, the Administrator of the Environmental Protection Agency will be kept advised and provided with such information as he will need from time to time to protect the interests of the United States and the authority of the Administrator in maintaining high quality of State waters.

In 1977 the Water Resources Board made a slight revision to this provision by relating water quality to the “established water quality criteria.”

In 1980, rulemaking by the State Water Resources Board was a watershed event in the evolution of West Virginia’s antidegradation policy. The language originally adopted in 1974 was replaced by a revised section 4, titled, “Antidegradation Policy.” This section paralleled language from the federal regulation that had been promulgated in 1975. The pertinent provisions of revised

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62 See Department of the Interior Compendium, supra note 4.

63 See West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Series I, Section 3, effective April 15, 1974, “Requirements Governing the Discharge of Sewage, Industrial Wastes and Other Wastes, Into the Waters of the State” [hereinafter “1974 regulations”].

64 Id. at § 3.02.

65 West Virginia Administrative Regulations, State Water Resources Board, “Requirements Governing the Discharge of Sewage, Industrial Wastes and Other Wastes, Into the Waters of the State, and Establishing General Water Use Categories and Water Quality Standards for the Waters of the State,” effective March 16, 1977. The first sentence of § 3.02 was revised to read as follows:

Waters will not be lowered in quality, with respect to all established criteria, unless and until it has been affirmatively demonstrated to the Chief of the Division of Water Resources, Department of Natural Resources, that such change is justifiable as a result of necessary development and will not interfere with or become injurious to any present or future assigned uses of such waters.


67 See supra text accompanying note 11.
section 4 are as follows:

It is the policy of the State of West Virginia that existing designated water uses shall be maintained and protected as follows:

(a) In all cases, existing beneficial water uses must be maintained and protected. Any action that would interfere with or become injurious to existing uses cannot be undertaken. Waste assimilation and transport are not recognized as beneficial uses.

* * *

(e) Existing trout and other high quality waters must be maintained at their existing high quality unless the State decides after public comment and hearing to allow limited degradation as a result of necessary and justifiable economic or social development. If limited degradation is allowed, it shall not result in injury or interference with existing stream water uses or in violation of State or Federal water quality criteria that describe the base levels necessary to sustain the national water quality goal uses of protection and propagation of fish, shellfish and wildlife and recreating in and on the water.

(f) The Board and the Chief shall assure that all new and existing point sources shall achieve the highest established statutory and regulatory requirements applicable to them and that feasible management or regulatory programs pursuant to Section 208 of the [federal Clean Water Act] for non-point sources, both existing and proposed, be utilized.

(g) In all cases, waters which constitute an outstanding national resource as designated in Section 7.73 shall be maintained and protected and improved where necessary.

(h) All applicable requirements of Section 316(a) of the [federal Clean Water Act] shall apply to modifications of the temperature water quality criteria provided for in these regulations.\(^6^8\)

With the addition of revised Section 4, the Board also incorporated definitions for “high quality waters,” “National Resource Waters,” and “trout waters.”\(^6^9\)

\(^6^8\) West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Chapter 1, § 4, (June 26, 1981). “Requirements Governing Water Quality Standards and Regulations Setting Forth Special Regulations, Chapter 1, effective June 26, 1981, Section 4. A comparison with the federal scheme for antidegradation, as discussed in ILB, supra, reveals that as of the 1980 rulemaking the framework of West Virginia’s antidegradation policy mirrored the three-tiered approach of the federal policy with § 4(a) corresponding to Tier 1, § 4(e) corresponding to Tier 2, and § 4(g) corresponding to Tier 3.

\(^6^9\) West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Chapter 1 (June 26, 1981). “High quality waters” were defined as “those waters whose quality is equal to
In the 1980 rulemaking, commensurate with the change to Section 4 and the inclusion of new definitions, the Board added three subsections to the section describing specific West Virginia waters to which the water quality standards applied. Section 7.71, titled “Trout Waters,” was a revision to a section in the rules that had listed certain trout waters and specified the criteria that were to be applied to them. The revised section listed “important” trout waters and the counties in which they were located. The applicable criteria had been moved to Section 8. Section 7.72, titled “High Quality Waters” specified that the waters covered by this category included those streams listed in the 1979 edition of “West Virginia High Quality Streams.” Section 7.73, which was cross-referenced in Section 4(g), further delineated those water bodies deemed to constitute National Resource Waters.

The Board prepared a “Rationale Document” to “assist EPA in its review” of the 1980 revisions. With regard to the new section setting forth the antidegradation policy, the Rationale Document stated that the revisions to this section were made to conform with federal requirements. The Rationale Document discussed comments that were received on the list of Trout Waters and noted that the definitions were included for “Trout Waters” and “National Resource Waters” or better than the minimum levels necessary to achieve the national water quality goal uses. Included are those streams or stream segments which receive annual stockings of trout but which do not support year-round trout populations.” Id. at 2(c). “National resource waters” are defined as “those whose unique character, ecological or recreational value or pristine nature constitutes a valuable national or State resource.” Id. at § 2(d). “Trout waters” are defined as “streams or stream segments which sustain year-round trout populations. Excluded are those streams or stream segments which receive annual stockings of trout but which do not support year-round trout populations.” Id. at § 2(k).

See West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Chapter 1, Section 7 (June 26, 1981)(Requirements Governing Water Quality Standards and Regulations Setting Forth Special Regulations, Chapter 1, effective June 26, 1981, Section 7).

See id. at § 7.71 (June 26, 1981).

See id. at § 7.72 (June 26, 1981). Section 7.72 read as follows:
High quality waters shall include but are not limited to:
(a) All streams designated by the West Virginia Legislature under the West Virginia Natural Streams Preservation Act, W. VA. CODE 20-58-1, et seq.
(b) West Virginia High Quality Streams Fourth Edition, prepared by the Wildlife Resources Division, Department of Natural Resources (1979).

See West Virginia Administrative Regulations, State Water Resources Board, Chapter 20-5 and 20-5A, Chapter 1, Section 7 (June 26, 1981). Section 7.73, titled National Resource Waters, read as follows:
National Resource Waters shall include but are not limited to the following waters of the State:
(a) All federally designated rivers under the “Wild and Scenic Rivers Act”, Public Law 95-542, as amended, 16 U.S.C. 1271, et seq.
(b) All naturally reproducing trout streams.
(c) All streams and other bodies of water in State and National Forests and Parks and Recreation Areas.


See id. at 9.
"Waters" in response to comments. However, the Rationale Document made no mention of comments regarding the provision added for High Quality Waters.\footnote{See id. at 14.} The absence of comment on the latter provision is surprising given the fact that the 1979 Department of Natural Resources document referenced in Section 7.72 listed 624 steams as "high quality," including rivers in highly industrialized areas.\footnote{See id.} One explanation for the lack of comment on what was, arguably, the major change to the water quality regulations at that time, may be that, in the absence of implementation procedures, the public did not have actual notice of the impact of this designation.

During 1985 and 1986 the Water Resources Board considered revisions to the State antidegradation policy that would have allowed the Chief of the Division of Water Resources to make the determination of whether or not to allow limited degradation of a "high quality stream."\footnote{Wildlife Resources Divisions, West Virginia Department of Natural Resources, West Virginia High Quality Streams, Appendix 1 (4th ed., 1979). Included as high quality streams are, for example, the Ohio River, the Kanawha River and the Big Sandy River, all of which have received significant discharges from industrial activities for many years. One reason such streams fell within this classification is the criteria used in assigning a "high quality stream designation," which included any "warmwater streams over five miles in length with desirable fish populations and public utilization thereof."} Some commentors objected to this proposal, arguing that this provision would allow the Chief to change water quality standards, and this approach was inconsistent with the Legislature's delegation of this authority to the Water Resources Board.\footnote{The State Water Resources Board of West Virginia, Rationale Document for Revision of Legislative Rules, Series I, II, III, and IX (1986) (hereinafter Water Resources Board's 1986 Rationale).} The Board agreed with these comments and rejected the proposed change, reiterating that "only the Board" could authorize the lowering of water quality.\footnote{See id.}

The next significant change to West Virginia's antidegradation policy came in 1994 in the response to objections made by EPA to the policy as it existed at that time.\footnote{See Letter from Stanley L. Laskowski, Acting Regional Administrator, U.S. Environmental Protection Agency Region III, to Dr. David E. Samuel, Chairman of the State Water Resources Board (January 10, 1994) (copy on file with author). The EPA criticized the State's policy for the following reasons: (1) cross referencing a section in the water quality standards which exempted certain waters from narrative water quality criteria; (2) not explicitly stating that the intergovernmental coordination provisions of the State's continuing planning process would be "fully satisfied" before any degradation was allowed to occur; (3) the failure to adopt implementation procedures for the policy; (4) the organization of the policy which inappropriately combined the concepts of antidegradation and establishing designated uses; and (5) a lack of clarity with regard which waters were to receive Tier 3 protection.} In response to these objections, the Water Resources Board proposed significant revisions to the antidegradation policy.\footnote{See 1994 Requirements Governing Water Quality Standard Revisions (to be codified at 46 C.S.R. § 1) (proposed June 1994) [hereinafter 1994 Proposed Water Quality Standard Revisions]. Wildlife Resources Division, West Virginia Department of Natural Resources, West Virginia High Quality Streams, Appendix 1 (4th ed. 1979).} The proposed revisions
reorganized the policy in two significant ways. First, the provisions related to designating existing uses were moved, consistent with EPA's recommendation, to Section 6 (Water Use Categories).\(^{83}\) Second, the descriptions of high quality waters and National Resource Waters were moved from Section 7 (West Virginia Waters) and incorporated directly into the antidegradation policy (Section 4).\(^{84}\) The Board did not stop, however, with these organizational changes. In response to EPA's objections concerning the scope of Tier 3 waters, the Board established a new category of waters, "Waters of Special Concern," and assigned to this category those waters which had previously been designated as "National Resource Waters."\(^{85}\) The standard of protection assigned to this new category read as follows:

In waters which constitute a water of special concern, no activities which result in the reduction of ambient water quality shall be allowed.\(^{86}\)

Further, the category previously captioned "National Resource Waters" was re-named "Outstanding National Resource Waters" ("ONRW") and, in lieu of the waters that had been transferred to the "waters of special concern" category, the only waters expressly included in the ONRW category were "those streams and rivers within the boundaries of Wilderness Areas designated by The Wilderness Act (16 U.S.C. 1131, et seq.) within the State."\(^{87}\)

In characterizing these changes, the Board stated that the new category, "waters of special concern," was incorporated as "an intermediate tier of protection of waters between tier 2 and tier 3."\(^{88}\) The Board stated that this change was made "to recognize waters which warrant greater protection that (sic) Tier 2 affords."\(^{89}\)

With these and other changes made to Section 4, EPA issued a conditional approval of West Virginia's antidegradation policy in 1995.\(^{90}\) EPA stated that the condition imposed upon its approval was the development of antidegradation implementation procedures.\(^{91}\) EPA requested that West Virginia complete

\(^{83}\) See id.

\(^{84}\) See id.

\(^{85}\) See id.

\(^{86}\) Id. at § 4.1.c. See also supra note 61. This level of protection corresponds to the Tier 2.5 classification.

\(^{87}\) 1994 Proposed Water Quality Standard Revisions, supra note 82, § 4.1.d. The revisions also established a nomination procedure for adding waters to the ONRW category.


\(^{89}\) 1994 Proposed Water Quality Standard Revisions, supra note 82.

\(^{90}\) See Letter from W. Michael McCabe, Regional Administrator, Environmental Protection Agency, Region III, to Dr. David E. Samuel, Chairman, West Virginia State Water Resources Board (November 9, 1995) (copy on file with author).

\(^{91}\) See id.
rulemaking to adopt these procedures during 1996.\textsuperscript{92}

IV. WEST VIRGINIA'S EFFORTS TO DEVELOP ANTIDEGRADATION IMPLEMENTATION PROCEDURES

As noted in the previous section, with its conditional approval of the State's antidegradation policy in 1995, EPA urged the Environmental Quality Board to develop procedures for implementation of the policy during 1996.\textsuperscript{93} The Board responded to EPA that it was working with staff from the Office of Water Resources as well as other State agencies to develop an antidegradation implementation guidance document and promised to keep EPA apprised of the progress made in this effort.\textsuperscript{94} This interagency group, known as the "Drafting Committee," consisted of representatives of the Division of Environmental Protection, the Department of Natural Resources, and the Environmental Quality Board.\textsuperscript{95} The Drafting Committee's work product was completed in 1998 and was proposed as a rule by the Environmental Quality Board for public comment in June 1998.\textsuperscript{96} The proposed rule was the subject of a public hearing held July 20, 1998.\textsuperscript{97} Significant negative comment was received, primarily from industry representatives, regarding the interagency work product.\textsuperscript{98} Some commentors requested that a stakeholders group be formed to work to address the deficiencies identified with the proposed procedures before they were submitted to the legislature for approval.\textsuperscript{99} From its perspective, EPA urged the Board not to withdraw the proposed rule from consideration by the legislature in the 1999 session, citing the delay that would result in the development of antidegradation

\textsuperscript{92} See id.

\textsuperscript{93} See id.

\textsuperscript{94} See Letter from Dr. Charles R. Jenkins, Chairman, Environmental Quality Board, to W. Michael McCabe, Regional Administrator, Environmental Protection Agency, Region III (June 12, 1996) (copy on file with author).

\textsuperscript{95} See id.

\textsuperscript{96} Letter from Donald Tarter, Ph.D. and Edward Snyder, Ph.D., Co-Chairs, Environmental Quality Board, to The Honorable Mike Ross and Mark Hunt, Co-Chair's, Legislative Rule Making Review Committee, Requirement Governing Water Quality Standards (August 6, 1999) (copy on file with author).

\textsuperscript{97} See id.

\textsuperscript{98} See Ken Ward, Jr., Industry Denounces Water Protection Rule, CHARLESTON GAZETTE, July 21, 1998. Industry opposed the opposed the proposed antidegradation plan because it was too vague, arbitrary, and overly stringent. Moreover, the plan was developed by state agencies without the input of public committees.

\textsuperscript{99} See Letter from Allen R. Wood, P.E., Manager, Water Quality Section, American Electric Power, to Dr. Edward M. Snyder, Chairman, West Virginia Environmental Quality Board, Notice for Public Comment on Proposed Antidegradation Implementation Procedures (July 20, 1998) (copy on file with author). A stakeholders group is a group that consists of representatives from all constituents that have an interest in the issue.
implementation procedures.\footnote{See Letter from Thomas J. Maslany, Director, Water Protection Division, EPA Region III, to Dr. Edward Snyder, Chair, West Virginia Environmental Quality Board (July 28, 1998) (copy on file with author).}

After the public hearing on the Drafting Committee's proposal, the Environmental Quality Board elected not to file the proposed implementation procedures for consideration in the 1999 legislative session, but instead asked the Drafting Committee to prepare responses to comments received.\footnote{Letter from Donald Tarter, Ph.D. and Edward Snyder, Ph.D., supra note 96.} At the same time the Board determined to convene a stakeholders group to address deficiencies in the antidegradation policy after the Drafting Committee had completed its response to comments.\footnote{See id. The Board elected to convene a stakeholders group despite a recommendation from its Technical Advisor that the use of a stakeholders group "might not be appropriate for this issue," and suggesting other options available to the Board. See, Memorandum from Libby Chatfield, Technical Advisor, to Environmental Quality Board Members (July 27, 1998) (copy on file with author). Among the alternative approaches recommended to the Board was allowing the Division of Environmental Protection's Office of Water Resources to develop the implementation guidance, as had been done with the Board's mixing zone regulation.} The response to comments was submitted to the Environmental Quality Board by the Drafting Committee in March, 1999.\footnote{See Antidegradation Implementation Procedures Drafting Committee, Summary of Comments Received (March 25, 1999).} The Environmental Quality Board then assembled a stakeholder group consisting of representatives of all the constituencies which had expressed interest on the proposed rule and scheduled an initial meeting for the group in August, 1999.\footnote{Intervening events cited by the Board were: (1) the filing of a Notice of Intent to Sue by the West Virginia Rivers Coalition and several other environmental organizations on May 28, 1999, threatening suit against EPA for failure to promulgate antidegradation implementation procedures; (2) a report from the Office of the Legislative Auditor to the Joint Government Operations Committee of the Legislature addressing operations of the Environmental Quality Board and recommending that the Board complete antidegradation implementation procedures for consideration during the 2000 legislative session; and (3) a letter dated June 22, 1999, from EPA to the Board indicating that if implementation procedures were not in place by April 1, 2000, EPA would pursue federal promulgation of the procedures for the State.}

Before the stakeholder group began its meetings, however, the Environmental Quality Board made the decision to advance a second version of the implementation procedures.\footnote{See id.} In a letter to the Legislative Rulemaking Review Committee the Environmental Quality Board Co-Chairs indicated that the Board had intended to propose changes to the implementation procedures for consideration in the 2001 legislative session, after receipt of the recommendations of the stakeholder group.\footnote{See Letter from Donald Tarter, Ph.D. and Edward Snyder, Ph.D., supra note 96.} Intervening events, however, caused the Board to alter its planned course and instead to file proposed procedures with the Legislative Rule-Making Review Committee ("LRRC") for consideration during the 2000 legislative session.\footnote{See id.} To this end on June 29, 1999, the Board filed a proposed rule
that made only minor changes from the rule proposed in 1998. Not surprisingly, many of the objections that had been voiced to the 1998 proposal were repeated in comments to the 1999 proposal. Without addressing these comments, and without making any significant changes to the proposal, on August 6, 1999, the Board filed the rule with the LRRC, pursuant to the West Virginia Administrative Procedures Act. In its cover letter filing the rule, the Board stated its intention "to establish a rigorous meeting schedule for the stakeholders group" with the goal of having the stakeholder group review the comments received on the proposed rule and making recommendations to the Board with regard to the rule by December 1999. Upon its review of these recommendations, the Board would provide further information to the LRRC.

The stakeholders group held its first meeting on August 11, 1999, and continued to meet periodically through the fall. In November 1999, recognizing that the work of the group would not be completed by December 1999, the date for completion previously identified by the Board to the LRRC, the participants agreed to continue their review of the proposed rule and the Environmental Quality Board agreed to withdraw the proposed rule from consideration by the LRRC. A new deadline of April 2000 was set by the Board for submission of recommendations from the stakeholders group.

The stakeholders group completed their work in May 2000 and issued a final report to the Environmental Quality Board. The Board met on June 1 and 2, 2000, to review the recommendations of the stakeholders group. At these meetings, the Board heard presentations from various participants in the stakeholders group and accepted many of the consensus recommendations for

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108 See id.
109 Ken Ward, Jr., Critics Blast Water Pollution Policy, CHARLESTON GAZETTE, August 12, 1999.
110 W. VA. CODE §29A-3-9 (1998). Under the West Virginia Administrative Procedures Act, W. VA. CODE §§ 29A-1-1 et seq. (1998), after an administrative agency finally approves a proposed legislative rule, it is filed with the Legislative Rulemaking Review Committe (LRRC), which is required to review the rule and make a recommendation to the full legislature. The recommendation may be that the legislature authorizes the promulgation of all or part of the rule, with or without amendment, or that the proposed rule be withdrawn. See W. VA. CODE § 29A-3-11(b) (1998).
111 Letter from Donald Tarter, Ph.D. and Edward Snyder, Ph.D., Co-Chairs, supra note 96.
112 See id. In this letter the Board acknowledged that its action was "unconventional."
113 See id.
114 See id.
115 See id.
116 The group was not able to achieve consensus on many of the major issues that had been raised in comments on the proposed rule. See Antidegradation Stakeholders Group Proposed Implementation Document, April 19, 2000.
117 See Minutes of the Environmental Quality Board Meetings, June 1, 2000.
changes to the rule that had been filed with the LRRC. Following these deliberations and extensive consideration of the comments of the stakeholders, the Board proposed, for the third time, a revised antidegradation policy and implementation procedures on July 3, 2000. Once again the proposed rule was resoundingly criticized, with critical comments filed by environmental organizations, business interests, economic development and tourism groups, and by EPA. After making minimal changes to the July 3, 2000 proposal, the Board filed a revised rule with the LRRC on September 1, 2000 (hereinafter referred to as the "Proposed Rule").

The following month, EPA Regional Administrator Bradley Campbell filed a letter with the Board stating that he was "extremely disappointed" with the rule filed with the LRRC. Noting that the Board had failed to address the objections that had been raised by EPA in its comments on the proposed rule, the letter continued:

In light of the Board’s action, there appears little prospect that the flaws in the current proposal will be remedied by the West Virginia Legislature in a manner that could lead to EPA approval upon enactment. Accordingly, EPA is immediately proceeding to prepare a draft proposal for Federal procedures that will be applicable in lieu of state-promulgated procedures.

As of this writing, EPA has not formally initiated procedures under the Clean Water Act to promulgate implementation procedures for West Virginia.

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118 See id.
120 See West Virginia Environmental Quality Board “List of Written Comments Provided to the Board, re: 2000/2001 proposed rule (filed 07/03/00).” Over 200 commenters filed written comments on the proposed rule.
121 Under the State Administrative Procedures Act, an agency seeking to adopt a legislative rule that has been through public notice and comment must file the rule with the Legislature and such actions are "deemed to be applying to the Legislature for permission . . . to promulgate such rule." W. VA. CODE § 29A-3-9 (1998).
122 Letter from Bradley M. Campbell, Regional Administrator, Environmental Protection Agency, Region III, to Edward Snyder, Ph.D., Chairman, West Virginia Environmental Quality Board (October 25, 2000) (copy on file with author).
123 Id.
124 See supra Part II.B. Under cover of letter dated December 12, 2000, EPA sent an "imperfect" draft of "[EPA’s] proposed Antidegradation Implementation Procedures for the State of West Virginia" to the EQB, soliciting their comments. See Letter from Bradley M. Campbell, supra note 122.
V. PRIMARY AREAS OF CONTROVERSY IN ANTIDEGRADATION POLICY AND PROCEDURES

In this section a few areas of significant controversy in West Virginia's antidegradation policy and the proposed implementation procedures are discussed. For purposes of brevity only selected areas of controversy will be addressed.126 As appropriate, the respective positions of EPA, environmental groups, and regulated entities in each of these areas are reviewed.

A. The Scope: Application of Policy to New vs. Existing Sources

A point of contention with regard to the scope of the antidegradation policy is whether antidegradation requirements should apply only to those activities that would result in a “new” contribution of pollutants to waters of the state or whether the requirements also should apply to existing operations which are neither seeking to establish new discharges nor to expand the amount of pollutants authorized under existing permits.126 In the absence of a consensus recommendation on this point from the stakeholders group, the Environmental Quality Board chose to apply antidegradation review requirements to new or expanded sources only.127 Environmental groups have argued that the failure to require all existing discharges to undergo antidegradation review is necessary to avoid giving “existing discharges a clear and permanent advantage over new activities.”128

The national guidance provided by EPA on this issue makes clear that the focus of antidegradation is on new or expanded discharges. EPA’s Water Quality Standards Handbook states the following with regard to the application of antidegradation requirements:

The antidegradation review requirements [for Tier 2 waters] are

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125 Issues not discussed herein which have been the subject of extensive comment include the application of antidegradation to nonpoint sources, the nature of the analysis of alternatives for activities triggering Tier 2 review, the types of activities, if any, that should be exempt from antidegradation review, the extent of trading that should be allowed to achieve antidegradation requirements and how to determine whether a water body qualifies as a “high quality water.” See generally West Virginia Environmental Quality Board, “Responses to Comment and Explanation of Proposed Amendments, 46 CSR 1, Requirements Governing Water Quality Standards,” (September 1, 2000).

126 See WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.5, at 4-7.

127 Proposed Revisions to Title 46, Legislative Rules, Environmental Quality Board, Series 1, Requirements Governing Water Quality Standards, filed with the West Virginia Legislative Rulemaking and Review Committee on September 1, 2000 (hereinafter “Proposed Rule”). Section 4A.1 of Appendix F of the Proposed Rule begins as follows: “These rules apply to new or expanded regulated activities that have the potential to affect existing water quality . . . .”

128 Letter to Dr. Edward Snyder and Dr. Donald Tartar, Co-Chairs, West Virginia Environmental Quality Board, from West Virginia Rivers Coalition and 14 other environmental groups, regarding comments on on proposed antidegradation implementation standards, August 11, 2000 [hereinafter “WVRC Comments”].
triggered by any action that would result in the lowering of water quality in a high-quality water. Such activities as new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts [an antidegradation] review . . . .129

In describing the conditions that must be achieved before degradation of high quality waters may occur, EPA states as follows:

The rationale behind the antidegradation regulatory statement regarding achievement of statutory requirements for point sources and all cost effective and reasonable BMPs for nonpoint sources is to assure that, in high quality waters, where there are existing point and nonpoint source control compliance problems, proposed new or expanded point sources are not allowed to contribute additional pollutants that could result in degradation.130

Despite this clear guidance from EPA Headquarters, EPA Region III has taken the position that West Virginia's antidegradation implementation procedures must apply antidegradation review to existing discharges in addition to new or expanded sources.131 Region III states in its comments on the Proposed Rule:

EPA Region III believes that the regulations should clearly mandate Tier 2 review . . . for all currently permitted discharges, unless the applicant, at the time of [permit] renewal, demonstrates substantial progress in reducing permit limits or pollutant loadings.132

EPA Region III further states that it advocates this expanded application of antidegradation review "[i]n light of the delays in implementation of the antidegradation program in West Virginia . . . ."133

There are several reasons to question the soundness of the position espoused by EPA Region III. First, EPA has never offered any legal authority in support of this position. Second, it ignores the fact that the quality of West Virginia’s waters generally has been significantly improved, not lowered, since the

129 WATER QUALITY STANDARDS HANDBOOK, supra note 30, § 4.5, at 4-7 (emphasis added).
130 Id. at 4-8. A BMP is a Best Management Practice.
131 See Letter from Bradley M. Campbell, supra note 122.
132 Id. Note that although Region III's specific comment is made in the context of the scope of review for Tier 2 waters, presumably the Agency intends, through the same rationale, to have the same scope of review for Tier 2.5 and Tier 3 waters.
133 Id.
first antidegradation policy was adopted in 1974.\textsuperscript{134} Third, as a practical matter, West Virginia is not “behind” other states in the implementation of antidegradation. In a recent filing with the Legislature, EPA has indicated that of the 53 states and territories required to develop antidegradation procedures, only 23 had completed this process and received EPA approval for their procedures.\textsuperscript{135} Fourth, EPA, which has failed since 1975 to issue any national guidance on implementation procedures, can hardly fault the states for being confused over the scope of their discretion in adopting procedures.\textsuperscript{136}

EPA Region III’s argument that existing sources should be subject to antidegradation review is supported, however, when applied to existing discharges in Tier 1 waters. The requirements in the State and federal antidegradation policies clearly require that existing uses are to be protected and maintained and no activity which would partially or completely eliminate any existing use is allowed.\textsuperscript{137} Therefore, all sources, new and existing, discharging to Tier 1 waters must satisfy this component of antidegradation review.\textsuperscript{138}

EPA Region III’s insistence that West Virginia apply antidegradation review to existing dischargers in Tier 2 waters is not consistent with its treatment of some other Region III states’ antidegradation implementation plans. For example, Pennsylvania’s antidegradation implementation procedures limit the antidegradation review for high quality (Tier 2) waters to new, additional, or increased discharges.\textsuperscript{139} This provision was adopted by the Pennsylvania

\textsuperscript{134} See State Stocks New Fish, But Hold on to Bait, CHARLESTON DAILY MAIL, September 10, 1996, at 7A, which reads, in part, as follows:

“Paddlefish . . . were once plentiful in West Virginia. But their populations declined because of dams and impaired water quality”, said Bernard Dowler, chief of the Division of Natural Resources’ Wildlife Resources Section.

"With the improvements in water quality during the past 20 years, the state’s largest rivers once again have developed rich populations of zooplankton that are a necessary food supply for the paddlefish," Dowler said.

\textsuperscript{135} See Facsimile transmission from Robert A. Koroncai, United States Environmental Protection Agency, Region III (Feb. 09, 2001)(on file with author) (submitting summary table of antidegradation procedures approved by EPA to the West Virginia Legislature). Moreover, even within Region III the rational given by EPA for different treatment, i.e., due to West Virginia’s delay in implementing formal antidegradation procedures, rings hollow. Consider the Region III states of Maryland, Delaware and Pennsylvania. As of January 2001, Maryland had yet to propose antidegradation implementation procedures for Tier 2 waters. See Maryland Department of the Environment, Antidegradation, <www.mde.state.md.us/wqstandards/ antidegradation2b.htm> (Jan. 2001). Delaware did not develop its antidegradation implementation procedures until 1999. See “Antidegradation Procedures for Surface Waters of the State,” Delaware Department of Natural Resources and Environmental Control, May 28, 1999. It was not until 2000, that EPA approved portions of Pennsylvania’s antidegradation policy . See infra note 137 and accompanying text.

\textsuperscript{136} See Harleston, supra note 4, at 53 (stating “In almost thirty years of existence, few details of implementing antidegradation have been expressed”).

\textsuperscript{137} See EPA OFFICE OF WATER REGULATIONS AND STANDARDS, QUESTIONS & ANSWERS ON: ANTIDEGRADATION 3 (August, 1985).

In this regard the Proposed Rule is not consistent with EPA requirement. See supra note 127.

\textsuperscript{139} See 25 PA. CODE § 93.4c(b)(1)(i)(A)(2000).
Department of Environmental Protection, Environmental Quality Board on July 16, 1999.140 On March 17, 2000, EPA Region III determined that this provision is "[c]onsistent with and exceeds the requirements of 40 C.F.R. § 131.12(a)(2) and 40 C.F.R. § 131.12(a)(3) [the federal antidegradation policy for Tier 2 and Tier 3 waters]."141

B. Methodology in Assigning Waterbodies to Tiers

There are two issues associated with the assignment of water bodies to a specific tier. The first is what data or information is necessary to qualify a water body for a particular tier. The second is what procedures should be followed in making the assignment. The definitions of the tiers are standard – the interpretations of those definitions are not. Tier 1 waters, for example, are defined as those waters that do not meet the fishable/swimmable goals of the Clean Water Act.142 Correspondingly, Tier 2 waters are defined as those waters whose quality is better than necessary to support fishable/swimmable uses.143

To make the determination of a waterbody’s appropriate classification EPA has sanctioned either a parameter-by-parameter or an overall evaluation of the waterbody (waterbody-by-waterbody) approach.144 In the parameter-by-parameter approach, pollutant concentrations in a waterbody are evaluated and if the concentration of any pollutant is below (i.e., more protective) the water quality criteria necessary to achieve fishable/swimmable uses, the waterbody can be classified above the Tier 1 level.145 A strict application of this approach, however, would mean that essentially all water bodies would be designated as “high quality” because most activities would generate at least one pollutant for which ambient water quality was below applicable criteria. The waterbody-by-waterbody approach is less rigid and can involve both qualitative and quantitative consideration to determine overall water quality.146

Historically, West Virginia appears to have used a variation of the waterbody-by-waterbody approach. As early as 1974, the regulations of the State Water Resources Board contained a list of the waterbodies designated as “Trout
Waters." In 1980, incorporating by reference a report of the Department of Natural Resources titled "West Virginia High Quality Streams," the Water Resources Board adopted an extensive listing of waters that were deemed to be high quality waters. As noted previously, the criteria used for this designation considered only the presence of fish species and there is no evidence to suggest that any direct evaluation of water quality was the basis of this assignment.

The 1980 incorporated list of high quality streams still appears, with slight modifications, in West Virginia’s antidegradation policy. It is worth noting that at the time these streams were initially designated as "high quality" waterbodies, there were no procedures or guidance in place to indicate the implications of this designation. This fact raises a fundamental issue as to whether there was any meaningful opportunity to comment on the inclusion of particular streams on this list.

A similar argument applies to the narrative descriptions of Tier 2.5 streams. These descriptions are essentially unchanged from the language adopted in 1980, albeit under the category of "National Resource Waters." The potential deficiency with regard to the adequacy of notice for Tier 2.5 designations could be remedied by adopting a procedure that provides an opportunity for public review and comment for each stream before it can be treated as a Tier 2.5 stream for antidegradation purposes. EPA endorses the concept of making a specific assignment for each waterbody following state rulemaking procedures in order to

147 See 1974 Regulations, supra note 61.
148 See supra notes 70 and 75 and accompanying text.
149 See id.
151 It appears that the first guidance from EPA on antidegradation was issued in 1985. See supra note 127 and accompanying text.
152 The absence of any reference to comments on this listing is further evidence that the public and the regulated community was not aware of the consequences of this listing. See State Water Resources Board of West Virginia "Rationale to the 1980 Revisions to the Water Quality Standards," (1980).
153 The Proposed Rule states, in Section 4.1.c. as follows:
Tier 2.5 Protection. In waters which constitute a water of special concern, no activities which result in the reduction of ambient water quality shall be allowed. Waters of special concern include:
4.1.c.1. All federally designated rivers under the "Wild and Scenic Rivers Act,"
4.1.c.2. All naturally reproducing trout streams.
4.1.c.3. All streams and other bodies of water in State and National Forests and Recreation Areas.
154 See supra note 71 and accompanying text.
155 The Proposed Rule includes a nomination procedure for Tier 2.5 and Tier 3 streams. It does not address the "grandfathered" streams under the 1980 Rule.
designate a stream as a Tier 2.5 or Tier 3 water.\footnote{156}

C. The Extent of Degradation Necessary to Trigger Tier 2 Review.

One component of antidegradation implementation procedures that has generated a variety of approaches is the determination of what amount of degradation is necessary to trigger antidegradation review.\footnote{157} Some argue that a strict reading of the language of the antidegradation policy, which requires that high quality waters be “maintained” unless appropriate justification for degradation is provided,\footnote{158} would not allow activities with de minimis impacts to avoid antidegradation review.\footnote{159} EPA, at least in Region VIII, has not taken this approach, however. In discussing the issue of “significant degradation” in its guidance, EPA Region VIII states as follows:

EPA Region VIII believes that tests of significance represent a valuable means of focusing [sic] state resources appropriately; however, such tests should not unduly reduce the state’s ability to pursue the primary function of tier 2, which is to ensure that non-degrading or less-degrading alternatives are identified and implemented.\footnote{160}

The U. S. Supreme Court has weighed in on the issue of “significance” in the area of water quality degradation in the case of \textit{Arkansas v. Oklahoma}.\footnote{161} At issue in the case was the impact of a discharge from an Arkansas sewage treatment plant on downstream water quality in Oklahoma waters.\footnote{162} Oklahoma water quality standards allowed “no degradation” of the Illinois River, the receiving water for the plant’s discharge.\footnote{163} The State of Oklahoma and others objected to the EPA-issued permit, which authorized the discharge for the Arkansas plant on the grounds that it

\footnote{156} See \textit{ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE}, supra note 51, at 10-12 (model procedure for Tier 2.5 and Tier 3 designations).
\footnote{157} See \textit{id}. at 72. The question of whether there should be a de minimis threshold for triggering antidegradation concern has been an issue since the Water Quality Control Act of 1965, discussed in \textit{supra} Part II.A. See also Harleston, \textit{supra} note 4, at 43-44, 57.
\footnote{159} See Modesitt, \textit{supra} note 7, at 216-17.
\footnote{160} \textit{ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE}, \textit{supra} note 51, at 55.
\footnote{161} 503 U.S. 91 (1992).
\footnote{162} See \textit{id}. at 94-95.
\footnote{163} See \textit{id}. at 95. The Oklahoma water quality standards provided that “[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in national and State parks, Wildlife Refuges, and those designated ‘Scenic Rivers’ in Appendix A.” \textit{Id}. at 95 n.2.
would not comply with Oklahoma’s water quality standards. On appeal, an Administrative Law Judge upheld the permit, ruling that the discharge had to result in “something more than a mere de minimis impact” on the State’s waters in order to implicate the State’s water quality standards. The Tenth Circuit reversed this ruling and held that because the Illinois River was already degraded and the effluent from the plant would reach the river in Oklahoma, the permit could not be issued because the plant effluent would contribute to the river’s deterioration even though it would not detectably affect the river’s water quality. The Supreme Court reversed the decision of the Tenth Circuit, and in doing so, upheld the use of de minimis determinations. The Court stated “[a]lthough [the Clean Water Act] contains several provisions directing compliance with state water quality standards [citation omitted] the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards.” From the Supreme Court’s perspective, therefore, the requirement of “no degradation” in Oklahoma’s antidegradation policy did not prohibit any new discharge, and was to be interpreted as limiting only those discharges that would impact water quality in some measurable way.

Consistent with the EPA Region VIII guidance, the West Virginia Proposed Rule allows some degradation to occur in Tier 2 waters without triggering an analysis of alternatives or a socio-economic justification. In Section 4C.4 of the Proposed Rule, for any activity that will cause “significant degradation,” the applicant must determine whether “less degrading or non-degrading alternatives to the proposed activity exist.” The Proposed Rule defines “significant degradation” as follows:

Any proposed activity that would degrade the ambient concentration of any parameter of concern by more than 10% at critical flow conditions or reduce the assimilative capacity by more than 10%, which ever is most protective, will be presumed to pose significant degradation.

Regulated entities have characterized this approach as the most stringent of any in the country. Presumably, to the extent any state utilizes the trigger of “any

164 See id.
165 See Arkansas, 503 U.S. at 96.
166 See id. at 96.
167 See id. at 108.
168 See Modesitt, supra note 7, at 217-218.
170 See Proposed Rule, Sec. 4C2.a.1.A., supra note 127.
degradation,” this would be a more stringent standard.172 The Environmental Quality Board’s decision to include this provision in the Proposed Rule was made in the face of the stakeholders’ failure to reach agreement on this issue. In describing this provision, the Board stated as follows:

The Board recognizes this issue [i.e., the provision defining significant degradation] as one of the most contentious in the procedures. Efforts to reach a compromise on this issue during the stakeholder process were unsuccessful. The Board acknowledges that a 5% value is among the lowest trigger [sic] found in procedures adopted in other states. The Board notes, however, that there are other states with more restrictive triggers, such as Pennsylvania, which has no “deminimis [sic]” value. . . .

Based on its review of the comments received, the Board agrees to amending the 5% deminimis value to 10% and clarified [sic] that it will apply to the ambient concentration or the assimilative capacity, whichever is most protective.173

VI. BRAGG VS. ROBERTSON—THE IMPACT OF ANTI DEGRADATION ON MOUNTAINTOP SURFACE MINING

In 1998, several landowners and the West Virginia Highlands Conservancy filed suit against the West Virginia Division of Environmental Protection (“DEP”) and the U.S. Army Corps of Engineers (“Corps”) under the citizen suit provisions of the Surface Mining Control and Reclamation Act (“SMCRA”)174 challenging the issuance of permits for mountaintop removal mining operations.175 In a controversial decision,176 U.S. District Court Judge Charles Haden ruled in favor of the plaintiffs in granting motions for summary judgment on two of the 17 counts contained in the

2000, p. 9. The initial proposal to which the comments were directed used the trigger of 5% rather than the 10% which was inserted in the Proposed Rule.

172 See ENVIRONMENTAL PROTECTION AGENCY REGION VIII GUIDANCE, supra note 51, at 73. See also Harleston, supra note 4, at 58 citing Columbus and Franklin County Metro. Park Dist. v. Shank, 600 N.E.2d 1042 (Ohio 1992).

173 West Virginia Environmental Quality Board, “Responses to Comments and Explanation of Proposed Amendments, 46 CSR 1, Requirements Governing Water Quality Standards,” (September 1, 2000).


175 See Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W.Va. 1999), appeal docketed, Nos. 99-2443 (4th. Cir. 1999) In the initial decision in the case the court enjoined the Corps of Engineers from issuing any further permits for the Hobet Mining Co.’s Spruce Fork Mine and stayed permits previously issued for that operation by the Director of the DEP. See Bragg v. Robertson, 54 F. Supp. 2d 635, 653 (S.D. W.Va. 1999).

176 See Ken Ward, Jr., What Now for Coal? Dire Predictions May Be Overblown, SUNDAY GAZETTE-MAIL, October 24, 1999, at 1A.
Second Amended Complaint. A detailed discussion of this decision is beyond the scope of the article. It is considered here, however, due to Judge Haden’s reliance, in part, on West Virginia’s regulations concerning water quality and antidegradation.

Mountaintop removal mining is a surface mining technique that involves exposing seams of coal by the removal of rock and dirt overburden. After removal of the coal some of the overburden (also known as “spoil”) is returned to the mined area. Excess spoil is placed in adjacent valleys and becomes “valley fills.” Due to the terrain in mountainous areas, the valley fills are generally placed in streams and stream beds.

Surface mining operations require several environmental permits from different agencies under SMCRA and the Clean Water Act. The SMCRA permit requires the operations to conform to the environmental performance standards contained in its implementing regulations. The operations must also be authorized by separate permits issued pursuant to the Clean Water Act - under Section 402, for any discharge of any pollutant from the operations to waters of the United States, and under Section 404, for the deposit of any fill material into navigable waters. The SMCRA and Section 402 permits are issued by the DEP and the Section 404 permit is issued by the U.S. Army Corps of Engineers.

The two counts addressed by the decision in Bragg involve the “Buffer Zone Rule,” a SMCRA regulation that prohibits any disturbance of land within one hundred feet of an intermittent or perennial stream unless specifically authorized by the DEP Director after making seven specific findings with regard to the surface mining activities. Among the findings was a requirement that the surface mining

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177 See Bragg, 72 F. Supp. 2d at 645.


179 See Bragg, 72 F. Supp. 2d at 646 n.4.

180 See id. at 646.

181 See id.

182 See id.

183 See Bragg, 54 F. Supp. 2d at 637.

184 See id.


186 See 30 U.S.C. § 1253(b) (1994) (SMCRA) and 33 U.S.C. § 1342(b) (1994) (Clean Water Act). The DEP has been delegated the authority to issue SMCRA permits by the Office of Surface Mining within the Department of the Interior, and to issue permits under Section 402 of the Clean Water Act by EPA.

187 See 33 U.S.C. § 1341(a) (1994). In order to be issued a Section 404 permit for a West Virginia activity the permit applicant must receive a certification from the DEP that the discharge will comply with state water quality standards.

188 W. VA. CODE ST. R. tit. 38, § 2-5.2 (2000); see also 30 C.F.R. § 816.57 (2000).
activities will not cause or contribute to a violation of applicable state or federal water quality standards ("Finding Seven").

With respect to Finding Seven, the court first concluded that West Virginia water quality standards prohibited the use of streams for the purpose of waste assimilation and that the "placement of valley fills in intermittent and perennial streams violates federal and state water quality standards by eliminating the buried stream segments for the primary purpose of waste assimilation." In further consideration of Finding Seven, the court discussed the antidegradation policy:

Federal and state water quality standards also have an antidegradation component, which provides, "existing water uses and the level of water necessary to protect the existing uses shall be maintained and protected. 40 C.F.R. 131.12(a)(1); 46 C.S.R. § 1-4.1(a). "[A]t a minimum all waters of the State are designated for the Propagation and maintenance of Fish and Other Aquatic Life . . . and for Water Contact Recreation consistent with [CWA] goals."[citation omitted] State and federal antidegradation policy require "the existing high quality waters of the State must be maintained at their existing high quality." [citation omitted] If limited degradation is allowed [citation omitted] "it shall not result in injury or interference with existing stream water uses or in violation of State or federal water quality criteria." 46 C.S.R. §1-4.1.b.

Citing a U.S. Fish & Wildlife Service publication which referenced valley fills of up to 250,000,000 cubic yards and stream burials of up to 2 miles long, the court continued:

This concentration of industrial waste is mortal to animal or aquatic life in the stream segment buried. Existing stream uses are not protected, but destroyed. These effects are inconsistent with State and federal water quality standards. . . . The [DEP] Director cannot make the required finding that valley fills will not cause or contribute to violations of applicable State or federal water quality standards. In the stream portion filled, those standards are

189 See Bragg, 72 F. Supp. 2d at 662; see also W. Va. CODE ST. R. tit. 38, § 2-5.2 (2000).
190 See Bragg, 72 F. Supp. 2d at 662 (citing 40 C.F.R. §131.10(a) and W. Va. CODE ST. R. tit. 38, § 1-6.1(a) (2000)).
191 See Bragg, 72 F. Supp. 2d at 662.
192 See id.
193 See id. at 663 (citing UNITED STATES FISH & WILDLIFE SERVICE, PERMITTED STEAM LOSSES DUE TO VALLEY FILLING IN KENTUCKY, PENNSYLVANIA, VIRGINIA AND WEST VIRGINIA: A PARTIAL INVENTORY (1998)).
inevitably violated.  

Under the rationale applied in \textit{Bragg}, valley fills related to surface mining operations are irreconcilably inconsistent with the antidegradation policy. Although the ruling in \textit{Bragg} turns on whether the "buffer zone" rule under SMCRA has been properly applied, the implication of the ruling is that even if that rule were amended in a fashion that allowed valley fills for purposes of obtaining a SMCRA permit, the Clean Water Act permits could not be issued because the fills would violate water quality standards and, in particular, the antidegradation policy.  

\section*{VII. CONCLUSION}  
The potential ramifications of the antidegradation policy currently under review in West Virginia are enormous. The failure of long stakeholders' negotiations to result in an agreement on appropriate procedures for implementing this policy is disappointing. It is the authors' belief that the applicable body of federal and state law and regulations allow sufficient latitude to develop a reasonable policy which neither shuts off significant industrial development nor depreciates the quality and value of our high quality lakes and streams. This appears to have been accomplished in other states and, if interest groups come together with a commitment to developing a reasonable policy, not the most stringent and not the least, this can be accomplished for West Virginia.

\footnote{\textit{Bragg}, 72 F. Supp. 2d at 663.}

\footnote{The defendants in \textit{Bragg} appealed the District Court ruling to the U.S. District Court of Appeals for the Fourth Circuit. On April 24, 2001, a three member panel of the Fourth Circuit Court of Appeals vacated the District Court's injunction, which enjoined the West Virginia Division of Environmental Protection from issuing further permits that authorize dumping of mountain rock within 100 feet of intermittent and perennial streams, on the jurisdictional ground that the Eleventh Amendment of the United States Constitution bars citizens from bringing suits in federal court against their own states. See \textit{Bragg} v. West Virginia Mining Ass'n, No. 99-2443, 2001 WL 410382 (4th Cir. April 24, 2001). The Fourth Circuit panel instructed the District Court to dismiss the plaintiffs' complaint without prejudice so that they may present their claims in the proper forum, i.e. state court. See \textit{id}. At this time, it is unknown whether plaintiffs will petition the Fourth Circuit Court of Appeals for a rehearing before the same panel, a rehearing en banc, or reinstitute the action in state court.}