

PROPOSED NEW TIER 2 RULE, PART 7050.0181

7050.0181 ANTIDEGRADATION REVIEW FOR HIGH-QUALITY WATERS.

Subpart 1. Policy. Whenever the quality of waters exceeds levels of quality necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that excess quality shall be maintained and protected unless the agency finds, after satisfying the public participation requirements in subpart 6, that allowing degradation of water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

Subp. 2. Definitions. For the purpose of this part, the following terms have the meanings given them:

A. "Assimilative Capacity" means the difference between the applicable water quality criterion for a pollutant parameter and the ambient water quality for that pollutant parameter where it is better than the criterion. If the state has not developed numeric criteria for a narrative standard, the agency, in establishing assimilative capacity, shall use numeric criteria published by EPA pursuant to 33 U.S. C. § 1314, referenced in EPA guidance or proposals, or used by EPA in analogous water quality assessments.

B. "Degradation" or "degrade" means any change in water quality that lowers the quality of high-quality waters for a parameter, or any adverse change in the physical, chemical, or biological conditions of high-quality waters.

C. "High-quality water" means all water bodies that exhibit water quality that exceeds the level necessary to support any one of the designated uses for their classification. A water body is a high-quality water if it has excess water quality for one parameter or use even though it may be impaired for another parameter or use. For purposes of this part, water quality means the actual quality of a water, including its chemical, physical and biological condition, prior to any proposed activity or discharge or that condition which could have existed on or after November 28, 1975, whichever is the highest quality.

Subp. 3. Applicability.

A. The agency shall conduct antidegradation review to ensure compliance with this section:

- (1) for any new, modified or re-issued NPDES permit;
- (2) for any general NPDES permit issued by the agency;
- (3) for any activity to which CWA Section 401, 33 U.S.C. § 1311, could apply;

- (4) for any water appropriation permit required by Minn. Stat. § 130G.271, subd. 1, that has the potential to degrade high-quality waters.
- (5) if it receives a request for antidegradation review from any person who demonstrates with evidence that a proposed activity has the potential to degrade high-quality waters.

Subp. 4. **Review Procedures.** Where antidegradation review for high-quality waters is required pursuant to Subp. 3, the agency shall perform the following evaluation:

A. Step 1.

- (1) The agency shall determine whether an activity has the potential to degrade high-quality water. If an activity is limited by a permit or other regulatory requirement, the potential effect of the activity is evaluated using the maximum flow and pollutant loading values allowed under the permit or other requirement.
- (2) The agency's determination, at a minimum, must be supported by:
 - (a) Identification of waterbody(ies) affected by the proposed activity and the use classification for the affected water body(ies);
 - (b) Identification of existing water quality and assimilative capacity for any water quality criterion or condition potentially affected by the proposed activity;
 - (c) Characterization and, where possible, quantification of the effect the activity may have on the assimilative capacity of the receiving water;
 - (d) Identification of the length of time that water quality is expected to be affected by the proposed activity; and
 - (e) Evaluation of any proposed mitigation or water quality protection practices.
- (3) Where insufficient data exist, such data must be collected prior to making the determination required in this Step.
- (4) Where the agency determines that an activity has no potential to degrade a high-quality water, no further review is required.

B. Step 2:

- (1) Where an activity has the potential to degrade high-quality waters, the agency shall determine whether it is necessary. An activity is not necessary for

- purposes of this section if there are feasible and prudent alternatives to the activity that will not degrade high-quality waters.
- (2) In evaluating whether there are feasible and prudent alternatives for purposes of this step, the agency shall, at a minimum, consider evidence demonstrating whether the objectives of the activity can be achieved by using alternative methods, sites, or practices.
 - (3) Where an activity is not necessary, the agency shall not allow the activity and shall take any authorized action required to prevent the degradation of high-quality water from the activity.

C. Step 3:

- (1) Where an activity has the potential to degrade high-quality waters and the agency has determined that no feasible and prudent alternatives exist, the agency shall evaluate alternatives to ensure that the lowest feasible amount of degradation be achieved, including whether the proposed degradation can be reduced or eliminated by cost effective and reasonable Best Management Practices for unregulated nonpoint sources or other unregulated activities.
- (2) The agency must require or take any authorized action required to ensure that all activities found necessary at Step 2 implement alternatives or mitigation measures that minimize the extent to which high-quality waters will be degraded.

D. Step 4.

- (1) Where an activity has the potential to degrade high-quality waters and no feasible and prudent alternatives exist, the agency shall evaluate whether the activity serves an important economic or social development objective in light of the proposed degradation of high-quality waters. An activity does not serve an important economic or social development objective if the benefits of the activity do not outweigh the costs of lowering water quality.
- (2) In balancing whether the important economic or social development objectives of a proposed activity outweigh the costs of lower water quality, the agency shall consider the following:
 - (a) economic benefits such as creating or expanding employment, increasing median family income, or increasing the community tax base;
 - (b) providing or contributing to necessary social services;
 - (c) the use or demonstration of innovative pollution control or management systems;

- (d) the prevention or remediation of environmental or public health threats;
 - (e) the benefits associated with high water quality for uses such as fishing, recreation, or tourism;
 - (f) the benefits of preserving assimilative capacity for future industry and development;
 - (g) the value of the water resource that would be degraded, including whether the waters are within national, state or local parks, preserves or wildlife areas, and the extent to which the resources or characteristics adversely impacted by the degradation are unique or rare within the locality, state, or nation.
- (3) If the agency determines that the social and economic development benefits of the activity do not outweigh the negative impacts of allowing water quality degradation, the agency shall not allow the activity and shall take any authorized action necessary to prevent degradation of the high-quality water from the activity.

Subp. 5. Antidegradation Review for General NPDES Permits.

A. New or reissued general NPDES permits implemented or administered by the agency shall undergo the antidegradation analysis described in subpart 4 at the time the agency develops and approves the general permit or program in order to ensure that individual and cumulative uses of the general permit will not have the potential to degrade high-quality waters.

B. Individual coverage under a general permit shall take effect only upon a finding by the agency that terms of the general permit are sufficient to prevent degradation of high-quality waters from the individual action.

C. The agency shall prepare and distribute a public notice of application for individual coverage under a general permit in accordance with the requirements of part 7001.0100, subparts 4 and 5. In addition to items required by part 7001.0100, subpart 4, the notice must include identification of the activity(ies) proposed and the receiving waters affected as well as the agency finding regarding whether terms of the general permit are sufficient to prevent degradation. The public comment period shall be 30 days.

D. Where it appears, based on public comment or the agency's own determination, that the proposed activity has the potential to degrade high-quality water, the agency shall either require additional conditions for individual coverage which will ensure no degradation or require an individual permit. In cases where an individual permit is required, the individual permit must be reviewed pursuant to subpart 4 of this part.

Subp. 6. Public notice required.

A. At least 30 days prior to issuing any draft NPDES permit or determining to allow any other activity that has the potential to degrade a high-quality water, the agency shall prepare and distribute a public notice in accordance with the requirements of part 7001.0100, subparts 4 and 5. In addition to items required by part 7001.0100, subpart 4, the notice must include:

- (1) a description of the activity, including identification of the water quality parameters for which there may be increased pollutant loading;
- (2) identification of the potentially affected water body(ies), including any downstream water body that may be affected by the activity, their assimilative capacity and impacts to the assimilative capacity from the proposed activity; and
- (3) a summary of the antidegradation review conducted by the agency pursuant to subpart 4 of this part.