



# Nondegradation Rulemaking

## Issue Paper 1. Introduction to Nondegradation and the Opportunity to Improve How Surface Waters are Protected

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**M**innesota's surface waters are a valuable and finite resource. How we protect this resource for the many varied uses will impact the health, welfare and economic well-being of generations to come.

The Minnesota Pollution Control Agency (MPCA) is committed to a rule revision effort to amend the state rules governing the nondegradation of waters. Using significant stakeholder input, the MPCA intends to thoroughly investigate the issues associated with nondegradation of waters, and adopt rules that will address those concerns.

### What is Nondegradation?

Section 303 (Title 33 of United States Code [U.S.C.] 1313) of the Clean Water Act (CWA) requires states and authorized tribes to adopt water quality standards for waters of the U.S. within their applicable jurisdictions. Water quality standards must include, at a minimum: 1) designated uses for all waterbodies within their jurisdictions, 2) water quality criteria necessary to protect the most sensitive of the uses, and 3) antidegradation provisions. The federal term "antidegradation" is equivalent to "nondegradation" used in Minnesota.

The initial federal antidegradation policy was established on February 8, 1968, by the Secretary of the U.S. Department of the Interior. The policy was included in the U.S. Environment Protection Agency's (EPA) water quality regulation 40 CFR 130.17, 40 FR55340-41, November 28, 1975. States are required to adopt antidegradation policies and

implementation procedures that at a minimum reflect federal antidegradation policy identified in 40 CFR 131.12. These requirements provide a mechanism for states to implement the objective of the CWA (Section 101 (a)) to "maintain the chemical, physical and biological integrity of the nation's waters." This is generally accomplished by establishing procedures by which states review regulated activities that have the potential to lower water quality.

Federal regulations (40 CFR 131.12 ) specify three levels, or tiers, of protection. The tier 1 level is for the protection of existing uses. Existing uses are those that can be established by demonstrating that fishing, swimming, or other uses have actually occurred since November 28, 1975, or that the water quality is suitable to allow such activities to occur. Protection of existing uses is the absolute baseline below which water quality may not be degraded.

The tier 2 protection level applies to waters where the quality of the water is better than the applicable standards. In this situation a lowering of water quality is only allowed if it is necessary to support important economic or social development in the area in which the waters are located. The finding of necessity to lower water quality must involve public participation and intergovernmental cooperation. This level of protection also requires assurance that the highest statutory and regulatory requirements for point sources and best

management practices (BMPs) for non-point sources are achieved.

The tier 3 protection level is for waters specifically recognized as having exceptional value, and for which the water quality must be maintained and protected. Within Minnesota Administrative Rules tiers 1 and 2 protection is covered in Minn. R. 7050.0185, while tier 3 protection is covered in Minn. R. 7050.0180.

### **A Brief History of Minnesota's Nondegradation Standards**

Minnesota's first nondegradation policy was adopted into water quality standards in 1968 (6 MCAR § 4.8014 115.03 Subd. 5.(a)(8)) and was based on the first federal antidegradation policy issued by the U.S. Department of the Interior. In 1984, the MPCA repealed the original nondegradation policy and replaced it with Minn. R. 7050.0180 which designated "Outstanding Resource Value Waters" (ORVW) and prohibited or restricted new or expanded discharges into these waters.

Further rule revisions were made to address nondegradation of waters other than ORVWs in 1988 (Minn. R. 7050.0185 ). Among other things this revision defined "new discharge" and "expanding discharge" for non-ORVWs using the base line date of January 1, 1988. It also established two significant thresholds that would trigger a nondegradation analysis. These triggers are: 1) new or expanded discharges greater than 0.2 million gallons per day and; 2) a new or expanded discharge containing any toxic pollutant at a mass loading rate likely to increase the concentration of the toxicant in the receiving water by greater than one percent over baseline quality.

The Lake Superior Basin Water Standards (Minn. R. 7052 ) were adopted in 1998 and included nondegradation policies for bioaccumulative chemicals of concern. Minor language changes to Minn. R. 7050.0185 (Nondegradation for All Waters) were made in the triennial water quality standards revisions completed in 2008. These changes provide additional clarification on how Minnesota's standards align with the federal tiers of protection.

### **Why Revise Minnesota's Nondegradation Standards?**

High water quality is increasingly being recognized as an important public resource and one that requires effective mechanisms that allow for decision making in its protection and use. The last major changes to

Minnesota's nondegradation standards occurred in 1988. Since that time there have been many changes to the state and federal regulatory structure for water protection and to the technical understanding of water quality protection. This rulemaking provides an opportunity to thoroughly investigate the issues associated with nondegradation of waters and to adopt rules that will address those concerns.

### **Stakeholder Input**

The goal of the stakeholder process is to engage in dialogue and explore ways in which nondegradation could be used as an effective tool to balance environmental, social and economic needs in how Minnesota's surface waters are protected. Stakeholders represent a wide range of interests and therefore provide valuable perspectives on how nondegradation may best serve the people of Minnesota.

Stakeholder meetings will begin in early June 2008, and we anticipate a total of six to eight meetings spaced four to six weeks apart. Topics to be discussed include: activities to which nondegradation applies; application of nondegradation requirements to NPDES-permitted stormwater discharges; and topics related to the protection of high quality waters (tier 2). Specific topics related to the protection of high quality waters will include alternatives analysis, public participation, assessment of potential impacts to receiving waters and the nondegradation review process. The topics and related issues will be presented in the form of Discussion Papers, which will be used to generate dialog at the meetings. Prior to the first meeting a draft list of topics and issues to be addressed in these papers will be sent to interested stakeholders. Additional topics and issues may be added as a result of stakeholder input.

Stakeholder comments received at each meeting, as well as MPCA response to those comments, will be shared verbally and in the form of revised Discussion Papers at subsequent meetings.

Information regarding the nondegradation rulemaking is located at [www.pca.state.mn.us/water/nondegradation-rule.html](http://www.pca.state.mn.us/water/nondegradation-rule.html). Additional resources that will help in gaining a more in depth understanding of nondegradation are provided on the next page. These documents will be used to develop the Discussion Papers and will be referred to in stakeholder dialogue.

## References and Resources

Objective and goals of the Clean Water Act (see Title I, Section 101)

<http://epw.senate.gov/water.pdf>

40 CFR § 131.12, Antidegradation policy

<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=5f8457547303397bd1842475d8848118&rgn=div5&view=text&node=40:21.0.1.1.18&idno=40#40:21.0.1.1.18.2.16.3>

Chapter 4, Antidegradation, Water Quality Handbook, Second Edition, 1994

[www.epa.gov/waterscience/standards/handbook/chapter04.html](http://www.epa.gov/waterscience/standards/handbook/chapter04.html)

Questions and Answers on Antidegradation (This document was originally designated as Appendix A to Chapter 2 — General Program Guidance (antidegradation) of the Water Quality Standards Handbook, December 1983)

[www.epa.gov/waterscience/standards/library/antidegqa.pdf](http://www.epa.gov/waterscience/standards/library/antidegqa.pdf)

2005 Memorandum from Ephraim King, EPA Office of Science and Technology, entitled “Tier 2 Antidegradation Reviews and Significant Thresholds”

[www.dnr.mo.gov/env/wpp/cwforum/documents/8-05-epa-tier2-memo4.pdf](http://www.dnr.mo.gov/env/wpp/cwforum/documents/8-05-epa-tier2-memo4.pdf)

EPA’s guidance on the scope of antidegradation review in a February 1994 memorandum to the Regions from Tudor Davies, “Interpretation of Federal Antidegradation Regulatory Requirement.”

[www.epa.gov/waterscience/library/wqstandards/antidegmemo.pdf](http://www.epa.gov/waterscience/library/wqstandards/antidegmemo.pdf)

EPA’s 1998 Advanced Notice of Proposed Rulemaking, Federal Register Vol. 63, No. 129.

[www.epa.gov/fedrgstr/EPA-WATER/1998/July/Day-07/w17513.pdf#page=39](http://www.epa.gov/fedrgstr/EPA-WATER/1998/July/Day-07/w17513.pdf#page=39)

EPA references related to antidegradation

[www.epa.gov/waterscience/standards/library/](http://www.epa.gov/waterscience/standards/library/)

Minnesota Administrative Rules — Nondegradation for Outstanding Resource Value Waters, Minn. R. 7050.0180.

[www.revisor.leg.state.mn.us/rules/?id=7050.0180](http://www.revisor.leg.state.mn.us/rules/?id=7050.0180)

Minnesota Administrative Rules — Nondegradation for All Waters, Minn. R. 7050.0185

[www.revisor.leg.state.mn.us/rules/?id=7050.0185](http://www.revisor.leg.state.mn.us/rules/?id=7050.0185)

Minnesota Administrative Rules — Lake Superior Basin Water Standards, Minn. R. 7052

Section .0300 Nondegradation Standards

[www.revisor.leg.state.mn.us/arule/7052/0300.html](http://www.revisor.leg.state.mn.us/arule/7052/0300.html)

Section .0310 Nondegradation Implementation

[www.revisor.leg.state.mn.us/arule/7052/0310.html](http://www.revisor.leg.state.mn.us/arule/7052/0310.html)

Section .0320 Nondegradation Demonstration

[www.revisor.leg.state.mn.us/arule/7052/0320.html](http://www.revisor.leg.state.mn.us/arule/7052/0320.html)

Section .0330 Nondegradation Decision

[www.revisor.leg.state.mn.us/arule/7052/0330.html](http://www.revisor.leg.state.mn.us/arule/7052/0330.html)

## Contacts

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