



# Nondegradation Rulemaking

## Issue Paper 2. To which activities does nondegradation apply?

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In order to develop effective nondegradation policy and implementation procedures, it is first necessary to achieve a common understanding of federal requirements outlined in the Clean Water Act (CWA) Section 101<sup>1</sup> and 40 CFR § 131.12<sup>2</sup>. With this framework in mind, it is important to determine to which types of activities nondegradation applies and what mechanisms are available for implementation. In situations where there is no clear regulatory authority over a given activity, what options are available to protect surface waters?

### How does nondegradation apply to the three levels or tiers of protection defined in federal regulations (40 CFR § 131.12)?

The objective of the CWA is to “restore and **maintain** the chemical, physical, and biological integrity of the Nation’s Waters” (emphasis added). To that end, states are required to develop and adopt antidegradation policies and implementation procedures that are, at a minimum, consistent with the federal antidegradation policy<sup>2</sup>. The federal antidegradation policy describes an approach in which there are three levels or tiers of protection. Figure 1 illustrates these levels where existing uses (tier 1), waters with quality better than the state’s standards (tier 2), and specially-designated waters (tier 3) are protected.

Existing uses are defined as “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality

standards”<sup>3</sup>. EPA guidance in their 1994 Water Quality Standards Handbook<sup>4</sup>, further notes that the protection of an existing use include “that the water quality is suitable to allow the use to be attained – unless there are physical problems, such as substrate or flow, that prevent the use from being attained.” The handbook goes on to state that water quality must be maintained so that “no mortality and no significant growth or reproduction impairment of resident species” occurs. Existing uses are not necessarily the same as designated uses, which are defined as “those uses specified in water quality standards for each water body or segment whether or not they are being attained”<sup>3</sup>. Waters not meeting designated uses (water quality standards) are identified through waterbody assessments and are listed as impaired as specified in section 303(d) of the Clean Water Act. It should be noted that the protection of existing uses applies to all waters, whether they are considered high quality (tier 2, waters with quality better than the state’s standards), specially-designated waters (tier 3), or impaired waters.

In addition to maintaining existing uses, waters where the water quality is better than applicable standards receive tier 2 protection. Activities that will result in the lowering of water quality in high quality waters must, in addition to maintaining existing and designated uses, also be evaluated in terms of the socioeconomic benefits of the proposed activity. Intergovernmental cooperation and public participation must be part of the decision

to allow a lowering of water quality. Specific topics related to the protection of high quality waters will be addressed in detail in later Issue Papers.

Waters with exceptional value, referred to as outstanding National resource waters (ONRWs) in federal regulations<sup>2</sup>, include waters with exceptionally high water quality, or having exceptional recreational or ecological significance. Federal regulations require that water quality for these specifically-designated waters be “maintained and protected”. EPA guidance<sup>4</sup> interprets this to mean “no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs.” The only exception is for “temporary and short-term” changes in the water quality<sup>4</sup>. Minnesota has designated waters of exceptional value as Outstanding Resource Value Waters (ORVWs). Specific issues relating to these waters will be addressed in a later Issue Paper.

In summary, the application of federal antidegradation regulation, as it relates to the levels or tiers of protection, prohibits any activity that would result in the:

- removal of an existing use (tier 1 protection),
- lowering of water quality in a high quality water where socioeconomic benefits do not outweigh degradation (tier 2 protection), and
- the permanent lowering of water quality in waters with exceptional value (ONRWs).

### **What considerations are used to determine to which activities nondegradation applies and to which activities it is enforceable?**

Minnesota’s water quality standards, including nondegradation provisions, are applicable to any activity that might affect water quality. However, there are factors that influence the implementation of nondegradation at both the state and federal level. The EPA has provided a number of guidance documents<sup>4,5,6,7</sup> regarding the applicability and implementation of antidegradation requirements.

Although nondegradation applies to any activity that has the potential to degrade water quality, implementation mechanisms may not exist for controlling all sources of pollution. Some types of activities are clearly currently “regulated” and by requiring a control document for those activities, the MPCA has an existing mechanism for implementing and enforcing nondegradation requirements. Examples include activities that require

CWA §402 National Pollutant Discharge Elimination System (NPDES) permits and CWA §401 water quality certifications. Generally, EPA and states, including Minnesota, apply nondegradation to point sources that are already regulated under either state or federal law and which are already required to obtain approval from a regulatory agency. Neither the state nor federal antidegradation regulations establish any regulatory mechanism to address activities that are not otherwise regulated. Application of nondegradation to unregulated activities is typically done on a voluntary basis, such as the implementation of voluntary best management practices (BMPs) to control nonpoint sources of pollution.

### **What means are available to apply nondegradation to activities for which there are no clear regulatory controls?**

As noted above, implementation of nondegradation can only be enforced where there is regulatory control, yet nondegradation standards still apply to any activity that has the potential to lower water quality. Federal regulations<sup>2</sup> state that “all cost-effective and reasonable best management practices for nonpoint source control” be achieved. The EPA has interpreted this regulation as not requiring a state to establish BMP requirements for nonpoint sources where such BMP requirements do not exist. As EPA clarified in the February 22, 1994 guidance memorandum<sup>5</sup>, state nondegradation rules need only include provisions to assure achievement of BMPs that are required under state nonpoint source control laws or regulations. However, the EPA does recommend that states explain in their antidegradation policies or procedures how, and to what extent, the state will require implementation of otherwise non-enforceable (voluntary) BMPs before allowing point source degradation of high quality waters. This rulemaking provides an opportunity to review and clarify implementation of nondegradation to regulated and unregulated activities.

### **Discussion Points**

- 1) CWA §402 NPDES permits and CWA §401 water quality certifications are two examples of where the state has regulatory authority to implement nondegradation. Are there other regulated activities where the states may implement nondegradation requirements?

- 2) Where regulatory mechanisms are currently not in place, what options are available for implementing nondegradation?
- 3) In addition to state implementation of nondegradation, could or should other units of government use their regulatory authority to implement nondegradation?
  - a) An example would be a municipality using ordinances to keep water quality in waters under their justification from degrading. What are some other examples?
  - b) What are the advantages and disadvantages of additional implementation of nondegradation through more localized units of government?
- 4) What procedures can be used in the “implementation of otherwise non-enforceable (voluntary) BMPs before allowing point source degradation of high quality waters”?

## References and Links

<sup>1</sup>Clean Water Act (CWA) Section 101, Declaration of Goals and Policy. 1972

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

<sup>2</sup>40 CFR § 131.12, Antidegradation Policy.

<http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=40&PART=131&SECTION=12&YEAR=1999&TYPE=TEXT>

<sup>3</sup>40 CFR § 131.3, Definitions.

<http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=40&PART=131&SECTION=3&YEAR=1998&TYPE=TEXT>

<sup>4</sup>Water Quality Standards Handbook: Second Edition, USEPA, Office of Water, 1994.

<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>

<sup>5</sup>Memorandum entitled “Interpretation of Federal Antidegradation Regulatory Requirement”, from Tudor Davies, Director, Office of Science and Technology (OST), to Water Management Division Directors Regions I - X, February 22, 1994.

<http://www.epa.gov/waterscience/library/wqstandards/antidegmemo.pdf>

<sup>6</sup>EPA Region V Guidance for Antidegradation Policy Implementation for High Quality Waters, 1986.

<sup>7</sup>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)

<http://www.epa.gov/waterscience/standards/library/antidegqa.pdf>

**Please keep in mind that these issue papers are to generate discussion and are not to be taken as representing MPCA decisions or recommendations at this time. Your participation and input into this rule is much appreciated.**

**Figure 1. Levels or tiers of antidegradation protection as specified in 40 CFR § 131.12.**

