

Compilation of Comments on Issue Paper #2
Applicability of Nondegradation –To which activities does non-deg apply?

General Comments relating to the Applicability of Nondegradation

- Protection strategy, non-deg, TAW, intensive watershed management are all in development at some time, need closer integration.
 - What are other states doing?
 - What about linear entities – such as MN/DOT and county road authorities? Should they have other options?
 - Should apply to all
 - Must look at agriculture. Without looking at Ag. you will never improve water quality in watershed.
 - Drainage is unregulated for Ag.
 - All new rules only apply to the same group-are we going to improve anything?
 - In large groups, various segments tend to believe each other as the “bigger” problem. It may be beneficial to have each group police it’s own, i.e. what can we do better rather than what should you do differently.
 - Any activity which as the potential to degrade water quality.
 - Should apply to any activity conducted on large scale that impacts water quality.
 - AG’s office certified for the MN Council Nonpoint Program that MN has authorities in place to regulate their six categories of non-point pollution including agriculture and forestry. Nuisance law and anti-deg.
 - Salt – Lakes: Invasives, enforcement big issue.
- There are significant differences between the policy issues for nondeg related to nonpoint sources (including all stormwater) and point sources. I believe it is appropriate to formally divide the discussion at multiple points in the stakeholder process and have a separate group to focus on issues specific to nonpoint sources. Among other things, we need to identify critical issues and arrive at some common terminology. I suggest a session at the next meeting to identify and list some the critical and special issues related to nondeg for nonpoint sources. If the MPCA does not think this division and separate discussion is appropriate, I request that this question be put to the entire stakeholder group for discussion and a determination.
- Nondeg is sufficiently sweeping, that the development of this new rule should trigger a resolution of the problems with the definition of “waters of the State”. There seem to be provisions so that sewage lagoons are not considered “waters of the State”. Similar provisions should be made for stormwater and water quality treatment BMPs. Similar provisions should be considered for conveyance systems that are not natural streams (ditches, gutters, etc.). We need a rational and legal system that allows for some water bodies to be used for treatment and/or conveyance without triggering or violating nondegradation. If statutory or rule changes are needed, we should get started on them.
- The distinction between Tier 1 and Tier 2 waters is confusing. It is difficult to see how almost all waters will be classified as Tier 2 waters. Please provide examples of waters that would be classified as Tier 1 and not Tier 2.

- The classification of waters for nondeg should be formally linked to the assessment process for impaired waters. Why can't both determinations be made simultaneously and based on the same data?
- There are nondeg provisions related to thermal degradation under the CWA Section 316. What types of Minnesota waters are covered under these provisions? Please provide examples.
- MPCA should not limit itself with the concept of high quality waters. Non deg should apply to all waters. An impaired listing does not mean that general improvement should not be a potential outcome. MPCA staff stated that restoration refers to TMDL (impaired waters) but this is not entirely true. All of MPCA actions should address restoration, including and especially non deg.
- Groundwater must be addressed in this rule. Stormwater and groundwater are intimately connected and must be addressed together. The current GW rule is very restrictive, but as a result the rule is unrealistic and essentially unenforceable, especially when applied to storm water. Reasonable measures for GW preservation, protection and restoration should be an essential part of MPCA determinations.

Questions or comments about the discussion provided in Issue Paper #2 **"To What Activities Does Nondegradation Apply?"**

- How do we apply it to recreation, such as is done in the BWCA and DNR wake control?
- How about what activities does it not apply to?
- It appears only new development or re-development is targeted as it is the only thing that can be regulated. Increased volume from conversion of prairie to cultivated fields is causing severe river bank erosion but unregulated.
- Should apply to Ag. Need to target AG. and dev.
- Create same thing that is too complex to use.
- You will spend all of this money with no results if you do not expand to Ag.
- How does the definition for existing uses (actually attained) work for MN waters that were mostly arbitrarily designed as fishable, swimmable?
- Ag drainage is an "agricultural purpose". It is necessary to have drainage. People talk about the problems with drainage (which weren't always accurate), but never the benefits.
- Canadian shield lakes need different requirements.
- "Waters of the state" comes up in many discussions on many subjects, especially construction, and MS4s. We do not want to nor can we deal with this directly since it has been defined by the legislature. However, many people inside and outside the MPCA misunderstand it, in large part because we have been obtuse and obscure about how this definition is used in our regulatory programs. The agency needs to address the way we apply the definition to our regulatory programs, not respond rule by rule, or project by project. Saying that treatment systems or conveyance systems are not "waters of the state" is not an acceptable option for storm water, especially since by statute they clearly are. MS4 systems are composed of man made and natural runoff systems, both of which can be affected by human activity, but may or

may not need treatment measures. If these situations are not clearly defined, statements about what is and is not a water of the state will lead to chaotic regulatory programs. The statute defines “waters of the state”, we must make the programs fit the definition.

- The definition of point and nonpoint sources was mis-stated by public and MPCA staff. Point sources are defined as discrete conveyances. This should be defined and education on the importance of this definition provided. The courts have ruled that EPA must go back to rulemaking to address past misuse of the term nonpoint source. For example, the stormwater program was brought into the NPDES program by Court action on this exact issue. Also, the forestry and ag exemptions from NPDES only apply to non point sources, therefore forest ditches are not exempt from CWA regulation (NPDES or 404). Under the CWA, the Corps uses terms like normal agriculture and silviculture to describe exempt activity, while other activity such as agriculture and silviculture construction are not exempt. MPCA needs to be careful in the use of these terms to avoid confusion in the public mind and in our own programs.

- MPCA should not only apply non deg back to the 1975 date EPA adopted. Reasonable restoration from past activity and retrofit are expected in the CWA. No date makes sense when you are trying to apply reasonable measures to restore and maintain waters. Why limit our options for reasonable measures by an unneeded and unreasonable date.

- Comments in consideration of the attached quotations from the fact sheet.

There is a high degree of incongruity between the objectives and directives contained in the attached excerpts (see below). The USEPA directs that nondegradation applies to any activity that has the potential to degrade water quality and that all cost-effective and reasonable best management practices for nonpoint source control be achieved, but goes on to state that regulatory mechanisms may not exist and that state nondegradation rules need only include provisions to assure achievement of BMP's that are required under state nonpoint source laws or regulations.

- It is important for the current nondegradation rulemaking process that the inconsistencies and deficiencies of federal guidelines be identified and discussed early in the process. It is even more important that MPCA lead discussion for addressing the deficiencies and charting a course for water quality rule, including nondegradation rule, that can fully restore and protect the state's water resources. The initial USEPA antidegradation policy contained the following guidance: *"States are required to adopt antidegradation policies and procedures that at a minimum reflect federal antidegradation policy"*. The key points are that it requires procedures together with policy, and that the federal guidelines are the minimum requirement. This would clearly imply that states should develop additional policy and procedures as necessary for effectively addressing nondegradation.

(referenced quotes from Issue Paper #2

"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."

"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."

"Federal regulations state that "all cost-effective ut EPA states and reasonable best management practices for nonpoint source control be achieved."

"As EPA clarified in the February 22, 1994 guidance memorandum, state nondegradation rules need only include provisions to assure achievement of BMPs that are required under state nonpoint source control laws or regulations."

1. Are there other regulated activities, other than through permits and water quality certifications, where the state may implement nondegradation requirements?

- Wilderness area rules.
- Are we going both voluntary/creative and regulatory approaches?
- Ditch buffer law in MN – BWSR. Alt. shoreline and rules – DNR
- SSTs rules.
- Construction permits, shoreland rules, feedlot permits, watershed planning, ind. permits.
- Should take a look at non reg activities you have a much larger non reg group then your graph shows in the power point.
- State needs to address nondeg activities for unregulated entities. Regulated entities represent only a small share of the problem.
- Agriculture needs regulation.
- Feedlot rules – i.e., land application of manure, site design; especially for manure storage systems.
- Shoreland and WACA ordinances/rules.
- No idea for state, but there may be statutory authority provided for local gov't and special purpose districts to implement BMPs and local regulations that could provide non-deg benefits.
- Trading? Can a credit trading system be developed within regulations?
- 103B, 103D, 103C, shoreland, WCA, flood plain, NPDES, TMDL action plans.
- Anyone receiving agricultural subsidies of any type (not just CRP e.g., crop subsidies) should be covered by conservation implementation plans and nondeg.
- BWSR, Dept of Ag. DNR, SWCD, WMD, MSDs, ACE, and Minnwater H2O programs that should be covered (wetlands, shoreland, floodplains, etc.).
- Farm program, CRP, CREP, etc.
- Wetland, drainage (BWSR) Shoreland (DNR) floodplain management. Water appropriations, aquatic. Waterworks activity permit. Source water protection, well head protection. MDH MDA – pesticide registration, etc. Feedlots – MPCA.
- Floodplain/Shoreland (DNR)
- Wetland Cert (BWSR)
- Drainage law (BWSR)
- Water Appropriateness (DNR)
- Invasive Species (DNR)
- Source Water Protection /WHP
- Groundwater Protection Act.
- Feedlots – 7000

- SST – 7080
 - CUP – conditional use permits by counties.
 - PCA control documents only or do other agency documents, DNR, BWSR, etc permits apply?
 - No run off into lake. Natural veg. the 1st 50 feet septic checks and regulation. Would like to see hardship as only standard variances.
 - Are there other federal agencies who already have this authority? Law is vague – nuisance law covers all of this.
 - BWSR – wetland issues. Is this an MPCA rule? Does this regulatory authority stop at MPCA or does it go to other LGU's?
 - Any permit, license, etc open potential to address as guidance.
 - Solid waste permits? Landfill runoff (not leachable)?
 - DNR (OHWL/Shoreline issues).
 - Landuse/Zoning
 - ?Legally enforceable? BMPs – for industrial or municipal construction stormwater. Agriculture/herbicide application or fertilizer application. Logging stream crossings, wetlands activities. Set-backs from water bodies.
- Other than 7050 and NPDES permits/401 certification, the State of Minnesota through several statutes and rules regulate several different activities that impact the integrity of surface waters. These statute and rules on the ground are implemented through permitting by other state agencies or through authorities given to local units of government. In addition Minnesota has authority from the federal government for administering water related federal laws besides the Clean Water Act...such as the Safe Drinking Water Act and FIFRA-(pesticide label enforcement) The state also has programs through rules allowing for the identification, establishment, and management of publicly owned Scientific and Natural Areas and Aquatic Management Areas. Statutes and Rules other than MPCA/NPDES control document that should be reviewed for relevance to achieving nondegradation goals: Statutes 103A-103G especially 103E Drainage Rules 6120 Shoreland and Floodplain Management 6136 Natural Preservation 6140 Boundary Waters Canoe Area 6216 Invasive Species 6270 Aquatic Management Areas 8410 Local Water Management 8420 Wetland Conservation 4410 Environmental Review
- suggest the following regulated activities that should be subject to anti-degradation review:
 - water appropriations
 - land use decisions (e.g., zoning)
 - CAFO's/AFO's
 - ISTS programs and rules that regulate them
- Believe that there are likely a number of regulated activities that have the potential to degrade water quality. Recommend that the MPCA make an inventory of currently regulated activities that could affect water quality. This inventory should include state as well as local regulation.
- Comments regarding applicability
- The majority of impaired water/TMDL designations for the stream resources of the state are the direct or indirect result of agricultural activities on the landscape.

Many of our lake resources are also impacted by nonpoint source pollution from contributing watershed areas. Ongoing assessments will continually add to an already large list of impairments and restoring water quality will come at great social cost into the future. Acceptance of the work and costs of this endeavor, by the responsible governmental units and citizens of the state, comes with the full expectation of successful restorations.

-In considering an example, the Minnesota River and its associated watersheds, the magnitude of changes to land use practices that will be required to correct the numerous nonpoint source impairments is seemingly insurmountable. As these practices are generally unregulated at either the state or federal level, the assumption is that voluntary BMP's are the only available approach. Adoption of appropriate BMP's by 80% or even 90% of agricultural producers will likely not achieve the goals of the various TMDL studies. For the current rulemaking process, the stakeholders and public would need to be kept informed of the realistic expectations for BMP participation, the consequences of various levels of participation, and the alternative action plan that will be ready to implement.

- A conclusion to be drawn from the preceding discussion is that Minnesota's nondegradation rulemaking should include new provisions that require implementation of cost-effective and reasonable BMP's for agricultural practices. This topic needs candid discussion at the next and other future stakeholder meetings for nondegradation rulemaking.

-Many of the state's waters are not meeting their designated use classifications of the water quality standards. Aquatic related birds and mammals, as higher trophic level species, have body burdens of toxic chemicals that affect health, reproduction, and overall population levels. This contaminant issue was effectively addressed in the nondegradation policies of The Lake Superior Basin Water Standards in 1998. This policy approach should be included in the current nondegradation rulemaking.

-There is a need to clarify nondegradation rules with respect to the exemptions contained in Section 404 of the Clean Water Act and the Wetlands Conservation Act. Nondegradation rules do not provide exemptions and do not acknowledge any of the exemptions under Section 404 or the Wetlands Conservation Act. It is important to establish as much rule consistency as is practical to minimize conflict and confusion for contractors, landowners, and agencies charged with administering the increasingly complex mix of regulation and rule. This will facilitate application and enforcement while protecting wetlands and other water resources.

2. Where regulatory mechanisms are currently not in place, what options are available for implementing nondegradation?

- With dredge and fill permits the state loses jurisdictional scope over waters because they fall under the EPA/Corps. The state should take over these permits like NPDES.
- Properly defined incentive systems to support watershed – based cooperative non-point source efforts of an innovative nature.
- Holistic multi-agency regulatory and voluntary measures defined.-able to find everything from boat wake control to NPDES results in one place.

- Farmers must be required to have a buffer strip around their farmed land to control sediment and nutrient runoff. Buffer strips work for wetlands, they can also work for Ag. land and would not be that costly to implement. This could be done through watershed requirements.
- Public drainages not MS4, agriculture, new permits? Nonpoint source permits? Agriculture permits aimed to protect water quality. Drainage work team.
- As someone said, industry could pay farmers to implement good BMP's and use that as a trading mechanism - Cities could do the same if allowed.
- Need rules for unregulated portions of agriculture; along with cost share \$\$ to implement, for example:
 - o Requiring buffers along fields in shoreland areas for row crops,.
 - o Prohibiting animal access to streams and lakes.
 - o Prohibit pesticide app. Within ____ feet of shoreland areas.
 - o Explore additional requirements for discharge of drainage water into streams/lakes, etc.
- Country or city planning and zoning, improve ditch law and set back enforcement, spend the \$ to regulate NPS.
- Need to address agricultural impacts of quality and quantity (drainage).
- Incentives \$ non permitted urban waters, education, work w/WMOs in metro area, trading.
- Instead of focusing on new regulation, what about incentive/govt programs for upgrading failing ISTS's for example.
- Voluntary education/action w/incentives, community based social management, efforts in regions.
- 103B, 103D, 103C, shoreland, WCA, flood plain, NPDES, TMDL action plans.
- New state rule giving MPCA authority to administer nondeg for all land uses.
- Make county boundaries MS4 boundaries and make counties responsible for land use activities within their boundaries.
- Income tax incentives for non-permittees. It is too expensive for permittee to go through a nondegradation review each permit term (and too expensive for the MPCA to administer. Can't BMPs be identified for each land user (NPS)-that would be sufficient to meet non-degradation, whereby an entity could avoid the nondeg process if they are implementing the necessary BMPs.
- If the State of MN can include 5,000 pop. and discharging into impaired waters, something that is not specifically in the EPA rule, why not include all counties as MS4? Need legislative acting to include a greater percent of contributors.
- Make it legal to enforce TMDL's for all participants in an implementation plan.
- Drainage laws.
- Can you add nondegrad. to these other regulated activities?
- Groundwater protection 7029, 780, MS4 permits, construction sites. Conditional use permits (CUPS) voluntary BMP seem to be of limited effectiveness social pressure; public education.
- A venture process that ends in the meaningful directive.
- Social pressure, humiliation
- County based social marketing
- Through county planning and zoning.

- Using the nuisance law and the state taking on being the RGU for environmental review when state waters are affected.
- Nonpoint sources are not regulated and these sources are the greatest contributors to water quality degradation. Point sources are highly regulated.
- Forestry and agriculture. *An activity could be considered non-degrading.
- Lake associations using rules as guidance?
- Legally enforceable BMPs or Voluntary BMPs.
- Economic incentives that fully account for the value/services provided by the water resources in a nondegraded state
- Effective Best Management Practices Social pressure/Community Based Social Marketing Education Public Ownership of lands around high valued waters
- Recommend that the MPCA adopt a petition process that would allow activities currently not regulated to become subject to anti-degradation review when supported by substantial evidence in a petition to the agency.

3. Could or should units of government, in addition to the state, use their regulatory authority to implement nondegradation?

- Yes, there are additional pts. of reg. available. (e.g., bldg permits, inspections, and billing)
- This can also be the best avenue for promulgation of BMP's for non-pt sources or stormwater -caution must be used for substandard implementation whether through intent or low funding.
- How would we know what is causing the degradation?
- Yes, however, there is not a clear connection between many BMP's, zoning requirements and practices and verifying their specific impact/benefit to water quality.
- I think they already do-i.e., watersheds have stds. for volume control and water quality. However, the state must enforce non-deg through it's NPDES permits. State needs to remain overall control for consistency.
- How about one permit for all vs. shoreline permit, MS4 permit, WCA permit.
- Give some authority and flexibility to watersheds and cities to implement trading mechanism.
- Yes, we should encourage local units of gov't to develop more stringent requirements to prevent water quality degradation.
- Yes, require all watersheds to have watershed management districts on WMOs, like in the metro area.
- Yes, but may need support and/or incentives to change.
- What incentive is there for this to occur?
- Yes
- Concern would be too many layers creates redundancy but also in some cases conflicting regulations for people to try to meet.
- Should!! Use the 103B, 103D process to achieve. Amend state statue delegating authority to LGU's.
- No, it would be applied too inconsistently and there is not enough expertise on the local level.

- Yes, incentives are always better than mandates.
- I believe that county and municipal agencies should enforce nondegrad.
- P&Z authorizes on land use.
- Yes.
- No, total chaos would result due to coordination problems.
- How will new MS4's impact industrial stormwater discharges?
- Sounds too confusing – needs to be one agency – not EPA, PCA, BWSR, national parks service, soil and water, LGU.
- Yes, but regulatory authority would need to be addressed.
- Yes ...probably need a legal opinion
- My initial thoughts are that no other units of government should use regulatory authority to implement nondegradation. It seems that if the state has to rely on rulemaking, I wonder what mechanism would be available to local government units. Additionally, potential duplication, conflict, or preemption seems most problematic.
- Municipalities are already required to implement nondegradation via the MS4 NPDES permit (if one of the originally selected 30).
- Overall there still seems to be a wide disconnect between the current rule, its intent, and its application to nonpoint source stormwater runoff (hence the need for new rulemaking I presume). Further exploration into the application of the rule or new rule requirements to stormwater runoff in the context of MS4 permits and TMDLs is needed.
- Maintain that the State cannot further delegate its authority/obligation for the antidegradation program to local units of government. The antidegradation policy is a significant portion of the State's water quality standards and the MPCA, as the agency with authority to implement the CWA, has the responsibility for the antidegradation policy. That said, am not opposed to involving local governmental units in cooperative efforts to implement the state's antidegradation policy where appropriate through the local government's regulatory authorities.
- While we want to work with partners, we must be very clear that MPCA cannot have other units of government actually implement non deg. We should be aware of 103 B and 103D etc.- but be aware that these rules are written for different purposes and bestow different authority than we have.

4. What procedures can be used in the implementation of otherwise non-enforceable BMPs before allowing point source degradation of high quality waters?

- EIS/EAW as point of reg. and evaluation.
- This is a good question for Dr. Peter Nawceck at University of Wisconsin, Madison.
- Nondeg needs to address Ag., otherwise, we will never maintain water quality. What about a buffer strip for Ag. land of 200'? This would be required around the perimeter of the Ag. land.
- Nondeg needs to address watersheds-such as Riley Purg. Bluff Creek, that refuses to address erosion in its streams, this is a large part of the sediment problem in the Minnesota River.

- Make them enforceable.
- State should establish policies and expectations and empower local basins and watershed to implement programs that will meet objective/goals e.g., \$ to each basin or watershed to work with cities/farmers to implement BMPs.
- Watershed based planning and permitting having BWQ revise 103B and 8410 rules to compliment their process.
- Maybe it is time to make them enforceable.
- Agriculture has done very little to control their impact on WQ while point sources continue to be controlled more and more.
- Don't set up rules that prohibit pollutant trading.
- Incentives are one option. Cost/benefit research for BMP's. Target areas where they will have the impact
- Credit trading, incentives, cost share programs.
- 103B.
- What about NPS?
- Incentives, clean water legacy,
- Treat drainage tile outlets as point sources especially those that drain into high value high quality waters or waters in areas where water quantity is a factor.
- Training-education efforts.
- Focus on education and prevention.
- TMDL or change of rule to have "legally enforceable BMPs"
- they were designed to do and does it matter where in the landscape they are placed in relationship to the water resources in question....GIS tools, see eLINK MNBWSR
- Need a process similar to the one outlined in the Groundwater Protection Act that has a mechanisms for going from voluntary to mandatory if effective BMPs are not adopted.

5. Additional questions that should be asked regarding the applicability of nondegradation or thoughts that were not addressed above.

- Air deposition is a problem for Hg pollution of waters. There are surely others where there are cross media conveyances. This offers challenges for control, but also additional pts. of reg. via air permits and such.
- Ground water as a conveyance-challenging.
- The Clean Water Council is discussing the issue of non-point source impact relative to TMDL's-similar issues and ideas are being expressed, should they be in the loop?
- It must be made clear in the rules that nondeg. does not apply to TMDL waters.
- It must be made clear in the rules that nondeg. does not apply to structural and nonstructural conveyance systems that go to BMP's such as ponds, infiltration/filtration ditches and swales and SPCD's.
- Will it be a one size fits all or will it be flexible enough to allow for enforcement and fit the individual nature of surrounding areas of waters?
- Is there a process to review nondegradation associated with general statewide activities that are new and growing, such as the biofuels industry, and may have

widespread effects on all three tiers of water? The generic EIS provides an avenue but it appears rare and difficult and does not specifically address nondegradation.

- What is expected out of the new reg. -still unclear and outcome does not look like it will change.
- My main concern is that rules are not put in place which will impede maintenance of property. If a city or property owner wants to rebuild its existing roadways/parking lots, no further implementation of BMP's should be required if no new runoff is created.
- How do we address ag. drainage that causes impacts to stream and river channels and banks off the farmer's property? Do we establish a volume and discharge limit for each farm/drainage area?
- We need to be using things such as drainage law and its requirements for buffers on public drainage ditches to implement nondeg. Also reqts. such as shoreline rules, etc.
- There are lots of misconceptions about agriculture practices and how they impact water quality.
- Too many comments based on assumption and not necessarily facts.
- What about natural/background impairments.
- Need to define ASAP what water bodies are in or out.
- Created Stormwater Ponds? Stormwater ponds that were historically wetlands? Ditches? Storm pipes? Swales? Box culverts?
- How does it apply to impaired waters, TMDL's? How can the BWSR rulemaking for Metro Water Planning be used to enhance water quality outcomes?
- How will this be incorporated into the new stormwater rules and regulations?
- What happens "New Pollutants" causing improvements are discovered.
- To get a handle of how effective various strategies would be, look at the historical record. Identify those waters where antidegradation prohibited activities have occurred. Evaluate if those activities could have been regulated under other authorities and/or what non regulated efforts would have protected the resource