

*Nondegradation Rulemaking Meeting Notes
June 9, 10 and 12, 2009
Compiled Comments*

Issue Paper 10. How should Outstanding Resource Value Waters be protected?

General Comments

-As we restore, protect and preserve (DNR) more waters, more waters have potential to become ORVW or prohibited, especially as public more highly values resources.

-One of the potentially greatest impacts of BWCAW ORVW is individual septic systems. These are regulated. Ground water impacts that reach ORVW is a problem that should be considered and enforced. How?

- As rules are being drafted (and before being put on public notice), they should be applied in a variety of “test” cases to determine if they can be effectively administered by permittees and agency staff and assessed to determine whether the desired outcomes are achieved. Taking this step will help uncover areas needing clarification, identify administrative hurdles, assess whether the level of effort is appropriate, and evaluate the effectiveness of the product on water quality.

Discussion Points

1. Minnesota Rule 7050.0180 currently does not have provisions for temporary lowering of water quality in ORVWs. Should such provisions be included in the revised rule? If so, what criteria should be used to determine the allowance for temporary lowering of water quality in ORVWs? Missouri’s definition of temporary degradation (page 3) may be a good starting point.

- Definitely yes! provisions should be listed with an acknowledgement that other provisions could apply at the discretion of the commissioner.
- Yes, provisions should be provided. They should be truly temporary (months, not years) and recoverable.
- Only for non-persistent pollutants, and not beyond reasonable thresholds (H2O standards?) This likely already occurs with road construction, etc.
- Design prevention into infrastructure.
- Alternatives analysis in all cases first.
- Develop BMPs for specific activities to prevent WQ impacts.
- Yes, but at the meeting today (6/12) the comment was made that federal language says for weeks and months, not years. Even weeks are too long unless it is periodical over weeks. Continual degradation for weeks and months is not acceptable.
- There should be a consideration of temporarily lowering tributary water quality that does not lower ORVW water quality. Also, stormwater construction permit type should be considered, but not a long term project to “come into compliance” similar to “variances granted”.
- What happens if the expected “temporary” lowering ends up being persistent? I do think that we need to address the reality that this happens, but we need to be clear and definitive on the criteria....however, I have no suggestions at this point for those criteria.
- Providing an allowance for temporary changes and defining temporary is a good idea, but please don’t create yet another public participation requirement unless it is needed. All land development processes have several steps that facilitate public involvement – both informational meetings and public hearings (e.g., in Rochester’s case, neighborhood meetings, planning and zoning commission meetings, and City Council meetings) – before a development is approved.

The environmental review process also has opportunities for public comment. If needed, clarify that public participation needs to be provided if there are not other processes already available to do so (for instance, a temporary dewatering project or a maintenance project). Emergency response activities should definitely be exempt under this provision (after a degrading flood event, all activities only improve conditions).

While Missouri's definition might seem reasonable on paper, how many of their criteria can be definitively addressed in practice? How do you determine the percent change in ambient conditions when you don't know what the ambient conditions are (how much of a research study would be needed to determine ambient over how long a period of time)?; how do you know which parameters to focus on and who decides?; aren't long-term benefits always

2. How should the protection of Restricted ORVWs be different than from other waters where lowering of water quality is permitted? Some options for considerations are shown below:

- Create and clearly define two levels of non-degrading alternative analyses.**
- Allow for two water quality-based levels of protection.**
- **Protect the characteristics that make the water body an ORVW.**
 - This one (*Protect the characteristics that make the water body an ORVW*) should apply. Others could also be applied, but ORVW should have a protection standard to keep them there. Natural conditions could change an ORVW restriction and this should be acknowledged.
 - *Protect the characteristics that make the water body an ORVW*- my vote
 - Protect the characteristics that make the water body an ORVW* -This one.
 - ORVW's should not be degraded from baseline for all pollutants, within reason. Biota make up part of the criteria for many of these designations, making it hard to eliminate many pollutants from consideration.
 - Not sure it's necessary to differentiate as waters in general improve.
 - I would think that an ORVW designation would protect the water from its quality being lowered.
 - The MPCA or DNR should choose. If public petition, then every little puddle will become an ORVW and there will be restrictions everywhere.
 - *Protect the characteristics that make the water body an ORVW* -If possible.
 - If we are now going to create different levels of allowable degradation for impaired waters (under the "all waters" category), unimpaired waters (also under the "all waters" category), and ORVWs, this will become very confusing and much more difficult to administer. Are the unimpaired waters truly cleaner than impaired waters (or are they dirty waters that have not yet been assessed? The rule will need to deal with the limbo of having listed waters without TMDLs and the changing status of waters (e.g., they get listed, the TMDL is done, the TMDL is implemented). Adding more categories won't change the fact that there will always be exceptions to the rule (e.g., unforeseen conditions or changing circumstances) that must be addressed. Has anyone determined whether the ORVW rule has, in actuality, provided a higher level of protection than the "all waters" rule. If not, maybe we should be thinking about 1 rule, not 2 or three cumbersome, parallel tracks. Alternative processes should only be adopted if they can create outcomes that can be demonstrated and that are distinguishably more protective. The ORVWs seem to be significantly different in character (although I'm not sure whether there would be agency agreement on how to define those differences or even to define the character), which lends more credence to the need to be characteristic-focused when deciding protection methods. The idea of merging the ORVW

analysis with a high quality water analysis on a parameter by parameter (or use) basis, again, adds complexity that will add confusion, complexity and administrative difficulty – will such a split review really result in meaningful and appropriate protection methods? For storm water, the limiting factor for nondegradation seems to be BMP effectiveness; if modeling the level of protection can only be done to a coarser level, then requiring a finer level of review is not helpful (think back to your significant digits lessons in math).

3. Should a public petition or nomination process be used in the designation of ORVWs? If so, what criteria should be used?

- No!! You might as well designate Minnesota as ORVW regardless of a justification. ORVW status must be a legally designated thing through a defined legislative process. Example, form a watershed group south of Twin Cities, for the Mississippi River Watershed and nominate/designate the watershed as ORVW (note: the only members are six extremists in the watershed group)
- No!!!
- Not a good idea, people would be motivated to nominate for the wrong reasons.
- No, slippery slope is a problem. State/federal designation makes more sense.
- Need to develop a comprehensive evaluation involving WQ, use, condition, aesthetic and aquatic life status. (how are they designated would i.d., the criteria).
- No! A public petition process is driven by perception and political motivation and criteria rather than on a technical basis. Most waters in northern Minnesota are quite high quality. Nomination of any of these waters for ORVW status would be an easy route to pursue for those opposing a project affecting a water body in the region.
- I would be concerned that a public nomination process would be used for outcomes other than what it sounds like. For instance, I could see nominations made in the types of getting a designation to stop projects/development/etc. In other words, an abusive use of this process on waters that have no business being an ORVW but someone wants to push their personal agenda. Could create more work for those who would be in charge of reviewing the nominations.
- MPCA or DNR should choose. If public petition, then every little puddle will become an ORVW and there will be restrictions everywhere.
- No, we currently have an informed process which should be good enough
- Downstream needs to be defined in terms of scale and distance. There must be an acknowledgement of the limitations of jurisdictional authority (i.e., boundaries).
- Perhaps DNR and MPCA can create a 5 or 10-year cycle for reviewing and updating the ORVW list (to add or remove ORVWs) so that they don't get in a perpetual rule making mode or so people can't use the ORVW process as a political means to block development (NIMBY). It would be good if this process preceded the adoption of MS4 permits so that we could prepare SWPPPs accordingly.

4. How should stormwater activities be regulated to ensure that lowering of water quality does not occur (for Prohibited waters) or is stringently controlled (for Restricted waters)? Some options to consider:

- 1. Require individual review of permit application including an analysis of the impact to the receiving water.**
- 2. Require more stringent permit conditions than for other waters. This assumes that, without knowing the impact to an individual receiving water, the ORVW will be protected.**

3. Through an adaptive management process, require monitoring of receiving waters to ensure the ORVW is being protected.

4. Through an adaptive management process, require monitoring of control measures to ensure their effectiveness.

5. Other, or combination of above.

- Stormwater should meet appropriate water quality standards at the ORVW and/or if temporarily lowered in tributary, should not lower ORVW water quality.
- new stormwater rules should be adequate to address nondegradation of ORVW
- *1. Require individual review of permit application including an analysis of the impact to the receiving water.* No
- *2. Require more stringent permit conditions than for other waters. This assumes that, without knowing the impact to an individual receiving water, the ORVW will be protected.* No, need a basis before this can be done. Yes
- *3. Through an adaptive management process, require monitoring of receiving waters to ensure the ORVW is being protected.* Could be
- *4. Through an adaptive management process, require monitoring of control measures to ensure their effectiveness.* Yes. Yes. Yes
- *5. Other, or combination of above.* Could be a combination of 3 and 4. Yes-adaptive management w/progression from BMPs -> infiltration -> treatment of remaining discharge
- More stringent requirements, monitor control measures.
- Adaptive management w/progression from BMP's – LID – infiltration – treatment of remaining discharge.
- A combination of all of the above

5. A number of questions related to NPDES-permitted stormwater activities arise from the definition of “expanded” discharge:

Is it possible to have increases in volume without increases in pollutant loading?

- Yes, treatment may be required but this could be done.
- If it impacts geomorphology of stream or wetland veg. it is a pollutant.
- Stormwater is not a regulated “outfall” under NPDES
- Not if flow is a pollutant or contributes to flood with treatment, although emerging contaminants create additional risk.
- Yes, with proper management (BMPs)
- Yes, especially in cases where increase volume is due to large storm (heavy rainfalls) events where the volume is high, but dilution due to volume is significant.
- I think it is probably possible, but not probable. However, the increased flow by itself can cause degradation
 - The current MS4 permit process already has requirements to protect ORVWs and provisions that require the identification of them and description of BMPs used to protect them. The individual SWPPPs are reviewed by agency staff and put on public notice, so we already have an individual review and impact analysis process that is vetted by the agency and the public. If, during their review, agency staff do not feel the level of protection is appropriate, they already can require more stringent BMPs. Receiving waters monitoring will not be useful because there will be upstream impacts coming from outside the jurisdiction or control of the permittee. Similarly, evaluation of BMP function may not be feasible either, due to the sheer number of BMPs acting together to protect the resource (e.g., there is not one BMP to protect one ORVW).

If ORVWs are such spectacular MN resources that deserve the highest level of protection, why haven't all the listed ORVWs been prioritized by the MPCA for completion of the impaired waters assessment (in advance of assessing "all waters" that have a lower quality standard), so that the TMDL process can be used to advance their protection?

Yes, you can have increases of volume (particularly in areas predominated by open space) without additional pollutant loading. In some cases increased volume can lead to degradation, but it should not be a universal presumption. Baseline conditions are those that existed at the time of designation – in many cases development today improves their condition because we now employ storm water management BMPs where none were required or utilized before.

Can an increases in volume, by itself, be considered degradation? This would depend, in part, on runoff volume in relation to the size of the receiving water.

- I can see situation when volume could be considered degradation of the non WQ parameters or stream invertebrate.
- Some locations, such as Red River Valley flood conditions. The Devils Lake outlet permit has a flow limitation relative to Sheyenne River flow.
- Not necessarily
- Yes, it would appear possible. However, it would be very costly to construct large holding ponds to contain storm water and release it slowly to avoid increased volume discharges.
- Yes, more flow can be damaging to waterways. It would nice to apply this to non-point flow sources such as drainage.
- No.
- Again - Stormwater is not a regulated "outfall" under NPDES. Volumes of stormwater are dependant on God (precipitation), not an engineered process.
- Yes.

Is it reasonable for the agency to require that applicants maintain storm water runoff conditions (volume and pollutant loading) at baseline conditions? In other words is it reasonable to require no net increase in storm water impacts as development and redevelopment occurs?

- No, not for volume, but yes to pollutant loading. Pollutant loading is reasonable as a concentration meeting a standard for effluent with all relevant considerations, including cumulative impacts.
- No it is not reasonable to expect SW will not have an impact. This is a no granted scenario. We are back to baseline, Who develops baseline ??? Big problem.
- Temporary increases would seem reasonable.
- Yes. I believe w/effective BMP's this is possible.
- With LID and other means to manage through infiltration and treatment technologies available for quality it's possible to maintain or reduce from baseline. What's the definition of reasonable in cost and time required?
- No! This is because average storm events do not always occur. The concepts of 10-year, 20-year, and 100 year, etc. storms and associated design criteria have been developed.
- BMPs and maintenance schedules should be required. That should be the focus more than number of gallons.
- Addressed in Construction Stormwater Program?
- I think so. Technology is continually changing and advancing. New methods of handling stormwater are being created, and necessity is the mother of all inventions.

