Nondegradation water rules to become antidegradation

The Minnesota Pollution Control Agency (MPCA) proposes replacing the existing nondegradation water quality rules found in Minn. R. ch. 7050 with new antidegradation rules. The proposed rules clearly align with the federal antidegradation regulatory requirements and provide fair and transparent implementation procedures for regulated activities subject to water quality standards, including antidegradation requirements. Adoption of the proposed rules will reduce the risk of legal challenges, permitting delays and associated costs. Most importantly, the proposed rules will benefit Minnesotans by providing a balanced approach for the protection of water quality and sustainable development.

In preparation for rulemaking, rule development staff has extensively sought input from stakeholders including the regulated community, other regulatory agencies, including Region 5 of the Environmental Protection Agency (EPA), and the public. The rule development staff consulted with MPCA permitting programs, which will be implementing the rules, reviewed other states’ antidegradation rules and implementation procedures, and reviewed court rulings, both in Minnesota and throughout the nation.

What is antidegradation?

The objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” In order to achieve this objective states and authorized tribes are required to develop water quality standards including three elements:

1. Designated uses that establish water quality goals.
2. Water quality criteria that define the minimum conditions necessary to achieve the goals.
3. Antidegradation policies that specify the framework used in making decisions regarding changes in water quality.

Federal regulations require states and authorized tribes to adopt antidegradation policies and identify implementation procedures that, at a minimum, reflect federal policy found in 40 CFR § 131.12. The policy specifies three levels, or Tiers, of protection.

- Tier 1 requires existing uses and the water quality necessary to support those uses to be maintained and protected. Existing uses are those that actually occurred on or after November 28, 1975.
- Tier 2 protects high water quality, which is the quality that exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. High water quality may be lowered only when:
  - It is “necessary” (Can degradation reasonably be avoided or minimized?).
  - It is “important” (Do the economic or social benefits outweigh the degradation?).
  - There is assurance that the highest statutory and regulatory requirements for point sources and best management practices for non-point sources are achieved.
  - There is an opportunity for public participation and intergovernmental cooperation in decisions to lower high water quality.
- Tier 3 requires the maintenance and protection of water quality necessary to preserve specific water resources of outstanding value.

Antidegradation requirements are implemented through the issuance and enforcement of MPCA water quality control documents (e.g., NPDES permits, 401 certifications of federal licenses and permits).
Why is the MPCA revising its current rules?

The rulemaking is occurring for the following reasons:

- The current rules are outdated – the last major revisions were made in 1988. Since that time there have been significant changes to federal water quality regulations and EPA guidance. In addition, the ability to accurately assess water quality and implement effective pollution controls has improved.
- Current methods for determining significant discharges (those requiring review) are not consistent with EPA guidance and recent court decisions, and are not protective of water quality.
- Past and continued potential for litigation challenging the issuance of permits.
- A petition for rulemaking.
- An opportunity to improve how existing water quality is protected.

What are the most significant changes?

The MPCA is proposing a change in terms from nondegradation to antidegradation. While nondegradation may be an accurate description for Tiers 1 and 3 antidegradation protection, which respectively prohibit the removal of existing uses and the degradation of outstanding resource value waters, it is not an accurate term to describe Tier 2 protection – which allows for the lowering of high water quality under prescribed conditions. The change also creates consistency with federal regulations, EPA guidance and other states’ rules and implementation procedures.

The proposed rules:

- Clearly align with federal antidegradation regulatory policy and EPA guidance.
- Contain two sets of antidegradation standards addressing the differences between individual and general permits.
- Contain procedures specific to the various activities the MPCA regulates.
- Provide clarity regarding the information needed of applicants and sequence of actions taken by the MPCA in making antidegradation determinations.
- Identify the factors the MPCA considers in conducting reviews.
- Establish a process for determining the water quality baseline.
- Provide limited exemptions from antidegradation procedures.
- Provide for compensatory mitigation for the loss of existing uses resulting from physical alterations.

The proposed rules do not:

- Contain exemptions from antidegradation procedures for de minimis (i.e., non-significant) discharges.
- Expand the scope of activities currently subject to the nondegradation rules.
- Create additional regulatory authority over currently unregulated activities.
- Alter, other than housekeeping changes, nondegradation provisions found in Minn. R. ch. 7052 (Lake Superior Basin Water Standards) or Minn. R. ch. 7060 (Underground Waters).

More information is available on the MPCA website at: [http://www.pca.state.mn.us/oxpg919](http://www.pca.state.mn.us/oxpg919)