

Note: The comment period for this rule has been extended 90 days to June 6, 2011.

Draft Rule – Surface Water Quality Antidegradation (OAC Rule 3745-1-05)

Note: This rule package along with the water quality standards and 401 water quality certification rule packages are three of four interrelated rule packages that have been available for interested party review since the fall of 2008. The fourth rule package, stream mitigation, is now available for interested party review. The release of the stream mitigation rule package starts a 90-day comment period for all four rule packages. As part of the notice of the stream mitigation rule package, an updated version of the draft Antidegradation rule is being released for review and comment. This updated fact sheet outlines the updates that have been made to the draft rule. A link to each rule package is on the Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

Two rulemakings have occurred since the fall of 2008 that have affected the Antidegradation rule. Some rule revisions were effective on March 15, 2010. Those revisions are included in this draft rule as existing text. Other rule revisions were proposed on October 5, 2010 but are not yet final. Those revisions continue to be shown in this draft rule as draft text.

What is Antidegradation?

Simply put, the antidegradation rule establishes a procedure to determine that a discharge is necessary before authorizing it. The antidegradation rule is required by the Clean Water Act and must be part of the State's Water Quality Standards. It is a concept that aligns with the underlying goal of the Clean Water Act that all point source discharges of pollutants to surface waters should eventually be eliminated and that we keep clean waters clean.

In practical terms, antidegradation refers to provisions that must be followed before authorizing any increased activity on a water body that may result in a lowering of water quality, including an increase in the discharge of a regulated pollutant, or activities that may significantly alter the physical habitat.

The antidegradation rule, along with water quality criteria and beneficial use designations, provides the overall structure of the water quality standards program. The antidegradation rule must protect the existing use of the water body, and only allow a lowering of water quality when it is necessary to support important social and economic development.

The state's antidegradation rule establishes procedures and requirements to ensure that the concepts outlined by the federal regulations are met. These requirements include public participation activities, intergovernmental coordination, determination of important social and economic development, an alternatives analysis and greater protection for exceptional quality streams.

Currently Ohio has two antidegradation rules within its water quality standards to support this program. Ohio Administrative Code (OAC) 3745-1-05 outlines the overall requirements for all appropriate activities on all waters while OAC 3745-1-54 outlines additional provisions to be implemented when evaluating projects relating to impacts to wetlands.

Why is the rule under review?

Section 119.032 of the Ohio Revised Code (ORC) requires Ohio EPA to review its rules every five years to determine whether they should be changed. The current version of Ohio's antidegradation rule became effective on July 1, 2003. The Agency has reviewed this rule and has identified needed changes.

What changes are being considered?

In addition to grammatical and formatting revisions, the following changes are being considered.

- The definition of "best available demonstrated control technology" (BADCT) is being updated to include new design criteria and effluent limits in Table 5-1 of the rule for nitrogen and phosphorus. The design criteria for nutrients would apply to new construction of biological treatment processes at new and existing sanitary wastewater treatment plants with a design average daily flow of 0.5 million gallons per day or greater. Effluent limitations, based on these design

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criteria, would only be included in a permit when the entire biological treatment processes are being installed or rebuilt, not just a portion of the plant. Projects designed exclusively to address treatment of wet weather flows under an approved combined sewer overflow long term control plan would not trigger the nutrient design criteria. In addition, the rule update does not preclude the use of water quality trading to meet effluent limitations, when applicable.

- Definitions for “designated uses,” “existing uses” and “threatened species” are being removed since these definitions are located in the Water Quality Standards definitions rule OAC 3745-1-02.
- Definitions for “loss of use,” “preferred alternative,” “40 C.F.R.” and “12-digit hydrologic unit watershed” are being added.
- The types of alternatives to be considered under the definitions for “minimal degradation alternative” and “non-degradation alternative” in paragraphs (A)(13) and (A)(18), respectively, are being clarified.
- The definition of “regulated pollutant” in paragraph (A)(23) is being revised to make the rule clear that parameters include narrative and numeric water quality criteria in OAC Chapter 3745-1 and those limited by best professional judgment in a National Pollutant Discharge Elimination System (NPDES) permit.
- The rule exemption in paragraph (B)(2)(b) for net increases from existing sources is being clarified. The draft language clarifies two additional situations for which the net increase is exempt: (1) allowing a limit up to that authorized by the immediately preceding NPDES permit; and (2) inclusion of a limit for a previously unpermitted pollutant if the pollutant was present or believed to be in the discharge when the immediately preceding permit was issued as long as there is not an increase.
- New language is included to provide a unifying framework for examining the issue of what constitutes the loss of a beneficial use. Paragraph (C)(1) describes the established “no net loss of wetlands” principle along with a parallel construct to describe the principles applicable to streams.
- The set aside revision process for special high quality waters in paragraph (E)(4) is being clarified.
- Table 5-3, listing Ohio threatened species, is being removed. The Ohio Department of Natural Resources, Division of Wildlife maintains and updates the list of Ohio threatened species. Removing the threatened species table from the rule will eliminate an unnecessary redundancy. Threatened species will continue to be a consideration when determining special high quality water candidates for listing.
- The tables of special high quality waters are being updated. Notable additions include the Mohican

River, Muskingum River, Whiteoak Creek, East Fork Whiteoak Creek, Yellow Creek, the lower 29 miles of Walnut Creek, the lower 20 miles of Todd Fork, and the lower 47 miles of the Tuscarawas River.

What updates have been made to the October 2008 draft version of the rule?

Changes that were effective March 15, 2010 have been included in the draft rule as existing text.

Review procedures applicable to stream and/or wetland dredge and fill projects have been removed. A new rule (3745-32-04) in the 401 water quality certificate rules package contains the antidegradation requirements for these types of projects.

The draft language pertaining to “loss of use” in paragraph (C)(1) has been clarified.

Tables of special high quality waters were updated and include waters in the following basins: Great Miami River, Licking River, Salt Creek (Muskingum River basin), Moxahala River, Killbuck Creek, and Captina Creek.

References to dated material have been updated.

A few corrections have been made in response to public comments received to date.

Who will be regulated by the revised rule?

Applicability of the revised rule will not differ from the current version of the rule. The rule changes clarify and update the rule requirements. In general, any project that proposes to increase the discharge of a regulated pollutant above levels currently authorized through a permit, or any activity that proposes to significantly alter the physical habitat of the water body is subject to an antidegradation review.

What additional information is the Agency seeking?

The Agency wants to hear from interested stakeholders (public, local officials, and NPDES permit holders) who may be impacted by these rule revisions. General comments and specific factual information are welcome.

How are the amendments formatted in the draft rule?

Text being considered for deletion is struck through; new text being considered is underlined.

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What is the rulemaking schedule?

At this time, the Agency is soliciting initial input on these draft rule revisions. Ohio EPA is required by section 121.39(D) of the Revised Code to contact potentially affected parties prior to adopting rule changes.

At the close of the draft rule comment period, the Agency will review the comments and make necessary changes to the rule. The Agency will then file the proposed rule with the Joint Committee on Agency Rule Review (JCARR), the Legislative Service Commission and the Secretary of State.

At that point, a second comment period, including one or more public hearings, will be scheduled. After the close of the second comment period, the Agency will review the comments, make any necessary changes and then adopt the final rule.

Ohio EPA expects to file the proposed rules in the summer of 2011. The final rules could be adopted by the end of 2011.

How can I comment on the draft revisions?

Please submit your comments in one of the following ways:

By email: dsw_rulecomments@epa.state.oh.us

By fax: (614) 644-2745

By postal mail:

Rule Coordinator

Ohio EPA, Division of Surface Water

P.O. Box 1049

Columbus, OH 43216-1049

Comments on the draft rules must be received no later than March 8, 2011.

How can I get more information?

Copies of this fact sheet and the draft antidegradation rule are on the Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

For more information about the draft rule, please contact:

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