

Maryland's High Quality Waters (Tier II)

The Clean Water Act requires three components to water quality standards that set goals for and protect each States' waters. The three components are: (1) designated uses that set goals for each water body (e.g., recreational use), (2) criteria that set the minimum conditions to support the use (e.g., bacterial concentrations below certain concentrations) and (3) an antidegradation policy that maintains high quality waters so they are not allowed to degrade to meet only the minimum standards. The designated uses and criteria set the minimum standards for Tier I.

Maryland's antidegradation policy has been promulgated in three regulations: COMAR 26.08.02.04 sets out the policy itself, COMAR 26.08.02.04-1, which is discussed here, provides for implementation of Tier II (high quality waters) of the antidegradation policy, and COMAR 26.08.02.04-2 that describes Tier III (Outstanding National Resource Waters or ONRW), the highest quality waters. No Tier III waters have been designated at this time.

Tier II antidegradation implementation has the greatest immediate effect on local government planning functions so MDE has prepared the following discussion to provide technical assistance to local governments working to complete the Water Resources Element of their comprehensive plans as required by HB 1141.

1. 26.08.02.04 – 1(B)

“General: An applicant for proposed amendments to **county plans** or **discharge permits** for discharge to Tier II waters that will result in a new, or an increased, permitted annual discharge of pollutants and a potential impact to water quality, shall evaluate alternatives to eliminate or reduce discharges or impacts. **If impacts are unavoidable, an applicant shall prepare and document a social and economic justification.** The Department shall determine, through a public process, whether these discharges can be justified.”

2. 26.08.02.04 – 1(F)(1) – (3)

“(1) Permits. Before submitting an application for a new discharge permit or major modification of an existing discharge permit (for example, expansion), the discharger or applicant shall determine whether the receiving water body is Tier II or, a Tier II determination is pending, by consulting the list of Tier II waters.”

“(2) Water and Sewer Plans (County Plans). As part of its continuing planning process, the Department shall review proposed amendments to county plans for any new or major modifications to discharges to Tier II bodies of water. If a proposed amendment to a County Plan results in a new discharge or a major modification of an existing discharge to a Tier II water body, the applicant shall perform a Tier II antidegradation review.”

“(3) Exemptions. The requirement to perform a Tier II antidegradation review does not apply to individual discharges of treated sanitary wastewater of less than 5,000 gallons per day, if all of the existing and current uses continue to be met.

3. 26.08.02.04 – 1(G)

(1) If a Tier II antidegradation review is required, the applicant shall provide an analysis of reasonable alternatives that do not require direct discharge to a Tier II water body (no-discharge alternative). The analysis shall include cost data and estimates to determine the cost effectiveness of the alternatives.

(2) If a cost effective alternative to direct discharge is reasonable, the alternative is required as a condition of the discharge permit or amendment to the county plan.

- (3) If the Department determines that the alternatives that do not require direct discharge to a Tier II water body are not cost effective, the applicant shall:
- (a) Provide the Department with plans to configure or structure the discharge to minimize the use of the assimilative capacity of the water body, which is the difference between the water quality at the time the water body was designated as Tier II (baseline) and the water quality criterion; and
 - (b) If an impact cannot be avoided, or no assimilative capacity remains as described in Section §G(3)(a) of this regulation, provide the Department with a social and economic justification for permitting limited degradation of the water quality.
- (4) An applicant shall update an antidegradation review when applying for a new permit or major modification to an existing permit.

4. 26.08.02.04 – 1 – L

- (1) Components of the SEJ may vary depending on factors including, but not limited to, the extent and duration of the impact from the proposed discharge and the existing uses of the water body.
- (2) The economic analyses shall include impacts that result from treatment beyond the costs to meet technology-based or water quality-based requirements.
- (3) The economic analysis shall address the cost of maintaining high water quality in Tier II waters and the economic benefit of maintaining Tier II waters.
- (4) The economic analysis shall determine whether the costs of the pollution controls needed to maintain the Tier II water would limit growth or development in the watershed including the Tier II water.

Noteworthy Points

- 1. It is incumbent upon the Counties to know what waters in their jurisdiction are Tier II.
- 2. Amendments to county plans that result in a new discharge to Tier II waters require an antidegradation review. The antidegradation review must consider the following: Can the discharge be avoided or placed elsewhere? If it cannot, has everything been done to minimize that water quality impact? If the impact has been minimized to the greatest extent feasible, but an impact to water quality will still occur, a social and economic justification (SEJ) for that impact must be prepared and approved by the MDE before the discharge can be permitted. The SEJ shall demonstrate that alternatives are not economically feasible and are consistent with Smart Growth. The SEJ process is public, similar to the Administrative Procedure Act requirements for permits.
- 3. Baselines have been established using biological community metrics that provide a cumulative assessment of water quality. This is very helpful for determining that waters are actually of a high quality, but makes it difficult to project what stressors, and the magnitude of those stressors, that will result in unacceptable impacts. MDE will provide technical assistance on this issue and solicits approaches from the local governments on how they would like to address this technically difficult issue.
- 4. Consistent with Maryland policy, Priority Funding Areas are subject to specific, appropriate SEJ provisions.