

Report From Agency

REPORT TO LEGISLATURE

NR 102, 103, 106, 207, 212, and 216, Wis. Adm. Code

Board Order No. WY-13-20
Clearinghouse Rule No. 23-010

Basis and Purpose of the Proposed Rule

Under the federal Clean Water Act, states are required to have an antidegradation policy as well as implementation procedures for the policy as part of their surface water quality standards. The policy and implementation procedures must protect existing uses of rivers, lakes, and streams, as well as protect waters that are doing better than water quality standards (high quality waters) from unnecessary degradation, potentially caused by new or increased discharges from regulated point sources. A state may only authorize lowering of water quality (i.e., increasing the concentration, level or load of a pollutant) of a high quality water if it finds that such lowering is necessary based on a social or economic analysis in the area of the high quality water. Wisconsin has an antidegradation policy (s. NR 102.05(1), Wis. Adm. Code) that has been in place since 1973 and has implementation procedures (ch. NR 207, Wis. Adm. Code) that were last updated in 2006. In 2015, EPA revised its regulations regarding water quality standards, including 40 CFR 131.12, which specifies what requirements state antidegradation policy statements must include.

The purpose of this rulemaking is to revise Wisconsin's existing antidegradation policy to be consistent with federal requirements and to ensure the implementation procedures are both clear and appropriately consistent with the antidegradation policy. It addresses the process for assessing potential degradation of surface water quality associated with proposed new or increased surface water discharges to high quality waters. The process, called "antidegradation review," would take place during a facility's planning stage or its Wisconsin Pollutant Discharge Elimination System permitting stage. The revised process is similar to that already in place but updates the policy and implementation procedures to reflect federal requirements enacted in 2015. As in the existing rule, it would require applicants proposing a surface water discharge that would significantly lower water quality to demonstrate that the discharge is socially or economically important, conduct an alternatives analysis, and select a treatment option that will lessen degradation to the extent practicable.

Previously, antidegradation procedures were in place only for individual wastewater permits although the federal antidegradation policy applies to all regulated sources. In this rule, procedures were added to address how antidegradation requirements would be applied to general permits and to storm water permits. Additionally, to comply with requirements of the U.S. Environmental Protection Agency, the threshold for allowing a streamlined review process was revised such that a somewhat smaller number of applicants may qualify for the streamlined review. To address stakeholder concerns, the department has included language specifying that low-cost pollutant reduction options will be prioritized and clarifying that existing concentrated animal feeding operations already meet antidegradation requirements via existing procedures and will not be required to conduct additional antidegradation review.

Based on the department's assessment, a small number of applicants are expected to be affected by the proposed revisions to this rule each year. The rule is expected to have a moderate (level 2) impact on small businesses.

Summary of Public Comments

See attached "Comments and DNR Responses—Natural Resources Board Order WY-13-20."

Modifications Made

See attached "Comments and DNR Responses—Natural Resources Board Order WY-13-20." The Executive Summary provides a brief bulleted list of revisions made.

Appearances at the Public Hearing

The following members of the public attended the public hearing. None registered or spoke in opposition to the rule.

The following registered or spoke in support of the rule:

- Tony Wilkin Gibart, Midwest Environmental Advocates

- Jim Baumann, Wisconsin's Green Fire
- Cheryl Nenn, Milwaukee Riverkeeper

The following did not indicate support or opposition:

- Vanessa Wishart, Municipal Environmental Group—Wastewater Division
- Chris McNerney, Bad River Nation - Mashkiizibii Natural Resources Department
- Alaina Noll, Oneida Nation
- Tim Fiocchi, WI Farm Bureau Federation
- Jason Mugnaini, WI Farm Bureau Federation
- Chad Zuleger, Dairy Business Association
- Kate Morton, WisPolitics.com
- Peter Kolaszewski
- Lori Mulsoff
- Shannon Benzer
- Evan Miller
- Pete Tomasi
- Thomas Meronek
- Austin Lesmeister
- Greg Breese
- Brenda Sargent

Changes to Rule Analysis and Fiscal Estimate

In the Rule Analysis, the following changes were made:

- Updates to section 5, Plain Language Analysis:
 - Minor wording revisions were made to reflect language changes in the proposed rule.
 - Language was revised to clarify that existing concentrated animal feeding operations (CAFOs) would not require antidegradation review.
 - Under the Antidegradation Screening step, information was added on two steps: “Water quality data screening” and “Other impacts to the receiving water.”
- Updates to section 10 related to the Economic Impact Analysis and Small Business Analysis:
 - A description of the percent of industries that are small businesses was added, with corresponding changes made to the sampling row of the table in section 11.
 - A note was added describing the change to the rule language allowing a permittee to elect whether to collect needed surface water data or to have the department collect it (in the public noticed draft, the permittee was required to collect it).
 - Specificity was added as to why costs for CAFOs are not expected.
- Updates to the table in section 11, Effect on Small Business:
 - The number of sites that may elect to sample water quality data was increased (the department made this cost optional in the revision to the rule language, but did not remove the potential costs from the table in the event that facilities elect to do the sampling themselves). However, the high-end number of facilities that might sample was revised to one fewer than for overall industrial facilities because one facility may not be a small business.
 - An error was corrected in the number of construction sites and estimated cost per facility (this did not affect the total costs).
 - The total costs were updated according to the revisions above.
- In section 12, the contact person for the Board Order was changed.

In the Economic Impact Analysis (EIA), the following revisions were made in response to public comments received:

- Section 9: Overall cost estimates were revised.
- Section 14, 19, and Attachment A: All items described above in the Rule Analysis were also revised in these sections of the EIA. Additionally:
 - In section 19, the table for Annual Cost Summary for Industries was updated to indicate a higher number of facilities may elect to sample water quality (total costs revised accordingly).
- Attachment B: The items described above were explained in more detail in Attachment B. Additionally:
 - Under “Costs to develop an Alternatives Analysis and Social or Economic Analysis,” a clarification was added stating that under the proposed rule, fewer applicants will need to develop a social or economic

analysis than under the existing rule, and this would therefore not be an additional cost. This did not change the cost estimate.

- The total cost tables at the end of the document were updated accordingly.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on form, style and placement; adequacy of references; and clarity, grammar, punctuation and use of plain language.

Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse, except for those discussed below.

Final Regulatory Flexibility Analysis

Based on the Statistics of U.S. Businesses' 2020 Annual Data Tables, the department estimates that 72% of affected industrial facilities (both wastewater permittees and stormwater permittees) are small businesses. From this, DNR estimates that 2 to 3 industrial facilities that are small businesses may need to perform surface water sampling because of the revisions in this rule, and of these, 1 to 2 may need to create an alternatives analysis. On a per-project basis, the same costs are applied for both small and larger businesses. The costs would be similar, although small businesses may have somewhat lower costs than larger industries because the rule provides that materials submitted during this process are scalable to the size of the facility/project.

The department has considered the methods outlined in s. 227.114(2)(a) to (e), Wis. Stats., and has concluded that, based on existing state and federal regulations, the department cannot exempt small businesses from sampling and antidegradation demonstration requirements. Small businesses still have the potential to significantly affect high quality waters with their discharge(s). Additionally, Wisconsin's WPDES permit program is based on the requirements in ch. 283, Wis. Stats., and the state's permitting program must be consistent with federal NPDES permit requirements established in the Clean Water Act and applicable federal regulations. Federal regulations do not allow less stringent requirements categorically for small businesses. However, the proposed rule contains allowances to scale the facility's sampling and application materials commensurate with the size of the project.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.