Comments and DNR Responses
Natural Resources Board Order WY-13-20
August 23, 2023

This document presents a summary of public comments received on a proposed rule revising the state's Antidegradation policy and implementation procedures housed in chs. NR 102, 207, and 216, with corresponding reference updates in chs. NR 103, 106, and 212. Responses from the Department of Natural Resources (DNR, sometimes referred to by commenters as WDNR or department) are provided below.

OVERVIEW

The proposed rule updates the state's water quality antidegradation policy and procedures to ensure consistency with federal requirements and overall modernization. It addresses the process for assessing potential degradation of surface water quality associated with proposed new or increased discharges to high quality waters. The process, called "antidegradation review," would take place during the 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. Based on the DNR's assessment, a small number of applicants are expected to be affected by the proposed revisions to this rule each year.

A Stakeholder Advisory Committee met four times to review and provide feedback on the concepts and draft language for this rule. Committee members were provided two draft versions of the rule to review and respond to prior to the formal public comment period. These organizations included Midwest Food Processors Association, Wisconsin Cheesemakers Association, Wisconsin Transportation Builders Association, Wisconsin Paper Council, Wisconsin Manufacturers and Commerce, Central States Water Environment Association, Wisconsin Dairy Alliance, Wisconsin Farm Bureau, and Dairy Business Association. Also included were municipal consulting firms, individuals representing construction discharges, environmental groups, EPA, the Municipal Environmental Group and Wisconsin Rural Water Association.

In addition to the statutorily required public notices and posting of materials, email notification was sent to the following distribution lists, totaling 5,863 recipients:

- Water Quality Standards & Assessments GovDelivery List
- Advisory Committee Members who had worked on rule development
- DNR and U.S. EPA staff

Individual letters were sent to Tribal leaders of the eleven federally recognized tribes in Wisconsin on March 21, 2023, along with an email to Tribal leaders and their Tribal Conservation Departments. These notifications offered consultation and provided rule materials for review.

ECONOMIC IMPACT ANALYSIS

A public comment period on the draft economic impact analysis (EIA) occurred from December 12, 2022, to January 11, 2023. Three comment letters were received, representing seven organizations. DNR revised the cost estimates contained in the EIA in response to some of the comments received, by increasing costs for water quality sampling and including costs for one additional storm water facility with an individual permit. DNR also added a section on the economic benefits of protecting high quality waters. DNR disagreed that costs would exceed $10 M over a 2-year period, as was asserted by one group of commenters. Several clarifications were added to the EIA supporting document. Although not required, DNR developed a concise response to comments on the EIA and provided it to the commenters as an informational resource prior to the public comment period.

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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.

PUBLIC COMMENTS ON DRAFT RULE

A 54-day public comment period on the draft rule occurred from March 27, 2023, to May 19, 2023, with a public hearing on May 12, 2023. The DNR received 8 comment letters and emails from 3 additional commenters, representing a total of 19 individuals and organizations.

In total, 32 entities (19 organizations and 13 individuals) submitted comments and/or attended the public hearing. Of all commenters (including those at the hearing), 9 were in support of the rule; 5 were in opposition; 3 addressed specific concerns but did not specify support or opposition, and 10 did not express a position. These are broken down as follows:

- The hearing had a total of 19 attendees (not counting DNR staff); 9 of these registered as a representatives of an organization. Three attendees registered in support of the rule, none in opposition, and 16 neither in support nor opposition. Two people provided oral statements at the hearing in support of the rule, and one spoke addressing specific concerns but did not specify support or opposition.
- Of the written letters/emails received, 3 letters and 3 emails representing 4 organizations and 4 individuals were in support; 1 letter representing 5 organizations was in opposition, and 3 letters raised specific concerns but did not specify support or opposition. Some of the letters received were from organizations also represented at the hearing.

EXECUTIVE SUMMARY OF CHANGES MADE IN RESPONSE TO COMMENTS

The DNR made several adjustments to the proposed rule in response to comments received during the public comment period. These adjustments improve the rule by ensuring that rule language closely reflects federal language, providing additional clarity throughout, identifying additional cases in which antidegradation review is not required, adjusting the process for sample collection to further reduce costs, addressing concerns about project delays, and responding to additional questions surrounding the economic impact analysis. Throughout, the DNR has modeled rule requirements to be reflective of federal antidegradation regulations.

This summary provides a bulleted list of revisions made at the request of stakeholders. Revisions include, but are not limited to, the following:

- Added detail to the Applicability sections of ss. NR 207.011 and 216.008, clarifying at what stages of permitting the rule applies.

- Identified additional instances that would not require antidegradation review:
    - Specified that a facility may increase its discharge if it will remain within its existing permit limitations without antidegradation review.
    - Specified that existing concentrated animal feeding operations (CAFOs) seeking an alternative effluent limitation already meet antidegradation requirements via existing procedures under s. NR 243.13, Wis. Adm. Code, and will not be subject to additional antidegradation review.
    - Added an exemption for, and definition of, temporary discharges.
    - Lengthened the allowable outfall relocation distance that would not require antidegradation review.

- Reduced costs and/or obligations:
    - Replaced the prior requirement for applicants to collect water quality data with an option for the applicant to select whether it prefers the department or the applicant to obtain the necessary data.
    - Added language stating that the department may approve low-cost options such as source reduction or optimization of the existing treatment plant as acceptable practicable alternatives.
    - In the general permit sections, removed a statement that the DNR may request information from potential applicants who may discharge under a general permit to instead state in a note that the DNR may consult with sector representatives.

- Revised the economic impact analysis (EIA):
    - Revised the small business impacts table to reflect that 79% of Wisconsin industries are small businesses.
    - Note: Although applicants are no longer required to collect additional water quality data, the cost estimate for this item was kept in place since some applicants may elect to do so.

- Revised process details to prevent delays:
    - A concern about project delays was recognized by moving the screening step earlier in the process. This will require only brief information from the applicant but will allow the department to provide formal feedback about the project and information requirements at an early enough stage for applicants to provide complete information for the antidegradation review at the time they submit their permit application, facility plan, or plans and

specifications. It will also allow either the DNR or the applicant (applicant's choice) to begin collecting additional water quality data in a timely manner, if needed. The DNR included a recommended timeline for submittal of the screening materials in a note, but this is not a requirement; the applicant has flexibility depending on their project. A graphic showing the steps and approximate timeline are provided in Figure 1 of this document.
    - If the applicant submits a complete antidegradation application with their permit application, facility plan, or plans and specifications, DNR's determination of whether the antidegradation policy has been satisfied will be included in the public notice for the WPDES permit or facility plan, maintaining the same final determination timeline as required for WPDES permits.
    - Specified that the "significance determination" is used to determine eligibility for a streamlined review process.

- Practicable alternatives analysis:
    - Revised the title of the section to include the term "practicable" and updated language in the section accordingly.
    - Revised language in alignment with federal language to clarify that a practicable alternative must be selected *if one is available.*
    - Revised language related to the facility's currently installed treatment technology to include a consideration of practicability.

- Added language in the section on total maximum daily loads detailing when a new or increased discharge may be allowable and when it would require antidegradation review.

- Storm water-specific changes:
    - Relocated provisions applicable to storm water into the storm water rule at s. NR 216.008. Previously, s. NR 216.008 cross-referenced substantial material from the wastewater rule, s. NR 207.031. Stakeholders requested that any language pertinent to the storm water rule be inserted into ch. NR 216 for ease of reading.
    - Specifically identified the information the DNR may request for purposes of conducting the antidegradation screening or review.
    - Revised language on use of storm water performance standards and prohibitions and when additional permit conditions may apply.
    - Removed the rule language related to department determinations to require permit coverage under certain municipal cases, as it was not identified in the scope statement although statutory authority exists.

- Other select clarifications:
    - In the section on reviewing nonpoint source impacts, clarified that only impacts for the parameters of concern in the antidegradation review would be considered. Additionally, removed the language restricting this review to *state-regulated* discharges for consistency with federal language.
    - Clarified that once a facility has received coverage under a general permit, further antidegradation procedures are not required.
    - Revised stormwater language to replace an incorrect reference to "least-degrading" with "less-degrading" alternatives.
    - Added clarity about how the state's intergovernmental coordination provisions are satisfied.
    - Additional clarifications were incorporated throughout as needed.

The DNR did not make changes in response to comments where such changes would be inconsistent with federal requirements or otherwise infeasible. These include the following topics:

- The scope of the rule was retained to include general permits and stormwater permits. Because these are permitted point source discharges, they are both covered under federal antidegradation regulations.

- Economic impact analysis:
    - The DNR respectfully disagrees that the cost thresholds for rulemaking have been exceeded. Section 227.137(3)(b), Wis. Stats., requires that the economic impact analysis forecast 1) the total implementation and compliance costs "reasonably expected to be incurred…as a result of the proposed rule, expressed as a single dollar figure" and 2) a determination as to whether $10 million or more in implementation and compliance costs "are reasonably expected to be incurred…over any 2-year period." The EIA reflects all costs that the DNR reasonably expects to be incurred based on permittee data and a thorough understanding of the rule implementation. Detail is provided throughout this document and the economic impact analysis as to various cost considerations.
    - A commenter requested that costs be included for development of the social or economic analysis. However, under the proposed rule, fewer facilities will need to develop this analysis than under the existing rule, so this will be a cost reduction for some facilities. It was therefore not added to the EIA.

- Definitions and categories:
    - Waters that are designated as limited aquatic life or limited forage fish and unidirectional flow waters with a low flow of zero are retained under the non-high quality waters category. More clarity was added to the latter category.
    - The definition of "increased discharge" was not restricted to only "actual" discharges, because the antidegradation rule expressly pertains to *proposed* changes that have not yet occurred.
    - Aside from certain exceptions, relocated outfalls are still considered new discharges.
    - The federal definition of "practicable" is retained, to ensure it is neither more nor less stringent than federal regulations.
    - The cross-reference to wetland provisions in ch. NR 103 has been retained. This does not impose new requirements.

- Streamlined review and significance determination for wastewater discharges:
    - The DNR retained the significance threshold for eligibility for streamlined review at 10% of the waterbody's assimilative capacity. This provides an option for streamlined review (which many states do not have) and is within the range that EPA has determined to be approvable in the recent past. The one-time use of the 10% threshold was also retained.
    - Additional provisions for small projects were not added, as there are already flexibility factors in place for small projects. These include the streamlined review process and the provision that if additional analyses are required for a full review, they may be tailored to the size and scope of the project.

- A significance determination was not included for the storm water antidegradation review, because it is infeasible under storm water permitting procedures, which differ from wastewater permitting procedures.

- The DNR did not establish a cumulative cap on the amount of a waterbody's assimilative capacity that may be used. DNR may approve use of the assimilative capacity if the antidegradation policy and procedures have been satisfied.
- The use of water quality data was not limited to data collected within the last 5 years, but language was added to state that data must still be representative of current conditions.
- Social or economic analysis:
    - A hard economic threshold of 110% of capital costs was not included as part of the economic analysis, because U.S. EPA has expressly disapproved similar provisions in other states.
    - The factors listed under this analysis were retained as they are broad enough to allow other types of factors to also be considered, and explicitly contain an "other items" category.
- The DNR cannot remove its obligation to consider nonpoint sources as this was a previously existing federal requirement. However, the rule specifies that this is DNR's obligation rather than the applicant's, and language was added to clarify that only certain pollutants in question would be reviewed.

A complete summary of the comments received and DNR responses follows.

Note: Some portions of the proposed code have been renumbered since the public comment version was provided. In this document, unless otherwise noted, the code citations reflect the numbering in the final draft being submitted to the Natural Resources Board.

PUBLIC COMMENT SUMMARY AND RESPONSES

The following is a summary of comments received and the DNR's response. If comments were from an organization, the organization is indicated at the start of the comment. Otherwise, comments are from individuals.

The following acronyms for organizations submitting comments are used throughout:

CW	Clean Wisconsin
MEA*	Midwest Environmental Advocates
MEG	Municipal Environmental Group – Wastewater Division
MWFPA	Midwest Food Products Association
RAW	River Alliance of Wisconsin
U.S. EPA	U.S. Environmental Protection Agency
VDC	Venture Dairy Cooperative
WCMA	Wisconsin Cheese Makers Association
WDA	Wisconsin Dairy Alliance
WGF	Wisconsin's Green Fire
WMC**	Wisconsin Manufacturers and Commerce
WPC	Wisconsin Paper Council
WTBA	Wisconsin Transportation Builders Association

*MEA et al. includes MEA, CW, and RAW

**WMC et al. includes WMC, WPC, MWFPA, VDC, and WDA

Comments from WMC et al. are attached in their entirety at the end of this document (in Section H) along with DNR responses.

Comments received by other parties are categorized into the following groups:

A. General
1. Antidegradation updates required by Clean Water Act delegation
2. Scope of rulemaking
3. General support of the rule

B. Antidegradation Policy
4. Applicability
5. High quality waters definition
6. Non-high quality waters definition
7. Great Lakes system

C. Wastewater Individual Permits
8. Applicability of implementation procedures
9. New or increased discharge definition
10. Total Maximum Daily Loads (TMDLs)
11. Compliance of state-regulated nonpoint source discharges
12. Water quality data
13. Requirements for Outstanding or Exceptional Resource Waters (ORW/ERW)
14. Significance threshold
15. Cumulative cap on significance threshold
16. Social or economic analysis
17. Alternatives analysis
18. Concentrated Animal Feeding Operations (CAFOs)
19. Departmental review
20. Public review

D. Wastewater General Permits

E. Stormwater Individual Permits
21. General
22. Increased discharge definition
23. Screening
24. Water quality data and additional information
25. Significance determination
26. Departmental review

F. Stormwater General Permits

G. Cross-reference or numbering errors

H. WMC et al. comment letter and DNR responses

A. GENERAL

1. Antidegradation updates required under Clean Water Act delegation and Public Trust Doctrine

Comments:

- MEA et al.:
    - "DNR is required to update Wisconsin's Antidegradation Policy to comply with the CWA [Clean Water Act]. All states that have been delegated authority from the EPA to operate a water pollution permit program pursuant to Section 402 of the CWA must ensure the administration of that program continues to comply with the minimum requirements of the CWA and its implementing regulations. The failure of states to update their statutes and regulations to ensure program administration in compliance with the CWA could result in an order from the EPA for those states to take corrective action, overpromulgation of inadequate state rules, and even the withdrawal of a state's authority to continue administering the program." The commenters' letter provided a history of efforts by their organizations and the DNR to update antidegradation rules, highlighting inconsistencies between DNR rules and federal requirements that were identified within their 2006 letter and 2015 Petition for Corrective Action.
    - "Adopting the proposed draft rule is long overdue and required to ensure the WPDES [Wisconsin Pollutant Discharge Elimination System] program is implemented in compliance with federal law. Otherwise, DNR runs the risk of having the EPA overpromulgate Wisconsin's antidegradation implementation procedures. If Wisconsin proposes an inadequate antidegradation policy, then the CWA requires EPA to inform Wisconsin as to the inadequacies in the proposed rule and direct that they be addressed. If Wisconsin does not fix the inadequate rule within 90 days, then EPA is required to propose and publish a rule of its own for Wisconsin that would comply with the CWA's requirements. In the alternative, EPA could also grant the PCA, order DNR to take corrective action, and even rescind DNR's authority to continue implementing the CWA in Wisconsin."
    - "Under the state Constitution, Wisconsin's waters are held in trust for the use and benefit of all people. These protected uses extend to recreation, fishing, and myriad other uses that are only possible with high water quality. The Legislature has delegated public trust responsibilities to DNR. In doing so, the Legislature affirmatively required and authorized DNR to "formulate plans and programs for the prevention and abatement of water pollution and for the *maintenance* and improvement of water quality." In this context, DNR's public trust duties to maintain water quality means, at a minimum, that high quality waters sustaining core public uses cannot be polluted to such an extent that those uses are no longer possible."
    - "neither DNR's statutory nor public trust obligations would be met if it fails to promulgate a rule to bring DNR in compliance with the CWA."
    - They expressed overall support for the rule, while providing specific comments on certain portions of the rule that are responded to in other topic areas of this document.
- An individual commented: "Revising the antidegradation rule (NR 102, NR 207 and associated rules) to be consistent with federal requirements has been a high priority work item for Wisconsin DNR for over 15 years. Not only have DNR staff recognized areas of inconsistency, but environmental groups

and EPA have pointed out the inconsistencies or areas of concern in Wisconsin's existing antidegradation regulations in several communications over the years. Wisconsin's implementation of antidegradation was a part of the 2015 petition before EPA to de-delegate Wisconsin's whole water pollution discharge permit program. EPA has apparently delayed action on the petition knowing that Wisconsin DNR has been committed to revising its antidegradation rule.

Two aspects of the 2015 revisions to EPA's water quality standards are relevant. First, EPA stated the process of formally finding a state's water quality standards as being deficient, leading to EPA's overpromulgation of those deficient standards. Second, the 2015 EPA rule clearly laid out what states must include in their antidegradation policies and, indirectly, in the associated implementation procedures. Wisconsin's proposed rule contains all the required elements of the federal rule. Adopting the rule with all these elements intact will reduce the risk that EPA would find Wisconsin's rule deficient and establish a federal antidegradation policy and procedures for Wisconsin."

Response: The DNR agrees that as a federally delegated authority, it is required to comply with federal requirements under the CWA, including the federal antidegradation requirements issued in 2015.

2. Scope of rulemaking

Comments: WTBA: "In discussions with the Antidegradation Stakeholder Advisory Committee (Advisory Committee) in 2022, the Department indicated that the rulemaking targets issues identified in a 2021 letter it received from EPA. The letter, sent in response to the Department's request, points to areas DNR should review but does not specify changes to Wisconsin's rule. It also does not indicate that a rulemaking of this breadth is necessary to obtain EPA approval of Wisconsin's antidegradation policy. The key change made by EPA in 2015 that is now incorporated into the proposed rule is the alternatives analysis required prior to finding that a lowering of water quality is necessary to accommodate important economic or social development. While EPA considered other changes at that time, most were not made. The proposed rule should be narrowed in scope to incorporate only new requirements adopted in 2015."

Response: As provided in the Board Order for the proposed rule, DNR has broad authority to promulgate an antidegradation policy and implementation procedures under chs. 281 and 283, Wis. Stats. In particular, s. 281.15, Wis. Stats., authorizes DNR to promulgate water quality standards, which encompass antidegradation requirements. While DNR focused on addressing items within EPA's 2021 letter, it also reorganized the existing code to provide a more logical sequence and to address sections that had previously been unclear. These revisions also address how antidegradation applies to storm water and general permits, since they are point source discharges that can lower water quality but were not contemplated within the existing codes. In addition to EPA's 2021 letter, DNR also reviewed 40 CFR Part 131.12, 40 CFR Part 132 Appendix E, volumes of the Federal Register, EPA's Water Quality Standards Handbook, and other EPA guidance documents to ensure the proposed rule is consistent with federal requirements.

3. General support of the rule

Comments: Individuals commented:

- "I submit the following comments as a citizen of Wisconsin who is informed about the regulatory scheme for protecting water quality in our state. In my experience, Wisconsin citizens, municipalities, businesses and visitors value and support having clean rivers, lakes and streams. They want to continue to recreate on and enjoy high quality waters, and they become concerned when the quality of their favorite waterbody declines. The federal Clean Water Act as well as Wisconsin's own laws made provision for protecting high quality waters from receiving any more pollution than is absolutely necessary, so that existing high quality is preserved and degradation is prevented as much as possible. Proposing and adopting this rule is a critical and overdue step to ensuring that high quality Wisconsin waters are adequately protected."

- "The proposed rule achieves the objective of clarifying what waters are high quality, when an antidegradation review is required, what information will be required and how antidegradation applies to WPDES permits for CAFO and stormwater, in addition to traditional wastewater discharges. The implementation procedures are laid out in the same sequence that the Department will consider information, making the procedures more straightforward to follow. The improved clarity provides certainty to the regulated community and ensures consistent implementation of antidegradation protections."

- "Wisconsin DNR, while on an admittedly short timeline, sought input on WY-13-20 from a broad range of stakeholders that included the regulated community (wastewater, CAFO and stormwater), environmental groups and partner agencies. The Stakeholder Advisory Committee members were given opportunities to comment on concepts as the rule was being drafted as well as having early access to drafts of the rule and supporting materials ahead of formal comment periods. Adjustments were made to rule language in response to stakeholder input; these were made part of the draft rule that went to public notice."

- "we … are always concerned about how discharges upstream might impact health of downstream waters or water supplies…" Noted that they support the conditions addressing bioaccumulative chemicals of concern.

- "Regarding policies being worked on regarding any outstanding/special waters in Wisconsin, PLEASE do everything possible to save our water supply." Commenter expressed particular concern with runoff from dairy farms.

  Response: Thank you for your support of the proposed rules. The DNR agrees that these rules are necessary for consistency with federal regulations, clarification of the implementation procedures, and continued protection of Wisconsin's waterways. The DNR worked with stakeholders across the spectrum of interests to provide advance review of concepts and materials and to identify and respond to concerns raised.

C. ANTIDEGRADATION POLICY

4. Applicability

Comment: U.S. EPA: "Federal regulations at 40 CFR § 131.2 state that water quality standards "serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act." As discussed in Chapter 4 of EPA's Water Quality Standards Handbook, because one of the purposes of water quality standards is to describe the desired condition of the aquatic environment, water quality standards "are applicable to all waters and in all situations, regardless of activity or source of degradation. … It is acceptable for a State to specify particular classes of activities for which no control requirements have been established in State law. It is not acceptable, however, to specify that standards do not apply to particular classes of activities."

Wisconsin's proposed antidegradation policy at NR 102.045 includes the following language that would restrict applicability of the policy to only regulated discharges:

- "[n]o high quality waters of the state shall be lowered in quality *by a new or increased regulated discharge…*" (NR 102.045(1), emphasis added);
- "[e]xisting uses and the level of water quality necessary to protect the existing uses shall be maintained and protected from degradation *caused by regulated discharges*" (NR 102.045(3), emphasis added); and
- "[f]or other high quality waters with assimilative capacity identified on a parameter-by-parameter basis under sub. (2)(b)4., water quality shall be maintained and protected from degradation *caused by regulated discharges*…" (NR 102.045(5), emphasis added).

As proposed, the antidegradation policy would not serve both purposes of water quality standards because it would not apply in all situations and, thus, would not provide the full protections required under 40 CFR § 131.12(a). To ensure that Wisconsin's antidegradation policy applies to all activities, consistent with 40 CFR § 131.2, Wisconsin Department of Natural Resources (WDNR) should remove the references to regulated discharges in NR 102.045. The State's antidegradation implementation procedures may provide that WDNR will implement the antidegradation policy through control documents for regulated discharges."

> **Response:** Revised. In the three instances cited above, the portions italicized in the comments have been removed from the rule language in recognition that the antidegradation policy applies to all surface waters and in all situations. However, as before, the DNR may focus its implementation efforts on existing authorities for regulated, point-source dischargers.

Comment: WTBA: "The Department indicated to the Advisory Committee that antidegradation screenings and reviews would not apply to existing permits upon promulgation. Rather, the review requirements would first apply to new or increased discharges at the time of permit issuance or renewal. This initial applicability should be clarified in the rule."

Response: Language was added to ss. NR 207.011(2) and 216.008(2) to specify that the new antidegradation provisions apply to applications submitted to DNR after the effective date of the rule. It further provides more clarity on the types of actions that would trigger an antidegradation review.

5. High quality waters definition

Comments:

- "WGF supports the continuation of the protection provided through this policy to Wisconsin's outstanding and exceptional resource waters and any national outstanding resources waters, if identified." [at S. NR 102.045 (4)]
- "WGF supports the hybrid approach for assessing high quality waters on a water type basis and a parameter-by-parameter basis that is first presented in this definition section." [at S. NR 102.045 (2) 4.]
- An individual commented: "Wisconsin has for a long time minimized degradation to certain waterbodies that are defined in its current rules. The proposed rule appropriately extends antidegradation protection to waterbodies that, while not currently identified as Outstanding or Exceptional Resource Waters, have water quality that exceeds at least some of the goals set for them, i.e., are doing better than simply meeting an applicable water quality standard."

Response: Thank you for your support.

6. Non-high quality waters definitions

Comment: U.S. EPA: "Under the proposed definition of "non-high quality waters" at NR 102.045(2)(c), all "[u]nidirectional flow waters that have an upstream low flow of zero" would not be considered "high quality waters" subject to the requirements of NR 102.045(5) because they do not have assimilative capacity. However, streams with zero flow during certain times of the year may have measurable flow with assimilative capacity during the rest of the year. To ensure that the antidegradation policy at NR 102.045(5) applies to all waters "where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water," consistent with 40 CFR § 131.12(a)(2), EPA recommends that Wisconsin not identify "high quality waters" based on flow and instead rely on background concentrations."

Response: No change. Zero flow waters are considered to have no assimilative capacity, and therefore their limits are set equal to criteria. This is already the most protective outcome under the antidegradation policy, so further antidegradation review would not result in more protection for these waters. Therefore, DNR is retaining their status under "Non-high quality waters" that do not require further antidegradation review. If there are downstream waters that are high-quality, antidegradation review would be required to protect those waters.

Comment: U.S. EPA: "Additionally, all waters "designated as limited aquatic life or limited forage fish under ch. NR 104 would not be considered "high quality waters" subject to the requirements of

NR 102.045(5). As defined at NR 102.04(3)(d) and (e), limited aquatic life and limited forage fish waters are waters of "limited capacity and naturally poor water quality or habitat." Consequently, these waters would not be expected to be high quality with respect to aquatic life. However, recreation is not considered when designating limited aquatic life and limited forage fish waters. Federal antidegradation regulations at 40 CFR § 131.12(a)(2)(i) specify that states shall not exclude waters from the requirements of 40 CFR § 131.12(a)(2) "solely because water quality does not exceed levels necessary to support *all of the uses specified in section 101(a)(2) of the Act*" [emphasis added]. If any limited aquatic life or limited forage fish waters would be considered high quality with respect to recreation, then those waters should be considered "high quality waters" subject to the requirements of NR 102.045(5) under Wisconsin's antidegradation policy."

> **Response:** No change. DNR does not consider limited aquatic life (LAL) or limited forage fish (LFF) waters to be "high quality" waters for recreation for purposes of antidegradation review. The state's recreational use applies to all surface waters, including LAL and LFF. Water quality must be maintained in all waters sufficient to meet recreational use water quality criteria. However, DNR does not consider them to be high quality recreational waters requiring antidegradation review. In the event of a new or increased discharge, the permitting processes specified in the existing codes will ensure that water quality standards are met for these waters to keep them safe for general recreational exposure.
>
> The public participation process for this rule serves as the opportunity for stakeholders to provide feedback on whether LAL or LFF waters should be considered high quality, and no comments were received from the public indicating that they felt LAL/LFF should be considered high-quality waters for aquatic life or recreation.
>
> In practice, the environmental outcome will be largely the same under either category, because facilities on LAL/LFF waters will already be obligated to do an antidegradation review to protect downstream waters in most cases.

Comment: An individual asked "how if at all antideg will be implemented to ensure that we are not further exacerbating pollution in the "not as healthy as we'd like" waters." The commenter also asked specifically about waters listed for chloride (salt), for which there are no total maximum daily loads (TMDLs) yet, and whether antidegradation procedures would apply to any new or increased discharges of chlorides.

> **Response:** For waters that are impaired (not meeting water quality criteria), facilities' limits would be set equal to criteria for the pollutant that it's impaired for. In those waters there is no assimilative capacity and so proposed new or increased discharges would have to meet the criteria. Antidegradation procedures do apply to proposed new or increased discharges of chlorides. For storm water discharges, a discharge of a pollutant of concern to an impaired water where there is not a TMDL shall follow the applicable requirements in ss. NR 216.007, 216.07 (10) (b), 216.27 (3) (j) 6., and 216.49 (3), Wis. Adm. Code.

7. Great Lakes system

Comment: "WGF supports the amended definition of "Great Lakes system" to include all the waters including Lake Michigan and Lake Superior [at NR 102.03 (1pr)]. WGF also supports the same change in NR 106.03 (4r)."

Response: Thank you for your support.

D. WASTEWATER INDIVIDUAL PERMITS

8. General

Comment: "WTBA shares concerns related to wastewater permits raised in Section VIII of the comments jointly submitted by the Wisconsin Paper Council, WMC, the Midwest Food Processors Association, Venture Dairy Cooperative and the Wisconsin Dairy Alliance."

Response: So noted. Please see responses provided to those comments under section H.

9. Applicability of implementation procedures

Comment: U.S. EPA: "NR 207.011(a) *[Sic: the intended reference here is ch. NR 207.11(1)]* states that "this subchapter sets procedures applicable to proposed new or increased discharges to high quality waters as defined under s. NR 102.045(2)(b)." Similarly, the introduction to the proposed antidegradation implementation procedures for individual Wisconsin Pollutant Discharge Elimination System permits at NR 207.031(1) only discusses the general procedures for high quality waters. However, the proposed antidegradation implementation procedures also establish procedures that implement the antidegradation policy for non-high quality waters (e.g., NR 207.011(2) and NR 207.031(2)) and outstanding state or national resource waters and exceptional resource waters (e.g., NR 207.031(6)). EPA recommends that WDNR clarify the applicability of the implementation procedures to ensure that the implementation procedures address all waters."

Response: Revised. Sections NR 207.011(1) and 207.031(1) have been revised to indicate that they apply to "the surface waters of the state."

10. New or increased discharge definition

Comments:

- MEG: "Under the current antidegradation policy, an "increased discharge" is defined as "any change in concentration, level or loading of a substance which would exceed an effluent limitation specified in a current WPDES permit." Wis. Admin. Code § NR 207.02(6)(a). The proposed rule broadens this definition in a manner not mandated by federal requirements. Under the proposed rule, an "increased discharge" is defined as: "any actual or expected change in concentration, level, or loading of a substance that is caused by or will be caused by a facility expansion, outfall relocation, process modification, connection of a pollutant source to an existing public or private wastewater treatment system, or other change, including the initial imposition of an effluent limitation for a parameter that

has not previously had a limit in an existing WPDES permit, except as specified under par. (b) 3." This proposed, broader definition could require a permittee to implement a costly antidegradation review even in instances where a permittee would remain in compliance with the current water quality based effluent limitations in its WPDES permit." They raised this concern in relation to two scenarios:

- Regionalization projects where one municipality seeks to discontinue its discharge and send its wastewater to a second municipal plant for treatment. "This scenario should not result in Municipality B having to undergo an antidegradation review when it would not alter its ability to comply with the water quality based effluent limitations that have been developed and included in its permit to meet water quality criteria."
- "If a POTW begins accepting wastewater from a new industrial discharger and can do so while continuing to comply with its current permit limitations, that POTW should not have to undergo an antidegradation analysis." Of concern here was "The inclusion of language regarding the "connection of a pollutant source to an existing public or private wastewater treatment system" in the definition of an "increased discharge".

"As the department continues to support regionalization of wastewater treatment facilities and the ability of communities to continue to develop, we encourage the department to ensure that POTWs have the flexibility necessary for these projects. To provide this flexibility, MEG requests that DNR revise the proposed definition of "increased discharge" to ensure permittees are not subject to antidegradation review in these types of scenarios."

Response: Revised. The DNR's intent was to continue the current practice to allow increases that would not exceed existing permit limits. The definition of increased discharge was revised to clarify how this would be handled for increases of concentration or mass. This should allow cases such as those specified above to proceed without antidegradation review if they continue to meet existing permit limits.

Comment: U.S. EPA: "Under the proposed definition of "increased discharge" at NR 207.021(3)(b)(3), the "issuance of a [Wisconsin Pollutant Discharge Elimination System] individual or general permit for an existing discharge that did not previously require authorization under state or federal regulations" would not be considered an increased discharge subject to the antidegradation implementation procedures. Although discharges that meet this definition would not be increasing their concentration or loading rate, these discharges would not have previously undergone an antidegradation review. Therefore, an antidegradation review should be conducted for these discharges to ensure that degradation is minimized, and the discharge is consistent with the antidegradation policy."

Response: No change, except for clarifying the language. The antidegradation review process applies only to new or increased discharges. For situations involving a new category of dischargers:

- For individual permits, if an existing discharger is not proposing to increase their discharge, at permit issuance the DNR would determine that an antidegradation review is not needed since no increased degradation of the receiving water would occur.
- A new facility seeking an individual permit for a new category of discharges would qualify as a new discharge and antidegradation review would be required.

- For a new general permit applying to a new category of discharges, antidegradation provisions will be included in the general permit conditions. Therefore, any new or existing facilities seeking coverage under the new general permit would be subject to the antidegradation provisions.

Comments:

- MEG disagrees that outfall relocations should be considered as new or increased discharges unless they are also requesting less restrictive permit limits. They request that "the reference to outfall relocation be removed or modified in each definition."
    - They note that outfall relocation is often required due to degradation of current outfalls or facility modifications or upgrades, and that the exemptions offered in the rule are "of limited practical use," for example citing "the construction footprint required for most outfall relocations would necessitate that the outfall be constructed well over 50 feet from the current outfall."
    - The inclusion of outfall relocations in the proposed definition of "new discharge" is not supported by similar definitions in state or federal law. Elsewhere in state code, an "existing source" is defined by coverage under a WPDES permit as of a certain date, similar to the current definition of a "new discharge" in the current Wisconsin antidegradation code. Federal code implementing the Clean Water Act does not explicitly define a "new discharge." However, the definition of "new discharger" suggests that most outfall relocations for currently permitted discharges should not be included in the definition of a "new discharge" for antidegradation purposes. Federal code defines a "new discharger" as:
        - any building, structure, facility, or installation: (a) From which there is or may be a 'discharge of pollutants;'

          (b) That did not commence the 'discharge of pollutants' at a particular 'site' prior to August 13, 1979;

          (c) Which is not a 'new source;' and

          (d) Which has never received a finally effective NPDES permit for discharges at that 'site.'
        - 40 C.F.R. § 122.22. The term "site" is defined as "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." *Id*. These definitions, including the broad use of the terms "land or water area," support the conclusion that unless a relocated outfall is proposed to be located on an entirely different site, an outfall relocation undertaken by a historically permitted discharger should not constitute a new discharge.
        - Taken together, these definitions support retaining the current definition of "new discharge" in the code and not expanding that definition to explicitly include relocation of outfalls for POTWs currently operating under a WPDES permit. We encourage the department to retain the current definition of "new discharge" to provide the necessary flexibility for facilities that need to undertake outfall relocation.

Response:

- Revision made to the distance threshold for a relocation. Upon further discussion with MEG, MEG recommended that "in general, 100 feet would provide a more reasonable distance for replacement of an outfall where the intent is to keep it as close as possible to the original location. At least as a general matter, this should provide a more reasonable footprint within which to complete the construction activities necessary for relocation." DNR has revised 50 ft. to 100 ft., accordingly.

- Under the existing antidegradation rule, DNR has considered outfall relocations to be "new discharges," particularly if the relocation is to a different receiving water or upstream of the current outfall in the same receiving water. DNR believes it is important to include outfall relocation in the definitions of new or increased discharges due to the water quality impact of that relocation. Different definitions are sometimes needed between different codes or statutes, depending on the context of the regulations. Comparing the definition of "new discharge" in the proposed rule to the federal definition of "new discharger" is of limited value because the definition serves a different purpose under certain federal regulations than DNR's proposed antidegradation rule. For example, under the federal requirements new dischargers have certain unique permit application requirements (40 CFR 122.21) and stringent compliance schedule requirements (40 CFR 122.47). In addition, the federal regulations use the definition of "new discharger" to distinguish from a "new source," which impacts the performance standard a source may be subject to under 40 CFR Subpart N. These requirements are not related to water quality standards, unlike the antidegradation rule.

Comment: WGF recommended that the rule be clarified as to how interim limits are treated and whether a facility with interim limits for a new pollutant (such as PFAS) would be considered a new or increased discharge and be subject to an antidegradation review.

Response: No change. Although the commenter included an example using PFAS, only specified pollutants get interim limits as part of a compliance schedule—primarily phosphorus or those pollutants that are under an approved variance. In most cases, interim limits are less stringent than or equal to final limits, so antidegradation would not be triggered by moving from an interim limit to a final limit. Though unlikely, if an interim limit is effective in a permit and the facility seeks a relaxed interim limit with a proposal that meets the definition of an increased discharge, it would be subject to an antidegradation review.

Comments:

- MEG: "…the proposed rule language provides no exemptions for temporary lowering of water quality. Federal guidance, however, does provide exemptions where lowering of water quality is temporary. *See, e.g., EPA's Water Quality Standards Handbook*, Chapter 4: Antidegradation, p. 13. The department should also provide for exemptions for temporary lowering of water quality."

Response: Allowance for temporary discharges added. The DNR appreciates the additional cited information provided by the commenter. Upon further review, the 1983 preamble of 48 F.R., p. 51403, does specifically state the federal intention to allow temporary or short-term discharges to Outstanding National Resource Waters (ONRW). It reads:

> "States may allow some limited activities which result in temporary and short-term changes in water quality. Such activities are considered to be consistent with the intent and purpose of an ONRW. Therefore, U.S. EPA has rewritten the provision to read "…that water quality shall be maintained and protected," and removed the phrase "No degradation shall be allowed. …"

Although the preamble language is specifically speaking about ONRW, which are meant to receive the greatest level of protection, it follows that by deeming temporary discharges acceptable in these cases, temporary discharges are also acceptable for other high-quality waters. Further, the portion of federal language discussed in the preamble remains in place after U.S. EPA's 2015 rule update, so these concepts and regulatory language still apply.

U.S. EPA's Water Quality Standards Handbook contains section 4.7 on Antidegradation published in 2012 (this has not yet been updated to reflect the 2015 federal updates to the antidegradation regulations): https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf. It reiterates the intent to allow temporary discharges and elaborates that "EPA's view of temporary is weeks and months, not years. The intent of U.S. EPA's provision clearly is to limit water quality degradation to the shortest possible time."

For wastewater and stormwater discharges, DNR added provisions to the proposed rule text under the "Applicability" sections at ss. NR 207.011(2) and 216.008(2) stating that an antidegradation demonstration is not required for temporary discharges. Definitions of "temporary discharge" of up to 90 days was added at ss. NR 207.021(8) and 216.008(3)(k). Ninety days is consistent with prior practice under DNR's former "short duration discharge general permit."

Comments: WGF: "The proposed rules do not discuss how application of loads occurring through variances will be considered. Variances are not permanent authorized discharges, but discharges allowed on an interim basis. The rules are silent on how increased loads should be calculated relative to variances. Should increased loads be calculated based on the non-variance WPDES TBELs or WQBELs, or based on the interim variance limits? Given the "permanent" aspects of allocating a portion of the assimilative capacity, WGF recommends the rules address how variance loads will be considered."

Response: No change. Due to the temporary nature of variances and that they only apply to water quality based effluent limits (not TBELs), assimilative capacity calculations will be based on a final WQBEL, not an interim limit.

Water quality standards variances are a regulatory structure that allows permittees to make incremental progress in pollutant reductions with the goal of achieving a water quality based effluent limit (and water quality standard) that is not currently achievable. It gives permittees time to systematically problem-solve on ways to reduce the pollutant of concern that is not achieving the standard and work towards attaining standards within a practical and economically feasible timeframe.

Permittees that have been granted variances are assigned interim effluent limits reflective of the highest attainable condition. In situations where a variance has been authorized, any increased discharge above and beyond an interim limit assigned as part of a variance would be subject to antidegradation. In addition, U.S. EPA-approved variances must meet federal highest attainable

condition requirements and per 40 CFR 131.14 (b) (1) (ii) the requirements shall not result in any lowering of the currently attained ambient water quality.

11. Total Maximum Daily Loads (TMDLs)

Comments:

- MEG: "The proposed rules provide a process for determining whether an antidegradation review is necessary for pollutants that are allocated under an EPA-approved TMDL. However, it is not clear whether the exemptions from antidegradation review under this process would apply in certain scenarios. For example, there are a number of POTWs across the state who have received very restrictive limits for phosphorus, compliance with which is very costly. For some of those permittees, TMDL-derived limitations available to them would be much less restrictive. Because the applicable TMDL study would have been designed to ensure the waterbody could accommodate wastewater discharges in the watershed, permittees subject to the TMDL should not have to undergo a separate antidegradation analysis in order to obtain a TMDL allocation. It is not clear from the proposed rule language, however, whether an antidegradation review would still be required in this scenario. We request that the department add clarifying language in the code or an associated note to address this issue."

- WGF commented in relation to s. NR 102.045 (3): "The draft rule contains several references to EPA approved TMDLs. Use of TMDL information is appropriate in WDNR's determinations. However, text in these provisions implies use "determinations" related to lowering water quality relative to existing uses derived though TMDLS. TMDLs lack both the legal authority and administrative procedures to allow for lowering water quality. They are not self-implementing, and EPA TMDL approval, by itself, is not sufficient.

    - WGF opposes use of this unauthorized use of TMDLs for lowering water quality or allowing an increase in load if that is allowed under this and other provisions. See also s. NR 207.031 (2) and (3)(c).

    - WGF agrees that the determination of whether a proposed new or increased discharge of a pollutant that is allocated under an EPA-approved TMDL should be subject to the process described in s. NR 207.031. See s. NR 207.031(8) 2."

- An individual asked how facilities covered under a TMDL would be treated under these rules. "Many point sources have to meet big reductions in TSS, TP, and bacteria (in the Milwaukee Basin) but others might have more lenient WLAs [wasteload allocations] but we still wouldn't want to see a new or increased discharge […]", noting that TMDL implementation and results take time.

Response: Provision added for clarity. Similar to current practice, if a WQBEL or interim limit has not taken effect, a permittee can receive a higher TMDL limit for the pollutant without going through antidegradation review. However, if a WQBEL or interim limit has taken effect, the permittee must go through an antidegradation review to demonstrate that there is a need for the higher TMDL limit and that water quality degradation has been lessened to the extent practicable. Although a TMDL sets wasteload allocations that would meet water quality criteria, a proposed increased discharge above existing limitations must still demonstrate need and that any lowering of water quality is lessened to the extent practicable. Section NR 217.16(2) to (4) requires antidegradation procedures under ch. NR 207 to be applied for requests for less stringent

phosphorus effluent limits in a TMDL area. Language was added under ss. NR 207.031(3)(d) and 216.008(7)(c) to clarify this.

12. Compliance of state-regulated nonpoint source discharges

Comment: MEG: "POTWs … have no control over whether other point source dischargers and/or regulated nonpoint source dischargers are in compliance with the antidegradation policy. It is not reasonable to preclude POTWs from pursuing a new or increased discharge on the grounds that there are other noncompliant dischargers in the watershed over which that POTW has no authority or control. At a minimum, in accordance with federal guidance on this issue, the proposed regulations should be revised to reflect that the analysis of compliance in Section 207.031(9)(a)6. must be made on a parameter by parameter basis. As explained in EPA guidance: "degradation by [a proposed] new point source of BOD should not be barred solely on the basis that BMPs unrelated to BOD loadings, or which relate to other waterbodies, have not been implemented." *See EPA's Water Quality Standards Handbook*, Chapter 4: Antidegradation, p. 10."

Response: Revised in part. The DNR concurs that it is the responsibility of the DNR and counties to implement state nonpoint source performance standards. The language requiring consideration of nonpoint sources for antidegradation purposes is not a new federal requirement; it has been established in the federal antidegradation regulations since 1983. Previously, Wisconsin did not reflect this requirement in its antidegradation policy and procedures and is correcting that at this time for consistency with federal regulations. Because federal regulations require states to implement their existing nonpoint source controls, DNR cannot remove this requirement from its antidegradation procedures. However, DNR revised the language under s. NR 207.031(3)(e)1.a. to specify that impacts would be assessed only for individual pollutants in question.

13. Water quality data

Comments: MEG: "Under Section NR 207.03(4) of the proposed rules, the applicant for a new or increased discharge is tasked with the responsibility of "obtaining and submitting sufficient data for the department's [antidegradation screening] determination." Further, the department "shall determine" whether the "submitted data is sufficient." *Id*. The open-ended nature of this data collection requirement and vague language regarding sufficiency of data has the potential to result in a permittee incurring significant costs for data collection. MEG requests that the department clarify what constitutes "sufficient data" to establish reasonable parameters and ensure that permittees understand the extent of data collection necessary for this evaluation."

Response: Related process revisions made. There may be significant variation in what will constitute sufficient data for projects of different size and complexity, and the types of parameters in the increased discharge. While the DNR understands the desire for more specificity in the rule, we believe that this will need to be determined individually for each project. The rule does contain information on the date range for the samples (typically not more than 10 years old, but must still be representative of current conditions), the sampling locations, and the factors to consider. The parameters to be sampled would be those that would be increased in the discharge (or in some cases, a surrogate where that is more effective). The DNR anticipates that for many

parameters, samples will be needed from three months during the growing season, and for those that vary in the effluent or in the receiving water seasonally, such as temperature, a full year will be needed if the discharge will be year-round.

However, in response to concerns about data collection, the DNR did revise the rule language at the section relocated to s. NR 207.031(2)(a), "Applicant screening submittal" and s. NR 207.031(4), "Water quality data." The process will now allow the applicant to determine whether they would prefer to collect any additional necessary data themselves or if they would prefer the DNR to collect the data or otherwise determine the appropriate parameter concentrations. The option to allow DNR to collect the data is meant to help alleviate cost or logistical concerns the applicant may have regarding sampling. To accommodate the time necessary for either party to collect additional data and to determine whether more detailed information such as a social or economic analysis or alternatives analysis is needed, language was added stating that the screening materials are to be submitted "as early as possible prior to" submittal of a permit application, facility plan, or plans and specifications. A note provides example timeframes, recommending 1.5 years prior to the complete application submittal to ensure sufficient time to collect data and prepare the complete application; the note also provides examples where shorter timeframes may be sufficient. By moving the screening step from after data collection to before data collection, this allows the DNR to collect data if needed and provides more formal communications about what additional materials may be needed if a full review is required, along with time for the applicant to prepare those materials. This more formal pre-planning is meant to alleviate concerns about project delays at the end of the process. See also Figure 1 which contains a graphic further explaining these steps, and the response to WMC et al.'s items II.D. and VIII.H.

Comments:

- MEA et al.:
    - "DNR should strengthen the provisions in the draft rule related to water quality data to ensure that ambient water quality measurements are up to date and water quality-based effluent limitations, assimilative capacity, and other relevant calculations are as accurate as possible. The draft rule currently allows the submission of water quality data that is up to ten years old without prior approval from DNR. […Although DNR may request additional data,] more recent sampling data should be required in the first instance. At the very least, the temporal provision should be reduced to five years to bring it in line with the maximum duration of WPDES permits, which necessarily requires reevaluation of the grounds for permit issuance."
    - "we also recommend explicitly requiring more recent sampling data if there has been a new or increased discharge to the receiving water upstream or downstream from the proposed discharge that will consume the same assimilative capacity."

Response: Revised. Language was added to clarify that data must be considered representative of current conditions. However, no change was made to limit the time frame to 5 years. The DNR's waterbody assessment guidance (WisCALM) states that data from the most recent 5 years is preferred, but older data may be used if still deemed representative of current conditions.

14. Requirements for Outstanding or Exceptional Resource Waters (ORW/ERW)

Comment: U.S. EPA: "The proposed antidegradation implementation procedures at NR 207.031(6) states that, for outstanding state or national resource waters and exceptional resource waters, WDNR "may not approve any change in effluent concentration, level, or loading unless the change will improve water quality." However, this section also states that "[p]ermit limits shall be set to only utilize the amount of assimilative capacity demonstrated to be needed by the facility," which implies that permit limits may allow a lowering of the currently achieved ambient water quality. EPA recommends that WDNR clarify the procedures for outstanding state or national resource waters and exceptional resource waters to ensure consistency with the requirements in the antidegradation policy for those waters. One way to address this would be to delete the sentence stating that "[p]ermit limits shall be set to only utilize the amount of assimilative capacity demonstrated to be needed by the facility.""

> **Response:** Revised. DNR removed the specified sentence for Outstanding Resource Waters under s. NR 207.031(6)(a), where we agree with the reasoning in the comment. However, for Exceptional Resource Waters under s. NR 207.031(6)(b), we retained the sentence but specified that it was applicable only to those cases where a lowering is allowed.

15. Significance threshold

Comments:

- "WCMA proposes that the WDNR determination of "a significant lowering of water quality in high quality receiving water or downstream waters" could be aligned to the number of point facilities that may impact a given water. WDNR, in NR 207.031 (8)(a)(3) describes a "10 percent significance threshold" related to the flow of a water body, its assimilative capacity, and details related to the effluent. This is a pragmatic concept that could be scaled based on the number of facilities that may impact a water body. A second "significance threshold" at 20 percent, for receiving waters with a fewer number of point sources (as determined by the WDNR) discharging to the water body, could reduce the regulatory burden of executing the social and economic analysis and alternatives analysis for additional small businesses. Like the 10 percent threshold, any subsequent request from an applicant to increase discharge of a parameter could trigger a full antidegradation analysis."
- MEA et al.:
    - **"**DNR must adopt the 10% *De Minimis* threshold used to determine when a significant lowering of water quality occurs. The draft rule proposes to establish a 10% *de minimis* threshold for determining when a new or increased discharge will result in a significant lowering of water quality and be subject to antidegradation review. This change, down from 33.3%, is vital to ensuring this rulemaking will comply with the federal antidegradation policy and survive EPA review. Simply put, the current system where new and increased discharges are considered insignificant and thus exempt from antidegradation review despite consuming up to 33.3% of a receiving water's assimilative capacity is unlawful."
    - "…any individual discharge consuming between 10% to 33.3% of a receiving water's assimilative capacity is significant and should be subject to antidegradation review. But, what is more, both Wisconsin's and the federal antidegradation policy "regulate [ ] degradation, not individual sources of degradation," and federal courts have made clear that *de minimis* thresholds must be established at a low enough level to protect against a significant lowering

of water quality due to cumulative impacts for all discharges into a receiving water. In fact, federal courts have questioned whether *de minimis* exceptions should even exist. There is certainly no explicit textual basis for a *de minimis* exception in the federal antidegradation policy, and some states, like Minnesota, do not provide for a *de minimis* exception at any level."

  - They provided an overview of applicable case law, which "makes clear that EPA is likely to approve a 10% *de minimis* threshold, whereas higher thresholds such as 15% or 20% have been subject to legal controversy and could risk the rule being found inadequate. States are not required to include any *de minimis* threshold in their antidegradation policy, and DNR's inclusion of a 10% *de minimis* threshold in the draft rule will significantly reduce the time and resources spent by both DNR and regulated entities on antidegradation review of discharges that do not have a significant impact on receiving water quality."

  - "Although we prefer a lower *de minimis* threshold, such as 5%, to provide an adequate margin of protection for Wisconsin waterways, we support DNR's proposal to establish a 10% *de minimis* threshold, particularly in view of provisions in the draft rule discussed below that authorize DNR to subject discharges to antidegradation review based on cumulative impacts."

- "WGF agrees that the proposed increase in discharge used as a threshold for determining significance should be no greater than 10 percent [at S. NR 207.031(8)3.]. Also, the maximum allocated increase should be no more than 10 percent."

- An individual commented: "Unlike surrounding states, Wisconsin has—and is proposing to continue using—a *de minimis* threshold so that very small increases in pollution are not required to undergo antidegradation review. Similarly, antidegradation review would not be required for a simple relocation of an existing discharge that would not change the impact on aquatic life. While these exemptions are appropriate, it is also appropriate that the proposed rule has limits on how often a discharger in a particular watershed may utilize them."

- "MEG appreciates that the proposed rule provides a significance threshold for antidegradation review."

- U.S. EPA: "EPA has recognized that states and authorized tribes have the discretion to include significance thresholds in their antidegradation programs as long as they use them in a manner consistent with the CWA and 40 CFR § 131.12. This includes demonstrating that the degradation allowed under the significance threshold is de minimis and that the use of a significance threshold does not result in significant degradation in the long run. Wisconsin's current antidegradation rules contain a significance threshold of 33%, which is greater than the range of values that EPA has approved, and courts have noted is reasonable (e.g., see Ky. Waterways Alliance v. Johnson, 540 F.3d 466, 483 (6th Cir. 2008)). Therefore, EPA supports Wisconsin's proposal to decrease the significance threshold to 10% of assimilative capacity, which would be within the range of values that EPA has approved and courts have noted is reasonable. However, the supporting documentation made available by WDNR does not explain how the State determined that degradation that would reduce assimilative capacity by less than 10% would be de minimis. […] EPA recommends that WDNR explain how it determined that a 10% significance threshold is appropriate […]"

- WTBA: "While EPA discussed the use of de minimis exclusions when it published the final rule in 2015, it did not mandate a specific threshold that would constitute a significant lowering of water

quality and trigger an antidegradation review. While the proposed rule lowers the significance threshold from one-third to 10% of assimilative capacity, the plain language analysis does not offer a scientific basis for the chosen percentage. An explanation of how the 10% level was set and the increased environmental protections it will provide should be included in the plain language analysis."

Response:

- DNR's proposed significance threshold aligns with thresholds in other state antidegradation policies, EPA guidance, and court decisions. Michigan, Ohio, and Indiana also have 10% significance thresholds, while Illinois, Iowa, and Minnesota did not set a threshold and require all proposals for new or increased discharges to complete an antidegradation review. EPA has expressed general support for de minimus exceptions if they are consistent with 40 CFR 131.12. 80 Fed. Reg. 51034-35 (Aug. 21, 2015). EPA has also specifically noted in guidance that a 10% threshold presents minimal risk to receiving waters and can be consistent with the Clean Water Act. *See* King Memo, 2005; Great Lakes SID, 1995. However, EPA has not endorsed setting a significance threshold above 10%. In addition, Courts have upheld EPA's approval of other state policies that set 10% significance thresholds (*Ohio Valley Env't Coal. v. Horinko*, 279 F. Supp. 2d 732, 770 (S.D.W. Va. 2003)), but have expressed skepticism that a significance threshold greater than 10% would be permissible. *Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 483-486 (6th Cir. 2008). DNR believes the highest threshold it can set for de minimus discharges is 10% of a water body's assimilative capacity, and that a higher threshold would be inconsistent with 40 CFR 131.12 and unlikely to receive EPA approval.
- DNR is not including a total cap on increased discharges; a facility (or more than one cumulative facilities) may propose to use up to 100% of the assimilative capacity. However, each applicant will only be authorized to use as much of the assimilative capacity as is needed based on the demonstrations in the review process and after degradation has been lessened to the extent practicable.

16. Cumulative cap on significance threshold

Comments:

- U.S. EPA: "[…] although the antidegradation implementation procedures at NR 207.031(8)(a)(3)(f) allows WDNR to consider cumulative impacts from multiple dischargers, it does not establish a firm cumulative cap to ensure that the significance threshold does not result in significant degradation in the long run. EPA recommends that WDNR […] revise the rules to require consideration of cumulative impacts."
- MEA et al.:
    - "Importantly, the draft rule proposes to establish the 10% *de minimis* threshold as a cumulative cap on individual permittees over multiple permit terms. As noted in the *Ohio Valley* case, including antidegradation procedures that protect against a significant lowering of water quality based on cumulative impacts is even more important that the individual threshold. Proposed Subdivision NR 207.031(8)(a)3.f states that "[a]fter an applicant has received a one-time increase that is at or below the 10 percent significance threshold for a

given parameter, the next time the applicant requests an increase for the parameter, a full antidegradation analysis is required." This language solves the conundrum identified in MEA and EPLC's 2006 letter to DNR and the 2015 PCA, which is that Wisconsin's current antidegradation implementation procedures would allow a single permittee to increase their discharges over successive permit terms and use up all of a receiving water's assimilative capacity without ever undergoing antidegradation review. Without this language, that conundrum would persist despite the inclusion of the 10% *de minimis* threshold. Discharges would have to be increased in smaller increments—up to 10% instead of up to 33.3%—but significant water quality impacts could still occur without complying with federal law."

- "DNR has also included language in the draft rule that would allow the department to, "[i]f there are multiple dischargers on a waterbody that, in the determination of the department, share the same assimilative capacity, . . . consider cumulative impacts in determining whether a proposed discharge would be considered a significant lowering of water quality." Retaining and appropriately exercising this discretionary authority is crucial to ensuring discharges that consume the same assimilative capacity are considered together when determining whether a significant lowering of water quality will occur. […] without the proposed language, significant cumulative impacts to water quality from multiple sources could evade antidegradation review in contravention of the federal antidegradation policy."

- WGF agrees WDNR should consider cumulative impacts over time in determining significant lowering of water quality.

- MEG: "… the proposed rule only provides for a one-time increase at or below this 10% significance thresholds for a permittee. If a permittee makes a subsequent request for an increase that is still below that 10% threshold, we see no reasonable basis to require a full antidegradation review at that time. MEG requests that the proposed rules be revised to account for multiple requests that continue to fall within the 10% significance threshold."

Response:

- To address concerns about establishing a cumulative cap on the significance threshold, DNR revised language at s. NR 207.031(8)(a)g. as follows: "If there are multiple dischargers on a waterbody that, in the determination of the department, share the same assimilative capacity, the department ~~may~~shall consider cumulative impacts in determining whether a proposed discharge would be considered a significant lowering of water quality." It would be impracticable at this time for the DNR to establish a definitive cap on the amount of assimilative capacity that can be used, as the DNR does not have sufficient tracking tools to support this approach.

- DNR is retaining the one-time use of the streamlined process for proposals below 10% of assimilative capacity. If that were removed and permittees were allowed to use the 10% threshold multiple times, it could result in permittees using phased increases in order to circumvent the need to do an antidegradation review, which is not the intent of this process.

17. Social or economic analysis

Comments:

- "WCMA is concerned that WDNR is not familiar with the administrative business structure at the majority of dairy processors in Wisconsin, which would qualify as small businesses by federal definition. WDNR's Supplemental Information for the Antidegradation Rule Economic Impact Analysis (p. 6) states: "Because this demonstration requires less time and effort to complete compared to the development of an alternatives analysis, the department anticipates that this type of work can be accomplished using existing personnel and under current operating budgets." The agency, in the EIA related to these proposed rules, chooses to assign no cost value to this type of work. WDNR regulators and Wisconsin legislators should understand that an overwhelming majority of dairy processors in Wisconsin do not have staff dedicated to researching regional economic and social impacts of regulations related to their businesses and communities. This work would need to be contracted with consultants. Proposed NR 207.031 (8)(b) implies awareness of the burden on smaller facilities by including a vague and underdefined reference to matching the complexity of the required social and economic analysis to the size of the applicant facility: "*The amount of information and level of detail provided shall be relative to the size of the project or facility…*"

  WCMA proposes that WDNR amend NR 207.031 (8)(b) with the following additional (underscored) language: "*(b) Social or economic importance analysis. For a discharge that will constitute a significant lowering of water quality as determined under par. (a), or for a stormwater discharge under s. NR 216.008 (7), the applicant shall submit sufficient information to demonstrate that the project is necessary to accommodate important social or economic development in the area where the receiving water is located. The amount of information and level of detail provided shall be relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of and potential risk to the receiving water. <u>The department may determine that the size of the facility and characteristics of the discharge and risk to receiving water negate the need for a social or economic importance analysis</u>….*""

  Response: No change. While the DNR appreciates that a smaller facility may need to hire consultants for certain aspects of this work, this will not result in costs beyond the existing rule for a social or economic analysis. In fact, under the proposed rule, fewer applicants will need to develop a social or economic analysis than under current code, which should result in a cost savings for some facilities. This is because under the existing procedures at s. NR 207.04(1)(c), <u>all</u> new or increased dischargers proposing <u>any</u> lowering of water quality must submit a social or economic analysis, regardless of whether they are above or below the significance threshold. Under the proposed revision, those below the significance threshold will <u>not</u> need to submit a social or economic analysis. DNR recognizes that this information was overlooked in the draft EIA supporting document and has now included it for clarity.

  Costs for hiring a consultant for other components of this process—water quality sampling and developing the alternatives analysis—were already included in the EIA with the assumption that all facilities may need to hire a consultant, regardless of size.

Comment: An individual commented: "Any review of standards for discharged waste waters should only allow for INCREASED protections of our water quality, never LOWERING even in the case of social or economic impact. There is too much room for individual analysis to be compromised."

Response: No change. DNR is committed to protecting water quality throughout its programs, including via implementation of the antidegradation rule. However, DNR also recognizes the need for economic and social growth that will sometimes necessitate a small lowering of water quality. Federal antidegradation regulations explicitly provide for some new or increased discharges when antidegradation review determines they are necessary for important economic or social development and the degradation associated with the discharges is lessened as much as practicable. U.S. EPA's antidegradation requirements are part of the Clean Water Act, and DNR's proposed rule is consistent with those requirements. DNR staff will carefully review all materials submitted during this process to ensure that there is a need for the increase and that measures have been implemented to lessen any degradation to the degree practicable.

18. Alternatives analysis

Comments: "WCMA offers a similar cost-related concern with NR 207.031 (8)(c) related to information an applicant must provide to evaluate practicable alternatives to a proposed discharge. An overwhelming majority of dairy processors in Wisconsin do not have staff dedicated to researching technology systems or estimating the cost to construct new structures to house new technology, install new technology, or operate a technology solution. This work would need to be contracted with consultants. WDNR, in its Supplemental Information for the Antidegradation Rule Economic Impact Analysis (p. 6) directly recognizes this cost, stating: *"the department solicited cost information from consultants with experience drafting alternatives analyses for various other pollutants such as facility upgrades for phosphorus."*

WDNR estimated in this report that each affected permittee would spend $35,000-$50,000 on a alternatives analysis (p. 7). This is a significant cost for a small to mid-sized Wisconsin dairy processor.

Proposed NR 207.031 (8)(c) also recognizes the cost burden on smaller facilities with another underdefined reference to matching the level of detail in an Alternatives Analysis to the size of the applicant facility: "*The amount of information submitted by the applicant and level of detail necessary shall be relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of and potential risk to the receiving water."*

WCMA proposes that WDNR amend NR 207.031 (8)(c) with the following additional (underscored) language: *"(c) Alternatives analysis. For a discharge that would constitute a significant lowering of water quality as determined under par. (a), or for a stormwater discharge under s. NR 216.008 (7), the applicant shall submit sufficient information to evaluate practicable alternatives to the proposed discharge. The department shall evaluate the alternatives analysis under sub. (9) (a) 4. to determine whether the applicant's proposed alternative is approvable. The amount of information submitted by the applicant and level of detail necessary shall be relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of and potential risk to the receiving water. <u>The department may determine that the size of the facility and characteristics of the discharge and risk to receiving water negate the need for an alternatives analysis.</u> The analysis under this paragraph pertains only to alternatives applicable to the facility site in question, not to alternatives such as shifting production to another facility.""*

Response: As WCMA notes, DNR has included the costs for a consultant (for both small and larger businesses) in its EIA. In the proposed rule language, what WCMA is seeking as a cost-reducing measure is already provided through the streamlined option for non-significant

discharges, which would allow small discharges to forego the social or economic analysis and alternatives analysis.

Because 40 CFR 131.12(a)(2)(ii) expressly requires a social or economic analysis and an alternatives analysis before a state may authorize a lowering of water quality, we do not believe that U.S. EPA would allow further exemptions from its requirement.

Comment: U.S. EPA: "Under the proposed antidegradation implementation procedure at NR 207.031(8)(c), dischargers conducting an alternatives analysis would be required to only consider "alternatives applicable to the facility site in question, not to alternatives such as shifting production to another facility." In some situations, shifting production to another facility may be a practicable alternative for avoiding a lowering of water quality. To ensure that the alternatives analysis considers the full range of practicable alternatives available to the facility, consistent with 40 CFR § 131.12(a)(2)(ii), EPA encourages WDNR to include the consideration of potential alternatives related to other facilities in any alternatives analysis."

Response: Revised. The sentence reading, "The analysis under this paragraph pertains only to alternatives applicable to the facility site in question, not to alternatives such as shifting production to another facility," was revised to read, "An applicant need not consider shifting production to another site if that is not practicable," and relocated to s. NR 207.031(8)(c)1. This allows the facility to rule out consideration of alternatives at other sites if the facility determines those would not be implementable.

Comment: U.S. EPA: "The proposed antidegradation implementation procedure at NR 207.031(8)(c)(1) would require applicants to demonstrate as part of the alternatives analysis that the facility "does not have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations." As proposed, this language is unclear. EPA's understanding is that the intent is for applicants to demonstrate that the currently installed treatment technologies at the facility will not be able to achieve the existing effluent limitations after the proposed changes that will result in a new or increased discharge. To ensure that facilities provide the information that WDNR requires as part of the alternatives analysis, EPA recommends that WDNR clarify NR 207.031(8)(c)(1). One potential way to clarify this language would be to replace the proposed language with "A demonstration that the facility's currently installed treatment technology is not capable of treating the proposed new or increased discharge to meet existing effluent limitations.""

Response: Revised and relocated. The sentence was revised to read, "A demonstration that it is not practicable for the facility's currently installed treatment technology to treat the proposed new or increased discharge to levels that will meet existing effluent limitations." The term "practicable" was used because it is defined in the rule and includes consideration of economics and therefore addresses a related comment from WMC et al. (addressed under section VIII.D.). This demonstration was relocated to the screening step under s. NR 207.031(2)(a)5., since this is information that should be considered early in the process while determining initial eligibility.

Comments: MEA et al.:

- "All facilities subject to antidegradation review must evaluate practicable alternatives to proposed discharges that would significantly lower water quality in receiving waters. "Practicable" is defined in the draft rule to mean "technologically possible, able to be put into practice, and economically viable." Unlike Wisconsin's current antidegradation implementing procedures, the draft rule does not go on to define "economically viable" in any circumstance and instead uses a note to point to recently released EPA guidance and their associated worksheets to provide clarity to regulated entities. […] this approach means relying on guidance that is not legally binding and making decisions on a case-by-case basis because there is no clarity as to what constitutes an alternative that is economically unviable."

- "The proposed rule should require consideration of any alternative technologies that would avoid a significant lowering of water quality from a proposed discharge as economically viable if the capital costs of the alternative in question do not exceed 110% of the capital costs of the proposed expansion—the cost threshold used in Wisconsin's current antidegradation policy implementing procedures. Although not as nuanced and flexible as the EPA guidance DNR cites, this approach creates a bright line rule that is easy for regulated facilities, DNR, and the general public to follow. It would also allow the general public to identify additional practicable alternatives with confidence that those alternatives would not be dismissed without adequate consideration from DNR. DNR need not establish such a bright line rule for all regulated entities either and certainly could, as it does in its current implementing procedure, apply such a rule to categories of dischargers likely to have the most impact on surface water quality in Wisconsin, e.g., industrial dischargers and wastewater treatment plants."

Response:

- As noted by the commenter, in this rule proposal DNR removed the threshold of 110% of capital costs that it previously used in its antidegradation rules, as this would no longer be approvable by U.S. EPA under their 2015 regulations. In 2016, U.S. EPA disapproved Iowa's proposed antidegradation rules after expressly determining that their proposed "hard cap" set at 115% of base costs "was inconsistent with the EPA's recently promulgated [2015] antidegradation regulations." U.S EPA's disapproval letter explains that a state cannot outright "preclude evaluation and selection of any alternative costing equal to or greater than 115% of the base case cost."

- See also additional information provided by EPA on what is meant by "economically viable" under WMC et al.'s comment at VIII D.

Comments: "WGF supports the addition of the "practicable alternatives analysis," consistent with federal guidance. WGF also supports the inclusion of public review opportunities as part of WDNR preliminary determination based on their review of the practicable alternatives."

Response: Support noted.

Comments:

- MEA et al.:
    - "The draft rule currently requires regulated entities to merely "[i]nclude a description of any alternative determined to be impracticable, and why that determination was made." And while reasons for making such a determination include "cost or affordability", the amount of information needed to justify that determination is unclear. At the very least, the draft rule language should be amended to read: "Include a description of any alternative determined to be impracticable, and an analysis of why that determination was made." This language would require additional analysis from the regulated entity rather than merely stating the reason, but would cabin the analysis to the reason provided. We appreciate that DNR can require analysis of specific alternatives (with no limitation on the alternative being practicable) or the submission of additional information necessary to assess their alternatives analysis, but the analysis should be submitted in the first instance to assist DNR in its assessing whether the alternative is in fact impracticable."

Response: Revised as suggested for clarity. This was the intent of the language and the cost of including an analysis was already covered in the EIA.

19. Concentrated Animal Feeding Operations (CAFOs)

Comment: WGF: "Under s. 207.011 (2) "Applicability," it is stated that the antidegradation policy will not apply to CAFOs unless the permittee is seeking an alternative discharge limitation. It is unclear why CAFOs should not be subject to antidegradation review and WGF opposes this exclusion.

While it is understandable that production areas with zero discharge would not constitute a new or increased discharge, the same cannot be presumed for fields where manure is spread under the provisions of the CAFO permit. Either these manure-spread fields are "point sources" since they are subject to the regulation of the CAFO permit, or they are "state-regulated nonpoint sources" regulated through the CAFO permit. According to EPA guidance, "state-regulated nonpoint sources" should be subject to the antidegradation policy. In the note that follows, WDNR makes a statement that "[a]ntidegradation does not apply to agricultural stormwater discharges from CAFO's land spreading activities" without any reference to federal regulation or law. What federal regulation is the basis for this statement?"

Response: Antidegradation procedures contained in ch. NR 207 are applicable only to new or increased point source discharges. Production area discharges allowed under a CAFO WPDES permit are subject to the ch. NR 207 antidegradation policy; however, as the commenter points out, the CAFO permit does not allow for discharges except in extreme and rare rainfall conditions. The rare and episodic nature of the allowed discharges is such that antidegradation analysis cannot be applied to them.

Runoff from fields where manure has been applied by a CAFO in accordance with a WPDES permit and a nutrient management plan is, by definition, agricultural stormwater discharge (nonpoint source discharges) and is not a point source discharge. Therefore, stormwater runoff from CAFO landspreading fields are not subject to the ch. NR 207 antidegradation policy.

The definition for point source discharge in federal code and in Wisconsin statute explicitly and specifically excludes "agricultural stormwater discharges." See s. 283.01(12), Wis. Stats., for

definition of a point source that excludes agricultural stormwater discharges. Agricultural stormwater discharge is defined in state code and in federal code to exclude precipitation induced discharges from fields where manure has been land-applied in compliance with a nutrient management plan. See, s. NR 243.03(2), Wis. Admin. Code. Similarly, federal regulations at 40 CFR 122.23(e) state, "For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)- (ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge."

- **Comment:** WMC asked where there is language in the draft rule that serves as the legal basis for the following statements the DNR provided in its response to comments received on its economic impact analysis:
    - Language was added to the EIA to clarify that when a CAFO proposes an ADL, it does not need to determine additional alternatives in its analysis, because the ADL *is* the practicable alternative that lessens degradation as compared to conventional manure storage and land application.
    - Language was added in the EIA explaining that the ADL is the best alternative for lessening degradation, and the DNR would not require a different alternative.

  Response: See response to WMC et al.'s item VIII B.

20. Departmental review

Comment: U.S. EPA: "40 CFR § 131.12(a)(2) requires that states only allow a lowering of water quality in high quality waters after "full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process." Wisconsin's proposed antidegradation policy includes this requirement as part of NR 102.045(5). However, the proposed antidegradation implementation procedures for individual Wisconsin Pollutant Discharge Elimination System permits at NR 207.031(1) and NR 216.008(4)(a) do not address intergovernmental coordination and only require WDNR to seek and consider public input. WDNR should ensure that the antidegradation implementation procedures incorporate intergovernmental coordination, consistent with the antidegradation policy and 40 CFR § 131.12(a)(2)."

Response: Clarifying note added. DNR satisfies the state's provisions for intergovernmental coordination through its standard public notice process for WPDES permits. As required by s. NR 203.03(4), Wis. Adm. Code, notice is provided to multiple intergovernmental agencies: US EPA, US Army Corps of Engineers, the city, town or village where the proposed discharge is located (for individual permits), the county and regional planning commission of the area where the proposed discharge is located, other states potentially affected by the proposed discharge, and any other agency or unit of government interested in the proposed discharge. These agencies may comment during the comment period if they have any concerns about the proposed changes to the permit. A note was added to ss. NR 207.031(9)(c)2. and 216.008(6)(c) and (9)(c)2. to clarify that

the public notice process satisfies both the intergovernmental coordination and public participation requirements.

Comment: WTBA: "The antidegradation screening and the review, if required, has the potential to delay permitting but the proposed rule does not establish any timelines for reviews and decision making. Significant delays can interfere with operations and increase applicant/permittee costs. The proposed rule should include provisions designed to ensure that antidegradation screening and review are completed in a timely manner."

Response: Except for the time that may be needed to collect background water quality data if none exist, the department does not expect a significant departure from the current time to process an application for coverage under an individual permit. See also response to WMC et al.'s item II D.

21. Public review

Comment: WGF: "Throughout the document, WDNR is appropriately adding provisions for public review and comment and WGF supports increased opportunity for public review and comment. However, in some cases, the public input is insufficient or not timely.

In s. 207.031(3)(e), as part of the antidegradation screening process, only the applicant is notified by WDNR and is required to submit further information for the antidegradation review. The public is not notified, and the public is not provided an opportunity to submit information until much later in the process, such as at the time of WPDES permit resistance. WGF recommends that a provision be added to provide for public notification and allowance of information submittal at the same time as the applicant."

Response: No change. The public review process prescribed in the proposed rule satisfies EPA's and the state's public participation requirement. During the public comment period for the draft permit/fact sheet, the public can submit comments if they disagree with determinations made during the screening process.

Comment: MEA and CW asked whether s. NR 203.02(4) applies to the antidegradation public notice process, such that individuals who are on the WPDES permit mailing list would be notified about a draft antidegradation determination taking place during facilities planning, and a Class 1 notice will be published along with the notice will be published here: https://dnr.wisconsin.gov/topic/Wastewater/PublicNotices.html.

Response: Yes, the process at s. NR 203.02(4) applies and would be carried out as described above.

F. WASTEWATER GENERAL PERMITS

22. Wastewater general permits

Comment: WTBA: "The phrase "implementation methods" is used only in NR 207.041 while "implementation requirements" and "implementation procedures" appear in other sections. These phrases should be consistent throughout. If methods are intended to convey a different meaning, this should be clarified."

> **Response:** Revised. All usages of "implementation methods" were changed to "implementation procedures" for consistency within the rule. The term "requirements" is used in the sections outlining the findings the DNR must make to approve a proposed new or increased discharge, and that usage was left as-is. The *procedures* are designed to determine whether a proposal meets the *requirements*.

Comments: WTBA: "NR 207.041 is titled "General permit antidegradation analysis" and paragraph (c) references conducting "the antidegradation analysis." Yet, NR 216.008(6) requires the Department to conduct an "antidegradation review" for each new and reissued general storm water permit. The phrase "antidegradation review" is primarily used throughout the draft, appearing 23 times while "antidegradation analysis" appears eight times. If analysis and review are intended to reference two different procedures, this should be clarified. If not, the two general permit sections should use consistent terms."

> **Response:** Revised. The term "antidegradation analysis" was revised to "antidegradation review" throughout for consistency within the rule.

Comments: WTBA: "[…] it is WTBA members that own and operate quarries or pits for the production of aggregate that will be impacted most by the proposed rule. […] Under the nonmetallic mining general permit, an existing permittee that still meets eligibility requirements and has an existing discharge that was previously covered under the permit is automatically granted coverage under a reissued permit. During Advisory Committee discussions, Department staff indicated that this process will remain intact. This should also be clarified in the rule."

> **Response:** No change. Section NR 205.08(3) and (9)(a), Wis. Adm. Code, provides that the DNR may reissue a WPDES general permit without requiring applications from existing permittees covered under the expiring permit, although the DNR may require additional information or Notices of Intent on a case-by-case basis. These provisions are outside the scope of this rulemaking effort and remain unchanged. The DNR's intent is not to do an antidegradation review for existing discharges that are not new or increased. Instead, for general permits, the DNR will do a prospective analysis at the time of the permit reissuance itself, not as individual permittees are granted coverage under the permit.

Comments: WTBA: "NR 207.041(1)(c) allows the Department to request information from "potential applicants" who may discharge under the general permit in order to conduct the antidegradation review.

The Department has indicated that "potential applicants" includes three categories: facilities that are covered under the existing permit, that have submitted an NOI for coverage or that may be covered for the first time due to permit revisions. Replace the term "potential applicants" in paragraph (c) with permittees, applicants, or a point source that may discharge under the general permit due to a change in the designated areas of the state or the specified categories or classes of point sources located within those areas to which the general permit is applicable. This language is consistent with Wis. Stat. § 283.35 and NR 205.08(1). Specifically stating this in the rule will eliminate ambiguity and provide notice to facility operators. "

Response: This section was removed. See response to next comment for further detail.

Comment: WTBA: "NR 207.041(1)(c) places no limit on the information that may be requested from a potential applicant. NR 116.008(5) [*sic: this is referring to NR 216.008(5)*] includes a similar requirement for storm water general permits, but also lists specific information to be requested. NR 207.041(1)(c) should be similarly limited as described no. 2 of the Antidegradation Screening section above."

Response: Revised. The DNR removed the proposed s. NR 207.041(1)(c) and replaced it with a note after proposed s. NR 207.041(1)(a) which reads:

> "**Note:** The department may consult with sector representatives to gather information necessary to conduct the antidegradation review. This may include information such as industry trends and associated changes in discharge characteristics and quantities, social or economic importance, and types of alternatives available to categories of dischargers and general costs associated with them."

The DNR made this change because we expect that antidegradation reviews in general permit reissuances will primarily rely upon general sector-wide information due to the nature of general permits, so working with industry groups will be the most efficient manner of gathering information to support antidegradation reviews for general permits.

Comment: WTBA: "NR 207.041(2) provides that if the Department determines that the general permit will achieve the antidegradation water quality standards, further antidegradation procedures are not required if an applicant has "certified that the general permit conditions will be met" and the Department has granted coverage under the permit. The language is confusing because the Department has explained that applicants/permittees unable to meet general permit conditions will be required to begin the individual permit process. The requirement could be clarified as follows:

> "If the department issues a determination under sub. (1) that a general WPDES permit will achieve the antidegradation water quality standards under ch. NR 102, no antidegradation procedures under this subchapter apply to a person seeking coverage under that general permit. The department shall grant coverage under the general permit if the person certifies that general permit conditions will be met."

To clarify the process, a provision could be added NR 207.041 stating that an individual permit may be required if a discharge is unable to meet permit conditions. Similar provisions are included in NR 216.008."

Response: No change. If a permittee certifies that they will meet the antidegradation conditions and the department determines that it can approve coverage under the general permit, then no additional antidegradation measures will be required of the applicant. However, antidegradation is only one of the factors that must be met in order for the department to grant coverage under a general permit, so the suggested language would not be reflective of the actual requirements.

G. STORMWATER INDIVIDUAL PERMITS

23. General

Comment: "WGF supports the inclusion of the antidegradation analysis for urban stormwater in s. NR 216.008 in a manner parallel to the analysis of wastewater discharges."

Response: Thank you.

Comment: U.S. EPA: "The proposed antidegradation implementation procedures for storm water discharges at NR 216.008(4)(b) and (7)(e) state that, where WDNR determines that the performance standards and prohibitions under ch. NR 151 "are not sufficient to meet antidegradation requirements under this section, the department may require additional permit conditions." If additional permit conditions are required to ensure compliance with antidegradation requirements, then those conditions should be included in the permit. Otherwise, the permit would not contain all conditions necessary to achieve water quality standards, consistent with 40 CFR § 122.44(d). To ensure that permits contain the limits and conditions necessary to comply with the antidegradation requirements, EPA recommends that WDNR replace the word "may" with "shall" in NR 216.008(4)(b) and (7)(e)."

Response: Revised. The DNR has revised the language from "may" to "shall" in response to this comment. The DNR has also reworded this provision to read that for both general and individual permits "the department shall impose additional permit conditions to address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge require a permittee to incorporate additional practices to meet antidegradation requirements."

Comment: WTBA: "Revisions to the storm water antidegradation procedures are needed to clarify and simplify the screening and review process and to ensure that reviews occur only when triggers are met i.e., a new or increased discharge is proposed and it has the potential to lower water quality in a high quality water."

Response: Revised. The DNR has clarified when the screening and review procedures apply by titling s. NR 216.008(7) as "Antidegradation screening procedures for individual permits".

Under s. NR 216.008(7), screening will indicate whether the discharge is a new or increased discharge to a high quality water or is a discharge that consists of a pollutant allocated under a TMDL for which no trade offsetting the discharge will occur. In these circumstances, the DNR will notify a permittee or applicant proposing a new or increased discharge that may lower water

quality that requirements for specific categories of surface water under s. NR 216.008(8) are applicable.

Comment: WTBA: "NR 216.008 should contain all specific procedures for storm water discharges that are clear and comprehensive. As drafted, the antidegradation screening and review process in NR 216.008 is confusing because it contains duplicative or conflicting provisions and it references procedures in NR 207.031. NR 207.011(2) provides that "[f]or stormwater discharges regulated under s. 283.33, Stats., the implementation procedures under s. NR 216.008 shall be followed." Yet NR 216.008 at times requires that procedures in NR 207.031 related to wastewater individual permits be followed, which adds unnecessary complexity and confusion.

For example, NR 216.008(7)(a)4. requires the Department to follow the procedures under NR 207.031(3)(d) to determine whether discharges will meet requirements under the state's antidegradation policy. While subdivision (d)2. establishes next steps if the antidegradation policy is met, NR 216.031(7) and (8) establish those steps for storm water discharges. Detailing all storm water requirements in the storm water rule would provide clarity and reduce the likelihood of differing interpretations and expectations."

Response: Revised. The DNR has removed the reference to storm water discharges under s. NR 207.011(2) and incorporated provisions from ch. NR 207, Wis. Adm. Code, as applicable, into the storm water antidegradation provisions of s. NR 216.008, Wis. Adm. Code.

24. Increased discharge definition

Comment: WTBA: "NR 216.008(2)(d) should be revised and narrowed to apply only to actual increases. It refers to a change in area, concentration or site conditions. Concentration presumably refers to substances, but it should be clarified. In addition, it is unclear what analysis would be used to determine whether a change will "reasonably increase the discharge of pollutants." To qualify as an increased discharge, a change should actually increase the discharge of pollutants."

Response: Revised. The DNR has modified the definition of increased discharge under s. NR 216.008(3)(d)1. to mean "an actual or proposed change in the area or site conditions that results in or will result in an increase in the concentration, level, or load of a pollutant associated with a currently permitted storm water discharge." The revised definition adds clarity by excluding situations where there is not an actual or proposed increase in the concentration, level, or load of a pollutant in the discharge, such as the issuance of a permit for a category of discharges that did not previously require coverage, the reissuance or administrative continuance of a general or individual permit, or the administrative function of a municipal separate storm sewer system (MS4) incorporating a new area under its jurisdiction.

25. Screening

Comment: WTBA: "NR 216.008(4) essentially outlines the antidegradation screening and review procedures for individual permits and should be revised to clarify this application. As drafted, it incorrectly applies to both individual and general permits. A nearly identical subsection in NR 207.031(1) explicitly states that it applies to individual permits only. A change is needed to conform subsection (4)

with NR 207.041 and the rule's plain language analysis, which state that the Department will conduct the antidegradation review during the process of issuing or reissuing the general permit and not at the time of conveyance of coverage. Also, as noted in no. 4 above, NR 216.008(4) should restate that antidegradation review occurs during permit issuance or reissuance."

Response: Revised. The DNR has amended s. NR 216.008(4) to better clarify general antidegradation implementation procedures applicable to storm water discharges. The revised language makes clear the implementation procedures under s. NR 216.008(4) apply to new and increased discharges to surface waters where there may be a lowering of water quality. It has been revised to include references for specific procedures related to general and individual permits.

The DNR has also added clarity to this subsection to address instances where a discharge may consist of a pollutant of concern to an impaired waterbody, but for which no TMDL exists. In this situation, a permittee proposing a new or increased discharge would utilize the existing requirements found in ss. NR 216.007, 216.07(10)(b), 216.27(3)(j)6., and 216.49(3), Wis. Adm. Code.

Provisions within s. NR 216.008(6) have also been revised to clarify how the DNR will condition general permits to address new or increased discharges to a surface water to meet the antidegradation policy. The revisions also describe the DNR procedures for determining that the antidegradation policy has been met. Once a general permit containing the antidegradation procedures has been issued, reissued or modified, if a person seeking coverage certifies the antidegradation requirements contained in the general permit will be met and the DNR concurs with that certification and confers coverage under the general permit, additional antidegradation measures are not needed.

Comment: WTBA: "NR 216.008 (7) and (7)(a) each state the requirement for a screening with one significant difference. Subsection (7) requires the screening of proposed discharges to determine the applicability of the antidegradation policy under NR 102.045 for new and reissued individual storm water WPDES permits, while paragraph (a) adds "antidegradation inquiry" as something that would trigger screening. This phrase appears only in this paragraph; it is not defined and its purpose is unclear and the reference should be removed. Furthermore, (7) and (7)(a) should be consolidated since it is unclear why both are needed."

Response: Revised. The DNR has consolidated language in s. NR 216.008(7) and (7)(a) as suggested and renumbered the remainder of sub. (7). The DNR agrees that removing antidegradation "inquiry" is appropriate. As part of the modification, sub. (7) now includes a screening step to indicate whether the discharge is a new or increased discharge to a high quality water, or is a discharge that consists of a pollutant allocated under a TMDL for which no trade offsetting the discharge will occur.

In these circumstances, the DNR will notify a permittee or applicant proposing a new or increased discharge that may lower water quality that requirements for specific categories of surface water under s. NR 216.008(8) are applicable.

Comment: WTBA: "NR 216.008 (7)(a)5. provides that if the Department determines that "there is a potential to lower water quality in a high quality water and if the Department determines that such a lowering may be permissible," the antidegradation review under the remainder of subsection (7) applies. As part of the process, the Department must notify the applicant if additional information must be submitted. This requirement should include a reference to subsection (5) which details the information DNR may require. In addition, subsection (5) should limit requests to the items it describes. Specifically:

> "(5) WATER QUALITY DATA AND ADDITIONAL INFORMATION. The Department may require an applicant or permittee to submit additional information for the purposes of conducting the antidegradation review and to determine whether coverage under a general permit is applicable or coverage under an individual permit is required under ch. 283, Stats. This information ~~may include any of~~ shall be limited to the following:""

Response: Revised. The DNR has revised s. NR 216.008(7) to constitute a screening step. The previous language included a reference to insufficient water quality data but did not include other data that may be needed under sub. (5). The DNR, therefore, has modified the title from 'High quality water determination' to 'Receiving water determination' and included information under sub. (5), as applicable, to make this determination.

The DNR has also revised the language in sub. (5) that "the permittee or applicant shall […] submit any of the following information, as applicable:"

- Surface water identification
- A list of parameters proposed or expected in the discharge
- Background water quality data
- Best Management Practices
- Modeling or other data
- Social or economic analysis and alternatives analysis

26. Water quality data and additional information

Comment: WTBA: "NR 216.008(5) identifies information the Department may collect when conducting an antidegradation review. However, it incorrectly implies that an antidegradation review of new or increased discharges could take place when an applicant seeks coverage under a general permit for the first time or when a permittee has a change in operations that may result in a new or increased discharge. This conflicts with NR 216.008(6)(e) and with the Department's plain language analysis of the general permit process which state that if the Department issues a determination that a general storm water WPDES permit will achieve antidegradation water standards, further antidegradation procedures are not required. It also conflicts with the process as described to the Advisory Committee by the storm water section staff. Specifically:

- General permit conditions are designed to prevent a lowering of water quality.
- The Department makes a preliminary antidegradation determination, solicits public input, and then issues a final determination.
- Applicant or permittee certifies that permit conditions are met. If unable to do so, its application would be treated as an individual permit application.

- A permittee with a change in plans that results in a new or increased discharge must certify that permit conditions will continue to be met. If unable to do so, it must apply for an individual permit.

Accordingly, this subsection should be revised as follow:

"The Department may require an applicant or permittee to submit additional information for the purposes of conducting the antidegradation review under pars. (6)(a) through (d) and subs. (7) and (8) ~~and to determine whether coverage under a general permit is applicable or coverage under an individual permit is required under ch. 283, Stats~~"

If the purpose of the stricken language is to allow DOR [*sic: DNR*] to request information for the review or rejection of an applicant's certification that it will meet permit conditions, this should be explicitly stated in NR 216.008(6)(e) which addresses determination of coverage under the general permit."

Response: Revised. The DNR has revised s. NR 216.008(5) as previously noted in response to item 25. The previous rule language contained in sub. (5) indicated information may be used by the DNR "to determine whether coverage under a general permit is applicable." As written, the intent was to convey that information used to make a determination of coverage under a general permit is separate and distinct from screening and review procedures applicable to individual permits.

If the DNR requires additional information to make a determination of coverage under a general permit, to conduct screening, or to conduct an antidegradation review, the DNR may request information under sub. (5). Therefore, the DNR has amended this introductory language as suggested, in part, to read, "conducting the antidegradation screening or review under subs. (7) to (9)" but retained "to determine whether coverage under a general permit is applicable…."

In some instances, the DNR may need additional information from a permittee or applicant to determine if a permittee is eligible to discharge under a general permit, or to determine if changes proposed in an amendment to a SWPPP, an amendment to plans under s. NR 216.50, or changes to storm water management programs required under s. NR 216.07(4) to (6) continue to meet the antidegradation conditions of the permit.

The DNR currently has existing requirements within ch. NR 216, Wis. Adm. Code, which allow the DNR to request information to make a determination of eligibility under the permit. For example, under s. NR 216.22(6), Wis. Adm. Code, "[t]he department may require more information than what is provided in the notice of intent to determine if coverage under a general permit is appropriate. The applicant shall provide additional information requested by the department within 30 days from receipt of notification by the department." In this instance, the timeline associated with obtaining this information may not coincide with the time needed to obtain background water quality data as specified under sub. (5). Therefore, the DNR has included a provision under s. NR 216.008(6)(e)3., that reads: "The department may request information under sub. (5) where additional information is needed from a permittee or applicant to demonstrate a discharge satisfies the permit conditions designed to meet the antidegradation policy."

27. Significance determination

Comment: WTBA: "NR 216.008(7)(d) requires an applicant to provide documentation of the social or economic importance analysis and the alternatives analysis when the Department "finds a proposed new or increased discharge will lower water quality in a receiving or down stream water…" This step of the antidegradation review for wastewater discharges requires the Department to determine whether there will be "significant" lowering of water quality. A significance determination is not required for storm water discharges under NR 216.008 but no discussion of the reasons for the divergent requirements is included in the plain language analysis. A significance determination should be added to the antidegradation screening process for storm water permits."

> **Response:** No change. The storm water program currently utilizes the requirements established under ch. NR 216, Wis. Adm. Code, and the performance standards and prohibitions under ch. NR 151, Wis. Adm. Code, to prevent degradation of receiving waters. These methods recognize that storm water discharges are highly variable in both volume and concentration and for these reasons calculating an effluent limitation, assimilative capacity for the receiving water, and/or a significance threshold on a case-by-case basis are impractical. The plain language analysis reflects this approach.

28. Departmental review

Comment: WTBA: "NR 216.008(8) details the Department's review of documentation submitted under subsection (7) and obligations upon making certain findings. The introductory paragraph requires the Department to "conduct an antidegradation review for each new and reissued individual storm water WPDES permit issued under this chapter." This directly conflicts with subsection (7) and the Department's plain language analysis, which state that a review is required only if there is a potential that a new or increased discharge will lower water quality in a high quality water. Subsection (8) should be revised to more closely track the review required for wastewater permits:

> "The Department ~~shall apply the antidegradation policy under s. NR 102.045 and~~ shall conduct an antidegradation review <u>based on information provided under sub. (7).</u> ~~for each new and reissued individual storm water WPDES permit issued under this chapter. The Department shall condition individual permits to meet the antidegradation policy. The Department shall follow the antidegradation review procedures as follows:~~ <u>The purpose of the antidegradation review is to evaluate whether the proposed activity satisfies the antidegradation policy under s. NR 102.045 and implementation requirements under this subchapter. The Department shall do all of the following in making its determination:</u>""

> **Response:** Revised. See the description of revisions to s. NR 216.008(7) under WTBA's comment for individual permits under item E. 25.

H. STORMWATER GENERAL PERMITS

Comment: WTBA: "NR 207.041 requires the Department to "…apply the antidegradation policy and implementation methods set out in this section for each new or reissued general WPDES permit for wastewater and storm water discharging to surface water…" when making an antidegradation

determination under a general permit. NR 207.041 does not contain the antidegradation policy and should reference NR 102.045 where it is established. In addition, since the antidegradation procedures for general storm water permits are established in NR 216.008(6), it is unclear why the procedures in NR 207.041 would also apply. The procedures in the two sections are phrased differently but their requirements are nearly identical. If NR 207.041 is intended to supplement NR 216.008(6) storm water requirements, this should be clarified. If not, the applicability of NR 207.041 to storm water permits should be clarified or the reference removed."

Response: Revised. The language referencing storm water discharges in s. NR 207.041 has been removed. The antidegradation implementation procedures for storm water discharges are established in s. NR 216.008.

Comment: WTBA: "NR 207.041(1) provides that the Department conducts the antidegradation review during the processes of issuing or renewing a general permit and not at the time of conveyance of coverage for an individual applicant. This should be restated in NR 216.008(6) since the storm water antidegradation review procedures are also established in this section."

Response: No change. The rule establishes that general permits will be conditioned to meet the antidegradation policy for discharges to surface water, and that upon issuance, reissuance, or modification of a general permit, the notice of final determination will include a statement specifying that the conditions of the general permit satisfy the antidegradation policy under s. NR 102.045. Under s. NR 216.008(6)(e), further antidegradation measures are not required provided the person seeking coverage under the general permit certifies that the permit conditions will be met and the DNR concurs with that assessment and issues a determination conferring coverage under the permit.

Comment: WTBA: "NR 216.008(6)(a) directs the Department to "obtain available evidence, as necessary, to support or develop specific requirements within the general permit and determinations related to new or increased discharges." It is unclear what "determinations related to new or increased discharges" references since the Department will not conduct an antidegradation review of new or increased discharges of individual applicants or permittees. If "determinations" refers to the determination that the general permit and new or increased discharges covered under it will achieve antidegradation water quality standards, this should be explicitly stated. If "determinations" refers to whether permit conditions will be met, this should be stated in (6)(e) which addresses determination of coverage under the general permit."

Response: Revised. The language under s. NR 216.008(6) has been amended to reflect that the antidegradation review for general permits occurs at the time of permit issuance, reissuance, or modification and applies to the specific permit conditions used to meet the antidegradation policy. These procedures are now found under sub. (6)(a) to (d).

These procedures are distinct from those used to determine if a permittee or applicant is eligible for coverage under a general permit as outlined in sub. (6)(e), where a permittee certifies as part of an application for coverage that that antidegradation will be met.

Comment: WTBA: "NR 216.008(6)(e) should be revised to clarify the applicant certification under a general permit and granting of coverage by the Department, similar to NR 207.041(2) under no. 7 above. NR 216.008(6)(e)2. and (6)(g) provide that if the Department determines that a discharge is unable to meet permit conditions, an individual permit may be required. Accordingly, to clarify when general permit coverage will be granted, revise paragraph (e) as follows:

> "If the department issues a determination that a general WPDES permit will achieve the antidegradation water quality standards under ch. NR 102, no antidegradation procedures under this section apply to a person seeking coverage under that general permit. The department shall grant coverage under the general permit if the person certifies that general permit conditions will be met."

Response: Revised. The DNR modified language in s. NR 216.008(6)(e) to clarify that when the department issues a determination that a general storm water WPDES permit will meet the antidegradation policy under s. NR 102.045, further antidegradation measures are not required if the person seeking coverage under the general permit certifies that the antidegradation permit conditions will be met and the DNR has granted coverage under the permit.

Under a general permit process, an applicant or permittee submits a notice of intent to the DNR that provides the specific measures the permittee or applicant will implement to satisfy the conditions of the general permit, which is designed to meet the requirements of chs. NR 151 and 216, Wis. Adm. Code, and the antidegradation policy in s. NR 102.045. The applicant or permittee will certify that they will meet the conditions. The DNR will confer coverage under the general permit when it finds that Notice of Intent has met these requirements

G. CROSS-REFERENCE OR NUMBERING ERRORS

Comments:

- MEA et al. noted that the following may be potential errors in the draft code:
    - Page 19: The cross reference to proposed Wis. Admin. Code NR § 207.031(6)(a) in proposed Wis. Admin. Code NR § 207.021(6) seems to be inaccurate. Consider whether the cross reference should be to proposed Wis. Admin. Code NR § 207.031(8)(a).

    Response: Corrected to read s. NR 207.031(8)(a).

    - Page 30: Consider whether the cross reference to proposed Wis. Admin. Code NR 102.045(2)(b)3.1 to 3 should be to proposed Wis. Admin. Code NR § 102.045(2)(b)1 to 3.

    Response: Corrected to read s. NR 102.045(2)(b)1. to 3.

    - Page 34: The numbering of definitions in proposed Wis. Admin. Code NR § 216.008(3) repeats paragraph "(e)" for both "new discharge" and "practicable."

    Response: Renumbered the second (e) in s. NR 216.008(3) and the following paragraphs to be (f) through (i).

Comment: U.S. EPA: "The antidegradation policy at NR 102.045(4) references requirements for exceptional resource waters at NR 207.031(4)(b), but that section does not pertain to exceptional resource waters. Please update the cross-reference to ensure the appropriate requirements are applied to exceptional resource waters."

Response: Corrected to reference s. NR 207.031(6)(b).

Comments: WGF noted that under proposed s. NR 207.021(3)(a), the reference to par. (b)3. looked like it may be incorrect.

Response: Corrected to reference the entire paragraph (b).

H. WMC et al. comment letter and DNR responses

Note that the following letter was converted from a .pdf file to a .docx format to enable responses to be inserted into the letter. Page numbering and formatting are different from the original letter.

These comments are submitted on behalf of the Wisconsin Paper Council (WPC), Wisconsin Manufacturers and Commerce (WMC), the Midwest Food Products Association (MWFPA), the Wisconsin Dairy Alliance (WDA), and Venture Dairy Cooperative (VDC).

Our coalition respectfully urges the Department of Natural Resources (DNR) to stop its work on its proposed antidegradation rulemaking (WY-13-20/Clearinghouse Rule 23- 010). Our reasons for making this request include, but are not limited to, the following:

1. DNR has failed to consider and incorporate all relevant compliance costs into its economic impact analysis.
2. The costs associated with the proposed rulemaking exceed $10 million over two years.
3. DNR failed to properly and lawfully evaluate small business costs associated with this rulemaking.
4. State law prohibits DNR from imposing requirements on point source discharges more stringent than required under federal law.

There are far too many unanswered questions as to how this rulemaking will be implemented and how it will impact the regulated community.

Response: These points are addressed in the itemized sections below.

WPC is the premier trade association that advocates for the papermaking industry before regulatory bodies, and state and federal legislatures to achieve positive policy outcomes. WPC also works to educate the public about the social, environmental, and economic importance of paper, pulp, and forestry production in Wisconsin and throughout the Midwest.

The pulp and paper sector employs over 30,000 people in Wisconsin and has an annual payroll of $2.5 billion. Wisconsin is the number one paper-producing state in the United States, with the output of paper manufactured products estimated to be over $18 billion.

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business. WMC members depend on fair, predictable environmental standards that do not unduly target or harm Wisconsin businesses.

MWFPA is a trade association founded in 1905 representing the food processing industry in the states of Wisconsin, Minnesota, and Illinois. MWPFA's purpose includes advocating on public policy issues including food safety, workforce, and environmental regulations.

WDA represents modern regulated dairy farms in Wisconsin and works diligently to preserve Wisconsin's heritage as the Dairy State. WDA advocates for the truth by contesting unnecessary regulations that do not protect natural resources.

VDC has a mission to positively impact policy at the state and local levels and protect the overall use of technology and innovation in how farmers grow and raise food. VDC works to combat unnecessary regulations, reduce government bureaucracy and advance smart policy to support the future of dairy farmers.

Again, the primary request from our coalition is for DNR to stop work on this antidegradation rulemaking, as this process has not followed applicable Ch. 227 rulemaking requirements and is therefore unlawful. However, if the DNR insists on moving forward, our coalition urges the DNR to make reasonable modifications to the rulemaking to lower the burden on the regulated community. Such modifications include retaining the current 33% assimilative capacity threshold, changes to new requirements for stormwater permittees, exempting CAFOs from the new requirements, and a number of other reasonable modifications described herein.

I. Most of Wisconsin Waters Have Good Water Quality

Wisconsin has a long history of protecting its waters through antidegradation regulations, as well as numerous other regulations. Wisconsin's implementation of the Wisconsin Pollutant Discharge Elimination System (WPDES) was among the first in the country. Wisconsin was also an early adopter of phosphorus and thermal standards.

In addition, although it is often ignored by the media, Wisconsin continues to pass and implement strict water quality standards. Recently, Wisconsin adopted stringent surface water criteria for two common types of PFAS that are no longer manufactured in the U.S.

– PFOA and PFOS. It should be noted that these criteria are more stringent than required by the EPA, and more stringent than the current PFOA/PFOS surface water criteria in all of Wisconsin's neighboring states.

Moreover, most Wisconsin waters are healthy. In the *Wisconsin Quality Report to Congress 2022*, DNR reported that 82% of the waters assessed were healthy. In addition, for those waters that are impaired, 23% have a restoration plan in place. Thus, the need for the proposed, more stringent antidegradation requirements must be considered in the context of the high quality of many of Wisconsin's waters, and the extensive state and federal regulations currently in place to preserve and protect those waters (including existing antidegradation requirements). DNR should consider the realistic, anticipated incremental environmental benefits from this effort and realistic costs associated with the proposed rules before moving forward. Moreover, insofar as DNR decides to pursue this rulemaking, DNR should only incorporate additional regulatory requirements that are specifically mandated by federal law.

> **Response:** Protection of high quality waters via the antidegradation review process is required under the Clean Water Act, and DNR is proposing to revise its existing policy to be consistent with federal water quality regulations enacted in 2015, which is a requirement of state-delegated National Pollutant Discharge Elimination System Programs. In addition, Wisconsin's proposed antidegradation revisions provide more leniency and cost-savings than other states' procedures by providing a streamlined process for proposed discharges that fall below a significance threshold (i.e., would use less than 10% of a stream's remaining assimilative capacity). Many other states do

not have such a provision in their antidegradation implementation procedures.

Federal antidegradation requirements purposefully allow states flexibility to establish implementation procedures for their antidegradation policies. Federal law requires states to develop antidegradation policies that are consistent with the policy provided under 40 CFR 131.12 and to further develop methods to implement those policies. Federal law requires a state's implementation methods to be consistent with its antidegradation policy and with 40 CFR 131.12(a) but does not otherwise specify required content for implementation methods. DNR's proposed antidegradation policy is consistent with federal requirements under 40 CFR 131.12, and its proposed implementation methods are consistent with the proposed policy.

II. The DNR has failed to consider and incorporate all relevant compliance costs into its economic impact analysis, in violation of Ch. 227 rulemaking requirements.

Wis. Stat. § 227.137 contains the requirements for developing economic impact analyses (EIA) of proposed rules. This provision mandates the EIA must contain information on the economic impact of the rule on specific business and other entities, and on the state's economy as a whole. Among other items, the EIA must include "[a]n estimate of the total implementation and compliance costs that are reasonably expected to be incurred by or passed along to businesses, local government units, and individuals…expressed as a single dollar figure."

On January 11, 2023, our coalition submitted detailed comments to the DNR raising serious concerns with its draft EIA. Our coalition appreciates the written response provided by DNR staff on Friday, April 21. As DNR noted, responding to draft EIA comments is not standard practice by the agency (though it should be).

More importantly, although DNR made minor adjustments to its final EIA, it failed to make the necessary modifications to comply with Ch. 227 rulemaking requirements. In particular, consider the following:

Response: See responses to individual items below.

A. Missing costs associated with a 2nd new or increased discharge for a facility

In prior comments, our coalition asked the DNR to consider costs associated with a second antidegradation review. In other words, consider the impact on a facility that may need a "new" or "increased" discharge, but previously underwent an antidegradation review. These costs could be substantial, because *any* increased discharge of a pollutant for which there is a water quality criterion in a "high quality water" would trigger the need for a full antidegradation review, as there is no assimilative capacity allowance permitted for a 2nd review.

In its response, DNR indicated there are no costs, as DNR "did not identify any prior instances of facilities seeking a second new or increased discharge." Such logic is absurd. The DNR is proposing new, more stringent requirements for antidegradation, which will trigger more reviews. Of course there could be an instance in which a facility may need a second new or increased discharge; this is a reasonable cost that the agency must consider.

Response: Section 227.137(3)(b), Wis. Stats., requires that the economic impact analysis forecast the costs "reasonably expected to be incurred…over any 2-year period" during which

costs are expected to be greatest. This does not entail including costs that are not expected to occur but that could theoretically occur. The EIA reflects all costs that the DNR reasonably expects to be incurred based on permittee data and a thorough understanding of the rule implementation. See the response to the next comment for further discussion on this point. The DNR is not aware of any instances similar to the presented scenario that have occurred, nor were any such actual examples presented during the public comment period. Still, as explained in the economic impacts analysis, conservative assumptions were used in estimating the number of antidegradation reviews expected to be needed, so the DNR expects that any antidegradation reviews that do occur as a result of a second new or increased discharge from a facility, if any, would not be sufficient in number to cause the EIA's forecasted number of reviews to be an underestimate.

B. Underestimated number of affected permittees

In our comments, our coalition encouraged the DNR to reconsider the number of facilities impacted. In its response, the DNR indicated it did not receive information "demonstrating" that its estimate was too low, and that the DNR considered "all permittees" in its analysis.

However, Wisconsin law provides that "an agency shall prepare an economic impact analysis" [see s. 227.137(3)] and the analysis "shall include…the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses…" [see s. 227.137(3)(b)]. In other words, the burden for compiling an accurate economic impact analysis falls on the DNR, not the regulated community. Moreover, the regulated community *did* compile a more detailed EIA, but the DNR failed to incorporate the vast majority of our coalition's recommendations into its own cost estimate.

In addition, contrary to the assertion made in its response, DNR did not consider "all permittees." As noted in the DNR's "Attachment B: Supplemental Information for the Antidegradation Rule Economic Impact Analysis, Board Order No. WY-13- 20" [see page 2], the DNR only analyzed the 30 most recent WPDES permittees, determined a percentage of facilities potentially impacted by the new rule, and then applied that percentage to all permittees. Reviewing a small sample set to determine a percentage is not the same as evaluating all permittees, as DNR claimed. Since it failed to consider and evaluate all permittees, it raises the question as to whether DNR significantly underestimated the affected number of permittees.

Response: The DNR followed the requirements of s. 227.137, Wis. Stats., when creating the economic impact analysis. Future or hypothetical costs are often difficult to project, and the DNR used the same process for assessing such costs as it has on other recent rulemakings. While the term "reasonably expected" is not defined in the statutes, Black's Law Dictionary defines "reasonable efforts" to be "one or more actions rationally calculated to achieve a stated objective, but not necessarily with the expectation that all possibilities are to be exhausted." In the economic impact analysis, while the DNR did not individually examine every permittee, the DNR used a representative subset of permittees to extrapolate total costs of the rulemaking. Based on years of issuing permits, along with experience in recent rulemaking, the DNR believes this to be a reasonable and reliable process for analyzing economic impact.

C. Missing treatment costs associated with a selected alternative

In our coalition comments, we noted that the DNR failed to consider any scenarios in which the DNR would require wastewater treatment as a practicable alternative. In its response, DNR indicated it had never previously required this, and clarified in the EIA that "optimization and source reduction" would be preferred alternatives. Again, the DNR's interpretation of the current rule is inadequate when it comes to estimating costs, as the agency is considering a more stringent rule. Regardless of DNR's belief of what has been required in the past, compliance costs for treatment by businesses is a realistic possibility under the rule and must be considered. If treatment will not be needed under this rule, DNR needs to explicitly specify within the rule that treatment will not be a required alternative to be considered.

> **Response:** Language added. While the DNR cannot outright exclude facility upgrades from the practicable alternatives analysis, if a facility upgrade is not deemed to be practicable then the permittee will provide an analysis as to why it is not considered a practicable alternative. In response to this comment, language has been added under s. NR 207.031(8)(c)1. and (9)(a)4. The new language provides flexibility that will help minimize compliance costs by allowing applicants to select, and the DNR to approve, lower-cost alternatives such as source reduction or optimization of the existing treatment plant. DNR reiterates that in over three decades of implementing the antidegradation rule with a similar alternatives analysis process, it has not required, and does not anticipate requiring, permittees to select a different treatment process as their proposed alternative, as optimization and source reduction are generally a satisfactory practicable alternative for lessening degradation. Therefore, DNR does not consider facility upgrades for wastewater treatment to be a cost that is reasonably expected to be incurred under s. 227.137(3)(b), Wis. Stats., and not appropriate for inclusion in the EIA.

D. Missing costs associated with project delays

In our coalition comments, we noted that DNR failed to consider any costs associated with new project delays associated with newly required and more lengthy antidegradation reviews. In response, DNR stated the following:

> *"DNR expects permittees **will plan appropriately [emphasis added]** to include any applicable permitting or approval processes in the timelines for facility construction or expansion, similar to any other upgrades they would propose to do outside of the antidegradation process (e.g., facility planning)."*

Again, this response is absurd. It is impossible for a facility to "plan appropriately" when the facility has no idea how much time to set aside. There are no time limits within the rule for the DNR to conduct its antidegradation review. A facility has no idea whether to plan for two weeks, two years, or even longer.

Our coalition agrees that, because there are no time limits in the proposed rule for an antidegradation review, it is very difficult to provide a cost estimate associated with the delays. However, that is a problem of the DNR's own making. Under Ch. 227 rulemaking, the DNR must consider all "reasonable" costs. If a project is delayed by an undetermined amount of time, it may create new costs associated with personnel, other applicable permits, land acquisition, construction, and many other costs.

> **Response:** Additional process detail added. Chapter NR 200, Wis. Adm. Code, sets time limits for the DNR's permitting process, specifying that after a complete application is received, the

DNR has 6 months to process the permit. A complete application includes the materials required to conduct the antidegradation review. The DNR's antidegradation determination will be completed by the end of this permitting timeframe and will be public noticed along with the permit. However, the DNR recognizes that some steps, particularly collection of additional water quality data if needed, will need to be conducted well before submitting a complete application. Therefore, pre-planning will be necessary as screening steps are needed to determine the need for additional water quality data and whether an applicant will qualify for streamlined review or will need to prepare additional materials for a full review. The DNR has added more detail to the "Applicant screening submittal" step (relocated to s. NR 207.031(2)) to recommend that pre-screening application materials should be submitted as early as possible prior to the permit issuance/reissuance submittal, municipal facility plan, or industrial plans and specifications.

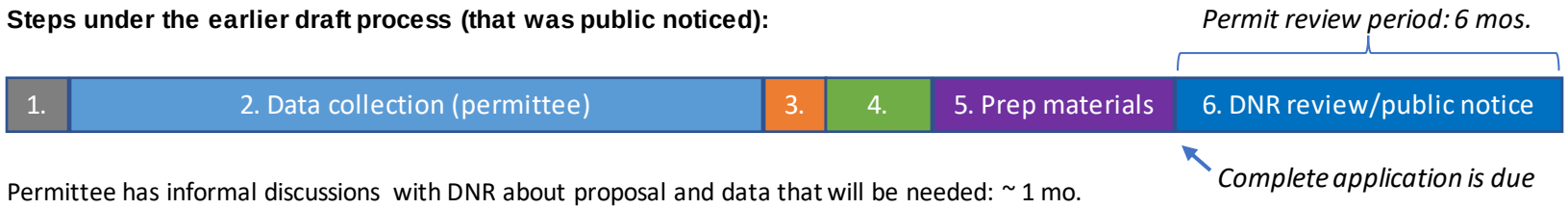
- This does not alter the overall amount of time required but provides a more transparent sequence of steps and notifications and allows the DNR to conduct water quality sampling if needed. See the graphic provided in Figure 1 that illustrates the process.
- The screening materials at the beginning of the process are relatively brief and do not include items such as the social or economic analysis or alternatives analysis; these can be prepared after water quality data is compiled if a full review is required. If additional water quality data may need to be collected, DNR recommends submitting screening materials approximately 1.5 years prior to submitting their complete application. This timeframe meshes with the typical timeframe that the DNR makes application materials available to permittees, 1.5 - 2 years prior to reissuance.
- A note was also added describing the typical scenario this represents and what circumstances may allow a shorter timeline. Although the processing time may be shorter for certain applications, the screening step should happen early on to determine the extent of materials that an applicant will need to provide for their complete application.
- The screening step will also allow the DNR to notify the applicant early on if their proposal is prohibited under the antidegradation provisions, so that the applicant can make alternative plans.

DNR's wastewater program prioritizes timely permit reissuance and is dedicated to working with the applicant throughout the process to clearly specify what materials will be required.

Figure 1. Comparison of antidegradation steps under the earlier draft process (A) and under the revised process recommended in the note in s. NR 207.031(2) and (B), for wastewater individual permit issuance/reissuance.

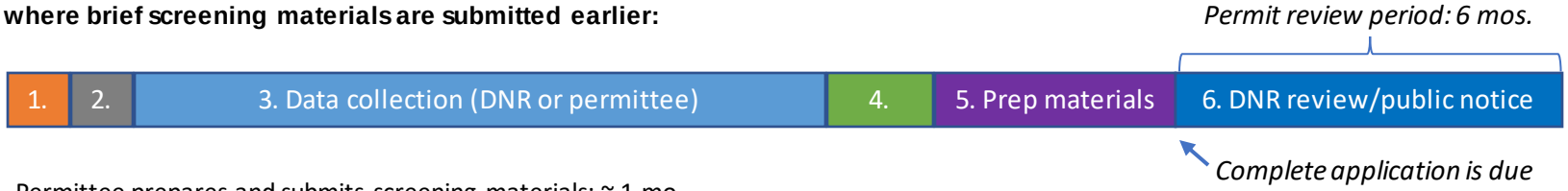
Overall, the steps remain largely the same, and take the same amount of time. However, under the revised process the permittee submits screening materials (orange step) at the start of the process instead of after data collection. This enables better communication and allows DNR to collect the data if the permittee prefers. The steps are color coded to indicate which steps are the same, though rearranged in order.

A. Steps under the earlier draft process (that was public noticed):



1. Permittee has informal discussions with DNR about proposal and data that will be needed: ~ 1 mo.
2. Permittee collects water quality data in receiving waters if needed: up to 1 yr.
3. Permittee prepares/submits screening info: ~1 mo.
4. DNR conducts the screening using the water quality data and notifies permittee whether additional materials are needed for a full review (social or economic analysis, alternatives analysis): ~ 2 mos.
5. If needed, permittee prepares/submits additional materials: ~ 3 mos. The antidegradation materials are submitted at the same time as a permit issuance/reissuance application. If the permittee qualifies for a streamlined review, further materials are not needed.
6. DNR reviews complete application and conducts public notice process: ~ 6 mos. (if it is part of a permit review, this would take place during the permit issuance/reissuance/etc.)

B. Steps under the revised recommended process (Note under s. NR 207.031(2)) where brief screening materials are submitted earlier:



1. Permittee prepares and submits screening materials: ~ 1 mo.
2. DNR conducts initial screening steps: ~ 1 mo.
3. DNR or permittee collects water quality data in receiving waters if needed: up to 1 yr.
4. DNR completes the screening using the water quality data and notifies permittee whether additional materials are needed for a full review (social or economic analysis, alternatives analysis): ~ 2 mos.
5. If needed, permittee prepares/submits additional materials: ~ 3 mos. The antidegradation materials are submitted at the same time as a permit issuance/reissuance application. If the permittee qualifies for a streamlined review, further materials are not needed.
6. DNR reviews complete application and conducts public notice process: ~ 6 mos. (if it is part of a permit review, this would take place during the permit issuance/reissuance/etc.)

III. The costs associated with the proposed rule exceeds $10 million over two years, thus requiring the agency to stop work on the rule until the legislature passes a bill authorizing the agency to promulgate the rule

In its revised EIA, DNR estimates the maximum annual cost of the rule proposal to be $1,652,484 and a maximum two-year cost of $2,484,384. Moreover, DNR estimates the total estimated 10-year cost to be $12,302,320. DNR's compliance cost estimate continues to be far too low.

Conversely, our coalition estimated total compliance costs at $56,682,538. In its response, the DNR largely dismissed our estimate, insisting that permittees will not be required to "install costly upgrades based on an antidegradation review." However, this is conjecture: DNR simply assumes that there will not be a scenario wherein they will force facility upgrades as a part of this rulemaking. There are a litany of possibilities in which "optimization or source reduction" may not be practical alternatives for an industrial facility.

Wis. Stat. § 227.139(2) provides in part that if a rule is expected to cost $10,000,000 or more in implementation and compliance costs incurred by businesses, local governments and individuals over a two-year period, the agency proposing shall stop work on the proposed rule until a bill is enacted authorizing the agency to promulgate the rule. The compliance costs for this rulemaking easily exceed $10 million over two years; thus the DNR must stop work on this rulemaking.

> **Response:** See the responses to the individual comments under section II related to the rule's expected costs. The DNR disagrees that the maximum cost over a 2-year period would be expected to exceed the DNR's estimate of ~2.5 million dollars. In response to comments, the DNR has further reduced permittee costs and responsibility for water quality sampling, added language prioritizing low-cost options, and added language clarifying the approach to selecting viable, practicable alternatives. This will keep costs manageable ("practicable") for the permittee.

IV. DNR's assumption that all costs within the rule are "small business costs" is flawed and unlawful

The DNR acknowledges the rule will have an impact on small business. In "Attachment A" to its economic impact analysis, the DNR states the following:

> "For the purposes of this economic impact analysis, the department is making the conservative assumption that all affected industrial facilities (both wastewater permittees and stormwater permittees) are small businesses due to the anticipated low number of economically affected industrial facilities statewide overall. This should not be construed to imply that large industrial facilities will not be economically affected by this rule, rather, the economic impact of this proposed rule has accounted for these facilities in the event they would be considered a small business. This analysis does not separate these small businesses by sector since the rule will apply to all sectors equally."

However, Wis. Stat. §. 227.19(3)(e) provides that the Department's small business report "shall contain as much information…as the agency can feasibly obtain and analyze with its existing staff and resources." In addition, Wis. Stat. § 227.19(3)(e)3 requires that the report include "the nature of any reports and the estimated cost of their preparation by small businesses that must comply with the rule," while Wis. Stat. § 227.19(3)(e)4 requires the inclusion of "the nature and estimated cost of other measures and investments that will be required of small businesses in complying with the rule."

In summary, there is a clear statutory mandate for the DNR to consider costs as they *explicitly apply to small businesses*. Moreover, the suggestion that costs are the same for both a small business and a large business under this rulemaking is inaccurate. For example, a large industrial facility may be able to utilize in-house personnel in some circumstances to prepare a required alternatives analysis. Conversely, a small business may simply lack the resources and have no choice but to hire an outside consultant. Assuming these costs are identical is an unlawful violation of s. 227.19(3)(e).

> **Response:** EIA and its Supporting Document revised. These were updated to both correct typographical errors in the small business and industry tables and also to refine the estimated number of small businesses affected by this rule. To verify assumptions made about the small businesses, the DNR reviewed data from the 2020 Statistics of U.S. Businesses report, provided by the U.S. Census Bureau. After reviewing the occurrence of small businesses within industries in Wisconsin, the DNR determined that approximately 72% of industrial point sources would be classified as "small businesses." This means that, in any given year of implementing the proposed rule, there is a 72% chance that an affected industrial facility is a small business. This occurrence of small businesses is consistent with the DNR's assumption that most businesses affected will be small businesses. To reflect this percentage, instead of assuming that all businesses affected will be small businesses, the DNR now assumes that three out of the four industrial wastewater permittees which may incur surface water sampling costs every year will be small businesses (instead of the previous assumption of 100%). The estimate of 1-2 facilities conducting an alternatives analysis was kept as-is to avoid using percentages for the number of facilities (since facilities only occur as whole numbers).
>
> As to how per-project costs incurred for a small business might compare to a larger one, the DNR has retained the same costs for both. The DNR anticipates 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. WCMA noted in a separate comment that small businesses may need to hire a consultant for some components of the analysis while larger industries may not. In the original estimate, DNR included the costs of hiring a consultant for facilities regardless of size, for both water quality sampling and developing an alternatives analysis, so these costs are covered in the estimate. Further, DNR will continue to provide enhanced compliance assistance for all small businesses.

V. State law prohibits DNR from imposing requirements on point source discharges more stringent than required under federal law

To justify this rulemaking, DNR has pointed to a petition filed with the EPA indicating that the state's current antidegradation rules are inconsistent with federal requirements and need to be revised. However, the EPA has not ordered Wisconsin to undertake this rulemaking.

During the scope statement process, WMC requested a copy of the EPA's correspondence with the DNR on this matter. In response, the DNR provided WMC with a June 4, 2021 letter that stated in part that the "EPA supports WDNR's decision to consider revising its antidegradation rules" in response to new federal regulations. In the letter, the EPA suggests several areas where the DNR could focus its efforts. (The letter is attached to these comments for reference.)

However, the EPA has not mandated DNR to undertake this rulemaking. In addition, instead of tailoring

its efforts to the concerns identified in the letter, this rulemaking attempts a full rewrite of the state's antidegradation requirements.

In addition, there is likewise no recent statutory change in Wisconsin to justify these sweeping rule revisions. The DNR has simply pointed to existing statutory authority under Wis. Stat. Ch. 281, Wis. Stat. Ch. 283, and Wis. Stat. Ch. 227, as well as the EPA's correspondence.

Moreover, Wis. Stat. § 283.11 (2)(a) provides that except for rules for stormwater discharges, "all rules promulgated by the department under this chapter as they relate to point source discharges…shall not exceed the requirements of the federal water pollution act…and regulations adopted under the act." Thus, DNR is required to remove any provisions in its proposed antidegradation rule that exceed federal requirements, except stormwater requirements. Thus, we request DNR conduct a review of the proposed rule and remove such requirements.

Finally, it should be noted that attempting to enact a rule more stringent than required by EPA standards not only violates Wis. Stat. § 283.11 (2)(a), but also makes the rule susceptible to a legal challenge or possible rejection by the Legislature. Under Ch. 227 rulemaking, this proposed rule must still be approved by lawmakers, and in the past the Legislature has been highly skeptical of unlawful rules.

> **Response:** The DNR, as a delegated authority under the Clean Water Act, is required under state law to follow and be consistent with any new or updated federal regulations in a timely manner. There is no provision in statute or code that requires the DNR to wait to update regulations until ordered by EPA. In this rulemaking, the DNR is not exceeding the requirements of federal law. Furthermore, s. 283.11, Wis. Stats. does not apply to water quality based effluent limitations, as made clear by s. 283.11(5), Wis. Stats., and thus would not apply to antidegradation review.
>
> Finally, ch. NR 102, Wis. Adm. Code, is promulgated under the authority of s. 281.15, Wis. Stats., meaning any requirements of ch. 283, Wis. Stats., would not be applicable to that section of code. The DNR therefore respectfully disagrees with the commenter's interpretation of regulations in this section.

VI. There are too many unanswered questions as to how this rulemaking will be implemented and how it will impact the regulated community

As noted previously, this rulemaking is not a targeted rewrite of the state's antidegradation requirements. Instead, the state's antidegradation requirements are being repealed and recreated. There are many unanswered questions as to how the DNR will implement this proposed rulemaking. Such questions include, but are not limited to, the following:

- As noted in the Clearinghouse Rule Comments prepared by Legislative Council, it is unclear when this rulemaking will apply to regulated entities. Will it apply to permittees with current, pending WPDES applications before DNR, or only to those WPDES permit applications that have not yet been submitted?

- Does the DNR intend to exempt temporary discharge permits, as allowed by federal law? If so, will the DNR insert language within the rule explicitly stating this?

- Can the DNR assure the regulated community that there will be no additional project delays associated with this rulemaking? If not, why were these costs not included in the final EIA, as

required by Ch. 227?

- Given that the process is undergoing a wholesale change and DNR acknowledges that CAFOs will be impacted by the change, how can DNR assume that CAFOs will incur zero dollars in costs?

- DNR is preparing to hire its third Wastewater Program Permits Section Chief in as many years. With this much turnover in the wastewater section, how can permittees be assured the antidegradation rule will be implemented as prior staff has indicated?

- Why is the DNR insisting on including stormwater permittees under this rulemaking, especially when the EPA did not identify this as a concern in its June 2021 letter?

- Why did the DNR not simply exempt WPDES general permittees from the proposed antidegradation requirements, as is done in neighboring Michigan?

- Why are there no time limits associated with a DNR antidegradation review under the rulemaking? What is the maximum length of time that the DNR can take to conduct an antidegradation review?

In many instances, answers to these questions need to be reflected with explicit language in the proposed rule. Responses from DNR via guidance, the EIA, or in a "supplemental EIA document" do not carry the force and effect of law and can be changed outside the rulemaking process.

Responses:

- **Applicability clause:** Language has been added to the Applicability sections in ss. NR 207.001(2) and 216.008(2), that clarifies that the revised rule would pertain to applications submitted after the revisions take effect. See the response to WTBA's comment under item B.4.

- **Temporary discharges:** Allowance for temporary discharges added. See response to MEG's comment on temporary discharges under item 10.

- **Project delays:** Additional information added on submittal timelines. See response under item II D in WMC et al.'s letter.

- **CAFOs:** Language added to specify which instances do not constitute "increased discharges." See response under item VIII B in WMC et al.'s letter.

- **Program management:** This is an incorrect statement. Although the most recent Wastewater Program's Permits Section Chief recently (May 2023) took a different position within the DNR, he had been in his role for 6 years. The Wastewater Section Chief has been in his position for 7.5 years.

- **Stormwater permits:** Under s. 283.01(12)(b), Wis. Stats., certain stormwater discharges are defined as point sources for which permit coverage is required. The antidegradation policy applies to all point sources, including stormwater discharges. The antidegradation implementation procedures in ch. NR 207, Wis. Adm. Code became effective in March of 1989 prior to the promulgation of storm water discharge rules, and were originally written to address the antidegradation procedures applicable to new or increased wastewater discharges to classified waters. The current rule clarifies how the antidegradation procedures apply to

stormwater discharges and how the antidegradation policy will be implemented through ch. NR 216, Wis. Adm. Code.

- **General permits:** No change. Michigan's rule language is from 1999, before the 2015 federal revisions went into effect. It is unlikely that EPA would approve an exemption for general permits. To do so a state would have to demonstrate that the activities covered under the permits do not lower water quality, which is not the case (except for temporary discharges, which the proposed rule now exempts from antidegradation review). Activities that do lower water quality must meet the requirements of the antidegradation policy. In DNR's approach to general permits in this rule, DNR will conduct the antidegradation review at the time of permit issuance/reissuance to incorporate conditions that will meet antidegradation requirements; this internal process entails no cost or activity from permittees. Permittees then certify that they will meet the conditions of the permit to obtain coverage. This satisfies the requirement that the state can assert that the lowering of water quality allowed under general permits will meet the requirements of the antidegradation policy.

- **Time limits:** Additional information added on submittal timelines. See response under item II D in WMC et al.'s letter.

VII. This rulemaking process has not been open and transparent

There is little doubt DNR will attempt to make the case that this rulemaking process has been a successful and collaborative one. DNR will point to its scope statement hearing, economic impact analysis, response to comments on the draft EIA, supplemental materials ("Attachment B") for the economic impact analysis, and its stakeholder advisory committee to make the case this has been an open and a transparent process.

In fact, members of this coalition have been deeply engaged in this rulemaking process since it began nearly two years ago. However, there have been serious concerns throughout:

- To begin, WMC submitted comments on this rule's scope statement (SS 051-21) on July 13, 2021, requesting several changes to the scope statement – including listing all relevant policy changes, identifying all entities impacted by the rulemaking, and providing a more detailed preliminary economic impact estimate. In its response, dated Monday, August 9, 2021, the DNR declined to make any changes.

- On July 6, 2022, WMC and a number of other organizations were invited to participate in an Antidegradation Stakeholder Advisory Committee. It is unclear what, if any, work on the rule occurred in the interim 11 months.

The Department then proceeded to conduct an abbreviated process: Four meetings in a little over two months. Simply put, the DNR did not provide enough time for the regulated community to provide meaningful feedback on the rulemaking. The product that was released following that stakeholder group was by no means a consensus document and should not be treated as such.

- In recent months, DNR staff have released the response to comments and other supplemental materials. However, this is simply not an appropriate substitute for meaningful changes to the rule itself. These documents do not carry the force of law and do not bind DNR, and our coalition is deeply concerned that these "clarifications" via guidance, such as DNR's

assurance that it will not require industrial dischargers to undergo costly treatment system upgrades, will simply change as it suits DNR staff.

It should be also noted that entirely reasonable requests were rejected or ignored by DNR staff. For example, WMC recently requested a listing of changes between the latest two versions of the antidegradation rule, but was told none existed. In addition, WMC asked two simple clarifying questions during the public comment period, and was told that such questions would be considered "public comments" and would be responded to after the public comment period closed. This is not how to conduct an open and transparent rulemaking process.

Response:

- DNR provided as much time for stakeholder input and participation as was feasible for this rule. Given the legislatively mandated expiration of scope statements at 30 months, time for preparation of draft rules and public participation prior to the public comment period is necessarily limited. In the time prior to the first stakeholder meeting, DNR reviewed federal requirements and other states' antidegradation procedures, compiled the necessary elements for draft rule language into a rough draft document for the group to work from, began work on the economic impact analysis, and conducted the necessary preparations for the series of stakeholder meetings. Although it is not mandatory to do so, the DNR prioritizes holding external advisory committee meetings to obtain important input on rules of general interest.

- DNR held 4 stakeholder advisory committee meetings, provided an early initial working draft, and provided a close-to-final draft after the 4th committee meeting but before the public comment period for feedback. DNR considered all comments and concerns raised via these avenues. As noted, DNR also provided a written response to comments received during the Economic Solicitation Period as a good-faith effort to address questions raised at that stage, though this was again above and beyond requirements. DNR made revisions to its economic estimates based on economic comments received.

- After the completion of the advisory committee meetings, DNR's Permits Section Chief attended a statewide meeting of WMC members for active dialogue about the proposed rule. He and a storm water program representative also attended a WPC statewide member meeting to discuss the rule.

- Early in the public comment period, DNR determined that in order to be fair and transparent to all parties, only simple clarifying questions would be answered for individuals while the comment period was open, and more complex questions would be compiled and answered as part of the formal response to comments.

- Contrary to the statement in the comment above, WMC did not request a listing of changes between the two rules, but rather asked, "Do you happen to have a listing or comparison document outlining the changes?" They were informed that we did not have such a document. Even if they had "requested" such a document, public records regulations do not require creation of a new document if none exists. While for certain other rules DNR has attempted to create such a document and agrees that they are helpful, in this case the reorganization of the rule sections made such a document infeasible to produce.

- In the current response to comments document, DNR is including items within rule text where possible that were previously clarified via responses or rule notes. A primary example is

clarifying that CAFOs seeking an alternative discharge limitation already meet antidegradation requirements under existing procedures in ch. NR 243, Wis. Adm. Code (see response to WMC et al.'s item VIIIB).

- While DNR attempts to resolve concerns to the satisfaction of as many stakeholders as possible, rulemaking rarely results in a "consensus document." DNR aims to provide a balance of consistency and flexibility for regulated entities while meeting federal requirements.

- As DNR explained previously, WMC et al.'s request at the scope statement phase was patently infeasible given that agencies are statutorily prohibited from beginning work on the rule until after the scope is approved by the Natural Resources Board (s. 227.135(2), Wis. Stats.). Therefore, for most rules it is impossible to know the details of all policy revisions that may be made or all entities affected until after the rule has at least an initial draft and an economic analysis has been done. DNR followed the statutory requirements in providing an appropriately scoped rule.

VIII. Specific suggestions for improvements

As noted previously, our coalition strongly urges DNR to stop work on this unlawful rulemaking. However, if DNR insists on moving forward, then our coalition recommends the following modifications:

A. Inclusion of "wetlands" in "maintenance of existing uses"

NR 102.45(3) provides that "wetland water quality standards under NR 103.03 shall be maintained." This provision should be eliminated from the antidegradation proposal. Similarly, NR 103.06(2) should be removed.

It is unclear what would trigger an antidegradation review for wetlands, and what additional actions would have to be conducted for wetlands under an antidegradation review. Moreover, the wetland water quality standards include items significantly beyond water quality criteria, including, for example, shoreland protection and protecting "cultural, educational, scientific and natural scenic beauty uses and values."

This provision does not add any additional protection for wetlands, and only creates confusion due to the broad nature of the proposed wetland water quality standards.

Response: Wetland Water Quality Standards under ch. NR 103, Wis. Adm. Code, have been in place since 1991. Under s. NR 103.06(2), the wetland code cross references existing ch. NR 207, the antidegradation procedures for wastewater permits, and states that those antidegradation procedures apply to wetlands. The language in the revised ch. NR 207 is meant to simply maintain the connection between the two codes and clarify that the antidegradation policy applies to wetlands such that existing uses in wetlands shall be maintained, which is a baseline requirement of the federal antidegradation policy. 40 CFR 131.12(a)(1) requires states to protect and maintain existing uses, and this includes the uses enumerated under s. NR 103.03, Wis. Adm. Code.

The proposed antidegradation rule states that waters designated as limited aquatic life are considered non-high quality waters, and under s. NR 104.02(3)(b), Wis. Adm. Code, wetlands are classified as limited aquatic life waters. Therefore, wetlands do not require antidegradation review under the proposed code. The rule further provides that new or increased discharges must be assessed under ch. NR 103, Wis. Adm. Code, which is an existing administrative code requirement. Furthermore, DNR's evaluation of impacts to waters classified as wetlands is based on our designated uses in the code, including aquatic life protection, public health, wildlife, and recreation.

B. CAFOs should be exempted from the rule

Proposed NR 207.011(2) explicitly notes that this rulemaking impacts "…concentrated animal feeding operations seeking an alternative discharge limitations under s. 243.12(2)(b) or (3)(c)…"

Our coalition requests CAFOs be explicitly exempted from this rulemaking. This mirrors a request WMC made to the DNR in prior comments submitted on October 19, 2022.

Throughout this process, DNR staff has insisted that although CAFOs are clearly subject to the proposed antidegradation requirements found in this rulemaking, the compliance costs for CAFOs are zero dollars. Although DNR's specific explanations have varied substantially, this section will focus on three claims made by DNR:

1. Language was added to the EIA to clarify how the rule applies to CAFOs
2. A note was added to the rule to limit the rule's applicability to CAFOs
3. Project delay costs were not addressed by DNR's EIA as they are "not easily quantifiable."

In reference to points #1 and #2 above, neither an adjustment made to a DNR economic impact analysis nor a "note" in a rule carries the force of law. For example, if DNR intends to determine that an alternative discharge limitation to surface water is the preferred alternative within a required alternatives analysis and thus no additional analysis is necessary – as it has stated in its "response to comments" – then DNR needs to include explicit language within the rule stipulating this.

In reference to the exclusion of project delay costs (point #3), as noted previously, this is not an allowable exclusion under Ch. 227 rulemaking. DNR is required to consider all "reasonable" compliance costs that an entity may incur.

In addition, project delays are especially problematic for CAFOs. Already, CAFO permitting is an incredibly arduous, time-consuming process. Imposing new antidegradation requirements on CAFOs, with new requirements for a social or economic analysis, alternatives analysis, and public comment, is problematic enough. Even worse, there are no time limits associated with these requirements, so there is no requirement that DNR complete an antidegradation review in a timely manner.

Moreover, it is unclear what appreciable benefit that DNR (or the public) is gaining by incorporating CAFOs into these requirements. If the current process already ensures incredibly stringent treatment requirements for discharges for CAFOs and no new treatment requirements will be imposed, what is the purpose of this change other than to confuse farmers and the public? Notably, addressing regulations for CAFOs was not addressed by EPA's June 2021 letter to the DNR outlining potential

changes.

DNR's central message to CAFO farmers on this rulemaking appears to be "trust us, you will not be impacted." From permitting delays, to eliminating the WPDES general permit for CAFOs, to a litany of other matters, DNR staff has not earned such trust from the regulated community. Language should be added to the rule explicitly exempting CAFOs from the rulemaking.

Response: Language has been added to specify which instances do not constitute "increased discharges." Federal requirements state that antidegradation applies to all new or increased point source discharges. State requirements must comply with but not exceed federal requirements. S. 283.11(2), Wis. Stats. It is not an option to categorically exclude all CAFOs from the ch. NR 207 antidegradation implementation procedures while remaining compliant with this statutory requirement. However, ch. NR 207 antidegradation implementation procedures will not apply to nearly all permitted CAFOs.

First, as is identified in other comment responses, the CAFO permit does not allow for production area discharges except in extreme and rare rainfall condition. An increase in production size of a CAFO does not translate to an increased discharge from the production area and, therefore, would not trigger ch. NR 207 antidegradation implementation procedures. Further, the rare and episodic nature of the allowed production area discharges is such that antidegradation analysis cannot be applied to them.

Discharges from land spreading areas managed according to the WPDES permit and a nutrient management plan are non-point source Agricultural Stormwater Discharge and not subject to ch. NR 207 antidegradation procedures.

For CAFOs seeking an alternative discharge limitation which involves a continuous discharge to surface water ("end of pipe discharge") the ch. NR 207 antidegradation procedures can be applied in the same manner as any other end of pipe discharge from a point source. However, the requirements in code for an existing CAFO to obtain an alternative discharge limitation preclude applicability for ch. NR 207 antidegradation implementation procedures because they do not allow for an increased discharge.

Requirements for a CAFO seeking an alternative discharge limitation are contained in s. NR 243.13(2)(b), Wis. Adm. Code, for dairy cows, cattle, and ducks, and s. NR 243.13(3)(c), Wis. Adm. Code, for swine, veal calves, and poultry other than ducks. Dairy cows, cattle and ducks, are required to demonstrate that the amount of pollutants discharged by a treatment system under the alternative discharge limitation would be equal to or less than the amount of pollutants discharged under the discharge limitations at s. NR 243.13(2)(a) that are included in their current permit. Facilities with swine, veal calves, and poultry other than ducks are required to demonstrate that the quantity of pollutants discharged from the production area will be offset by additional best management practices that achieve an equivalent or greater reduction in the quantity of pollutants released to other media, including water and air, from the production area or land application areas.

These existing requirements contained in ch. NR 243, Wis. Adm. Code, do not allow an increased discharge for an existing CAFO that is seeking an alternative discharge limitation; therefore ch. NR 207 antidegradation procedures are not triggered. As a result, the proposed rule revisions do not change or add to the requirements for existing CAFOs seeking an alternative discharge limitation.

The circumstance where ch. NR 207 antidegradation procedures could be triggered and would apply for a CAFO are in the situation where a new CAFO is proposed that will seek an alternative discharge limitation that involves direct discharge to surface water. To date, this situation has never occurred in Wisconsin and the DNR has no current applications that fit these circumstances.

The DNR has added the following language to the exclusions from the definition of "Increased Discharge" at s. NR 207.021(3)(b) to clarify this analysis:

> "NR 207.021 (3) (b) 4. An existing CAFO that seeks an alternative discharge limitation under s. NR 243.13 (2) (b) or (3) (c) and demonstrates that the alternative discharge will be equal to or less than the mass loading associated with their current permit."

C. Rule should be aligned with longstanding EPA guidance regarding projects with a temporary water quality standard exceedance

Proposed revisions to NR 207 do not address projects that would only temporarily cause an exceedance of a water quality standard. The proposed rule should be revised to clarify that, consistent with U.S. EPA's longstanding practice, projects that would only cause a temporary and limited exceedance of a water quality standard do not require further antidegradation review, even for outstanding resource waters.

EPA first established antidegradation provisions for outstanding resource waters in 1975. In 1983, the agency amended 40 C.F.R. § 131.12(a)(3) to provide a limited exception to the absolute "no degradation" requirement for outstanding resource waters established under the original rule. EPA explained the basis for this revision as follows:

> The no degradation provision was sometimes interpreted as prohibiting any activity (including temporary or short-term) from being conducted. **States may allow some limited activities which result in temporary and short- term changes in water quality [emphasis added].** Such activities are considered to be consistent with the intent and purpose of an ONRW. Therefore, EPA has rewritten the provision to read '. . . that water quality shall be maintained and protected,' and removed the phrase 'No degradation shall be allowed'" 48 Fed. Reg. 51400, 51402 (Nov. 8, 1983).

Subsequent EPA guidance addresses the scope of activities allowed under 40 C.F.R. § 131.12(a)(3). "It is difficult to give an exact definition of 'temporary' and 'short-term' because of the variety of activities that might be considered. However, in rather broad terms, EPA's view of temporary is weeks and months, not years. The intent of EPA's provision clearly is to limit water quality degradation to the shortest possible time." Office of Water, U.S. EPA, *Water Quality Standards Handbook*, EPA-823-B-12-002 (2012) at 13-14. Consistent with this guidance, a number of other jurisdictions have adopted antidegradation rules that allow for temporary exceedances of water quality standards. For example, the State of Michigan and the Bad River Band's antidegradation rules authorize temporary exceedances of water quality standards applicable to high quality or outstanding waters. *See* Mich. Admin. Code R. 323.1098(8)(a); Resolution No. 7-6-11- 441 of the Bad River Band of Lake Superior Tribe of Chippewa Indians, at Section E.3.ii.

The Department's proposed antidegradation standards do not contain any such provisions allowing short-term or temporary exceedances of water quality standards for outstanding waters. Proposed section NR 207.031(6), Wis. Admin. Code would prohibit any increased discharge to outstanding state or federal resource waters unless that change improves water quality. This terminology appears on its face to prohibit even a short-term exceedance of a water quality standard, as the language of this section is different from, and more restrictive than, the corresponding language of 40 C.F.R. § 131.12(a)(3), which only states that water quality "must be maintained."

Because this provision is more restrictive than the corresponding federal water quality standards, it exceeds the Department's authorized rulemaking authority under Wis. Stat.

§ 283.11. To resolve this regulatory asymmetry, our coalition requests that NR 207.031(6) be revised to mirror the corresponding language of 40 C.F.R. § 131.12(a)(3), and that in doing so the Department expressly note the intent of the revision is to align the rule with the longstanding EPA guidance by allowing temporary and short-term exceedances of water quality standards, even in outstanding resource waters.

> **Response:** Allowance for temporary discharges added. See response to MEG's comment on temporary discharges in item 10.

D. The proposed definition of "practicable" is vague and DNR should consider incorporating "affordability" into the selection process for a preferred alternative

DNR has proposed the following definition within NR 207.001(2):

> *(2) "Practicable" means technologically possible, able to be put into practice, and economically viable*

However, it is unclear what "economically viable" means, and no definition appears in the rule.

One possible solution can be found in neighboring Iowa. Iowa's antidegradation requirements consider the "affordability" of an alternative under an antidegradation analysis. In addition, when considering whether an alternative is "reasonable," Iowa considers whether the alternative is practicable, economically viable, and affordable.

Iowa's requirements further provide that an applicant may conduct an "affordability assessment" to determine if an alternative is "too expensive to reasonably implement." Notably, if the applicant determines that such an alternative is not affordable, then the alternative cannot be considered the preferred alternative [see *Iowa Antidegradation Implementation Procedure;* accessed via iowadnr.gov].

Given the uncertainty created by the proposed requirements, DNR should incorporate language into the rule allowing an applicant to demonstrate that one or more alternatives are not affordable, or too expensive to reasonably implement, similar to Iowa's antidegradation requirements.

> **Response:**
>
> - No change. DNR is using the definition of "practicable" that is identical to the federal definition, since the term is being applied specifically within the same context as the federal regulation. In such a case, using a definition that differs may be perceived as being either more or less stringent than the federal definition. However, the portion of the definition that

says "able to be implemented" can consider affordability; applicants may include this information in their alternatives analysis. This is reflected in the language already proposed under s. NR 207.031(8)(c)1. that states "Reasons for determining that an alternative is impracticable may include land availability or site constraints, cost or affordability, available technologies and limitations of those technologies, or logistics."
*Note that the definition of "practicable" in ch. NR 207 was relocated to s. NR 207.021(6) so that it specifically applies to the Antidegradation subchapter.

- In EPA's response to comments document for their 2015 updates to the federal antidegradation rules, they provided further explanation on what is intended by the term "economically viable":

> "EPA's intention with the term "economically viable" is that the alternative can be achieved and any additional costs to implementing the alternative can be afforded. EPA agrees with a comment suggesting that to be economically viable, an alternative must be one that can be implemented at a reasonable cost to the regulated entity in light of that entity's finances or without causing a substantial hardship to the entity or its customers. If a private entity proposes an activity that would lower water quality and conducts an analysis of alternatives, EPA would not expect the entity to consider alternatives that would preclude any profit.
>
> EPA also agrees with commenters that dischargers, states and authorized tribes need not undertake unnecessarily costly actions that produce nominal additional environmental benefit; however the final rule does not require them to do so. The final rule allows the entity conducting an analysis of alternatives to choose among a range of practicable (definition of which includes "economically viable") alternatives. When choosing among them, they may consider costs and benefits, as well as other considerations. They may also choose not to consider cost-benefit calculations."

E. Definition of "increased discharge" needs to be altered

The references to "expected" change and "will be caused" in NR 207.021(3)(a) should be eliminated from this definition. An increased discharge should only include actual discharges to be consistent with federal law [40 CFR 131.12], which applies when a lowering of water quality is allowed.

> **Response:** Revised in part. The requirements under 40 CFR 131.12 apply to proposed changes to water quality, not changes that have already occurred. The antidegradation analyses required under this section must happen before the proposed new or increased discharge occurs. A key sentence at 40 CFR 131.12(a)(2)(ii) exemplifies this point by stating: "Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located." However, DNR changed the word "expected" to "proposed" to clarify that antidegradation applies when a facility is proposing a change, not to a change that DNR may anticipate but has not been proposed by the facility.

F. Definition of "new discharge" needs to be altered

DNR has proposed the following definition within NR 207.021(4):

(4) "New discharge" means any of the following:

> *1. A point source discharge to a surface water permitted for the first time under a WPDES permit under s. 283.31, Stats.*
>
> *2. A proposed relocation of a point source, except a proposed relocation of a point source to the same receiving water* ***if the department determines [emphasis added]*** *any of the following:*
>
> > *a. The relocated outfall is within 50 feet of the original outfall.*
> >
> > *b. The relocated outfall is within the original mixing zone as defined under s. NR 102.03 (2).*
> >
> > *c. The relocation would not cause additional impacts to a portion of the waterbody.*
>
> *3. A proposal to convert an authorized discharge of pollutants to groundwater under an existing WPDES permit to discharge pollutants to surface water.*
>
> *4. Reauthorization of a previously permitted discharge that does not currently have permit coverage.*

The reference to "if the department determines" should be changed to "if the permittee demonstrates" to provide certainty to permittees. Also, DNR should consider expanding the 50 feet threshold mentioned above. This distance is minimal, and our coalition questions the need for this short of a limitation, particularly in larger bodies of water.

> **Response:** Revised, in part. The language under s. NR 207.021(4)(b) was revised to read "if the permittee demonstrates and the department determines." This reflects that the permittee will make a demonstration in their application that their proposal meets one of the listed exceptions, and the DNR must determine whether it concurs with the demonstration; the DNR may need to review additional information about the waterbody to do so.

G. Add initial applicability clause to the rule

In their Clearinghouse Comments to DNR, Legislative Council raised the following:

f. Would the proposed rule benefit from an initial applicability clause? [s.

1.03 (3), Manual.] For instance, will the revised anti-degradation policy and procedures apply only to discharges first proposed after the rule takes effect? Or will they be retroactive to pending permit applications?

Our coalition agrees the initial applicability of the rule is unclear. An initial applicability clause should be added to clarify that the proposed rule only impacts new permit applications submitted after the rulemaking takes effect, not pending permit applications. This would provide clarity and certainty to permittees.

Response: Applicability clause added. See the response to WTBA's comment under item B.4.

H. Proposed water quality monitoring program lacks sufficient clarity and statutory authorization, and needs to be eliminated

The proposed water quality sampling requirements are not authorized by state or federal regulations; therefore, the sampling requirements must be removed from the final rule. Proposed NR 207.031(4) improperly places the burden on permit applicants to conduct water quality sampling if the agency's own data proves to be insufficient. Specifically, the proposed requirements provide:

If there is insufficient existing representative ambient water quality data for this determination, the applicant shall be responsible for obtaining and submitting sufficient data for the department's determination. The applicant shall collect data in the receiving and downstream waters in accordance with the department's monitoring and quality assurance protocols for each parameter. The department shall determine whether the quantity, quality, and representativeness of existing or submitted data is sufficient. Sampling of surrogate parameters directly related to the impact of the pollutant of concern may be required.

This proposal should be stricken from the final rule for at least three reasons. First, there is no explicit statutory authority in Chapter 283 for this requirement, and as such, it exceeds the Department's rulemaking authority under Wis. Stat. § 283.11. Nor is there even relevant authority within federal law [40 C.F.R. § 131.12].

Second, the requirement to conduct pre-project monitoring of unknown parameters and an unknown round of sampling events will introduce significant delays to the WPDES permitting process, especially for stormwater WPDES permits for transportation and utility projects, many of which cross multiple waterways. The cost of this sampling cannot be estimated in advance, and may run into the six figures or more for significant projects. The uncertainty and potential impact of these requirements would also jeopardize project times, as these requirements could easily add a year or more to the timeline for the Department to issue WPDES permits or permit coverage for these projects.

Finally, the proposed water quality sampling requirements are exceptionally vague as to the "quantity, quality, and representativeness" of what data will be accepted. The absence of clear quantitative and qualitative standards will create a basis for any project opponent to challenge any antidegradation determination based on allegations that some additional type or duration of monitoring should have been conducted to comply with the rule. For these reasons, the proposed water quality sampling requirements must be removed from the proposed rule.

Response: In response to concerns about water quality data sampling, the DNR revised the proposed language to allow the applicant to select whether it prefers to have the DNR collect any additional water quality data or to do so itself, when there is not enough recent ambient data for the receiving waterbody. In s. NR 207.031(2), "Applicant screening submittal", par. (a)6. was added for the applicant to indicate its preference when it submits its screening materials. Section NR 207.031(4), "Water quality data," was also revised to this effect. Under this adjustment, permittees seeking an antidegradation review are not required to incur additional costs for sampling. However, the DNR retained those costs as part of its economic impact analysis as a conservative measure, to account for permittees which decide to collect the water quality data themselves.

I. Antidegradation procedures for individual WPDES permits need to mirror federal law

Proposed NR 207.031 sets forth procedures for individual WPDES permits. NR 207.031(1) provides in part that the DNR will determine whether any proposed lowering of water quality has been prevented or lessened. This should be clarified so that it is only necessary to prevent or lower the lessening of water quality if one or more *practicable* alternatives are available, as specified in 40 CFR § 131.12(2)(ii).

Response: Revised. Language has been revised at multiple places to address this comment, including the following:

- The "General" subsection under s. NR 207.031(1) was revised to read, "…the department shall determine whether a practicable alternative would prevent or lessen any lowering of water quality…"
- The "Practicable alternatives analysis" paragraph at s. NR 207.031(8)(c) was revised to read, "If such alternatives are available, the applicant shall indicate which of the options is their preferred alternative." Under par. (c)1., the following was added: "If practicable alternatives have been identified under this paragraph that will prevent or lessen water quality degradation, the applicant shall identify its preferred practicable alternative."
- The "Departmental antidegradation review" subsection at s. NR 207.031(9)(a)4. was revised to read, "If an alternatives analysis is required under sub. (8) (c) and the department finds that one or more practicable alternatives has been identified that will effectively lessen degradation from the proposed activity, one of these alternatives is selected for implementation."

J. Current 33% assimilative capacity threshold for determining "significant lowering of water quality" should be maintained

Under the proposed rule [see NR 207.031] the DNR lowers the threshold for determining when there has been a significant lowering of water quality, which triggers the need to conduct an antidegradation analysis. The threshold is proposed to be lowered from 33% of assimilative capacity to 10%, "as determined by the department."

The existing 33% threshold should be maintained, as this provision may trigger significant compliance costs for permittees. The assimilative capacity threshold is not mandated by federal law.

Moreover, if EPA disapproves a 33% threshold, DNR should aggressively advocate for a threshold greater than 10 percent. DNR has provided no information to demonstrate that Wisconsin's antidegradation policy has been unsuccessful in protecting water quality, nor has DNR provided a peer-reviewed scientific basis for going to a 10% threshold.

Response: No change. See response to items 15 and 16.

K. New "one time cap" on use of assimilative capacity should be removed

In addition, NR 207.031(8)(a)(f) adds a new provision to the antidegradation provisions that greatly

limits the use of this threshold. Specifically, it stipulates that a permittee can only use the 10% significant threshold once without going through a full antidegradation analysis. DNR, however, has not provided any information that this has been an issue during the decades that Wisconsin has had an antidegradation policy. Thus, this requirement should be removed.

Response: No change. See response to items 15 and 16.

L. Cumulative impacts language must be modified or deleted

Also, proposed NR 207.031(8)(a)(f) specifies in part that DNR "may consider cumulative impacts in determining whether a proposed discharge would be considered a significant lowering of water quality." We question the need for this provision. First, it would seem that cumulative impacts would be reflected by the assimilative capacity of the water body.

However, to the extent that DNR wishes to consider cumulative impacts beyond the assimilative capacity threshold, it must explicitly include language in the rule stipulating *how* it will determine cumulative impacts. Section 227.10(1) stipulates "each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute." DNR's process for determining cumulative impacts with respect to antidegradation clearly necessitates rulemaking.

Response: The DNR agrees that cumulative impacts will be reflected in the assimilative capacity of the receiving water; i.e., if multiple facilities over time have used part of the assimilative capacity, less assimilative capacity will be available. The DNR will need to consider current water quality data that is representative of any other facility increases over time to determine how much assimilative capacity remains for any newly received proposal. The DNR is not planning to establish a cap on cumulative impacts (see response to comments under item 16). As long as proposed impacts are lessened to the extent practicable, social or economic need is demonstrated, and existing uses are maintained, the DNR may authorize the use of the assimilative capacity while ensuring that water quality standards will still be attained. This is the same as past practice.

M. Calculation for assimilative capacity should remove the phrase "as determined by the department"

Proposed NR 207.031(8)(a)3. provides that "a significant lowering of water quality is a discharge that will use greater than 10 percent of the receiving or downstream waterbody's assimilative capacity **as determined by the department [emphasis added]** using the following procedures…"

This section of the rule prescribes the procedure for determining the 10% assimilative capacity threshold. The phrase "as determined by the department" suggests that DNR can alter [the] threshold as it sees fit, which creates significant uncertainty for permittees. If the applicant demonstrates compliance, this should be sufficient. The phrase "as determined by the department" should be removed from the rule.

Response: Revised and Table 1 removed. Upon further analysis, DNR has replaced the calculation procedures in Table 1 with a broader statement, similar to that in the existing s. NR 207.05(2)(d). This was revised because DNR determined that the calculations in Table 1. did

not cover all scenarios. Calculations will differ based on a number of variables including the type of parameter, whether dealing with concentration or mass, and whether the discharge is new or increased. Because of the inherent variation, the new language states:

> "The significance threshold will be exceeded if the proposed new or increased discharge is greater than either of the following: 1. Ten percent of the assimilative capacity for any indicator parameter other than dissolved oxygen. 2. The sum of 90 percent of the existing level and 10 percent of the water quality criterion for dissolved oxygen."

Again, this is similar to how the calculation is framed under the existing code.

Because of these complexities, it is DNR's responsibility to conduct these calculations. An applicant may provide its own calculations if it wishes, but the DNR remains responsible for the final review and determination that appropriate and correct calculation procedures were followed, as specified in s. NR 207.031(8)(a). Regardless, s. NR 207.031(8)(a)3. was revised to read, "…a significant lowering of water quality is a discharge that will use greater than 10 percent of the receiving or downstream waterbody's assimilative capacity as calculated ~~determined by the department~~ using the following procedures…" Under this section, DNR cannot "alter the [10%] threshold," but will apply appropriate calculations based on the specifics of the proposal.

N. "Reasonable potential" threshold should be removed

Proposed NR 207.031(8)(a)3.d. provides in part the following:

> d. Determine whether the proposed discharge has **reasonable potential [emphasis added]** to exceed the 10 percent significance threshold under subd. 3. c. using the procedures under s. NR 106.05. A new or increased discharge will result in a significant lowering of water quality if there is a proposed increase of a parameter over 10 percent of the assimilative capacity.

The proposed "reasonable potential" threshold appears inconsistent with the language noting a significant lowering of water quality "if there is a proposed increase of a parameter over 10 percent of the assimilative capacity." If the proposed increase is less than 10% of assimilative capacity, then the criteria has been met under the rule. The "reasonable potential" threshold injects unneeded certainty for permittees, and should be removed.

> **Response:** Removed. In addition to the revisions to the calculations section described under item M. above, DNR determined that a reasonable potential calculation may not be applicable to all discharge situations, and has therefore removed it. However, it may still be applied as part of the calculations for some discharges if effluent data is available. The reasonable potential process is simply a way to compare the effluent data to the calculated water quality based effluent limit (or, in this case, the 10% threshold) to determine whether the effluent will exceed the criterion/threshold. The process is described in detail in ch. NR 106.

O. Social or economic importance analysis section should be modified

Proposed NR 207.031(8)(b) sets forth the requirements for conducting the social or economic importance analysis. This provision provides in part that the "amount of information and level of

detail provided shall be relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of the potential risk to the receiving water."

Initially, we would encourage DNR not to be excessive in its information demands. DNR should consider, for example, that expansions or new facilities are likely subject to some local approvals (e.g., zoning), and several items listed above are subject to other regulations (e.g., discharge and risks to the receiving water). The social or economic analysis are "in addition to" other approvals or reviews.

Moreover, social and economic areas listed should be relatively easy to ascertain. We encourage DNR to take these considerations in mind when determining what information is necessary for this analysis.

It is also unclear why the DNR is removing some permissible criteria under the current rule. DNR should compare the existing criteria [under the current NR 207.04(1)(c) and the proposed criteria and ensure that important criteria are not being eliminated. These potentially include:

- Avoiding a reduction in employment level
- Industrial and residential growth
- Efficiency (only "energy efficiency" is contained in the proposed rule)

In addition, we note that both the social and economic "areas" listed in the rule include a provision allowing a permittee to demonstrate "other areas that would accommodate important economic [or social] development not specified under this subdivision." We support this addition. This allows applicants to explain other benefits of their projects beyond those categories specifically mentioned in the rule in order to meet antidegradation review requirements.

> **Response:** No change. The list of factors provided under the economic considerations section generally covers the above items and explicitly allows for additional considerations if appropriate.

P. Alternatives analysis section should be modified

Proposed NR 207.031(8)(c) specifies the requirements for the alternatives analysis. As an initial matter, our coalition recommends the name of this subsection be modified to "Practicable Alternatives Analysis." This is consistent with the requirement in 40 CFR 131.12(a)(2)(ii), which requires an analysis of "practicable" alternatives.

As noted previously, the proposed NR 107.02(6) defines "practicable" to mean "technologically possible, able to be put into practice, and economically viable." It is unclear what the difference is between what is technologically feasible and what is "able to be put into practice." One interpretation would be if something is technologically feasible, it can be put into practice.

In addition, as noted previously, it is unclear what is considered "economically viable." In addition to incorporating "affordability" into the definition of "practicable," DNR should provide further information regarding how it would determine "economic viability." While DNR included in its draft rule a reference to EPA guidance entitled "*Clean Water Act Financial Capability Assessment Guidance*"(https://www.epa.gov/waterfinancecenter/clean-water-act-financial-capability-assessment-guidance), that guidance is targeted to municipalities and not industry. Of course, industry and

governments have different economic constraints, including revenue options.

Also, DNR included language within the rule that specifies the alternatives analysis only applies to the facility site in question, and not to alternatives such as shifting production to another location. This language is helpful in that it puts bounds around the scope of the alternatives to be evaluated.

a. Requirement for a demonstration that the facility does not have treatment capability.

Proposed NR 207.031(8)(c)1. requires an applicant to submit a demonstration that its facility does not have treatment capability to treat any proposed new or increased discharge to the level needed to meet applicable effluent guidelines. The ability to treat by itself, however, does not necessarily reflect increased costs associated with treating an additional load. As referenced above, "practicable" includes being "economically viable."

To reiterate, the DNR made clear in its "Response to Comments" that it would *not* seek to force facilities to incur additional treatment costs, and instead target source reduction. Consistent with that statement, this provision should be modified to provide an exception if the treatment "capability" is not "economically viable" or "affordable" for the facility.

b. "Less-degrading alternative" under the alternatives analysis

Proposed NR 207.031(8)(c)2. requires an applicant to provide a range of practicable alternatives to prevent or lessen the degradation associated with the discharge.

Moreover, proposed NR 207.031(8)(c)6. requires an applicant to identify "a proposed practicable alternative that prevents or lessens water quality degradation…" The requirement for selecting a "practicable alternative" is set forth in 40 CFR 132.12(a)(2)(ii). This provision requires states to analyze alternatives and provides the following:

> "The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternative, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.

There are several key points regarding this provision that we request be clearly incorporated into DNR's proposed rule:

- The federal rule recognizes that a practicable alternative that will prevent or lower water quality may not exist. Consequently, a practicable alternative may not need to be implemented under federal requirements.

- The federal rule does not require an applicant to implement the "least" degrading alternative. The federal rule only requires implementation of "one" alternative if one exists.

- The federal rule does not specify that the state selects what alternative will be implemented. That choice is left to the discretion of the applicant.

In addition, as noted previously, DNR stated in its "Response to comments" that it would prioritize alternatives that utilize less-costly alternatives including source reduction or optimization, as opposed to treatment. However, there is no language in the proposed rule requiring DNR to prioritize alternatives

that utilize source reduction. If this is DNR's intent, it must be explicitly stated within the rule.

Responses:

- **Subsection title:** The title of this subsection has been revised to "Practicable alternatives analysis".
- **Definition of "practicable" and "economically viable":** No change to the federal language. See explanation under section VIII D.
- **Facility site in question:** Based on a comment from EPA, DNR revised and relocated this sentence. See response to item 18.
- **Treatment capability:** Revised. Proposed s. NR 207.031(8)(c)1. was revised and relocated to the screening step under s. NR 207.031(2) and (3), since this is a determination that should happen early in the process. It was revised to read, "A demonstration that it is not practicable for the facility's currently installed treatment technology to treat the proposed new or increased discharge to levels that will meet existing effluent limitations." The term "practicable" was used because it is defined in the rule and includes consideration of economic viability.
- **Federal language regarding alternatives analysis:**
    - Revised. The comment recommends adopting the federal language at 40 CFR 132.12(a)(2)(ii) that reads, "The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternative, the State shall only find that a lowering is necessary if one such alternative is selected for implementation." These sentences are now both reflected within the DNR proposed code, with minor modifications to fit grammatically within the DNR code sequence. The first of the two sentences was already included in DNR's earlier draft at s. NR 207.031(8)(c), and remains. A sentence has been added to s. NR 207.031(9)(a)4. to reflect the intent of the second sentence.
    - The proposed rule also requires "less" rather than "least" degrading alternatives; a correction was made in the storm water rule to change the unintended use of the term "least."
    - As the permitting authority, DNR determines what the appropriate effluent limitations are in the permit. If the DNR determines that the permittee's preferred alternative is not appropriate, DNR would not approve the alternative analysis and would potentially proceed with permit reissuance with appropriate limits. DNR expects that there will be thoughtful discussion amongst the parties and consensus reached before the antidegradation materials are submitted.
- **Prioritizing optimization or source reduction:** Language added. Under the "Departmental Review" subsection at s. NR 207.031(9)(a)4., a sentence was added to this effect. See also response at item II.C.

IX. Suggestions for stormwater section of rule

A. Rule structure should be modified

As an initial matter, we request that DNR explicitly include all specific provisions for stormwater discharges. Detailing all stormwater requirements in the stormwater section of the rule, rather than referencing parts of the wastewater antidegradation rule, would provide significantly more clarity to the stormwater antidegradation requirements.

> **Response:** Revised. Language added. To address this comment, the DNR has amended the proposed rule to incorporate all storm water antidegradation implementation procedures and requirements within ch. NR 216, Wis. Adm. Code.

B. Applicability section is too broad

NR 216.008(2) provides that "this section establishes antidegradation to any person proposing to increase an existing storm water discharge or create a new storm water discharge…." The language in NR 216.008(4)(b) indicating that the DNR may determine measures are not sufficient to meet antidegradation requirements and require additional permit conditions, and the language in NR 216.008(5) indicating that the DNR may require information from a "permittee" for purposes of an antidegradation review, appears inconsistent with the language in NR 216.008(2). These provisions do not appear to be limited to "new or increased" discharges.

> **Response:** Revised. The DNR has revised these sections to make clear that the antidegradation policy applies to any person proposing to increase an existing storm water discharge or create a new storm water discharge to the surface waters of the state. The DNR has also specified that after the rule takes effect, antidegradation requirements will be applied to applications for coverage for WPDES individual permit issuance, reissuance, or modification. The rule will apply to general permits and will be implemented upon the issuance, reissuance, of modification of a general permit. The DNR has also excluded discharges that temporarily lower water quality provided the discharge only occurs for the length of time necessary to undertake an activity that is limited in nature and will not permanently degrade water quality.
>
> Section NR 216.008(4) has also been revised to reflect that the existing requirements established under ch. NR 216, Wis. Adm. Code and performance standards and prohibitions under ch. NR 151, Wis. Adm. Code, will be used to prevent degradation for all receiving waters where the antidegradation policy applies. However, these provisions do not address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge may require additional practices to meet antidegradation requirements for a proposed new or increased discharge. As specified under s. NR 216.008(6), when these instances occur, the DNR will obtain evidence when necessary to support or develop these conditions and will make a preliminary finding that the specific conditions satisfy the antidegradation policy.
>
> When an applicant submits a notice of intent for coverage under a general permit and the applicant has a new or increased discharge, they must certify that the conditions of the permit used to satisfy the antidegradation policy for a new or increased discharge are met.

C. Definition of discharge should mirror statutory definition

NR 216.008(2)(d) defines "increased discharge" to include "site conditions that would reasonably increase the discharge of pollutants." Wis. Stat. § 283.01(4) defines "discharge" as a "discharge of any pollutant." This language should be modified to mirror the statutory definition, and specify that there must actually be an increase in a discharge of pollutants from the site to constitute an "increased discharge."

> **Response:** Revised. The DNR has modified the definition of "increased discharge" to mean "an actual or proposed change in the area or site conditions that results in or will result in an increase in the concentration, level, or load of a pollutant associated with a currently permitted storm water discharge." However, the definition cannot be limited to *actual* discharges because the rule pertains primarily to *proposed* discharges that have not yet taken place. The definition was also subdivided to specify that an increased discharge does not include reissuance or administrative extension of a WPDES general or individual permit, issuance of a WPDES individual or general permit for a category of existing discharges that did not previously require a permit under state or federal regulations, or instances where a permitted municipal separate storm sewer system (MS4) incorporates a previously unincorporated area, provided an applicant or permittee is not proposing an increase in the concentration, level, or loading of a pollutant in the discharge.

D. Definition of "practicable" is also problematic in the stormwater section

As noted in the wastewater section, the definition of "practicable" in NR 216.008(3) requires economic viability. What constitutes economic viability is therefore a key factor in determining what alternatives are "practicable". The applicable EPA guidance DNR references in a note on page 29 of the draft rule, however, focuses on municipalities, and not industry. There are significant differences between the two; for example, governments can tax and impose fees. DNR should provide guidance regarding economic viability, with an opportunity to comment, that is specific to industry.

> **Response:** No change. See the response to WMC et al.'s item VIII D.

E. Unlike the wastewater antidegradation provisions, there is no assimilative capacity threshold for triggering an antidegradation review

Under DNR's proposed stormwater rules, there is no threshold for allowing minor impacts to a waterbody before triggering an antidegradation review. NR 216.008(4)(a) provides in part that DNR will conduct antidegradation review on "any proposed lowering of water quality." Current antidegradation rules contain a threshold of 33% of the assimilative capacity of waterbody, while DNR's proposed rule contains a 10% threshold for "other high quality" waters.

The proposed rule appears to require an antidegradation review any time there is a new or increased discharge of a pollutant to a high quality water, regardless of the amount of pollutants discharged or impact to a waterbody. This exceeds what is required by federal law, and will require reviews resulting in no environmental benefit or a negligible environmental benefit. This is particularly true when

considered in light of the extensive federal, state and local stormwater requirements that are in place, as well as other water quality standards.

DNR should modify the stormwater section of the rule to establish a significance threshold so as to focus on new or increased discharges that are likely to have a significant impact on the water quality. That threshold should be the same as the threshold established for wastewater discharges.

> **Response:** Revised. The existing storm water implementing regulations recognize that storm water discharges are highly variable in both volume and concentration and for these reasons calculating an effluent limitation and subsequently an assimilative capacity for the receiving water and/or a significance threshold are impractical. In most instances and for most receiving waters, the existing requirements established under ch. NR 216, Wis. Adm. Code, and performance standards and prohibitions under ch. NR 151, Wis. Adm. Code, will be used to prevent degradation for all receiving waters. However, these provisions alone do not address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge may require additional practices to meet antidegradation requirements for a proposed new or increased discharge.
>
> The DNR has revised s. NR 216.008(7) to reflect the first step is a screening step and unless there is a determination by the DNR that there is a potential for lowering of water quality further antidegradation measures would not be required.
>
> Additionally, consistent with federal regulations, the DNR has added s. NR 216.008(2)(b), specifying temporary discharges are not subject to the antidegradation policy.

F. Determination that performance standards/prohibitions are insufficient to prevent degradation

Proposed NR 216.008(4)(b) provides that if DNR determines that existing stormwater prohibitions and performance standards are insufficient to prevent degradation, DNR may require additional permit conditions.

This provision appears to give DNR unlimited authority to require additional permit conditions. This rule does not, however, include information about how DNR is going to make the determination that existing rules are insufficient to prevent antidegradation. DNR must include within the rule explicit language providing how it will determine that the current rules are inadequate in preventing any antidegradation, and describing any actions it may take in the event DNR decides existing rules are inadequate.

> **Response:** Revised. Section NR 216.008(4) has been renumbered and this paragraph reworded to read:
>
> > "*Performance standards*. The requirements established under this chapter and the performance standards and prohibitions under ch. NR 151 shall be utilized to prevent degradation of all receiving waters. Upon issuance, reissuance, or modification of general and individual permits, the department shall impose additional permit conditions to address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge require a

permittee to incorporate additional practices to meet antidegradation requirements."

The DNR has relied on existing requirements established under ch. NR 216, Wis. Adm. Code, and the standards and prohibitions under ch. NR 151, Wis. Adm. Code, to meet the water quality standards for most receiving waters. However, these standards alone may not be sufficient to prevent a lowering of water quality to some receiving waters given the site-specific characteristics of the water body or discharge. In these circumstances, the language proposed provides flexibility in drafting conditions within the context of general permits to accommodate site-specific characteristics of the water body or discharge, thereby ensuring most permittees or applicants will continue to be eligible for coverage under general permits.

This framework also provides the public with the ability to provide input on the use of best management practices to meet the antidegradation policy, while promoting the efficient administration of the storm water WPDES program. When developing conditions of the general permit designed to meet the antidegradation policy, the DNR will gather information, as necessary, and may consult with sector representatives to develop specific requirements under the general permit. During general permit issuance, reissuance, or modification, the DNR will make a preliminary determination under s. NR 216.008(6)(b) that the conditions of the general permit meet the antidegradation policy. The public, sector representatives, and governmental bodies will have an opportunity to comment on these provisions during the public notice period.

G. Additional requests from DNR for water quality data should be defined and limited

Proposed NR 216.008(5) allows DNR to require an applicant or permittee to provide information regarding the antidegradation review and to determine whether coverage will be under an individual or general permit. If the applicant or permittee indicates it will meet the terms of a general permit, that permittee should be allowed coverage under the general permit.

In addition, this provision provides a list of information that "*may include* any of the

following." This language should be changed to "*shall be limited* to the following." This modification provides appropriate sideboards and prevents DNR from unlimited, open- ended requests for information from the applicant.

Response: Revised. The DNR has revised s. NR 216.008(5) to identify the specific information necessary to determine eligibility for coverage under a general permit, antidegradation screening, or antidegradation review. Further antidegradation procedures are not required if the person seeking coverage under the general permit certifies that the antidegradation permit conditions will be met and the DNR has conferred coverage under the permit.

H. Support for limits on antidegradation requirements once a permit is issued

Our coalition supports the language in NR 216.008(6)(e)1. indicating that no further antidegradation requirements are required once DNR issues a permit containing antidegradation requirements and coverage is granted, if the applicant certifies that the conditions of the permit will be met.

Response: Thank you for the comment.

I. The term "antidegradation inquiry" is confusing and should be deleted

Proposed NR 216.008(7) indicates that DNR will "screen" proposed discharges when determining the applicability of the antidegradation policy. NR 216.008(7)(a), however, refers to an "antidegradation inquiry." The difference between these two terms is unclear, and "antidegradation inquiry" is not defined within the rule. DNR should eliminate the reference to "antidegradation inquiry" to provide additional clarity to these provisions.

Response: Revised. The DNR has revised this subsection to reflect that the "inquiry" is actually a screening step. Under the revised provisions, the DNR will review information provided by the permittee or applicant to determine if the discharge is a new or increased discharge, a discharge to high quality water, or a discharge of a pollutant allocated under a TMDL water. The DNR will notify a permittee or applicant under s. NR 216.008(7)(e) if the screening steps indicate that an antidegradation review applies, additional information is needed to conduct the screening or review, or if the lowering of water quality is not permissible.

J. DNR requests for information should be limited

NR 216.008(7)(a)5. provides in part that the applicant shall be notified if the applicant is required to submit additional information. Regarding the information that must be provided, this provision should reference NR 216.008(5), which details the information DNR may require. Further, information requests should be limited to those items explicitly listed within NR 216.008(5).

Response: Revised. The DNR has modified the language under s. NR 218.008(7)(e) to read: "That further information is needed, as applicable under sub. (5), to complete the screening process or antidegradation review, and what additional information may be required." Section NR 216.008(5) was also modified to specifically identify the information the DNR may request for purposes of conducting the antidegradation screening or review under s. NR 216.008(7) to (9), and to determine whether coverage under a general permit is applicable or coverage under an individual permit is required under ch. 283, Stats. The DNR had previously accounted for the costs associated with collecting this information as part of the EIA.

K. Requirements for other high quality waters should be modified as previously described

Proposed NR 216.008(7)(d) contains the requirements for "other high quality waters". These requirements include the social and economic importance analysis, and the alternatives analysis. These requirements are contained in federal law [40 CFR 131.12]. Please see our comments in Section VIII (O) and (P) of this document for our comments on the social or economic analysis, and the alternatives analysis.

Response: Revised. The DNR has incorporated the term "practicable" within the title of the alternatives analysis section. Similar to the requirements for wastewater individual permits, the DNR has included a request that the applicant include their preferred alternative that would lessen the proposed discharge of pollutants associated with the discharge. In addition, the DNR

has revised the level of information that must be provided by the permittee or applicant so that it is relative to the size of the project or facility, the characteristics of the proposed discharge, and the characteristics of and potential risk to the receiving water.

Where the rule previously referenced practicable alternatives under s. NR 207.031(8)(c), these provisions have now been incorporated into the storm water antidegradation procedures under ch. NR 216, Wis. Adm. Code. The storm water program has included similar language to wastewater's requirements within the screening steps of s. NR 216.008(7), for the department to determine whether an applicant's proposed or implemented best management practices are sufficient to prevent a lowering of water quality. Also, similar to the wastewater provisions, storm water implementing regulations specify that an applicant need not consider shifting production to another facility if that is not practicable.

The antidegradation implementation procedures for storm water discharges specify that the applicant proposing a new or increased discharge of bioaccumulative chemicals of concern (BCCs) to a Great Lakes system water shall identify any cost-effective pollution prevention alternatives and techniques that are available to the applicant or permittee that would prevent or lessen the extent to which the increased loading would result in a lowering of water quality. The storm water program recognizes that most proposed new or increased discharges of BCCs will require the implementation of source area controls to prevent a lowering of water quality. The rule also specifies that new or increased discharges to the Lake Superior Basin follow the procedures under s. NR 102.12(3), Wis. Adm. Code, for the pollutants identified in that subsection.

L. Reference to "performance standards" needs clarification in the rule

Proposed NR 216.008(7)(e) specifies in part that if DNR determines that performance standards or prohibitions are insufficient to meet antidegradation requirements, it may require additional permit conditions. DNR should include explicit language in the rule as to how it will determine if the performance standards or prohibitions are insufficient.

Response: Revised. Proposed s. NR 216.008(7)(e) (now s. NR 216.008(8)(d)) has been amended to read as follows:

> "*Performance standards*. The applicant shall submit information demonstrating that the respective requirements of this chapter and the performance standards and prohibitions of ch. NR 151 are met. The department shall impose additional permit conditions to address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge require a permittee to incorporate additional practices to demonstrate that antidegradation requirements are met."

As previously indicated in response to comment IX.E, in most instances the existing requirements established under ch. NR 216, Wis. Adm. Code, and performance standards and prohibitions under ch. NR 151, Wis. Adm. Code, will be used to prevent degradation for all receiving waters.

However, when an applicant is not eligible for coverage under a general permit or is unable to meet the conditions of the general permit designed to meet antidegradation, the DNR would

notify the permittee of the need to apply for an individual permit, and that the provisions under s. NR 216.008(8) apply. The DNR would consult with a permittee or applicant on options they may be considering to meet the antidegradation policy, considering the category of receiving water and any less degrading best management practices that may be practicable.

M. Language requiring DNR to conduct an antidegradation review for "each new or reissued permit" must be deleted

Proposed NR 216.008(8) that DNR "shall conduct an antidegradation review for each new or reissued individual storm water WPDES permit issued under this chapter." We strongly object to this language, which we assume was included in error. Under federal law, a review is only required if there is a new or increased discharge that will lower water quality in a high quality water. DNR must modify this language to reflect this approach, and be consistent with federal law.

Response: Revised. The DNR has modified s. NR 216.008 (8) (now sub. (9)) in response to this comment to reflect that the antidegradation review and determination applies where the DNR has notified a permittee or applicant that there will be a lowering of water quality under s. NR 216.008(7).

N. Alternatives analysis should specify "less degrading alternative" instead of "least degrading alternative"

NR 216.008(8)(a)(5) indicates that if an alternative is approvable, the preliminary

determination shall reflect the "least degrading alternative selected." This language is confusing because there is no requirement to select the least degrading alternative. Moreover, the language in the wastewater section of the rule provides for the "less degrading" alternative.

Under federal law, the requirement is to select a "less" degrading practicable alternative if there is one. Consequently, DNR needs to modify this language. Again, we assume this language was included in error.

Response: Revised. The DNR has modified the language in s. NR 216.008(8)(a)(5) (now s. 216.008(9)(a)(5)) to be reflective of a "less-degrading" alternative.

O. Proposed revisions to the stormwater permit provisions should be stricken

Proposed section NR 216.03(3) authorizes DNR to require a project to apply for an individual WPDES permit if it believes that a discharge would be significant. It is not apparent why this provision has been included in revisions to the antidegradation rule, unless the intent is to require an increased use of individual stormwater permits for construction projects in any area subject to antidegradation.

DNR's Economic Impact Analysis does not evaluate an increase in individual stormwater permits or evaluate the significant and unnecessary cost of delay for major projects required to conduct water quality sampling under proposed NR 207.013. As such, the proposed NR 216.03 should either be removed from the final rule, or an independent EIA should be prepared that fully assesses the significant costs of individual permit processing, modeling, and water quality sampling that would be required

under the new rule. In addition, DNR should also assess the additional cost and resource demands to the agency resulting from an increase in submission of individual permit applications.

Response: Revised. The DNR has removed this subsection from the proposed rule in response to comment but may seek to incorporate these provisions into the municipal storm water implementing regulations in a future rulemaking effort.

X. Conclusion

Our coalition includes businesses and farms committed to ensuring a reasonable and stable regulatory environment in Wisconsin. Our members could all be negatively impacted by this proposed rulemaking (WY-13-20/Clearinghouse Rule 23-010).

Again, our coalition respectfully urges DNR to stop its work on its proposed antidegradation rulemaking. Our reasons for making this request include, but are not limited to, the following:

1. DNR has failed to consider and incorporate all relevant compliance costs into its economic impact analysis.
2. The costs associated with the proposed rulemaking exceed $10 million over two years.
3. DNR failed to properly and lawfully evaluate small business costs associated with this rulemaking.
4. State law prohibits DNR from imposing requirements on point source discharges more stringent than required under federal law.
5. There are far too many unanswered questions as to how this rulemaking will be implemented and how it will impact the regulated community.

If DNR refuses to stop work on the rule – which is contrary to what the law requires – our coalition urges DNR to make the aforementioned reasonable modifications. Such modifications will help better align the rule with applicable state and federal law and minimize the negative impact of this rule on Wisconsin businesses and farmers.

Response: DNR has sought to address all public comments received while keeping in mind the requirements of the federal antidegradation regulations. In pursuit of that goal, DNR has made a number of changes to the proposed rule that were requested by stakeholders, including the following: revising rule language to more closely reflect federal language, providing additional clarity throughout, adjusting the process for sample collection to further reduce costs, addressing concerns about project delays, identifying additional cases in which antidegradation review is not required, and responding to additional questions surrounding the economic impact analysis. Each of these topics, along with all other public concerns, are discussed at length in this document. DNR respectfully disagrees that the cost thresholds for rulemaking have been exceeded, and has addressed that concern more thoroughly in section II (above). DNR believes that this proposed rule provides clarity for applicants and a more transparent process for the public, while protecting and preserving the quality of the waters of the State.