# Clearinghouse Rule 23-010

The statement of scope for this rule, SS 051-21, was approved by the Governor on May 13, 2021, published in Register No. 785B on May 24, 2021, and approved by the Natural Resources Board on August 11, 2021. This rule was approved by the Governor on insert date.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD REPEALING, RENUMBERING AND AMENDING, , AMENDING, REPEALING AND RECREATING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 102.05 (1), 102.13 and 207.11 (5); to **renumber and amend** NR 102.12 (1); to **amend** NR 102.23 (3), 103.06 (2), 106.03 (4r), 106.145 (4) (b), 212.74 (intro.) and 212.75 (intro.); to **repeal and recreate** NR 207 subch. I; and to **create** NR 102.03 (1L), (1p), and (1pg), 102.045, 207.001, 216.008, and 216.03 (3), relating to updating Wisconsin's water quality antidegradation policy and procedures and affecting small business.

**WY-13-20**

## Analysis Prepared by the Department of Natural Resources

**1. Statutes Interpreted:**

Section 281.12, Wis. Stats.
Section 283.13(5), Wis. Stats.
Section 281.13(1)(a) and (b), Wis. Stats.
Section 281.15, Wis. Stats.
Section 281.65(4)(c) and (cd), Wis. Stats.
Section 283.11(5), Wis. Stats.
Section 283.13(5), Wis. Stats.
Section 283.31(3) and (4), Wis. Stats.
Section 283.55, Wis. Stats.
Section 283.83, Wis. Stats.
Section 227.11(2), Wis. Stats.

**2. Statutory Authority:**

Section 281.12, Wis. Stats.
Section 281.13(1)(a) and (b), Wis. Stats.
Section 281.15, Wis. Stats.
Section 281.65(4)(c) and (cd), Wis. Stats.
Section 283.13(5), Wis. Stats.
Section 283.31(3) and (4), Wis. Stats.
Section 283.33, Wis. Stats.
Section 283.37, Wis. Stats.
Section 283.55, Wis. Stats.
Section 283.83, Wis. Stats.
Section 227.11(2), Wis. Stats.

**3. Explanation of Agency Authority:**

The statutory authority for revising the antidegradation policy statement in ch. NR 102, Wis Adm. Code, which is a narrative water quality standard, and for revising the procedures used to implement the policy in Wisconsin Pollutant Discharge Elimination System (WPDES) permits is as follows:

1. Section 281.12, Wis. Stats., grants the department general supervision and control to carry out the

planning, management, and regulatory programs necessary for prevention and reduction of water pollution and for improvement of water quality.

2. Section 281.13(1)(a) and (b), Wis. Stats., give the department the authority to create rules to research and assess water quality in the state.
3. Section 281.15, Wis. Stats., mandates that the department promulgate water quality standards, including water quality criteria and designated uses. It recognizes that different use categories and criteria are appropriate for different types of waterbodies, and that the department shall establish criteria which are not more stringent than reasonably necessary to ensure attainment of the designated use for the waterbodies.
4. Section 281.65(4)(c) and (cd), Wis. Stats., directs the department to prepare a list of impaired waters.
5. Section 283.13(5), Wis. Stats., states that the department shall establish more stringent limitations than required under that section when necessary to comply with water quality standards or any other state or federal law.
6. Section 283.31(3) and (4), Wis. Stats., state that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation, state water quality standards, and total maximum daily loads.
7. Section 283.33(8), Wis. Stats., directs the department to promulgate rules for the administration of s. 283.33, Wis. Stats., which sets forth the requirements for storm water discharge permits under the WPDES program.
8. Section 283.37, Wis. Stats., gives the department authority to promulgate rules regarding permit applications.
9. Section 283.55, Wis. Stats., gives the department authority to impose monitoring and reporting requirements.
10. Section 283.83, Wis. Stats., requires that the department establish a continuing planning process and that plans shall include implementation procedures including compliance schedules for new water quality standards.
11. Section 227.11(2), Wis. Stats., provides the department with the authority to promulgate rules that are necessary to administer the specific statutory directives in chs. 281 and 283, Wis. Stats.

**4. Related Statutes or Rules:**

These proposed rules relate to surface water quality standards and the WPDES permit program, specifically the antidegradation policy currently located at s. NR 102.05(1), Wis. Adm. Code, and antidegradation policy implementation procedures in chs. NR 207 and 216, Wis. Adm. Code. Related rules include chs. NR 102, 104, 105, and 106, Wis. Adm. Code, which contain Wisconsin's surface water quality standards and their application, and chs. NR 200 to 299, Wis. Adm. Code., which contain requirements for the WPDES permit program. Chapter 283, Wis. Stats., contains the statutory authority and requirements for the WPDES permit program.

**5. Plain Language Analysis:**

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

standards, including 40 CFR 131.12, which specifies what requirements state antidegradation policy statements must include. The purpose of this rulemaking is to revise Wisconsin's existing antidegradation policy to be consistent with federal requirements and to ensure the implementation procedures are both clear and appropriately consistent with the antidegradation policy.

Minor updates were made to chs. NR 103, 106, and 212 to cross-references or for consistency of definitions.

*Antidegradation Policy Statement*

The state's antidegradation policy is a narrative water quality standard contained in ch. NR 102. The existing policy under ch. NR 102.05 is being replaced with an updated policy under ch. NR 102.045. The proposed language reflects the requirements of 40 CFR 131.12, as updated by EPA in 2015. The proposed policy states that existing uses of surface waters will be maintained and protected. Proposed revisions clearly define what is a "high quality water" in Wisconsin. EPA's regulations offer states two options for defining "high quality": on a waterbody-by-waterbody basis and/or on a parameter-by-parameter basis. The proposed definition of "high quality waters" is a hybrid option, using both approaches. Some Wisconsin waters are high quality by type, such as Outstanding Resource Waters and Exceptional Resource Waters that are listed in ch. NR 102, Wis. Adm. Code. All other waterbodies that are not high quality by type may be considered high quality on a parameter-by-parameter (e.g., phosphorus, chloride, copper, etc.) basis if water quality is better than a water quality standard for a designated use. This means that a waterbody can be high quality for one or more parameters, even if it is impaired for a different parameter. For example, a waterbody may be impaired for phosphorus, but chloride levels are better than the chloride water quality criterion. The waterbody would be considered high quality for the purposes of considering new or increased discharges of chloride, but would not be high quality for phosphorus. Proposed revisions to the antidegradation policy also define which waters are non-high quality (e.g., impaired waters, limited aquatic life waters, etc.). In order to prevent further degradation of waters that are already impaired, the proposed policy prohibits lowering of water quality with respect to the concentration, level, or loading of a parameter that is causing the impairment.

The proposed revisions to the policy statement direct how degradation will be prevented for each type of high quality water. For waters that are high quality by type, water quality must be maintained and protected, with no lowering of water quality, except as specified for certain proposed discharges to exceptional resource waters as stated in the implementation procedures (chs. NR 207 and 216, Wis. Adm. Code). For all other high quality waters, the policy requires that the department may only approve a lowering of water quality when the applicant has analyzed practicable alternatives and demonstrates to the department that lowering of water quality is necessary to support important social or economic development in the area of the new or increased discharge. The department must also find that existing uses of the water will be maintained and protected, and that statutory and regulatory requirements for all point sources under ch. 283, Wis. Stats., and relevant requirements for regulated nonpoint sources under s. 281.16, Wis. Stats., and ch. NR 151, Wis. Adm. Code, are being achieved. In making these findings, the department must solicit public input.

The final two requirements in the antidegradation policy statement address protection of Great Lakes system waters and thermal discharges. The Great Lakes system waters must be protected from the impacts of persistent, bioaccumulative chemicals of concern by avoiding or limiting increases of these substances. Evaluation of degradation potentially caused by new or increased thermal discharges must be consistent with federal Clean Water Act section 316(a).

*Antidegradation Policy Implementation Procedures*

This rule package proposes to repeal and recreate the existing subch. I of ch. NR 207, Wis. Adm. Code, to

align with the proposed revisions to the antidegradation policy statement in proposed s. NR 102.045, Wis. Adm. Code. The recreated subchapter will set procedures applicable to proposed new or increased discharges to high quality waters and apply to any person or facility proposing to increase an existing discharge or create a new discharge to the surface waters of the state. The majority of the procedures in ch. NR 207, Wis. Adm. Code, generally apply to new or increased discharges of wastewater covered by an individual WPDES permit, but procedures applicable to general WPDES permits are also included. The antidegradation policy implementation procedures applicable to stormwater discharges to high quality waters regulated under s. 283.33, Wis. Stats. will be located in s. NR 216.008, Wis. Adm. Code. New or increased discharges to high quality waters from concentrated animal feeding operations (CAFOs) seeking an alternative discharge limitation under s. NR 243.13 (2)(b) or (3)(c), Wis. Adm. Code, will follow the procedures for review of individually permitted wastewater discharges in the recreated ch. NR 207, Wis. Adm. Code.

*Wastewater individual permit antidegradation analysis*:
The proposed revisions to ch. NR 207, Wis. Adm. Code, start with defining a new or increased discharge so that applicability of antidegradation procedures is clear. The definition also details what will not be considered an increased discharge. To be consistent with the antidegradation policy stated in s. NR 102.045, Wis. Adm. Code, the department will conduct a review of any new or increased discharge covered by an individual WPDES permit and determine whether it will lower water quality in a high quality water as defined in s. NR 102.045(2)(b), Wis. Adm. Code. If a determination of significant lowering of water quality is made, the department will then determine whether any proposed lowering of water quality has been prevented or lessened and also whether lowering is necessary to support important social or economic development in the area where the waters are located. The applicant shall submit the information and supporting evidence required by ch. NR 207, Wis. Adm. Code, using department-approved forms and following applicable instructions. The department's determination will be based upon department review of antidegradation application materials, which would be submitted as part of a permit application or a proposed municipal facility plan. The sequence of antidegradation review for discharges covered by an individual wastewater WPDES permit is as follows:

- *Antidegradation screening:* The department screens each request to determine whether lowering of water quality may be allowable and whether such lowering requires an antidegradation review.
    - *New or increased discharge determination:* The department determines whether the proposed discharge meets the definition of a new discharge or an increased discharge.
    - *High quality waters determination:* If the proposed discharge is a new or increased discharge, the department determines whether the receiving water or downstream waters affected by the proposed discharge are high quality waters as defined in s. NR 102.045 (1)(a)3., Wis. Adm. Code. If the proposed new or increased discharge is to a water listed on the section 303(d) list as not attaining a water quality criterion for a specific parameter or the department has data showing that it is not attaining a water quality criterion for a parameter, no lowering of water quality will be allowed with respect to the concentration, level, or loading of a parameter that is causing the impairment.
    - *Total maximum daily load (TMDL) area determination:* If the proposed new or increased discharge is for a pollutant allocated under an EPA-approved TMDL, the department determines whether a potential lowering of water quality may be allowable and whether an antidegradation review is required.
    - *Notification*: If there is potential to lower water quality in a high quality water, the department notifies the applicant that an antidegradation review is required and further information must be submitted.
- *Water quality data*: If there is insufficient existing ambient water quality data to determine concentrations or levels of the parameters of concern in the receiving waters and downstream waters, the applicant must obtain and submit sufficient data for the department's determination.

- *Requirements for certain types of high quality waters*:
    - *Outstanding Resource Waters*: The department will not approve any change in effluent concentration, level or loading unless it would improve water quality. Effluent limits will be set equal to or better than background concentrations upstream of or adjacent to the discharge site, or at water quality criterion, whichever is more protective.
    - *Exceptional Resource Waters*: Effluent limits will be set equal to or better than background concentrations upstream of or adjacent to the discharge site, or at water quality criterion, whichever is more protective, unless lowering of water quality is necessary to prevent or correct contamination or a public health problem.
    - *Great Lakes system waters*: New or increased discharges of bioaccumulating chemicals of concern are prohibited unless the applicant demonstrates the necessity to lower water quality through an antidegradation analysis.
- *Antidegradation review for other high quality waters*:

  *Significant lowering of water quality determination.* The department determines whether the proposed discharge would constitute a significant lowering of water quality. Any lowering of water quality due to a bioaccumulative chemical of concern is considered significant. For other discharges, 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% of the assimilative capacity of the receiving water for that parameter. If the department finds that the proposal would not result in a significant lowering of water quality, no further antidegradation review is required, allowing the applicant to proceed without a determination of social or economic need or an alternatives analysis. After an applicant has received a one-time increase that is at or below the 10% threshold for a given parameter, the next time the applicant requests an increase for the parameter, a full antidegradation review will be required.
    - *Social or economic analysis*. For a discharge that the department determines would result in a significant lowering of water quality, 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. A list of factors to consider in making this determination is contained in the rule.
    - *Alternatives analysis*. For a discharge that the department determines would be a significant lowering of water quality, the applicant must submit a description and analysis of a range of practicable alternatives that have the potential to prevent or lessen the degradation associated with the proposed discharge.
    - *Departmental antidegradation review:* After review of all submitted materials, the department will only authorize a lowering of water quality if it finds that such lowering is necessary to accommodate important social or economic development, and that a less-degrading practicable alternative has been chosen for implementation. Any alternative that is approved by the department will have permit limits set to utilize the amount of assimilative capacity demonstrated to be needed by the facility for the approved alternative. The department will ensure that point source and state-regulated nonpoint source discharges to the receiving water will meet requirements under the antidegradation policy in s. NR 102.045(5)(c), Wis. Adm. Code.
    - *Departmental determination:* The department will provide a preliminary written determination as to whether or not the antidegradation policy in s. NR 102.045, Wis. Adm. Code, has been satisfied. If not, the applicant will be notified of deficiencies. In that case, for new dischargers, permit limits shall be set equal to background concentrations or criteria, whichever is more stringent. For a proposed increased discharge, the department will not authorize less-stringent permit limits than those currently in effect. The department will seek public comment on its preliminary

determination. After consideration of any comments, the final antidegradation determination will be included with the department's final determination to issue or deny the WPDES permit or to approve or disapprove the facility plan.

*Wastewater and stormwater general permit antidegradation analysis***.** The department will apply the antidegradation policy and implementation methods to each new or reissued general WPDES permit for wastewater and storm water discharging to surface water as part of the general permit issuance process. Before a general permit is issued or reissued, the department will obtain available evidence, as necessary, to support specific requirements, permit conditions, and findings as they relate to any new or increased discharges that would be covered by the general permit. Further, the department will make findings on how the antidegradation policy and the antidegradation implementation requirements are met. Finally, the department will provide the antidegradation determination during the general permit public notice and accept comments on the determination. If the department issues a determination that a general WPDES permit achieves the antidegradation water quality standard, additional antidegradation reviews are not required if the permittee seeking coverage under the general permit certifies the permit conditions are met and the department confers coverage under the general permit.

*Storm water individual permit antidegradation analysis*:

- *Screening*: In circumstances where a permittee is unable to utilize the general permit conditions designed to prevent a lowering of water quality that meet the antidegradation policy, the department would proceed to screening and requesting additional information (if necessary) to determine if an individual permit application is required.
- *Notification:* If screening indicated that the discharge was a new or increased discharge that had the potential to lower water quality in a proposed high quality water, the department will notify the applicant that additional information will be required to inform the antidegradation review.
- *Additional information:* Information the applicant would be required to provide includes water quality data where insufficient data exists, the social or economic importance analysis, the range of alternatives considered, and information indicating that the less-degrading alternative has been selected for implementation.
- *Additional Requirements for outstanding state or national resource waters, exceptional resource waters, and Great Lakes system waters:* For stormwater discharges to these high quality waterbody types, the method for determining if a discharge that is equal to or better than the receiving water is as follows:
    - Discharges from a municipal facility regulated under subch. I of ch. NR 216, Wis. Adm. Code, shall achieve a discharge less than or equal to the average annual load from the municipality based on achieved pollutant load reductions.
    - Discharges from an industrial site regulated under subch. II of ch. NR 216, Wis. Adm. Code, shall implement best management practices that achieve discharge concentrations at or below background concentrations of the receiving water.
    - Discharges from a construction site regulated under subch. III, of ch. NR 216, Wis. Adm. Code, shall achieve a discharge less than or equal to the average annual load from the construction site in the pre-development condition.
    - Great Lakes system waters, as defined in the renumbered s. NR 102.03(1pr), Wis. Adm. Code, are to be protected from the impacts of persistent, bioaccumulative chemicals of concern by avoiding or limiting to the maximum extent practicable increases in these substances.
- *Antidegradation Review:* The department will use the information submitted by the applicant, and only authorize a lowering of water quality if it finds that a) such lowering is necessary to accommodate important social or economic development in the area of the new or increased discharge, and b) that when one or more practicable alternatives that would prevent or lessen the

degradation associated with the proposed discharge are identified, a less-degrading alternative has been selected for implementation, or the additional requirements for outstanding state or national resource waters, exceptional resource waters, and Great Lakes system waters have been met.

- *Preliminary antidegradation determination*: The department will use the information and factors considered in the antidegradation review to condition individual permits to meet the antidegradation policy. If the department finds that the antidegradation policy will not be satisfied, it shall provide written notification to the applicant of the deficiencies.
- *Opportunity for comment:* The department will provide a draft antidegradation determination with public notice to issue or deny the WPDES permit and will consider comments the public or other agencies provide prior to making a final determination on permit issuance.
- *Final antidegradation determination:* When the department determines the proposed activity satisfies or fails to satisfy the antidegradation policy, it will prepare a written final antidegradation determination that will be included with the department's final determination to issue or deny the WPDES permit.

**6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:**
The federal statutory authority for antidegradation policy is in the Clean Water Act, Section 303(d)(4)(B), which states (bolded for emphasis):

- "STANDARD ATTAINED.—**For waters** identified under paragraph (1)(A) **where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standard, <u>any effluent limitation</u>** based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard **may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section**."

The primary federal regulation governing state antidegradation policies and procedures is 40 CFR 131.12, as amended in 2015. Most of the requirements in that section are focused on the content of a state's antidegradation policy.

- 40 CFR 131.12(a)(1) requires that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Proposed s. NR 102.045(3), Wis. Adm. Code, contains this requirement.
- 40 CFR 131.12(a)(2) requires that "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, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." Proposed s. NR 102.045(5)(c), Wis. Adm. Code, contains these requirements.
- 40 CFR 131.12(a)(2)(i) states that "the State may identify waters for the protections described in paragraph (a)(2) of this section on a parameter-by-parameter basis or on a water body-by-water body basis. Where the State identifies waters for antidegradation protection on a water body-by-water body basis, the State shall provide an opportunity for public involvement in any decisions about whether the protections described in paragraph (a)(2) of this section will be afforded to a water body, and the factors considered when making those decisions. Further, the State shall not exclude a water body from the protections described in paragraph (a)(2) of this section solely

because water quality does not exceed levels necessary to support all of the uses specified in section 101(a)(2) of the Act." Based on this portion of the regulation, the department proposes to provide antidegradation to some waterbodies on a waterbody-by-waterbody basis and all other waterbodies on a parameter-by-parameter basis. This is reflected in the definition of "high quality waters" found in s. NR 102.045(2)(b), Wis. Adm. Code.

- 40 CFR 131.12(a)(2)(ii) requires that "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." This requirement is contained in s. NR 102.045(5)(a), Wis. Adm Code. The preamble to the federal rule clarifies that this involves two analyses: an analysis of alternatives and an analysis related to economic or social importance. 80 Fed. Reg. 51032 (Aug. 21, 2015). For the alternatives analysis, the federal regulation further requires that "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 alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation." This required part of the antidegradation analysis is included in s. NR 207.031(8)(c) and (9)(a)4., and s. NR 216.008(7)(c)2. and (8)(a)4., Wis. Adm. Code. The requirements for an economic or social importance analysis are contained in s. NR 207.031(8)(b) and (9)(a)3., and s. NR 216.008(7)(d)1. and (8)(a)3., Wis. Adm. Code.
- 40 CFR 131.12(a)(3) requires that "where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected." Sections NR 102.045(2)(b)1. and (4), and 207.031(6)(a), Wis. Adm. Code, contain this requirement.
- 40 CFR 131.12(a)(4) requires that antidegradation review of thermal discharges be consistent with Section 316(a) of the Clean Water Act. Section NR 102.045(7), Wis. Adm. Code, contains these requirements.
- 40 CFR 131.12(b) requires that "the State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section. The State shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public." Proposed procedures for implementing Wisconsin's antidegradation policy are contained in chs. NR 207 and 216, Wis. Adm. Code.

The Great Lakes Water Quality Initiative Antidegradation Policy in 40 CFR 132, Appendix E also applies to this rulemaking. The requirements are reflected in ss. NR 102.045(6), 207.031(7) to (8), and 216.008 (7)(c), Wis. Adm. Code.

**7. If Held, Summary of Comments Received During Preliminary Comment Period and at Public Hearing on the Statement of Scope:**

The department held a virtual preliminary public hearing on the statement of scope on July 13, 2021. Twenty-three members of the public attended the hearing. No attendees testified verbally. One letter was received seeking additional details that were not available at the time of the scope statement but that have been provided in these draft documents. The comment letter also proposed that stormwater requirements should not be included in this rulemaking because ch. NR 216, Wis. Adm. Code, was being revised in a different rulemaking effort. The department decided to retain stormwater within the scope of this rulemaking because it is specific to antidegradation, which was not addressed in the separate rulemaking related to stormwater requirements.

**8. Comparison with Similar Rules in Adjacent States:**
A review of water quality standards rules in Illinois, Iowa, Minnesota and Michigan revealed that these states all have antidegradation policies and implementation procedures that are substantively similar to Wisconsin's proposal. Each state requires the following:

- Protection and maintenance of existing uses.
- Protection of high quality waters designated both on a waterbody-by-waterbody basis (e.g. Outstanding or Exceptional Resource Waters) and on a parameter-by-parameter basis.
- Identification of which waters are included or excluded from the definition of a new or increased discharge.
- Submittal of an alternatives analysis.
- Submittal of an alternatives analysis for discharges of bioaccumulative chemicals of concern to the Great Lakes system (not applicable to IA).
- Submittal of a social or economic importance analysis demonstrating that the proposed discharge is necessary for important social or economic development.
- A description of the findings the state must make to approve a proposed new or increased discharge.
- Procedures for public participation.

Items that vary between states include:

- *Significance threshold:* Wisconsin's proposal contains a significance threshold that allows applicants proposing discharges below the threshold to use a more streamlined review process. Michigan has the same 10% threshold as Wisconsin's proposal. Illinois, Iowa, and Minnesota do not contain a significance threshold, so all applicants proposing a new or increased discharge must complete a full antidegradation review regardless of the amount of discharge.
- *Alternatives analysis:* Wisconsin requires an alternatives analysis and selection of a "less-degrading" alternative. Minnesota has a more rigorous alternatives analysis than Wisconsin, requiring applicants to rank alternatives from most to least degrading and select one of the least degrading; Minnesota also provides multiple tests an applicant can run to determine if an impact is substantial. Iowa requires applicants to select the least-degrading and reasonable alternative. Illinois and Michigan require an alternatives analysis, but do not explicitly require selection of a less-degrading alternative.
- *Social or economic importance analysis:* Compared to Wisconsin, Minnesota assesses other factors along with social and economic benefits to determine the social or economic importance of the proposed discharge, including the value of the water resource. Iowa and Michigan are more like Wisconsin, providing a non-exhaustive list of factors an applicant may use to demonstrate social or economic importance. Illinois provides a short but non-exhaustive list of potential benefits of the proposed activity.
- *General permits:* Similar to Wisconsin, Minnesota applies antidegradation procedures to general permits and to stormwater discharges. Iowa applies antidegradation procedures to new or reissued general permits and to individual municipal separate storm sewer system (MS4) permits. In contrast, Michigan exempts discharges authorized under general permits from antidegradation review.
- *Codification of implementation procedures:* In this rule package, Wisconsin proposes to promulgate its antidegradation implementation procedures for clarity and consistency. Iowa and Michigan implement their antidegradation procedures through guidance rather than code. Iowa's guidance explicitly states that antidegradation review applies to facility plan approval (as in Wisconsin's proposal). Minnesota has both promulgated implementation procedures and associated guidance.

The states' antidegradation regulations are found here:

- Illinois' antidegradation policy is contained in 35 Ill. Adm. Code 302.105, last amended in 2002.
- Iowa's Antidegradation Policy rule, 567 IAC 61.2(2), became effective in state rules on February 17, 2010. Their implementation procedures are laid out in guidance rather than in code ("Iowa Antidegradation Implementation Procedure," IDNR, 2010).
- Minnesota's antidegradation rules, found at Minn. R. 7050.0250-.0335 and 7052.0300-.0380, became effective Nov. 14, 2016. Minnesota updated its antidegradation rules to be consistent with EPA's 2015 amendments to 40 CFR 131.12.
- Michigan's antidegradation policy is found in Rule 98 of its Part 4 Water Quality Standards. Michigan implements its antidegradation policy through guidance, rather than administrative rule ("WRD-PS-001 – Antidegradation/Antibacksliding, EGLE, 2021).

**9. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:**
The department reviewed requirements from federal antidegradation regulations and accompanying EPA guidance, as well as approaches used by other states. Procedures were generally revised to maintain consistency with current processes where feasible, while incorporating the 2015 federal requirements. A stakeholder advisory committee was convened to review the proposed procedures and provide feedback.

**10. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:**
Estimated costs for small businesses are summarized in the table below. Full documentation of the methods used for this analysis is provided in Attachment B of the economic impact analysis. The department is conservatively making the assumption that all affected industrial facilities (both wastewater permittees and stormwater permittees) are small businesses as part of this analysis due to the anticipated low number of economically affected industrial facilities statewide overall. This analysis does not separate these small businesses by sector since the rule will apply to all sectors equally.
In summary:

- To determine the statewide economic cost of this proposed rule for wastewater discharges, the department evaluated three primary areas of costs: 1) the costs to develop an alternatives analysis, 2) sampling costs incurred by facilities needing to evaluate the background quality of the receiving waterbody or waterbodies, and 3) the costs incurred by facilities that choose an alternative based on the alternatives analysis. Costs to municipal rate-payers were also assessed.
- To determine the economic costs to storm water discharges under the proposed rule, the department considered costs associated with: 1) application fees, sampling, data collection and analysis, engineering/consultant costs, 2) the installation of treatment best management practices, and 3) operation and maintenance of specialty filtration systems related to non-conventional pollutants.
- The department anticipates that 2 to 3 CAFO permittees will seek to establish surface water discharges under alternative discharge limits (ADLs) in each year. While these facilities would follow the procedures established in this rule, none of these discharges are expected to entail additional costs based on this rule. There are no anticipated cost impacts for typical CAFO permittees that do not discharge to surface water under ADLs.

Data for obtaining the cost estimates for small businesses was sourced from: the Wisconsin State Laboratory of Hygiene (for sampling costs), private sector consultants familiar with alternatives analysis costs, internal review of the department's WPDES permit database, and urban grant recipient costs from 2016 - 2019.

**11. Effect on Small Business (initial regulatory flexibility analysis):**
From the analyses outlined above, the following table summarizes estimated costs for small businesses.

**Cost Summary for Industries (assumed to be small businesses)**

| Cost Area | Low End Number of Small Businesses Per Year | High End Number of Small Businesses Per Year | Low End Cost Per Small Business | High End Cost Per Small Business | Low End Total Statewide Annual Costs to Small Businesses | High End Total Statewide Annual Costs to Small Businesses |
|---|---|---|---|---|---|---|
| Alternatives Analysis (Wastewater Permittees) | 1 | 2 | $35,000 | $50,000 | $35,000 | $100,000 |
| Sampling (Wastewater Permittees) | 1 | 2 | $600 | $3,600 | $600 | $7,200 |
| Construction, New Discharger (Stormwater Permittees) | 0 | 1 | $0 | $900 | $0 | $900 |
| Industrial, New Discharger (Stormwater Permittees) | 0 | 1 | $0 | $245,346 | $0 | $245,346 |
| Industrial, Increased Discharge (Stormwater Permittees) | 0 | 2 | $0 | $245,346 | $0 | $490,692 |
| **Total:** | | | **$35,600** | **$545,192** | **$35,600** | **$844,138** |

**12. Agency Contact Person:**
Wade Strickland
Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921
wade.strickland@wisconsin.gov, 608-669-0171

**13. Place where comments are to be submitted and deadline for submission:**
Written comments may be submitted at the public hearings, by regular mail, or email to:
Kristi Minahan
Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921
608-266-7055, kristi.minahan@wisconsin.gov

Comments may be submitted to the department contact person listed above or to DNRAdministrativeRulesComments@wisconsin.gov until the deadline given in the upcoming notice of public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and on the department's website, at https://dnr.wi.gov/calendar/hearings/. Comments may also be submitted through the Wisconsin Administrative Rules Website at https://docs.legis.wisconsin.gov/code/chr/active.

## RULE TEXT

**SECTION 1. NR 102.03 (1L), (1p) and (1pg) are created to read:**

**NR 102.03 (1L)** "Designated use" means a use specified for a water body or segment in water quality standards under s. NR 102.04 (3), (5), (7) and (9), regardless of whether the use is being attained.

**(1p)** "Existing use" means a use actually attained in a water body on or after November 28, 1975, whether or not it is included in the water quality standards.

**(1pg)** "Great Lakes" has the meaning established in NR 102.22 (5).

**SECTION 2. NR 102.045 is created to read:**

**NR 102.045 Antidegradation policy. (1)** GENERAL. The entirety of this section constitutes the antidegradation policy, which is a narrative water quality standard. No high quality waters of the state shall be lowered in quality by a new or increased regulated discharge unless it has been demonstrated that all of the conditions of the policy in this subsection and the implementation procedures under subch. I of chs. NR 207 and 216 have been met.

**(2)** DEFINITIONS. In this section and subch. I of ch. NR 207:

(a) "Assimilative capacity" means the difference between the water quality criterion for a substance identified under ch. NR 102 or 105 and the existing level of that substance in a surface water.

**Note**: The methods for calculating the existing levels of a substance in a surface water are found for individual parameters under chs. NR 102, 106, and 217.

(b) "High quality waters" means any of the following waters:

1. Outstanding national resource waters as described under 40 CFR Part 132, Appendix E, II. A.

2. Outstanding resource waters as listed under s. NR 102.10.

3. Exceptional resource waters as listed under s. NR 102.11.

4. All other surface waters where water quality is better than a water quality standard for an existing or designated use, as determined by the department on a parameter-by-parameter basis. High

quality waters include surface waters where there is assimilative capacity in the receiving water for any parameter in a proposed new or increased discharge. Waters may not be excluded from being considered high quality based solely on permit violations, unlawful discharges from nonpoint sources, or spills that cause non-attainment of water quality criteria under chs. NR 102 to 105.

**Note:** Wisconsin does not currently have any waters designated as outstanding national resource waters, but if any are designated in the future they would be considered a high quality water for antidegradation purposes under federal regulations.

**Note:** Under the Clean Water Act, authorized states and tribes are required to be protective of downstream waters and water quality standards of downstream or adjacent states or tribes, including any antidegradation standards for downstream waters. Current water quality standards for states and tribes can be found on the U.S. EPA's website at https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa#tb0.

**Note:** Under sub. (2) (b) 4., an example of determining whether a waterbody is high quality on a parameter-by-parameter basis is as follows: if a facility is proposing a new discharge to a receiving water and the discharge contains chloride and phosphorus, and if the receiving water attains its chloride criterion but does not attain its phosphorus criterion, there is assimilative capacity for chloride but not for phosphorus. Therefore, the waterbody is considered high quality for chloride, but it is not a high quality water for phosphorus. Under permit limit calculations under chs. NR 106 and 217, if a waterbody is not attaining a water quality standard for a specified pollutant, no discharge above the water quality criterion for that pollutant is authorized. However, a new or increased discharge may be allowable for other pollutants with concentrations better than water quality standards via the antidegradation process.

(c) "Non-high quality waters" means any of the following:

1. Waters designated as limited aquatic life or limited forage fish under ch. NR 104.

2. Waters without assimilative capacity, including any of the following:

a. Waters that are not attaining water quality criteria, including those listed on the section 303 (d) list as not attaining a water quality criterion for the parameter of concern, or for which there is water quality data indicating that the water is not attaining the applicable criterion.

b. Waters that have background concentrations equal to water quality criteria.

c. Unidirectional flow waters that have an upstream low flow of zero.

**(3)** MAINTAIN EXISTING USES. Existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected from degradation caused by regulated discharges. If a surface water is listed on the section 303 (d) list as not attaining a water quality criterion for a specific parameter or the department has data showing that it is not attaining a water quality criterion for a parameter, there shall be no lowering of water quality with respect to the concentration, level, or loading of a parameter that is causing the impairment unless it is allocated as part of the reserve capacity or wasteload allocation under an U.S. EPA-approved TMDL or as allowed under s. NR 217.13 (8). Wetland water quality standards under ch. NR 103.03 shall be maintained.

**(4)** HIGH QUALITY WATERS LISTED BY WATERBODY TYPE. The water quality in high quality waters described under sub. (2) (b) 1. to 3. shall be maintained and protected, with no lowering of water quality, except as specified for certain proposed discharges to exceptional resource waters under s. NR 207.031 (4) (b).

**(5)** OTHER HIGH QUALITY WATERS. For 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 unless the department finds, after intergovernmental coordination and public participation provisions of the continuing planning process described under ch. NR 121, that all of the following are met:

(a) After an analysis of alternatives, a lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are affected.

(b) The resulting water quality will be adequate to fully protect existing uses of the water.

(c) Statutory and regulatory requirements for all new and existing point sources under ch. 283, Stats., and relevant requirements for regulated nonpoint sources under s. 281.16, Stats., and ch. NR 151, are being achieved.

**(6)** GREAT LAKES SYSTEM WATERS. As specified under s. NR 102.12, Great Lakes system waters are to be protected from the impacts of persistent, bioaccumulative chemicals of concern as defined under s. NR 105.03 (9) by avoiding or limiting to the maximum extent practicable increases in these substances.

**Note:** Bioaccumulative chemicals of concern that have been identified by the department are those substances noted with an asterisk under ch. NR 105 Tables 8 and 9.

**(7)** THERMAL DISCHARGES. In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 (a) of the Clean Water Act.

**SECTION 3. NR 102.05 (1) is repealed.**

**SECTION 4. NR 102.12 (1) is renumbered NR 102.03 (1pr) and amended to read:**

**NR 102.03 (1pr)** ~~The~~"Great Lakes system" ~~includes~~means all the surface waters within the drainage basin of the Great Lakes, including the waters of Lake Superior and Lake Michigan.

**SECTION 5. NR 102.13 is repealed.**

**SECTION 6. NR 102.23 (3) is amended to read:**

**NR 102.23 (3)** Great Lakes communities as defined ~~in~~under s. NR ~~102.22 (6)~~ 102.22 (5). This use exists only for the regulation of discharges of heat.

**SECTION 7. NR 103.06 (2) is amended to read:**

**NR 103.06 (2)** ~~In addition to the requirements of s. NR 207.03 (5), this~~This chapter shall apply to new or increased point source discharges to wetlands.

**SECTION 8. NR 106.03 (4r) is amended to read:**

**NR 106.03 (4r)** "Great Lakes system" means all the surface waters within the drainage basin of the Great Lakes, including the waters of Lake Superior and Lake Michigan.

**SECTION 9. NR 106.145 (4) (b) is amended to read:**

**NR 106.145 (4)** (b) The department may not establish an alternative mercury effluent limitation for a new discharge to waters in the Great Lakes system~~, as defined in s. NR 102.12 (1),~~ unless the proposed discharge is necessary to alleviate an imminent and substantial danger to the public health or welfare. For the purposes of this section, a new discharger is any building, structure, facility or installation from which there is or may be a discharge of pollutants, as defined ~~in~~under s. NR 200.02 (4), the construction of which commenced after November 1, 2002. An existing discharger that relocates its outfall after November 1, 2002 may not be considered a new discharger for purposes of this paragraph.

Relocation includes the diversion of a discharge from a land treatment system or systems to a surface water.

**SECTION 10. NR 207.001 is created to read:**

**NR 207.001 Definitions.** In this chapter:

**(1)** "Loading" means the concentration or amount of a substance within a discharge multiplied by the flow of that discharge.

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

**Note:** See s. NR 207.031 (8) (c) on alternatives analysis for more information on practicability determinations.

**(3)** "Receiving water" means the portion of a surface water affected by a proposed new or increased discharge.

**(4)** "Section 303 (d) list" means a list of waters that do not attain water quality standards and require a total maximum daily load analysis, as specified under section 303 (d) of the Clean Water Act, 33 USC 1313 (d).

**Note:** Waters not attaining water quality standards are also referred to as "impaired waters" in subch. II of this chapter and elsewhere in natural resources administrative codes.

**(5)** "Surface waters" means all waters of the state, as designated under s. 281.01 (18), Stats., except groundwater, as established under s. 299.01 (5), Stats.

**(6)** "TMDL" or "total maximum daily load" has the meaning established under s. NR 151.002 (46m).

**(7)** "U.S. EPA" means the United States environmental protection agency.

**(8)** "WPDES" or "WPDES permit" means Wisconsin pollutant discharge elimination system permit issued by the department under ch. 283, Stats.

**(9)** "WQBEL" or "water quality based effluent limitations" means effluent limitations established by the department under s. 283.13 (5), Stats.

**SECTION 11. Subch. I of NR 207 is repealed and recreated to read:**

CHAPTER NR 207, SUBCHAPTER I
ANTIDEGRADATION

**NR 207.011 Purpose and applicability. (1)** PURPOSE. The purpose of this subchapter is to establish implementation procedures for the antidegradation policy under s. NR 102.045. This subchapter sets procedures applicable to proposed new or increased discharges to high quality waters as defined under s. NR 102.045 (2) (b).

**(2)** APPLICABILITY. This subchapter applies to any person proposing to increase an existing discharge or create a new discharge to the surface waters of the state. For a proposed increased discharge, an antidegradation analysis shall be conducted for the portion of the discharge that represents an increase from the existing, authorized discharge. For stormwater discharges regulated under s. 283.33, Stats., the implementation procedures under s. NR 216.008 shall be followed. For all other new or increased discharges to high quality waters, including concentrated animal feeding operations seeking an alternative discharge limitation under s. NR 243.13 (2) (b) or (3) (c), the procedures under ss. NR 207.031 to 207.041 shall be followed. An antidegradation demonstration under this subchapter is not required for water quality trades that result in an overall net reduction to the receiving water of the pollutant being traded.

**Note:** Concentrated animal feeding operations (CAFOs) seeking an alternative discharge limitation are those that install advanced treatment technology for manure and process wastewater and discharge treated effluent to surface waters through a discrete outfall. For other CAFOs, permits contain production area discharge limitations to prevent degradation of surface waters consistent with the antidegradation policy. Antidegradation does not apply to agricultural stormwater discharges from a CAFO's land spreading activities.

**NR 207.021 Definitions.** The definitions under s. NR 102.045 (2) are applicable in this subchapter. In addition, in this subchapter:

**(1)** "Bioaccumulative chemical of concern" or "BCC" has the meaning established under s. NR 105.03 (9).

**(2)** "Great Lakes system" has the meaning established under s. NR 102.03 (1pr).

**(3)** (a) "Increased discharge" means 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.

(b) "Increased discharge" does not include any of the following instances if the applicant is not proposing to increase the concentration, level, or loading of the discharge:

1. The initial imposition of an effluent limitation for a substance that is in an existing discharge but was not limited in a prior or the current permit if the initial imposition of the limitation is due only to one of the following:

a. A revised or newly promulgated water quality standard.

b. A change in receiving water characteristics such as flow or concentration of the pollutant.

c. Newly available effluent data or additional effluent data that reflects normal variability in effluent quality, if there is not a trending increase in pollutant concentrations, levels or loads.

2. Reissuance of a WPDES individual or general permit, including reissuance of an administratively continued permit.

3. Issuance of a WPDES individual or general permit for an existing discharge that did not previously require authorization under state or federal regulations.

**Note:** The definition of increased discharge under par. (a) and exclusions under par. (b) also apply to discharges of bioaccumulative chemicals of concern (BCCs) to Great Lakes system waters. These definitions are consistent with the requirements for BCCs under the Great Lakes Water Quality Initiative. BCCs that have been identified by the department are those substances noted with an asterisk in ch. NR 105 Tables 8 and 9.

**(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 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.

**(5)** "Outfall" means any discharge structure authorized in a WPDES permit that is used to convey wastewater effluent to a surface water.

**(6)** "Significant lowering of water quality" means a lowering of water quality determined to be significant under s. NR 207.031 (6) (a).

**NR 207.031 Antidegradation procedures for individual WPDES permits. (1)** GENERAL. To be consistent with the antidegradation policy stated under s. NR 102.045, the department shall conduct a review of any new or increased discharge and determine whether it will lower water quality in a high quality water as defined under s. NR 102.045 (2) (b). If so, the department shall determine whether any proposed lowering of water quality has been prevented or lessened and whether lowering is necessary to support important social or economic development in the area where the waters are located. The applicant shall submit the information and supporting evidence required under this subchapter using department-approved forms and following applicable instructions. The department's determination shall be based upon a review of the antidegradation application materials, including, if applicable, an analysis of alternatives under sub. (8) (c), a social importance analysis or economic importance analysis under sub. (8) (b), and a demonstration that resulting water quality will be adequate to fully protect existing uses. The department shall seek and consider public input.

**(2)** NON-HIGH QUALITY WATERS. For receiving waters that the department determines to be non-high quality waters as defined under s. NR 102.045 (2) (c), standard limit calculation procedures under chs. NR 102, 104, 106, 210, and 217 apply. If a surface water is listed on the section 303 (d) list as not

attaining a water quality criterion for a specific parameter or the department has data showing that it is not attaining a water quality criterion for a parameter, there shall be no lowering of water quality with respect to the concentration, level, or loading of a parameter that is causing the impairment, unless it is allocated as part of the reserve capacity or wasteload allocation under a TMDL approved by the U.S. EPA or as allowed under s. NR 217.13 (8). If a new or increased discharge to a non-high quality water would lower water quality in a high quality water downstream, an antidegradation analysis is required for the downstream water in accordance with subs. (3) to (9).

**Note:** Under ch. NR 104, wetlands are assigned a limited aquatic life designated use. However, under s. NR 103.06 (2), new or increased point source discharges to wetlands require an analysis under s. NR 103.08.

**(3)** DEPARTMENT ANTIDEGRADATION SCREENING. Based on materials submitted by the applicant to the department for a permit issuance, permit reissuance, or facility planning submittal, the department shall conduct an antidegradation screening for any discharge under this subsection. The department shall assess the following information to determine whether a lowering of water quality may be permissible, and if so, whether it requires further antidegradation review under subs. (4) to (9):

(a) *New or increased discharge determination.* The department shall determine whether the proposed discharge meets the definition of a new discharge or an increased discharge under s. NR 207.021 (3) and (4).

(b) *High quality water determination*. If the proposed discharge is a new or increased discharge, the department shall determine whether the receiving water or downstream waters affected by the proposed discharge are high quality waters as defined under s. NR 102.045 (2) (b). If there are insufficient water quality data available to make this determination, the department may require the applicant to collect water quality data under sub. (4).

**Note:** Under the Clean Water Act, authorized states and tribes are required to be protective of downstream waters and water quality standards of downstream or adjacent states or tribes, including any antidegradation standards for downstream waters. Current water quality standards for states and tribes can be found at U.S. EPA's website at https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa#tb0.

(c) *Pollutants that are allocated under an EPA-approved TMDL.* For a proposed new or increased discharge for a pollutant that is allocated under an EPA-approved TMDL, the department shall

use the following procedures to determine whether a lowering of water quality may be permissible, and if so, whether it requires further antidegradation review under subs. (4) to (9):

1. If there is reserve capacity available for the pollutant, the department may consider a lowering of water quality under the antidegradation procedures under subs. (4) to (9). Proposed discharges that may be considered in a TMDL area include discharges to a receiving or downstream water that is listed as impaired on the section 303 (d) list.

2. If there is no reserve capacity available for the pollutant, the department may not approve a new or increased discharge unless the new or increased discharge is offset through a trade authorized under s. 283.84, Stats., or other means such that the discharge does not result in a lowering of water quality.

3. If a new or increased discharge is specifically allowed under an EPA-approved TMDL because it does not cause or contribute to an impairment, an antidegradation demonstration under this subchapter is not required.

**Note:** An example of a TMDL-approved discharge under subd. 3. is discharges of total suspended solids (TSS) less than the target value approved under the Milwaukee River Basin TMDL (2018).

(d) *Other impacts to the receiving water.* 1. If the determinations under pars. (a) to (c) indicate that the proposed discharge may be considered by the department and requires an antidegradation review, the department shall determine whether point source and state-regulated nonpoint source discharges to the receiving water will meet requirements under the antidegradation policy under s. NR 102.045 (5) (c). To make the determination under this paragraph, the department shall complete all of the following:

a. Identify point sources and state-regulated nonpoint sources that potentially impact the receiving water.

b. Evaluate, to the extent feasible given agency resources, whether there are noncompliance issues with point source WPDES permits or required state-regulated nonpoint source best management practices and whether receiving water quality has improved or degraded over time.

2. If the department finds that the antidegradation policy is met under subd. 1., the proposal for a new or increased discharge shall proceed through antidegradation review under this subchapter. If not, the department may not authorize the proposed lowering of water quality and will notify the applicant.

**Note:** The department may take actions or coordinate with other county, state, or federal agencies to address any issues identified under subd. 1.

(e) *Notification.* If there is potential to lower water quality in a high quality water and if the department determines such a lowering may be permissible, requirements for an antidegradation review under subs. (4) to (9) apply. The department shall notify the applicant if the applicant is required to submit further information for an antidegradation review.

**(4)** WATER QUALITY DATA. The department shall determine existing concentrations or levels of parameters of concern in the receiving water and downstream waters based on the most recent data available, not to exceed 10 years old unless the department determines that those levels are still representative. 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. The department shall determine existing concentrations or levels of parameters of concern based on the following:

(a) The applicant shall submit sufficient and credible baseline water quality information for the receiving water, as described under par. (c), in order for the department to determine the applicable protection level and the assimilative capacity of the receiving water, including the capacity to accommodate future development activities or multiple discharges. For purposes of determining assimilative capacity, the applicant shall submit receiving water samples according to one of the following:

1. For waters with unidirectional flow, samples shall be taken upstream of the discharge site but outside the direct influence of the discharge.

2. For waters without unidirectional flow such as lakes or impoundments, samples shall be taken adjacent to the discharge site but outside the direct influence of the discharge.

(b) The level of baseline water quality data necessary for department review shall be relative to the size of the project, characteristics of the proposed discharge, and the characteristics of the receiving water including special management or habitat designations, as applicable.

(c) When evaluating whether the information submitted is sufficient and credible or whether additional information may be required, the department shall consider all relevant factors, including the following:

1. The sensitivity of the receiving water to degradation of existing or designated uses.

2. The parameters of concern in the proposed discharge.

3. The available dilution or assimilative capacity of the receiving water for the proposed discharge, including the impacts of authorized discharges.

4. The representativeness of any surrogate water information proposed for baseline water quality relative to the receiving water under review, including geographic, hydrologic, geologic, water use, and water quality characteristics.

5. The validity of any baseline concentrations assumed to be below detection levels.

6. The quantity, date of analysis, analytical method, detection level, and spatial and temporal scope of any submitted data.

7. Applicable seasonal or natural variability.

**Note:** The department's monitoring protocols and standard operating procedures, including quality assurance protocols, and existing data housed by the department may be accessed through the department's SWIMS database. Contact the department at DNRSWIMS@wisconsin.gov for access to the database. More information is available by contacting the department's surface water monitoring section or on its surface water monitoring website at https://dnr.wi.gov/topic/SurfaceWater/monitoring.html.

(d) The department may require water quality modeling on a case-by-case basis to determine whether downstream waters are likely to be lowered in quality by a proposed new or increased discharge.

**(5)** APPLICANT INFORMATION. (a) The applicant shall submit all of the following information to the department:

1. The expected maximum and average pollutant concentrations in the effluent for proposed new or increased pollutants that have a numeric or narrative water quality criterion, secondary value, or TMDL target, if different from data already submitted to the department through regular permit monitoring. If pilot testing data are available, that data shall also be submitted.

2. The projected increase in effluent flow as defined under s. NR 106.06 (4) (d), if different from current flow data.

(b) In addition to the information submitted under par. (a), the applicant may also submit data to be considered in the department's receiving water flow rate determination.

**(6)** REQUIREMENTS FOR OUTSTANDING STATE OR NATIONAL RESOURCE WATERS AND EXCEPTIONAL RESOURCE WATERS. (a) *Outstanding state or national resource waters.* For proposed new or increased discharges to or impacting downstream state outstanding resource waters or outstanding national resource waters, the department may not approve any change in effluent concentration, level, or loading unless the change will improve water quality. The department shall set limits for an approvable new or increased discharge equal to or better than background concentrations upstream of or adjacent to the discharge site or the water quality criterion, whichever is more protective. Permit limits shall be set to only utilize the amount of assimilative capacity demonstrated to be needed by the facility.

(b) *Exceptional resource waters.* For proposed new or increased discharges to or impacting downstream exceptional resource waters, the department shall set limits equal to or better than background concentrations upstream of or adjacent to the discharge site, or at water quality criterion, whichever is more protective. If lowering water quality is necessary to prevent or correct contamination or a public health problem, the applicant and the department shall follow the procedures under sub. (8). Permit limits shall be set to only utilize the amount of assimilative capacity demonstrated to be needed by the facility.

**(7)** GREAT LAKES SYSTEM WATERS. The department shall prohibit new or increased discharges of BCCs to a Great Lakes system water unless the applicant demonstrates the necessity to lower water quality through an antidegradation analysis following the procedures under sub. (8). For a proposed new or increased discharge to the Great Lakes system of a BCC that is already exceeding its water quality criterion, permit limitations shall be set no higher than the criterion and only utilize the amount of assimilative capacity demonstrated to be needed by the facility.

**(8)** OTHER HIGH QUALITY WATERS. For high quality waters other than those specified under sub. (6), all of the following procedures apply:

(a) *Significant lowering of water quality determination.* The department shall determine whether a proposed new or increased discharge would constitute a significant lowering of water quality in the high quality receiving water or downstream waters as follows:

1. Any proposed new or increased discharge of BCCs to Great Lakes system waters is a significant lowering of water quality that requires the applicant to submit a social importance analysis or economic importance analysis under par. (b) and an alternatives analysis under par. (c) for each BCC.

2. Any proposed new or increased discharge of a pollutant that is allocated under an EPA-approved TMDL is a significant lowering of water quality that requires the applicant to submit a social importance analysis or economic importance analysis under par. (b) and an alternatives analysis under par. (c), except those discharges specified under sub. (3) (c) 3.

3. For all proposed new or increased discharges not described under subds. 1. and 2., 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 using the following procedures:

a. Determine flow rates for the receiving water.

b. Analyze the submitted data to determine effluent concentration, effluent flow, and receiving water concentration following the procedures under ch. NR 106.

c. Determine the 10 percent significance threshold, which is the limit that utilizes 10 percent of the available assimilative capacity, incorporating dilution ratios, using the applicable equation in Table 1.

**Table 1**
**Equations for determining a waterbody's 10 percent significance threshold**

| | |
|---|---|
| A. | For all discharges except those specified in row B., the 10 percent significance threshold is:<br>$((WQBEL - WQC) \div 10) + WQC$ |
| B. | For a discharge with an intake from the receiving water for which $f > 0$, or for any discharge of dissolved oxygen[1], the following formulas apply:<br>For a discharge to a waterbody with unidirectional flow, the ambient level necessary to prevent significant lowering of water quality is:<br>$[Q_s \times (0.9 \times C_s + 0.1 \times WQC) + (Q_e \times (1 - f) \times WQC)] \div (Q_s + Q_e \times [1 - f])$<br>For a discharge to a waterbody without unidirectional flow, the ambient level necessary to prevent significant lowering of water quality is:<br>$(2 \times WQC + 9 \times C_s) \div 11$ |

| | |
|---|---|
| | The department shall calculate the 10 percent significance threshold using the applicable WQBEL calculation under ch. NR 106, but substituting the level necessary to prevent significant lowering of water quality calculated using one of the above equations for the WQC variable. |
| C. | The following variables apply to the equations in this table:<br><br>$C_s$ = background concentration of the substance (in units of mass per unit volume) as specified under the applicable procedures in chs. NR 106 or 217<br><br>f = fraction of the $Q_e$ withdrawn from the receiving water<br><br>$Q_s$ = receiving water design flow (in units of volume per unit time) as specified under the applicable procedures in chs. NR 106 or 217<br><br>$Q_e$ = effluent flow (in units of volume per unit time) as specified under the applicable procedures in chs. NR 106 or 217<br><br>WQBEL = the water quality based effluent limit calculated using a projected effluent flow, if applicable, under the applicable procedures under chs. NR 106 and 217<br><br>WQC = the numeric water quality criteria, secondary criteria, or TMDL target |

[1] Biochemical oxygen demand limits are calculated separately to ensure attainment of dissolved oxygen criteria.

d. Determine whether the proposed discharge has reasonable potential 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. If the lowering of water quality will be significant, the applicant shall submit a social importance analysis or economic importance analysis under par. (b) and an alternatives analysis under par. (c).

e. If the department determines that the lowering of water quality will not be significant, as calculated under subd. 2., the department shall document this determination in the WPDES permit fact sheet. In this case, a social importance analysis, economic importance analysis, or alternatives analysis under pars. (b) to (c) are not required for authorization of the approved discharge.

f. After 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. If there are multiple dischargers on a waterbody that, in the determination of the department, share the same assimilative capacity, the department may

consider cumulative impacts in determining whether a proposed discharge would be considered a significant lowering of water quality.

(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. To demonstrate the need for accommodating important social or economic development, the applicant shall complete one of the following:

1. A social importance analysis identifying each affected community in the area where the receiving water for the proposed discharge is located and demonstrating that a lowering of water quality is necessary to accommodate important social development, including in any of the following areas:

a. Community services provided.

b. Public health or safety improvements.

c. Infrastructure improvements.

d. Education and training.

e. Cultural amenities.

f. Recreational opportunities.

g. Other areas that will accommodate important social development not specified under this subdivision.

2. An economic importance analysis identifying each affected community in the area where the receiving water for the proposed discharge is located and demonstrating that a lowering of water quality is necessary to accommodate important economic development, including in any of the following areas:

a. Employment, job availability, and salary impacts.

b. Impacts to the tax base or municipal utility customers.

c. Increases in production or energy efficiency.

d. Expanded leases and royalties.

e. Commercial activities.

f. Agricultural activities.

g. Access to resources.

h. Access to a transportation network.

i. Other areas that would accommodate important economic development not specified under this subdivision.

(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. 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. The applicant shall submit all of the following to the department:

1. A demonstration that the facility, as currently configured, does not have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations.

2. A description and analysis of a range of practicable alternatives that have the potential to prevent or lessen the degradation associated with the proposed discharge. Include a description of any alternative determined to be impracticable, and why that determination was made. 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:** The U.S. EPA publishes resources such as its *Clean Water Act Financial Capability Assessment Guidance* and *Interim Economic Guidance for Water Quality Standards* and their associated worksheets and spreadsheets that may be used to guide determinations of impracticability based on cost.

3. For proposed new or increased discharges of BCCs to Great Lakes system waters, the applicant shall do all of the following:

a. Identify any cost-effective pollution prevention alternatives and techniques that are available to the applicant, that would prevent or lessen the extent to which the increased loading results in a lowering of water quality.

b. Identify alternative or enhanced treatment techniques that are available to the entity that would prevent the lowering of water quality and their costs relative to the cost of treatment necessary to achieve the applicable effluent limitation.

c. Follow the procedure under s. NR 102.12 (3) for new or increased discharges of the pollutants identified in that subsection.

4. For each of the practicable alternatives under subd. 2. to 3., identification of receiving water quality and accompanying environmental impacts on the receiving and downstream waters, including impacts to aquatic life and public health in downstream communities.

5. Evaluation of the cost for each of the practicable alternatives under subd. 2. to 3.

6. Identification of a proposed practicable alternative that prevents or lessens water quality degradation while also considering whether the alternative will have other environmental impacts. If the applicant has selected an alternative that results in no degradation to the receiving water, the social or economic importance analysis under par. (b) is not required.

**Note:** An example of other environmental impacts under subd. 6. would be a proposed effluent treatment alternative that would also increase or decrease impacts to air quality. An applicant may indicate whether regulations for other departmental environmental programs will be met under their proposal, and may include information about other positive environmental impacts.

(d) *Additional information*. The department may require the analysis of specific alternatives or request additional information that the department determines necessary to assess the submitted social

importance analysis or economic importance analysis under par. (b) and alternatives analysis under par. (c).

**(9)** DEPARTMENTAL ANTIDEGRADATION REVIEW. The department shall conduct an antidegradation review based on the information provided under subs. (4) to (8). 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:

(a) *Antidegradation review.* If, after review of available evidence, the department finds that the proposed discharge will lower water quality in a high quality receiving or downstream water, the department may only authorize lowering of the receiving or downstream water quality if the department finds that all of the following are met:

1. The reduction of water quality meets the applicable water quality criteria to protect existing and designated uses under chs. NR 102 to 105.

2. If the proposed discharge will lower water quality in a high quality water identified under s. NR 102.045 (2) (b) 3. 1. to 3., each applicable requirement to protect a high quality water under sub. (6) is met.

3. If required under sub. (8) (b), the social importance analysis or economic importance analysis demonstrates that a lowering of water quality is necessary to accommodate important social or economic development in the area of the discharge.

4. If required under sub. (8) (c), the alternatives analysis demonstrates that all of the following are met:

a. A lowering of water quality under the antidegradation policy is necessary, and that when one or more practicable alternatives that will prevent or lessen the degradation associated with the proposed discharge are identified, a less-degrading alternative has been selected for implementation.

b. The methods of pollution prevention, control, and treatment of waste and other substances to be discharged are found by the department to be the most effective and practicable.

5. Permit limits shall be set to only utilize the amount of assimilative capacity demonstrated to be needed by the facility. Permit limits shall be set by the department based on the materials submitted by

the applicant and the department's review and may not be less stringent than limits calculated using the procedures under chs. NR 106 and 217.

6. Point source and state-regulated nonpoint source discharges to the receiving water meet requirements under the antidegradation policy under s. NR 102.045 (5) (c).

7. The antidegradation policy and procedures in this subchapter have been applied consistent with section 316 (a) of the Clean Water Act, 33 USC 1326 (a), with regard to potential thermal discharge impairments.

(b) *Preliminary antidegradation determination.* 1. Based upon the antidegradation review described under par. (a), the department shall prepare a written draft antidegradation determination as to whether the antidegradation policy under s. NR 102.045 has been satisfied.

2. If the department finds that the antidegradation policy under s. NR 102.045 is not satisfied, the department shall provide written notification to the applicant of the deficiencies. In that case, for new dischargers, permit limits shall be set equal to background concentrations or criteria, whichever is more stringent. For a proposed increased discharge, the department may not authorize less-stringent permit limits than those currently in effect.

(c) *Opportunity for comment.* The department shall do all of the following:

1. Provide public notice of the draft antidegradation determination at one of the following times:

a. For non-industrial dischargers subject to the requirements under ch. NR 110, the department shall provide public notice of the draft antidegradation determination during the facility plan review required under s. NR 110.08.

b. For all other dischargers, the department shall include the draft antidegradation determination as part of the public notice to issue or deny the WPDES permit according to ch. NR 203 or as a separate earlier notice.

2. Distribute the public notice according to the process under subch. I of ch. NR 203.

3. Provide opportunity for comment on the draft antidegradation determination.

(d) *Final antidegradation determination*. The department shall consider comments received under par. (c) before preparing a written final antidegradation determination. The final antidegradation

determination shall include a statement of whether the proposed activity satisfies or fails to satisfy the antidegradation policy specified under s. NR 102.045 and implementation requirements in this subchapter. The final antidegradation determination shall be included with the department's final determination to issue or deny the WPDES permit or approve or disapprove the facility plan.

**NR 207.041. General permit antidegradation analysis. (1)** GENERAL PERMIT ISSUANCE OR REISSUANCE. The department shall 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 as part of the general permit issuance process rather than at the conveyance of coverage for individual applicants. Before a general permit is issued or reissued, the department shall do all of the following:

(a) Obtain available evidence, as necessary, to support specific requirements and determinations under this section as it relates to any new or increased discharges.

(b) Make determinations on how the antidegradation policy and the antidegradation implementation requirements under this section are met.

(c) The department may request information from potential applicants who may discharge under the general permit in order to conduct the antidegradation analysis.

(d) Provide the antidegradation determination during the general permit public notice and accept comments on the determination.

**(2)** CONVEYANCE OF COVERAGE. 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, further antidegradation procedures are not required for a person seeking coverage under that general permit provided that the person certifies that the general permit conditions will be met, and the department has granted the person coverage under the general permit authorizing the discharge.

**SECTION 12. NR 207.11 (5) is repealed.**

**SECTION 13. NR 212.74 (intro.) is amended to read:**

**NR 212.74 Developing TMDLs for nearshore and open waters of the Great Lakes.** This section describes requirements for deriving TMDLs for waters of the Great Lakes ~~system~~ as defined ~~in~~under s. NR 102.22 (5) and inland lakes within the Great Lakes system ~~with~~, as defined under s. NR

102.03 (1pr), that have no appreciable flow relative to their volumes. This section applies to TMDLs for all pollutants excluding the following: alkalinity, ammonia, bacteria, biochemical oxygen demand, chlorine, color, dissolved oxygen, dissolved solids, pH, phosphorus, salinity, temperature, total and suspended solids, turbidity, and whole effluent toxicity. In addition to the requirements specified in s. NR 212.73, TMDLs in this section shall also meet all of the following:

**SECTION 14. NR 212.75 (intro.) is amended to read:**

**NR 212.75 Developing TMDLs for Great Lakes systems tributaries and connecting channels.** This section describes conditions for deriving TMDLs for tributaries and connecting channels of the Great Lakes system as defined ~~in~~under s. NR ~~102.12 (1)~~102.03 (1pr) that exhibit appreciable flows relative to their volumes. This section applies to TMDLs for all pollutants excluding the following: alkalinity, ammonia, bacteria, biochemical oxygen demand, chlorine, color, dissolved oxygen, dissolved solids, pH, phosphorus, salinity, temperature, total and suspended solids, turbidity, and whole effluent toxicity. In addition to the requirements specified ~~in~~under s. NR 212.73, TMDLs in this section shall also meet all of the following:

**SECTION 15. NR 216.008 is created to read:**

**NR 216.008 Antidegradation analysis. (1)** PURPOSE. The purpose of this section is to establish the implementation procedures for the application of the antidegradation policy under s. NR 102.045 to storm water discharges regulated under ch. 283, Stats.

**(2)** APPLICABILITY. This section establishes antidegradation requirements applicable 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.

**(3)** DEFINITIONS. In this subchapter:

(a) "Designated use" has the meaning established under s. NR 102.03 (1L).

(b) "Existing use" has the meaning established under s. NR 102.03 (1p).

(c) "Great Lakes system" has the meaning established under s. NR 102.03 (1pr).

(d) "Increased discharge" means a change in area, concentration, or site conditions that would reasonably increase the discharge of pollutants associated with a discernible, confined, and discrete conveyance of storm water by a permitted discharge under s. 283.33, Stats.

(e) 1. "New discharge" means a storm water discharge that would first occur after the permittee's start date of coverage under a permit issued under s. 283.33, Stats., to a surface water to which the facility did not previously discharge storm water.

2. "New discharge" does not include an increase in a storm water discharge to a surface water to which the facility discharged on or before coverage under the permit.

(e) "Practicable" means technologically possible, able to be put into practice, and economically viable.

**Note:** See s. NR 207.031 (8) (c) on alternatives analysis for more information on practicability determinations.

(f) "Receiving water" has the meaning established under s. NR 216.002 (25m).

(g) "Surface waters" means all waters of the state, as designated under s. 281.01 (18), Stats., except groundwater, as defined under s. 299.01 (5), Stats.

(h) "SWPPP" means storm water pollution prevention plan.

**(4)** GENERAL. (a) To be consistent with the antidegradation policy under s. NR 102.045, the department shall conduct a review of any new or increased discharge and determine whether it will lower water quality in a high quality water as defined under s. NR 102.045 (2) (b). If so, the department shall determine whether any proposed lowering of water quality has been prevented or lessened and is necessary to support important social or economic development in the area where the waters are located. The applicant shall submit the information and supporting evidence required under this subchapter using department-approved forms and following applicable instructions. The department's determination shall be based upon department review of the antidegradation application materials, including, when applicable, a social importance analysis or economic importance analysis under sub. (7) (d) 1., an alternatives analysis under (7) (d) 2., and a demonstration that resulting water quality will be adequate to fully protect existing uses. The department shall seek and consider public input.

(b) Requirements established under this chapter and the performance standards and prohibitions under ch. NR 151 shall be utilized to prevent degradation for all receiving waters. If the department determines that these measures are not sufficient to meet antidegradation requirements under this section, the department may require additional permit conditions.

**(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 the following:

(a) Identification of all surface waters, and their respective antidegradation categories under s. NR 102.045, located, at a minimum, up to one-quarter mile from the proposed new or increased discharge.

(b) Sampling of the discharge and collection of background water quality data for receiving and downstream waters, if not already available. When evaluating whether the information submitted is sufficient and credible or whether additional information is required, the department shall consider all relevant factors, including those specified under s. NR 207.031 (4).

(c) Practices and procedures the permittee will implement to limit impacts to high quality waters.

**(6)** ANTIDEGRADATION PROCEDURES FOR GENERAL PERMITS. The department shall apply the antidegradation policy under s. NR 102.045 and shall conduct an antidegradation review using the following procedures for each new and reissued general storm water WPDES permit issued under this chapter and ch. 283, Stats.:

(a) *Antidegradation review*. For the purposes of conducting an antidegradation review, the department shall obtain available evidence, as necessary, to support or develop specific requirements within the general permit and determinations relating to new or increased discharges. The department shall condition general permits to meet the antidegradation policy for discharges to surface water.

(b) *Preliminary antidegradation determination*. The department shall prepare a written preliminary antidegradation determination describing how the permit conditions satisfy the antidegradation policy described under s. NR 102.045.

(c) *Public participation and opportunity for comment.* The department shall include the antidegradation determination with the public notice procedures under s. NR 205.08 (8) to (10) for issuance or reissuance of a general permit.

(d) *Final antidegradation determination*. The department shall consider comments received from the public and government agencies, and any other pertinent information received during the public notice period under par. (c), prior to making a final antidegradation determination. The notice of final determination under s. NR 203.13 shall include a statement specifying the conditions of the general permit that satisfy the antidegradation policy specified under s. NR 102.045.

(e) *Determination of coverage under general permit*. 1. If the department issues a determination that a general storm water WPDES permit will achieve the antidegradation water quality standards under ch. NR 102, further antidegradation procedures are not required if the person seeking coverage under the general permit certifies that the permit conditions will be met and the department has conferred coverage under the permit.

2. If a permittee or applicant identifies, or the department determines, that a discharge is unable to meet the general permit conditions, an individual permit may be required. In that case, the procedures under sub. (7) shall be followed unless an applicant is engaging in a water quality trade that would result in an overall net reduction to the receiving water of the pollutant being traded.

(f) *Amendments*. 1. In this paragraph, "administrative operational changes" include changes to SWPPP contacts, stormwater management program contacts, and other administrative changes that do not result in a change in the operation of a site that would affect the quality or level of pollutant reduction a program would achieve.

2. Except for administrative operational changes, if a permittee proposes 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) that would result in a discharge of pollutants in excess of levels previously addressed by the programs, the permittee shall provide information to the department to demonstrate that the amendment meets the conditions of the general permit.

(g) *Terms and conditions.* The department shall include in each general permit terms and conditions that require a permittee to notify the department if the permittee is unable to satisfy the permit conditions to meet the antidegradation policy described under s. NR 102.045. If the department determines that a discharge will no longer meet the permit conditions, the department may treat the application as an individual permit application under s. 283.31 or 283.33, Stats., and ss. NR 216.03 (3), 216.25, and 216.51, and the procedures for individual permits under sub. (7) shall be followed.

**(7)** PROCEDURES FOR INDIVIDUAL PERMITS. The department shall screen proposed discharges when determining the applicability of the antidegradation policy under s. NR 102.045 for each new and reissued individual storm water WPDES permit issued under ch. 283, Stats., and this chapter. The screening process shall include all of the following steps:

(a) *Department review of information and screening.* Based on materials submitted by the applicant for a permit issuance, permit reissuance, or antidegradation inquiry, the department shall conduct an antidegradation screening for any discharge under this paragraph. The department shall assess the following information to determine whether a lowering of water quality may be permissible, and if so, whether it requires further antidegradation review under pars. (b) to (f) and sub. (8):

1. 'New or increased discharge determination.' The department shall determine whether the proposed discharge meets the definition of a new discharge or an increased discharge under sub. (3) (d) and (e).

2. 'High quality water determination.' If the proposed discharge is a new or increased discharge, the department shall determine whether the receiving water or downstream waters as identified under s. NR 216.008 (5) (a) affected by the proposed discharge are or may be high quality waters as defined under s. NR 102.045 (2) (b). If there are insufficient water quality data available to make the determination under this subdivision, the department may require the applicant to collect water quality data under s. NR 216.008 (5).

**Note:** Under the Clean Water Act, authorized states and tribes are required to be protective of downstream waters and water quality standards of downstream or adjacent states or tribes, including any antidegradation standards for downstream waters. Current water quality standards for states and tribes can be found at U.S. EPA's website at https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa#tb0.

3. 'Pollutants that are allocated under a U.S. EPA-approved TMDL.' For a proposed new or increased discharge for a pollutant that is allocated under a U.S. EPA-approved TMDL, the department shall use the procedures under s. NR 207.031 (3) (c) to determine whether a lowering of water quality may be permissible, and if so, whether it requires further antidegradation review under this subsection.

4. 'Other impacts to the receiving water.' If the determinations under subds. 1. to 2. indicate that the proposal to discharge requires an antidegradation review, the department shall determine whether point source and state-regulated nonpoint source discharges to the receiving water will meet requirements

under the antidegradation policy under s. NR 102.045 (5) (c). To make the determination under this subdivision, the department shall follow the procedures under s. NR 207.031 (3) (d).

5. 'Notification to applicant.' If there is potential to lower water quality in a high quality water and if the department determines that such a lowering may be permissible, requirements for an antidegradation review under the remainder of this subsection apply. The department shall notify the applicant if the applicant is required to submit further information for an antidegradation review.

(b) *Requirements for outstanding state or national resource waters and exceptional resource waters.* 1. 'Outstanding national resource waters and outstanding resource waters.' For proposed new or increased discharges to or impacting downstream outstanding national resource waters or outstanding resource waters, as defined under s. NR 102.045 (2) (b) 1. and 2., a permittee shall implement best management practices designed to prevent a lowering of water quality by discharging water that is equal to or better than the receiving water, according to one of the following:

a. Discharges from a municipal facility regulated under subch. I shall achieve a discharge less than or equal to the average annual load previously discharged from the municipality based on achieved pollutant load reductions.

b. Discharges from an industrial site regulated under subch. II shall implement best management practices that achieve discharge concentrations at or below background concentrations of the receiving water.

c. Discharges from a construction site regulated under subch. III shall achieve a discharge less than or equal to the average annual load from the construction site based on the applicable development conditions as defined under s. NR 151.002.

2. 'Exceptional resource waters.' a. Except as specified under subd. 2. b., for proposed new or increased discharges to or impacting downstream exceptional resource waters, a permittee shall implement best management practices designed to prevent a lowering of water quality by discharging water that is equal to or better than the receiving water in accordance with the applicable requirement under subd. 1. a. to c.

b. When a lowering of water quality in an exceptional resource water is necessary to prevent or correct contamination or a public health problem, requirements under par. (d) apply.

(c) *Great Lakes system waters.* The department shall prohibit new or increased discharges of bioaccumulative chemicals of concern to a Great Lakes system water unless the applicant demonstrates the necessity to lower water quality through an antidegradation analysis following the procedures under par. (d).

**Note:** Bioaccumulative chemicals of concern that have been identified by the department are those substances noted with an asterisk in ch. NR 105 Tables 8 and 9.

(d) *Requirements for other high quality waters.* If the department finds a proposed new or increased discharge will lower water quality in a receiving or downstream water that is a high quality water other than those specified in par. (b), the applicant shall submit all of the following documentation in addition to the water quality data required under sub. (5):

1. 'Social or economic importance analysis.' An applicant applying for coverage under an individual permit that would constitute a proposed new or increased discharge to a high quality water shall submit a social importance analysis or economic importance analysis under s. NR 207.031 (8) (b) to demonstrate that the project is necessary to accommodate important social or economic development in the area where the receiving water is located.

2. 'Alternatives analysis.' An applicant applying for coverage under an individual permit that would constitute a proposed new or increased discharge to a high quality water shall submit an alternatives analysis under s. NR 207.031 (8) (c) to evaluate practicable alternatives to the proposed discharge. The department shall evaluate the alternatives analysis under sub. (8) (a) 4. to determine whether the applicant's proposed alternative is approvable.

(e) *Performance standards.* The applicant shall submit information demonstrating that the respective requirements related to water quality under subchs. I, II, and III of this chapter and the performance standards and prohibitions under ch. NR 151 are met. If the department determines that the performance standards or prohibitions are not sufficient to meet the antidegradation requirements under this section, the department may require additional permit conditions and application materials to demonstrate antidegradation requirements under this section are met.

(f) *Amendments.* 1. In this paragraph, "administrative operational changes" means changes to SWPPP contacts, stormwater management program contacts, and other administrative changes that do not result in a change in the operation of a site that would affect the quality or level of pollutant reduction a program would achieve.

2. Except for administrative operational changes, if a permittee proposes 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) that would result in a discharge of pollutants in excess of levels previously address by the programs, the permittee shall provide information to the department that demonstrates the amendment meets the conditions of the permit.

**(8)** DEPARTMENT ANTIDEGRADATION REVIEW AND DETERMINATION FOR INDIVIDUAL PERMITS. The department shall apply the antidegradation policy under s. NR 102.045 and shall conduct an antidegradation review 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:

(a) *Antidegradation review.* If, after review of available evidence, the department finds that the proposed discharge will lower water quality in a high quality receiving or downstream water, the department shall only authorize lowering of the receiving or downstream water quality if the department finds that all of the following are met:

1. The reduction of water quality meets the applicable water quality criteria to protect existing and designated uses under chs. NR 102 to 105.

2. If the proposed discharge will lower water quality in a high quality water identified under s. NR 102.045 (2) (b) 1 to 3, each applicable requirement to protect a high quality water under sub. (7) (b) to (f) is met.

3. If required under sub. (7) (d), the social importance analysis or economic importance analysis demonstrates that a lowering of water quality is necessary to accommodate important social or economic development in the area of the discharge.

4. If required under sub. (7) (d), the alternatives analysis demonstrates that all of the following are met:

a. A lowering of water quality under the antidegradation policy is necessary, and that when one or more practicable alternatives that would prevent or lessen the degradation associated with the proposed discharge are identified, a less-degrading alternative has been selected for implementation.

b. The methods of pollution prevention, control, and treatment of waste and other substances to be discharged are found by the department to be the most effective and practicable.

5. If an alternative meeting the requirements under sub. (7) (d) 2. is approvable by the department, permit conditions used in the preliminary antidegradation determination shall reflect the least degrading alternative selected, or if there is no degradation to the receiving water, the preliminary antidegradation determination shall reflect that there is no lowering of water quality.

6. Point source and state-regulated nonpoint source discharges to the receiving water will meet requirements under the antidegradation policy under s. NR 102.045 (5) (c).

7. The antidegradation policy and procedures under this subchapter have been applied consistent with section 316 (a) of the Clean Water Act, 33 USC 1326 (a), with regard to potential thermal discharge impairments.

8. The respective requirements under subchs. I, II, and III of ch. NR 216 related to water quality and the performance standards and prohibitions under ch. NR 151 are met.

(b) *Preliminary antidegradation determination.* 1. Based upon the antidegradation review described under par. (a), the department shall prepare a written draft antidegradation determination as to whether the antidegradation policy under s. NR 102.045 has been satisfied.

2. If the department finds that the antidegradation policy is not satisfied, the department shall provide written notification to the applicant of the deficiencies, and shall provide the applicant the opportunity to modify the application to meet the requirements under sub. (7).

(c) *Opportunity for comment.* The department shall do all of the following:

1. Include the draft antidegradation determination with the public notice to issue or deny the WPDES permit according to s. NR 203.02.

2. Distribute the public notice according to subch. I of ch. NR 203.

3. Provide opportunity for comment on the draft antidegradation determination.

(d) *Final antidegradation determination*. The department shall consider comments received under par. (c) before preparing a written final antidegradation determination. The final antidegradation determination shall include a statement of whether the proposed activity satisfies or fails to satisfy the antidegradation policy specified under s. NR 102.045 and implementation requirements in this subchapter. The final antidegradation determination shall be included with the department's final

determination to issue or deny the WPDES permit under s. NR 203.13 for approval or denial of a permit to discharge.

**SECTION 16. NR 216.03 (3) is created to read:**

**NR 216.03 (3)** If the department determines that any of the following conditions are met, the department may require that a storm water discharge be covered by an individual WPDES permit under s. 283.31 or 283.33, Stats.:

(a) The storm water discharge is a significant source of pollution and more appropriately regulated by an individual WPDES storm water permit.

(b) The storm water discharger is not in compliance with the terms and conditions of this chapter, or a general storm water discharge permit issued under this subchapter.

(c) The department promulgates rules establishing effluent limitations or standards.

**SECTION 17. EFFECTIVE DATE.** This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

**SECTION 18. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

For Adam N. Payne, Secretary