

Chapter NR 207

ANTIDegradation AND ANTIBACKSLIDING

Subchapter I — Antidegradation

NR 207.01	Purpose and applicability.
NR 207.02	Definitions.
NR 207.03	Antidegradation evaluation procedure.
NR 207.04	Fish and aquatic life waters.
NR 207.05	Determining significant lowering of water quality.

Subchapter II — Antibacksliding

NR 207.10	Purpose and applicability.
NR 207.11	Definitions.
NR 207.12	Antibacksliding.

Note: Corrections made under s. 13.93 (2m) (b) 7., Stats., Register, August, 1997, No. 500.

Subchapter I — Antidegradation

NR 207.01 Purpose and applicability. (1) PURPOSE.

The purpose of this subchapter is to establish implementation procedures for the antidegradation policy in s. NR 102.05 (1) (a). This subchapter sets procedures applicable to proposed new or increased discharges to outstanding resource waters, exceptional resource waters, Great Lakes system waters, fish and aquatic life waters, and waters listed in tables 3 through 8 in ss. NR 104.05 to 104.10.

(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.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1), Register, August, 1997, No. 500, eff. 9-1-97; **CR 17-002: am. Register April 2018 No. 748, eff. 5-1-18.**

NR 207.02 Definitions. In addition to the definitions in ch. NR 205, the following definitions apply to this chapter:

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

(2) “Bioaccumulation factor” means the ratio of the concentration of a substance in an aquatic organism to the concentration of the substance in water to which the organism is exposed regardless of whether the concentration in the organism results solely from body contact with the water or from body contact plus ingestion of food contaminated with the substance, as determined under ch. NR 105 and associated technical support documents.

(3) “Exceptional resource waters” means any surface water, or portion thereof, in s. NR 102.11.

(4) “Fish and aquatic life water” means any surface water, or portion thereof, in s. NR 102.13.

(5) “Great Lakes system” means any surface water in s. NR 102.12 (1).

(6) (a) “Increased discharge” means any change in concentration, level or loading of a substance which would exceed an effluent limitation specified in a current WPDES permit.

(b) Except as provided in par. (c), increased discharge does not include the initial imposition of effluent limitations for substances which were in a previous discharge but which had not been limited in a prior or the current permit unless the initial imposition of effluent limitations occurs due to a changed discharge location, other than a change in location necessary to accommodate a mixing zone as provided for in ch. NR 106.

(c) For discharges of bioaccumulative chemicals of concern (BCCs), defined in s. NR 105.03 (9), to the Great Lakes system, increased discharge means:

1. An increased discharge as defined in par. (a);
2. The initial imposition of an effluent limitation for a BCC that occurs due to an actual or expected increase in loading of the BCC; and

3. Any actual or expected increase in loading of a BCC which is caused by or will be caused by a facility expansion, a process modification, or the connection to an existing public or private wastewater treatment system of a substantial source of untreated or pretreated effluent containing BCCs, and which requires notification to the department pursuant to s. NR 205.07 (2) (a) or (3) (c) or (d). Under this subdivision, increased discharge does not include any increase in the loading of BCCs that is caused by normal operational variability, changes in intake pollutants or increasing the rate or hours of production within the existing production capacity. Normal operational variability includes, for POTWs, any additional wastewater volume within the existing capacity of the POTW from commercial, industrial or residential growth which do not normally contribute substantial quantities of BCCs to the POTW’s wastewater flow.

(7) “Loading” means the concentration of a substance within a discharge multiplied by the flow of that discharge.

(8) “New discharge” means any point source which has not received a WPDES permit from the department prior to March 1, 1989.

(9) “Outstanding resource waters” means any surface water, or portion thereof, in s. NR 102.10.

(10) “Receiving water” means the portion of a surface water which will be affected by a proposed new or increased discharge.

(11) “Significant lowering of water quality” means a lowering of water quality determined to be significant under s. NR 207.05.

(12) “Surface water” means all waters of the state, as designated in s. 281.01 (18), Stats., except groundwater.

(13) “Water quality based effluent limitations” means effluent limitations established by the department pursuant to s. 283.13 (5), Stats.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; correction in (13) made under s. 13.93 (2m) (b) 7., Stats., Register, March, 1997, No. 495; am. (5), (6) (b) and (12), cr. (6) (c), Register, August, 1997, No. 500, eff. 9-1-97; **correction in (12) made under s. 35.17, Stats., Register April 2018 No. 748.**

NR 207.03 Antidegradation evaluation procedure.

(1) **GENERAL.** When the department promulgates a less stringent criterion for a non-BCC pursuant to s. NR 105.02 (2) or revises a secondary value for a non-BCC due to an updated scientific database, any subsequent requests for increased permit limitations based on the revised criterion or secondary value will not be subject to the requirements of this chapter if the following occur:

(a) The department determines that the increased limitations based on the changed criterion or secondary values will still maintain and protect the existing designated uses, and

(b) The receiving water is not an outstanding resource water, an exceptional resource water subject to the requirements of sub. (4) (b), or a water for which sub. (7) (c) applies.

(2) **DISSOLVED-BASED METAL LIMITATIONS.** If a person requests an increased limitation based on a dissolved metals criterion pursuant to s. NR 106.07 (7) (b), the request for an increased limitation will not be subject to the requirements of this chapter if the following occur:

(a) The department determines that the increase limitations based on the changed criterion or secondary value will still maintain and protect the existing designated uses, and

(b) The receiving water is not an outstanding resource water, an exceptional resource water subject to the requirements of sub. (4) (b), or a water for which sub. (7) (c) applies.

(3) OUTSTANDING RESOURCE WATERS. If the department determines that a WPDES permit application proposes a new or increased discharge to outstanding resource waters, effluent limitations for substances in the new or increased portion of the discharge will be set equal to the background levels of these substances, upstream of, or adjacent to, the discharge site unless it is determined that for Great Lakes system waters, such limitations would result in significant lowering of water quality under s. NR 207.05 (4) (b). Effluent limitations for those substances shall be determined in accordance with s. NR 207.04.

(4) EXCEPTIONAL RESOURCE WATERS. If the department determines that a WPDES permit application proposes a new or increased discharge to exceptional resource waters, it shall review the application as follows:

(a) For a proposed new discharge which is needed to prevent or correct either an existing surface or groundwater contamination situation, or a public health problem, water quality based effluent limitations shall be determined in accordance with sub. (6).

(b) For a proposed new discharge which is not needed to prevent or correct either an existing surface or groundwater contamination situation, or a public health problem, water quality based effluent limitations shall be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

(c) For a proposed increased discharge, water quality based effluent limitations for the increased portion of the discharge shall be determined in accordance with sub. (6).

(d) Whenever effluent limitations determined in accordance with pars. (a) to (c) would result in any substance in the proposed new or increased discharge causing significant lowering of water quality as determined under s. NR 207.05 (4) (b), effluent limitations shall be determined in accordance with s. NR 207.04.

(5) GREAT LAKES SYSTEM. If the department determines that a WPDES permit applicant proposes a new or increased discharge to the Great Lakes system, it shall establish effluent limitations using the procedures in ss. NR 207.04 and 207.05; except for proposed new or increased discharges of the pollutants identified in s. NR 102.12 (3) to waters of the Lake Superior basin. No new or increased discharge of those pollutants identified in s. NR 102.12 (3) may be permitted unless the applicant certifies at time of application that the proposed new or increased discharge is necessary after utilizing best technology in process or control using commercially available techniques with demonstrated performance levels for similar applications.

(6) FISH AND AQUATIC LIFE WATERS. If the department determines that a WPDES permit application proposes a new or increased discharge to fish and aquatic life waters, it shall establish effluent limitations using the procedures in ss. NR 207.04 and 207.05.

(7) WATERS LISTED IN TABLES 3 THROUGH 8 IN SS. NR 104.05 TO 104.10. If the department determines that a WPDES permit application proposes a new or increased discharge to waters listed in tables 3 through 8 in ss. NR 104.05 to 104.10, the following procedure shall apply:

(a) The person proposing a new or increased discharge shall demonstrate to the department whether or not the discharge will result in:

1. Significant lowering of water quality in downstream fish and aquatic life or Great Lakes system waters as determined under s. NR 207.05;

2. Lowering of water quality of downstream outstanding resource waters;

3. Lowering of water quality of downstream exceptional resource waters, except for a proposed increased discharge or a proposed new discharge necessary to correct or prevent an existing surface or groundwater contamination situation or a public health problem.

(b) Sections NR 207.04 and 207.05 shall apply under either of the following circumstances:

1. A proposed increased discharge would result in significant lowering of water quality of downstream fish and aquatic life waters, exceptional resource waters, or Great Lakes system waters; or

2. A proposed new discharge which is necessary to correct or prevent an existing surface or groundwater contamination situation or a public health problem and would result in a significant lowering of downstream exceptional resource waters.

(c) Effluent limitations shall be set to prevent a lowering of water quality under the following circumstances:

1. The proposed new or increased discharge would result in a lowering of water quality to downstream outstanding resource waters; or

2. A proposed new discharge not subject to par. (b) 2. would result in a lowering of water quality to downstream exceptional resource waters.

(d) The remaining provisions of this chapter do not apply to situations relating to proposed new or increased discharges to waters listed in tables 3 through 8 in ss. NR 104.05 to 104.10 not covered by pars. (a) to (c).

(8) NONCONTACT COOLING WATER. The requirements of subs. (1) and (2) apply to new or increased discharges of noncontact cooling water. The requirements of subs. (3) to (5) do not apply to new or increased discharges of noncontact cooling water which meet the following criteria:

(a) The discharge contains no additives other than those necessary to provide a safe drinking water supply or those similar in type and amount to substances typically added to a public drinking water supply.

(b) The discharge complies with the thermal criteria in ch. NR 102.

(c) The department has determined that the discharge does not contain concentrations of substances other than additives specified in par. (a) which will result in violations of water quality criteria established under ch. NR 105 or if the department has determined that the existing concentration of a toxic substance in the receiving water is greater than the water quality criterion in ch. NR 105 that the source of the water supply for the discharge is the same receiving water.

(d) The discharge does not contain groundwater which is withdrawn from a location because of noncompliance with the standards in ch. NR 140.

(9) PERMIT CONDITIONS AND REPORTING REQUIREMENTS. All WPDES permit applications for new or increased discharges reviewed under the procedures established in this chapter shall be subject to the permit conditions and reporting requirements in chs. NR 200 to 297.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) to (7) to be (3) to (9) and am. (3), (4) (a) and (c), cr. (1) and (2), Register, August, 1997, No. 500, eff. 9-1-97; CR 05-089; am. (5) Register July 2006 No. 607, eff. 8-1-06.

NR 207.04 Fish and aquatic life waters. (1) APPLICATION INFORMATION. Persons proposing a new or increased discharge to fish and aquatic life waters shall provide documentation for the following:

(a) An assessment of existing treatment capability which demonstrates:

1. Any of the following:

a. The permittee's discharge equals or exceeds 85% of any mass permit limitation.

b. The permittee's monthly average discharge equals or exceeds 85% of a monthly average effluent limitation established in a permit for 3 consecutive months;

c. The permittee's weekly average discharge equals or exceeds 85% of a weekly average effluent limitation established in a permit for 4 consecutive weeks.

d. The permittee's daily discharge equals or exceeds 85% of a daily maximum effluent limitation established in a permit 5 or more times during a calendar year;

e. There are exceedances of any daily maximum, weekly average or monthly average effluent limitation for a parameter in a permit; or

f. A municipal permittee's compliance maintenance annual report point total, as required in ch. NR 208, is 70 or greater;

2. The treatment facilities were maintained in good working order;

3. The treatment facilities were operated and maintained as efficiently as possible; and

4. The conditions documented in subd. 1. were not due to temporary upsets.

(b) Effluent quality data and background water quality data for indicator parameters so a determination will be made on whether or not a significant lowering of water quality will occur under s. NR 207.05.

(c) If the proposed new or increased discharge is found to result in any lowering of water quality or if the person proposing the new or increased discharge has waived the procedure in s. NR 207.05 (2) (a) to (d), the permit applicant shall demonstrate the following:

1. The proposed new or increased discharge will accommodate important economic or social development in any of the following ways:

- a. The discharger will be increasing its employment.
- b. The discharger will be increasing its production level.
- c. The discharger will be avoiding a reduction in its employment level.
- d. The discharger will be increasing its efficiency.
- e. There will be industrial, commercial or residential growth in the community.
- f. The discharger will be providing economic or social benefit to the community.
- g. The discharger will be correcting an environmental or public health problem.

(d) If the new or increased discharge is found to result in a significant lowering of water quality or if the person proposing the new or increased discharge has waived the procedure in s. NR 207.05 (2) (a) to (d), the permit applicant shall demonstrate the following:

1. The proposed significant lowering of water quality cannot be prevented in a cost effective manner by the following types of pollution control alternatives:

- a. Use of conservation measures.
- b. Use of recycling measures.
- c. Use of other applicable wastewater treatment process or operational changes.
- d. Use of source reduction measures.
- e. Use of other pollution minimization alternatives.

2. For proposals involving the expansion of a wastewater treatment plant, whether or not there are alternative wastewater treatment technologies which:

- a. Have documented performance levels for similar wastewater composition,
- b. Have capital costs less than 110% of the capital costs (or present worth less than 115% of the related total present worth value) for alternatives achieving the water quality based effluent

limitations or the effluent limitations determined pursuant to chs. NR 200 to 297, as appropriate, and

c. Would prevent a significant lowering of water quality.

3. Whether or not there are other discharge locations or alternatives which would meet the conditions of subd. 2. b. and c.

4. Any other information required by the department or believed by the applicant to be necessary to complete review of the application.

Note: It is the intent of the department that, where possible, an applicant may use applicable information contained in a facility plan approved by the department to meet the requirements of s. NR 207.04 (1) (a) 1.a. to f..

(2) DEPARTMENT DETERMINATIONS. (a) If the department determines that the existing wastewater treatment facilities have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations as documented under sub. (1) (a), effluent limitations will remain unchanged.

(b) If the department determines that the existing treatment facilities do not have treatment capability to treat any proposed new or increased discharge and maintain treatment levels sufficient to meet existing effluent limitations, effluent limitations will be developed using the following procedures:

1. If the proposed new or increased discharge will not significantly lower water quality as determined under s. NR 207.05 (4) and will accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations will be determined based on applicable procedures and criteria in chs. NR 102, 103, 105 and 106 or on categorical effluent limitation procedures pursuant to chs. NR 200 to 297 as appropriate.

2. If the proposed new or increased discharge will not significantly lower water quality as determined under s. NR 207.05 (4) and will not accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations for substances in the new or increased discharge will be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

3. If the proposed new or increased discharge will significantly lower water quality as determined under s. NR 207.05 (4), or the applicant has chosen to waive the procedure in s. NR 207.05 (2) (a) to (d), and the proposed discharge will not accommodate important economic and social development as documented under sub. (1) (c), water quality based effluent limitations for substances in the new or increased discharge will be set equal to the existing levels of these substances upstream of, or adjacent to, the discharge site.

4. If the proposed new or increased discharge will significantly lower water quality as determined under s. NR 207.05 (4), or the applicant has chosen to waive the procedure in s. NR 207.05 (2) (a) to (d), and the proposed discharge will accommodate important economic and social development as documented under sub. (1) (c), effluent limitations for the proposed new or increased discharge will be determined using the procedure in par. (c).

Note: When assessing existing treatment capabilities, it is the intent of the department to consider projected increases in a permittee's discharge due to a planned water conservation project.

(c) The department shall use the following procedures to determine water quality based effluent limitations or effluent limitations determined pursuant to chs. NR 200 to 297 as appropriate, for each substance in the proposed new or increased discharge for which the existing levels upstream of, or adjacent to, the discharge site are of better quality than applicable water quality criteria or secondary values derived according to ch. NR 102, 103 or 105:

1. If there are no applicable pollution control alternatives or alternative discharge locations which meet the conditions of sub. (1) (d) 2. or 3., effluent limitations will be determined for the new or increased portion of the discharge based on applicable procedures and criteria or secondary values derived according to chs.

NR 102, 103, 105 and 106 or based on effluent limitations pursuant to chs. NR 200 to 297, as appropriate.

2. If there are applicable pollution control alternatives or alternative discharge locations which meet the conditions of sub. (1) (d) 2. or 3., water quality based effluent limitations will be determined for the new or increased portion of the discharge based on the applicable pollution control alternative or alternative discharge site which prevents the significant lowering of water quality.

3. For an increased discharge not involving expansion of a wastewater treatment plant:

a. If there are no demonstrated, cost effective pollution control alternatives which would prevent significant lowering of water quality as demonstrated under sub. (1) (d) 1., effluent limitations shall be determined pursuant to chs. NR 102 and 106 or chs. NR 200 to 297, as appropriate.

b. If there are demonstrated, cost effective pollution control alternatives which would prevent the significant lowering of water quality as demonstrated under sub. (1) (d) 1., water quality based effluent limitations will be determined for the new or increased portion of the discharge based on the cost effective pollution control alternative which prevents the significant lowering of water quality.

(d) The department shall determine water quality based effluent limitations using the water quality criteria or secondary values derived according to ch. NR 102, 103, 104 or 105 for substances in the proposed new or increased discharge whose levels in the receiving water are of lesser quality than the water quality criteria or secondary values for the receiving water upstream of, or adjacent to, the discharge site.

(e) In addition to the provisions of pars. (a) to (c), if the department determines that a proposed new or increased discharge will result in lowering of water quality in downstream outstanding resource waters or a proposed new discharge would result in lowering of water quality in exceptional resource waters, other than for the reasons specified in s. NR 207.03 (2) (a), water quality based effluent limitations for substances in the new or increased portion of the discharge will be set to prevent the lowering of water quality in the downstream outstanding or exceptional resource water. Whenever s. NR 207.03 (2) (a) applies, effluent limitations shall be established using the procedures in this section.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; renum. (1) (a) 1. a. to d. to be (1) (a) 1. b. and d. to f., cr. (1) (a) 1. a., c. and (d) 1. e., am. (2) (c) (intro.), 1. and (d), Register, August, 1997, No. 500, eff. 9-1-97.

NR 207.05 Determining significant lowering of water quality. (1) **INDICATOR PARAMETERS.** For each proposed new or increased discharge the department shall determine a list of water quality parameters for which the significant lowering of water quality test will be applied. The list shall consist of:

(a) Biochemical oxygen demand/dissolved oxygen, ammonia-nitrogen, and copper; or

(b) Some other list of substances for which water quality criteria or secondary values have been determined according to chs. NR 102 to 105, not to exceed 10 parameters, which is determined to be representative of the discharge.

(2) **APPLICATION INFORMATION.** Persons proposing a new or increased discharge shall use the following procedure to demonstrate to the department whether the discharge will result in a significant lowering of water quality:

(a) Determine the expected levels of the indicator parameters in the discharge.

(b) Determine existing levels of the indicator parameters upstream of, or adjacent to, the discharge site using applicable procedures in chs. NR 102 and 106 or specified by the department if none of those procedures apply. Existing levels shall be based on the earliest source of data after March 1, 1989 unless a demon-

stration is made that there has been a change in existing levels resulting in a change in the assimilative capacity of the receiving water, in which case the existing levels shall be based on the data used in the demonstration.

(c) Calculate expected levels in the receiving water of the indicator parameters as a result of the proposed new or increased discharge. In calculating expected levels in the receiving water, the following shall be used:

1. Applicable design low flow rates or dilution ratios for the receiving water in ch. NR 102 or 106 or specified by the department if none of those rates or ratios apply.

2. The daily average discharge loading rates for the new or increased portion of a municipal discharge or the yearly average discharge loading rates for the new or increased portion of an industrial discharge.

(d) Compare the expected levels in the receiving water of each indicator parameter as calculated in par. (c) to:

1. The assimilative capacity multiplied by one-third for all indicator parameters except dissolved oxygen; or

2. The sum of the existing level multiplied by two-thirds and the water quality criterion multiplied by one-third for dissolved oxygen.

(3) **PROCEDURE WAIVER.** Persons proposing a new or increased discharge may choose to waive the procedure in sub. (2), and proceed directly to the economic and social development test in s. NR 207.04 (1) (c).

(4) **DEPARTMENT DETERMINATIONS.** The department shall determine that a proposed new or increased discharge will result in a significant lowering of water quality if either:

(a) The proposed new or increased discharge, along with all other new or increased discharges after March 1, 1989, taking into account any changes in assimilative capacity over time that have been demonstrated under sub. (2) (b), results in an expected level of an indicator parameter in the receiving water of either of the following:

1. Greater than one-third multiplied by the assimilative capacity for any indicator parameter other than dissolved oxygen; or

2. Greater than the sum of the existing level multiplied by two-thirds and the water quality criterion multiplied by one-third for dissolved oxygen.

(b) For a discharge to the Great Lakes system, the mass loading to the receiving water of any substance in the proposed new or increased discharge having a bioaccumulation factor greater than 1000 would be increased.

History: Cr. Register, February, 1989, No. 398, eff. 3-1-89; am. (1) (b) and (4) (b), Register, August, 1997, No. 500, eff. 9-1-97.

Subchapter II — Antibalancing

NR 207.10 Purpose and applicability. (1) **PURPOSE.** The purpose of this subchapter is to establish antibalancing requirements for the WPDES permit program.

(2) **APPLICABILITY.** This subchapter applies to any permittee that requests in a WPDES permit modification or reissuance application an increased or less stringent limitation that limits the discharge of a pollutant to a surface water. This subchapter does not apply to a request for an increased limitation that limits the discharge of a pollutant to groundwater. This subchapter is not applicable when the department increases a limitation that has not yet taken effect in a WPDES permit.

History: CR 17-002: cr. Register April 2018 No. 748, eff. 5-1-18.

NR 207.11 Definitions. In addition to the definitions in ch. NR 205, the following definitions apply to this subchapter:

(1) "Best professional judgment limitation" means technology based effluent limitations established on a case-by-case basis by the permit drafter when there are no applicable promulgated

effluent guidelines for the category of discharge. These limitations are established under s. NR 220.21 and 33 USC 1342(a)(1)Bt.

(2) “Effluent limitation guidelines” or “effluent guideline standard” or “ELGs” means guidelines for establishing technology based effluent limitations under 33 USC 1313(b) including, but not limited to, guidelines for best practicable control technology currently achievable, best conventional pollutant control technology, best available technology economically achievable, and new source performance standards.

(3) “Impaired water” has the meaning in s. NR 151.002 (16m).

(4) “State technology based treatment standard” means a technology based treatment standard promulgated by the state that is not an ELG.

Note: The department’s state statutory authority for establishing technology based guidelines and standards is found in ss. 283.11, 283.13, 283.19, and 283.21, Stats. An example of a state treatment technology based standard is a standard promulgated under s. 283.11 (3) or (4), Stats.

(5) “Total maximum daily load” or “TMDL” has the meaning in s. NR 151.002 (46m).

History: CR 17-002: cr. Register April 2018 No. 748, eff. 5-1-18.

NR 207.12 Antibacksliding. (1) **GENERAL.** Except as provided in this section, effluent limitations or standards in a reissued, revoked and reissued, or modified permit shall be at least as stringent as the effective effluent limitations or standards in the previous permit. If one of the exceptions in subs. (2) to (4) is satisfied to relax or backslide a limitation, the limitation may only be made less stringent if both of the following apply:

(a) The less stringent limitation is at least as stringent as required by the effluent limitation guideline in effect at the time the permit is reissued, revoked and reissued, or modified.

(b) The less stringent limitation complies with state water quality standards, including the antidegradation requirements in subch. I.

Note: The requirements in sub. (1) is commonly referred to as the “safety clause” provision of the antibacksliding requirements in the Clean Water Act, and these requirements apply to any relaxation of any limitation. See 33 USC 1342(o)(3).

(2) **RELAXING A BEST PROFESSIONAL JUDGMENT LIMITATION.** Best professional judgment limitations established under s. NR 220.21 (1) that have taken effect in a permit may be made less stringent in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are satisfied and one or more of the following apply:

(a) Material and substantial alterations or additions to the permitted facility occurred after the best professional judgment limitation was initially imposed in the permit, which justify the application of a less stringent effluent limitation,

(b) New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this paragraph does not include revised regulations, guidance, or test methods.

(c) The department determines that technical mistakes or mistaken interpretations of law were made when the best professional judgment limitation was initially imposed in the permit.

(d) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.

(e) The permittee has received department approval for any of the following:

1. A modified technology based limitation under s. 283.13 (3), Stats.

2. An extended compliance schedule under s. 283.13 (6), Stats.

3. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

4. An alternative thermal effluent limitation under s. 283.17 (1), Stats.

(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the best professional judgment limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

Note: Subsection (2) is based on the requirement in 33 USC 1342(o)(1).

(3) **RELAXING A WATER QUALITY BASED LIMITATION OR A LIMITATION BASED ON A STATE TECHNOLOGY BASED TREATMENT STANDARD.** (a) **General.** Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are met and, for an increased water quality based effluent limitation, one of the following requirements is satisfied:

1. ‘Impaired waters and TMDL based limitations.’ For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant, any water quality based effluent limitation that is based upon a federally approved total maximum daily load for the pollutant may be made less stringent, provided at least one of the following applies:

a. Other wasteload allocated limitations for one or more dischargers to the impaired receiving water or downstream water are also adjusted so, cumulatively, the total maximum daily load allocations will still assure the attainment of water quality standards.

b. The designated use that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA.

2. ‘Impaired water and no federally approved TMDL developed.’ For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant but where a total maximum daily load has not yet been developed and approved by EPA for the pollutant, a water quality based effluent limitation for the pollutant may be made less stringent, provided at least one of the following applies:

a. The discharger can demonstrate that the increase in loading will be offset through a water quality trade or other means with another discharge of the same pollutant to the impaired water. The offset must be approved by the department and must be implemented prior to discharge.

b. The designated use that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA, and the resulting less stringent limit would be subject to this paragraph.

3. ‘Other waters that attain the water quality standard.’ For discharges of a pollutant to a surface water where neither the immediate receiving water or downstream water is an impaired water for the pollutant, any water quality based effluent limit, including a limitation based upon a total maximum daily load or other wasteload allocation, may be made less stringent provided water quality standards, including designated uses and antidegradation, are met.

Note: The requirements in sub. (3) (a) 1. and 3. are based on the provisions of 33 USC 1313(d)(4) and still require compliance with sub. (1), which requires antidegradation requirements be satisfied. An example of the allowance for backsliding under this subdivision is a situation where the initial water quality based effluent limit was based on protection of a receiving water or a downstream water that did not meet the applicable water quality standard and the previously impaired water has now met or exceeded the water quality standard.

(b) **Specific exceptions to backsliding prohibition.** Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload alloca-

tion, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit if sub. (1) (a) and (b) are satisfied and at least one of the following applies:

1. Material and substantial alterations or additions to the permitted facility occurred after the limitation was initially imposed in the permit that justify the application of a less stringent effluent limitation.

2. New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this subdivision includes the establishment of an EPA approved total maximum daily load for the pollutant and receiving water. New information under this subdivision does not include revised regulations, guidance, or test methods. The relaxation of a water quality based effluent limitation under this subdivision that is based upon a revised wasteload allocation, a revised TMDL, or any alternative grounds for translating water quality standards into effluent limitations, is permissible only if the cumulative effect of the revised allocation results in a decrease in the amount of pollutants discharged into the receiving waters, and such revised allocations are not the result of a discharger completely or substantially eliminating its discharge of pollutants.

3. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonable available remedy.

4. The permittee has received department approval for any of the following:

a. A modified technology based limitation under s. 283.13 (3), Stats.

b. An extended compliance schedule under s. 283.13 (6), Stats.

c. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

d. An alternative thermal effluent limitation under s. 283.17 (1), Stats.

5. The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

Note: These exceptions are listed in 33 USC 1342(o)(2).

(4) RELAXING AN INTERIM EFFLUENT LIMITATION OR AN ELG-BASED LIMITATION OR STANDARD. Interim effluent limitations, standards, and conditions and ELG-based effluent limitations and standards that have taken effect in a permit may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements in sub. (1) (a) and (b) are met and both of the following are met:

(a) Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued.

(b) Changes have occurred that would constitute cause for a permit modification or revocation and reissuance under ch. NR 203.

Note: Subsection (4) addresses the requirements in 40 CFR 122.44(l)(1).

History: CR 17-002; cr. Register April 2018 No. 748, eff. 5-1-18; correction in (3) (a) 2. b. under s. 13.92 (4) (b) 7., Stats., Register April 2018.