

Chapter NR 209

THERMAL EFFLUENT LIMITATION MODIFICATION PROCEDURES

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Note: Corrections made under s. 13.93 (2m) (b) 7., Stats., Register, March, 1997, No. 495.

NR 209.01 Purpose. The purpose of this chapter is to establish procedures implementing s. 283.15 (4), Stats., for the imposition of alternative effluent limitations for the thermal components of a point source discharge to surface waters of the state which are less restrictive than limitations and standards adopted pursuant to ss. 283.13 and 283.19, Stats.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.02 Definitions. The following definitions are applicable to terms used in this chapter. Definitions of other terms and meanings of abbreviations are set forth in ch. NR 205.

(1) "Alternative effluent limitations" means effluent limitations, standards of performance, or a thermal mixing zone for the control of the thermal component of a discharge which are less restrictive than limitations and standards adopted pursuant to ss. 283.13 and 283.19, Stats.

(2) "Petitioner" means the owner or operator of any point source who desires the department to impose alternative effluent limitations.

(3) "Balanced, indigenous community" or "balanced, indigenous population" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species, and non-dominance of pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with effluent limitations and standards effective by July 1, 1983, including modifications thereof in accordance with the provisions of this chapter.

(4) "Relevant evidence" means new or historical biological data, physical monitoring data, and engineering or diffusion models.

(5) "Representative, important species" means species which are representative, in terms of their biological needs, of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water receiving a thermal discharge.

(6) "Spatial" means area, volume, configuration, and location.

(7) "Water quality standards" means applicable water quality standards set forth in chs. NR 102-104, or any federally promulgated water quality standards applicable to surface waters of the state.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.03 Petition for alternative effluent limitations. (1) The owner or operator of any point source who desires the department to impose alternative effluent limitations shall petition the department for an adjudicatory hearing upon filing an application for a WPDES permit or requesting a modification of an existing permit to allow for a facility expansion, or no later than 60 days following issuance by the department of a public notice

of intent to issue or so modify such permit. Such petition shall include a description of the alternative effluent limitations desired by the petitioner. Such petition may also be accompanied by a request for the department to propose a list of representative important species.

(2) Such owner or operator shall submit to the department:

(a) Within 60 days after the petition required by sub. (1), or within 60 days after being notified of the department's selection of representative, important species in accordance with s. NR 209.04 (2), or within such longer time as the department may specify, such data and other information as he or she wishes to have considered in support of the petition for alternative effluent limitations, or

(b) Within 30 days after such petition, or within 30 days after being advised of the department's identification of representative, important species in accordance with s. NR 209.04 (2), whichever is later, and after consultation with the department, a written plan of study and demonstration in accordance with s. NR 209.07.

(3) A petitioner who desires to have the determination with respect to alternative effluent limitations deferred in accordance with the provisions of s. NR 209.09 shall so specify at the time the plan of study is submitted.

(4) A petitioner who desires to attempt a demonstration showing the absence of prior appreciable harm in accordance with s. NR 209.08 (1), and to limit the contents of his or her demonstration on the basis that the discharge has and will have a low impact on the segment of the water body receiving the discharge, shall not undertake such demonstration without the prior written approval of the department.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.04 Identification of representative, important species. (1) When a petitioner proposes to include a demonstration in accordance with s. NR 209.08 (2) he or she shall so notify the department at the time the petition is filed and may at the same time submit data and information to assist the department in selecting appropriate representative, important species.

(2) The department shall within 60 days of receiving such petition advise the petitioner of the species selected, which shall include any species included in applicable state water quality standards and such other species as the department deems appropriate. The department shall promptly notify the regional administrator of the U.S. environmental protection agency, the secretary of commerce and the secretary of the interior, or their designees that representative, important species will be identified and that any timely comments relative thereto will be considered by the department in its identification of such species.

(3) If available information is insufficient to enable the department to select representative, important species, the petitioner shall at the request of the department conduct such studies and furnish such evidence as may be necessary to select appropriate species and shall have the burden of proving that the species are appropriate and that the discharge will assure the protection and propagation of such species.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.05 Public notice. (1) If a petition has been filed in accordance with s. NR 209.03 (1) and the petitioner has submit-

ted data and information in accordance with s. NR 209.03 (2) (a), the public notice of the proposed issuance of the permit shall include:

(a) A statement that the thermal component of the discharge is subject to effluent limitations together with a brief quantitative description of the thermal effluent limitations required pursuant to ss. 283.13 and 283.19, Stats.,

(b) A statement that such a petition for alternative effluent limitations has been filed and that less stringent effluent limitations may be imposed on the thermal component of the discharge, together with a brief quantitative description of the proposed alternative effluent limitations included in the petition,

(c) A statement that the petitioner has submitted evidence in support of a request for alternative effluent limitations and that the department is considering imposition of such alternative effluent limitations,

(d) A statement that all data submitted by the petitioner, and a summary thereof, are available at the office of the department for public inspection during office hours, and

(e) A statement that any interested person may comment upon the petitioner's proposed alternative effluent limitations by participating in the hearing.

(2) If a petition has been filed in accordance with s. NR 209.03 (1) and the petitioner has filed a written plan of study and demonstration in accordance with s. NR 209.03 (2) (b), the public notice of the proposed issuance of a permit shall include, in addition to the information required by sub. (1) (a) and (b):

(a) A statement that the petitioner has submitted such a plan of study,

(b) A summary of the petitioner's proposed plan of study and demonstration,

(c) A statement that such plan is available at the office of the department for public inspection during office hours, and

(d) A statement that any interested person may comment in writing upon the petitioner's proposed plan of study and may request a public informational hearing to consider such plan.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.06 Hearing procedures. (1) Hearings to consider alternative effluent limitations shall be adjudicatory hearings in accordance with the provisions of s. 283.63, Stats., and ch. NR 203.

(2) Hearings to consider a proposed plan of study shall be public informational hearings held in accordance with ch. NR 203.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76; corrections made under s. 13.93 (2m) (b) 7., Stats.

NR 209.07 Plan of study and demonstration.

(1) Any written plan of study and demonstration submitted in accordance with s. NR 209.03(2)(b) shall:

(a) Describe the alternative effluent limitations proposed by the petitioner,

(b) Identify the type of demonstration contemplated in accordance with s. NR 209.08,

(c) Include a description of the data and information which the petitioner proposes to submit, and

(d) Include a schedule for the completion and submission of such demonstration.

(2) The petitioner may consult with the department as to the nature and content of the plan of study and may seek the recommendation of the department with respect to such plan. Failure to adopt any recommendation shall not preclude the use of such plan nor prejudice any determinations based on the results of completion of such plan, nor shall the existence of such plan in any way suspend or negate the requirements of s. 283.13, 283.15 (4) or 283.19, Stats.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.08 Determination of alternative effluent limitations. (1)

ABSENCE OF APPRECIABLE PRIOR HARM. (a) Alternative effluent limitations may be established by the department in the case of a point source which has commenced discharge prior to the filing of a petition for such limitations if the petitioner has demonstrated that no appreciable harm has resulted from the thermal component of the discharge, taking into account the interaction of such component with other pollutants and the additive effect of other thermal discharges, to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water receiving the discharge, or that despite the occurrence of such previous harm the desired alternative effluent limitations, or appropriate modifications thereof, will assure the protection and propagation of such a community.

(b) In determining whether appreciable harm has occurred the department shall consider:

1. Evidence as to the period of time over which the discharge has occurred,

2. Evidence demonstrating compliance or noncompliance during the period of prior discharge with water quality standards designed to protect fish and aquatic life, and

3. Additional evidence, including any biological, engineering, or other data demonstrating that such water quality standards are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community.

(2) **PROTECTION OF REPRESENTATIVE, IMPORTANT SPECIES. (a)** Alternative effluent limitations may be established by the department for a source, whether or not the discharge commenced prior to the filing of a petition for such limitations, if the petitioner demonstrates that the discharge will assure the protection and propagation of representative, important species, selected in accordance with s. NR 209.04 (2), whose protection and propagation, if assured, will assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and aquatic life in and on the body of receiving water.

(b) Notwithstanding par. (a), the department shall not establish alternative effluent limitations if it determines based on evidence introduced at the hearing that:

1. The species studies are not representative, in terms of biological needs, of a balanced, indigenous community in the receiving water,

2. The temperature requirements employed in calculating the proposed alternative effluent limitations are not adequate to assure the protection and propagation of those species in and on the receiving water, or

3. The temporal or spatial distribution of the proposed mixing zone is excessively large or otherwise inconsistent with the purposes of s. 283.15 (4), Stats.

(3) In determining in accordance with sub. (2) whether the protection and propagation of the representative, important species will be assured, the department may consider evidence demonstrating that the discharge will comply with applicable temperature requirements for growth, reproduction, and survival of such species as specified in any applicable water quality criteria or in water quality information published by EPA, or additional information supplied by the petitioner or required by the department. Compliance with such temperature requirements shall be determined outside a proposed mixing zone whose temporal and spatial distribution will assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the receiving water body.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.

NR 209.09 Deferred determination. (1) The department may defer determination with respect to alternative effluent limitations in any case in which it determines, after reviewing the evidence which the petitioner plans to present or the petitioner's plan of study, that sufficient information on which to base a

knowledgeable determination is not likely to be available within a reasonable period of time.

(2) When the department defers such determination with respect to a particular discharge it may issue a permit for a term up to 5 years which requires that discharge to achieve thermal effluent limitations no later than the date specified in applicable effluent limitations and standards required by ss. 283.13 and 283.19, Stats., but affords the permittee an opportunity to request the deferred hearing when the necessary evidence has been devel-

oped.

(3) Any hearing scheduled in accordance with sub. (2) shall be given public notice in accordance with s. NR 209.04 (1) or (2) as appropriate and be held sufficiently in advance of any final compliance date in a permit to allow the permittee to take measures necessary to comply in the event the request for alternative effluent limitations is denied.

History: Cr. Register, June, 1976, No. 246, eff. 7-1-76.