

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-13-20

Relating to: Revisions to chapters NR 102, 106, 205, and 207, and other related regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures.

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rule will be proposed as a permanent rule.

2. Detailed description of the objective of the proposed rule:

The objective of the proposed rule is to update Wisconsin's antidegradation policy and implementation procedures to establish an effective, transparent process for conducting antidegradation reviews consistent with federal regulations. Antidegradation reviews are a federally-required component of water quality standards. They are established to protect existing uses and to protect high quality waters from degradation. A state's antidegradation policy and implementation procedures do not prohibit all activities that would otherwise lower water quality in high-quality waters. However, they require a demonstration that lowering of water quality is necessary to support social or economic development in the area where the waterbody is located. States are required to adopt an antidegradation policy and implementation procedures that are consistent with the Clean Water Act and federal regulations promulgated under the Act (33 USC 1313(d)(4)(B), 40 CFR 131.12) and 40 CFR 132 Appendix E.

The purpose of these rule revisions is to ensure that Wisconsin's antidegradation policy, currently established in ch. NR 102, Wis. Adm. Code, and its implementation procedures, detailed in ch. NR 207, Wis. Adm. Code, are consistent with federal regulations (40 CFR 131.12) that were revised effective August 21, 2015 (Federal Register Vol. 80, No. 162). The rule revisions may also include additional antidegradation policies and procedures that apply in the Great Lakes Basin (40 CFR 132, Appendix E). The following list highlights some of the areas that will be addressed in the rule revisions to ensure consistency with federal law:

- Clarify when an antidegradation review is needed.
- Clarify what the applicant must demonstrate, what the department's antidegradation review entails and what determinations the department must make.
- Identify which surface waters are subject to antidegradation review.
- Re-evaluate what constitutes "significant lowering of water quality."

- Identify public participation requirements.
- Re-evaluate existing antidegradation review exemptions for consistency with federal regulations.
- Re-evaluate guidelines for determining activities that result in important social or economic development.
- Revise the “analysis of alternatives” process. During an antidegradation review, the range of practicable alternatives that would prevent or lessen degradation associated with lowering of water quality must be evaluated.
- Evaluate and define the applicability of antidegradation implementation procedures to Wisconsin Pollutant Discharge Elimination System (WPDES) general permits, Concentrated Animal Feeding Operations (CAFOs) and stormwater WPDES permits.
- Evaluate and include, if necessary, additional antidegradation policies and procedures for antidegradation reviews in the Great Lakes Basin.

The antidegradation implementation procedures currently in ch. NR 207, Wis. Adm. Code, are unclear and are inconsistent with current federal regulations. In the proposed rule, the department will establish a transparent procedure for determining where an antidegradation review is needed, under which circumstances, and what this review entails.

Additional changes to associated rules may be pursued that are reasonably related to those discussed here, such as revisions to policies and/or implementation procedures related to WPDES permits, including general permits, CAFO permits issued under ch. NR 243, Wis. Adm. Code, and stormwater permits issued under ch. NR 216, Wis. Adm. Code. The department will also consider revisions to the definition of new discharge, new discharger and other related definitions in various permitting chapters to ensure consistency with federal regulations and to provide consistency in permit implementation procedures such as antidegradation reviews, compliance schedules and variances.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Federal requirements: The United States Environmental Protection Agency (EPA) revised its antidegradation regulations in 40 CFR 131.12 in 2015. The Great Lakes Initiative regulations, specified in 40 CFR 132 and Appendices, were promulgated in 1995.

Prior to August 21, 2015, the EPA established an antidegradation policy consisting of three levels of protection:

- Tier 1: Applies to all water and requires that water quality must support all uses.
- Tier 2: Applies to waters where quality exceeds the level needed to support fish and aquatic life, and recreation (i.e., high quality waters), and requires a demonstration that any proposed lowering of water quality is necessary to support important social and economic development in the area where the waterbody is located.
- Tier 3: Applies to Outstanding and Exceptional National Resource Waters and requires that water quality in these waters be maintained and protected.

In its 2015 revised regulations, the EPA identified two approaches for antidegradation implementation methods to protect Tier 2 waters, otherwise known as high-quality waters. In the

waterbody-by-waterbody approach, states identify waterbody types that will receive antidegradation review and they will conduct an antidegradation review for any new or increased discharge to one of these waterbodies. In the parameter-by-parameter approach, states identify parameters for which water quality is better than necessary to support uses and conduct an antidegradation review for every parameter that exceeds this level. In the preamble to its revised rule, EPA made comparisons between the two antidegradation approaches. During the rulemaking process, the department will consider both of these options, in consultation with stakeholders, and propose an approach, or combination of approaches, for reviews.

State Antidegradation Requirements: The department's, existing narrative antidegradation policy is specified in s. NR 102.5(1)(a), Wis. Adm. Code, and was established in 1973. Wisconsin's procedures for implementing the antidegradation standard on point sources are found in ch. NR 207, Wis. Adm. Code, and were initially established in 1989. In 1997, there were revisions to ch. NR 207, Wis. Adm. Code, to implement the federal Great Lakes Initiative Regulations in 40 CFR 132 and Appendices. However, the department's current antidegradation standard and implementation procedures are not consistent with 40 CFR 131.12.

As part of the proposed rule, the department will establish a more straightforward process to determine when an antidegradation review is triggered and the scope of the review, given EPA's direction to the department. Both the waterbody-by-waterbody approach and the parameter-by-parameter approach will be evaluated during the rulemaking process, in consultation with stakeholders, to ensure that the selected approach is efficient and provides adequate protection to the state's high quality waters.

Analysis of Policy Alternatives: The alternative to the proposed approach is to not revise the current antidegradation policy and implementation procedures at this time, despite EPA stating that the department's rules are inconsistent with federal law. Pursuant to ss. 283.001(2), 283.11(2), and 283.31(3)(d)(1), Wis. Stats., the department is required to promulgate rules and administer a permit program that complies with the Clean Water Act and federal regulations promulgated pursuant to this Act. Thus, Wisconsin's antidegradation procedures must be consistent with the Clean Water Act and federal regulations. Additionally, resolving discrepancies between Wisconsin's antidegradation procedures and federal regulations is needed to address one issue in an October 20, 2015 Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Wisconsin currently pending before EPA.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Revisions to the antidegradation policy and implementation procedures will be promulgated under s. 281.15, Wis. Stats.:

- Section 281.15, Wis. Stats., mandates that the department promulgate-by-rule water quality standards, including water quality criteria and designated uses.
- 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.

- Section 283.15(5), Wis. Stats., states that the department shall establish more stringent limitations than required under subs. (2) and (4) when necessary to comply with water quality standards.
- Section 283.37, Wis. Stats., gives the department authority to promulgate rules regarding permit applications.
- Section 283.55, Wis. Stats., gives the department authority to impose monitoring and reporting requirements.
- 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 revised water quality standards.
- 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 ch. 283, Wis. Stats.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The department estimates that 550 hours of state employee time will be needed to complete the promulgation of the proposed rule over 3 years.

6. List with description of all entities that may be affected by the proposed rule:

Business/Industry and Municipalities: Businesses, industries and municipalities that discharge to surface waters and hold WPDES permits or may obtain a WPDES permit in the future, including their consultants, attorneys or other advisors, may be affected by this rule. The revisions will provide a clearer antidegradation review process and clearer, more consistent definitions.

State Government: The rule update will enable the department to gain efficiencies in several internal processes allowing state funds to be used more economically.

Public: The public will benefit from a more transparent approach to protecting Wisconsin's high quality waters and the ability to participate in both the selection of these waters and the antidegradation determinations made by the department.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

- 33 USC 1313(c) (section 303(c) of the Clean Water Act) requires that states periodically review and modify or adopt, if necessary, water quality standards. This requirement applies to all surface waters in the state.
- 33 USC 1313(b) provides that EPA may promulgate water quality standards if a state fails to promulgate a standard in accordance with the timeframes established in 33 USC 1313(a).
- 33 USC 1313(d)(4)(B) (section 303(d)(4)(B) of the Clean Water Act) allows effluent limitations to be revised only if the revisions are subject to and consistent with EPA's antidegradation policy.

- 40 CFR 131.12 contains the federal antidegradation policy and procedures, and requires states with approved programs to be consistent with the federal antidegradation requirements.
- 40 CFR 132 Appendix E contains antidegradation procedures for discharges of certain pollutants to the Great Lakes Basin.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):

The department expects moderate economic impacts (\$50,000 to less than \$10 million in any 2 years) as a result of this rule. The economic impact of this rule package is partially dependent on the approach selected. Selection of the waterbody-by-waterbody approach would allow the department to focus where antidegradation reviews are required. Reviews would only be needed for new or increased discharges that would significantly lower the water quality of the waters determined to be high quality.

Selection of the parameter-by-parameter approach would allow the department to implement the same process for any waterbody when new/increased discharges of parameters are proposed for which water quality is better than necessary to support uses. As part of this rule package, both approaches will be evaluated to ensure that the selected approach provides adequate protection to the state's waters while minimizing economic impacts. Businesses, industries and municipalities that discharge to surface waters and hold a WPDES permit or may obtain a WPDES permit in the future may be affected by this rule. The department will solicit public input on the projected economic impact and will convene an advisory group to provide input on the proposed rule modifications.

9. Anticipated number, month and locations of public hearings:

The department anticipates holding a virtual public hearing in the month of April 2023 to provide an opportunity for business/industry, municipalities, environmental groups and the public throughout the state to participate.

Contact Person: Marcia Willhite, marcia.willhite@wisconsin.gov

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For Preston D. Cole, Secretary

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Date Submitted