



Assembly Committee on Environment

CR 23-010

Updating Wisconsin's Water Quality Antidegradation Policy

February 27, 2025

Good morning, Chair Goeben and members of the Committee. My name is Adrian Stocks, and I am the Water Quality Bureau Director for the Wisconsin Department of Natural Resources (DNR). Thank you for the opportunity to testify, for informational purposes, on CR 23-010, related to updating Wisconsin's water quality antidegradation policy and procedures.

As you may know, this rule was originally submitted to the Legislative committees in late 2023. After the original legislative hearing, Chair Gundrum requested that we hold further discussions with stakeholders to consider additional concerns. Because this rule was recently reassigned to this committee, I will provide the general background on the rule as well as an update on the work we've done since the first legislative hearing.

Under the Clean Water Act, every state is required to have an "antidegradation" policy to prevent degradation of the state's lakes, rivers, and streams over time. Wisconsin's antidegradation policy was established in 1973 and its implementation procedures have been in place since 1989, with minor updates since that time. In 2015, the U.S. EPA updated the federal regulations relating to antidegradation. Our revisions during this rulemaking are to incorporate the EPA requirements to ensure consistency with federal code and maintain our delegated authorities under the Clean Water Act.

Antidegradation procedures are applied when a facility discharging wastewater or storm water requests to increase the amount of their discharge or to create a new discharge. The department typically receives just a few of these requests each year. Because increased discharges have the potential to lower water quality, certain requirements must be met before DNR can approve such a request. For many waterbodies, the antidegradation policy allows for a new or increased discharge if it is necessary and if the waterbody receiving the discharge can assimilate the additional effluent while still attaining its water quality standards. However, for certain types of waterbodies, lowering of water quality is not allowed. These include the state's Outstanding or Exceptional Resource Waters, and waters that are already impaired for a given pollutant, with certain exceptions. These overarching principles of the antidegradation policy are the same as those found in the current state and federal codes.

In this rulemaking, we added language to clarify how the antidegradation rule will be implemented for additional types of permits. Previously, Wisconsin's code only specified implementation procedures for wastewater discharges with an individual permit. However, because the federal code applies to all point sources, this rule package addresses both wastewater and storm water, and adds provisions for general permits.

- For wastewater, the overall process remains largely the same as before, with the same required steps and application materials. Some elements were revised in accordance with federal requirements, which I'll discuss further in a moment.

- For storm water, the rule establishes implementation procedures similar to those used for wastewater, though they are specific to the storm water program where necessary. Storm water discharges requiring an individual permit may require antidegradation review. However, most storm water permittees are covered under general permits and will see little change.
- General permits for stormwater or wastewater cover multiple dischargers within a category. This rule establishes processes internal to DNR, applied when the department issues general permits. However, applicants who certify that they can comply with the conditions of the general permit do not require further review.
- We also evaluated whether additional requirements were necessary for concentrated animal feeding operations, or CAFOs, and determined that existing CAFOs and most new operations already meet antidegradation requirements under existing code.

Federal regulations have always required a facility seeking a new or increased discharge to submit certain application materials, which include a demonstration that the new or increased discharge will accommodate important social or economic development. Additionally, an alternatives analysis must be completed demonstrating that the facility will implement practices to lower the impact of the discharge if a practicable option is available.

Though wastewater permittees typically go through the full antidegradation review process and submit all of these materials, Wisconsin has always provided extra flexibility to permittees through a streamlined review for applicants whose proposed discharge is determined to be “not significant”. Under the streamlined process some application materials are not required. However, U.S. EPA has determined that Wisconsin’s previous threshold for qualifying for streamlined review was not sufficiently protective of water quality. Therefore, the threshold for qualifying for streamlined review was updated, and a small number of applicants that may have qualified in the past will now need to submit the full application package. We estimate that 5 to 10 wastewater facilities that may have previously qualified for the streamlined process may now need to do the full review. In the department’s economic analysis, we included costs for preparing these application materials, and for selecting a more protective alternative if needed. It’s important to emphasize that regardless of where this threshold is set, facilities may still be authorized to increase their discharge. It simply determines which facilities may use a more streamlined review process.

During the original rulemaking process, we established a stakeholder advisory group comprised of members representing industries, municipalities, agricultural producers, and facilities discharging storm water. During a series of meetings, we provided them with several draft versions of the rule and used their feedback to improve clarity and feasibility. We made several adjustments in response to comments, including the following:

- We identified additional instances that would not require antidegradation review. For instance, if a facility would still be able to meet their existing permit limits with an increased discharge, this review is not required. Also, the rule clarifies that temporary discharges are not subject to antidegradation review.
- We added a cost-saving option for applicants that allows a facility to elect to have DNR staff collect water quality data instead of the facility.
- We adjusted the process timeline to allow greater lead time and avoid project delays.
- We specified that certain low-cost options are acceptable as practicable alternatives, and that a facility is only required to select a practicable alternative if one is available.

Over this past year, we have had additional meetings and correspondence with a variety of stakeholders from business and environmental groups. We have carefully considered and responded to their requests. As a result, we have drafted germane modifications that we plan to submit in the near future. These modifications include the following:

- We updated the definitions of “parameter” and “water quality standards”.
- We provided that an applicant may use the streamlined approach more than one time.
- And, we increased the allowed temporary discharge from 90 to 180 days for storm water discharges from construction projects.

In closing, I'd like to emphasize that the antidegradation process only applies if an applicant wishes to increase their discharge or create a new discharge. The department receives very few of these requests each year, and for wastewater permittees the process remains largely the same as before. A small number of individual storm water applicants may also need to submit application materials if they are not eligible for coverage under a general permit. Flexibility has been built in for smaller discharges, which may be small businesses, by continuing to provide the streamlined review option, eliminating sampling costs if needed, and by allowing the application to be tailored in scope corresponding to the size of the project.

On behalf of the Department of Natural Resources, we would like to thank you for your time today. I would be happy to answer any questions you may have.

February 27, 2025

Wisconsin Assembly
Committee on Environment
2 E Mifflin St, 225 Northwest
Madison, WI 53703



RE: TESTIMONY ON CLEARINGHOUSE RULE 23-010 RELATING TO UPDATING WISCONSIN'S WATER QUALITY ANTIDEGRADATION POLICY AND PROCEDURES AND AFFECTING SMALL BUSINESS.

Good morning, Chair Goeben and members of the Committee.

My name is Rob Lee, and I am a staff attorney at Midwest Environmental Advocates, a nonprofit law center that combines the power of law with the resolve of communities facing environmental injustice to secure and protect the rights of all people to healthy water, land, and air. Thank you for holding a public hearing as part of your review of this important rulemaking.

The rule package before you today, Clearinghouse Rule 23-010, represents the Wisconsin Department of Natural Resources' ("DNR") third attempt in the last 16 years at updating its antidegradation regulations to comply with the federal Clean Water Act. This is not a new issue; MEA first raised it with DNR as early as 2006. Where the first two attempts were unsuccessful, we are certainly hopeful that the third time is the charm and therefore urge you to support the rule package.

The federal Clean Water Act prohibits the discharge of pollutants to surface waters without a permit, and the authority to administer the resulting permitting program in Wisconsin, called the Wisconsin Pollutant Discharge Elimination System, or WPDES program, has been delegated to DNR from the U.S. Environmental Protection Agency ("EPA"). That delegation of federal authority to the states comes with conditions, one of which is DNR's ongoing duty to update its regulations to comply with the Clean Water Act and its implementing regulations.¹

Now, you may hear that we do not need to update the state's antidegradation policy because the vast majority of Wisconsin's surface waters are meeting Clean Water Act standards, but the whole point of the rule is to make sure those surface waters continue to meet those standards. In other words, the point of the rule is to prevent those waters that are already "clean" from degrading and becoming impaired.

An important concept for this rule package is assimilative capacity, which is the amount of capacity that a waterbody has to assimilate, or absorb, a pollutant before the water becomes

¹ See 33 U.S.C. § 1344(g)1, (h)(1)(A)(i). See also 40 CFR § 123.1(f) ("Any state program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part," which specifies the EPA's procedures and criteria for approving, revising, or withdrawing state-delegated programs").

impaired and potentially unsafe to drink, swim, or fish, or even unfit for use in certain commercial applications. The rules prevent impairments by limiting how much of a receiving water's assimilative capacity a permittee can consume.

An easy way to think about assimilative capacity is like a bank account that does not replenish, where the receiving water is the account and the assimilative capacity of the receiving water is how much money is in the account. The current rules say that you can spend up to a third of the money in the account on a purchase without asking yourself whether you really need that good or service or whether you can get the same good or service cheaper. Further, the current rules say that, if you wait five years, you can spend another third, and after another five years, another third, until there is no money left, and all without asking whether you needed to spend as much money as you did.

To take the analogy one step further, imagine it is a shared bank account, and now that you have spent all the money, your spouse or whoever else may have needed access to the money is hung out to dry. In other words, once all the assimilative capacity of a receiving water is used up and the water becomes impaired, other businesses will not have the opportunity to spend some of that money on things they need.

Of course, a prudent person would take a closer look at all significant purchases, not just those that would spend more than a third of their bank account. A prudent person would ask themselves important questions like whether they really need the good or service or can get it cheaper. And if that is the kind of prudence we would use with something as mundane as a purchase, it is absolutely the kind of prudence we should use with something as valuable as Wisconsin's waters.

That is what this antidegradation rule does—requires permittees likely to have a significant impact on water quality to ask themselves those important questions. Except under the proposed rule package a significant impact on water quality would occur when a permittee proposes to spend more than ten percent of their bank account, or consume more than ten percent of the assimilative capacity of a receiving water. By the way, that ten percent number was not plucked out of thin air but is rather based on what EPA can approve under existing federal law and interpretive cases.²

As reflected in the chart attached to my testimony, if there is a significant impact on water quality, permittees must consider whether there are any practicable alternatives that would avoid the significant impact on water quality. If there are no practicable alternatives, the permittee must establish that its discharge will result in important social and economic development in the area. Such development may include all sorts of things like private sector job creation, public services, and much more.

² See, e.g., *Ohio Valley Environmental Council v. Horinko*, 279 F. Supp. 2d 732, 767-773 (S.D. W. Va. 2003) (upholding West Virginia's ten percent threshold for individual permittees but invalidating a twenty percent threshold for all dischargers).

Further, under the proposed rule package, the receiving water must be treated like a shared account, so no single permittee is using all the assimilative capacity and preventing others from engaging in economically beneficial activities.

Clean water is vital to the state's economy, whether for manufacturing and processing, for recreation, or for tourism. We absolutely need to protect the clean water we have while continuing to clean up other waterways. This rulemaking is a small but important part of ensuring that future generations enjoy the same benefits we do today, and I therefore urge you to allow this long overdue rule package to become law.

Thank you for the opportunity to provide testimony. I would be happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob Lee". The signature is stylized and cursive.

Rob Lee

Staff Attorney

MIDWEST ENVIRONMENTAL ADVOCATES

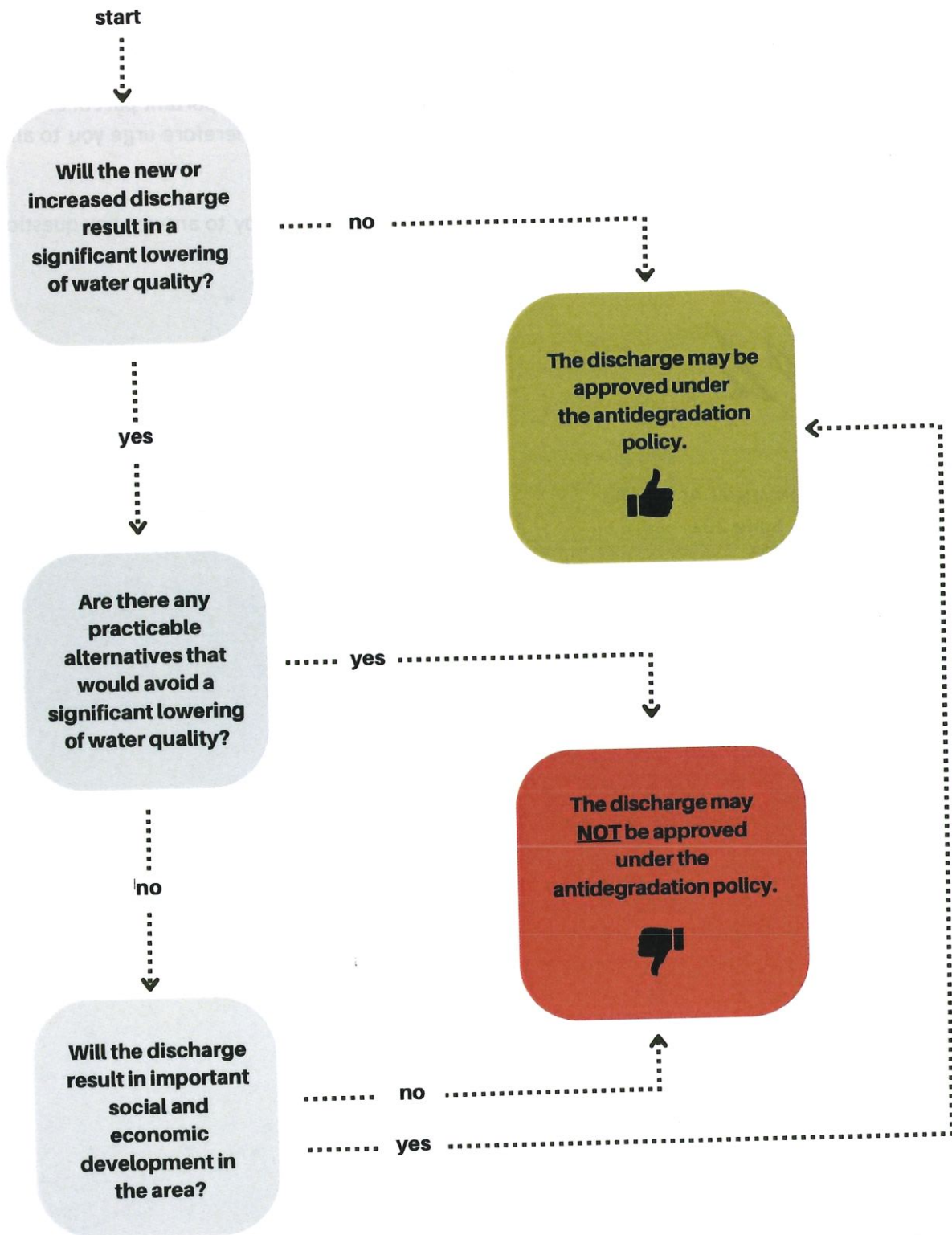
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THE ANTIDEGRADATION REVIEW PROCESS





DATE: February 27, 2025
TO: Assembly Committee on Environment
FROM: Clean Wisconsin
RE: Testimony in Support of Proposed Antidegradation Rules (CR 23-010)

Clean Wisconsin is a non-profit, non-partisan environmental advocacy organization working on clean water, clean air and clean energy issues. Founded over fifty years ago with over 20,000 members and supporters around the state, we employ scientists, policy experts and attorneys to protect and improve Wisconsin's environment.

First, before getting into why the substance of the rule is valuable and worth adopting, it's worth noting that DNR used a good process when putting this rule together.

Clean Wisconsin participated in the stakeholder advisory committee along with at least nine statewide agricultural and industry organizations. DNR staff worked diligently as part of that process, provided two draft versions of the rule for review and feedback from the stakeholder advisory committee and patiently waded through the many questions, concerns, and suggestions raised during this rulemaking. When the Department didn't agree with our suggestions, it explained why it didn't agree.

While it is not required by law, Clean Wisconsin appreciated the department's thoughtful structure and implementation of the stakeholder advisory process. So, we appreciate how this rule came together.

Second, antidegradation is important for preserving high quality waters, and it's just smart policy. Antidegradation is important because, as the name suggests, it aims to prevent degradation of our high-quality waters. These waters sustain aquatic life. And they are the waters that Wisconsin's residents—and visitors—enjoy fishing, swimming, and paddling on.

Antidegradation is smart policy, because it's like the saying, an ounce of prevention is worth a pound of cure. It's much cheaper to *preserve* high quality waters than it is to try to take an impaired water and clean it up. We've learned that the hard way.

That's precisely why the Clean Water Act requires all states to have an up-to-date antidegradation policy. Which brings us to the last point.

Third, and perhaps most importantly, this rulemaking is long overdue and required for Wisconsin's antidegradation policy to be consistent with the Clean Water Act. Wisconsin's antidegradation policy has been inconsistent with the federal minimum requirements for a very long time. Federal regulations were most recently updated in 2015, putting Wisconsin even further out of step with the Clean Water Act. There is no reasonable disagreement about this.

DNR is now putting forward a rule to update our state antidegradation policy to make it consistent with federal regulations and ensure we're meeting our Clean Water Act obligations.

And that is something that DNR must do; the Clean Water Act requires it, and EPA has been as clear as they can be that Wisconsin needs to do better with its antidegradation policy.

That's what this rule does. It doesn't create a host of new requirements out of thin air that go beyond what federal antidegradation policy directs; it aligns with requirements in a federal rule that is ten years old at this point, and that our neighbor states have already come into line with.

Importantly, there are consequences if we don't update Wisconsin's antidegradation policy. EPA has a legal obligation to ensure states who run their own permitting program have an adequate antidegradation policy, and the Clean Water Act gives EPA tools to get more involved if we fail to update our state policy. They are required to review our antidegradation rule, and they will not approve it if it does not meet baseline requirements. Further, if EPA fails to fulfill its Clean Water Act duties, citizens can take legal action to compel it to; this has happened in several states that did not update their antidegradation policies expeditiously enough. Nobody wants this, yet it is the logical outcome of failing to promulgate rules to get our antidegradation policy to a place where it is consistent with the Clean Water Act.

And, unfortunately, this point needs to be highlighted because some groups have suggested or even outright requested that the rule be weakened in ways that EPA and federal courts have clearly and repeatedly said are not consistent with the Clean Water Act, and which EPA cannot legally approve.

The draft rule isn't perfect. It is the result of compromise and balance between the interests of a wide range of stakeholders. But it is a good rule that ensures that our high quality waters stay that way, and it's one that Wisconsin must promulgate if we're going to have an antidegradation policy that is again consistent with federal requirements.

We understand that DNR is considering germane modifications to the draft rule and thus withhold judgment on whether any modifications affect our present support for this rulemaking.

If you have any questions, please contact Clean Wisconsin's government relations director, Erik Kanter, at ekanter@cleanwisconsin.org and (262) 565-3263.