

August 23, 2023

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 October 12, 2023.

**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 adopts 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), 212.72 (3), 212.74 (intro.) and 212.75 (intro.); to **repeal and recreate** NR 207 subch. I; and to **create** NR 102.03 (1km), (1L), (1p), (1pg) and (10), 102.045, 207.001, and 216.008, 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., gives 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., states 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 and implementation procedures for the policy as part of their surface water quality standards. Antidegradation provisions support the Clean Water Act's goal of restoring and maintaining the nation's waters by imposing requirements that must be met before water quality may be lowered in a surface water. 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, Wis. Adm. Code, 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, Wis. Adm. Code. 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 reflects existing statutory requirements by prohibiting 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 (Outstanding or Exceptional Resource Waters), 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 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 storm water 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 (ADL) under s. NR 243.13 (2)(b) or (3)(c), Wis. Adm. Code, that include a direct discharge to surface waters, will follow the existing procedures for review of individually permitted wastewater discharges in the recreated ch. NR 207, Wis. Adm. Code. Existing CAFO facilities seeking an ADL that meet the requirements under s. NR 243.13 (2) (b) or (3) (c), Wis. Adm. Code would not be subject to antidegradation review.

*Wastewater individual permit antidegradation review:*

The proposed revisions to ch. NR 207, Wis. Adm. Code, start with defining a new or increased discharge so the 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 the proposed discharge is necessary to support important social or economic development in the area where the waters are located. The applicant shall submit the information 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 prior to or 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.
  - *Water quality data screening:* The department determines whether sufficient water quality data for the receiving and downstream waters is available for the review. If not, the applicant may indicate its preference for whether the department or the applicant will obtain and provide the necessary information.
  - *Receiving water determination:* If the proposed discharge is a new or increased discharge, the department determines which category of high quality or non-high quality waters apply to the receiving water or downstream waters, as defined in s. NR 102.045(2)(b) to (c), 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.

- *Other impacts to the receiving water:* If a lowering of water quality is under consideration, the department identifies point sources or nonpoint sources that are discharging any pollutant of concern under the antidegradation review to the receiving waters. If sources are identified, the department will, to the extent feasible, evaluate whether there are noncompliance issues and initiate actions required under state law.
- *Notification:* The department notifies the applicant whether an antidegradation review is required and further information must be submitted.
- *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 review.
- *Antidegradation review for other high quality waters:*
  - *Eligibility for streamlined review.* The proposed new or increased discharge qualifies for a streamlined review if the department determines that it would not constitute a significant lowering of water quality. Any lowering of water quality due to a bioaccumulative chemical of concern in Great Lakes system waters or of a pollutant allocated under a TMDL 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 that will use up more than 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.
  - *Practicable 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 alternatives that have the potential to prevent or lessen the degradation associated with the proposed discharge. If one or more practicable alternatives are identified, the applicant must select one to lessen the degradation from the 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, if one is available. 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 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 the policy has been satisfied, permit limits will be set in accordance with the procedures in chapter NR 207 and other applicable regulations. If it has not been satisfied, the applicant will be notified of the reasons for this determination. 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 regarding the WPDES permit or the facility plan.

*Wastewater and storm water general permit antidegradation review.* The department will apply the antidegradation policy and implementation procedures 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, reissued or modified, the department will obtain available information, 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 grants coverage under the general permit.

*Storm water individual permit antidegradation review:*

- *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 a 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 storm water 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 reasons for the determination.
- *Opportunity for comment:* The department will provide a draft antidegradation determination with public notice regarding the WPDES permit and will consider comments the public or other agencies provide prior to making a final determination on permit issuance, reissuance, or modification.
- *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 regarding 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 standards, any effluent limitation 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), 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 apply antidegradation procedures 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 review is included in s. NR 207.031(8)(c) and (9)(a)4., and s. NR 216.008(8)(c)2. and (9)(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(8)(c)1. and (9)(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 (8)(b), 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 storm water 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 storm water within the scope of this rulemaking because it is specific to antidegradation, which was not addressed in the separate rulemaking related to storm water 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 Iowa).
- 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:

- *Streamlined process using a 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.
- *Practicable 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 additional factors to determine the social or economic importance of the proposed discharge, such as the value of the water resource. Iowa and Michigan are more similar to 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 storm water 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.

Adjacent states' antidegradation regulations are found as follows:

- 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 estimated the percent of industrial point source dischargers that are small businesses potentially affected by this rule. In reviewing small business data from the Statistics of U.S. Businesses' 2020 Annual Data Tables provided by the U.S. Census Bureau, the department determined that approximately 72% of industrial point sources in Wisconsin are small businesses and adjusted the number of facilities accordingly. On a per-project basis, the same costs are applied for both small and larger businesses. The costs would be similar, although small businesses may have somewhat lower costs than larger industries because the rule provides that materials submitted during this process are scalable to the size of the facility/project. 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.
  - NOTE: The department revised the proposed language in s. NR 207.031(4), Wis. Adm. Code to specify that the applicant may select whether it prefers to have the department collect any additional water quality data or to do so itself, when there is not enough recent ambient data for the receiving waterbody. Therefore, permittees seeking an antidegradation review are not required to incur additional costs for sampling. However, the department included those costs as part of their economic impact analysis as a conservative measure, to account for permittees which decide to collect the water quality data themselves.
- 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 or 3 CAFO permittees will seek to establish surface water discharges as an ADL in each year. Existing CAFOs which change to an ADL compliant with s. NR 243.13 (2) (b) or (3) (c), Wis. Adm. Code, would not have an increased discharge and therefore would not be subject to antidegradation review. For this reason, there are no anticipated cost impacts for CAFO permittees.

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.

Annual Cost Summary for 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
Sampling (Wastewater Permittees)	2	3	\$1,400	\$8,400	\$2,800	\$25,200
Alternatives Analysis <sup>1</sup> (Wastewater Permittees)	1	2	\$35,000	\$50,000	\$35,000	\$100,000
Construction, New Discharger (Storm water Permittees)	0	3	\$0	\$300	\$0	\$900
Industrial, New Discharger to High Quality Water Listed by Type (Storm water Permittees)	0	1	\$0	\$235,146	\$0	\$235,146
Industrial, New Discharger to Other High Quality Water (Storm water Permittees)	0	1	\$0	\$235,146	\$0	\$235,146
Industrial, Increased Discharge (Storm water Permittees)	0	2	\$0	\$235,146	\$0	\$470,292
<b>Total:</b>					<b>\$37,800</b>	<b>\$1,066,684</b>

<sup>1</sup> Wastewater facilities that may do an alternatives analysis are a subset of those doing sampling in the row above.

**12. Agency Contact Person:**

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**13. Place where comments are to be submitted and deadline for submission:**

A comment period was held from March 27, 2023 to May 19, 2023 with a public hearing on May 12, 2023.

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**RULE TEXT**

**SECTION 1. NR 102.03 (1km), (1L), (1p), (1pg) and (10) are created to read:**

**NR 102.03 (1km)** “Criteria” or “criterion” has the meaning established in 40 CFR 131.3 (b).

**(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 s. NR 102.22 (5).

**(10)** “Water quality standards” or “standards” has the meaning established in 40 CFR 131.3 (i).

**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 unless it has been demonstrated that all of the conditions of the policy in this subsection and the implementation procedures under subch. I of ch. NR 207 and ch. NR 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 parameter identified under this chapter or ch. NR 105 and the existing level of that parameter in a surface water.

**Note:** The methods for calculating the existing levels of a parameter in a surface water are found for individual parameters under this chapter and chs. NR 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. A water is high quality for a specific parameter if it has assimilative capacity for that parameter. 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 this chapter to ch. NR 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 an applicant 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 chs. NR 106 and 217, if a waterbody is not attaining a water quality standard for a specified parameter, no discharge above the water quality criterion for that parameter is authorized. However, a new or increased discharge may be allowable for other parameters 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 the water quality criteria for the parameter of concern, including those listed on the section 303 (d) list as not attaining the applicable criterion or for which the department determines there is water quality data indicating that the water is not attaining the applicable criterion.

b. Waters that have background concentrations equal to the water quality criteria for the parameter of concern.

c. Unidirectional flow waters where the waterway immediately upstream from the proposed new or increased discharge has an upstream low flow of zero, as defined for toxics in s. NR 106.06 (3) (bm) and (4) (c), for total phosphorus in s. NR 217.13 (2) (b), and for temperature in s. NR 106.53 (1). In this case, the non-high quality water extends until such point where there is available assimilative capacity.

**(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. 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 U.S. EPA-approved TMDL or as allowed under s. NR 217.13 (8). Wetland water quality standards under s. 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 (6) (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 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 of the affected waters.

(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 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 procedure shall be consistent with section 316 (a) of the Clean Water Act, 33 USC 1326 (a).

**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:**

*[Note to Legislative Reference Bureau: Newly created s. NR 207.001 should appear before subch. I of ch. NR 207 in the promulgated administrative code.]*

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

(1) “Criteria” or “criterion” has the meaning established in 40 CFR 131.3 (b).

(2) “Loading” means the concentration or amount of a parameter within a discharge multiplied by the flow of that discharge.

(3) “Parameter” means a chemical, physical, or biological property that can be tested or monitored as a measure of water quality.

**Note:** Water quality parameters that are frequently sampled or monitored include pollutants, temperature, dissolved oxygen, biochemical oxygen demand (BOD) and pH. Parameters also include biological metrics such as chlorophyll *a* (an algal indicator) or plant, fish or insect communities; however, these are typically not applied for purposes of antidegradation review.



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

(5) "Section 303 (d) list" has the meaning established under s. NR 102.03 (6).

**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.

(6) "Surface waters" means all waters of the state, as designated under s. 283.01 (20), Stats., except groundwater, as defined in s. 299.01 (5), Stats.

(7) "TMDL" or "total maximum daily load" has the meaning established under s. NR 212.72 (11).

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

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

(10) "WQBEL" or "water quality based effluent limitation" means an effluent limitation established by the department under s. 283.13 (5), Stats.

(11) "Water quality standards" or "standards" has the meaning established in 40 CFR 131.3 (i).

**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 the surface waters of the state.

(2) **APPLICABILITY.** (a) Except as provided in par. (b), this subchapter applies to any person proposing to increase an existing discharge or create a new discharge to the surface waters of the state at any of the following actions after the effective date of this rule [LRB inserts date]:

1. Submittal of an application for individual WPDES permit issuance, reissuance, modification, or revocation and reissuance, if antidegradation review was not previously conducted under subsds. 2. to 4.

2. Submittal of a new or amended municipal facility plan.

3. Submittal of new or amended municipal plans and specifications if antidegradation review was not previously conducted during the facility planning stage.

4. Submittal of new or amended industrial plans and specifications.

(b) If the department has already reviewed and approved a new or increased discharge for any action under par. (a) within 5 years prior to the effective date of this rule [LRB inserts date], additional antidegradation review is not required under this subchapter.

(c) For a proposed increased discharge, an antidegradation review shall be conducted for the portion of the discharge that represents an increase from the existing, authorized discharge.

(d) For general WPDES permits, the department shall apply antidegradation procedures under s. NR 207.041 when the department issues a notice of intent to issue, reissue, modify, or revoke and reissue the permit.

(e) For storm water discharges regulated under s. 283.33, Stats., the implementation procedures under s. NR 216.008 shall be followed.

(f) For all other new or increased discharges to high quality waters, including new 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.

(g) An antidegradation review under this subchapter is not required for temporary discharges or for water quality trades that result in an overall net reduction to the receiving water of the pollutant being traded.

**Note:** A concentrated animal feeding operation (CAFO) permit containing production area discharge limitations under s. NR 243.13 (2) is only authorized to discharge from the production area on a temporary basis during very limited, precipitation-induced discharge events. Given that such discharges are temporary, sporadic, and rare, antidegradation procedures contained in this chapter cannot be implemented for these types of CAFO permits. Antidegradation does not apply to agricultural storm water discharges from a CAFO's land spreading activities because those discharges are not point sources subject to the WPDES permit under s. 283.01 (12), Stats.

**NR 207.021 Definitions.** The definitions under s. NR 102.045 (2) and s. NR 207.001 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 an actual or proposed change in concentration, level, or loading of a parameter that lowers water quality, 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, and which causes any of the following:

1. Exceedance of an effluent limitation specified in a current WPDES permit.

2. Exceedance of a mass limit or its equivalent mass load based on the concentration limit in the permit and the effluent flow rates as calculated under s. NR 106.06 (4) (d). For purposes of this subdivision, these flow calculations apply not only to toxics but to any parameter for which a mass calculation is appropriate.

3. 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).

(b) “Increased discharge” does not include any of the following instances if the applicant is not proposing to change the concentration, level, or loading of a parameter in the discharge such that it will lower water quality:

1. The initial imposition of an effluent limitation for a parameter 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 parameter.

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 a category of existing discharges that did not previously require a permit 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. An existing CAFO that seeks an alternative discharge limitation under s. NR 243.13 (2) (b) or (3) (c) and demonstrates that the alternative discharge will be equal to or less than the mass loading associated with their current permit.

**(4)** "New discharge" means any of the following:

(a) A point source discharge to a surface water permitted for the first time under a WPDES permit under s. 283.31, Stats.

(b) A proposed relocation of a point source, except a proposed relocation of a point source to the same receiving water if the permittee demonstrates and the department determines any of the following:

1. The relocated outfall is within 100 feet of the original outfall.

2. The relocated outfall is within the original mixing zone as defined under s. NR 102.03 (2).

3. The relocation would not cause additional degradation to the portion of the waterbody where the outfall is relocated.

(c) A proposal to convert an existing WPDES-permitted groundwater discharge to instead discharge to a surface water.

(d) Reauthorization of a previously permitted facility whose permit coverage was terminated or is no longer in effect, but that seeks new permit coverage.

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

(6) “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.

(7) “Significant lowering of water quality” means a lowering of water quality determined to be significant under s. NR 207.031 (8) (a).

(8) “Temporary discharge” means a proposed new or increased discharge that may lower water quality for less than 90 days but that will not lower water quality after the discharge ceases in either the immediate or downstream surface waters. “Temporary discharge” does not include seasonal discharges that reoccur in subsequent years and does not include any proposed new or increased discharge of a bioaccumulative chemical of concern.

**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 proposed new or increased discharge under an individual WPDES permit and determine whether it will lower water quality in a surface water of the state. If so, the department shall determine whether a practicable alternative would prevent or lessen any lowering of water quality 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 information 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 and make a determination as to whether the antidegradation requirements have been satisfied under sub. (9) (c) and (d).

**Note:** An applicant may obtain the forms required under this subsection on the department’s website at <https://dnr.wisconsin.gov/topic/Wastewater/PermitApplications.html>.

(2) APPLICANT SCREENING SUBMITTAL. (a) The purpose of the applicant's screening submittal is to enable the department to review the applicant's available information and notify the applicant of what additional information, if any, will be required for submittal of a complete antidegradation application during any of the actions specified under s. NR 207.011 (2) (a). A person proposing a new or increased discharge shall submit all of the following screening information to the department as early as possible prior to any of the actions specified under s. NR 207.011 (2) (a):

1. The proposed location of the new or increased discharge and identification of the receiving water.

2. A list of the parameters that are proposed or expected to change in concentration, level or loading in the new or increased discharge.

3. The expected maximum and average concentrations in the effluent for parameters listed under subd. 2. 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.

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

5. A demonstration that it is not practicable for the facility's currently installed treatment technology to treat the proposed new or increased discharge to levels that will meet existing effluent limitations.

6. An indication of whether the applicant prefers to collect water quality data from the receiving water and downstream waters as specified under sub. (4), or whether the applicant requests that the department determine parameter concentrations, levels or loads in the receiving water, in the event that the department determines under sub. (3) (b) that sufficient receiving water data are not available for the parameters listed under subd. 2. to complete the screening process.

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

**Note:** The department recommends that applicants submit their screening information 1.5 years before submitting their permit application, facility plans, or plans and specifications to allow sufficient

time to gather water quality information and compile any additional information if required. A scenario that would require 1.5 years advance notice would be one that requires 1 year of monitoring for temperature and 3-6 months of monitoring for other parameters, and a full application that includes a social or economic analysis and alternatives analysis. Applications may take less time for the department to process if sufficient water quality data already exists or is submitted with the screening application, the proposal would not affect temperature of the receiving waters, or the proposal qualifies for streamlined review under sub. (8) (a). If the applicant prefers that the department collect any additional water quality information but does not submit its request with sufficient lead time, that may impact the timing of the final determination.

(3) DEPARTMENT ANTIDegradation SCREENING. Based on materials submitted by the applicant under sub. (2) and other relevant information available for the department's review, 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. (5) 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). The department shall also determine whether the applicant has demonstrated that it is not practicable for the facility's currently installed treatment technology to treat the proposed new or increased discharge to levels that will meet existing effluent limitations.

(b) *Water quality data screening.* The department shall determine whether sufficient water quality data for the receiving and downstream waters are available to determine the applicable waterbody categories under par. (c) and, if applicable, to calculate the assimilative capacity used for the significance determination under sub. (8). If sufficient water quality data are not available, the applicant or the department shall follow the steps under sub. (4) to compile the necessary data.

(c) *Receiving water determination.* If the proposed discharge is a new or increased discharge, the department shall determine which high quality or non-high quality categories, defined under s. NR 102.045 (2) (b) to (c), apply to the receiving water and downstream waters affected by the proposed discharge. After the appropriate waterbody categories are identified, the department shall determine whether a lowering of water quality for each applicable category is prohibited or may be permissible under subs. (5) to (8).

**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>.

(d) *Pollutants that are allocated under an EPA-approved TMDL.* For a proposed new or increased discharge of a pollutant to a receiving water where the pollutant has an allocation 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. (5) to (9):

1. If an effluent limitation for the pollutant is in effect, a request for an increased discharge is subject to further antidegradation review under subs. (5) to (9). If a limitation for the pollutant has not taken effect, a permittee may receive an effluent limitation based on a TMDL wasteload allocation for the pollutant without further antidegradation review.

2. If there is a proposed new discharge to a receiving or downstream water with an approved TMDL or a proposed increased discharge of a pollutant that would exceed an effluent limitation based on a TMDL wasteload allocation, the department may consider a lowering of water quality under the antidegradation procedures under subs. (5) to (9) if there is reserve capacity available for the pollutant.

3. If there is no reserve capacity available for the pollutant, the department may not approve a new or increased discharge of the pollutant 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.

4. An antidegradation demonstration under this subchapter is not required if a proposed increased discharge will not result in an effluent concentration above the applicable numeric or narrative water quality criteria for the receiving or downstream waters, and if the proposed discharge is specifically allowed under an EPA-approved TMDL because it does not cause or contribute to an impairment.

**Note:** An example under subd. 4. is a discharge of total suspended solids (TSS) less than the target value approved under the EPA-approved Milwaukee River Basin TMDL (2018, section 3.2.2). Under this TMDL, “wastewater dischargers will not be required to meet effluent limits lower than 12



mg/L (including equivalent mass limits) in order to comply with the water quality targets developed for this TMDL.”

(e) *Other impacts to the receiving water.* 1. If the determinations under pars. (a) to (d) indicate that the proposed new or increased discharge may be considered by the department and requires further antidegradation review, the department shall determine whether point source and state-regulated nonpoint source requirements are being administered in accordance with state law for discharges to the receiving water to ensure that the antidegradation policy under s. NR 102.045 (5) (c) is satisfied. 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 are discharging a pollutant of concern under the antidegradation review that may be negatively impacting the quality of the receiving water.

b. If pollutant sources are identified under subd. 1. a., to the extent feasible given agency resources, evaluate whether there are noncompliance issues with point source WPDES permits or nonpoint source performance standards and prohibitions under ch. NR 151. The department shall also evaluate existing data that may inform whether receiving water quality in the area of the proposed discharge has improved or degraded over time. If there are significant noncompliance issues with point or nonpoint sources that are causing a negative impact to the receiving water, the department shall to the extent feasible and in consideration of available resources, initiate actions required under state law.

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 that may take actions to address any noncompliance issues identified under subd. 1.

(f) *Eligibility for streamlined review.* If requirements under sub. (8) will apply, the department shall use the information obtained during the screening process to determine whether the applicant is eligible for a streamlined review under sub. (8) (a).

(g) *Notification.* If there is potential to lower water quality, the department shall notify the applicant of its findings under pars. (a) to (f) and shall specify one or more of the following:

1. That requirements for an antidegradation review under subs. (5) to (9) apply.

2. That further information is needed to complete the screening process or antidegradation review, and what additional information may be required.

**Note:** If further information is needed to complete the screening process, the department may issue a first notification as to what additional information is needed to complete the screening, and a second notification after it completes the screening process to inform the applicant whether it qualifies for a streamlined review under sub. (8) (a) or will be required to submit additional materials under sub. (8) (b) to (c).

3. That the proposed lowering of water quality is prohibited under this section, in which case the department shall issue a preliminary determination under sub. (9) (b).

**Note:** Examples where lowering of water quality is prohibited include situations where there is no assimilative capacity, where the discharge is to an outstanding resource water or certain exceptional resource waters, or in a TMDL area with no reserve capacity or available allocations.

**(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 water quality data that are sufficient, representative, and credible, as described in this subsection. If there is insufficient existing representative ambient water quality data for this determination, the department may determine background levels by collecting water quality data during the next sampling season or using other scientifically defensible methods such as data from representative sites in watersheds with similar characteristics. If the applicant chooses to obtain and submit 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 existing concentrations or levels of parameters of concern and the remaining assimilative capacity for such parameters in the receiving waters, based on the following:

(a) Determinations shall be made using the most recent representative data available, not to exceed 10 years old unless the department determines that those levels are still representative. If the department determines that existing data are no longer representative of current conditions based on changes at the local or watershed scale, more recent data may be required to ascertain current water quality.

(b) If new water quality samples are collected, they shall be collected consistent with the following locations:

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

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

(c) 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.

(d) When evaluating whether the available data is representative, sufficient, and credible or whether additional information may be necessary, 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](mailto: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>.

(e) The department may use 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) 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 the parameter, 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 review 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 ch. NR 103.

(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 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.

(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). In these cases, permit limits may not exceed pollutant levels 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 review 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 may not exceed the amount demonstrated to be needed by the facility.

**(8) OTHER HIGH QUALITY WATERS.** For a new or increased discharge to a high quality water other than those specified under sub. (6), all of the following procedures apply:

(a) *Eligibility for streamlined review.* An applicant is eligible for a streamlined review process if the department determines that the proposed new or increased discharge would not constitute a significant lowering of water quality in the high quality receiving water or downstream waters. A streamlined review does not require the applicant to submit a social importance analysis, economic importance analysis, or alternatives analysis under pars. (b) to (c). The department shall make this determination 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) (d) 4.

3. For all proposed new or increased discharges not described under subs. 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 calculated using the following procedures:

a. Determine flow rates for the receiving water.

b. Analyze the submitted data to determine existing and proposed effluent concentrations, effluent flows, and existing and proposed receiving water concentrations.

c. Determine whether the proposed discharge will exceed the 10 percent significance threshold. The significance threshold will be exceeded if the proposed new or increased discharge is greater than either of the following:

1. Ten percent of the assimilative capacity for any indicator parameter other than dissolved oxygen.

2. The sum of 90 percent of the existing level and 10 percent of the water quality criterion for dissolved oxygen.

d. If the department determines that the lowering of water quality will be significant, the department shall notify the applicant under sub. (3) (g) that the applicant must submit a social importance analysis or economic importance analysis under par. (b) and an alternatives analysis under par. (c). The applicant shall submit these materials at the time the applicant submits any of the items under s. NR 207.011 (2) (a), along with other materials required under this subchapter, to constitute a complete application for antidegradation review.

e. If the department determines that the lowering of water quality will not be significant, the department shall notify the applicant under sub. (3) (g) and 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 proposed 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 review is required.

g. If there are multiple dischargers on a waterbody that, in the determination of the department, share the same assimilative capacity, the department shall 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 new or increased discharge that will constitute a significant lowering of water quality as determined under par. (a), 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. If the applicant has selected an alternative under par. (c) that results in no degradation to the receiving water, the social or economic importance analysis under this paragraph is not required. 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) *Practicable alternatives analysis.* For a proposed new or increased discharge that will constitute a significant lowering of water quality as determined under par. (a), the applicant shall submit

sufficient information to evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed discharge. If such alternatives are available, the applicant shall indicate which of the options is their preferred alternative. The department shall evaluate the alternatives analysis under sub. (9) (a) 4. to determine whether the applicant's preferred 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 applicant shall submit all of the following to the department:

1. 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, except as provided in subd. 2. Practices may include source reduction or other methods of pollution prevention, facility optimization, and other control or waste treatment practices. If an applicant is unable to identify any practicable alternatives, the applicant is still required to submit alternatives that are available that may lessen or prevent degradation and provide an analysis as to why the alternatives were not practicable. 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. An applicant need not include shifting production to another site if that is not practicable. If practicable alternatives have been identified under this paragraph that will prevent or lessen water quality degradation, the applicant shall identify its preferred practicable alternative.

**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 practicability based on cost.

2. 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 to the Lake Superior Basin of the pollutants identified in that subsection.

3. For each of the practicable alternatives under subd. 1. or 2., 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. The applicant shall also identify whether the alternatives are expected to have other types of environmental impacts that are not water quality based.

**Note:** An example of other environmental impacts under subd. 4. 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.

4. Evaluation of the cost for each of the practicable alternatives under subd. 1. or 2.

(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. (2) 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 information, 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) 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 an alternatives analysis is required under sub. (8) (c) and the department finds that one or more practicable alternatives has been identified that will effectively lessen degradation from the proposed activity, one of these alternatives is selected for implementation. If degradation can be lessened through methods such as source reduction or optimization of the existing treatment plant, the department may find that those methods are acceptable as the practicable alternative.

5. Permit limits shall be set by the department based on the materials submitted by the applicant and other relevant information available for the department's review. Permit limits shall not exceed the pollutant levels demonstrated to be needed by the facility, 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 of the antidegradation policy under s. NR 102.045 (5) (c) as determined under sub. (3) (e).

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 identifying the reasons for this determination and shall calculate effluent limits that satisfy the antidegradation policy and requirements under this subchapter. 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, if the

antidegradation policy under s. NR 102.045 is not satisfied, 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 to solicit public input on the preliminary antidegradation determination:

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 regarding 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.

**Note:** The public notice process under subd. 2. also satisfies the state's intergovernmental coordination provisions under s. 283.83 (1) (e), Stats.

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 notice of final determination regarding the WPDES permit or the written determination to approve or reject the facility plan or facility's plans and specifications.

**NR 207.041. General permit antidegradation review. (1) GENERAL PERMIT ISSUANCE OR REISSUANCE.** The department shall apply the antidegradation policy and implementation procedures set out in this section for each new, reissued, modified, or revoked and reissued general WPDES permit as part of the general permit issuance process rather than at the time coverage for individual applicants is granted. Before a general permit is issued or reissued, the department shall do all of the following:

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

**Note:** The department may consult with sector representatives to gather information necessary to conduct the antidegradation review. This may include information such as industry trends and associated changes in discharge characteristics and quantities, social or economic importance, and types of alternatives available to categories of dischargers and general costs associated with them.

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

(c) 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 s. NR 102.045, further antidegradation procedures are not required for an applicant seeking coverage under that general permit, provided that the applicant certifies that the general permit conditions will be met and the department has granted the applicant coverage under the general permit authorizing the discharge.

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

**SECTION 13. NR 212.72 (3) is amended to read:**

**NR 212.72 (3)** ~~“Increased discharge” means any increase in the concentration or mass loading of a pollutant of concern that exceeds an effluent limitation that is in effect in a current permit~~has the meaning established in s. NR 207.021 (3).

**SECTION 14. 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 15. 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 16. NR 216.008 is created to read:**

**NR 216.008 Antidegradation review. (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. (a)** 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, at the time of any of the following after the effective date of this rule [LRB inserts date]:

1. Submittal of an application for an individual WPDES permit issuance, reissuance, or modification.

2. Departmental notice of intent under sub. (6) to issue, reissue, or modify a WPDES general permit.

**(b)** An antidegradation demonstration under this section is not required for a temporary discharge or for a water quality trade that results in an overall net reduction to the receiving water of the pollutant being traded.

**Note:** Examples of a temporary discharge, as defined under sub. (3) (k), include dewatering activities or maintenance of existing post-construction storm water treatment practices.

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

(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) 1. “Increased discharge” means an actual or proposed change in the area or site conditions that results in or will result in an increase in the concentration, level, or load of a pollutant associated with a currently permitted storm water discharge.

2. “Increased discharge” does not include any of the following if the applicant or permittee is not proposing an increase in the concentration, level, or loading of a pollutant in the discharge:

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

b. Issuance of a WPDES individual or general permit for a category of existing discharges that did not previously require a permit under state or federal regulations.

c. A permitted MS4 that incorporates under its jurisdiction a previously unincorporated area.

**Note:** Under par. (4) (c), discharges of increased pollutants of concern are addressed in ss. NR 216.007, 216.07 (10) (b), 216.27 (3) (j) 6., and 216.49 (3).

(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.

**Note:** A permittee or applicant proposing a new discharge that may require coverage under multiple general permits is encouraged to contact the department for planning purposes.

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.

(f) “Practicable” means technologically possible, able to be put into practice, and economically viable.

**Note:** See sub. (8) (c) 2. on alternatives analysis for more information on practicability determinations.

(g) “Parameter” means a chemical, physical, or biological property that can be tested or monitored as a measure of water quality.

**Note:** Water quality parameters that are frequently sampled or monitored include pollutants, temperature, dissolved oxygen, biochemical oxygen demand (BOD) and pH. Parameters also include biological metrics such as chlorophyll a (an algal indicator) or plant, fish or insect communities; however, these are typically not applied for purposes of antidegradation review.

(h) “Receiving water” has the meaning established under s. NR 216.002 (25m).

(i) “Surface waters” means all waters of the state, as designated under s. 283.01 (20), Stats., except groundwater, as defined under s. 299.01 (5), Stats., or navigable waters used for post-construction storm water treatment meeting the criteria under s. NR 151.003 (2).

(j) “SWPPP” means storm water pollution prevention plan.

(k) “Temporary discharge” means a proposed new or increased discharge that may lower water quality for less than 90 days, will not lower water quality in the receiving water after the discharge ceases, and best management practices applicable to the type of discharge are implemented. “Temporary discharge” does not include seasonal discharges that reoccur in subsequent years, or new or increased discharges of bioaccumulative chemicals of concern.

**(4) ANTIDEGRADATION IMPLEMENTATION.** (a) *General implementation.* 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 surface water of the state.

(b) *Performance standards.* The requirements established under this chapter and the performance standards and prohibitions under ch. NR 151 shall be utilized to prevent degradation of all receiving waters. Upon issuance, reissuance, or modification of general and individual permits, the department shall impose additional permit conditions to address instances when the specific categories of a receiving water or specific characteristics of a regulated discharge require a permittee to incorporate additional practices to meet antidegradation requirements.

(c) *Pollutants of concern in an impaired water.* Where a discharge consists of a pollutant of concern as defined under s. NR 216.002 (23m), any increase in discharge is addressed through ss. NR 216.007, 216.07 (10) (b), 216.27 (3) (j) 6., and 216.49 (3) unless there is an approved TMDL for the pollutant of concern.

**Note:** Section NR 216.07 (10) (b) requires a permitted MS4 to identify and implement management practices and control measures to reduce, with the goal of eliminating, the discharge of pollutants that contribute to an impairment of a waterbody for which there is no U.S. EPA-approved TMDL.

**Note:** Section NR 216.27 (3) (j) 6. requires an industrial permittee to identify through their SWPPP the source area control best management practices that will be used to reduce, with the goal of eliminating, the discharge of the pollutant of concern that contribute to the impairment of a waterbody.

**Note:** Section NR 216.49 (3) requires a construction site that discharges to any receiving waters designated as an impaired water to identify and address control measures and maintenance practices that will collectively be used to reduce, with the goal of eliminating, storm water discharges containing pollutants of concern through the erosion control plan required under s. NR 216.46 and the storm water management plan required under s. NR 216.47.

(d) *General permits.* For general permit issuance, reissuance, or modification, the department shall use the procedures under sub. (6).

(e) *Individual permit coverage and screening.* If an applicant or permittee proposing a new or increased discharge is not eligible for coverage under a general permit, the applicant or permittee shall follow the screening procedures for individual permits under sub. (7).

**(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 screening or review under subs. (7) to (9), and to determine whether coverage under a general permit is applicable or coverage under an individual permit is required under ch. 283, Stats. The permittee or applicant shall follow applicable instructions and use department-approved forms to submit any of the following information, as applicable:

(a) *Surface water identification.* Identification of all surface waters located, at a minimum, within one-quarter mile from the proposed new or increased discharge. For each identified surface water, the



permittee or applicant shall identify the respective antidegradation category under s. NR 102.045 and whether the surface waters are listed as impaired on the section 303 (d) list or whether they are subject to a TMDL.

(b) *Proposed or expected parameters.* A list of the parameters that are proposed or expected to change in concentration, level or loading in the new or increased discharge.

(c) *Background water quality data.* The department shall determine existing concentrations or levels of the parameters listed under par. (b) for the receiving water using data that are sufficient, representative, and credible. Determinations shall be made using the most recent representative data available, not to exceed 10 years old unless the department determines that those levels are still representative. If the department determines that existing data are no longer representative of current conditions based on changes at the local or watershed scale, more recent data may be required. In this case, a permittee may request that the department determine background water concentrations or levels as specified under subd. 1., or shall indicate to the department that they wish to collect the data under subd. 2. Water quality data collected shall be representative of locations upstream of the proposed discharge location, but outside the direct influence of the discharge. One of the following shall be used to determine background water quality concentrations or levels where the department determines representative data does not exist:

1. The department may determine background water concentrations or levels by collecting water quality data during the next sampling season or using other scientifically defensible methods such as data from representative sites in watersheds with similar characteristics based on the parameters listed under par. (b). The department shall consider all relevant factors listed under subd. 3.

2. If a permittee or applicant wishes to collect the background water quality data where data is not already available, sampling and reporting of the background water quality data shall be provided for the receiving waters, shall include the parameters listed under par. (b), and shall consider the factors listed under subd. 3. If the applicant wishes to obtain and submit sufficient data for the department's determination, it shall collect data in the receiving water in accordance with the department's monitoring and quality assurance protocols for each parameter. The department shall determine existing concentrations or levels of parameters of concern.

3. The following factors will be used when determining where data is sufficient, representative, and credible:

- a. The sensitivity of the receiving water to degradation of existing or designated uses.
- b. The parameters of concern in the proposed discharge.
- c. 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.
- d. The validity of any baseline concentrations assumed to be below detection levels.
- e. The quantity, date of analysis, analytical method, detection level, and spatial and temporal scope of any submitted data.
- f. 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](mailto: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) *Best management practices.* Practices and procedures the permittee or applicant will implement to limit impacts to specific classes of surface waters.

(e) *Modeling or other data.* Modeling or other information related to pars. (a) to (d).

(f) *Social or economic analysis and alternatives analysis.* If the department notifies an applicant under sub. (7) that information under subs. (8) and (9) are required, a social importance analysis or economic importance analysis under sub. (8) (c) 1., an alternatives analysis under sub. (8) (c) 2., and a demonstration that resulting water quality will be adequate to fully protect existing uses.

**Note:** An applicant may obtain the forms required under this subsection at the department website: <http://dnr.wi.gov/topic/stormwater>.

**(6) ANTIDegradation PROCEDURES FOR GENERAL PERMITS.** The department shall apply the antidegradation policy under s. NR 102.045 to general storm water WPDES permits issued under this chapter and ch. 283, Stats. For each new, reissued, and modified general permit, the following antidegradation implementation procedures under this subsection shall apply, as applicable:

(a) *Antidegradation review.* The department shall condition general permits to meet the antidegradation policy for new or increased discharges to surface water. Before a general permit is issued, reissued, or modified the department shall do all of the following:

1. Obtain available information, as necessary, to support specific requirements and determinations under this section within the general permit as it relates to any new or increased discharges to satisfy the antidegradation policy.

**Note:** The department may consult with sector representatives to gather information necessary to conduct the antidegradation review. This may include information such as industry trends and associated changes in discharge characteristics and quantities, social or economic importance, and types of alternatives available to categories of dischargers and general costs associated with them.

2. Make determinations that the antidegradation policy and the antidegradation implementation requirements under this section are met.

(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, reissuance, or modification of a general permit.

**Note:** The public notice process under par. (c) also satisfies the state's intergovernmental coordination provisions under s. 283.83 (1) (e), Stats.

(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 a 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 antidegradation permit conditions will be met and the department has granted the person coverage under the general permit authorizing the discharge.

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 screening procedures under sub. (7) shall be followed unless a permittee or 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.

3. The department may request information under sub. (5) where additional information is needed from a permittee or applicant to demonstrate a discharge satisfies the permit conditions designed to meet the antidegradation policy.

(f) *Amendments.* 1. In this paragraph, “administrative operational changes” include changes to SWPPP contacts, storm water 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 a pollutant 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 screening procedures for individual permits under sub. (7) shall be followed.

**(7) ANTIDEGRADATION SCREENING 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 issued, reissued, or modified individual storm water WPDES permit issued under ch. 283, Stats., and this chapter. As part of the screening process, the department shall review information provided as part of a permit issuance, permit reissuance, permit modification, or where a permittee covered under an individual permit 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). Screening shall include all of the following steps:

(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 sub. (3) (d) and (e) and whether the applicant has demonstrated that the facility's proposed or implemented best management practices to treat the proposed new or increased discharge are sufficient to prevent a lowering of water quality.

(b) *Receiving 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 sub. (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 is insufficient data available to make the determination under this paragraph, collection of water quality data or other information, as applicable, under sub. (5) may be necessary.

**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 a U.S. EPA-approved TMDL.* For a proposed new or increased discharge of a pollutant to a receiving water where the pollutant has an allocation under a U.S. EPA-approved TMDL, the department shall determine whether a lowering of water quality may be permissible, and if so, whether it requires further antidegradation review under this subsection using the following procedures:

1. For a construction or industrial discharger:

a. If there is reserve capacity available for the pollutant, an antidegradation demonstration is required under subs. (8) and (9) to demonstrate the need for a new or increased wasteload allocation and that water quality degradation has been lessened to the extent practicable. 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.

b. 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.

2. For a municipal discharger, the requirements under s. NR 216.07 (10) (c) and the conditions of the permit designed to meet the TMDL apply. When a discharger is unable to meet these conditions or s. NR 216.07 (10) (c), the new or increased discharge shall be 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.

(d) *Other impacts to the receiving water.* If the determinations under pars. (a). to (c). indicate that the proposal to discharge requires an antidegradation review, the department shall determine whether point source and state-regulated nonpoint source requirements are being administered in accordance with state law for discharges to the receiving water to ensure that the antidegradation policy under s. NR 102.045 (5) (c) is satisfied. To make the determination under this paragraph, the department shall complete all of the following:

1. Identify point sources and state-regulated nonpoint sources that are discharging a pollutant of concern under the antidegradation review that may be negatively impacting the quality of the receiving water. For those parameters that the department determines may be negatively impacting the quality of the receiving water, the department shall evaluate whether required regulatory actions under state law are being taken to reduce the impacts from the pollutant.

2. If pollutant sources are identified under subd. 1., to the extent feasible given agency resources, evaluate whether there are noncompliance issues with point source WPDES permits or nonpoint source performance standards and prohibitions in ch. NR 151. The department shall also evaluate existing data that may inform whether receiving water quality in the area of the proposed discharge has improved or degraded over time. If there are significant noncompliance issues with point or nonpoint sources that are causing a negative impact to the receiving water, the department shall to the extent feasible and in consideration of available resources, initiate actions required under state law.

(e) *Notification to applicant.* If there is potential to lower water quality, the department shall notify the applicant of one or more of the following:

1. That requirements for an antidegradation review under subs. (8) to (9) apply.

2. That further information is needed, as applicable under sub. (5), to complete the screening process or antidegradation review, and what additional information may be required.

3. That the proposed lowering of water quality is prohibited under this section, in which case the department shall issue a preliminary determination under sub. (9) (b).

**Note:** Examples where a new or increased discharge that would lower water quality is prohibited include where the discharge is to an outstanding resource water or certain exceptional resource waters, or in a TMDL area with no reserve capacity or available allocations.

(8) REQUIREMENTS FOR SPECIFIC CATEGORIES OF SURFACE WATERS. When the department issues a notification to a permittee or applicant under the screening procedures in sub. (7), the following requirements apply to specific categories of waters:

(a) *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 a discharge 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.

(b) *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 review following the procedures under par. (c).

**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.

(c) *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. (a), the applicant shall submit all of the following documentation in addition to the 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 under subd. 1. a. or economic importance analysis under subd. 1. b. to demonstrate that the project is necessary to accommodate important social or economic development in the area where the receiving water is located. The applicant shall include the following information in the social or economic importance analysis, as applicable:

a. The social importance analysis shall identify each affected community and include any of the following factors to demonstrate a lowering of water quality is necessary to accommodate important social development: community services provided; public health or safety improvements; infrastructure improvements; education and training; cultural amenities; recreational opportunities; other areas that will accommodate important social development not specified under this subd. 1. a.

b. The economic importance analysis shall identify each affected community and include any of the following factors to demonstrate a lowering of water quality is necessary to accommodate important economic development: employment, job availability, and salary impacts; impacts to the tax base or municipal utility customers; increases in production or energy efficiency; expanded leases and royalties; commercial activities; agricultural activities; access to resources; access to a transportation network; other areas that would accommodate important economic development not specified under this subd. 1. b.



2. 'Practicable alternatives analysis.' For a proposed new or increased discharge that would result in a lowering of water quality, the applicant shall submit sufficient information to evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed discharge. The department shall evaluate the alternatives analysis under sub. (9) (a) 4. to determine whether the applicant's preferred 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 applicant shall submit all of the following to the department:

a. 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. Practices may include source reduction or other methods of pollution prevention, facility optimization, and other control or treatment practices.

b. A description of any alternative determined to be impracticable, and an analysis of 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. An applicant need not include shifting production to another site if that is not practicable. If practicable alternatives have been identified under this subdivision that will prevent or lessen water quality degradation, the applicant shall identify its preferred practicable alternative.

**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.

c. For proposed new or increased discharges of BCCs to Great Lakes system waters, identification of any cost-effective pollution prevention alternatives and techniques that would prevent or lessen the extent to which the increased loading results in a lowering of water quality. For new or increased discharges to the Lake Superior Basin, the applicant shall follow the procedures under s. NR 102.12 (3) for the pollutants identified in that subsection.

d. For each of the practicable alternatives under subd. 2. a. to b., identification of the receiving water quality and accompanying environmental impacts on the receiving and downstream waters, including impacts to aquatic life and public health in downstream communities. The applicant should also identify whether the alternatives are expected to have other types of environmental impacts that are not water quality based.

**Note:** An example of other environmental impacts under subd. 2. d. would be a proposed discharge 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.

e. Evaluation of the cost for each of the practicable alternatives under subd. 2. a. to b.

f. Any additional information or analysis of specific alternatives that the department determines necessary to assess the submitted social importance analysis or economic importance analysis under subd. 1. and alternatives analysis under this subdivision.

(d) *Performance standards.* The applicant shall submit information demonstrating that the respective requirements of this chapter and the performance standards and prohibitions of ch. NR 151 are met. The department shall impose additional permit conditions to address instances when the specific categories of a receiving water or specific characteristic of a regulated discharge require a permittee to incorporate additional practices to demonstrate that antidegradation requirements are met.

(e) *Amendments.* 1. In this paragraph, “administrative operational changes” means changes to SWPPP contacts, storm water 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 a pollutant in excess of levels previously addressed by the programs, the permittee shall provide information to the department that demonstrates the amendment meets the conditions of the permit.

**(9) 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 or increased discharge seeking coverage under an individual WPDES permit issued under this chapter where the department has determined under sub. (7) (e) there is potential to lower water quality in a high quality water and the department determines that such a lowering may be permissible under sub. (8). 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 information, 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. (8) (a) to (d) is met.

3. If required under sub. (8) (c), 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 under sub. (8) (c) 2.  
a.

b. When the analysis of alternatives identifies one or more practicable alternatives that the department determines will effectively lessen degradation from the proposed activity, one of these alternatives is selected for implementation. If degradation can be lessened through implementation of best management practices, the department may find that those methods are acceptable as the practicable alternative.

5. If an alternative meeting the requirements under sub. (8) (c) 2. is approvable by the department, permit conditions used in the preliminary antidegradation determination shall reflect a less 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 of the antidegradation policy under s. NR 102.045 (5) (c), as determined under sub. (7) (d).

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 requirements under this chapter 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 identifying the reasons for this determination, and shall provide the applicant the opportunity to modify the application to meet the requirements under sub. (8).

(c) *Opportunity for comment.* The department shall do all of the following to solicit public input on the preliminary antidegradation determination:

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

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

**Note:** The public notice process under subd. 2. also satisfies the state's intergovernmental coordination provisions under s. 283.83 (1) (e), Stats.

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 section. The final antidegradation determination shall be included with the department's notice of final determination regarding the WPDES permit under s. NR 203.13.

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

August 23, 2023

**SECTION 18. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on September 27, 2023.

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

BY \_\_\_\_\_

For Adam N. Payne, Secretary