

Report to
Legislative Council Rules Clearinghouse
NR 102, 103, 106, 207, 212, and 216, Wis. Adm. Code
Natural Resources Board Order No. WY-13-20
March 14, 2023

Wisconsin 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.

Federal Authority

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 standard, 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.

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 (7) (c), Wis. Adm. Code.

Comparison of 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 IA).
- 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:

- *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.
- *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 other factors along with social and economic benefits to determine the social or economic importance of the proposed discharge, including the value of the water resource. Iowa and Michigan are more like 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 stormwater 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.

The states’ antidegradation regulations are found here:

- 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).

Court Decisions Directly Relevant

None applicable.

Analysis of the Rule - Rule Effect - Reason for the Rule

Under the federal Clean Water Act, states are required to have an antidegradation policy as well as implementation procedures for the policy as part of their surface water quality standards. 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.

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, Wis. Adm. Code. 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. 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 (e.g., outstanding 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 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.

Antidegradation 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 s. NR 102.045, Wis. Adm. Code. The recreated subchapter will set procedures applicable to proposed new or increased discharges to high quality waters 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 stormwater 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 under s. NR 243.13 (2)(b) or (3)(c), Wis. Adm. Code, will follow the procedures for review of individually permitted wastewater discharges in the recreated ch. NR 207, Wis. Adm. Code.

Wastewater individual permit antidegradation analysis:

The proposed revisions to ch. NR 207, Wis. Adm. Code, start with defining a new or increased discharge so that 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 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 evidence 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 as part of a permit application or a proposed municipal facility plan.

Storm water individual permit antidegradation analysis:

Antidegradation procedures created in ch. NR 216, Wis. Adm. Code, largely parallel the procedures for wastewater individual permits, with some adjustments necessitated by storm water permitting procedures. Procedures are outlined for each type of storm water individual permit (municipal separate storm sewer system, industrial, and construction) If a determination is made that a project would result in a lowering of water quality based on the criteria specified in the proposed rule, the department will then determine whether any proposed lowering of water quality has been prevented or lessened and also whether lowering is necessary to support important social or economic development in the area where the waters are located.

Wastewater and stormwater general permit antidegradation analysis. The department will apply the antidegradation policy and implementation methods 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 or reissued, the department will obtain available evidence, 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 confers coverage under the general permit.

Agency Procedures for Promulgation

The department will hold an online hearing on May 12, 2023 at 1:00 p.m. The hearing will be followed by a request for board adoption expected in September 2023, followed by a request for the governor's approval and legislative review.

Description of any Forms (attach copies if available)

The department anticipates developing or revising WPDES permit application forms that will assist applicants in providing the required information for the antidegradation process in a consistent format.

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