

**Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item**

SUBJECT:

Request that the Board approve the Statement of Scope for Board Order WY-13-20 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse, for proposed rules affecting chapters NR 102, 106, 205, and 207, and other related regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures

FOR: August 2021 Board meeting

PRESENTER'S NAME AND TITLE: Marcia Willhite, Water Evaluation Section Chief

SUMMARY:

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

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

A preliminary public hearing on this scope statement was held on July 13, 2021. A recording of the hearing is available at: <https://widnr.widen.net/s/gspfgqrfvj>.

If the scope statement for Board Order WY-13-20 is approved, the department may begin drafting the rule language. As required by statute, the department may not begin work on the content of the proposed rule until the scope statement is approved. Once the rule is drafted, the department will seek public comment on the economic impact of the rule and on the proposed rule language. The 30-month time frame for submission of a final rule to the legislature for approval expires on November 24, 2023.

RECOMMENDATION: That the Board approve the Statement of Scope for Board Order WY-13-20 and conditionally approve the public hearing notice and notice of submittal of proposed rules to the Legislative Council Rules Clearinghouse.

LIST OF ATTACHED MATERIALS (check all that are applicable):

- Statement of Scope
- Governor's Approval of Statement of Scope
- Public Comments Summary

Approved by	Signature	Date
Adrian G. Stocks, Water Quality Program Director	<i>Adrian G. Stocks</i>	7/14/2021 1:27 PM CDT
Darsi J. Foss, Environmental Management Division Administrator	<i>Darsi J. Foss</i>	7/14/2021 1:37 PM CDT
Preston D. Cole, Secretary	<i>Todd Ambts</i>	7/19/2021 8:50 AM CDT

for

by Todd Ambts

cc: Board Liaison - AD/8
Department Tribal Liaison - AD/8

DS
WR

Program attorney - LS/8

Department rule officer - LS/8

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CORRESPONDENCE/MEMORANDUM

DATE: July 16, 2021

TO: All Members of the Natural Resources Board

FROM: Preston D. Cole, Secretary

SUBJECT: Background memo on preliminary public hearing and public comments received on the scope statement for Board Order WY-13-20, relating to proposed rules affecting chapters NR 102, 106, 205, and 207, and other related regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures.

On May 26, 2021, the co-chair of the Joint Committee for the Review of Administrative Rules (JCRAR) requested that the department hold a preliminary public hearing and comment period on the scope statement for Board Order WY-13-20, pursuant to s. 227.136(1), Wis. Stats. The statement of scope contemplates rulemaking to revise chapters NR 102, 106, 205, and 207, and other related regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures.

Public Hearing

The department held a virtual preliminary public hearing on the statement of scope on July 13, 2021 at 1:00 p.m. Twenty-three members of the public attended the hearing. No attendees testified verbally. The hearing recording can be accessed at <https://widnr.widen.net/s/gspfgrqfvj>.

Written Public Comment

The public comment period ended on July 13, 2021. One letter was received recommending changes to the proposed scope statement. Written comments are attached.

Drafter: Marcia Willhite

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July 13, 2020

Department of Natural Resources
Attn: Kristi Minahan – WY/3
101 S. Webster Street
Madison, WI 53703

Sent via e-mail to Kristi.Minahan@wisconsin.gov

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to provide testimony and written comments regarding Statement of Scope SS 051-21 (WY-13-20). This scope statement pertains to proposed rulemaking for Wisconsin's water quality antidegradation policy and procedures.

WMC is the largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes, and from every sector of the economy. Since 1911, our mission has been to make Wisconsin the most competitive state in the nation to do business. This mission includes ensuring a regulatory environment that does not unduly burden Wisconsin businesses.

WMC has several concerns with the draft scope statement:

- 1. The scope statement is unlawfully vague.** Chapter 227 rulemaking requires agencies to provide "a description of...new policies proposed to be included in the rule." [See s. 227.135(1)(b)].

However, the relating clause of the draft scope statement simply lists "Revisions to chapters NR 102, 106, 205, and 207, **and other related regulations** [emphasis added] for the purpose of updating Wisconsin's water quality antidegradation policy and procedures." In other words, the Department has failed to identify the sections of administrative code that may be adjusted. This is unlawful and renders the relating clause virtually meaningless. "Other regulated regulations" does not sufficiently identify existing policies that are relevant to the proposed rule.

In addition, the last paragraph of *Section 2 – "Detailed description of the objective of the proposed rule"* states the following:

Additional changes to associated rules may be pursued that are reasonably related to those discussed here [emphasis added], such as revisions to policies and/or implementation procedures related to WPDES permits, including general permits, CAFO permits issued under ch. NR 243, Wis. Adm. Code, and stormwater permits issued under ch. NR 216, Wis. Adm. Code. The department will also consider revisions to the definition of new discharge, new discharger and

other related definitions in various permitting chapters [emphasis added] to ensure consistency with federal regulations and to provide consistency in permit implementation procedures such as antidegradation reviews, compliance schedules and variances.

“Additional changes” that are “reasonably related to those discussed here” does not meet the statutory mandate under s. 227.135(1)(b). Nor is that standard met with the phrase “other related definitions in various permitting chapters.”

Moreover, *Section 2* of the draft scope statement explicitly mentions changes to NR 243 and NR 216. However, those chapters of code are not explicitly mentioned in the relating clause of the scope statement. If the Department plans to change policies included in NR 243 and NR 216, they need to be listed in the relating clause.

Finally, the last paragraph of *Section 2* should be placed under *Section 3*, which is the appropriate section for the “new policies proposed to be included in the rule.” Otherwise, the purpose of the paragraph is unclear. For example, does the Department intend to make changes NR 216 and NR 243 within WY-13-20? Or is the purpose of this section merely to inform the regulated community that this is an “objective” that will be pursued in a subsequent rule?

It appears the purpose of this draft scope statement is to grant the Department maximum flexibility to choose to include whatever policies it wishes within WY-13-20. However, without a clear description of the new policies to be included in the proposed rule, the regulated community is merely left to guess how this rulemaking may impact them. Moreover, such a vague description is unlawful under Chapter 227 rulemaking requirements.

- 2. Stormwater permitting changes are being pursued simultaneously in two different rules.** The last paragraph of *Section 2* of the draft scope statement notes that “revisions to...stormwater permits issued under ch. NR 216...” may be pursued. However, the Department is already pursuing a rewrite of NR 216 “to align with federal storm water requirements and effectuate consistency with relevant changes to state statutes and federal requirements” [See “*Explanation of Agency Authority*” under the draft WT-09-19].

In addition, DNR staff has informed WMC that substantive changes are expected to the current, draft WT-09-19. It is unknown when such changes will be finalized and released to the public.

To comply with state requirements, the regulated community needs to understand the rules of the game, but it cannot do so when attempting to monitor two concurrent, competing rulemaking processes regarding the same policies. Advancing both rules at once creates uncertainty and confusion for Wisconsin businesses.

- 3. The scope statement fails to explicitly identify impacted industries.** *Section 6* of the draft scope statement notes that “Businesses, industries and municipalities that discharge to surface waters and hold WPDES permits **or may obtain a WPDES permit in the future [emphasis added]**...” may be affected by this rule.

Section 227.135(1)(e) requires that statements of scope shall include “a description of **all [emphasis added]** of the entities that may be affected by the rule.” However, as noted in *Section 2*, the department is considering “revisions to the definition of new discharge, new discharger and other related definition.” This statement, and other statements within the draft scope statement, suggest that businesses that currently are not required to obtain a WPDES permit under the existing administrative code may be required to do so as a result of this rulemaking. In other words, under the current description, many entities may have no idea that they may be impacted by the proposed rule until it is already being implemented.

Without identifying the specific industries subject to the rule, the proposed statement of scope does not comply with statutory requirements. WMC urges the department to list which specific industries and entities may be affected by the proposed rule, as required by s. 227.125(1)(e).

- 4. The estimated economic impact is too broad.** The draft scope statement provides an estimated economic impact of “\$50,000 to less than \$10 million over any two year period.”

It is difficult to understand how the Department determined such a broad figure, except to provide a figure that is exempt from requirements under s. 227.139. This statute requires an agency, including the DNR, to “stop work on the proposed rule and may not continue promulgating the proposed rule” when the compliance costs for the regulated community are estimated at more than \$10 million over any 2-year period.

The broad estimate included in the draft scope statement gives the regulated community almost no concept of how much the proposed rule will actually cost. Affected entities would be impacted far differently by a proposed rule that will cost \$50,000 versus a proposed rule that will cost \$10 million in compliance costs.

To conclude, WMC urges the DNR to make the following changes to the draft scope statement:

- 1. Explicitly list all policy changes to be included in the rule, as required by s. 227.135(1)(b).** This includes listing all chapters of administrative code the Department intends to modify.
- 2. Remove any reference to NR 216, and cease any changes to this section of the administrative code under WY-13-20.** Since the Department is already in the process of

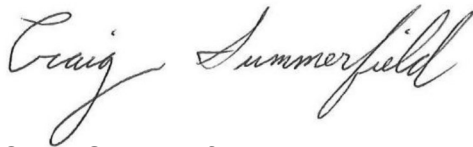
making changes to NR 216, additional changes are inappropriate and would lead to confusion for the regulated community.

3. **Explicitly identify all entities affected by the proposed rulemaking, as required by s. 227.135(1)(e).** This includes listing the types of industries impacted by the rulemaking.
4. **Narrow the estimated economic impact.** This includes making a determination if the proposed rulemaking violates requirements under s. 227.139.

Finally, the DNR asserts in the scope statement that the antidegradation rulemaking is necessary to comply with requirements from the Environmental Protection Agency (EPA), and notes that the EPA has stated that “the department’s rules are inconsistent with federal law” [See *Section 3 – “Analysis of Policy Alternatives”*]. **WMC requests the DNR provide us with copies of the EPA’s correspondence to the agency indicating that the state’s antidegradation rules are out of compliance with federal law**, so that the regulated community can better understand how current requirements need to be updated.

Thank you for the opportunity to provide comments on Statement of Scope SS 051-21. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Craig Summerfield". The signature is written in black ink and is positioned above the printed name and title.

Craig Summerfield
Director of Environmental & Energy Policy

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-13-20

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

Rule Type: Permanent

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

The rule will be proposed as a permanent rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Section 281.15, Wis. Stats., mandates that the department promulgate-by-rule water quality standards, including water quality criteria and designated uses.
- Section 283.31(3) and (4), Wis. Stats., state that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation, state water quality standards and total maximum daily loads.

- Section 283.15(5), Wis. Stats., states that the department shall establish more stringent limitations than required under subs. (2) and (4) when necessary to comply with water quality standards.
- Section 283.37, Wis. Stats., gives the department authority to promulgate rules regarding permit applications.
- Section 283.55, Wis. Stats., gives the department authority to impose monitoring and reporting requirements.
- Section 283.83, Wis. Stats., requires that the department establish a continuing planning process and that plans shall include implementation procedures including compliance schedules for revised water quality standards.
- Section 227.11(2), Wis. Stats., provides the department with the authority to promulgate rules that are necessary to administer the specific statutory directives in ch. 283, Wis. Stats.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DocuSigned by:

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For Preston D. Cole, Secretary

4/1/2021 | 8:15 AM CDT

Date Submitted

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Tony Evers

Office of the Governor | State of Wisconsin

May 13, 2021

By Electronic Mail Only

Dear Secretaries and Agency Heads:

On this day, I approved the following statements of scope pursuant to Wis. Stat. § 227.135(2):

- A statement of scope by the Department of Natural Resources, submitted March 16, 2021, relating to site-specific phosphorus criteria for Lac Courte Oreilles (Wis. Admin. Code ch. NR 102); and
- A statement of scope by the Department of Natural Resources, submitted April 1, 2021, relating to regulations for the purpose of updating Wisconsin's water quality antidegradation policy and procedures (Wis. Admin. Code chs. NR 102, 106, 205, and 207); and
- A statement of scope by the Department of Safety and Professional Services, submitted March 16, 2021, relating to barbering licensure and practice outside of a licensed establishment (Wis. Admin. Code chs. SPS 50 and 60-65); and
- Both an emergency and permanent statement of scope by the Psychology Examining Board, submitted April 16, 2021, relating to a legislative update (Wis. Admin. Code chs. Psy 1-5); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to worker's compensation treatment guidelines (Wis. Admin. Code ch. DWD 81); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to worker's compensation minimum permanent partial disability ratings (Wis. Admin. Code ch. DWD 80); and
- A statement of scope by the Department of Workforce Development, submitted April 30, 2021, relating to minor and technical changes to the worker's compensation program (Wis. Admin. Code ch. DWD 80); and
- A statement of scope by the Department of Natural Resources, submitted March 29, 2021, relating to sturgeon spearing harvest regulations and gear use (Wis. Admin. Code ch. NR 20).

On this day, I approved the following proposed administrative rules pursuant to Wis. Stat. § 227.185:

- A proposed rule by the Department of Workforce Development, submitted April 14, 2021, relating to replacing derogatory or offensive terminology with current, inclusive terminology (Wis. Admin. Code chs. DWD 80, 272 and 277); and
- A proposed rule by the Public Service Commission, submitted April 29, 2021, relating to renewable resource tracking (Wis. Admin. Code ch. PSC 118); and
- A proposed rule by the Medical Examining Board, submitted April 26, 2021, relating to unprofessional conduct (Wis. Admin. Code ch. Med 10); and
- A proposed rule by the Psychology Examining Board, submitted March 31, 2021, relating to renewal and reinstatement of licenses (Wis. Admin. Code ch. Psy 4); and
- A proposed rule by the Department of Public Instruction, submitted April 23, 2021, relating to age waivers for general educational development tests (Wis. Admin. Code ch. PI 5); and
- A proposed rule by the Department of Public Instruction, submitted May 6, 2021, relating to revisions to pupil nondiscrimination procedures (Wis. Admin. Code ch. PI 9); and
- A proposed rule by the Department of Natural Resources, submitted April 23, 2021, relating to fish harvest in Lake Superior (Wis. Admin. Code chs. NR 20 and 25); and
- A proposed rule by the Department of Natural Resources, submitted April 14, 2021, relating to Lake Michigan whitefish management (Wis. Admin. Code ch. NR 25); and
- A proposed rule by the Department of Natural Resources, submitted April 15, 2021, relating to the 2021 migratory bird season (Wis. Admin. Code ch. NR 10); and
- A proposed rule by the Department of Natural Resources, submitted April 14, 2021, relating to contaminated sediment sites, the implementation of 2015 Wisconsin Act 204 (Wis. Admin. Code chs. NR 756 and 758); and
- A proposed rule by the Department of Agriculture, Trade and Consumer Protection, submitted November 5, 2020, relating to residential rental practices (Wis. Admin. Code ch. ATPC 134).

Please direct any questions about this letter to my deputy policy director, Katie Domina.

Sincerely,



Tony Evers
Governor

cc: Ryan Nilsestuen, chief legal counsel (ryan.nilsestuen1@wisconsin.gov)
Katie Domina, deputy policy director (katherine.domina1@wisconsin.gov)
DOA State Budget Office (SBOAdminRules@spmail.wi.gov)
Emma Esch, DNR (emma.esch@wisconsin.gov)
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Mark Kunkel, DWD (markd.kunkel@dwd.wisconsin.gov)
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

June 4, 2021

REPLY TO THE ATTENTION OF:
WW-16J

Mr. Adrian Stocks, Water Quality Manager
Division of Environmental Management
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Stocks:

Through a call with Region 5 Water Division on March 19, 2021, the Wisconsin Department of Natural Resources (WDNR) informed Region 5 that it is considering initiating a rulemaking to revise the State's antidegradation rules and requested EPA's feedback.

Wisconsin's antidegradation rules have not been revised within the last 20 years. In that time, new federal guidance and regulations related to antidegradation have been issued, including revisions in 2015 to the federal antidegradation requirements at 40 CFR § 131.12. EPA supports WDNR's decision to consider revising its antidegradation rules to account for these new and revised federal guidance documents and regulations and ensure that Wisconsin's rules are consistent with all applicable federal requirements.

WDNR requested that EPA identify provisions of Wisconsin's antidegradation rules that WDNR might want to especially focus on in evaluating the possibility of revising its antidegradation rules. In response to that request, EPA has identified the following:

- Wisconsin's rules establishing which activities require an antidegradation review, including:
 - The definition of "increased discharge" at NR 207.02(6), and
 - The activities not subject to an antidegradation review at NR 207.03(1) and (2);
- The method of determining whether a proposed activity would cause a "significant lowering of water quality" at NR 207.05, including the *de minimis* provision at NR 207.05(4);
- Wisconsin's requirements for the analysis of alternatives required under an antidegradation review, including:
 - The pollution control alternatives required to be considered at NR 207.04(1)(d), and
 - Wisconsin's method of establishing water quality based effluent limitations and conditions based on the analysis of alternatives at NR 207.04(2)(c);
- Wisconsin's protection of existing uses ("Tier 1" protection); and
- The public participation process for antidegradation reviews.

EPA hopes that this letter will assist WDNR as it considers the possibility of reviewing and revising aspects of its antidegradation rules. If you have any questions, please contact Sydney Weiss of my staff at (312) 886-9262 or weiss.sydney@epa.gov.

Sincerely,

Tera L. Fong
Division Director, Water Division

cc via email:

Marcia Willhite, WDNR