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VIA EMAIL

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**RE: Comments of the Municipal Environmental Group - Wastewater Division  
WY-13-20: Proposed Rules Relating to Updating Wisconsin's Water Quality  
Antidegradation Policy and Procedures**

Dear Ms. Minahan:

I am submitting these comments on behalf of the Municipal Environmental Group–Wastewater Division (MEG Wastewater). MEG Wastewater is an organization of over 100 municipalities statewide who own and operate wastewater treatment plants. We represent facilities ranging in size from small sanitary districts to larger utilities. MEG appreciates this opportunity to comment on the draft rule for WY-13-20, regarding proposed updates to Wisconsin's water quality antidegradation policy and procedures.

MEG greatly appreciates the opportunities for stakeholder input that the department has provided with this rule package. MEG has been working with the department on this rulemaking effort since the stakeholder group meetings held last summer and applauds the department's willingness to address some of the concerns MEG has raised through that process. We continue to have, however, a number of concerns with this rule as drafted, as further explained below.

**1. Definitions of New and Increased Discharges**

*a. Broadened Definition of Increased Discharge*

Under the current antidegradation policy, an "increased discharge" is defined as "any change in concentration, level or loading of a substance which would exceed an effluent limitation specified in a current WPDES permit." Wis. Admin. Code § NR 207.02(6)(a). The proposed rule broadens this definition in a manner not mandated by federal requirements. Under the proposed rule, an "increased discharge" is defined as:

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any actual or expected change in concentration, level, or loading of a substance that 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, including the 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) 3.

This proposed, broader definition could require a permittee to implement a costly antidegradation review even in instances where a permittee would remain in compliance with the current water quality based effluent limitations in its WPDES permit.

Consider, for example, a regionalization project under which Municipality A seeks to discontinue its WPDES permitted wastewater discharge and instead send its wastewater to Municipality B for treatment. These types of regionalization projects are often beneficial to the environment in addition to decreasing costs for both municipalities. In this scenario, Municipality B may be discharging a greater mass load of certain wastewater pollutants than it would in the absence of the wastewater influent from Municipality A. However, based on the total flow received, Municipality B may still be able to meet the water quality effluent limitations in its WPDES permit. Municipality B could therefore accept the wastewater influent from Municipality A and continue to comply with all terms of its WPDES permit without modification. However, under the proposed definition for “increased discharge”, Municipality B may still be required to conduct a costly antidegradation review despite the fact that it would be able to remain in compliance with its permit limitations. This scenario should not result in Municipality B having to undergo an antidegradation review when it would not alter its ability to comply with the water quality based effluent limitations that have been developed and included in its permit to meet water quality criteria.

The inclusion of language regarding the “connection of a pollutant source to an existing public or private wastewater treatment system” in the definition of an “increased discharge” raises similar concerns. If a POTW begins accepting wastewater from a new industrial discharger and can do so while continuing to comply with its current permit limitations, that POTW should not have to undergo an antidegradation analysis.

Federal antidegradation policy supports MEG’s position that the definition of increased discharge should not be broadened to include scenarios such as those outlined above. Federal antidegradation policy provides that “[e]xisting in stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. 131.12(a)(1). This policy is met if a discharger continues to meet water quality based effluent limitations in that discharger’s permit. Further, EPA’s Water Quality Standards Handbook reminds us that “Antidegradation is not a ‘no growth’ rule and was never designed or intended to be such.” *EPA’s Water Quality Standards Handbook*, Chapter 4: Antidegradation at p. 9. In the case of the scenarios provided above, the level of water quality would continue to be protected through compliance with the permittee’s water quality based effluent limitation in its WPDES permit. This is not an action that should require a costly antidegradation review.

As the department continues to support regionalization of wastewater treatment facilities and the ability of communities to continue to develop, we encourage the department to ensure that POTWs have the flexibility necessary for these projects. To provide this flexibility, MEG requests that DNR revise the

proposed definition of “increased discharge” to ensure permittees are not subject to antidegradation review in these types of scenarios.

*b. Outfall Relocation*

Section NR 207.021 of the rule as drafted specifically defines both new and increased discharges to include “outfall relocation,” which would include outfall relocations for publicly owned treatment works (“POTWs”). POTWs must on occasion undertake outfall relocation due to issues such as degradation of current outfalls over time or facility modifications or upgrades. For the following reasons, MEG requests that the reference to outfall relocation be removed or modified in each definition.

With respect to the definition of increased discharge, MEG agrees that *if*, in conjunction with an outfall relocation, a permittee is requesting less restrictive permit limits for a particular pollutant parameter than the limits in the permittee’s current permit, that could constitute an increased discharge. However, absent a request for an actual increase in the pollutant level in the discharge, an outfall relocation in and of itself should not fall within the definition of an increased discharge. MEG requests that the department clarify the rule in this regard by removing the reference to “outfall relocation” from the definition of increased discharge.

Further, MEG disagrees that an outfall relocation should be included in the definition of a “new discharge.” The current definition of a “new discharge” is “any point source which has not received a WPDES permit from the department prior to March 1, 1989.” Wis. Admin. Code § NR 207.02(8). Under the proposed definition, the relocation of an outfall, even for a permittee that has historically operated under a WPDES permit, would constitute a “new discharge,” with limited exceptions. This would mean most POTWs that need to rebuild an outfall would need to undertake a costly antidegradation analysis even if they plan to discharge the same quality of effluent from the relocated outfall. This is a change from the department’s interpretation of the current antidegradation policy which could create significant financial hardship for POTWs.

While the department is proposing some exemptions for when an outfall relocation is subject to antidegradation requirements, these exemptions are of limited practical use. For example, one exemption is for outfalls relocated within 50 feet of the original outfall. However, the construction footprint required for most outfall relocations would necessitate that the outfall be constructed well over 50 feet from the current outfall.

The inclusion of outfall relocations in the proposed definition of “new discharge” is not supported by similar definitions in state or federal law. Elsewhere in state code, an “existing source” is defined by coverage under a WPDES permit as of a certain date, similar to the current definition of a “new discharge” in the current Wisconsin antidegradation code. Federal code implementing the Clean Water Act does not explicitly define a “new discharge.” However, the definition of “new discharger” suggests that most outfall relocations for currently permitted discharges should not be included in the definition of a “new discharge” for antidegradation purposes. Federal code defines a “new discharger” as:

any building, structure, facility, or installation:

- (a) From which there is or may be a ‘discharge of pollutants;’
- (b) That did not commence the ‘discharge of pollutants’ at a particular ‘site’ prior to August 13, 1979;
- (c) Which is not a ‘new source;’ and
- (d) Which has never received a finally effective NPDES permit for discharges at that ‘site.’

40 C.F.R. § 122.22. The term “site” is defined as “the land or water area where any ‘facility or activity’ is physically located or conducted, including adjacent land used in connection with the facility or activity.” *Id.* These definitions, including the broad use of the terms “land or water area,” support the conclusion that unless a relocated outfall is proposed to be located on an entirely different site, an outfall relocation undertaken by a historically permitted discharger should not constitute a new discharge.

Taken together, these definitions support retaining the current definition of “new discharge” in the code and not expanding that definition to explicitly include relocation of outfalls for POTWs currently operating under a WPDES permit. We encourage the department to retain the current definition of “new discharge” to provide the necessary flexibility for facilities that need to undertake outfall relocation.

## **2. Total Maximum Daily Loads**

The proposed rules provide a process for determining whether an antidegradation review is necessary for pollutants that are allocated under an EPA-approved TMDL. However, it is not clear whether the exemptions from antidegradation review under this process would apply in certain scenarios. For example, there are a number of POTWs across the state who have received very restrictive limits for phosphorus, compliance with which is very costly. For some of those permittees, TMDL-derived limitations available to them would be much less restrictive. Because the applicable TMDL study would have been designed to ensure the waterbody could accommodate wastewater discharges in the watershed, permittees subject to the TMDL should not have to undergo a separate antidegradation analysis in order to obtain a TMDL allocation. It is not clear from the proposed rule language, however, whether an antidegradation review would still be required in this scenario. We request that the department add clarifying language in the code or an associated note to address this issue.

## **3. Collection of Water Quality Data**

Under Section NR 207.03(4) of the proposed rules, the applicant for a new or increased discharge is tasked with the responsibility of “obtaining and submitting sufficient data for the department’s [antidegradation screening] determination.” Further, the department “shall determine” whether the “submitted data is sufficient.” *Id.* The open-ended nature of this data collection requirement and vague language regarding sufficiency of data has the potential to result in a permittee incurring significant costs for data collection. MEG requests that the department clarify what constitutes “sufficient data” to establish reasonable parameters and ensure that permittees understand the extent of data collection necessary for this evaluation.

## **4. Significance Threshold Limitations**

MEG appreciates that the proposed rule provides a significance threshold for antidegradation review. The proposed rule defines “significant lowering of water quality” as “a discharge that will use greater

than 10 percent of the receiving or downstream waterbody's assimilative capacity ....” Wis. Admin. Code § NR 207.031(8)(a)3. However, the proposed rule only provides for a one-time increase at or below this 10% significance thresholds for a permittee. If a permittee makes a subsequent request for an increase that is still below that 10% threshold, we see no reasonable basis to require a full antidegradation review at that time. MEG requests that the proposed rules be revised to account for multiple requests that continue to fall within the 10% significance threshold.

## **5. Compliance of State-Regulated Nonpoint Source Discharges**

In conducting its antidegradation review, the department “may only authorize lowering of the receiving or downstream water quality if the department finds that ...[p]oint source and state-regulated nonpoint source discharges to the receiving water meet requirements under the antidegradation policy....” Wis. Admin. Code § NR 207.031(9)(a)6. POTWs, however, have no control over whether other point source dischargers and/or regulated nonpoint source dischargers are in compliance with the antidegradation policy. It is not reasonable to preclude POTWs from pursuing a new or increased discharge on the grounds that there are other noncompliant dischargers in the watershed over which that POTW has no authority or control. At a minimum, in accordance with federal guidance on this issue, the proposed regulations should be revised to reflect that the analysis of compliance in Section 207.031(9)(a)6. must be made on a parameter by parameter basis. As explained in EPA guidance: “degradation by [a proposed] new point source of BOD should not be barred solely on the basis that BMPs unrelated to BOD loadings, or which relate to other waterbodies, have not been implemented.” *See EPA’s Water Quality Standards Handbook*, Chapter 4: Antidegradation, p. 10.

## **6. Temporary Impacts**

Finally, the proposed rule language provides no exemptions for temporary lowering of water quality. Federal guidance, however, does provide exemptions where lowering of water quality is temporary. *See, e.g., EPA’s Water Quality Standards Handbook*, Chapter 4: Antidegradation, p. 13. The department should also provide for exemptions for temporary lowering of water quality.

Thank you for consideration of these comments. We greatly appreciate the opportunity to participate in this process.

Sincerely,

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