

***Delivered via electronic mail***

May 10, 2023

Department of Natural Resources  
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**RE: Comments on Draft Rule WY-13-20, Updates to Wisconsin's Antidegradation Policy**

Dear Kristi:

Midwest Environmental Advocates (“MEA”), Clean Wisconsin, and River Alliance of Wisconsin submit these comments in support of Draft Rule WY-13-20, which seeks to update Wisconsin’s antidegradation policy and its implementing procedures, contained in Chapters NR 102 and NR 207 of the Wisconsin Administrative Code, in compliance with the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*

MEA is a non-profit environmental law center that combines the power of the law with the resolve of communities facing environmental injustice to secure and protect the rights of all people to healthy water, land, and air. MEA submits these comments on its own behalf and on behalf of the 16 Wisconsinites who filed a Petition for Corrective Action with the U.S. Environmental Protection Agency (“EPA”) in 2015 to cure deficiencies in Wisconsin’s water pollution permit program.<sup>1</sup>

For more than 50 years, Clean Wisconsin has been working to preserve and protect Wisconsin’s clean water, clean air and natural heritage. With an active membership and advocacy base 20,000-strong, our dedicated staff of experts conducts sound science, engages in public policy, takes legal action, and fosters strong partnerships with allies and stakeholders to help ensure a safe, healthy environment for everyone.

Representatives from MEA and Clean Wisconsin, among many other representatives from municipal and industry groups, participated in the Stakeholder Advisory Committee that the Wisconsin Department of Natural Resources (“DNR”) convened to review the proposed rule and provide feedback.<sup>2</sup> We appreciate the opportunity to further engage on this important

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<sup>1</sup> For more on the Petition for Corrective Action, visit the EPA’s website at <https://www.epa.gov/wi/npdes-petition-program-withdrawal-wisconsin-0>. The Petitioners include John Domino, Ronald Grasshoff, Dean Hoegger, William Iwen, Doug & Sherryl Jones, Dave Marshall, Cheryl Nenn, Allie Raven, April Stone Dahl, Elaine Swanson, Jim Swanson, Nancy & Lynn Utesch, Jim Wagner, and Timm Zumm.

<sup>2</sup> Draft Wisconsin Natural Resources Board Order WY-13-20, p. 10 (Mar. 1, 2023), <https://dnr.wisconsin.gov/sites/default/files/topic/Rules/WY1320DraftRule2.pdf> [hereinafter, “WY-13-20”].

rulemaking and ensure Wisconsin's high-quality waters are maintained for current and future generations.

River Alliance of Wisconsin is a statewide nonprofit, nonpartisan advocacy organization that has empowered people to protect and restore Wisconsin's waters for thirty-years.

These comments first establish that DNR is required to update Wisconsin's antidegradation policy to be consistent with the federal antidegradation policy and comply with the CWA, especially since Wisconsin's procedures for implementing its antidegradation policy have been outdated for nearly two decades. Next, these comments support DNR's proposed 10% *de minimis* threshold for determining whether a new or increased discharge will significantly lower water quality in addition to rule provisions that allow DNR to assess cumulative impacts to receiving waters as necessary. These comments also point out opportunities to improve the draft rule, such as providing greater clarity regarding "economically viable" alternatives and bolstering data submission requirements. Finally, these comments consider the draft rule through the lens of Wisconsin's Public Trust Doctrine.

## **I. DNR is Required to Update Wisconsin's Antidegradation Policy to Comply with the CWA.**

As DNR is aware, all states that have been delegated authority from the EPA to operate a water pollution permit program pursuant to Section 402 of the CWA must ensure the administration of that program continues to comply with the minimum requirements of the CWA and its implementing regulations.<sup>3</sup> The failure of states to update their statutes and regulations to ensure program administration in compliance with the CWA could result in an order from the EPA for those states to take corrective action, overpromulgation of inadequate state rules, and even the withdrawal of a state's authority to continue administering the program.<sup>4</sup>

### **A. A Brief History of Antidegradation Regulation and Advocacy in Wisconsin.**

All state-delegated water pollution permit programs must contain an antidegradation policy that is consistent with 40 CFR § 131.12.<sup>5</sup> Wisconsin has had an antidegradation policy in state administrative regulations since 1973.<sup>6</sup> Procedures to implement that policy through Wisconsin's water pollution permit program, called the Wisconsin Pollutant Discharge Elimination System ("WPDES"), were first adopted on March 1, 1989.<sup>7</sup> However, other than some minor revisions in

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<sup>3</sup> See 33 U.S.C. § 1344(g)1, (h)(1)(A)(i). See also 40 CFR § 123.1(f) ("Any state program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part," which specifies the EPA's procedures and criteria for approving, revising, or withdrawing state-delegated programs").

<sup>4</sup> See 33 U.S.C. §§ 1313(c)(3)-(4), 1344(i).

<sup>5</sup> 40 CFR § 131.12(a).

<sup>6</sup> Wis. Admin. Code NR 102.03(2) (as published in 213 Wis. Admin. Reg. 13 (Sept. 1973), <https://docs.legis.wisconsin.gov/code/register/1973/213b/insert/nr102.pdf>).

<sup>7</sup> CR 87-174, 398 Wis. Admin. Reg. (Feb. 1989), [https://docs.legis.wisconsin.gov/code/register/1989/398b/rules/cr\\_87\\_174.pdf](https://docs.legis.wisconsin.gov/code/register/1989/398b/rules/cr_87_174.pdf).

1997 and 2006 related to bioaccumulative chemicals of concern and Great Lakes system waters, DNR has not successfully updated its antidegradation policy and implementing procedures to maintain compliance with the CWA.<sup>8</sup>

DNR was made aware that its policy was inconsistent with the CWA as early as 2006 in a letter from MEA and the Environmental Law and Policy Center (“ELPC”).<sup>9</sup> That letter pointed out, for example, that Section NR 102.05(1) of the Wisconsin Administrative Code, which remains unchanged to this day, only protects *assigned uses* (also known as designated uses) when the federal antidegradation policy requires protection of *existing uses* actually attained in the water body on or after November 28, 1975, whether or not those uses are assigned or designated.<sup>10</sup> That letter also pointed out DNR’s failure to clearly define whether “significant lowering of water quality” occurs when the current 33.3% *de minimis* threshold is exceeded by a single permittee in one permit, by that same permittee over multiple permits, or by multiple permittees using the same assimilative capacity in a receiving waterbody.<sup>11</sup> Even then, EPA recommended the 10% *de minimis* threshold that DNR is proposing in the draft rule.<sup>12</sup> In addition, the 2006 MEA and ELPC letter pointed out deficiencies with Wisconsin’s antidegradation policy such as the definition of “increased discharge” functionally exempting facilities that increase discharge volumes but only have concentration-based effluent limits;<sup>13</sup> the need for public participation during the facility planning process when antidegradation review actually occurs, not afterward;<sup>14</sup> and the failure to apply antidegradation review procedures to stormwater discharges.<sup>15</sup>

DNR eventually recognized the need to revise Wisconsin’s antidegradation policy and implementing procedures consistent with the CWA. In December 2009, DNR published a scope statement in the Wisconsin Administrative Register to begin the rulemaking process needed to accomplish the revision.<sup>16</sup> That rulemaking, however, languished and in September 2013, the EPA proposed major revisions to the federal antidegradation policy.<sup>17</sup> The next month, DNR announced that it was putting the antidegradation rulemaking it started approximately 45 months prior on hold to await federal developments.<sup>18</sup> On October 20, 2015, EPA finalized its revisions to the federal antidegradation policy,<sup>19</sup> thus requiring Wisconsin follow suit and revise

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<sup>8</sup> See CR 96-148 §§ 111-123, 500 Wis. Admin. Reg. (Aug. 31, 1997), [https://docs.legis.wisconsin.gov/code/misc/chr/lrb\\_scanned/cr\\_96\\_148\\_final\\_rule\\_filed\\_with\\_lrb.pdf](https://docs.legis.wisconsin.gov/code/misc/chr/lrb_scanned/cr_96_148_final_rule_filed_with_lrb.pdf); CR 05-089, 607 Wis. Admin. Reg. (July 31, 2006), [https://docs.legis.wisconsin.gov/code/misc/chr/lrb\\_filed/cr\\_05\\_089\\_final\\_rule\\_filed\\_with\\_lrb.pdf](https://docs.legis.wisconsin.gov/code/misc/chr/lrb_filed/cr_05_089_final_rule_filed_with_lrb.pdf).

<sup>9</sup> Letter from MEA & ELPC to DNR (Aug. 2, 2006) (on file with author).

<sup>10</sup> *Id.* at 1-2.

<sup>11</sup> *Id.* at 4-5.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 2-4.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> 648 Wis. Admin. Reg. (Dec. 14, 2009), <https://docs.legis.wisconsin.gov/code/register/2009/648a/register/toc>.

<sup>17</sup> Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51,020 (Aug. 2015), <https://www.govinfo.gov/content/pkg/FR-2015-08-21/pdf/2015-19821.pdf>.

<sup>18</sup> DNR, Surface Water Quality Triennial Standards Review: Status of 2012-2014 Topics (Oct. 1, 2023)

<sup>19</sup> *Supra* n. 17.

its antidegradation policy.<sup>20</sup> In 2016, DNR published another scope statement in the Administrative Register, but again that rulemaking languished and the scope statement expired in February 2020.<sup>21</sup> The scope statement under which the currently proposed draft rule is proceeding was published in May 2021 and expires on November 23, 2023.<sup>22</sup>

### **B. The 2015 Petition for Corrective Action Demonstrates How Wisconsin's Antidegradation Policy Does Not Comply with the CWA.**

In 2015, MEA, on behalf of 16 Wisconsinites, filed a Petition for Corrective Action ("PCA") pursuant to 33 U.S.C. § 1342(c)(3).<sup>23</sup> In addition to continued non-compliance with the now revised federal antidegradation policy, the PCA identified other deficiencies with the WPDES program that needed to be resolved to regain programmatic compliance with the CWA. The PCA also incorporated by reference 75 deficiencies with the WPDES program that EPA had previously identified in a 2011 letter to DNR.<sup>24</sup> Antidegradation was presumably left off that 2011 list of deficiencies because DNR was purportedly working under the December 2009 scope statement to revise Wisconsin's antidegradation policy.<sup>25</sup>

The PCA accurately described the federal antidegradation policy, as updated in EPA's 2015 rulemaking, and explained why Wisconsin's antidegradation policy continued to fall short of federal requirements.<sup>26</sup> As alluded to in the 2006 letter from MEA and ELPC to DNR, the PCA pointed out that Chapter NR 207 effectively exempts from antidegradation review those facilities that would consume up to 33.3% of a receiving water's assimilative capacity, deeming such discharges "insignificant" and not subject to antidegradation review.<sup>27</sup> The danger of establishing *de minimis* thresholds that are too high is that it creates categorical exemptions to antidegradation review that could "unduly restrict[] the number of proposed activities that are subject to a full antidegradation review" and "may not adequately prevent cumulative water quality degradation on a watershed scale."<sup>28</sup> As early as 1998, EPA recognized "that more than a ten percent reduction in assimilative capacity would be significant, and thus not be *de minimis*."<sup>29</sup>

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<sup>20</sup> See 40 CFR § 131.12(a).

<sup>21</sup> 728 Wis. Admin. Reg. (Aug. 29, 2016), <https://docs.legis.wisconsin.gov/code/register/2016/728b/register>; Wis. State Leg., Scope Statement SS 076-16, [https://docs.legis.wisconsin.gov/code/scope\\_statements/all/076\\_16](https://docs.legis.wisconsin.gov/code/scope_statements/all/076_16).

<sup>22</sup> Wis. State Leg., Scope Statement SS 051-21, [https://docs.legis.wisconsin.gov/code/scope\\_statements/all/051\\_21](https://docs.legis.wisconsin.gov/code/scope_statements/all/051_21).

<sup>23</sup> Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Wisconsin (Oct. 20, 2015), [https://midwestadvocates.org/assets/resources/2015-10-19\\_PCA\\_-\\_Signatures.pdf](https://midwestadvocates.org/assets/resources/2015-10-19_PCA_-_Signatures.pdf) [hereinafter, "PCA"].

<sup>24</sup> See *id.* at 26-31 (citing Letter from EPA Region 5 Administrator Susan Hedman to DNR Secretary Kathy Stepp (July 18, 2011), <https://www.epa.gov/sites/default/files/2016-07/documents/adm-hedman-letter-201107.pdf>).

<sup>25</sup> See *supra* n. 16.

<sup>26</sup> PCA, pp. 36-44.

<sup>27</sup> *Id.* at 37.

<sup>28</sup> PCA, p. 38 (citing 63 Fed. Reg. 36,742, 36,783 (July 7, 1998), <https://www.govinfo.gov/content/pkg/FR-1998-07-07/pdf/98-17513.pdf>).

<sup>29</sup> PCA, p. 38 (citing 63 Fed. Reg. 36,742, 36,783 (July 7, 1998)).

Guidance from other EPA regions the PCA cites also suggested that a 5% *de minimis* threshold would be appropriate.<sup>30</sup>

Another failing of Wisconsin's antidegradation implementing regulations pointed out in the PCA is that there is no cumulative cap for individual permittees, which could be allowed to consume the entire assimilative capacity of a receiving water over three five-year permit terms.<sup>31</sup> Examples were then provided in which DNR simply set effluent limitations at the level equal to 33.3% the assimilative capacity of the receiving water without undertaking antidegradation review of clearly significant discharges.<sup>32</sup>

Like the 2016 letter, the PCA again pointed out that the definition of "increased discharged" functionally exempts facilities that increase discharge volumes but only have concentration-based limits.<sup>33</sup> This increased loading of pollutants to receiving waters can significantly lower water quality even though the concentration of pollutants in the discharge has not increased, and both Wisconsin's antidegradation policy and the federal antidegradation policy require review of significant impacts to receiving waters from increased discharges regardless of whether the previous permit had mass or flow limits.<sup>34</sup>

Again, like in the 2016 letter, the PCA pointed out the need for better public participation during the facility planning process when antidegradation review actually occurs, not afterward.<sup>35</sup> Going beyond the 2016 letter, the PCA highlighted two salient examples of DNR failing to assess viable alternatives that would have eliminated or reduced water quality impacts, a requirement during antidegradation review.<sup>36</sup> The PCA concluded its discussion of antidegradation deficiencies in the WPDES program by questioning DNR's commitment to actually promulgate the rule, and by requesting that EPA overpromulgate antidegradation rules for Wisconsin and object to any WPDES permit that fails to meet the federal antidegradation policy.<sup>37</sup>

In response to the PCA, EPA released a Final Protocol for Responding to Issues Related to the WPDES Permit Program on June 26, 2016.<sup>38</sup> That Protocol indicates that EPA will continue to monitor progress on the 75 deficiencies identified in its 2011 letter, review DNR's implementation of its antidegradation policy, and assess whether DNR has adequate authorities to implement antidegradation procedures consistent with federal rules, including through reviewing select permits.<sup>39</sup> The Final Protocol also indicates that EPA will review whether Wisconsin's administrative rulemaking process inappropriately limits DNR's ability to update the WPDES

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<sup>30</sup> PCA, p. 37 (citing EPA, *Region 8 Antidegradation Guidance*, p. 18).

<sup>31</sup> PCA, p. 39.

<sup>32</sup> *Id.* at 39-40.

<sup>33</sup> *Id.* at 40.

<sup>34</sup> Wis. Admin. Code NR § 102.05(1)(a); 40 CFR § 131.12(a)(2).

<sup>35</sup> PCA, pp. 43-44.

<sup>36</sup> *Id.* at 42-43.

<sup>37</sup> *Id.* at 44-46.

<sup>38</sup> Attachment to Letter from EPA Region 5 NPDES Program Chief Kevin Pierard to MEA Staff Attorney Tressie Kamp (June 26, 2016).

<sup>39</sup> *Id.* at 2.

program to comply with the CWA and its implementing regulations.<sup>40</sup> EPA now considers nearly all 75 deficiencies resolved, with those remaining requiring statutory changes that must be accomplished through the Wisconsin Legislature,<sup>41</sup> and we fully expect EPA to be closely monitoring DNR's ability to promulgate the proposed draft rule.

The current rulemaking effort is now the third time in the last 14 years that DNR has attempted to update its antidegradation policy to at least meet the regulatory floor of the CWA. Adopting the proposed draft rule is long overdue and required to ensure the WPDES program is implemented in compliance with federal law. Otherwise, DNR runs the risk of having the EPA overpromulgate Wisconsin's antidegradation implementation procedures. If Wisconsin proposes an inadequate antidegradation policy, then the CWA requires EPA to inform Wisconsin as to the inadequacies in the proposed rule and direct that they be addressed.<sup>42</sup> If Wisconsin does not fix the inadequate rule within 90 days, then EPA is required to propose and publish a rule of its own for Wisconsin that would comply with the CWA's requirements.<sup>43</sup> In the alternative, EPA could also grant the PCA, order DNR to take corrective action, and even rescind DNR's authority to continue implementing the CWA in Wisconsin.<sup>44</sup>

For these reasons, we support the rule as drafted, although we discuss below those portions of the rule that must be retained and offer a few suggestions for improving the rule.

## **II. DNR Must Adopt the 10% *De Minimis* Threshold Used to Determine When a Significant Lowering of Water Quality Occurs.**

The draft rule proposes to establish a 10% *de minimis* threshold for determining when a new or increased discharge will result in a significant lowering of water quality and be subject to antidegradation review.<sup>45</sup> This change, down from 33.3%, is vital to ensuring this rulemaking will comply with the federal antidegradation policy and survive EPA review. Simply put, the current system where new and increased discharges are considered insignificant and thus exempt from antidegradation review despite consuming up to 33.3% of a receiving water's assimilative capacity is unlawful.

For starters, any individual discharge consuming between 10% to 33.3% of a receiving water's assimilative capacity is significant and should be subject to antidegradation review. But, what is more, both Wisconsin's and the federal antidegradation policy "regulate[] degradation, not individual sources of degradation," and federal courts have made clear that *de minimis* thresholds must be established at a low enough level to protect against a significant lowering of water quality

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<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Wisconsin Legal Authority Review Status (May 11, 2020), <https://www.epa.gov/sites/default/files/2020-05/documents/2020-05-11-wi-lar-status.pdf>.

<sup>42</sup> See 33 U.S.C. § 1313(c)(3).

<sup>43</sup> See 33 U.S.C. § 1313(c)(3)-(4).

<sup>44</sup> See 33 U.S.C. § 1344(i).

<sup>45</sup> WY-13-20 at 25 (to be codified at Wis. Admin. Code NR § 207.031(8)(a)3).

due to cumulative impacts for all discharges into a receiving water.<sup>46</sup> In fact, federal courts have questioned whether *de minimis* exceptions should even exist.<sup>47</sup> There is certainly no explicit textual basis for a *de minimis* exception in the federal antidegradation policy,<sup>48</sup> and some states, like Minnesota, do not provide for a *de minimis* exception at any level.<sup>49</sup>

In *Ohio Valley Environmental Coalition v. Horinko*, the Southern District of West Virginia found that an EPA decision approving West Virginia's antidegradation implementation procedure that established a 10% *de minimis* threshold for individual discharges to a receiving water was supported by evidence in the record, while simultaneously finding that a 20% *de minimis* threshold for all discharges to a receiving water was not supported by evidence in the record.<sup>50</sup> For the 10% individual discharge *de minimis* threshold, the court accepted EPA's evidence and deferred to the agency's reliance on its Water Quality Guidance for the Great Lakes System: Supplementary Information Document, which states:

*De minimis* provisions provide a means for States . . . to differentiate between actions that will result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality. It is reasonable to assume that loading increases . . . that will use less than ten percent of the remaining assimilative capacity in a water body will have a negligible effect on ambient water quality.<sup>51</sup>

The court did not uphold West Virginia's 20% cumulative discharge *de minimis* threshold, however. The court stated that the cumulative threshold "will dictate the total reduction in available assimilative capacity that a water body may undergo without [antidegradation] review. Without a cumulative cap on *de minimis* discharges, individual discharges could easily consume all of the available assimilative capacity."<sup>52</sup> The court did entertain an argument from intervenors on behalf of industrial groups that pointed out the same EPA guidance suggested that a 90% threshold could be considered *de minimis* for certain pollutants.<sup>53</sup> But the court unequivocally stated that it would reject such a figure "out of hand."<sup>54</sup> Those same intervenors also argued that the 20% threshold was adequate because EPA had approved Colorado's 15% *de minimis* threshold for discharges of certain pollutants, but the court rejected this argument because (1) EPA's approval of a state's antidegradation implementing procedure is not evidence that procedure complies with the

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<sup>46</sup> See *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 492 (6th Cir. 2008) (citing 40 CFR 131.12).

<sup>47</sup> *Id.* at 484 n. 12 ("As an initial matter, I question whether such *de minimis* exceptions should even be allowed for Tier II review.").

<sup>48</sup> See 40 CFR § 131.12.

<sup>49</sup> See Minn. R. 7050.025-7050.0335.

<sup>50</sup> *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 767-773 (S.D. W. Va. 2003).

<sup>51</sup> *Id.* at 769 (citing EPA Water Quality Guidance for the Great Lakes System: Supplementary information Document at 208-09).

<sup>52</sup> *Ohio Valley Environmental Coalition*, 279 F. Supp. 2d at 770-71.

<sup>53</sup> *Id.* at 771.

<sup>54</sup> *Id.*

federal antidegradation policy; (2) 15% “is, obviously, a lower figure than twenty percent”; and (3) Colorado’s procedure contained a limitation that the 15% *de minimis* threshold only applied to temporary or short term changes in water quality, not degradation in the long term.<sup>55</sup> Since the EPA failed to provide any citations to record evidence in support of the 20% cumulative discharge *de minimis* threshold, the court found that EPA’s approval of that figure to be arbitrary and capricious.<sup>56</sup>

In *Kentucky Waterways Alliance v. Johnson*, the Sixth Circuit Court of Appeals reversed a district court decision granting summary judgment to EPA after the EPA failed to even calculate how much assimilative capacity would be consumed, individually or cumulatively, by discharges authorized under five exemptions in Kentucky’s antidegradation implementing procedures.<sup>57</sup> For example, Kentucky exempted increased discharges from existing permit holders “so long as the expansion does not increase pollutant loading by 20% or more.”<sup>58</sup> Since EPA did not convert those exemptions to assimilative capacity, which is what 40 CFR § 131.12 protects, and did not analyze the cumulative impacts of discharges to receiving waters authorized through all the exemptions, the Court found that it could not evaluate the reasonableness of EPA’s determination to approve Kentucky’s antidegradation implementation procedures and remanded the case back to EPA to consider those deficiencies.<sup>59</sup>

This discussion of applicable case law makes clear that EPA is likely to approve a 10% *de minimis* threshold, whereas higher thresholds such as 15% or 20% have been subject to legal controversy and could risk the rule being found inadequate. States are not required to include any *de minimis* threshold in their antidegradation policy, and DNR’s inclusion of a 10% *de minimis* threshold in the draft rule will significantly reduce the time and resources spent by both DNR and regulated entities on antidegradation review of discharges that do not have a significant impact on receiving water quality. Although we prefer a lower *de minimis* threshold, such as 5%, to provide an adequate margin of protection for Wisconsin waterways, we support DNR’s proposal to establish a 10% *de minimis* threshold, particularly in view of provisions in the draft rule discussed below that authorize DNR to subject discharges to antidegradation review based on cumulative impacts.

#### **A. Language Requiring Review Based on Cumulative Impacts.**

Importantly, the draft rule proposes to establish the 10% *de minimis* threshold as a cumulative cap on individual permittees over multiple permit terms.<sup>60</sup> As noted in the *Ohio Valley* case, including antidegradation procedures that protect against a significant lowering of water quality based on cumulative impacts is even more important than the individual threshold.<sup>61</sup> Proposed Subdivision NR 207.031(8)(a)3.f states that “[a]fter an applicant has received a one-time increase

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<sup>55</sup> *Id.* at 772-73.

<sup>56</sup> *Id.* at 773.

<sup>57</sup> *Kentucky Waterways Alliance*, 540 F.3d at 492.

<sup>58</sup> *Id.* at 491.

<sup>59</sup> *Id.* at 492-93.

<sup>60</sup> WY-13-20 at 26 (to be codified at Wis. Admin. Code NR § 207.031(8)(a)3.f).

<sup>61</sup> *Ohio Valley Environmental Coalition*, 279 F. Supp. 2d at 770-71.



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 analysis is required.” This language solves the conundrum identified in MEA and EPLC’s 2006 letter to DNR and the 2015 PCA, which is that Wisconsin’s current antidegradation implementation procedures would allow a single permittee to increase their discharges over successive permit terms and use up all of a receiving water’s assimilative capacity without ever undergoing antidegradation review.<sup>62</sup> Without this language, that conundrum would persist despite the inclusion of the 10% *de minimis* threshold. Discharges would have to be increased in smaller increments—up to 10% instead of up to 33.3%—but significant water quality impacts could still occur without complying with federal law.

DNR has also included language in the draft rule that would allow the department to, “[i]f there are multiple dischargers on a waterbody that, in the determination of the department, share the same assimilative capacity, . . . consider cumulative impacts in determining whether a proposed discharge would be considered a significant lowering of water quality.”<sup>63</sup> Retaining and appropriately exercising this discretionary authority is crucial to ensuring discharges that consume the same assimilative capacity are considered together when determining whether a significant lowering of water quality will occur. If impacts are not considered cumulatively, then the existing level of a substance in a receiving water could be adjusted upward for each successive discharge to that receiving water, which in turn influences the calculation of available assimilative capacity and how much each successive discharge will consume. In other words, without the proposed language, significant cumulative impacts to water quality from multiple sources could evade antidegradation review in contravention of the federal antidegradation policy.

### **III. DNR Should Continue to Define “Economically Viable” Alternatives in Terms of a Percentage of the Present Value of Capital Costs of the Proposed Alternative.**

All facilities subject to antidegradation review must evaluate practicable alternatives to proposed discharges that would significantly lower water quality in receiving waters.<sup>64</sup> “Practicable” is defined in the draft rule to mean “technologically possible, able to be put into practice, and economically viable.”<sup>65</sup> Unlike Wisconsin’s current antidegradation implementing procedures, the draft rule does not go on to define “economically viable” in any circumstance and instead uses a note to point to recently released EPA guidance and their associated worksheets to provide clarity to regulated entities.<sup>66</sup> Although we appreciate the inclusion of this note in the draft rule and the flexibility that guidance affords as compared to promulgated regulatory language, this approach means relying on guidance that is not legally binding and making decisions on a case-by-case basis because there is no clarity as to what constitutes an alternative that is economically unviable.

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<sup>62</sup> Letter from MEA & ELPC to DNR (Aug. 2, 2006); PCA at 39.

<sup>63</sup> WY-13-20 at 26-27 (to be codified at Wis. Admin. Code NR § 207.031(8)(a)3.f).

<sup>64</sup> *Id.* at 28 (to be codified at Wis. Admin. Code NR § 207.031(8)(c)).

<sup>65</sup> *Id.* at 16, 34 (to be codified at Wis. Admin. Code NR § 207.001(2)).

<sup>66</sup> *Id.* at 28-29 (citing, e.g., EPA, *Clean Water Act Financial Capability Assessment Guidance* (Feb. 2023), <https://www.epa.gov/system/files/documents/2023-01/cwa-financial-capability-assessment-guidance.pdf>).

If DNR is going to make decisions on a case-by-case basis, it needs to increase the informational requirements for excluding alternatives as economically unviable. This determination is crucial because it effectively controls whether or not a facility can proceed with their proposed alternative or must implement a different alternative that would avoid a significant lowering of water quality. The draft rule currently requires regulated entities to merely “[i]nclude a description of any alternative determined to be impracticable, and why that determination was made.”<sup>67</sup> And while reasons for making such a determination include “cost or affordability”, the amount of information needed to justify that determination is unclear.<sup>68</sup> At the very least, the draft rule language should be amended to read: “Include a description of any alternative determined to be impracticable, and an analysis of why that determination was made.” This language would require additional analysis from the regulated entity rather than merely stating the reason, but would cabin the analysis to the reason provided. We appreciate that DNR can require analysis of specific alternatives (with no limitation on the alternative being practicable) or the submission of additional information necessary to assess their alternatives analysis,<sup>69</sup> but the analysis should be submitted in the first instance to assist DNR in its assessing whether the alternative is in fact impracticable.

In too many other areas of environmental law, the practicable alternatives analysis has turned into a game by which permit applicants pre-select alternatives so that the preferred option looks viable and practicable by comparison, and DNR often lacks the resources necessary to fully vet the proper range of true alternatives. Given the plain federal requirements for a robust alternatives analysis in any adequate antidegradation policy, it is imperative that DNR receive a meaningful alternatives analysis from anyone proposing a new or increased discharge.

The proposed rule should require consideration of any alternative technologies that would avoid a significant lowering of water quality from a proposed discharge as economically viable if the capital costs of the alternative in question do not exceed 110% of the capital costs of the proposed expansion—the cost threshold used in Wisconsin’s current antidegradation policy implementing procedures.<sup>70</sup> Although not as nuanced and flexible as the EPA guidance DNR cites, this approach creates a bright line rule that is easy for regulated facilities, DNR, and the general public to follow. It would also allow the general public to identify additional practicable alternatives with confidence that those alternatives would not be dismissed without adequate consideration from DNR. DNR need not establish such a bright line rule for all regulated entities either and certainly could, as it does in its current implementing procedure, apply such a rule to categories of dischargers likely to have the most impact on surface water quality in Wisconsin, e.g., industrial dischargers and wastewater treatment plants.

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<sup>67</sup> WY-13-20 at 28 (to be codified at Wis. Admin. Code NR § 207.031(8)(c)2.

<sup>68</sup> The standard in proposed Wis. Admin. Code NR § 207.031(8)(c) only requires information submitted to be relative to the size of the project or facility, but that standard is nebulous at best.

<sup>69</sup> *Id.* at 29 (to be codified at Wis. Admin. Code NR § 207.031(8)(d)).

<sup>70</sup> Wis. Admin. Code NR § 207.04(2)(c)2 (incorporating Wis. Admin. Code NR § 207.04(1)(d)2 by reference).

#### **IV. DNR Should Strengthen its Water Quality Data Requirements.**

DNR should strengthen the provisions in the draft rule related to water quality data to ensure that ambient water quality measurements are up to date and water quality-based effluent limitations, assimilative capacity, and other relevant calculations are as accurate as possible. The draft rule currently allows the submission of water quality data that is up to ten years old without prior approval from DNR.<sup>71</sup> Regulated entities are required to conduct their own sampling only if more recent data is not available and DNR approval is not obtained.<sup>72</sup> Although DNR can determine that submitted data is insufficient or not credible based on, among other things, “[t]he available dilution or assimilative capacity of the receiving water for the proposed discharge, including the impacts of authorized discharges,”<sup>73</sup> and although DNR may require sampling for “surrogate parameters directly related to the impact of the pollutant of concern,”<sup>74</sup> more recent sampling data should be required in the first instance. At the very least, the temporal provision should be reduced to five years to bring it in line with the maximum duration of WPDES permits, which necessarily requires reevaluation of the grounds for permit issuance.<sup>75</sup> However, we also recommend explicitly requiring more recent sampling data if there has been a new or increased discharge to the receiving water upstream or downstream from the proposed discharge that will consume the same assimilative capacity.

#### **V. Maintaining High Water Quality is Imperative to Protecting Wisconsin’s Public Trust Resources.**

Under the state Constitution, Wisconsin’s waters are held in trust for the use and benefit of all people.<sup>76</sup> These protected uses extend to recreation, fishing, and myriad other uses that are only possible with high water quality.<sup>77</sup> The Legislature has delegated public trust responsibilities to DNR.<sup>78</sup> In doing so, the Legislature affirmatively required and authorized DNR to “formulate plans and programs for the prevention and abatement of water pollution and for the *maintenance* and improvement of water quality.”<sup>79</sup> In this context, DNR’s public trust duties to maintain water quality means, at a minimum, that high quality waters sustaining core public uses cannot be polluted to such an extent that those uses are no longer possible.

That is what the antidegradation rule is broadly intended to prevent, and thus in this instance the prerogatives of the CWA and Wisconsin’s Public Trust Doctrine’s align. Indeed, central among DNR’s duty to prevent water pollution and maintain water quality is proper administration of the WPDES program, and a foundational element of that program is that DNR must issue regulations

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<sup>71</sup> WY-13-20 at 22 (to be codified at Wis. Admin. Code NR § 207.031(4)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 23 (to be codified at Wis. Admin. Code NR § 207.031(4)(c)).

<sup>74</sup> *Id.* at 22 (to be codified at Wis. Admin. Code NR § 207.031(4)).

<sup>75</sup> See Wis. Stat. § 283.53(1).

<sup>76</sup> See Wis. Const. art. IX, § 1.

<sup>77</sup> *Clean Wis., Inc. v. DNR*, 2021 WI 72, ¶12, 398 Wis. 2d 433, 961 N.W.2d 611.

<sup>78</sup> See *id.* at ¶13 (citing Wis. Stat. §§ 281.11, .12).

<sup>79</sup> Wis. Stat. § 281.12(1) (emphasis added).

and otherwise act in a manner that complies with the CWA.<sup>80</sup> Thus, neither DNR's statutory nor public trust obligations would be met if it fails to promulgate a rule to bring DNR in compliance with the CWA.

## **VI. Potential Errors in the Draft Rule.**

We identified the following potential errors in the draft rule that DNR should address:

- Page 19: The cross reference to proposed Wis. Admin. Code NR § 207.031(6)(a) in proposed Wis. Admin. Code NR § 207.021(6) seems to be inaccurate. Consider whether the cross reference should be to proposed Wis. Admin. Code NR § 207.031(8)(a).
- Page 30: Consider whether the cross reference to proposed Wis. Admin. Code NR 102.045(2)(b)3.1 to 3 should be to proposed Wis. Admin. Code NR § 102.045(2)(b)1 to 3.
- Page 34: The numbering of definitions in proposed Wis. Admin. Code NR § 216.008(3) repeats paragraph "(e)" for both "new discharge" and "practicable."

Thank you for the opportunity to submit comments on this important rulemaking and do not hesitate to reach out with any questions or concerns using the contact information in the signature blocks below.

Sincerely,

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<sup>80</sup> See Wis. Stat. §§ 283.001(2), .11(1)-(2).