SUBCHAPTER II
ANTIBACKSLIDING

NR 207.10 Purpose and applicability. (1) PURPOSE. The purpose of this subchapter is to establish antibacksliding requirements for the WPDES permit program.

(2) APPLICABILITY. This subchapter applies to any permittee that requests in a WPDES permit modification or reissuance application an increased or less stringent limitation that limits the discharge of a pollutant to a surface water. This subchapter does not apply to a request for an increased limitation that limits the discharge of a pollutant to groundwater. This subchapter is not applicable when the department increases a limitation that has not yet taken effect in a WPDES permit.

NR 207.11 Definitions. In addition to the definitions in ch. NR 205, the following definitions apply to this subchapter:

(1) "Best professional judgment limitation" means technology based effluent limitations established on a case-by-case basis by the permit drafter when there are no applicable promulgated effluent guidelines for the category of discharge. These limitations are established under s. NR 220.21 and 33 USC 1342 (a) (1) B.

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(2) "Effluent limitation guidelines" or "effluent guideline standard" or "ELGs" means guidelines for establishing technology based effluent limitations under 33 USC 1313 (b) including, but not limited to, guidelines for best practicable control technology currently available, best conventional pollutant control technology, best available technology economically achievable, and new source performance standards.

(3) "Impaired water" has the meaning in s. NR 151.002 (16m).

(4) "State technology based treatment standard" means a technology based treatment standard promulgated by the state that is not an ELG.

Note: The department's state statutory authority for establishing technology based guidelines and standards is found in ss. 283.11, 283.13, 283.19, and 283.21, Stats. An example of a state treatment technology based standard is a standard promulgated under s. 283.11 (3) or (4), Stats.

(5) "Total Maximum Daily Load" or "TMDL" has the meaning in s. NR 151.002 (46m).

NR 207.12 Antibacksliding. (1) GENERAL. Except as provided in this section, effluent limitations or standards in a reissued, revoked and reissued, or modified permit shall be at least as stringent as the effective effluent limitations or standards in the previous permit. If one of the exceptions

in subs. (2) to (4) is satisfied to relax or backslide a limitation, the limitation may only be made less stringent if both of the following apply:

(a) The less stringent limitation is at least as stringent as required by the effluent limitation guideline in effect at the time the permit is reissued, revoked and reissued, or modified.

(b) The less stringent limitation complies with state water quality standards, including the antidegradation requirements in subch. I.

Note: The requirements in sub. (1) is commonly referred to as the "safety clause" provision of the antibacksliding requirements in the Clean Water Act, and these requirements apply to any relaxation of any limitation. See 33 USC 1342 (o) (3).

(2) RELAXING A BEST PROFESSIONAL JUDGMENT LIMITATION. Best professional judgment limitations established under s. NR 220.21 (1) that have taken effect in a permit may be made less stringent in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are satisfied and one or more of the following apply:

(a) Material and substantial alterations or additions to the permitted facility occurred after the best professional judgment limitation was initially imposed in the permit, which justify the application of a less stringent effluent limitation,

(b) New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this paragraph does not include revised regulations, guidance, or test methods.

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(c) The department determines that technical mistakes or mistaken interpretations of law were made when the best professional judgment limitation was initially imposed in the permit.

(d) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.

(e) The permittee has received department approval for any of the following:

1. A modified technology based limitation under s. 283.13 (3), Stats.

2. An extended compliance schedule under s. 283.13 (6), Stats.

3. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

4. An alternate thermal effluent limitation under s. 283.17 (1), Stats.

(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the best professional judgment limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control

actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

Note: Subsection (2) is based on the requirement in 33 USC 1342 (o) (1).

(3) RELAXING A WATER QUALITY BASED LIMITATION OR A LIMITATION BASED ON A STATE TECHNOLOGY BASED TREATMENT STANDARD. (a) *General.* Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are met and, for an increased water quality based effluent limitation, one of the following requirements is satisfied:

1. 'Impaired waters and TMDL based limitations.' For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant, any water quality based effluent limitation that is based upon a federally approved total maximum daily load for the pollutant may be made less stringent, provided at least one of the following applies:

a. Other wasteload allocated limitations for one or more dischargers to the impaired receiving water or downstream water are also adjusted so, cumulatively, the total maximum daily load allocations will still assure the attainment of water quality standards.

b. The water quality standard ~~designated use~~ that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the U.S. environmental protection agency (EPA).

2. 'Impaired water and no federally approved TMDL developed'. For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant but where a total maximum daily load has not yet been developed and approved by the EPA for the pollutant, a water quality based effluent limitation for the pollutant may be made less stringent, provided at least one of the following applies:

a. The increased discharge will be offset through a trade or other means with another discharge of the same pollutant to the impaired water. The offset must be approved by the department and implemented prior to the increase.

b. The water quality standard that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA.

3. 'Other waters that attain the water quality standard.' For discharges of a pollutant to a surface water where neither the immediate receiving water or downstream water is an impaired water for the pollutant, any water quality based effluent limit, including a limitation based upon a total maximum daily

load or other wasteload allocation, may be made less stringent provided water quality standards, including designated uses and antidegradation, are met.

Note: The requirements in sub. (3) (a) (1) and (3) are based on the provisions of 33 USC 1313 (d) (4) and still require compliance with sub. (1), which requires antidegradation requirements be satisfied. An example of the allowance for backsliding under this subdivision is a situation where the initial water quality based limit was based on protection of a receiving water or a downstream water that did not meet the applicable water quality standard and the previously impaired water has now met or exceeded the water quality standard.

(b) *Specific exceptions to backsliding prohibition.* Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit if sub. (1) (a) and (b) are satisfied and at least one of the following applies:

1. Material and substantial alterations or additions to the permitted facility occurred after the limitation was initially imposed in the permit that justify the application of a less stringent effluent limitation.

2. New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this subdivision includes the establishment of an EPA approved total maximum daily load for the pollutant and receiving water. New information under this subdivision does not include revised regulations, guidance, or test methods. The relaxation of a water quality based effluent limitation under this subdivision that is based upon a revised wasteload allocation, a revised TMDL, or any alternative grounds for translating water quality standards into effluent limitations, is permissible only if the cumulative effect of the revised allocation results in a decrease in the amount of pollutants discharged into the receiving waters, and such revised allocations are not the result of a discharger completely or substantially eliminating its discharge of pollutants.

3. A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonable available remedy.

4. The permittee has received department approval for any of the following:

a. A modified technology based limitation under s. 283.13 (3), Stats.

b. An extended compliance schedule under s 283.13 (6), Stats.

c. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33.

d. An alternate thermal effluent limitation under s. 283.17 (1), Stats.

5. The permittee has installed the treatment facilities required to meet the effluent limitations in

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the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.

Note: These exceptions are listed in 33 USC 1342 (o) (2).

(4) RELAXING AN INTERIM EFFLUENT LIMITATION OR AN ELG-BASED LIMITATION OR STANDARD. Interim effluent limitations, standards, and conditions and ELG-based effluent limitations and standards that have taken effect in a permit may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements in sub. (1) (a) and (b) are met and both of the following are met:

(a) Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued.

(b) Changes have occurred that would constitute cause for a permit modification or revocation and reissuance under ch. NR 203.**Note:** Subsection (4) addresses the requirements in 40 CFR 122.44 (l) (1)

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