

Into the Weeds

Making Sense of Complex Water Quality Issues: Anti-backsliding and Antidegradation



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Overview

- What are anti-backsliding and antidegradation?
- When do they apply?
- Why are they so apparently difficult and complex?
- What are the current issues and challenges?

Don't Go Back There

- **The terms are similar – they apply to statutory and regulatory provisions that set forth the goal that water quality be maintained and improved**
- **Policy behind both – new impairments or relaxation of requirements can only be approved in certain specific limited contexts**
- **Concepts appear interrelated, but they are distinct regulatory requirements that must be analyzed and satisfied separately in most situations**
- **Anti-backsliding – applies to permits; based on 402(o) of CWA**
- **Antidegradation – relates to receiving waters; based on 40 CFR 131.12**

Anti-backsliding

- **The General Prohibition** – anti-backsliding prohibits the renewal, reissuance, or modification of an NPDES permit that contains effluent limitations, permit conditions, or standards that are less stringent than those established in the previous permit

- **Set forth in CWA section 402(o)** – consists of three main parts:
 - 1) A prohibition on specific forms of backsliding
 - 2) Exceptions to the prohibition
 - 3) A “safety clause” that provides and absolute limitation on backsliding

Statutory Prohibition Against Backsliding

Two specific situations where it is prohibited to relax effluent limitations:

- 1) To revise existing technology-based effluent limitations (TBEL) that was developed on a case-by-case basis using BPJ to reflect subsequently promulgated effluent guidelines that would result in less stringent effluent limitations (less frequent)
 - (BPJ – used by permit writers to establish TBELs in the absence of national standards of performance – ELGs)
- 2) Relaxation of effluent limitation based on state standards, such as water quality standards or treatment standards (more frequent)
 - But, of course, there are exceptions to both situations – and then, exceptions to the exceptions

Anti-backsliding Exceptions for *BPJ Limits*

- **Section 402(o)(2) specifies six exceptions for BPJ limits:**
 - Substantial alterations or additions to permitted facility
 - New information that was not available at the time of permit issuance
 - Technical mistakes or misinterpretations of the law in permit issuance
 - Events beyond the permittee's control and no reasonable available remedy
 - Permit modified under 40 CFR §122.62, or variance granted
 - Permittee unable to meet the permit limitations after properly operating and maintaining required treatment facilities

Anti-backsliding Exceptions for Limits Based on *State Standards*

- **Section 402(o)(2) exceptions (thus, backsliding allowed):**
 - Substantial alterations or additions to permitted facility
 - New information that was not available at the time of permit issuance
 - Events beyond the permittee's control and no reasonable available remedy
 - Permittee unable to meet the permit limitations after properly operating and maintaining required treatment facilities
- **Or Section 303(d)(4) exceptions:**
 - Waters Attaining Standards
 - Consistent with effluent guidelines and water quality standards
 - Waters Not Attaining Standards
 - Existing limited based on TMDL or WLA
 - Must assure attainment of water quality standards
 - Consistent with technology-based requirements

Anti-backsliding for *All Other Effluent Limitations, Standards or Conditions*

- **NPDES regulations [122.44(l)(1)] prevent backsliding unless:**
 - Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued
 - Changes would constitute a cause for permit modification or revocation and reissuance under 40 CFR § 122.62

- **Notes**
 - This regulation predates the anti-backsliding statute
 - Some differences between statute and regulation
 - One might think later enacted statute would supercede regulation
 - However, EPA maintains regulation remains in effect and must be followed

“Exception Safety Clause”

- **Regardless of any exception met, backsliding of effluent limitations is prohibited if the less stringent limitation:**
 - Violates applicable effluent limitation guidelines (ELGs)
 - Violates water quality standards, including antidegradation

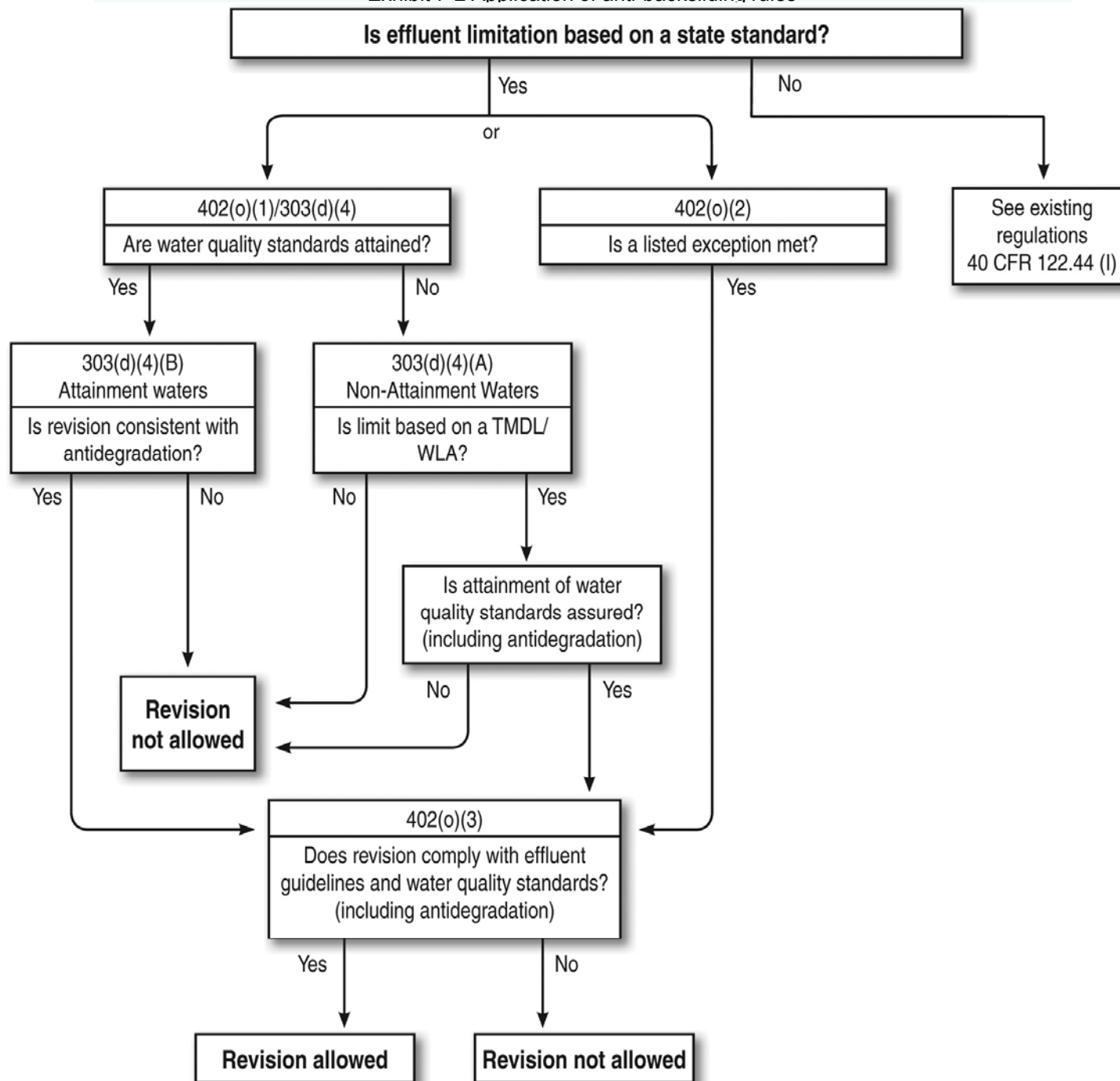
Conclusions on Anti-backsliding

- **Anti-backsliding provisions – a long and winding road with many bumps along the way**
- **To understand – must break into separate components, generally speaking here's the step-by-step approach:**
 - 1) Determine the basis of the limits, standards or conditions in the existing permit. Are they based on BPJ, ELGs, or water quality related requirements?
 - 2) Determine the basis for requesting less stringent limits, standards or conditions

Conclusions (cont.)

- 3) Identify which components of the anti-backsliding statute and/or regulations apply
- 4) Analyze how backsliding could apply, including which exceptions may be available
- 5) Consult the antidegradation rules: when limits are revised, it will apply (because a less stringent limit would allow a new or increased discharge); when standards or conditions are revised, it will not apply.

Exhibit 7-2 Application of anti-backsliding rules



Anti-backsliding – What's New?

- **EPA – “not much” but “consistent confusion – always a struggle”**
- **Trading – EPA Water Quality Trading Policy Statement –**
“EPA believes that the antibacksliding provisions of 303(d)(4) of the CWA will generally be satisfied where a point source increases its discharge through the use of credits in accordance with alternate or variable water quality based effluent limitations contained in an NPDES permit, in a manner consistent with provisions for trading under a TMDL, or consistent with the provisions for pre-TMDL trading including in a watershed plan”
- **Politics – when parties shift and States decide to relax water quality standards – anti-backsliding may kick in**

Antidegradation



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Anti-degradation: Statutory and Regulatory Background

- **CWA 303(c) requires each State to establish water quality standards (WQS) for all of its waterbodies**
- **Federal regulations at 40 CFR 131.6 define the minimum components for WQS's – the required three elements:**
 - 1) Designated uses
 - 2) Water quality criteria
 - 3) A statewide anti-degradation policy

Anti-degradation: Overall Purpose, Policy and Application

What is the Policy?

- **Furtheres overall goal of the Clean Water Act – keep improving water quality, no going backwards**
 - The requirement for the policy is not originally statutory, but regulatory

The Application

- **Applies to any NPDES permit action that is anticipated to result in a new or increased loading of pollutants to the surface waters of a State**
 - Think “growth”
 - Requires the State to affirmatively find that uses are protected with each permit issuance

The Anti-degradation Policy

- **States are required to adopt three-tiered statewide anti-degradation policies and methods that shall, at a minimum:**
 - Tier 1 – protect existing uses and existing in-stream water quality. (40 CFR 131.12(a)(1))
 - Tier 2 – where the water quality is better than the level necessary to support uses (high quality waters), degradation is not allowed unless the state finds that “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” Public participation is required. (40 CFR 131.12(a)(2))
 - Tier 3 – where high quality waters constitute an outstanding National resource (such as waters of national and state parks) that water quality shall be protected and maintained. (40 CFR 131.12(a)(3))

Notes from the EPA Handbook

- States may adopt more stringent policies
- Some states have adopted an additional tier – Tier 2 ½ - EPA accepts the additional tier because it is more stringent and therefore permissible under section 510 of the CWA
- State antidegradation policies and implementation procedures are subject to review by the Regional Administrator

Notes from the EPA Handbook

- **Tier 2 High Quality Waters**
 - All parameters need to be better than the State's ambient criteria for the water to be deemed a high quality water
 - Antidegradation should be applied on a pollutant-by-pollutant basis and a water-body-by water-body basis
 - “Antidegradation is not a ‘no growth’ rule and was never designed or intended to be such”
 - “The burden of demonstration on the individual proposing an activity to lower water quality will be high”
 - Does not mandate that States establish controls on nonpoint sources
 - leaves this to the States

Pennsylvania Antidegradation Checklist

Procedure No. 14
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Antidegradation Demonstration Checklist

Permit Processor: (% pmt[signature_name] %) Designated Name: (% info[designated_name] %)

Permit No.: (% nondate[permit_no] %) Permit Action: (% type[dm_memo_action2] %)

Permit ID.v: (% type_case[permit_id] %)(% nondate[version] %) Priority: (% type[priority_cd] %)

1. Application is for a: ☐ New Use ☐ Increased Discharge
2. Are there existing uses which require greater protection than the designated uses?
☐ No ☐ Yes – Provide explanation: _____

3. Does the receiving water meet Water Quality Standards?
☐ Yes ☐ No – Provide explanation as to what parameter is in non-attainment: _____

4. Is the proposed discharge directed to an Outstanding State Resource Water (OSRW)?
☐ No ☐ Yes – If the proposed discharge cannot meet water quality standards, propose denial of application. Provide explanation: _____

5. Is applicant exempt from Rule 98 Requirements?
☐ No ☐ Yes – Provide explanation, and then skip to line 13: _____

6. Identify the social or economic development and benefits to the area that are addressed in the submitted antidegradation statement (check all that apply).
 - ☐ (I) Employment Increases
 - ☐ (II) Production Level Increases
 - ☐ (III) Employment Reduction Avoidance
 - ☐ (IV) Efficiency Increases
 - ☐ (V) Industrial, Commercial, or Residential Growth
 - ☐ (VI) Environmental or Public Health Problem Corrections
 - ☐ (VII) Economic or Social Benefits to the Community
 - ☐ Other – Provide explanation: _____

Did the applicant provide a thorough and specific identification of benefits that would be foregone if the lowering of water quality was not allowed? ☐ Yes ☐ No – Inform the applicant that additional information will be needed, or the application will be considered incomplete.

Does the information submitted by the applicant appear to support the notion that the proposed discharge will provide important social or economic benefits? ☐ Yes ☐ No – Provide an explanation as to why the submitted information is contradictory to the proposed demonstration: _____

7. Is there a potential for lowering of the water quality associated with a thermal discharge?
☐ No ☐ Yes – Provide explanation: _____

8. Does the application indicate the presence of any Bioaccumulative Chemicals of Concern (BCC)?

Pennsylvania Antidegradation Checklist

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☐ No ☐ Yes – Provide explanation as to what implications Rule 323.1098 may have on this proposed discharge with regards to the BCC: _____

9. Did the applicant provide an explanation as to why the proposed discharge is necessary over other alternatives?

☐ No – Inform applicant that alternatives need to be addressed.

☐ Yes – Provide explanation: _____

10. Is connection to an existing municipal treatment system a viable alternative to a surface water discharge (i.e., distance, available capacity)?

☐ Yes – Advise applicant to connect to the existing treatment system.

☐ No – Provide explanation: _____

11. Is the application for a privately-owned treatment system serving the public for the treatment of domestic wastewater from two or more residences? ☐ No, proceed to #12 ☐ Yes

If Yes – Has the applicant provided a resolution for continuation of service from the local unit of government (LUG) or have alternate means to ensure proper operation and maintenance of the treatment system been established?

☐ Yes – If alternate means, explain: _____

☐ No – Contact LUG and provide brief explanation of circumstances behind the decision: _____

12. Will the proposed discharge cause substantial impact on certain designated uses, such as important spawning areas or high quality inland lakes, even though the designated uses continue to be fully supported?

☐ No ☐ Yes – Provide an explanation as to which uses will be impacted. Discuss the situation with your supervisor and document what decisions were made: _____

13. Were any comments received from the public regarding Antidegradation?

PN date: _____

☐ No

☐ Yes – Provide brief description of comments: _____

14. Does the submitted demonstration satisfy the requirements of Rule 323.1098?

☐ Yes

☐ No – Provide explanation: _____

[Sign and Submit with Decision Maker Packet]

Antidegradation Demonstration reviewed by:

(% pmt[signature_name]_%)

Date

Permit Processor

[Sign Prior to Issuance or Denial]

Antidegradation Demonstration approved by:

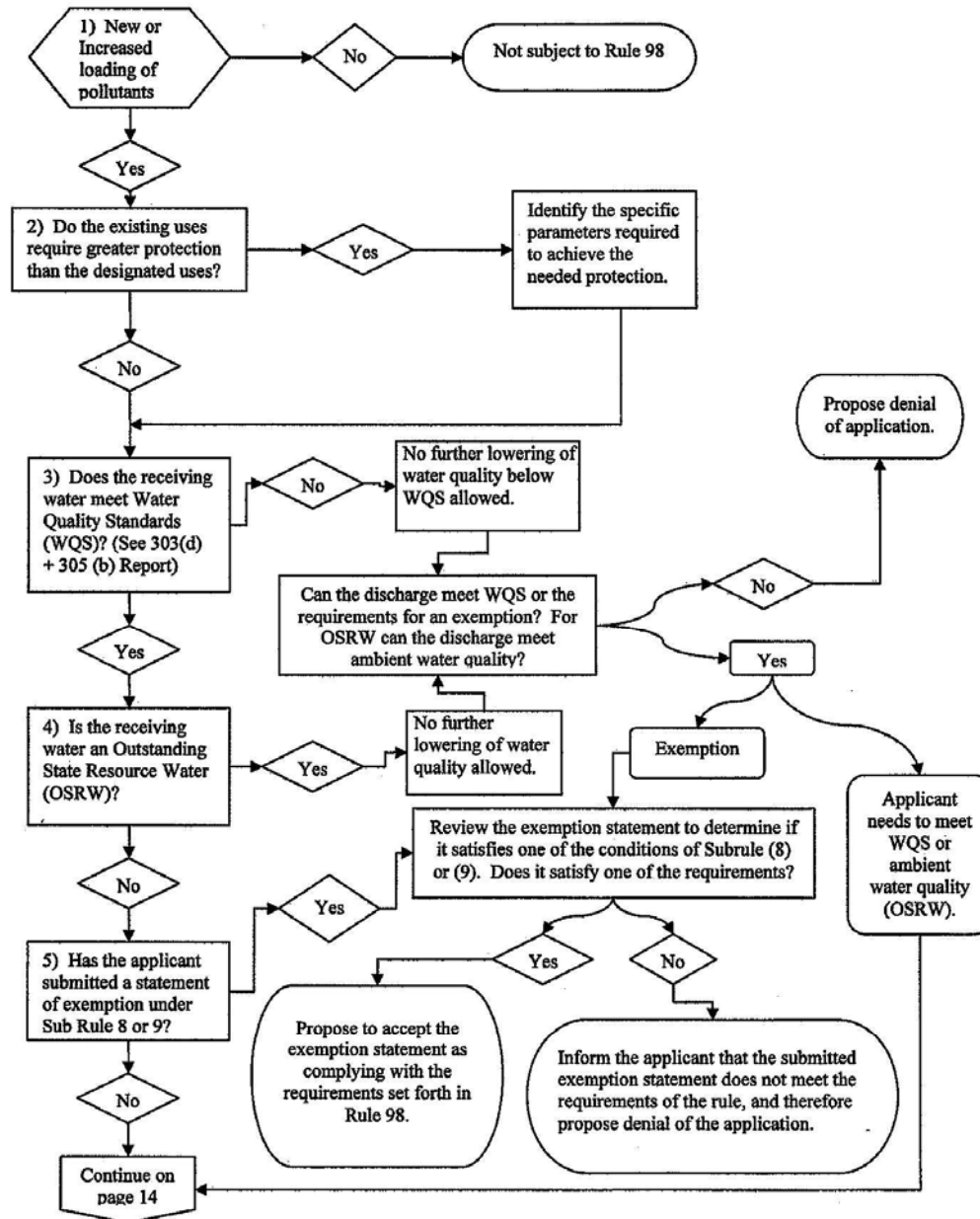
William Creal, Chief
Permits Section

Date

Pennsylvania Flow Chart

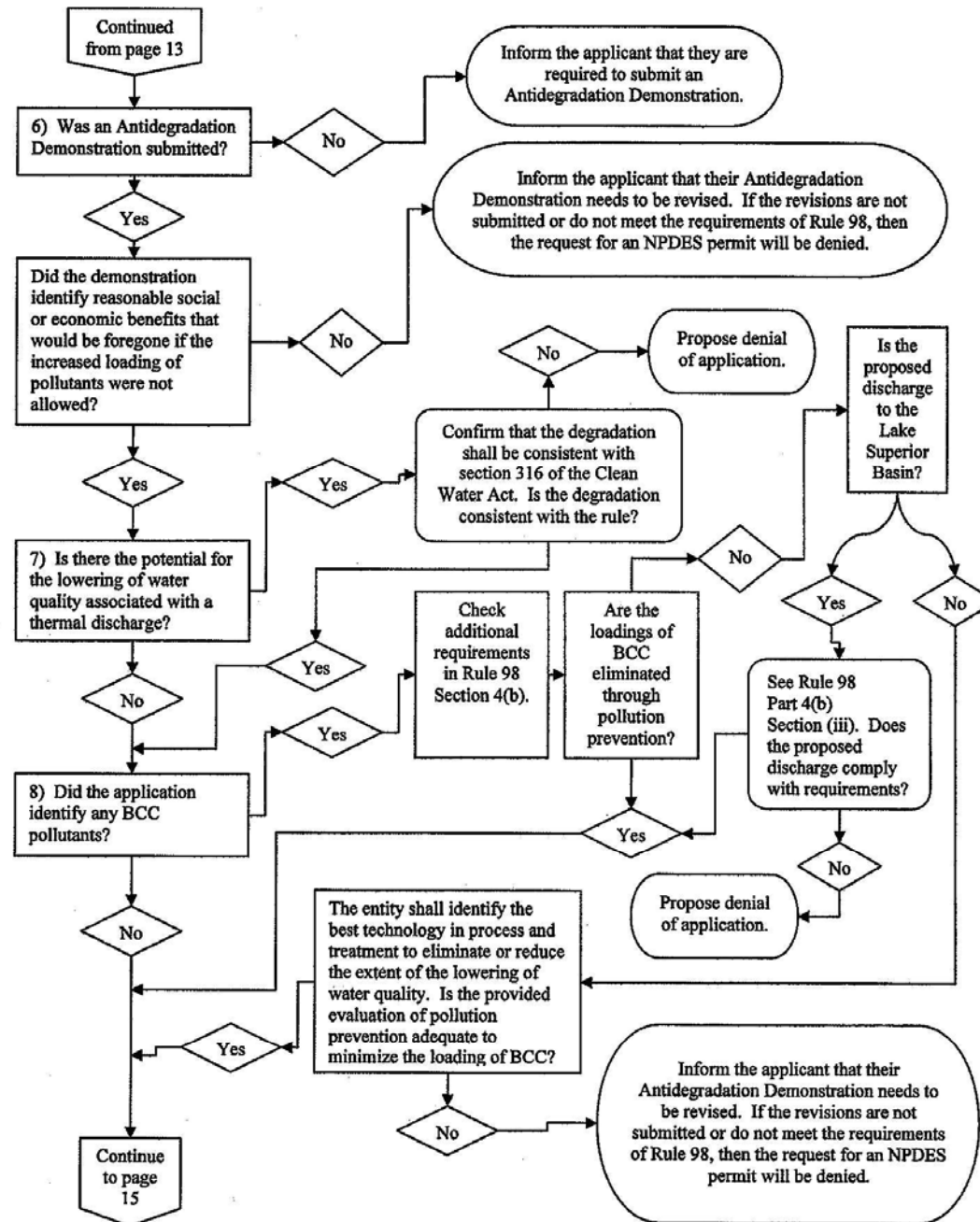
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Antidegradation Demonstration Procedural Flow Chart



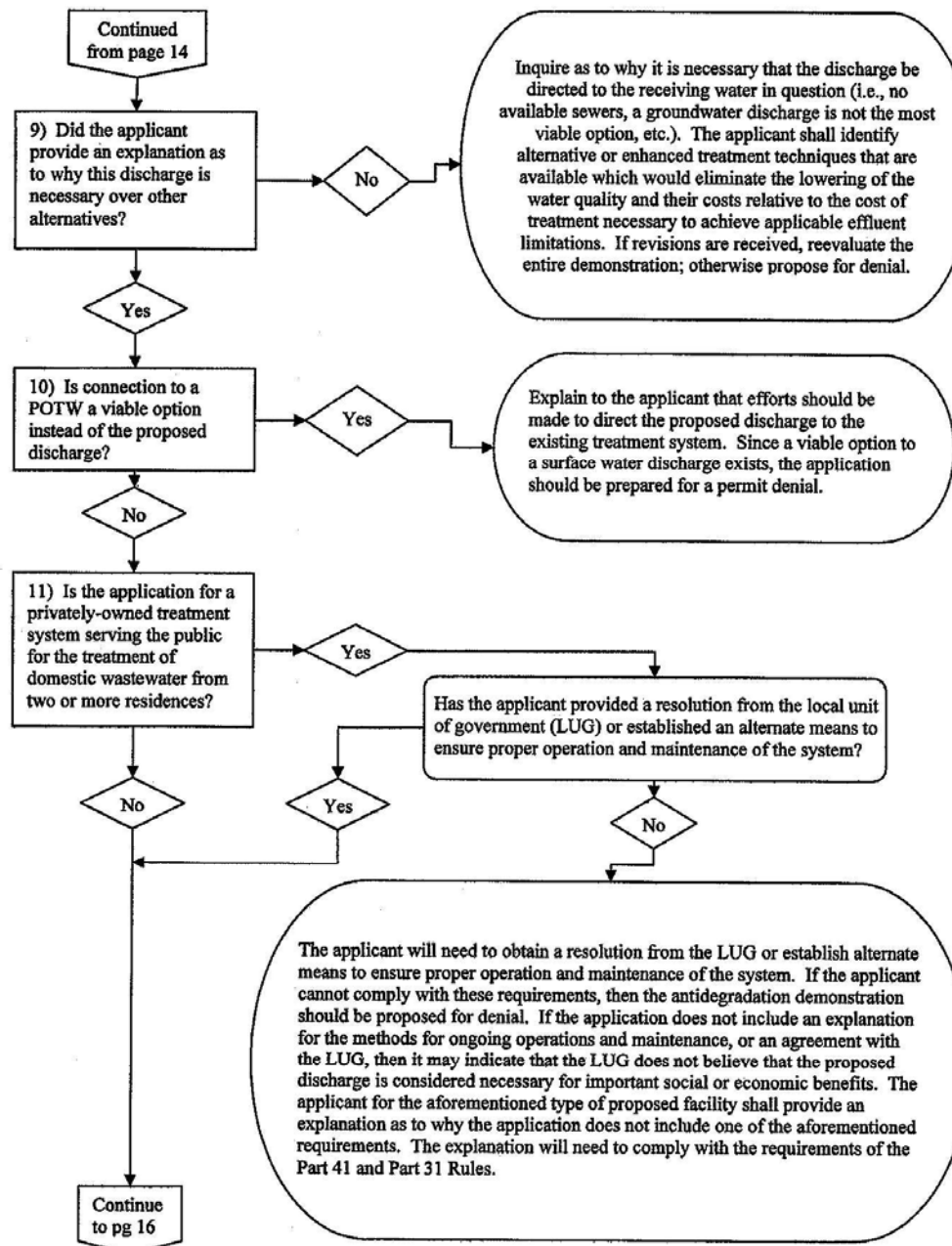
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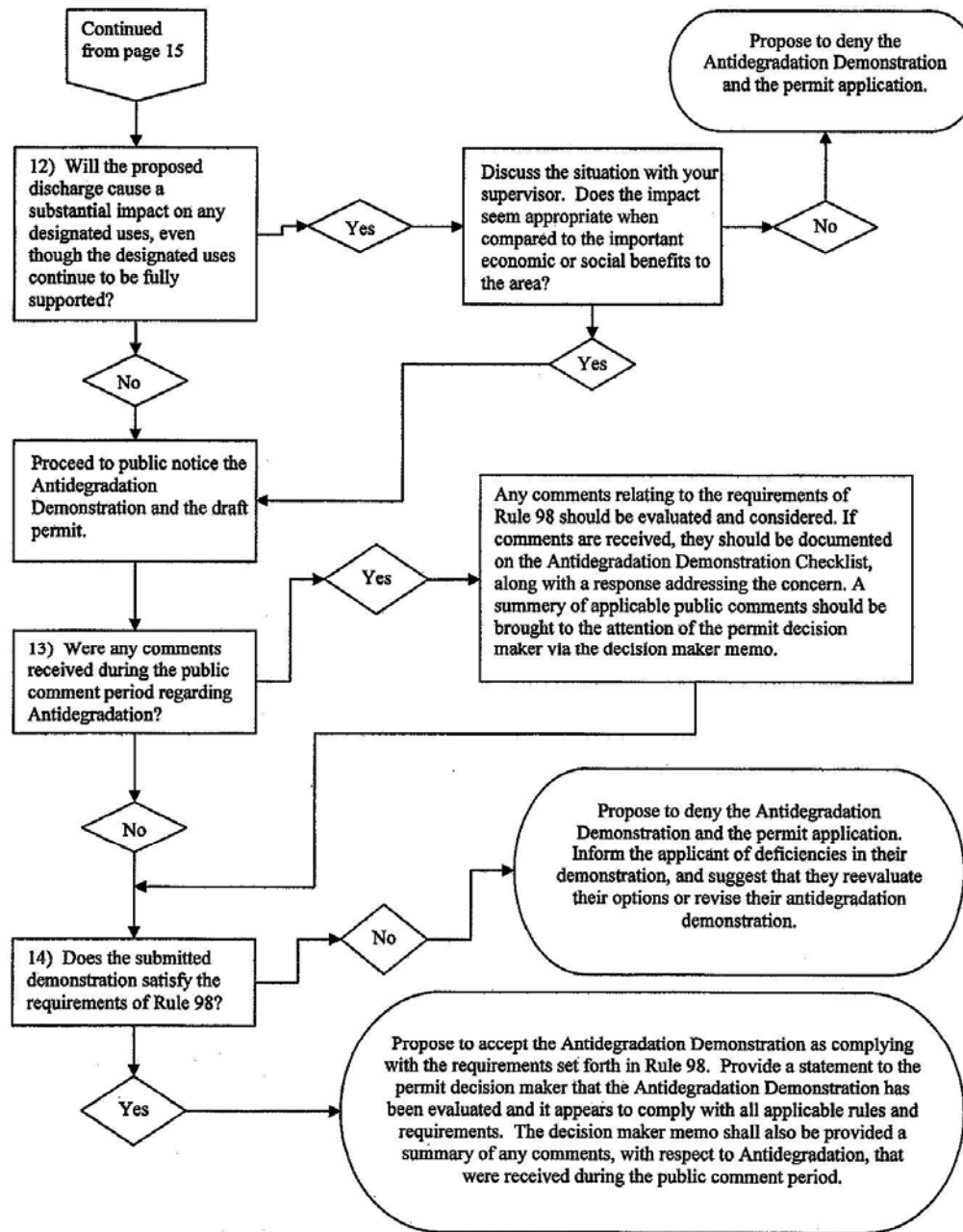
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Questions?

Thank you



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