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**IMPLEMENTATION PROCEDURES FOR THE ANTIDEGRADATION PROVISIONS OF THE MASSACHUSETTS SURFACE WATER QUALITY STANDARDS, 314 CMR 4.00**

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## I. Purpose and Applicability

**Purpose –**The United States Environmental Protection Agency's (EPA) regulation, 40 CFR § 131.12, requires states to develop and adopt antidegradation policy and methods for implementing such policy. Massachusetts' antidegradation "policy" is set forth in the Massachusetts Surface Water Quality Standards, 314 CMR 4.00. This document explains how the antidegradation provisions of the Massachusetts Surface Water Quality Standards (WQS or Standards) are implemented.

**Applicability –** These procedures apply to all new and increased point source discharges to surface waters of the Commonwealth requiring a permit under 314 CMR 3.00. These discharges include, but are not limited to:

1. all point source discharges of pollutants to surface waters from publicly and privately owned treatment works, including any bypasses or overflows from such works, and from manufacturing, commercial and mining activities and processes, whether treated or untreated; and

2. Concentrated Aquatic Animal Production Facilities, discharges into Aquaculture Projects, Silvicultural Point Sources, Rock Crushing and Gravel Washing Facilities, Log Sorting and Log Storage Facilities and Concentrated Animal Feeding Operations, all as defined in 314 CMR 3.00.

Additionally, these procedures apply to new and increased remedial discharges to surface waters conducted pursuant to M.G.L. 21E, whether or not exempt from the need for a surface water discharge permit under 314 CMR 3.00.[1] Finally, as explained below, in certain circumstances, these procedures apply to existing discharges undergoing the permit renewal process.

### Tiered review

The federal regulations applicable to state water quality standards require state standards to contain at least three tiers of antidegradation review. Massachusetts also has adopted a Tier 2 1/2 review to protect its outstanding resource waters. The WQS, therefore, contain four tiers of review – Tier 1 protects existing uses in all waters; Tier 2 protects the quality of high quality waters, with limited degradation allowed where certain requirements are met; Tier 2 1/2 protects outstanding resource waters and prohibits new or increased discharges, except for the express

[1] The WQS afford the Department the authority to exempt particular remedial discharges from an antidegradation authorization. See 314 CMR 4.04(5)(d).

purpose of maintaining or enhancing the resource for its designated use; and Tier 3 requires the quality of special resource waters to be maintained and protected, except where discharges result in temporary and short term changes in water quality, but still protect uses.

| Category of water | Tier of review |
|---|---|
| • all waters | Tier 1 |
| • high quality waters (HQWs) | Tier 2 |
| • outstanding resource waters (ORWs) | Tier 2 ½ |
| • special resource waters (SRWs) | Tier 3 |

**II. Technology Based Review – minimum requirements for all discharges**

All discharges requiring a permit must be provided with a level of treatment equal to or exceeding the requirements in 314 CMR 3.00 for technology based effluent limitations. As provided in 314 CMR 3.00, minimum technology based treatment requirements for publicly owned treatment works (POTWs) consist of secondary treatment and applicable limitations and standards promulgated by EPA. The technology based review for POTWs in the Clean Water State Revolving Fund (SRF) process is accomplished through the Comprehensive Wastewater Management Plan review. Title II of the Federal Clean Water Act sets requirements for this process, which include, but are not limited to, the investigation of alternatives, recycling and reclamation of wastewater and consistency with a plan or plan amendment approved under Section 208 or 303(e) of the Federal Clean Water Act. The technology based review for POTWs subject to the SRF process generally is satisfied upon completion of the Comprehensive Wastewater Management Plan or Project Evaluation Report, public participation and Department approval. The technology based review for POTWs that are not in the SFR process is conducted through the NPDES permitting process.

The technology based review for non POTWs likewise is conducted during the NPDES permitting process and technology based requirements are applied by EPA when the NPDES permit is drafted. EPA has promulgated categorical standards and limitations for discharges from various types of industries. Existing industrial discharges are required to achieve the best conventional pollutant control technology for conventional pollutants and the best available technology economically achievable for nonconventional and toxic pollutants. Certain new industrial discharges are required to comply with new source performance standards based on best available demonstrated control technology. Effluent limitations for parameters or industries not covered by the categorical standards and limitations are established on a case-by-case basis, based on best professional judgment (BPJ). The technology review is complete when the Department certifies the draft permit or modifies it using BPJ in accordance with 314 CMR 3.00.

**III. Determine Applicability of Specific Antidegradation Designations**

Because the WQS designate high quality waters (HQWs), outstanding resource waters (ORWs) and special resource waters (SRWs) for additional protection, it is necessary to determine if any of these designations apply.

1. **High quality waters** – include waters whose quality exceeds, i.e. is better than, minimum levels necessary to support the national goal uses of propagation of fish, shellfish and wildlife and recreation in and on the water ("fishable/swimmable"), regardless of their Class or designated uses. The national goal uses correspond to the Class B and Class SB designations and criteria in the WQS. Class A and SA waters that exceed (that is, have quality better than) any minimum criteria for their Class also are high quality waters for those particular criteria. The determination that a water is high quality is made in relation to the particular pollutants in the discharge under consideration. A water need not be better than all criteria to be considered high quality. Rather, a water is considered high quality with respect to any individual parameter that exceeds minimum criteria for its Class and for which the applicant proposes a discharge of pollutants.

   In order to determine whether a water is high quality, the existing quality of the water is determined for each pollutant of concern. For each pollutant that is better than the minimum criteria applicable to the water's Class, the water is considered high quality and Tier 2 review is required. The existing quality of a waterbody is the natural background quality and any permitted and unpermitted discharges under the most severe hydrologic conditions at which the water quality criteria apply. These hydrologic conditions are delineated in 314 CMR 4.03(3).

**Other high quality waters** – include "low flow waters and waters whose character cannot be adequately described or protected by traditional criteria." 314 CMR 4.04(2). These latter waters include wetlands bordering non ORW surface waters. (See 314 CMR 4.06(2).) Case by case determinations, made as revisions to the WQS, may include other waters as well.

2. **Outstanding resource waters** - constitute an outstanding resource as determined by their outstanding socioeconomic, recreational, ecological or aesthetic value. The WQS provide that all Class A waters (waters designated as a public water supply) and their tributaries are ORWs (see 314 CMR 4.04(3) and 314 CMR 4.05(3)). Other ORWs may be designated in the WQS tables on a case-by-case basis and include, but are not limited to, certain waters within certain Areas of Critical Environmental Concern. Additionally, the WQS provide that wetlands bordering Class A ORWs and state certified vernal pools are ORWs. Wetlands bordering other ORWS are ORWs "to the boundary of the defined area." (See 314 CMR 4.06.)

3. **Special resource waters** – are waters of exceptional significance, as determined by the Department, and may include, but are not limited to, waters in national or state parks and wildlife refuges. The Department has not yet designated any waters as special resource waters.

As noted above, discharges to HQWs undergo Tier 2 review, discharges to ORWs undergo Tier 2 1/2 review and discharges to SRWs undergo Tier 3 review. For purposes of antidegradation review, discharges to waters that both do not have quality better than necessary to support national goal uses, that is, waters that are not high quality, and do not have a specific antidegradation designation in the WQS (i.e., HQW, ORW or SRW), may be permitted after Tier 1 review.

**IV. Tier 1 – Protection of Existing Uses - 314 CMR 4.04(1)**

The WQS provide that in all cases, existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected. This review, which applies to new and increased discharges as well as discharges undergoing the permit renewal process, proceeds in three steps:

1. **Identify existing uses** – Existing uses are those designated uses, and any other uses that do not impair the designated uses, that actually are attained in a waterbody on or after November 28, 1975. The Department biennially assesses attainment of designated uses and publishes the results in its Summary of Water Quality (Section 305b Report, part of the Massachusetts Integrated List of Waters (Section 305b/303d) Report. The Department published its first assessment summary in 1977. That information provides some baseline information for purposes of reviewing existing uses.

   Additional existing uses may be identified from information gathered during any Massachusetts Environmental Policy Act (MEPA) review, intergovernmental coordination and public participation conducted in connection relative to the discharge. These other existing uses are protected to the extent that they are consistent with designated uses. Federally listed endangered and threatened species habitat is an example of an existing use that could be identified during the review process. Assimilation and transport of pollutants are not considered existing uses.

2. **Determine quality impacts** – Impacts of a discharge on existing uses can result from a lowering of water quality or habitat alteration. Lowering of water quality can be predicted by mathematical modeling of the waterbody. Models require quality and quantity information on both the waterbody and the discharge. This information is used to predict impacts at the most severe hydrologic conditions at which water quality criteria apply. (314 CMR 4.03(3) sets out these hydrologic conditions.) The Department conducts some mathematical modeling as part of its continuing planning process. Where applicable models do not exist or need updating, the Department may require the applicant to supply the necessary information or perform the analysis to determine impacts. The impact analysis, however, is not restricted to mathematical modeling. Based on BPJ, the Department will accept the use of other types of analyses as well.

3. **Compare with criteria** – Predicted impacts of a discharge are compared with the water quality criteria in 314 CMR 4.00, including any applicable site specific criteria, to determine whether existing uses would be protected. The WQS contain minimum water quality criteria specific to each water class, additional

minimum criteria applicable to all waters as well as site specific criteria that are applicable to particular waters. In a high quality water, water of a quality better than the minimum criteria may be necessary to protect an existing use.

The WQS contain narrative as well as numerical criteria. To apply narrative criteria, the Department generally uses the weight of evidence approach, based on information published by EPA, Department policies and guidance and site specific information. (The weight of evidence approach is addressed in various EPA documents, which, along with water quality standards information, are available on EPA's website at www.epa.gov/waterscience.)

4. If the Department determines that existing uses would not be protected, then the review process stops and the Department proceeds with permit denial in accordance with the procedures in 314 CMR 2.00. Applicable EPA permit procedures also apply. Where the Department determines that existing uses will be protected, the review process for a discharge proceeds. With respect to the review of an application for permit renewal, to the extent still relevant, the Department may rely on information submitted and determinations made in connection with previously issued permit(s) for the discharge. Prior to development of a TMDL, renewal of a permit for a discharge to an impaired water may not allow the discharger to increase its loading of the same pollutant that is causing the impairment and, at a minimum, existing treatment must be optimized. Once a TMDL is developed, permits and permit renewals are based on the allocations in the TMDL.

Where a water is not categorized in the WQS and the Department does not have sufficient information to categorize it, a permit applicant may seek a Tier 1 designation of the proposed receiving water relative to the particular discharge by submitting sufficient water quality data to demonstrate that the water is not high quality for any parameter to be affected by the proposed discharge. Similarly, pursuant to its authority in 314 CMR 3.10(1), where the Department does not have sufficient information to categorize a waterbody, as part of the application process, the Department may require an applicant to obtain sufficient water quality data to demonstrate the water quality for any parameter to be affected by the proposed discharge. Absent information indicating that a particular water is not high quality, as stated in the WQS (314 CMR 4.06(4)), the water is presumed high quality and Tier 2 review would apply. During the review process, should water quality data demonstrate that the water is not high quality, then Tier 1 review would apply.

## V. Tier 2 – Protection of High Quality Waters - 314 CMR 4.04(2)

HQWs are protected and maintained for their existing level of quality. The Department may permit new or increased discharges to these waters only where: 1) the Department has determined that the discharge is insignificant, or 2) pursuant to 314 CMR 4.04(5), an authorization is granted to allow a lowering of water quality.

1. **Determination of insignificance** – 314 CMR 4.04(2) provides, in part, that the Department may determine that a new or increased discharge is insignificant because it does not have the potential to impair any existing or designated use and cause any significant lowering of water quality.

   Insignificant discharges - Except where the Department determines that in order to adequately protect water quality a particular discharge of the type described below requires an antidegradation authorization under 314 CMR 4.04(5), the Department has determined that the following discharges are insignificant:

   a) Temporary discharges - a temporary discharge where, after cessation of the discharge, water quality will be at least equal to that which existed prior to commencement of the discharge. In order for a discharge to be considered temporary, the discharge should occur over weeks or months, not years; and

   b) New or increased loadings of a pollutant that use < 10% of the unused loading capacity of a receiving water - a new or increased discharge of a pollutant that would use less than 10% of the available assimilative capacity of the receiving water for that pollutant.

   Repeated/multiple insignificant discharges - The Department will consider the cumulative effect of repeated or multiple insignificant discharges on receiving water quality. Each new or increased discharge's effect on water quality will be reviewed in context with all other discharges. A new or increased discharge that would otherwise

be considered insignificant may be deemed significant if the effect of it, together with any previously approved discharges, is expected to result in a significant lowering of water quality. In such cases, an antidegradation authorization would be required.

2. **Authorizations - 314 CMR 4.04(5)** - Where the Department has not determined that a proposed discharge to a HQW is insignificant, the Department may issue an authorization for the discharge, provided that the applicant meets the conditions in 314 CMR 4.04(5)(a)1 through 4, discussed below.

   a) Economic or social importance, 314 CMR 4.04(5)(a)1. The applicant must demonstrate that the "discharge is necessary to accommodate important economic or social development in the area in which the waters are located". The applicant first must demonstrate that the new or increased discharge is linked to important social or economic development. Then the applicant must demonstrate that the discharge is necessary. The word "important" is relative to the area in which the waters are located. Important social or economic development refers to development that clearly serves a valid public purpose.

   A discharge may be considered necessary to accommodate economic or social development if it is needed for:

   i) new production by a new discharger;

   ii) production that cannot be accommodated by the current treatment facility;

   iii) increased loading to a POTW, as a result of community growth, that cannot be accommodated by the current treatment facility; or

   iv) other circumstances the Department deems analogous to i) through iii).

   When asserting that current facilities cannot accommodate production or growth, the applicant must demonstrate that this is due to increased loading to the facility and not to inadequate treatment, operation or maintenance. The Department, however, may not authorize a lowering of water quality based upon social or economic importance if there is a compelling environmental reason not to do so. The Department will use information obtained during applicable MEPA review of a project to help formulate its decision. In some cases, the benefits associated with high levels of water quality may outweigh the benefits associated with important economic or social development.

   **POTWs -** If the proposed discharge is from a POTW subject to the SRF process, is in accordance with a Comprehensive Wastewater Management Plan or Project Evaluation Report, has been subject to public participation and is approved by the Department, then it is presumed that the requirement of economic or social importance has been met.

   **Non POTWs and POTWS not in the SRF process** - Determinations for these discharges are case specific. Applicants must demonstrate that the discharge is necessary for an activity that benefits the environment, area economy, public health, safety or welfare. The Department may require supplemental documentation from the affected local government(s) or other affected entities that the proposed lowering of water quality is necessary for important economic or social development.

   b) Alternatives analysis -314 CMR 4.04(5)(a)2. The applicant also must demonstrate that "no less damaging alternative site for the activity, source for disposal, or method of elimination of the discharge is reasonably available or feasible". This demonstration must include an analysis of the reuse and conservation of wastewater, relocation of the activity, land application of wastewater or use of closed systems, alternative methods of production or operation, improved process controls, improved wastewater treatment facility operation, alternative methods of treatment and treatment beyond applicable technology requirements of the Federal Clean Water Act. Technologically feasible alternatives must be compared with the potential environmental degradation.

c) Mitigation of the discharge - 314 CMR 4.04(5)(a)3. Additionally, the applicant must demonstrate "to the maximum extent feasible that the discharge and the activity are designed and conducted to minimize adverse impacts on water quality, including the implementation of source reduction practices". All reasonable efforts to minimize the environmental impacts of the proposed discharge must be made. Emphasis is placed on source reduction. This includes investigation of changes in plant production processes or raw materials that reduce, avoid or eliminate the use of pollutants, including, but not limited to, nutrients, toxics and hazardous substances, or generation of pollution by-product per unit product, so as to reduce overall risks to the environment. Compliance with M.G.L. Ch. 21I (the Toxics Use Reduction Act) is required.

d) Compliance with criteria - 314 CMR 4.04(5)(a)4. The applicant finally must demonstrate that the "discharge will not impair existing water uses nor result in a level of water quality less than that specified for the Class". This requirement ensures Tier 1 review for discharges requiring an antidegradation authorization.

3. **Other factors applicable to discharges to HQWs** - 40 CFR § 131.12 provides, in part, that prior to issuing an antidegradation authorization for a discharge to a high quality water, the State shall assure that "there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control."

   Relative to BMPs for nonpoint sources, EPA has explained in its *Water Quality Standards Handbook* that this federal requirement means that the state must assure that all cost effective and reasonable BMPs *required* by the particular state are being implemented for nonpoint sources of the pollutants at issue.

   **Existing discharges to HQWs that are subject to permit renewal or modification -** The Department may determine that circumstances warrant Tier 2 review and require an existing discharger that has applied for permit renewal to undergo Tier 2 review. Circumstances that may warrant such review include, but are not limited to, cumulative degradation resulting from multiple discharges or degradation by the discharger's noncompliance with its permit. Evidence of newly detected impairment attributable to a discharge could constitute grounds for permit modification and warrant Tier 2 review.

## VI. Tier 2 1/2 - Protection of Outstanding Resource Waters - 314 CMR 314 CMR 4.04(3)

1. **New or increased discharges to ORWs** - may be allowed only where both the discharge is "determined by the Department to be for the express purpose and intent of maintaining or enhancing the resource for its designated use" and an authorization is granted pursuant to 314 CMR 4.04(5). The WQS further provide that the Department's determination to allow a new or increased discharge for the purpose of maintaining or enhancing a resource for its designated use must be made in agreement with the federal, state, local or private entity recognized by the Department as having direct control of the water resource or the governing water use.

   Examples of discharges that could qualify as being for the purpose of maintaining or enhancing a resource for its designated use include, but are not limited to: discharges necessary to maintain a public water supply, such as a public supply treatment plant effluent; chemical application to a waterbody necessary to control weeds or algae to maintain designated uses; and discharges necessary to provide access to or maintain these areas (e.g. runoff from roads, parking lots or park buildings, or from reservoir maintenance activities).

   Following the Department's determination, made in agreement with the appropriate entity, that a new or increased discharge to an ORW is for the express purpose of enhancing or maintaining the water for its designated use, the authorization process of 314 CMR 4.04(5) proceeds, which is the same as that for Tier 2, except the condition of economic or social importance (314 CMR 4.04(5)(a)1) does not apply. It generally is implicit that any discharge and resulting degradation that would be allowable under 314 CMR 4.04(3) would be necessary to accommodate important economic or social development in the area.

2. **Existing discharges to ORWs** - The regulations provide that "[a]ny person having an existing discharge to these waters shall cease said discharge and connect to a publicly owned treatment works (POTW) unless it

is shown by said person that such a connection is not reasonably available or feasible. Existing discharges not connected to a POTW shall be provided with the highest and best practical method of waste treatment determined by the Department as necessary to maintain the outstanding resource." The purpose of this requirement is to minimize any degradation and to ensure that water quality remains as close to natural background conditions as feasible. In connection with an application for permit renewal, at its discretion, the Department may require an existing discharge to an ORW to undergo the authorization process in 314 CMR 4.04. This could be appropriate, for example, where new methods of reuse and conservation of wastewater, alternative methods of production or operation, improved process controls, or improved wastewater treatment facility operation may be available.

**VII. Tier 3 – Protection of Special Resource Waters – 314 CMR 4.04(4)**

Special resource waters are provided the highest level of antidegradation protection; their quality "shall be maintained and protected." These waters may include, but are not limited to, waters of exceptional ecological significance. Although the quality of these waters might not be especially high, based on traditional criteria, they are unique, important or ecologically sensitive.

1. **New or increased discharges to SRWs**, and to tributaries to SRWs that would result in lower water quality in the SRW, are prohibited, except where both: the discharge results in only temporary and short term changes in the quality of the SRW, does not permanently degrade water quality or result in quality lower than necessary to protect existing uses; and an authorization is granted pursuant to 314 CMR 4.04(5).

   Generally, as explained in EPA's guidance, "temporary" and "short-term" mean weeks or months, not years. When temporary or short-term degradation is allowed, all practical means of minimizing the degradation must be implemented. Further, the degradation must be limited to the shortest time possible. In its *Water Quality Standards Handbook*, EPA has presented the following, among other, examples of allowable temporary lowering of water quality under this Tier of protection: in a national park, enlargement and upgrade of a WWTF that discharges to a SRW to provide higher levels of treatment - the water quality enhancing activity would be allowed if there is only a temporary increase in sediment and/or organic loading, which would occur during the construction phase only; and b) replacement of a septic system at a campground located immediately adjacent to a SRW – construction may be allowed if BMPs are followed to minimize disturbance of water quality and aquatic habitat.

   Once the Department has determined that a proposed discharge to a SRW will result in only temporary and short term changes in the quality of the SRW, will not permanently degrade water quality or result in quality lower than necessary to protect existing uses, then the authorization process in 314 CMR 4.04(5) is applied. The process to authorize a discharge to an SRW under 314 CMR 4.04(5) is the same as that for an authorization to discharge to an ORW (Tier 2 1/2), as discussed above.

2. **Existing discharges to SRWs** - the Department may reissue a permit for an existing discharge to an SRW if the discharge had a permit at the time the waterbody was designated an SRW, provided that there is no increase in the discharge volume, concentration and loading above the permitted amount; or provided that the discharge meets the requirements applicable to a new or increased discharge to a SRW. Additionally, in connection with an application for permit renewal, as is the case with existing discharges to ORWs, the Department may require an existing discharger to a SRW to undergo the authorization process in 314 CMR 4.04.

**VIII. Exemptions from certain authorization requirements**

The WQS provide that the Department may exempt a particular discharge from the antidegradation authorization provisions, 314 CMR 4.04(5), provided that the discharge is either: a) a discharge exempt from the permit requirement by 314 CMR 3.05(4) (discharge necessary to abate an imminent hazard); or b) a new or increased discharge specifically required as part of a Department enforcement order in order to improve existing water quality or prevent existing water quality from deteriorating. For purposes of these procedures, exempted discharges would not constitute a lowering of water quality. Regardless of whether the Department exempts such a discharge from the need for an antidegradation authorization, as noted above, in all cases, existing uses and the level of water quality necessary to protect existing uses must be maintained and protected. This requirement may not be avoided even for an exempted discharge.

**IX. Public Participation**

With respect to public review, the antidegradation provisions of the WQS state: "Where an authorization is at issue, the Department shall circulate a public notice in accordance with 314 CMR 2.06. Said notice shall state an authorization is under consideration by the Department, and indicate the Department's tentative determination." See 314 CMR 4.04. Certain aspects of the public review regulations applicable to surface water discharge permitting in 314 CMR 2.00 are delineated below.

**314 CMR 2.06: Public Notice** - requires public notice of the preparation of a draft permit and a tentative determination to issue a permit.

**314 CMR 2.05(2)** - requires a fact sheet "for every draft …general surface water discharge permit … Type I and Type II NPDES [2]permit … and for every draft permit which the Department finds is the subject of widespread public interest or raises major issues."

**314 CMR 2.05(3) -** specifies the content of the fact sheet.

The public notice provisions also address how and to whom notice must be given (see **314 CMR 2.06(3)**) as well as the content of the public notice (see **314 CMR 2.06(4)**). As noted above, the antidegradation provisions require that the public notice state that an authorization is under consideration by the Department and indicate the Department's tentative determination. Although not explicitly required by the regulations, where the Department has tentatively determined that a discharge is insignificant, this also should be stated in the public notice.

**314 CMR 2.07 -** addresses public hearing requirements.

**Massachusetts Environmental Policy Act (MEPA) regulations** - Under 301 CMR 11.00 (the MEPA regulations), as in effect on the date of this document, a "[n]ew discharge or Expansion in discharge of any amount of sewage, industrial waste water or untreated stormwater directly to an outstanding resource water" is a review threshold that requires an ENF and an EIR. (See 301 CMR 11.03(5)(a)5.) MEPA thresholds also apply to certain other types of surface water discharges. Accordingly, for some surface water discharges, the MEPA process provides additional intergovernmental coordination, public participation and information.

[2] See 257 CMR 2.00, *Certification of Operators of Wastewater Treatment Facilities*, which provides in part at 257 CMR 2.15(1): "(b) Type I Facility -any facility that has less than three unit operations as listed and has a rating of < 20 points.
(c) Type II Facility -any facility that has three or more unit operations as listed or has a rating of > 20 points."
"(a) Unit Operations is defined as any component of a process that could be utilized solely or combined to attain a specific objective. The rating system is based on the number of specified unit operations in a proposed wastewater treatment facility and the total number of points assigned to each unit operation."