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April 22, 2022

Mr. Dave Simpson  
Nevada Division of Environmental Protection  
Bureau of Water Quality Planning  
901 S Stewart Street  
Carson City, Nevada 89701

Subject: Nevada Mining Association comment concerning NDEP’s proposed antidegradation regulations, Petition R-119-20

Dear Mr. Simpson:

The Nevada Mining Association (NVMA) respectfully submits the following comments with regard to the Division of Environmental Protection’s proposed regulations (R-119-20) concerning surface water quality and antidegradation.

The NVMA strongly supports the highest levels of water quality possible in Nevada’s streams, rivers, and lakes. Each year our members spend millions of dollars to monitor and maintain water quality in and around their operations. We also recognize the strong water quality programs that Nevada has had in place since the mid-1970’s. Nevada has been delegated Clean Water Act (CWA) authority since that time and has demonstrated leadership, competence, and pragmatism in enacting the provisions of the CWA in the state.

While we remain concerned about the complexity and impacts of the proposed regulations (both intended and unintended) as outlined below, we would like to commend the Bureau of Water Quality Planning’s staff for their comprehensive outreach efforts and patient responses to comments.

**Background of the Nevada Mining Association**

Organized in 1913 with the stated mission of serving as the public voice for Nevada’s mining industry, the Nevada Mining Association (“NVMA”) prides itself as being a trustworthy resource for federal, state, and local policy matters, community engagement, public education, and workforce development agencies. With a diverse membership comprised of 500 member companies representing each link in the mining supply chain, NVMA is uniquely positioned to offer comments on matters from exploration and discovery, development and construction, operation and production, to closure and reclamation.

**A. Antidegradation**

- 1. The need for the proposed regulations pertaining to antidegradation review is unclear**



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## **1. The need for the proposed regulations pertaining to antidegradation review is unclear**

The proposed antidegradation regulations are some of the most detailed and complex regulatory packages proposed by the agency for some time. It includes 55 pages of regulatory language and 97 pages of implementing guidance on topics that are highly technical and esoteric. While we understand the agency's intent on the establishment of Ecological and Aesthetic Waters (this is not an endorsement of the proposed EAW requirements), we are at a loss to understand the rationale for the antidegradation review process changes. Despite extensive discussion with NDEP staff, we are still unclear as to the purpose of the proposed regulations and, more importantly, the value they provide over the current requirements in terms of the protection of water quality, the simplification of analysis, or more timely permitting.

Nevada has had CWA delegation since the 1970's. To secure and maintain this authority, the state has consistently demonstrated that its requirements are at least as stringent as the federal program and consistent with its provisions, one of which is antidegradation. This ensures waters exhibiting higher quality than applicable standards are maintained. The proposed regulatory provisions significantly modify and complicate the existing program, which has long been determined to meet and exceed the standards of the delegating authority, the US Environmental Protection Agency (EPA).

In proposing the regulations, NDEP maintains that the proposed requirements will simplify and streamline the antidegradation review process, particularly in waters where Requirements for Maintaining Higher Quality (RMHQs) have not been established. In our review of the existing program and proposed requirements, we could not identify where process simplification will occur, time frames for water quality analysis shortened or permitting times reduced. This appears to be a solution in search of a problem. By the Division's own admission, the regulatory revisions related to discharges and antidegradation review (outside of EAWs) were not requested by those currently holding discharge permits or from industries proposing discharges in the future. Therefore, potentially introducing uncertainty and unintended consequences in an area that is not currently in dispute or objectionable to any interested parties.

To help illuminate the areas of proposed amendments, the NVMA requests a side-by-side analysis of the existing requirements and the proposed regulations to clearly highlight the differences in the programs and how those changes will deliver upon the stated objective of simplification and reducing timelines for decisions on discharge requirements/determinations.

- 2. The regulations are supported by nearly 100 pages of implementing guidance which demonstrate the significantly increased complexity of the proposed regulations and casts doubt on the long-term consistency of program operation.**

The proposed regulations rely upon two extensive guidance documents for implementation. The first is *Nevada's Antidegradation Implementation Procedures* which is 36 pages long. The second is an *Antidegradation Permit Writers Guidance* which is 61 pages long. As denoted by the names, neither document is part of the regulatory package or Nevada Administrative Code. Consequently, these documents are subject to modification at the will of the agency and in the absence of meaningful public input, which has the potential to introduce uncertainty, criticisms, and claims of lack of transparency.

Agency regulations should be concise, simple, and easy for the regulated community and the people of Nevada in general to understand. More importantly, they should be well thought out and vetted with the public and those regulated to ensure clarity, understanding, and the objectives and impacts on public health, the environment, and fiscal obligations. Unfortunately, the current regulatory package has been found by our membership and other interested groups to be deficient in the above areas.

As such, we request that the agency revisit the regulations and guidance documents with an eye toward simplification and inclusion of all applicable program requirements into regulations. It is sound public policy to regulate through the Nevada Administrative Code, not through guidance.

- 3. A fiscal analysis must be conducted to estimate the short- and long-term impacts of the regulations on local governments and industry.**

The tabletop exercises conducted by the agency in the formal and informal workshops highlighted the potential short-and long-term fiscal impacts of the proposed regulations on current and future permitted dischargers. A major permit modification (including a flow-only change) will trigger a comprehensive antidegradation analysis and reevaluation of permit discharge limits, even though those permits may have been in place for decades with no deleterious water quality impacts. In the worst-case scenario, mandatory reductions in permit concentration limits could be as high as 90%, resulting in the need for new, expensive, and perhaps technically infeasible treatment systems.

The lack of fiscal stewardship is a consistent criticism of government agencies. When questioned as to the estimated individual facility and statewide costs of the regulations, the agency noted that no fiscal impact analysis had been conducted. The undertaking of a substantial regulatory change without the appreciation of the potential increased cost to the taxpayers and the regulated community plays right into that narrative.

We request that the agency estimate their short- and long-term costs to all dischargers in Nevada, and especially to municipal governments and industry, before moving forward with any proposed regulatory changes.

## **B. Ecological and Aesthetic Waters (EAW)**

### **1. The role of the Division in processing an EAW petition must be clarified.**

The proposed regulations outline a process for an individual or organization to submit a petition for an EAW through either the NDEP or directly to the State Environmental Commission (SEC). In either case, the role of the NDEP is undefined and ambiguous.

#### **a. NDEP should Not become a Consultant for Petitioners.**

In a petition submitted directly to NDEP, the proposed regulations in Section 2(2)(a) *requires* the agency to work with the petitioner to prepare the petition for the SEC for consideration. For NDEP to play the role of consultant, advisor, or co-petitioner is inappropriate as it has the ability to leave the Department subject to claims of compromised objectivity or of acting as the agent of both the petitioner and the Commission. This is especially true when acting as the technical staff to the Commission.

The role of NDEP must be limited to its primary responsibility to the SEC, providing objective, lawful, and science-based recommendations grounded in the merits of the petition and in accordance with Nevada's statutes and regulations. Furthermore, this process reallocates valuable resources, which are already strained, away from other critical NDEP functions without fees or costs to offset workloads or compensate for the additional technical skills/knowledge that may be required by staff.

As such, there is a real question as to whether the Department should weigh into the process of direct petition submittal for optical, objectivity, staffing, and fiscal considerations. As a result, we strongly encouraged any portion of the regulatory package that causes NDEP to act as a consultant or co-petitioner be deleted.

#### **b. The Environmental Commission Lacks the staff to Independently evaluate petitions.**

With regard to a petition submitted directly to the SEC (Section 2(4)), it must be recognized that the Commission does not have the technical staff to evaluate an EAW petition (or any regulatory petition) independently. As noted above, NDEP's responsibility is to perform an objective analysis of the petition and provide recommendations to the SEC on its merits. Consequently, NDEP must remain a neutral and unbiased party. To ensure this occurs, we ask the following language be added to the proposed regulations:

*"The petitioner is responsible for all costs associated with gathering and compiling data and information for an EAW petition."*

**2. The EAW process outlined in the regulations must be better defined.**

An effective body of regulations clearly defines the regulatory process, program elements, roles, time frames, and requirements. The EAW language within the proposed regulations fails to meet these requirements. The NVMA has looked to other state EAW programs and has found examples that outline clear and concise requirements and processes for the filing, evaluation, and consideration of a petition by the governing body. Important elements include:

- a. Clearly defined criteria that the EAW petition must meet.
- b. The roles and responsibilities of the regulatory agency in reviewing the petition.
- c. Decision criteria for the regulatory agency in allowing the petition to move forward.
- d. The process for notification of a deficient petition.
- e. The process for moving the petition forward to the decision-making body.
- f. Requirements for public outreach, Tribal consultation, and a dialog with state agencies, local governments, and federal land managers.

Though it is the opinion of the NVMA that no one does it better than Nevada, there is an opportunity to seek inspiration and guidance from Montana's program. (*See* Montana Code 75-5-316). Thereby adding the appropriate definition to the regulations, program, and process for Nevada's EAW regulations.

**3. EAW designation must ensure the protection of land use, water rights, and other values in and near the water body.**

The proposed regulations include a list of attributes and activities within an EAW that shall not be impacted when designation occurs (see Section 2(6)(a-e)). This section is silent on the impacts of an EAW designation on federal or private lands uses, including historic irrigation practices, agricultural activities (including grazing), and exploration and/or mining. Assurances of the protection of historic, current, and future land uses (and in particular, those listed above) must be included in the regulations to avoid the introduction of uncertainty and impediments of existing easements and rights.

**4. The Clean Water Act does not have a definition of Waters of the US (WOTUS), consequently this proposed rule is premature.**

Nevada is unique, not only in environment but in regulatory concerns. As the driest state in the union, with many of our streams and water bodies being ephemeral, having only periodic flow, or, in some cases, no flow for long periods of time or years on end, it is important to have regulations that are flexible but predictable. These water features, along with others such as secondary tributaries to navigable waters, lakes (including pit lakes), playas, unconnected wetlands, irrigation ditches, springs, etc., have been in dispute as WOTUS and the associated Clean Water Act jurisdiction since 1989. Each federal administration since the 1990's has attempted to define a WOTUS resulting in numerous lower federal court actions and two US Supreme Court decisions. The matter is still not resolved. In fact, the SCOTUS is set to hear



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the *Sackett v. EPA* case during the 2022 session, and the Biden Administration has signaled the desire to undertake yet another effort at rulemaking.

It is the belief of the NVMA and other interested parties that until the definition of a WOTUS is resolved, new state rulemaking regarding EAWs and antidegradation requirements is premature and likely to lead to further confusion. Aside from existing discharges in waterways already defined as WOTUS, the NDEP is speculating as to what water features of the state may be in or out of CWA jurisdiction resulting in the application of restrictive, unlawful, or unnecessary designations or requirements to future water bodies and discharges.

In summation, the Nevada Mining Association recognizes and appreciates the important responsibilities the NDEP has protecting the quality of Nevada's precious water resources. Yet, we remain concerned about the scope of the regulations and their potential for unintended consequences that may frustrate the stated goals of the Department. Nevada's modern mining industry remains highly focused on preserving and conserving the waters of Nevada and stands ready to work alongside the agency to develop regulations that the stated goals of simplification and reduced delays while protecting Nevada's high-quality waters and our vibrant economy.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tyre Gray". The signature is written in a cursive, flowing style.

Tyre Gray, Esq.  
President