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**BY E-MAIL**

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**Re: Proposed Regulation R119-20 Addressing Extraordinary Ecological,  
Aesthetic or Recreational Waters (EAWs) and Other Aspects of  
Antidegradation Program Compliance**

Dear Mr. Simpson:

The following comments are submitted on behalf of Nevada Gold Mines (NGM) for NDEP's consideration as it assesses the regulatory path forward relative to the proposed updates to Nevada's antidegradation program.<sup>1</sup> These comments are intended to provide some examples of issues that could warrant further consideration as NDEP assesses next steps and are not intended as an exhaustive list of all such considerations.

**1. Complexity of the Rulemaking.**

As noted throughout the rulemaking process, NGM appreciates the efforts NDEP has made to better inform all stakeholders on proposed changes to Nevada's antidegradation regulations. NDEP's outreach is particularly important for a program change with such potentially sweeping consequences. NDEP has acknowledged that this rulemaking effort is one of its biggest to date. That assertion is supported by the hundreds of pages of material associated with the proposed regulation and the related guidance documents. The complexity of the rulemaking is further evidenced by the evolution of the proposed rules and guidance. In particular, NGM recognizes that in response to comments on the earlier draft of the rule changes, NDEP has made many revisions. In turn, NDEP has updated aspects of the expansive draft guidance documents, the draft Antidegradation Implementation Procedures and the draft Antidegradation Permit Writers' Guidance. Stakeholders cannot, however, fully appreciate the

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<sup>1</sup> To the extent that NDEP has not directly addressed issues raised in the October 29, 2021 comments NGM submitted on the prior draft of the rulemaking (the October comments), those comments are adopted by reference.

implications of the myriad changes given the potential scope of the same. For example and in responses to prior NGM comments, NDEP specified that it would make “appropriate revisions to the supporting documents to align with the regulatory language and provide clarification in the interpretation and implementation of the regulations.” NDEP Response to October comments at 7. Those changes cannot, however, be effectively reviewed until all the comments are considered.

Presuming NDEP will be revising aspects of the proposed rule in response to the latest, robust outreach, NDEP will then need to revise the corresponding guidance provisions intended to implement those changes. And, until that time, the regulated community cannot adequately assess implications of the rulemaking package. NGM suggests that NDEP consider: further evaluating possible suggestions in response to the stakeholder outreach; evaluating whether those suggestions warrant rule changes; assessing what sorts of changes are important for clarity in the guidance documentation; and promoting comprehensive consideration of the changes to the rules and guidance documents. NGM recognizes that NDEP is not under any time constraint or water quality standards program obligations relative to the proposed changes. Correspondingly, NDEP could determine to evaluate stakeholder comments, revise the proposed rule in response to those comments, revise the guidance documents to track any revisions to the rule and provide stakeholders time and opportunity to further evaluate the complete package of antidegradation materials.

## **2. Refining the Understanding of Degradation and the Need for Antidegradation Review.**

As a general matter (and for evaluating impacts to EAWs and for assessing the need for Tier 2-related antidegradation review), NDEP should consider how it assesses degradation for purposes of program implementation. In particular, the rule should further clarify that degradation does not include any short-term or limited change to water quality. In fact, NDEP could consider designating certain types of changes as insignificant yet still protective of higher water quality and, therefore, not triggering antidegradation obligations.

NDEP has stated that the Water Pollution Control Act (NRS 445A.565) presumes a “broad” definition of “degrade” as including any constituent in a discharge that exceeds a baseline water quality value for which NDEP has established a water quality standard (set forth in NAC 445A.11704 to 445A.2234) in the receiving waters. That assertion could be further considered; the statute does not prohibit NDEP from evaluating whether a discharge will “briefly impact” receiving waters (as opposed to lowering the higher quality of the surface waters). Since the statute refers to the maintenance of the higher quality of the receiving waters, NDEP should look at the impacts of a discharge to the receiving water quality rather than solely evaluating the concentration of any particular constituent in a discharge.

NDEP has acknowledged its reliance on a practical perspective. Nevada’s 2007 continuing planning process (CPP) already recognizes the concept of “significance”. It specifies

that an RMHQ is supported by monitoring data identifying concentrations “**significantly** [not slightly] better than the standard necessary to protect the beneficial uses”. CPP (2007) at 19 (emphasis added). Similarly, if a discharge is temporary or if its impacts are limited, such a discharge could be characterized as insignificant and protective of the receiving water quality negating the need for further antidegradation review while remaining consistent with the statutory obligation to maintain the higher quality of those waters. NDEP may, therefore, want to reconsider how it approaches its implementation of the statute for purposes of this rulemaking. A more practical approach is both consistent with Nevada law and will likely result in a more reasonable and sustainable program for protecting Nevada’s surface water resources.

### **3. EAW Nominations.**

(a) Two Different Processes. NGM would like to better understand NDEP’s approach to the process for nominating EAWs. The proposed rule now includes two separate, potentially duplicative processes for nominating waters as EAWs: a petition filed with the State Environmental Commission (SEC) (pursuant to NAC 445B.886); and a nomination submitted directly to NDEP. Both processes oblige the nominating party to “work with [NDEP]” to assemble the data and information prescribed in Section 2.3(a) of the proposed rule. See also Section 2.4(a) (cross-referencing Section 2.3(a) for nominations to be submitted directly to the SEC). Both processes require the SEC to make a determination. Is there a meaningful distinction between the processes? Given that the ultimate determination is made by the SEC, why have a separate process with NDEP?

(b) Resources for Nominating EAWs. NDEP stated, in response to comments, that it is “NDEP’s intent to set a ‘high bar’ for [nominating] EAWs.” NDEP Response to October Comments at 3. To that end, NDEP has recognized the need for carefully evaluating data and evidence relative to the EAW nomination process and has properly included additional information in the rule outlining data required to classify an EAW. NDEP has not, however, provided enough specifics on the burdens associated with such a nomination. NGM suggests that the rule provide additional clarity specifying that the information necessary to nominate an EAW must be assembled by the nominating party and that the nominating party will be responsible for all associated costs. See, e.g., Mont. Code Ann. 75-5-316(6) (recognizing that the nominating party must bear the costs associated with that nomination process in Montana which includes preparation of an EIS). That clarification is potentially important to document; NDEP cannot and should not assume the burden of data collection and other requirements for EAW nominations, an obligation that could be unwieldy and improperly affect resources essential for NDEP’s other program commitments.

(c) Implications of EAW Nomination on Existing Dischargers. The proposed rules clarify that each surface water or segment of a surface water that is classified as an EAW must have an antidegradation protection of 3 or 2.5. See Section 4. That level of antidegradation protection precludes “any new or expanded discharge” into the classified water. The limitations on discharges to EAWs prompt careful focus on the “grandfather” provision related to the same.

As drafted, the grandfather provision specifies that a discharge in place before the receiving water is classified as an EAW continues to be authorized provided that discharger “maintains the existing permitted flow, effluent limitations and other conditions and requirements of the original permit and the permit holder does not request to expand or modify the point source discharge or the zone of mixing. . . [or constitutes] an activity authorized by the Department to restore or maintain the water quality or other attribute of a classified water.” Section 6 at 1(a)(3) and 1(b)(3). As drafted, the grandfather provision may be unduly limiting. For example, what if changes to the discharge stem from effluent limit developments? If NDEP adopts new criteria for a particular constituent and a permit is reopened to address the same with new effluent limitations, does that revised condition undermine the authorization of a long-standing existing discharge? What if the existing discharger’s effluent limitations are revised pursuant to changes in NDEP’s waste load analysis, does that revised condition undermine the authorization of a long-standing discharge? NDEP should consider clarifying the grandfather provision to ensure existing and pending discharges and potential discharges (including those associated with non-point sources) are not affected by an EAW nomination even if those discharge conditions evolve over time. Further and as identified throughout these comments, there may be circumstances where an expansion of an existing discharge results in insignificant impacts to the classified EAW. In that instance, such a discharge should not be prohibited.

(d) Implications of EAW Nomination on New Dischargers. There is no dispute over the concept that properly classified EAW waters should receive protection. The prohibition on new discharges to Tier 3 or 2.5 water bodies could, however, be further clarified and refined. For example, NDEP has not proffered a reason for disallowing temporary, limited or insignificant new discharges to Tier 3 waters; a blanket discharge prohibition may not be appropriate under all circumstances, e.g., such as those associated with stormwater management or for repairs of structures located in such waters.<sup>2</sup> Similarly, NDEP has recognized its authority to review and authorize new or expanded discharges into Tier 2.5 waters provided those discharges do not “degrade” the water quality or other attribute of the classified water. See Section 6 at (b)(2). Again (and as referenced above), the characterization of degradation may be too constraining given the overarching, unduly restrictive approach to compliance with Nevada’s

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<sup>2</sup> NDEP appears to have contemplated exceptions to the no discharge requirement but those exceptions are unclear. See Preamble (describing that Section 6 establishes limited exceptions to the prohibition on new or modified discharges into EAWs). Some exceptions are incorporated in the general permit and stormwater provisions. For example, the reference to temporary or limited lowering of water quality appears in Section 11 (general permits) but is not clearly factored into the EAW section of the proposed rules. In turn, the EAW portion of the antidegradation checklist in the draft implementation procedures appears to acknowledge a broader exception to the discharge preclusion, i.e., for all temporary and limited activities (although the checklist also references factors in Section 4.2.1 which section does not appear to be included). The rule language should be consistent with the notion of a broad exception to the no discharge condition for all EAWs. Note also that Section 11 references individual stormwater permits and the fact that applicants for stormwater permits could be authorized into EAWs if the applicant can “demonstrate that the water quality or other attribute of the classified water will be maintained and protected”. The allowance of discharges described in Section 11 appears at odds with the prohibitions in earlier provisions of the proposed rule.

antidegradation-related statutory provision. See also EPA's Water Quality Standards Handbook at 4.7 (recognizing that exceptions to the no discharge requirement include activities that result in temporary and short-term changes in water quality). These sorts of issues may warrant further consideration in the context of assessing possible overbroad consequences of the prohibitions included in the proposed rule.

(e) Implication of EAW Nomination on Upstream Dischargers. Under the proposed rule, new or expanded discharges that occur upstream of a Tier 3 or 2.5 water could also be precluded if "the discharge would degrade the water quality of the classified water or impact an attribute of the classified water." Section 6.1(a)(2)(II) and (b)(2)(II). The terms of the upstream review provision suggest that if an upstream discharger increases flow, a potential benefit for downstream waters, that discharge could be precluded if it results in a short-term increase in any constituent subject to a water quality standard. NDEP should, as indicated throughout these comments, be able to assess the temporal nature of any change and should not simply compare the baseline receiving water quality with the end of pipe chemistry of the effluent, i.e., an apples to oranges comparison.

There are other practical implementation questions that support further review. For example, at what point would NDEP assess evidence of degradation in the downstream classified water? Does an upstream discharge to an ephemeral wash that reaches an EAW, need to meet the water quality associated with the EAW at the confluence or further downstream? What if the upstream ephemeral water only reaches the EAW under periods of high or low flow? Does the upstream discharger still need to conduct antidegradation review? See 445A.122 (indicating that standards do not apply during, among other conditions, periods of extreme high or low flow). NDEP may want to consider whether it needs to further clarify circumstances under which upstream discharges would not trigger antidegradation-related regulatory scrutiny.

#### **4. Antidegradation Review.**

Antidegradation review procedures for waters not classified as EAWs are not new. NDEP has been successfully implementing the program for years. The following provides some examples of questions raised by the proposed changes that could warrant further consideration.

(a) Thresholds for Triggering Review. NDEP would require antidegradation review for a modified point source discharge that results in, among other criteria, changes in pollutant composition. Section 7.1. If NDEP adopts new water quality standards or incorporates new analytical methods that expand its ability to detect constituents in a discharge, do those changes (absent any other revisions by the permittee) constitute modifications that trigger antidegradation review? Presuming that is not NDEP's intent, further consideration of the thresholds that trigger antidegradation review may be appropriate.

(b) Baseline Water Quality—Burden on Discharging Entities. NDEP would require that antidegradation review be founded on baseline water quality conditions (for those

constituents not already subject to RMHQs). Although the proposed rule provides that “baseline water quality must be of sufficient quality and represent the chemical conditions of the receiving water” (Section 8), baseline can be based on as few as three samples (Section 3). The CPP (2007) suggests that the long-standing NDEP data requirements (greater than five years) were intentional. See CPP at 19 (stating that more than two samples per year for five years are likely needed to estimate the 95<sup>th</sup> percentile for most pollutants). Since the establishment of RMHQs (or other measures of baseline water quality) trigger potentially significant consequences for the regulated community, that foundational data must be credible and defensible. NDEP may want to further consider the nature and extent of information needed to support baseline water quality relied on for antidegradation review purposes.

NDEP’s proposed baseline water quality rule changes establish that, in many circumstances, individual dischargers/project proponents are now responsible for ascertaining baseline water quality (rather than NDEP). While NDEP is understandably trying to leverage information available in the discharging community, assigning that burden to the regulated community may have unforeseen consequences. The RMHQ process has been implemented for years. The rigor associated with establishing those standards is important and seemingly intentional; the implications of revising the approach to establishing baseline values for antidegradation program implementation are potentially substantial. The proposed short-cut approach could result in inconsistencies and prompt burdensome data collection requirements and odd discrepancies. For example, if individual dischargers separately evaluate baseline relevant to a particular receiving water, how are distinctions in the data set reconciled? Since NDEP acknowledged throughout the April 2022 workshops that it has water quality data for 90% of the receiving waters in Nevada, could NDEP establish schedules prioritizing particular areas for RMHQ development or additional data collection rather than bypassing the approach and quality control inherent in the long-standing process?

(c) Implications for Ephemeral Features. The proposed rule does not clarify how the antidegradation program changes would be implemented with respect to ephemeral waters in Nevada. How would a project proponent evaluate baseline and antidegradation obligations for features that do not reach downgradient surface waters? Alternatively, if discharges to ephemeral features flow into downstream waters, how will a project proponent document that those flows may not warrant further review, e.g., from a water quality perspective.? If discharges to ephemeral waters are characterized by NDEP as not compromising the quality of the receiving waters (e.g., because the changes are limited in terms of reach or because the changes are short-term or because the changes would only occur during extreme flow conditions), those discharges should not be subject to the detailed and time consuming approach that could be triggered if the receiving waters are considered Tier 2 (e.g., as a result of the tributary rule) with water quality better than standards.

NGM recognizes NDEP is seeking to clarify its role established in statutory requirements and to enhance stewardship over the State’s surface waters. NGM suggests that the proposed rule changes be further evaluated to avoid unforeseen complications that could be burdensome

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Page Seven

and potentially confusing for all stakeholders. We look forward to working with you to accomplish these objectives.

Sincerely,

PARSONS BEHLE & LATIMER

*/s/ Lisa A. Kirschner – Electronically Signed*  
Lisa A. Kirschner  
Attorney at Law

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