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September 8, 2022

Dave Simpson, Supervisor
Bureau of Water Quality Planning
901 S. Stewart Street, Suite 4001
Carson City, Nevada 89701

Dear Mr. Simpson:

On behalf of The Pew Charitable Trusts, I appreciate the opportunity to comment on Nevada's proposed regulations for Extraordinary Ecological, Aesthetic, or Recreational Waters (EAWs) and Antidegradation policy and review procedures (R113-22). Protecting the quality of our waters, especially in a climate changing world, is imperative for both people and nature. Pew has submitted comments on earlier versions of this draft policy and made our concerns about certain aspects of this proposed regulation known as well as offered potential solutions. We do not believe the current draft addresses our concerns in a meaningful way. We look forward to continuing to work with the Nevada Division of Environmental Protection to improve this regulation, so it protects the highest value waters in the state.

Pew's U.S. Public Lands and Rivers Conservation project seeks to conserve biodiversity by protecting and restoring ecologically and culturally significant U.S. lands and rivers. To achieve this landscape level conservation, Pew works collaboratively with policy makers, Indigenous communities, local businesses, scientists, hunters, anglers, and others to implement balanced solutions that help safeguard landscapes and sustain local communities.

States have the primary authority to regulate surface and groundwater within their boundaries. Outstanding National Resource Waters (ONRW) protections—or as they will be referred to in Nevada, EAWs—are determined by the states through the authority granted to them under the federal Clean Water Act (CWA). The goal of the CWA is to ". . . restore and maintain the chemical, physical and biological integrity of the Nation's waters" CWA, Section (101(a)), and accompanying federal regulations call for the maintenance and protection of waters of exceptional recreational or ecological significance.

Pew works in several states to protect ONRWs and recognizes that not all waterbodies qualify for this designation; however, we have seen the importance of protecting high value and high-quality waters for wildlife, recreation, and as drinking water sources for rural communities.

On October 29, 2021, Pew provided comments on the original draft version of Nevada's proposed EAW rule and Antidegradation policy and review procedures (R119-20). The draft

regulations and policy provided a strong framework for protecting some of Nevada's most high value waters and allowed for a comprehensive approach to water quality management. Our comments focused on the following:

- Requesting greater clarity on water quality standards needed to meet EAW criteria
- Eliminating the "ability to manage" as a criterion for EAWs
- Supporting public participation and comments as part of the EAW nomination process, while noting that EAW criteria should take precedence in the designation and classification of these waters
- Supporting the recommendation that Lake Tahoe be protected as an EAW with Tier 3 protection.

Unfortunately, the current version of this policy is a significant step back from the state's original agency draft version.

Pew appreciates the effort that has gone into drafting this policy. Nonetheless, we believe several provisions in the proposed rule set an almost insurmountable bar for the public to nominate a waterbody for EAW status, as well as being inconsistent with Clean Water Act and federal antidegradation requirements. Rather than focusing on water quality or ecological, aesthetic, or recreational significance, several subsections of the current proposed rule require analysis and data collection based on factors that are outside the scope of EAW criteria.

Our comments below on the proposed Extraordinary Ecological, Aesthetic, or Recreational Waters rule would, if incorporated, create a strong tool for the state and the public to safeguard and prevent degradation of Nevada's most extraordinary waters.

1. The criteria laid out in Sections 2.3(a)-(e), and (i), with some straightforward changes recommended below to Sec 2.3(i), provide sufficient guidance to ensure a petitioner can effectively demonstrate that waters proposed for EAW designation will meet the criteria established by the state. Any petitioner wanting to successfully nominate waters for EAW designations will need to justify why these waters qualify and will need to have robust data and evidence to support the nomination.
2. Section 2.3(d) requires, "adequate and representative water chemistry data that supports the nomination and demonstrates that the water has significantly better quality than the applicable standards of water quality...." It should be the state's responsibility to know if water quality standards are being met on a parameter-by-parameter basis. If there is no data, the burden of an independent assessment should not fall on the petitioners. That said, we understand that it is extremely time and resource intensive to test the water quality of every water body in the state. Pew recommends that other existing data points, such as recreation activities, healthy fish populations, flora and fauna species, and other indicators of river health, should be used as indicators for high water quality. Additionally, information collected should not be required to have more than two years' worth of representative data.

3. Sec. 2.3(f) requires a demonstration that the provisions of title 48 of the Nevada Revised Statute (NRS) would not be affected by an EAW classification and Sec. 2.3(g) requires a demonstration of the compatibility of the classification with any preexisting or preauthorized land use activities and authorized or pending discharges. However, the language outlined in Sec 2.7 clearly states that classification of a surface water as an EAW does not prohibit or impair any use of water authorized under title 48 of NRS, does not entitle an appropriator of water to require that the source of the water meet his or her specific requirements for water quality, does not prohibit or alter activities authorized under state or federal permits related to the management and maintenance of structures and devices in and on the water, and does not restrict or alter any existing land uses or prohibit or impair any property rights or land use activities authorized under a state or federal permit occurring on any federally managed lands adjacent to an EAW.
 - a. The information required in Secs. 2.3(f) – (g) is unnecessary because the proposed rule is requiring documentation of activities that cannot be impacted in any way by this rule according to language in Sec 2.7. Furthermore, if a waterbody qualifies as an EAW given the current land use activities, then presumably the existing activities are compatible with the designation and should not adversely impact the attributes associated with an EAW. In short, an EAW designation cannot impact activities outlined in Secs 2.3 (f)-(g) and Pew recommends these sections be deleted.
4. Sec. 2.3(h), which requires a summary of the social and economic benefits and impacts associated with the classification, is outside the scope of the Clean Water Act. Therefore, each of these requirements serve as an unnecessary burden which could discourage members of the public from petitioning to protect a waterbody as an EAW. Pew recommends deleting Sections 2.3(h).
5. Section 2.3(i) requires that a nomination include, “Evidence of any public outreach and communication efforts within the local community near the surface water or segment thereof conducted by the person submitting the petition, which may include, without limitation, letters or statements from stakeholders, landowners or federal, state, or local government agencies.”
 - b. Pew believes robust public participation and comment opportunities will be an important part of the EAW designation process, however the Division of Environmental Protection should clarify that EAW criteria set forth in Section 2.1 (a) – (c) govern the designation and classification of these waters, not additional criteria, such as public outreach, that are not required pursuant to the Clean Water Act and the EPAs guidance. Pew recommends the following edits to this section:
 - e. Evidence of any public outreach and communication efforts. ~~within the local community near the surface water or segment thereof conducted by the person submitting the nomination, which may include, without limitation, letters or statements from stakeholders, landowners or federal, state, or local government~~

~~agencies.~~

Thank you again for the opportunity to comment and for the time it took to craft such a comprehensive policy. We urge incorporation of Pew's suggestions into the State's draft policy to ensure a strong framework for protecting some of Nevada's most high value waters. We look forward to future collaboration. Please feel free to contact me at csandstedt@pewtrusts.org or (775) 342-7367 should you have questions or need further information.

Sincerely,

Carrie Sandstedt

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