



Response to comment letters submitted to the Division after the January 25, 2024, workshop for R113-22

Response to comments submitted by *City of Reno, City of Sparks, Washoe County, and Truckee Meadows Water Authority*

Comment Summary:

Regulation does not describe the process for identifying "parameters of concern". The phrase "...or as determined by the Department" should be removed or the process for identifying how those parameters will be identified should be included.

NDEP Response:

The proposed antidegradation program, implemented through the discharge permitting process, is consistent with current practice. An applicant for a permit to discharge will be required to submit a list of constituents known or expected to be present in the discharge. These parameters will be identified as parameters of concern. In certain circumstances, the Department may have reason to believe that an additional unidentified constituent might be present in the discharge and may require testing to verify the presence of the constituent. The phrasing "as determined by the Department" is necessary to allow for identification of those parameters of concern through this process. Information for how parameters of concern will be identified will be included in the updated Draft Permit Writer's Guide.

Comment Summary:

Concerning the length of time needed to establish an Interim Baseline Value (IBV), recommend changing to "samples collected a minimum of 30 days apart" to allow for faster establishment of IBVs and shorter delays for permit issuance.

NDEP Response:

The current proposal that an IBV can be established after 8 samples collected approximately 90 days apart over a period of at least two years is sensible because it better enables for seasonal and annual hydrologic variability, key drivers of water quality, to be captured. Characterization over a two-year period provides better certainty that the IBV will be representative of the baseline water quality (i.e., five-year) value and reduces the risk that baseline water quality will differ drastically from the IBV.

Comment Summary:

The proposed regulation lacks clarity and specificity in terms of what waterbodies can be designated the beneficial use of "extraordinary ecological, aesthetic, or recreational value". Specific data requirements should be outlined in the regulation. (How will the SEC identify waterbodies that fall into this category? What data is required beyond water quality data? Is there a public notice, comment, and engagement process prior to designation?)

NDEP Response:

40 CFR 131.12(a) requires Nevada to develop and adopt a statewide antidegradation policy. At a minimum, Nevada's antidegradation policy must be consistent with the federal antidegradation policy. The beneficial use of "extraordinary ecological, aesthetic, or recreational value" is

Jan 25, 2024, Workshop

consistent with 40 CFR 131.12(a)(3) which states “Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” The process for designating Tier 2.5 and Tier 3 antidegradation protection varies considerably among states. Among the antidegradation policies approved by EPA, some have documented procedures for designating Tier 2.5 and Tier 3 antidegradation protections—including those proposed by the public—but others do not. The process for the public to nominate a water as “Extraordinary”, a central topic in previous versions of the antidegradation regulation, was omitted from the proposed regulation since it was highly debated, and consensus was not achieved on the specific criteria that should be required for a nomination to move forward. Given that the Tier 2.5 and Tier 3 designations are special categories affording the highest levels of water quality protection, it seems logical that the State Environmental Commission (SEC) would require specific information to inform any decision on whether a waterbody should be considered for this designation. It should also be pointed out that under NAC 445A, the SEC has always had the ability to assign any waterbody with the “Extraordinary” beneficial use. However, Lake Tahoe remains the lone waterbody with this designation. Designation of any waterbody with the “Extraordinary” beneficial use in the future would require following Nevada’s administrative rulemaking process and thus would be subject to the public notification, comment, and engagement process for the designation to occur. The public would be offered the opportunity to voice support or opposition to any proposed designation through that process.

Comment Summary:

Additional clarity is needed on the restrictions associated with mixing zones in Tier 2.5 waters. Specifically, it is unclear if: (1) new parameters of concern could be added to established mixing zones; (2) new mixing zones could be granted if new requirements to maintain higher quality are developed; (3) dilution credits would apply.

NDEP Response:

Tier 2.5 is a special category affording the highest level of water quality protection for waterbodies possessing unique characteristics or values as determined by the State Environmental Commission. The proposed regulation specifies that baseline water quality or any requirement to maintain existing higher quality in a Tier 2.5 waterbody must be maintained and protected. Mixing zones can be grandfathered as long as they are not altered in any manner. Adding parameters would constitute an alteration of a mixing zone and this is not permissible. New mixing zones are not permissible, because, by definition, the water quality would be degraded at the point of discharge, and degradation of a Tier 2.5 water is prohibited. Dilution credits would therefore not be applicable.

Response to comments submitted by *Nevada Gold Mines*

Comment Summary:

Suggest a best professional judgement (BPJ) option be utilized in circumstances when the two-year time frame for establishing an IBV becomes unduly constraining.

NDEP Response:

Jan 25, 2024, Workshop

The proposed approach to establish an IBV after a two-year period where existing data are insufficient for such purpose allows for new permits to be issued in a timeframe that is likely consistent with planning and construction for a new discharge. The intent of the antidegradation regulation is to maintain and protect existing uses and high quality/high value waters. The proposed regulation provides consistency across the State with respect to a variety of regulated activities that have the potential to degrade water quality.

Comment Summary:

Concern that an IBV more stringent than baseline water quality or requirement to maintain higher quality could be interpreted as backsliding and could preclude corresponding relaxation of a permittee's discharge limits.

NDEP Response:

NDEP has consulted US Environmental Protection Agency Region 9 legal counsel on this circumstance. The answer received was that although an anti-backsliding analysis consistent with CWA Section 402(o) would be needed, this relaxation would be allowed under two separate exceptions to the backsliding rule: (1) the backsliding is in compliance with the State antidegradation policy which requires IBVs to be updated in a timely manner with baseline water quality (CWA Section 402(o)(1) (In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title [i.e., CWA Section 303(d) the antidegradation policy]); (2) It falls under the listed exception at 402(o)(2)(B)(i) (information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance). These exceptions allow for this circumstance so long as the relaxed limit does not result in a violation of an existing water quality standard (CWA Section 402(o)(3)).

Comment Summary:

Recommend considering some potentially applicable additional clarifications of what should not be considered a modification or expanded discharge; specifically: (1) a discharge relocation within the same segment of a receiving water (2) new effluent limits that do not reflect a change in discharge composition; (3) flow changes that do not result in concentration or load increases.

NDEP Response:

No changes proposed. NDEP believes the criteria characterizing a modification or expanded discharge are appropriate as written.

Comment Summary:

Recommend clarifying the meaning of an expanded point source that would subject the discharge to the antidegradation program.

NDEP Response:

As written in the regulation, an expanded point discharge includes, without limitation, a proposed: (a) Increase of the maximum flow of the discharge; (b) Increase in the concentration of any parameter of concern in the discharge; (c) Increase in the load of any parameter of concern to the receiving water; (d) Change in the composition of the discharge which would require different effluent limitations; or (e) Relocation of the discharge.

Comment Summary:

Recommend clarifying that the effluent quality need not be directly compared to the applicable baseline condition but should be assessed in terms of possible impacts to the receiving water after discharge and at the point where the upstream flows meet the segment characterized as Tier 2.5 or Tier 3.

NDEP Response:

Antidegradation must be satisfied at the point of discharge into the receiving water. In this hypothetical circumstance of a discharge upstream of a Tier 2.5 or Tier 3 waterbody, it would depend on the level of antidegradation protection assigned to the receiving water. If Tier 1, then baseline water quality standards must be maintained and protected. If Tier 2, then the baseline water quality, or a requirement to maintain existing higher water quality, or IBV, as appropriate, would need to be maintained and protected unless an exception for social or economic benefit were granted by the Commission. Regardless of the level of antidegradation protection for the receiving water, the proposed upstream discharge would furthermore need to demonstrate that water quality in the downstream Tier 2.5 or Tier 3 water would be maintained and protected.

Comment Summary:

NDEP should clarify how/if antidegradation program applies to non-jurisdictional waters under the Clean Water Act. If the antidegradation program will apply to some non-relatively permanent waters, address how those waters will be categorically characterized. Tier 2 analysis should not be required for jurisdictional waters that run only in response to precipitation.

NDEP Response:

If adopted, the regulation would pertain to all surface waters of the State. As defined in NRS 445A.415, this includes all streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, springs, irrigation, and drainage systems; and all bodies or accumulations of surface water, natural or artificial. Nevada statutes and regulations do not address permanency of waters.

Comment Summary:

Given that the draft Antidegradation Implementation Procedures and Antidegradation Permit Writers' Guidance referenced in the Antidegradation Program Fact Sheet will likely include details relative to application of the rulemaking, it should be available to the public for comment prior to finalizing the same.

NDEP Response:

Implementation procedures are specified in the DRAFT Antidegradation Implementation Procedures, which will be available for review ahead of the State Environmental Commission hearing to adopt the proposed regulation. The Antidegradation Permit Writers' Guidance document will be updated to be consistent with the regulation upon approval of the regulation.



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

February 2, 2024

Re: NDEP's Proposed Regulation R113-22

Dear Mr. Kuchnicki:

Thank you for the opportunity to comment on the Proposed Regulation R113-22. These comments are submitted on behalf of the City of Reno, City of Sparks, Washoe County, and Truckee Meadows Water Authority (TMWA). Collectively these public entities manage the region's water resources, supply clean drinking water to over 450,000 people, and treat and discharge wastewater and stormwater. We support protecting Nevada's waterways for all beneficial uses and appreciate the Nevada Division of Environmental Protection's (NDEP) leadership in developing these regulations.

We appreciate the time and resources NDEP has utilized to conduct workshops and address questions stakeholders have proposed regarding the proposed regulations over the past years. Several of our previous comments and concerns have been addressed through the current draft regulations.

We strongly support high water quality levels for Nevada's waterbodies and believe it is important to protect and maintain water quality. However, as agencies that provide drinking water and treat wastewater and stormwater within the Truckee Meadows, we still have remaining concerns about the complexity and intent of the regulations.

In Section 3 regarding the definition of "parameter of concern", there is no process defined for how NDEP will identify parameters of concern beyond the water quality standards. The phrase "...or that has been determined by the Department to be of concern" should be removed, or alternatively, additional information regarding how those parameters will be identified should be included.

Section 5, defining interim baseline value, should be amended to include "...samples collected a minimum of 30 days apart". This language is in the draft guidance and allows for a faster establishment of interim baseline values (IBV) and shorter delays for permit issuance.

As currently drafted in Section 12, Subsection 1 (a)-(c), the categories to determine if a water body is an "extraordinary ecological, aesthetic, or recreational value" are overly broad and lack definition. For example (c) states "[s]ome other extraordinary ecological, aesthetic, or recreational value. This could include anything. The proposed regulations relating to Tier 2.5 and

3 waters and the “extraordinary ecological, aesthetic, or recreational value” designation still lack clarity in terms of waterbodies that can be designated. The language in the regulation lacks the necessary specificity to indicate what waters are truly meant to be protected as “extraordinary” and how water quality data is used to evaluate an “aesthetic” designation.

The specific data requirements necessary for an “extraordinary ecological, aesthetic, or recreational value” designation should be clearly outlined in the regulations. There are remaining questions that should be addressed related to the SEC’s process for designating waterbodies as having “extraordinary ecological, aesthetic, or recreational value.” How will the SEC identify waterbodies that fall into this category? What data is required beyond water quality data? Is there a public notice, comment, and engagement process prior to designation?

Additionally, we have concerns pertaining to Section 12, Subsection 4(a)(3) where it states surface waters designated as Tier 2.5 prohibit new or expanded zones of mixing. It is unclear if this applies on a parameter-by-parameter basis or if an existing mixing zone would readily incorporate any new parameters of concern that may be added in the future. Our concern with this section is that if additional Requirements to Maintain Higher Quality (RMHQs) are developed, they may not be granted a mixing zone. It is unclear if dilution credits would apply or if the established mixing zone would be able to be applied to new parameters. This has a major impact on what types of effluent limitations could be applied to Publicly Owned Treatment Works (POTWs) if no dilution credit is applied. This also has an impact if only certain existing parameters have an approved mixing zone and a POTW wants to add additional parameters in their existing permit to the established mixing zone. We feel that additional clarity is needed in this section.

City of Reno, City of Sparks, Washoe County, and TMWA thank you for considering our comments. We also appreciate NDEP’s efforts to work through these proposed regulations. We believe there is still more refining needed to avoid unintended consequences that will impact our community. We are happy to continue working with NDEP to refine these draft regulations to protect Nevada’s water.

Sincerely,

Michael A. Drinkwater

Michael Drinkwater
City of Sparks, Community Services Director

A handwritten signature in black ink, appearing to read "Nate Allen", followed by a long horizontal line extending to the right.

Nate Allen
TMWA, Director of Natural Resources

A handwritten signature in blue ink, reading "Trina Magoon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Trina Magoon
City of Reno, Director of Utility Services

A handwritten signature in blue ink, reading "Dwayne Smith". The signature is stylized, with a large, bold "D" and a long horizontal stroke.

Dwayne Smith
Washoe County, Director, Engineering and Capital Projects

February 2, 2024

BY E-MAIL

Jason Kuchnicki
Division of Environmental Protection (NDEP)
Bureau of Water Quality Planning
901 South Stewart Street, Suite 4001
Carson City, NV 89701
ndep-sam@ndep.nv.gov

Re: Comments on LCB Draft Proposed Regulation R113-22 – Antidegradation

Dear Mr. Kuchnicki:

Nevada Gold Mines (NGM) appreciates the opportunity to review and comment on the referenced draft proposed regulation (referred to as the draft rule or draft regulation). NGM recognizes NDEP's substantial effort in updating Nevada's antidegradation program. The current draft rule reflects changes that are directly responsive to prior comments from NGM and others including the elimination of the two-tiered process for nominating Extraordinary Ecological, Aesthetic or Recreational Waters (EAWs) and the substitution of a State Environmental Commission (SEC)-initiated classification of surface waters consistent with corresponding beneficial uses. The current version of the rulemaking is easier to understand and reflects a substantial improvement from earlier drafts. The following comments are intended to briefly identify some remaining questions and suggestions aimed at further refining and improving the rulemaking and the implementation of the antidegradation requirements in Nevada's permitting program.¹

1. Interim Baseline Value Timing. NDEP has determined to move to the tier system for antidegradation, a system that has been implemented in many jurisdictions and that is consistent with EPA's federal antidegradation policy. See 40 C.F.R. 131.12. Although the tier system is familiar, there are possible timing complications in NDEP's proposed approach to categorization of receiving waters. If the receiving water exhibits water quality that is better than the "baseline" water quality for the surface water or segment thereof (i.e., so that the receiving

¹ These comments adopt prior comments submitted by NGM dated April 22, 2022 and October 29, 2021 to the extent those comments have not been addressed and are germane to the current version of the rulemaking.

water is identified as Tier 2), the draft rule requires that a project proponent conduct a formal antidegradation review of possible alternatives for managing the proposed discharge. Typically, the baseline for characterizing receiving waters is established with five years of data (See Draft Rule, Sections 4 and 6). In the draft rule, NDEP has sought ways to expedite antidegradation review in the absence of adequate baseline data. Specifically, the draft rule would authorize NDEP to assess water quality baseline on a two year time frame referred to as an interim baseline value or IBV. “The IBV is established by the Department based on not less than eight samples collected approximately 90 days apart over a period of at least two years.” See Draft Rule, Section 5. In other words, NDEP could move forward on a surface discharge permit without establishing a formal baseline for each “parameter of concern” by utilizing the IBV approach.² In some circumstances, the two year time frame for establishing an IBV could still be unduly constraining. While NDEP acknowledged at the January 25, 2024 workshop (referred to as the workshop) that project proponents should contact the agency early to begin sampling a receiving water (as necessary) before submission of a discharge permit application, it is possible that the timeframes outlined for the IBV process could improperly hinder options for water management at a site, water management that may be preferable from an environmental stewardship perspective. In that instance (and if the IBV process is impracticable from a timing perspective), NDEP should be able to use best professional judgment (BPJ) regarding baseline conditions for purposes of allowing the Section 15 process to move forward. The BPJ assessment could be based, for example, on existing data (even if not available for an entire two year time frame) as well as information in the permit application forms, pilot studies and other sources that could demonstrate the effluent will or will not negatively affect the baseline conditions of the receiving water. Whereas most dischargers may be able to access the data to support an IBV on a schedule that is consistent with project development, there ought to be a BPJ option so that NDEP can avoid a permit bottleneck, where warranted.

2. Antibacksliding Associated with Establishment of Baseline Less Stringent than IBV. If a permit limit is calculated based on an IBV and data establish that the IBV is more stringent than the subsequently developed RMHQ or baseline value, interpretations of the antidegradation provisions of the Clean Water Act (CWA) could preclude corresponding relaxation of a permittee’s discharge limits. See generally CWA at Section 402(o). At the workshop, NDEP stated it does not believe antibacksliding would apply to discharge limits that are updated based on the availability of additional receiving water data. Can NDEP specify that changes to IBVs or RMHQs based on additional data may result in relaxation of corresponding permit limits under the technical mistake or some other exception to antibacksliding? See generally 40 CFR 122.44(l).

3. Threshold for Characterizing Permit Modifications as Subject to Antidegradation Review. Section 13 of the draft rule characterizes certain changes to a permit application as modifications that will result in an expanded point source discharge thereby triggering an antidegradation review. NDEP should consider some potentially applicable additional

² A parameter of concern includes any parameter with a water quality standard. Draft Rule, Section 3. Given the breadth of that definition, a permit process could be held up because of missing data for a single parameter.

clarifications. For example, the relocation of a discharge within the same segment of a receiving water should not be characterized as a modification that will result in an expanded point source discharge. Similarly, the rule should clarify that new effluent limits that do not reflect a change in composition of the discharge (e.g., a decision by NDEP to track additional constituents due to standard changes) should not be characterized as an expanded point source. Additionally, point source flow changes that do not result in increases in concentration or load should not be subject to antidegradation review.

4. Upstream Discharges Upstream of Tier 2.5 or Tier 3 Waters. The draft rule would prohibit new or expanded point source discharges into or upstream of a Tier 2.5 or upstream of a Tier 3 surface water if those discharges would degrade baseline water quality. Draft Rule, Section 12. As noted above, NDEP could clarify the meaning of an expanded point source that would subject the discharge to the antidegradation program. Additionally, the rule/guidance should clarify that the effluent quality need not be directly compared to the applicable baseline condition but should be assessed in terms of possible impacts to the receiving water after discharge and at the point where the upstream flows meet the segment characterized as Tier 2.5 or Tier 3.

5. Implementation of Antidegradation to Ephemeral (Non-Relatively Permanent) Water Bodies. Waters without a surface connection to a downgradient water body may not be jurisdictional under the CWA. NDEP should clarify how/if it contemplates applying the antidegradation program to those waters. If the antidegradation program is applicable to some non-relatively permanent waters, will those waters be categorically characterized as Tier 1 receiving waters?³ This clarification is potentially important; “[a]bsent data, a waterbody is assumed to merit Tier 2 protection” See NDEP Fact Sheet: Implementing Nevada’s Antidegradation Program. As with effluent dominated waters, NDEP should not be requiring Tier 2 analysis for jurisdictional receiving waters that only run in response to precipitation.

6. Referenced Guidance Documents. Throughout the multi-step rulemaking, NDEP has referenced two different guidance documents referred to as the Antidegradation Implementation Procedures and Antidegradation Permit Writers’ Guidance. The Fact Sheet associated with this latest version of the draft rule continues to refer to both guidance documents. These guidance documents are not, however, available in revised form. The federal antidegradation regulation specifies that “[t]he State shall develop methods for implementing the antidegradation policy . . . and shall provide an opportunity for public involvement during the development and any subsequent revisions of the implementation methods, and shall make the methods available to the public.” 40 C.F.R. 131.12(b). At the recent workshop addressing this version of the rule, NDEP stated that it would finalize the guidance documents subsequent to finalizing the rule. Given that the guidance will likely include details relative to application of the rulemaking, it should be available to the public for comment prior to finalizing the same.

Thank you for your consideration of these comments.

³ Tier 1 levels of protection apply to effluent dominated waters. Draft Rule, Section 8.

Jason Kuchnicki
Division of Environmental Protection
Bureau of Water Quality Planning
February 2, 2024

Sincerely,

PARSONS BEHLE & LATIMER

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

LAK:ah