

# Humboldt River Basin Water Authority

April 22, 2022

Dave Simpson  
Nevada Division of Environmental Protection  
Bureau of Water Quality Planning  
901 S. Stewart St., Suite 4001  
Carson City, NV 89701

## **Re: LCB Draft Proposed Regulations R119-20**

Dear Mr. Simpson:

The Humboldt River Basin Water Authority (HRBWA) respectfully submits the following comments on the Legislative Council Bureau (LCB) Draft of Proposed Regulation R119-20 which sets forth a process for the State Environmental Commission to classify a surface water of the State or segment thereof as a water of extraordinary ecological, aesthetic or recreational value (EAW) and establishes provisions for antidegradation protection of Nevada surface water resources.

HRBWA is a unit of local government in Nevada established in 1995 by Elko, Eureka, Humboldt, Lander and Pershing Counties to ensure that a long-term supply of reasonably priced water is available to support future agricultural, municipal, recreation and industrial uses within the Humboldt River Basin while protecting existing decreed and certificated water rights.

The Humboldt River Basin is the largest river basin that is entirely within Nevada covering more than 16,000 square miles and 34 hydrographic areas.

### **General Comments**

HRBWA supports the protection of Nevada's lakes, rivers and streams and recognizes the Nevada Division of Environmental Protection's obligation to have an antidegradation program under the *Clean Water Act* and NRS 445A.565. Furthermore, HRBWA appreciates NDEP's efforts to engage stakeholders in the rulemaking process and willingness to consider and incorporate changes to the proposed regulatory language.

### **Antidegradation**

As noted by NDEP, historically Nevada has implemented antidegradation through the establishment of Requirements for Maintaining Higher Quality (RMHQs) when the monitoring data showed that existing water quality for individual parameters was significantly better than the standard necessary to protect the beneficial uses. According to NDEP establishing RMHQs typically requires several years of data and, as a result, RMHQs have only been set for selected streams throughout the State, and consequently, a significant number of high-quality streams do not have RMHQs and are currently not provided any antidegradation protection.

**Member Counties:** Elko • Eureka • Humboldt • Lander • Pershing

HRBWA questions the necessity for NDEP to establish an entirely new process for antidegradation that is arguably more complex and costly than the existing requirements. It does not appear that the US Environmental Protection Agency (EPA) is requiring these proposed changes or that the existing process is delaying projects proposing a permitted discharge to waters for which limited or no data are available to establish RMHQs. The proposed changes include 55 pages of regulatory language, 67 pages of implementation procedures and a 69 page permits writers guide. While we understand that it may take years to establish RMHQ's we submit that regulated entities and the general public would be better served by NDEP continuing its existing antidegradation and prioritizing the development of additional RMHQ's.

HRBWA believes that the associated Antidegradation Implementation Procedures, and Permit Writers Guidance were not sufficiently vetted. While not a part of the proposed regulations, these documents explain how NDEP intends to regulate and use its enforcement discretion. EPA's water quality regulations (40 CFR 131.12) require States to provide an opportunity for public involvement during the development and any subsequent revisions of the antidegradation policy implementation methods.

Lastly, we are not aware that a Small Business Impact Statement has been prepared. NRS 233B.0608 requires an analysis of any direct and significant economic burden upon a small business; or direct restriction of the formation, operation or expansion of a small business, and also the estimated cost to the agency for enforcement of the proposed regulations.

In summary, HRBWA is concerned that the proposed antidegradation regulations are overly complex, potentially costly and will not improve the protection of water quality or result in more efficient and timely permitting.

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

HRBWA agrees that 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 should be maintained and protected as required under the *Clean Water Act*. However, HRBWA believes that the proposed regulations do not provide a clear understanding or processes for EAW designations.

EAW qualifications are broad and ambiguous: Pursuant to Sec. 2.1 of the proposed regulations the State Environmental Commission (Commission) may classify a surface water or segment of a surface water as a water of extraordinary ecological, aesthetic or recreational value if the Commission determines that the water has one or more of the following attributes:

- (a) Water quality that is higher than the applicable standards of water quality
- (b) Unique water quality characteristics; or
- (c) Some other important ecological, aesthetic or recreational value

Without additional parameters these attributes can be applied to a broad range of waters that are not outstanding National resources. Unique water quality characteristics, and some

other important ecological, aesthetic or recreational value are ambiguous terms that should be defined or clarified so there is an understanding of how they will be interpreted and applied.

The bifurcated process for nominating an EAW is confusing and not well defined: 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 Commission. This bifurcated process creates confusion and creates dissimilar roles for NDEP depending on how the EWA nomination is submitted.

If a petition is submitted directly to NDEP, Section 2(2)(a) of the proposed regulations requires the person nominating the EAW to work with NDEP to gather the following information including, but not limited to:

- A watershed inventory
- A statement detailing the compatibility of the classification with any preexisting or preauthorized land use activities on lands adjacent to the surface water or segment thereof, which must include, without limitation, historical irrigation practices and agricultural activities in the watershed
- A written statement detailing the social and economic benefits and impacts associated with the classification
- 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

The regulations not only implies that NDEP is part of the nomination process it also requires NDEP to utilize existing resources to help gather information, much of which appears to be outside of the agency's purview.

If the petition is submitted directly to the Commission, the Commission has 30 days to evaluate the merits of the nomination and notify the nominator if the Commission will initiate proceedings to adopt a regulation classifying the nominated surface water as an EAW or deny the petition. The process to evaluate a nomination within 30 days, including NDEP's role, is not well defined.

The lack of standards for evaluating EWA nominations: Section 2(3) of the proposed regulations outline the information needed in support of an EAW nomination. There are no standards for the information needed or benchmarks for how it will be evaluated. For example, what level of information is needed for the Commission to consider the social and economic impacts of an EAW designation, and how will the Commission determine the adequacy of public outreach and communication efforts within the local community near the surface water.

The EAW evaluation process lacks meaningful consultation with state agencies, local governments, and federal land managers and robust public outreach: Sec. 2(3)(a)(8) requires a person submitting a nomination to provide 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. This requirement lacks standards for what is acceptable. At a minimum, outreach and consultation with local governing bodies including, but not limited to, boards of county commissioners, city councils, regional water authorities, conservation districts, and irrigation districts should be required and documented. These entities prepare and maintain information required to support an EAW nomination. For example, Nevada's counties are required to adopt local land use and water resource plans and BLM is required to adopt resource management plans.

The proposed regulations must require an outreach plan to ensure that all potentially impacted parties have the opportunity to provide comment on a proposed EAW designation, especially residents and businesses who are most likely to be impacted by an EAW designation of a nearby surface water. Stakeholders in Nevada's rural areas must be provided notification and reasonable opportunities to participate in designation process.

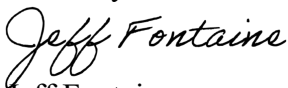
EAW designations can impact land uses and water rights: HRBWA is concerned about impacts of an EAW designation on the use of federal and private lands including historic irrigation practices, agricultural activities (including grazing), exploration and mining. We appreciate that the proposed regulations seek to provide assurances that existing land uses will be allowed to continue, however, there is no mention of how the expansion of existing uses and future land uses would be impacted. Since the vast majority of Nevada's land is managed by the Bureau of Land Management under a multiple use mandate and the U.S. Forest Service designation of a surface water or, segment of a surface water, could impact future land uses as well as existing land uses such as livestock grazing when federal permits are being renewed.

Certain water rights issues still need to be resolved including the interactions between an EAW and water allocation. For example, how will minimum flows in rivers and streams be addressed, particularly in ecologically and aesthetically designated water bodies?

Waters of the United States (WOTUS) creates uncertainty: The definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA) is in flux and new regulations are currently being considered by EPA. New regulations could have a significant bearing on the scope and application of NDEP's proposed regulations.

Thank you for your consideration of these comments. We look forward to continuing the dialogue on the proposed regulations with NDEP. Please do not hesitate to contact me if you have any questions.

Sincerely,



Jeff Fontaine  
Executive Director

Cc: HRBWA Board of Directors