

NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
Workshop to Solicit Comments on proposed regulations

R113-22: Establishing Antidegradation Review Process Provisions for Point
Source Discharges into Surface Waters and Classification for Waters of
Extraordinary Ecological, Aesthetic or Recreational Value

Date: August 31st, 2022

Time: 09:30 am

In-Person & Virtual Workshop using Teams software

MEETING NOTES

ATTENDEES:

Workshop Chair:

Dave Simpson, Program Supervisor, Bureau of Water Quality Planning, Standards Branch

NDEP Staff:

Paul Comba, Chief, Bureau of Water Quality Planning,

Carrie Skorcz, Environmental Scientist, Bureau of Water Quality Planning, Standards Branch

Ciara Scalia, Environmental Scientist, Bureau of Water Quality Planning, Standards Branch

Public:

John Hadder, Donette Barreto, Andy Maggi – PEW, Jennifer Thomason, Lawrence S. Bazel, Michael Chanen, Glenn King, Sandra K Brewer, Johnathan Lytle, John Tennert, Doug Busselman, Andrew Dixon, Adeline Thibault, Kara Steeland, Jennifer Inaba, John Solvie, AJ Rodrigues, Mathilda Guerrero, Daniel Fischer, Elveda Martinez, Jon Rudolph, Seth Alm, Zachary Blumberg, Jeff Fontaine, Nicole K Cutler, Donovan Gross, Katrina Pascual, Cale Pete, Carrie Sandstedt, James Gatzke, Dana LaRance, Mervin Wright, Derek Babcock, Lisa A. Kirschner, Michael Drinkwater, Haley Brown, Amy Race, Joseph R. Leedy, Clifford Banuelos, Michael Arrasate, PCWCD

SUMMARY:

Paul Comba presented the proposed regulations under the R113-22 petition to establish provisions for an antidegradation review process and a classification for waters of extraordinary ecological, aesthetic, or recreational value (EAW).

The proposed regulations would establish provisions for the classification of certain waters as waters of extraordinary ecological, aesthetic or recreational value; defining certain terms relating to an antidegradation review process; establishing provisions for an antidegradation review process for point source discharges into surface waters of this State; revising provisions relating to standards for water quality; revising various provisions relating to discharge permits, general permits and zones of mixing; and providing other matters properly relating thereto.

QUESTIONS (Q), ANSWERS (A) AND COMMENTS (C):

EAWs

1. Q. Can you define 'unique' as listed in the regulation?
A. This would have to be determined per water body based on its specific attributes.
2. C. When looking at qualifiers, there will be some in our society that will make it never-ending, normally coming from corporate industrial polluters.
3. C. The downside of flexibility is that you could get large number of applications, as there isn't enough specificity. Should have a list of waters or examples for people who are water users, and there's not clear criteria.
A. If we come up with a list of waters, then we would be questioned as to why this water is being considered, and why not another one. The criteria that an EAW would be based upon would need to be demonstrated by the nominating party.
4. C. It's best to leave the nomination process open for the citizens of NV, and have provisions for local input, as everyone needs to agree upon it.
A. Comment Noted.
5. Q. Is an EAW aspirational to improve water quality to this level.
A. No, an EAW would be based on existing conditions. The intent of an EAW designation is not intended to improve water quality conditions.
6. Q. Nominating criteria for EAW – what about the selection process, is there a certain number of boxes that need to be checked?
A. An EAW can be based on higher water quality conditions or have ecological, recreational or aesthetic qualities. Information requirements outlined in the regulation is to substantiate the nomination. There may be some nominated waters where all the listed information may not be necessary.
7. Q. What are guidelines for SEC to decide
A. The SEC will decide based on the additional supporting information.
8. C. There is a lot of very burdensome information for people who are not in government to provide, for example, providing historical records. An EAW cannot change anything that is already in effect (water use, discharges, land uses). It is more than is needed.
A. The intent of an EAW classification is not to affect or restrict existing land uses and discharges. Pre-existing – does not mean from the past, historical means current adjacent land use, that has this been used this way in the immediate past, and will it be used for those uses in the future
9. C. The more information that is provided, the quicker the process will go, and records are regularly available.

10. C. Requiring all this information means that the commission will not accept an application if it isn't available, and this nomination process should be a tool for the public to use. This is the point of this under the Clean Water Act.
11. C. Don't you think that there will be other organizations that can help them
12. C. For compatibility with historic uses, couldn't you ask an old irrigator instead of looking through reams of data.
13. C. NDEP Could provide links to information needed within a guidance document to facilitate a robust application.
14. Q. There is a lot of work that goes into getting needed resources, that will prevent folks from petitioning for EAW protection. Suggest deleting entire sections and shortening sections. Public outreach and communication efforts are critical. Every water body will require different groups of people to be contacted. Believe this policy is a step back from what previously existed.
 - A. The idea is to put together a complete regulatory package that the SEC feels is adequate to act on. Let's say you take a waterbody in front of SEC and have someone else that is an adjacent land user or discharger, the SEC is going to ask you if you have contacted and communicated with stakeholders.
15. Q. Can we have a citizens guide with links to all the basic resources that would be needed to nominate a water, and what types of information are needed? Maybe have someone on staff that is qualified to give advice.
 - A. That's interesting. There is something like this that exists in Georgia where the petitioner is helped to understand what is required and where to get it.
16. Q. How much information and who is responsible?
 - A. The petitioner is responsible and it's difficult to set thresholds on what is adequate and sufficient information, as it will be different for each water body.
17. Q. Information should be provided 'to the extent it's available'.
 - A. That language is already has been included in the proposed regulation.
18. Q. There's an implementation guidance document, that might be the place to put the references as a living document for guidance that is essential
 - A. That's a good idea, the guidance document could provide sources of information for the nomination process.
19. Q. The proposed EAW rule creates a burden on the public, as a result, the process will not lead to waters being nominated
20. Q. What about qualifications for springs, would they qualify under this regulation, and could it be included as aesthetic if has cultural significance?

- A. The definition is that it qualifies when it is a free-flowing water body. A ruling from the attorney general's office may be necessary. The NAC water quality regulations usually refer to surface waters and a spring is not usually included in the regulations.
21. Q. In Section 3(f), should it include federal water plan in that section as well where applicable?
A. Okay, thanks for that.
22. Q. When a nomination is submitted to the SEC, are they required to decide on whether to approve or deny the nomination, or do they request more information?
A. If a petition was not acted on by the SEC, they would list reasons for not acting and could request more information and resubmission of petition.
23. Q. Tier 3 is already in the regulation?
A. Antidegradation protection levels are not defined in the regulations at this point. The beneficial use which would be assigned to EAWs of ecological, aesthetic or recreational water is already in existing regulations.
24. Q. We appreciate you beating your heads against the wall with the Nevadans, and that the nominator doesn't have to pay for everything. You need local input and we recommend that the list of information be things that 'can be' included, and NDEP acts as gatekeeper
A. If the SEC is getting weak proposals, that's not fair to them, but comment noted.
25. Q. The State environmental commission doesn't have staff to gather information. If NDEP is involved, then I think that they would have a conflict-of-interest
A. That is intent of including in the regulations - the recommended information to accompany a petition.
26. C. All that information is needed so that others can decide how to interact with the application. We're caught in the middle of trying to provide access for the public and NGOs with opportunity for other stakeholders to comment.
27. Q. What are the increased protections beyond a tier 2?
A. If a waterbody is assigned a tier 3, there can be no new or increased point sources into the waterbody. A tier 2 protection does allow for decrease in water quality if it's important for social and economic reasons.

Anti-degradation

28. Q. You're falling back on the RMHQ is that correct?
A. Correct, if it already exists, it will be used as tier 2.
29. Q. Are their changes to antidegradation review process?
A. The antidegradation review will be done by the Division during the permitting process. A review could be conducted when major permit change is proposed.

30. Q. Are you throwing out IBVs?
A. Yes.
31. Q. Now we're falling back to the RMHQ process?
A. Yes.
32. Q. The only process for antidegradation review is what is in this reg?
A. Yes, we've updated and corrected in this reg to determine the tier to set the protective limit
33. Q. I thought tier 3 provides for temporary or limited discharges, that's important as you can't predict every instance
A. Yes. This allowance is now included in the section of the regulation that describes the antidegradation policy. The provisions of the antidegradation policy do not apply when an activity is required for public health or to respond to an emergency.
34. Q. Baseline vs existing – the language in the rule jumps back and forth
A. You're correct, in the actual rule, it's called 'baseline'
35. Q. How does this work if there is flowing water downstream from ephemeral waters and you have discharge upstream of the flowing water?
A. It's determined at the downstream control point where there is flowing water. If discharge doesn't make it to flowing waterway, then it doesn't fall under antidegradation.
36. Q. Would you need to have a mixing zone permit?
A. A mixing zone would be possible, but the entire upstream water could not be used as a mixing zone.
37. Q. Sections 15 and 16 is for general and stormwater permits – are they allowed into tier 2.5 waters?
A. If discharge conforms with current permit conditions and requirements, it would be allowed. For discharge into an EAW, the discharger would need to show that conditions in the EAW are maintained and protected.
38. Q. It's always concentration based, never load based?
A. Yes, unless there is a TMDL.
39. Q. On pg. 21, the table with Mahogany Creek – there's no trout on it.
A. That table is out of our regs as they exist today. Not all regs list aquatic species of concern.
40. C. The requirements section of EAW, needs wiggle room to provide easier access to petition for the public, could use New Mexico State as a guide.
41. Q. Could we use those requirements to make a guidance document instead of in the actual regulation, like what we have in antidegradation?

A. We need the requirements in the regulation for the SEC to base their decision on, and not just provide a resource guide for nominating a waterway as an EAW. Just because it's difficult doesn't mean should be excluded.

42. Q. Will there be a public comment period for EAW and antidegradation?

A. Yes, there will be a public comment period. This petition will go through the formal rule-making process.

43. C. Once a decision is brought to the SEC, they can move it forward or reject it, and as a petitioner it needs to have qualifiers spelled out in regs, but SEC guidance is vague - need to give information to help in application process, with additional information in a guidance document as not all things are relevant for each waterbody

44. Q. What about appeals if something is denied?

A. Usually an appeal is made to the SEC but since the SEC is deciding, it would probably go to court, depending on what the SEC rules and if it's left open or closed.

ADJOURNMENT:

Workshop adjourned by Paul Comba.