

Response to preliminary comments provided by Mr. A. Biaggi during technical listening sessions on the agency draft regulatory petition R119-20.

Discussion items on the Nevada Division of Environmental Protection’s Proposed Antidegradation Requirements R119-20.
October 5, 2021

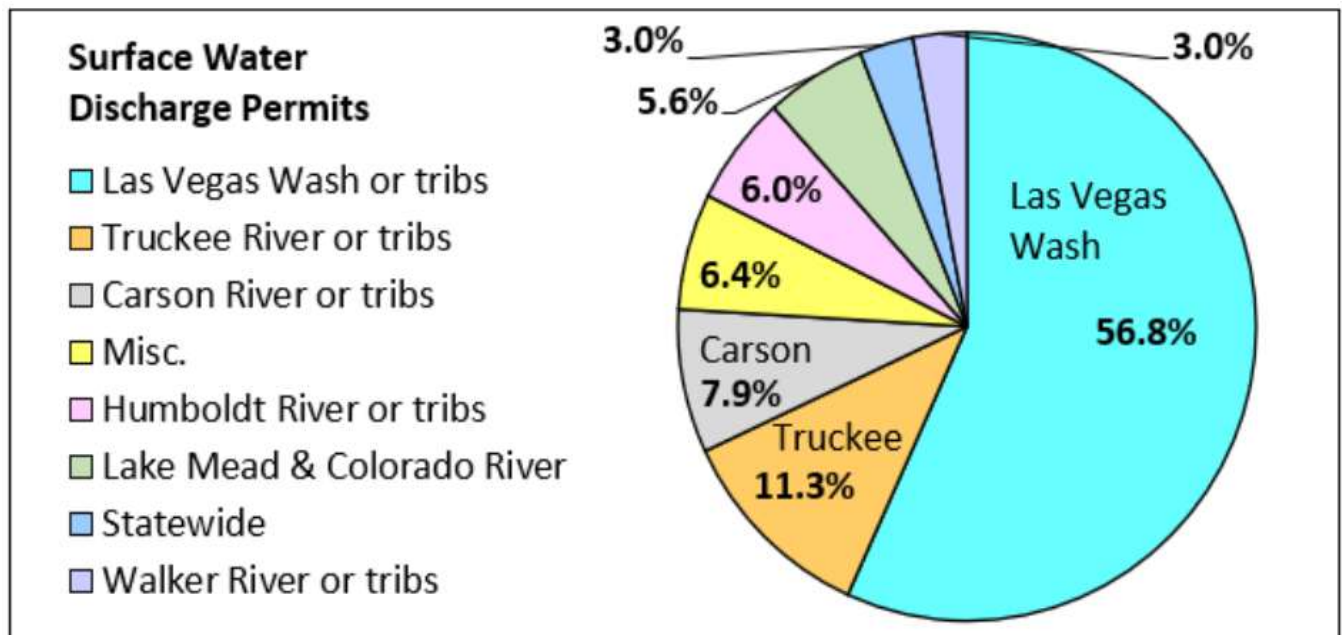
A. General comments

1. The need and basis for these regulations is still not clear. Nevada has had program delegation and an effective antidegradation program consistent with the Clean Water Act in place for decades. A compelling argument has not been made as to why the proposed changes are needed.

NDEP has outlined why the proposed regulations are needed. At present, antidegradation is implemented only for a handful of parameter/waterbody combinations for which RMHQs have been established. At present, there are many waterbodies that have no RMHQs. NDEP’s BWQP and BWPC worked together on the current proposed rule, implementation procedures, and guidance document.

2. There will be obvious fiscal effects of the proposed regulations to Nevada’s business and industry. We look forward to a complete and robust agency fiscal impact analysis in support of the regulatory hearing before the State Environmental Commission.

A fiscal impact analysis will be specific to each permit applicant. NDEP has reviewed all former and current surface water discharge permits; these show that about three-quarters of permits are for well-studied waters (Carson, Truckee, LV Wash), so it is likely that water quality is a known quantity and should preclude sampling and analytical costs being incurred by a permit applicant.



Based on evaluation of past SW permits (n=266), there should be data available for evaluating chemistry for most receiving waters to which surface-water discharge permits are requested.

The cost that will be incurred by a permit applicant to complete an antidegradation review analysis to demonstrate to NDEP that their discharge will not degrade surface waters of the state would best be determined by the permit applicant rather than NDEP. NDEP permit writers will review the applicant's analysis.

As required by NRS 233B.0608, NDEP will be preparing a Small Business Impact Disclosure and Statement to accompany the proposed regulatory petition.

3. We are concerned about the possible changes to the proposed regulatory language by LCB. We would feel more secure in working off of language reviewed by the Counsel. If substantive changes are ultimately made, we ask that a new public outreach effort be initiated.

A revised version will be submitted to LCB for their formatting. The point of all the public outreach to date is to assure that stakeholders' concerns are addressed and that the final version of the proposed regulation to be presented at the SEC meeting takes into account stakeholders' concerns raised during the public meetings. Public outreach has been ongoing and will continue over the next several months. The LCB draft of the regulatory petition will be the version of the draft rule presented at the formal rule-making public workshops, providing yet another opportunity for stakeholders to provide input on the draft rule language that will be presented to the SEC.

4. We have requested separation of the EAW provisions and antidegradation. It is our understanding that the agency is not amenable to that request. We respectfully ask that the two issues be separated as much as possible in future public workshop and discussions. They deal with different topics, with different issues, and somewhat different constituencies. We recognize their interrelatedness but believe separate discussions will result in more meaningful input and overall speed the regulatory process.

The two topics are related so it makes most sense to present them together. The antidegradation protection tiers include Tier 3 and Tier 2.5. These would make little sense without a discussion of EAWs.

5. Establishing tiers and EAWs can significantly impact local communities which needs to be quantified. There must be a robust community engagement process including public notifications and local workshops.

NDEP agrees that outreach efforts with the local community, stakeholders, landowners and local government agencies is an important step to gauge whether a waterbody should be classified as an EAW. Outreach efforts to present the data and information that an EAW nomination is based upon and to solicit comments on such would be an important part of the regulatory rule-making process.

6. There is still ambiguity regarding the terms "activities" and BMPs and how they will be considered and implemented. This is especially true for EAWs.

Any activity that has the capacity to affect water quality is of interest. BMPs for diffuse sources are generally voluntary measures that are encouraged. Ideally, the classification of a water as an EAW

would generate interest and support from stakeholders to work with NDEP to implement BMPs to control or limit diffuse sources of pollution effects on the EAW.

7. The Division has developed an extensive implementation manual and permit writers guidance. While not a part of the proposed regulations, these documents inform and clarify the proposed regulations. The regulations must be discussed in the context of these documents to enable review and minimize the potential for discrepancies.

Once NDEP has finalized the draft rule language, appropriate revisions will be made to the supporting documents to align with the regulatory language and provide clarification in the interpretation and implementation of the regulations.

8. There are no provisions for the removal of an EAW designation if the attributes for its creation are no longer present. The regulations should specify a rescission process.

NAC 445A.123 provides regulatory authority allowing the SEC to classify and reclassify surface waters. The adoption of an EAW follows the process for adopting water quality standards, which includes public notice, public meetings, and stakeholder comments. Rescinding or removing a waterbody from EAW status would follow the same process as adopting the waterbody as an EAW.

B. Fact Sheet Inconsistencies

1. In paragraph 3 of the *“Implementing Nevada’s Antidegradation Program Fact Sheet”* is inaccurate in that the federal requirements do not include a Tier 2.5.

Comment noted. The state-specific nature of Tier 2.5 will be clarified as noted.

2. In paragraphs 4 and 5 of the *“Implementing Nevada’s Antidegradation Program Fact Sheet”*, it is stated that the goal of the proposed regulation is the need for a more timely, flexible and comprehensive approach. In evaluating the steps outlined for evaluating a discharge permit application in Figure 1, it is not clear where those efficiencies will be achieved. Steps 3 and 4 are major areas of potential effort and delay. It is not clear what is contained in those “black boxes” and how the processes contained in them improve upon the existing methodology. It is recommended that the agency provide a desktop example to demonstrate the improved efficiencies of the proposed regulation.

Comment noted. NDEP will be presenting desktop exercises to stakeholders that will outline the procedural steps involved with conducting an antidegradation review analysis and hopefully, will show how the proposed process provides for maintenance and protection of water quality conditions in receiving waters.

3. In the section defining an ecological or aesthetic water (EAW) of the *“Implementing Nevada’s Antidegradation Program Fact Sheet”*, Best Management Practices are referenced as a criterion for treatment while the regulation itself notes “highest and best degree of pollution prevention, control and treatment”. Clarification is needed on this inconsistency.

Comment noted. Once NDEP has finalized the draft rule language, appropriate revisions will be made to the supporting documents to align with the regulatory language and provide clarification in the interpretation and implementation of the regulation

4. Numerous references to “Nevadan” in the Fact Sheets and in the proposed regulation (see Section 1(2)) implies only Nevada residents may petition the SEC for consideration of the designation of a water as an EAW. We question the legality and statutory basis of a residency requirement to petition the State Environmental Commission.

Inclusion of the “any Nevadan” language was to address concerns that outside groups with no affiliation in the area where the possible EAW would be located could submit a nomination for the water. Alaska included similar language in their recent antidegradation regulations. NDEP replaced “Nevadan” with “interested person” in the revised rule to be consistent with NAC 445B.886.

5. There should be a definition section of the proposed regulation to define commonly used terms and phrases.

NDEP has attempted to define terms and phrases specific to the proposed regulation within the draft rule language.

C. Section 1 of the Proposed Regulations

1. It would appear EAWs apply to a Water of the US (WOTUS) and Water of the State (WOTS) (see Section 1(1)). This is more expansive than the requirement of the federal Clean Water Act. What is the basis for this expansion and why is it necessary? To better understand the implications, we request maps be provided in the regulatory development process identifying WOTUS and WOTS in Nevada. Finally, will the antidegradation requirements be applied more broadly than waters subject to CWA jurisdiction?

NDEP believes that an EAW classification should be available for any surface water of the State if the water has the essential attributes that would support consideration as an EAW.

The proposed antidegradation requirements would apply to all surface waters of the state whose quality is higher than the applicable standards of water quality pursuant to NRS 445A.565.

The mapping exercise suggested would certainly be helpful but is beyond the scope of this proposed regulatory action. An outside entity with available resources to take on this mapping exercise would demonstrate support of NDEP’s efforts to ensure that all surface waters of the State are preserved, maintained, and protected.

2. In Section 1(4) an exemption of Title 48 (statutes governing water allocation) from the antidegradation provisions is provided for an EAW. Is there a statutory basis for this exemption? Significant clarification is needed with regard to the interactions between an EAW and water allocation. For example, will an EAW allow for new dams or diversion structures? How will minimum flows in rivers and streams and minimum pools in reservoirs be addressed, particularly in ecologically and aesthetically designated water bodies? How will federal and state operating criteria be factored into an EAW designation (note: the language in Section 1(5)

is inadequate)? How will conflicts between water quality and water allocation be resolved, by whom, and in what venue?

NDEP has revised Section 1(4) to affirm that designation of a waterbody as an EAW *“shall not affect, amend modify or supersede the use of the water as authorized under title 48 of NRS, or any rule, regulation or order promulgated or issued by the State Engineer per NRS 445A.725.”* The intent of the section is not to provide an exemption.

The draft rule language has been revised to specify the background information needed for a water to be considered as an EAW. The information and data submitted would address the questions raised in the comment. NDEP is aware that for certain EAW nominations that will involve other state and federal agency input, NDEP will have to take the lead in coordination of these meetings to ensure that all criteria and potential conflicts have been discussed.

3. Does the addition of Lake Tahoe as a EAW in any way impede ongoing water pollution control efforts and the local, state, bi-state, interstate compact (TRPA) or federal levels?

The California portion of Lake Tahoe is already recognized as an ONRW. Nevada currently recognizes the special status of Lake Tahoe by placing on it, the designated beneficial use of “water of extraordinary ecological or aesthetic value.” NDEP does not believe that classification of Lake Tahoe as an EAW would impede ongoing water pollution controls efforts.

NDEP has stated several times during public meetings that the classification of waterbodies as EAWs will be a transparent process with input solicited from all stakeholders who may be affected by such a decision. Additionally, the designation of EAWs must be supported by a “high bar” of information and data to support the nomination. Simply including Lake Tahoe in the draft rule for consideration as an EAW without following the process as proposed in the draft rule could be viewed as being disingenuous. NDEP feels that the focus of this proposed regulatory action should be to acquire SEC approval of draft rule language that will establish a foundation for EAW nominations and outline the process to officially classify a water as an EAW. In a subsequent and separate regulatory action, NDEP would initiate stakeholder involvement discussions and prepare a nomination package for Lake Tahoe to demonstrate how the process would be followed to classify the lake as an EAW with an appropriate tier of antidegradation protection.

4. Why not allow a discharge to a EAW if there is no degradation or impact to water quality, the resource, or EAW values?

The proposed regulation follows the strategy employed by at least 20 other states; that is, allowing a Tier 2.5 outstanding water, into which, discharges are allowed. However, the discharge cannot adversely affect the “essential attribute or character” that makes the water an EAW. The “essential character” need not be pristine water quality. This is recognized in the “or” in Section 2(2) of the proposed regulation, which states that *“The higher water quality condition, unique water quality characteristic, or important ecological, aesthetic, or recreational value shall be maintained and protected in a surface water or segment thereof that has been classified as an EAW...”*

Section 2(2) has been revised to state that *“This tier of protection does not preclude a new or expanded point-source discharge, where such sources would not lower the water quality conditions in the EAW.”*

5. More detail should be provided as to the analysis needed to demonstrate the social and economic considerations to support an EAW. Furthermore, should this be an “or” rather than “and”?

The assessment of social and economic considerations associated with classifying a surface water as an EAW would need to include sufficient detail to address the positive benefits, but also the negative implications (if there was potential for such). NDEP feels that EAW nominations should require assessment of social and economic benefits as compared to Tier 2 antidegradation review, which should require demonstration of either social or economic justification for lowering higher water quality conditions.

The guidance documents will be amended to provide more detail on information that should be provided in the discussion of social and economic benefits and impacts.

6. The EAW designation has the potential to alter or impact existing private and federal land uses. Additional language is needed in the proposed regulations to ensure existing and potential land uses are not impacted and that valid state and federal land use and environmental permits will not be impacted or altered.

Comment noted. NDEP agrees that the factors mentioned need to be taken into consideration when evaluating a surface water as an EAW. These factors have been included in the revised draft rule language as information that will be needed to support adoption of a regulation to classify an EAW.

7. What is the relationship between a state EAW designation on federal land/water and the need for analysis under the National Environmental Policy Act (NEPA)?

The designation of an EAW on federal land, assuming that there is support from the federal land management agency, would not be subject to NEPA; however, potential impacts to EAWs due to a proposed action may need to be considered during a NEPA analysis for that action (per discussion with BLM personnel during outreach meeting on October 27, 2021).

8. Except for the formal hearing process before the State Environmental Commission, what other public outreach will be conducted for an EAW designation? An Outreach Plan should be prepared to ensure **all** potentially impacted parties have the opportunity to weigh in. This obligation of the Division should be outlined in the regulation.

As with any proposed revision to Nevada’s water quality standards, a regulatory action to classify an EAW will follow established administrative rule-making procedures which includes publishing the draft regulation and providing ample opportunities for stakeholders and interested parties to provide comment and discussion. NDEP has revised the draft rule language to outline the supporting information and data that will be required to adopt a regulation to classify an EAW. This information would be made available for review and comment during local community and

stakeholder outreach meetings and public workshops which would be organized by NDEP as part of the administrative rule-making process. Feedback from the outreach meetings and review of the supporting information will be considered by NDEP as to whether there is local support for a proposed EAW classification.

9. The regulations should specify the format of an EAW petition, not just that of the regulatory petition process of the SEC. The regulations should specify the background information needed for an EAW petition (such as five years of water quality data, basis for ecological consideration, etc.), clear rationale for the request, social and economic considerations, existing land and water uses, applicable operational criteria, existing discharges, and the format of that information. Should the nomination of EAWs align with the Triennial Review?

NDEP has revised the draft rule language to specify the background information and data that should be compiled to support an EAW nomination and includes most of the suggested background information mentioned in the comment.

Aligning EAW nominations with the triennial review process would be most appropriate as classification of a surface water as an EAW would be in effect an addition to or an amendment of a water quality standard. However, reservations have been expressed that by tying nominations to the triennial review process, this would limit consideration of such waters to only every three years. NDEP notes that most changes to water quality standards take several years of work, and the EAW process will probably take a similar amount of time. Because of this, it is likely that an EAW nomination will intersect with a triennial review period, regardless of whether this is specified as a requirement.

10. Clarification is needed with regard to an EAW designation and the tributaries to that water body and future upstream discharge restrictions.

An EAW designation would not transfer up into the tributaries; however, any proposed discharge to those tributaries must undergo routine antidegradation evaluation and any discharge cannot adversely impact water quality conditions in the downstream EAW.

D. Section 2 of the proposed regulation

1. In the Section 2, Antidegradation Policy, it is noted that the tier of protection is determined on a parameter-by-parameter basis. This will result in water bodies being classified in multiple tiers depending on the water quality parameter. Furthermore, the tier may change over time based upon the Triennial Review analysis and other information. It is unclear what the implications are of multiple tiering and appears to be an unnecessary complication of the antidegradation process. We call upon NDEP to provide a clear and concise explanation of this process, its implications, and real-world application to a water body.

As noted, the proposed antidegradation policy would be applied on a parameter-by-parameter basis, meaning some parameters may have higher water quality conditions while other parameters may only have water quality at the water quality standard level. If the antidegradation policy is properly implemented, and the Tier 2 protection level for a parameter

should not change over time (if we assume, for the sake of argument, that climate change or drought does not affect water quantity).

NDEP notes that more than 15 other states follow a parameter-by-parameter approach. Furthermore, the AG's office provided an opinion that because RMHQs follow a parameter-by-parameter approach, this regulation should be consistent and follow the same approach.

NDEP will provide tabletop mock-exercises to outline the procedural steps that would be involved in conducting an antidegradation review analysis, which will provide an overview of the process, the associated implications, and the application to Nevada surface waters.

2. In Section 2(3)(a) "economically viable" is the only treatment technology listed. What about other levels of treatment or the lack of treatment technology for a particular parameter?

The draft rule language has been revised for the reason listed in the comment.

3. In Section 2(3)(c) the word "standard" should be plural.

Comment noted.

4. In Section 2(3)(d) a facility that is proposing a new or increased discharge must be in full permit compliance or be under an enforcement or compliance schedule and must use the highest and best treatment technology. Does this reflect an existing requirement or is this new? What if treatment technologies other than "highest and best" will achieve the necessary water quality goal?

Before a new discharge is allowed to lower the existing water quality for a parameter requiring Tier 2 protection, an evaluation of existing discharges within the same receiving water should be done to identify whether there are any compliance problems associated with an existing discharger in meeting their permit effluent limitations for the parameter in question. Where such compliance problems exist, before the new discharger is allowed to discharge pollutants (above the Tier 2 level) there should be some assurance that a measure or an action is being taken or planned to resolve the existing compliance problem.

This section of the draft rule has been revised to state, "*The statutory and regulatory requirements for treatment of new and existing point sources are achieved through the application of the highest and best degree of waste treatment available under the existing technology, consistent with the economic capability of the project.*"

Additional detail will be added to the guidance document to explain how this requirement will be implemented and evaluated during the permitting process.

5. Section 2(3)(e) – This would appear to bring diffuse sources into the antidegradation process with the caveat that the diffuse sources are contributing the same sort of pollutants as the point source. Is a similar provision in the current regulations? It is not clear what the relationship will be between those point and nonpoint source discharges and how they will be controlled and regulated. Is this an expansion of CWA requirements? Does it apply to WOTS?

The intent of this section is to address nonpoint source pollution where there are existing nonpoint source compliance problems in high quality waters. Ideally, strategies are in-place or planned when a nonpoint source is contributing to lower quality, with respect to a parameter of concern in the point source discharge. This regulatory language does not require the NDEP to establish or require BMPs for nonpoint sources where such BMP requirements do not exist.

The draft rule language has been revised to include the statement, “Cost-effective and reasonable best management practices or other strategies, as recommended under the Department’s diffuse source program, per NAC 445A.336, are used to the extent practicable to prevent or reduce the lowering of higher water quality conditions.” This would be a consideration when lowering of high water quality conditions is proposed in WOTUS and WOTS. The details of how this will be evaluated and assessed, will be included in the draft guidance document.

6. Section 3(2)(c) – Baseline water quality (if not available) must be developed by the discharger. That is consistent with current requirements. As noted in comments above, a demonstration of the superior efficiency and timeliness of the proposed regulations is needed.

Without knowing the water quality conditions in a receiving water, NDEP cannot determine whether high water quality conditions exist in the receiving water or ensure that authorization of a discharge will not degrade the possible higher and existing water quality conditions in Nevada surface water resources.

As previously noted, NDEP has reviewed all former and current surface water discharge permits. This review showed that about three-quarters of permits are for well-studied waters (Carson, Truckee, LV Wash), so it is likely that water quality is a known quantity and should preclude sampling and analytical costs being incurred by a permit applicant.

7. In Section 3(3)(a) what about a natural degradation of water quality? For example, temperature in the face of climate change? If degradation occurs, can the EAW designation be rescinded?

NAC 445A.123 provides regulatory authority allowing the SEC to classify and reclassify surface waters. The adoption of an EAW follows the process for adopting water quality standards, which includes public notice, public meetings, and stakeholder comments. Rescinding or removing a waterbody from EAW status would follow the same process as adopting the waterbody as an EAW.

8. Section 3(3)(d) addresses tributaries and their relationships to an EAW. This part of the regulation expands the boundaries and definition of an EAW in some circumstance.

An EAW designation would not transfer up into tributaries; however, any proposed discharge to those tributaries must undergo routine antidegradation evaluation and show that a discharge will not adversely impact water quality conditions in the tributary as well as the downstream EAW.

There may situations where a tributary is also nominated for classification as an EAW. In such cases, classification of the tributary water would be subject to the same information and data requirements, outreach efforts and agency coordination as would be done for the downstream EAW.

9. Section 3(4)(b)(i) and the role of existing RMHQs is not clear. Further clarification is needed in order for a clear understanding between the existing RMHQ requirements and the proposed new provisions. A crosswalk is needed to better understand the new provisions and existing water quality standards, RMHQs, and other criteria.

Additional language has been added to the draft rule to clarify that higher water quality conditions shall mean that the baseline concentration of a parameter in the receiving water is better than the water quality standard level or a RMHQ has been adopted for the parameter.

10. Section 3(4)(b)(ii) how does one ascertain the impacts to an aesthetic value? To a recreation value? Criteria and guidance is needed to support this section to ensure there are objective and fair analytical standards.

NDEP has revised the draft rule language related to EAWs to narrow the attributes that could be associated with an EAW and would be able to be evaluated and assessed based on water quality conditions. An EAW classification will be based on the surface water having higher water quality condition, unique water quality characteristic, or important ecological, aesthetic, or recreational value.

Proposed discharges into an EAW (Tier 2.5) or into tributaries to an EAW would be evaluated based on whether such discharges would lower the existing water quality conditions in the EAW. This eliminates separate criteria being used to evaluate whether a discharge will impact the essential attribute of the EAW. The water quality conditions in the EAW will be used as the basis for evaluating whether a discharge would have a negative impact on the EAW.

11. In Section 3(5)(e) what is the rationale for revisiting mixing zones if a permit is to be reissued in the absence of changes to flow and other conditions?

Comment noted. An application for a renewed mixing zone will not require an antidegradation review (assuming renewal of the discharge permit is a reissue) unless conditions in the previously authorized mixing zone are proposed to be modified. The draft rule language has been revised to reflect the above.

12. Section 3(6)(d) addresses TMDLs and effluent standards. Is this the current practice or a new requirement?

This would be the accepted approach when a receiving water was impaired for a parameter that may be in the discharge. Pursuant to NRS 445A.520, NDEP would not set an effluent discharge limit at the impairment level but instead at the water quality standard level. Ideally, a TMDL would be developed to address the impairment and when the TMDL was approved, the permit may be modified to incorporate the waste load allocation to regulate the level of the parameter in the discharge.

13. Section 3(7)(b) – The language in the section is redundant after the word “considerations” given the criteria contained in Section 3(7)(8). Also, the language in the two section are inconsistent.

Comment noted. NDEP has revised the draft rule to provide better clarity.

14. What is the statutory basis for inclusion of the control of diffuse sources in Section 3(8)(b)(vi)?
NDEP has revised the draft rule to provide consistency with regulatory authority.

15. Clarification is needed on the language in Section 3(9)(c) and Section 3(10)(b). Both appear to imply an allowed discharge to an EAW. This is inconsistent with the definition of an EAW and the prohibition of all point source discharges.

Comment noted. To address concerns about stormwater discharges under a general or MS4 permit to an EAW, the draft regulatory language in Section 2 (Antidegradation Policy) has been amended whereby permitted activities to restore or maintain the essential attribute(s) of the EAW would not be subject to Tier 3 or Tier 2.5 antidegradation protection requirements.

16. A waterbody cannot be excluded from Tier 2 protection solely because water quality for some parameters do not meet levels necessary to support beneficial uses? In these cases, Tier 1 protection would apply for the impaired parameter(s) while the others would be subject to Tier 2 protection. If the intent is to support beneficial uses how does this help?

For clarification the sentence should be stated as, "A waterbody cannot be excluded from Tier 2 protection solely because water quality for some parameters do not meet water quality standards."

Some waterbodies could have Tier 1 protection for some parameters and Tier 2 protection for other parameters. If some parameters are not meeting water quality standards (i.e., the waterbody is not supporting at least one beneficial use and is impaired), and a TMDL has not been developed to address the impairment(s), antidegradation requirements would assign a Tier 1 protection level to parameters exceeding water quality standard levels. A new or expanded discharge cannot cause further degradation of water quality conditions in the receiving water.