

Response to preliminary comments provided by Ms. Lisa Kirschner on behalf of Nevada Gold Mines during technical listening sessions on the agency draft regulatory petition R119-20.

Re: Preliminary Comments – Petition R119-20 Antidegradation Draft Rule

Dear Mr. Simpson,

Consistent with the Nevada Division of Environmental Protection's (NDEP) October 29, 2021 deadline, the following preliminary comments submitted on behalf of Nevada Gold Mines (NGM) are intended for NDEP consideration as it works on revisions to the draft of the proposed antidegradation regulation, i.e., Petition R119-20 (referred to as the draft rule). NGM appreciates the efforts NDEP has made to provide extensive information to all stakeholders regarding its work to refine the antidegradation component of Nevada's water quality standards program. The informational webinar and the two technical sessions in September of 2021 reinforced NDEP's assertion that this rulemaking is one of its biggest efforts to date. NDEP's determination to continue evaluating the details of the draft rule and substantive comments on the same will further improve the draft as part of its next steps in the rulemaking process. These comments identify some of the possible issues NDEP may want to consider as it moves forward. This letter provides some overarching suggestions/thoughts followed by comments on some of the specific sections of the draft rule (and guidance documents).¹

Footnote 1: We recognize that the rulemaking will be revised. These "issue spotting" comments are, therefore, not comprehensive. Additional, substantive comments may be submitted as part of the formal public comment process.

1. Overarching Comments:

(a) There are multiple documents supporting the draft rule including the draft Antidegradation Implementation Procedures and the draft Antidegradation Permit Writers' Guidance. Having two different detailed guidance documents (with lots of overlap) makes assessment of the information more difficult. NDEP should consider streamlining the implementation procedures and guidance into a single document to enable easier review and to minimize the potential for discrepancies between the guidance documents and between the guidance documents and the rule.

Comment noted. NDEP will try to streamline the two documents as much as possible; however, the documents have different focus and will remain as two separate documents.

(b) NDEP should consider clarifying how the revised antidegradation rule would apply to state waters not governed by the federal Clean Water Act (CWA). NDEP has stated (in the stakeholder outreach) that antidegradation review contemplated by the draft rule would not apply to discharges to ground water. See also draft rule, Section 2 (stating that "antidegradation policy applies to all surface waters of the State"). The scope of the program warrants careful review; the detailed approach contemplated by the petition could be limited to CWA waters to ensure ease of application and consistency. NDEP already evaluates the quality-related aspects of possible discharges to non-CWA waters under Nevada's Water Pollution Control permit program; additional procedural hurdles may prove to be unduly burdensome without substantive environmental benefits.

State statute (NRS 445A.565) requires that waters of the state not be degraded. Under NRS 445A.565, **Protection of surface waters of higher quality; treatment of and control over discharges constituting new or increased sources of pollution**, the statute states that:

1. Any surface waters of the State whose quality is higher than the applicable standards of water quality as of the date when those standards become effective must be maintained in their higher quality. No discharges of waste may be made which will result in lowering the quality of these waters unless it has been demonstrated to the Commission that the lower quality is justifiable because of economic or social considerations. This subsection does not apply to normal agricultural rotation, improvement or farming practices.

The proposed antidegradation review rule would be applicable to NPDES permits (CWA waters) and Individual permits (State waters).

(c) The language in the draft rule could be more precise (and should be carefully evaluated for internal consistency and to avoid redundancy). For example, Tier 2 review should be assessed based on social **or** (not and) economic benefits. The assessment of alternatives for Tier 2 review should be for economic **and** (not or) technically feasible options. See comments below on NDEP draft rule at 7.d and 8.a.

Comment noted. NDEP has been continuously revising the draft rule based on feedback; a careful review will be done prior to submittal of the revised rule to LCB.

(d) NGM understands that part of the reason for pursuing changes to the program stems from the time and data requirements associated with establishing RMHQs, the existing regulatory requirements to maintain higher quality waters. NDEP has proposed the establishment of interim baseline values (IBVs) for parameters that do not have RMHQs asserting that those IBVs could be developed more expeditiously. Could the suggested guidance approach to IBVs be so sweeping (e.g., IBVs must be established for any constituent present in the effluent no matter the concentration), that it would undermine those streamlining efforts and result in tremendous additional time/resources for project proponents seeking permit authorizations?

The establishment of IBVs would be to protect higher water quality conditions for a parameter that does not have an established RMHQ. If a constituent was identified as a pollutant of concern in the effluent and it's corresponding level in the receiving water was better than the water quality standard, antidegradation as well as statutory requirements would require the constituent to be limited at the IBV level in the effluent.

To avoid those possible consequences, NDEP may want to clarify its direction to project proponents for establishing IBVs necessary to screen discharges for antidegradation compliance and to ensure the approach meets NDEP's streamlining intentions. For example, if a constituent is characterized as having no reasonable potential to exceed water quality standards based on the relevant water quality standard (and will, therefore, not be limited in the permit) and the data indicate that it is present in

low concentrations (as assessed by NDEP), IBV development for that constituent should not be required.

NDEP has been working on mock desk exercises to work out detailed guidance on performing antidegradation reviews. Additional detailed guidance on data handling and review will be provided in the AIP and Permit Writers' Guidance and discussed with stakeholders during workshops.

Until data are available for the receiving water, it is not possible for permit writers to determine if the concentrations in the effluent have a reasonable potential to degrade the receiving water. That is the purpose of collecting data during the permitting process. If those data show there are parameters in the effluent at concentrations that will not adversely affect the concentrations of that parameter in the receiving water, then the permit can move forward.

The IBV (minimum = 3 samples) was designed to avoid delays associated with the 5 years of quarterly data that has historically been used to establish RMHQs. The IBVs would be developed following similar procedures to establish RMHQs and would be used in a similar manner during permitting to maintain and protect higher water quality conditions. As additional water chemistry data was collected, the IBV would be replaced with an established RMHQ water quality standard.

2. Section 1 Extraordinary Ecological and Aesthetic Waters (EAWs):

(a) Issue para. 1: The rule would establish that EAW waters can "hav[e] some or all of the following essential attributes . . ." The list of attributes is broad (e.g., higher water quality conditions, aesthetic significance, historical significance, essential character etc.). In the September 9 workshop, NDEP indicated it has broad discretion to assess those and corresponding data needs. NDEP continually reiterated that it will assess nominations on a case-by-case basis.

(i) Comment: The foundation for EAW nominations should be subject to rigorous data requirements and specified quality assurance and control. The EAW nomination process should include baseline requirements (e.g., five years of data for assertions of water quality-based conditions similar to what is required for establishing RMHQ values). Nominations should be based on data and science and should not be accepted if limited to unsubstantiated qualitative assertions.

It is NDEP's intent to set a "high bar" for EAWs. That means sufficient and adequate data and information as described in Section 1 of the proposed regulation would need to be compiled to support an EAW nomination. Because each waterbody and circumstance is unique, NDEP must evaluate the data and evidence on a case-by-case basis. NDEP believes the list of requirements for nominating a waterbody is sufficiently rigorous.

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 data. The draft rule language was also revised to expand the background information and data that would be needed to support an EAW petition.

(b) Issue para. 2: The rule outlines the nomination process (requiring the filing of a form with the Commission). The additional data obligations mandate discussion of social and economic benefits and impacts associated with a designation.

(i) Comment: NDEP has indicated that any assessment of social and economic benefits and impacts for EAW nomination will be on a “case by case” basis.² The guidance/procedures should include factors that warrant against nomination (as well as those that may support a nomination). For example, EAW nomination should be denied if it would result in economic harm, could undermine water quality goals (e.g., by prohibiting centralized treatment) or if it could impact job creation and projected tax revenues.

Footnote 2: Note that EAW nominations should require assessment of social and economic benefits as compared to Tier 2 antidegradation review which should require demonstration of one or the other.

Comment noted. The assessment of social and economic considerations associated with classifying a surface water as an EAW would need to address not only the positive benefits but also the negative implications (if there was potential for such).

The revised draft rule has been revised to require “A discussion of the social and economic **benefits and impacts** associated with an EAW designation.”

(ii) Comment: Consider whether the nomination process should be aligned with the triennial review period in an effort to coordinate with NDEP’s water quality-related assessment of State waters.

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.

(c) Issue para. 3: NDEP has identified factors the Commission will consider during a public hearing to classify a water as an EAW (and for determining whether to protect that water as a Tier 3 or 2.5).

(i) Comment: The factors should include a grandfather provision establishing that the nomination of a water body may not affect existing rights, e.g., preexisting or preauthorized land-use activities and rights including those for which permits are already pending and including all activities on adjacent lands and/or within the vicinity of the nominated surface water (including existing or pending discharges to upgradient waters).³

Footnote 3: The draft Implementation Procedures document also addresses implications of EAW nomination with respect to existing land uses. See, e.g., Section 3.0. Correspondingly, any changes to the rule provisions (e.g., to clarify that it should also apply to pre-existing and pre-authorized land uses) would require an update to the procedures documentation.

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 should accompany an EAW nomination.

(ii) Comment: There are certain broad statements relative to “grandfathered” activities in the draft Implementation Procedures document that may warrant further evaluation given the possible misunderstanding related to the same. For example, Section 3.0 refers to the “encouragement” of best management practices if existing land uses within the vicinity of an EAW are allowed to continue. Any such information should clarify that NDEP has no intention to regulate land uses outside the scope of its authority under the Water Pollution Control Act.

NDEP does not have regulatory authority to require BMPs or other land management activities; hence, it can only encourage the use of BMPs. 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.

(d) Issue para. 5. The EAW classification “shall not prohibit or alter activities, which are authorized under a state or federal permit, related to management and maintenance of structures and devices in and on the water.”

(i) Comment: It is possible maintenance of stormwater control structures, dust control measures and other activities near an EAW could have implications for the receiving water (but may not discharge through point sources to the receiving water). These activities should not be undermined by an EAW classification. The provision could be appropriately broadened to establish that the classification of a water as an EAW “shall not prohibit or alter activities, which are authorized under a state or federal permit, related to management and maintenance of structures and devices in, on or that would impact the water.”

Comment noted. The draft rule language has been revised to clarify that such activities are not undermined by an EAW classification.

(e) Issue (EAW general): The EAW nomination process does not clearly address the implications of any such nomination to upgradient waters. Nevada regulations specify that where there is no specific control point on a water body, the applicable surface water criteria are those from the nearest control point downstream to the next control point upstream in the watershed (or the next designated water). NAC 445A.1239.

(i) Comment: The draft rule should include a provision that states, with specificity, that the tributary rule (NAC 445A.1239) does not apply to the nomination process for any water body or segment of a water body. See comments below relative to the draft guidance.⁴

Footnote 4: This issue has been contemplated. Section 4.1 of the draft Guidance specifies that Tier 2 and 3 protection is not mandated for tributaries to EAWs but that “the water quality standards . . . for an EAW must be applied to its unclassified tributaries in accordance with the tributary rule.” See also 4.2.2 (further clarifying that discharges to EAWs must be evaluated to be certain they do not lower the existing water quality in the downstream EAW). Section 4.2.1 specifies that

“existing point source discharges that were permitted prior to designation of the water as an EAW will be allowed to continue.” These references warrant further review as the rule language is refined.

The EAW status does not transfer up into tributaries; however, any proposed discharge to those tributaries must undergo routine antidegradation evaluation and any discharge cannot adversely impact the downstream EAW.

As noted in footnote comment, supporting guidance documents will be reviewed and amended, when necessary, to align with the refined draft rule language and to provide clarification in the interpretation and implementation of the draft rule.

(ii) Comment: The draft rule should provide, with specificity, an opportunity for the public, including upgradient dischargers, land users, permit holders and any others with any interest in the nomination, to review the nomination and supporting information in order to comment on the same. The rule references that the Commission will consider information submitted by the public for or against the nomination but does not specify how the data and other information being considered are to be evaluated by the public. (draft rule at Sections 1.2 and 1.3).

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 stakeholder 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 proposed EAW classification.

(iii) Comment: Note the nomination process references NAC 445B.886 (draft rule at Section 1.2) which establishes “any interested person may petition the Commission in writing for the adoption, filing, amendment or repeal of any regulation and shall accompany his or her petition with relevant data, views and arguments” whereas the language of the draft rule states “any Nevadan” may nominate a surface water or segment of a surface water. This discrepancy likely needs additional evaluation.

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 draft rule to be consistent with NAC 445B.886.

(iv) Comment: New discharges to Tier 3.0 EAWs are precluded (draft rule at Section 2); the draft rule could further clarify that modifications to existing discharges, i.e., any changed circumstances that would not result in an increase in concentration or load of constituents relative to the EAW nomination, are not precluded. For example, if there are flow changes but those changes do not result in increased concentration or loads of a constituent, those discharges should be characterized as existing.

Major modifications to an existing permit would not be allowed in a Tier 3 EAW. Such modifications to an existing permit for a Tier 2.5 EAW would be allowed if the modification would not adversely affect the EAW. That was the point of adding Tier 2.5, which is not in EPA's regulations, but is accepted by EPA.

The clarification noted in the comment and the example provided would be more appropriate in the guidance document rather than the draft rule.

(v) Comment Section 4.2.2 of the draft guidance specifies that "the applicant may submit a study to demonstrate that discharges containing effluent concentrations that exceed the baseline water quality of the downstream EAW for parameters of concern will not result in degradation of the downstream EAW." NDEP should consider identifying a specific framework for that study and should recognize modeling is an appropriate means for demonstrating the implications of a discharge on a downstream EAW.

Modeling would be acceptable to demonstrate that there would be no implications of a discharge on a downstream EAW; but the framework for conducting a study to demonstrate such would be the responsibility of the applicant rather than NDEP. As is currently done, NDEP would review any demonstration provided by a permittee or an applicant.

(vi) Comment Section 4.2.2 of the draft guidance indicates that if EAW classification is based on attributes other than water quality, the permit writer shall perform a qualitative analysis to demonstrate whether a proposed new or expanded point source would have an effect on the unique value of the waterbody.⁵ The guidance should clarify that the project proponent/prospective permittee gets to review and comment on that analysis which comments would be considered by NDEP (and the Commission, as warranted).

Footnote 5: As noted above, nominations should be based on data and science and should not be accepted if limited to unsubstantiated qualitative assertions.

Based on comments made during the stakeholder outreach meetings, NDEP has narrowed the attributes which would be associated with an EAW with the intent these attributes could be correlated with water chemistry of the nominated surface water. 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.

3. Section 3 – Implementation Procedures:

(a) Issue para. 1: The draft rule suggests that antidegradation review is triggered if there is a request for a new or expanded discharge. See Section 3.1.a. and 3.1.b.

(i) Comment: New or expanded actions should not include certain activities (including flow changes), e.g., where the concentration-based limit is less than or equal to the ambient concentration of the receiving water, a permit is being changed but the limits are equal to or less than limits in the prior permit, the proposed activity is temporary and limited etc. This information should be included in the permit writer's

guidance/implementation procedures. The draft guidance specifically exempts new and expanded discharges associated with a ground water remediation project; that sort of approach could be broadened to help streamline the program. See Guidance at fn.2. The guidance does not (and should) exempt temporary and limited activities from antidegradation review.⁶ The rule or guidance could also clarify that if a permit is being renewed and new effluent limits are added to maintain the existing concentrations and loads (including variability), those new effluent limits do not trigger a Tier 2 review.

Footnote 6: The temporary and limited exemption is only addressed in the context of EAWs. See generally Permit Writers' Guidance at 4.2.1. See also comments on general permit antidegradation review.

Comment noted and NDEP agrees that additional detail should be included in the guidance document as suggested.

(b) Issue para. 1: The draft rule suggests that a new, modified or renewed zone of mixing must undergo antidegradation analysis. See Section 3.1.c.

- (i) Comment: A renewed mixing zone should only undergo antidegradation analysis if it reflects circumstances changed from the issued condition. Otherwise, it does not constitute a new or expanded action. Note also, the administrative code states that “[t]he Director shall periodically review all zones of mixing and may . . . modify any such zones” 99999 445A.300. That review should be limited to a new, modified or renewed mixing zone (if the renewed mixing zone reflects a change from the issued conditions).

Comment noted. An application for a renewed mixing zone will not require an antidegradation review unless conditions specified in the previously authorized mixing zone are proposed to be modified. The draft rule language has been revised to reflect the above.

(c) Issue para 2: The draft rule suggests that the antidegradation review steps include the identification of parameters of concern and indicates that the parameter of concern means a parameter with either a numeric or narrative water quality standard. See Section 3.2.

- (i) Comment: The process for identifying parameters of concern, the data related to the same etc. should be in guidance and not in rule. The draft guidance identifies possible considerations for evaluating whether constituents should be considered for follow-up. See Permit Writers' Guidance at 5.1. It can also specify that if a discharge of a parameter is temporary and limited, it need not be identified as a parameter of concern. Guidance on identifying parameters of concern could be expanded to provide the information on data collection and other logistical considerations.

Comment noted. NDEP agrees with suggestion and will revise guidance document accordingly.

- (ii) Comment: The draft guidance includes clear and proper statements that pH and temperature should not be identified as parameters of concern and that there are certain constraints on identifying DO and BOD. See Guidance at 5.1. Despite this clear

statement, the example in 7.2.4 identifies temperature as a parameter of concern. That discrepancy may warrant additional follow-up.

Comment noted and NDEP will revise guidance document to be consistent. Temperature is not generally a parameter of concern but may be so in thermal discharges to cold-water streams.

- (iii) Comment: NDEP should consider (in guidance) providing additional details on the necessary data quality for establishing baseline. While the IBV concept is considered “a temporary RMHQ for purposes of permitting”, it should be based on data that are representative, reproducible and subject to proper quality control particularly if interim baseline can be established with only three samples.

Water samples collected for establishing IBVs would need to be collected based on sampling and analysis plan approved by NDEP. Approval of the plan would take into account data quality objectives as noted. If samples were collected by the applicant prior to submitting a permit application, NDEP would review the field sampling techniques used, lab chain-of-custody forms and lab QA/QC methods to ensure data quality objectives were met.

- (iv) Comment: To the extent that the parameter of concern includes a narrative water quality standard, the guidance/procedures should consider explaining how NDEP’s analysis of antidegradation will review the same and potentially note that the offramps, e.g., if discharges are temporary and limited, also apply to any narrative standard compliance issues.

Comment noted. The antidegradation review analysis focus is on parameters of concern in a discharge and the possibility exists that a parameter of concern may not have a numeric water quality standard. The narrative standards need to be relied on in such situations especially if the level of the parameter in the receiving water is at relatively low level or not detected.

(d) Issue para. 3: The Antidegradation levels -- broken down by tier -- appear to review information already identified in Section 2. See draft rule, Section 3.3-5.

- (i) Comment: To the extent Section 3 reiterates information in Section 2, it should be stricken or the language between the two sections should be identical.

Comment noted and NDEP has revised the draft rule language to eliminate redundancy as noted.

(e) Issue para. 5: For Tier 2, the draft rule suggests that a point source discharge will not cause degradation if effluent at the point of discharge is better than the corresponding baseline water quality condition or RMHQ. See draft rule at 5.b-d.

Comment: This suggestion of comparing effluent water quality to receiving water quality should be revised; NDEP should be assessing whether the receiving water (not the effluent) at the point of discharge will be better than or equal to the corresponding baseline water quality condition or RMHQ, e.g., where there is instantaneous mixing or at the edge of any mixing zone. Note, Section 7.d. acknowledges that the degradation must be “in” the receiving water. ⁷ Comparing effluent to baseline

water quality may not reflect possible impacts of the discharge on the receiving water (e.g., degradation would not occur if there is instantaneous mixing and baseline receiving water quality is not exceeded as a result of the same).

Footnote 7: The draft rule (Section 2, para. 3.c.) provides that the lowering of water quality cannot “cause or contribute to exceedance of [a] water quality standard that has been established for a downstream water.” As noted above, NDEP should consider identifying a location for evaluating where the “lowering of water quality” would be assessed to ensure clarity and to document that the assessment in the water body is at some point certain.

Comment noted. No changes made to the proposed rule language at this time. The permit guidance document is more appropriate to provide more discussion related to the receiving water compliance issue raised in the comment.

(f) Issue para. 7: The draft rule states that the degradation of water quality in a receiving water may be authorized if the Commission determines no other less degrading alternatives are determined to be economically or technologically feasible. See draft rule at 7.d.

- (i) Comment: If there are less degrading alternatives, they must be both economically and technologically feasible.

Comment noted and the draft rule language has been revised to convey such.

- (ii) Comment: In the draft Implementation Procedures, NDEP has clarified that “[a]ny alternative analysis completed as a requirement of other permitting activities would be acceptable to the Division for antidegradation review purposes.” See draft Procedures at 4.3.4.1. That concept could be clearly stated in rule.

Comment noted and the draft rule language has been revised to incorporate the concept as suggested.

- (iii) Comment: NDEP has stated (7.4 of the draft guidance) that it must be certain (as part of antidegradation assessment) that all cost-effective and reasonable Best Management Practices (BMPs) are being implemented.⁸ How can that effort be documented? Does that apply to point source discharges? Will that assessment hold up discharge permits? What is the specific authority for that BMP assessment?

Footnote 8: Similarly, the draft rule states that NDEP must verify that cost-effective and reasonable BMPs or other strategies required under the diffuse source program are being implemented suggesting that is a prerequisite to approving new or expanded point source discharges for the same parameter of concern. draft rule at 8.b.vi. Diffuse source obligations are voluntary; that information should be clarified in the rule, i.e., must verify that cost-effective BMPs or other strategies, if any are required under the voluntary diffuse source program. . . . See generally NRS 445A.570 (affirming that diffuse source controls are not mandatory); Draft Guidance at 7.4 (indicating that “this requirement does not require the Division to establish BMPs for nonpoint sources where such BMP requirements do not exist”).

Ideally, strategies (e.g., BMPs) would be in-place or planned to address the nonpoint source pollution when it is contributing to lower water quality. This requirement does not require the NDEP to establish 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.” The details of how this will be evaluated and assessed will be included in the draft guidance document.

(g) Issue para. 7: NDEP has stated (7.2 of the draft guidance) that projects should be evaluated from an absolute value, present net worth for determining affordability.

- (i) Comment. NDEP could clarify that these methods reflect examples of the sort of analysis that may be warranted and that a discharger may be able to utilize an alternative method.

Comment noted and NDEP agrees with suggestion. The use of alternative method(s) other than absolute value or present net worth to determine affordability will be included in the draft guidance.

(h) Issue para. 8: Tier 2 review evaluates economic or social considerations, not both. The draft rule language suggests otherwise. See, e.g., draft rule at 8.a. (stating that the project proponent will be required to provide justification (to the Commission) of economic and social importance of the proposed activity).

Comment: The requirement for the Tier 2 justification is to demonstrate that the discharge will be accommodating “important economic or [not and] social considerations” The guidance document (7.3) indicates that a project should be demonstrated to be economically or socially important not both. See also NRS 445A.565. The language throughout the rule, guidance and procedures is inconsistent and may warrant further review.⁹

Footnote 9: Guidance or the rule could clarify that mitigation projects can contribute to a finding of social or economic importance.

Comment noted. NDEP has been continuously revising the draft rule based on feedback; a careful review will be done prior to submittal of the revised rule to LCB.

(i) Issue (General): NDEP has stated (7.4 of the draft guidance) that existing dischargers could be further scrutinized under the antidegradation program if a proposed project seeks to discharge a constituent for which the existing discharger is having “compliance difficulties”.

- (i) Comment: What constitutes a constituent for which existing dischargers are having “compliance issues”? NDEP should consider clarifying that compliance difficulties are routine and substantive noncompliance with discharge obligations. For example, occasional sample variability should not be characterized as compliance difficulties.

The term constituent should be replaced with parameter (pollutant). Before lowering of the existing water quality for a parameter requiring Tier 2 protection is allowed, an evaluation of existing discharges within the same receiving water would need to 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, it would be inconsistent with the philosophy of the antidegradation policy to allow the discharge of additional pollutants associated with the new discharge in the absence of some measure or action being taken or planned to resolve the existing compliance problem.

NDEP agrees with the suggestion to include additional discussion in the guidance document to clarify what constitutes an on-going and substantive permit compliance problem.

(j) Issue Para. 9: The draft rule indicates that all general permits are subject to antidegradation review during issuance or renewal. draft rule at 9.a.

- (i) Comment: Consider whether guidance should clarify that many discharges governed by general permits, e.g., stormwater discharges, are temporary and limited and would be exempted from antidegradation review obligations. (Presumably this would apply to the construction, mining and industrial stormwater permits.)

Although the discharges noted in the comment may be temporary and limited, coverage under a general permit would require that the discharges consistently comply with specified permit conditions to protect water quality and satisfy antidegradation requirements.

(k) Issue Para. 9: The draft guidance states that “reliance on BMPs, stormwater management plans or storm water [sic] pollution prevision [sic] plans alone are not appropriate to ensure appropriate water quality is achieved.” Guidance at 8.1.2.

- (i) Comment: This statement appears contrary to the foundation for many general permits.

The intent of the above statement, which is used as an “example” in the draft guidance, is there may be instances based on the nature of the discharge where the effectiveness of accepted pollutant controls may not be adequate for protecting water quality. In such instances, there may be a need to require implementation of additional pollutant controls as a condition of the permit to ensure that water quality is maintained and protected.

4. Additional Considerations

(a) Issue: The draft guidance suggests that no mixing zones are granted for Tier 1 waters. Guidance at 4.3.

- (i) Comment: What does this mean given all waters are subject to Tier 1 protection at a minimum?

The guidance document will be revised to allow mixing zones in receiving waters for Tier 1 parameters provided the requirements of NAC 445A.297 to NAC 445A.299, inclusive, are met. However a mixing zone would not be an option for a parameter that is exceeding the water quality standard level in the receiving water.

(b) Issue: The draft guidance identifies that an IBV (or RMHQ) should be assessed for parameters of concern. Guidance at 5.2. As noted above, parameters of concern are based on a long list and include constituents that are simply identified as “detected” in the effluent in a permit application. Guidance at 5.1.

- (i) Comment: The requirement to develop IBVs should be limited to constituents that may be substantially elevated as compared to baseline (so that there should be offramps for de minimis contributions of a constituent to the receiving water). The guidance could also clarify that an IBV for any given receiving water applies only to the project proponent and is not the default baseline for other projects to the same receiving water if those projects provide additional relevant data.

Comments noted. Although antidegradation rules of other states provide for some degradation that is considered insignificant based on the assimilative capacity concept, NRS 445A.565 does not allow for “de minimis” degradation of water quality. NDEP agrees that an IBV determined for a parameter in a receiving water may be revised as additional relevant data is made available and could be dependent on location for situations involving multiple discharges.

- (ii) Comment: If a permit limit is calculated based on an IBV and subsequent data establish that the IBV is too stringent, the permittee’s discharge limits may not be able to be relaxed based on the CWA’s antidegradation requirements. See generally CWA at Section 402(o). 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 exception to antibacksliding? See generally 40 CFR 122.44(l).

NDEP believes that a permit effluent based on an IBV calculated from a limited sample data set could be modified as additional water chemistry data became available indicating a less-restrictive effluent limitation was justified. The CPP already describes how RMHQs may be modified if new data indicate a significant change of greater than 25% (NDEP 2004). The argument in support of modifying a “temporary RMHQ” (i.e., an IBV) is that if a complete chemistry data set was available at the time the permit was originally issued, such that an RMHQ could be established, the effluent limitation may have been set at the less restrictive level.

Thank you for your consideration of these comments.

PARSONS BEHLE & LATIMER

/s/ Lisa A. Kirschner

Lisa A. Kirschner

Attorney at Law

on behalf of Nevada Gold Mines (NGM)