

Response to preliminary comments provided by PEW Charitable Trusts during technical listening sessions on the agency draft regulatory petition R119-20.



2005 Market Street, Suite 1700
Philadelphia, PA 19103-7077
215.575.9050 Phone
215.575.4939 Fax

901 E Street NW, 10th Floor
Washington, DC 20004
202.552.2000 Phone
202.552.2299 Fax
www.pewtrusts.org

Dave Simpson
Nevada Division of Environmental Protection
Bureau of Water Quality Planning
901 S. Stewart Street
Carson City, Nevada 89701
dsimpson@ndep.nv.gov

October 29th, 2021

Dear Mr. Simpson,

On behalf of The Pew Charitable Trusts, I am writing to express our appreciation for the opportunity to comment on Nevada’s proposed regulations for Ecological or Aesthetic Waters (EAWs) and Antidegradation policy and review procedures. Protecting the quality of our waters, especially in a climate changing world, is an imperative for both people and nature.

The Pew Charitable Trusts seeks to preserve ecologically and culturally diverse U.S. public lands and rivers through federal and state administrative protections, legislative designations, the defense of bedrock conservation laws, and restoring America’s National Parks System. To accomplish these goals, we work closely with conservation groups, recreation organizations, local businesses, local governments, Tribal Nations, and other stakeholders to develop collaborative proposals for public lands and rivers protection.

Rivers and wetlands in the United States provide myriad benefits to humans, also known as ecosystem services, including climate regulation, drinking water, food supply, recreation, and cultural and scientific opportunities that support biodiversity, human health, and local communities. Despite these benefits, very few of the 3.5 million miles of rivers in the United States and 141,000 miles of rivers in Nevada have protective designations.

Pew has a rich history of engagement in Nevada. Through our longstanding and trusted collaborations in the state, Pew has partnered with local organizations and decision makers to protect some of Nevada’s wildest landscapes. But those landscapes are in jeopardy if the rivers and streams that feed them are not also protected.

Nevada is the most arid state in the U.S. with an annual average precipitation of approximately 10 inches. Protecting the rivers flowing throughout Nevada means safeguarding vital drinking

water sources, critical species such as the threatened Lahontan Cutthroat trout, migrating wildlife, and limited freshwater resources that feed the Great Basin and Mojave deserts.

Below please find both overarching, general comments as well as specific comments on the proposed regulations for Ecological or Aesthetic Waters (EAWs) and Antidegradation policies. We appreciate all the time and consideration that has gone into drafting these policies and look forward to continuing to work with the Nevada Division of Environmental Protection and the Bureau of Water Quality Planning to implement this policy and designate deserving waters as EAWs.

General Comments

Nevada's freshwaters supply drinking water to residents across the state, sustain wildlife habitat, and provide an economic boost to local communities. However, few of the state's rivers, lakes, and creeks have substantive protections. We applaud the Nevada Division of Environmental Protection (Division) for your work in drafting a policy to safeguard some of the state's most outstanding waters as Ecological or Aesthetic Waters (EAW). This policy along with the antidegradation policy and implementation procedures will help safeguard stretches of rivers or other water bodies with high water quality or other important characteristics, including exceptional ecological, recreational, historic, or habitat values. Once protected, EAWs will have the highest level of protection for freshwater under the Clean Water Act.

Nevada's waters are under increasing threat as the climate warms and the population grows, placing greater stress and demand on freshwater resources. Including a process for EAW designation as part of the state's updated anti-degradation program will facilitate meaningful protections for the state's most outstanding waters and prevent degradation of stretches of rivers, streams, wetlands and other water bodies with high water quality or other unique characteristics.

Pew stands ready to work with the agency to ensure this policy is finalized and implemented in the coming months.

Specific Comments

Below please find section specific comments on both the proposed Ecological or Aesthetic Waters policy and the draft Antidegradation Implementation Procedures.

Proposed Regulation of the State Environmental Commission R119-20 Agency Draft Version *Section 1. Extraordinary Ecological or Aesthetic Waters*

In Section 1.2.c., regarding the nomination of a waterbody as an Ecological or Aesthetic Water for its water quality conditions, Pew requests greater clarity on the water quality standards needed to meet these criteria. There are two ways to provide this clarity. The agency could

simply reference the related Nevada Administrative Code which would provide such clarity, or the agency could define, in this section, the specific baseline water quality standard necessary for each parameter in order for the waterbody to qualify for EAW designation.

If a waterbody was nominated based on water quality conditions, it would be expected that sufficient and adequate water quality data would be collected and submitted to support the nomination. NDEP collects five-years of quarterly water sample data to develop RMHQs for high-quality waters.

In Section 1.3.b., the proposed regulation describes the factors that the State Environmental Commission will consider during a public hearing when deciding whether to designate a surface water as an EAW. One of the factors considered in an EAW designation is whether there is an ability to manage the surface water to maintain and protect the water quality conditions, special uses, or the ecological or aesthetic value of the water. We appreciate the amount of time and resources it takes to manage natural resources, and support the agency having the resources necessary to manage state's lands and waters. However, Pew does not support an "ability to manage" criteria for EAWs. Whether the agency has the required resources to manage the resources should not be determinative of whether a high-quality water receives designation as an EAW. Such determinations should instead be made based on science. We hope to work with the Division to ensure the resources are in place to manage all water resources deserving of greater protections.

NDEP agrees that nominations should be based on data and science. NDEP has revised the draft rule language related to EAWs to expand the background information and data that would be needed to support an EAW nomination. The "ability to manage" criteria has been removed. Supporting information would include "consistency of an EAW classification with local, regional, and state water planning and management plans" and "compatibility with pre-existing land-use activities in the watershed including irrigation practices and agricultural activities."

Another factor, as laid out in Section 1.3.d, that the State Environmental Commission will consider when deciding whether to classify surface water as an EAW is "public comments in support of, or in opposition to, an EAW classification[.]" While we agree that public participation and comments are a critical component to the EAW nomination process and to safeguarding natural and cultural resources, we urge the Division to ensure that science, and not politics or popularity, are what govern the designation and classification of EAWs. As such, we suggest that the Division clarify that public comments will be considered when assessing an EAW designation, but unless they include scientific data regarding the ecological or aesthetic attributes of the proposed EAW, they will not affect designation or classification.

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.

We applaud the Division for its draft recommendation to designate Lake Tahoe as an EAW with Tier 3 protection. Lake Tahoe is home to iconic wildlife and fish such as black bear, Lahontan cutthroat trout, and Kokanee salmon, it provides clean drinking water to over half a million people in Nevada and California, and provides recreational opportunities which fuel the local economy. A Tier 3 designation will ensure Lake Tahoe has the level of protection needed to safeguard the water quality, clarity, wildlife habitat, and recreational opportunities of the largest freshwater lake in the Sierra Nevada. Nevada's Tier 3 EAW protection for Lake Tahoe will also mirror the designation provided by the State of California, ensuring more coordinated management across 122,000 acres of the lake.

NDEP agrees with comment that Lake Tahoe should be designated as an EAW with an assigned high level of antidegradation protection. After internal discussion and consideration, NDEP has decided that the designation of Lake Tahoe as an EAW and determining the tier of protection would be best done in a separate regulatory petition. Although the Lake has an assigned beneficial use of a water of extraordinary ecological or aesthetic value, the official designation as an EAW should follow the process which is proposed in the draft rule for nominating and classifying waterbodies as EAWS.

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.

We understand that the state has received some negative feedback regarding its draft Tier 3 designation of Lake Tahoe and is now considering providing a lesser level of protection for the lake. To do so would be a mistake for the lake and its resources, but it would also create confusion for permittees. Consistency between Nevada and California's designations is much preferred for both ecological and managerial reasons.

NDEP agrees with comment. As noted in previous comment response, resolution of this issue would be best addressed in separate regulatory action that would be specific to classifying Lake Tahoe as an EAW which would also entail discussions with stakeholders, permittees and local governing agencies to address perceived concerns and misconceptions associated with a proposed Tier 3 antidegradation protection level.

In addition to protecting Lake Tahoe as a Tier 3 EAW, we urge the Division to protect all tributaries to Lake Tahoe as Ecological and Aesthetic waters. Providing this designation will preserve their high-quality ecological values and will ensure Lake Tahoe's water quality is safeguarded.

Comment noted. This suggestion may be considered by NDEP in a future regulatory action as has been discussed previously.

Section 2. Antidegradation Policy

Section 2.3 describes the findings necessary for the agency to lower water quality in Tier 2 surface waters. As currently drafted, one of those findings is that "[t]he new or increased source of pollution will not cause further degradation of water quality when existing dischargers are not in compliance with regulatory requirements and permit conditions unless enforcement and/or permit compliance actions have been initiated to achieve compliance." It is unclear why a new or increased source of pollution that will not cause further degradation of water quality should be a finding for indeed *lowering* water quality. Moreover, if existing dischargers are out of compliance, certainly that should not be a reason for allowing lower water quality standards. Pew requests clarification on this section.

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 (at a concentration 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.

Section 3. Antidegradation Implementation Procedures

Section 3.3.b. states that "Existing point-source discharges as authorized by the Division at the time an EAW is approved by the Commission will be exempt from Tier 3 antidegradation protection requirements." Pew supports grandfathering current point source dischargers in Tier 3 waters, however, as currently written, Pew does not think this intent would be fully recognized. Pew proposes that the agency replace the words "at the time an" with the word "before" to clarify that no additional discharges would be authorized at the time of EAW designation, and that the authorized point source discharges occurring prior to designation will be allowed to continue without change.

Comment noted. Draft rule language has been revised to convey that authorized point source discharges occurring prior to designation as a Tier 3 EAW will be allowed to continue assuming that permit conditions and requirements are maintained, and subsequent permit renewals do not involve an expanded discharge or major permit modification.

Section 3.4.b describes how the agency expects to allow for new or increased discharges while maintaining Tier 2.5 protections for high-quality waters. We suggest two minor edits below (in red) to simplify and strengthen this section:

“i. Where the EAW classification is based on higher water quality conditions which may include adopted RMHQs (requirements to maintain existing higher quality), the antidegradation review analysis will evaluate each parameter of concern in the discharge. ~~to determine whether t~~ The higher water quality conditions in the Tier 2.5 water would be maintained and protected if the proposed or expanded point-source discharge is authorized.

“ii. Where the EAW classification is based on a unique water quality characteristic, or important ecological, aesthetic, or recreational value, ~~a demonstration must be made to the Division that the attributes that formed the basis of~~ the EAW classification ~~must~~ be maintained and protected if the new or expanded point-source discharge is authorized.”

Comment noted. Draft rule language has been revised to require that the existing water quality conditions in the EAW when designated must be maintained and protected and there is no separate evaluation dependent on the attribute that the EAW classification was based upon.

Similarly, in section 3.4.c we recommend the following language deletion to simplify and strengthen language to ensure the highest level of protection for EAW. The section would then read as follows (edits in red):

“When a new or expanded point-source discharge is proposed in a tributary water to an EAW that has been assigned Tier 2.5 protection, ~~a demonstration must be made to the Division that~~ the higher water quality condition, unique water quality characteristic, or important ecological, aesthetic, or recreational value in the downstream EAW will be maintained and protected.”

Comment noted. Draft rule language has been revised requiring that demonstration must be made that the existing water quality conditions in the downstream EAW will be maintained and protected. Whether this is done based on an antidegradation review analysis which focuses on evaluating the chemistry of the discharge compared to the existing water quality in the receiving EAW or through some other alternative, such as modelling is at the discretion of the project proponent or permittee.

Finally, section 3.9.c further regulates new discharges to EAWs, but as currently written confuses what is allowed in Tier 2.5 versus Tier 3 waters. To clarify that no new discharges are allowed in Tier 3 EAWs as defined in Section 2.1, Pew recommends the addition of the red text below:

“A person or **discharger** seeking authorization to discharge under a general permit will be presumed to be meeting antidegradation requirements if they comply with all of the permit conditions and requirements. If the notice of intent supplied pursuant to NAC 445A.268 indicates the receiving water will be an EAW, **with Tier 2.5 protection**, the higher water quality condition, unique water quality characteristic, or important ecological, aesthetic, or recreational value of the EAW will be maintained and protected. The Division may authorize the discharge to an EAW **with Tier 2.5 protection** under a general permit or direct the applicant to apply for an individual permit as provided in NAC 445A.269, as necessary. **Tier 3 EAW protection prevents activity of any or new or expanded point-source discharge.**”

Comment noted. Draft rule language has been revised to reflect comment. With suggested edits to Section 3.9(c), repeating the protection requirements associated with a Tier 3 EAW does not seem necessary as these requirements are covered in Section 2.1.

DRAFT Nevada’s Antidegradation Implementation Procedures - August 2021

As a companion to the Ecological and Aesthetic Waters regulation, Pew appreciates the detailed and comprehensive guidelines detailing Nevada’s Antidegradation Implementation Procedures. This guidance provides the State and freshwater users comprehensive direction to maintain and protect Nevada’s surface waters. Below are several comments and recommendations to support the state’s goal of protecting high quality waters and preserving the unique values of Nevada’s surface waters.

Pew is sensitive to the agency’s limited funding and resources to carry out the protection of high-quality waters in the state. In Section 2.2, Historical Policy for Antidegradation in Nevada, the document states that “[a]lthough the Division’s statewide monitoring program has collected water chemistry data from more than 700 waterbodies (or waterbody segments) across the state, the additional resources required to conduct intensive monitoring and sampling to develop RMHQs for all of these waters is not feasible.” The Division makes reference to this issue again in section 3 of the document. Pew would like to work with the state to identify federal funding sources which could provide financial resources to the state to monitor and sample Nevada’s surface waters to develop RMHQs for these waters.

NDEP is appreciative of the offer and welcomes further discussion on this subject matter.

Pew is concerned that this lack of funding might lead to unintended consequences for high quality waters. For example, in section 3.1, Implementation of a Tiered Approach in Nevada, the document outlines that, “[p]ermit renewals with the same discharge limitations, requirements, and conditions as the previous permit will be viewed as not causing further degradation of water quality; such renewals will not be subject to additional antidegradation review.” In the face of climate change and warming temperatures, higher temperatures in water bodies can impact their quality and ability to accommodate certain pollutant levels. Pew strongly recommends that regular water quality testing occur to ensure that water quality is not degraded and, in circumstances where degradation has occurred, an antidegradation review be required. Assuming that the same discharges and requirements will not cause further degradation of water quality simply does not comport with science. Water bodies should be

monitored regularly to ensure quality standards are being met.

Comment noted.

Finally, Pew appreciates the state's position that it will assume Tier 2 protections for all waterways for which it has limited or non-existent water quality data. This position is far superior to a position that would assume Tier 1 designations for these waterways. At the same time, Pew believes that at least some of these waters would qualify for EAWs. We urge the state to work with governmental and NGO partners to set a timeframe for obtaining water quality sampling information for waterways throughout the state and determining the appropriate level of protection. Working together, we may find ways to fill the gaps the agency currently perceives and protect this important resource for all Nevadans.

Comment noted.

Thank you for the opportunity to comment. We appreciate the time, effort, and dedication it took to craft such a comprehensive and balanced policy. The regulations and policy provide a strong framework to protect some of Nevada's most high value waters and allows for a comprehensive approach to water quality management. We look forward to future opportunities to comment and collaborate with the Division of Environmental Protection and the Bureau of Water Quality Planning. If you have any questions, or need further information, please contact Carrie Sandstedt at csandstedt@pewtrusts.org or (775) 342-7367.

Sincerely,

R. Nicole Cordan

Nicole Cordan
Project Director
U.S. Public Lands and Rivers Conservation
The Pew Charitable Trusts