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Response to preliminary comments provided by Pyramid Lake Paiute Tribe during technical listening sessions on the agency draft regulatory petition R119-20.

Subject: Comments on Proposed Regulations for Antidegradation Protection and Nevada's Extraordinary Ecological Aesthetic Waters (EAWs) (Regulation R119-20)

Thank you for allowing us to submit comments on the proposed regulations for Antidegradation Protection and Nevada's Extraordinary Ecological or Aesthetic Waters (EAWs). The Pyramid Lake Paiute Tribe (Tribe) appreciates the Nevada Division of Environmental Protection's (NDEP) continued effort to provide transparency throughout the regulatory process.

The Paiute people, across lands now known as Nevada and elsewhere, and specifically at Pyramid Lake (PL), have stood as ecological stewards since before time. They maintained the Truckee River Watershed, ensuring sustainability for future generations. From the past through today, the Pyramid Lake Paiute Tribe (PLPT) works with government agencies to maintain the balance that nature intended, so that the Tribe's and threatened and endangered aquatic species can thrive as they once did. Due to water diversions and watershed management, population numbers of those species dwindled in the 20th century to extirpation. Thankfully today, concerted efforts in accordance with current scientific knowledge led to more successful conservation management of aquatic species.

The Tribe cannot overemphasize the importance of clean water and its role in preserving the Tribe's cultural identity. The interconnectedness of water to all things living requires a higher commitment of protection to Nevada waterways in preserving the key ecological resources that makes Nevada great. Therefore, a more stringent and highly protective antidegradation policy by the State is required to protect and maintain its natural resources. While the State is to be commended for promulgating its Antidegradation policies, the Tribe finds that the state's Antidegradation policy falls short of what is needed, due to the State's vague and unclear regulations proposed in R119-20.

Background information of Pyramid Lake Paiute Tribe & its stewardship responsibilities

The Pyramid Lake Paiute Reservation (hereinafter "Reservation") is located in northwest Nevada, approximately 35 miles northeast of Reno. The Reservation is the largest Native American reservation in Nevada, both in land base (approx. 475,000 acres) and tribal population (approx. 2,300 tribal members). The Paiute people have successfully thrived in the region for thousands of years utilizing Pyramid Lake's fish populations as their foundation of their diet, economy and culture. Pyramid Lake is a large desert terminal lake that receives most of its water from the lower Truckee River, which begins in Lake Tahoe, flows 140 miles through urban and industrial areas of Reno/Sparks, and terminates in Pyramid Lake. The lower Truckee River is vital spawning habitat for two Federally-listed fish species: the endemic and endangered cui-ui and the threatened Lahontan cutthroat trout (LCT).

The PLPT Natural Resources Department submitted the following comments and requests for clarification:

1. Antidegradation is just one part of the Water Quality Standards trifecta overall, with beneficial uses and water criteria being the others. Water quality criteria are put in place to support the Uses of a waterbody. However, nowhere in the regulations does it indicate that the State shall establish the Uses and then the relevant criteria to uphold those Uses of a waterbody. What are the components of an “antidegradation review analysis?”

Agree. There are three components to water quality standards. The proposed antidegradation regulation addresses only the antidegradation component. The other components (beneficial uses and water quality criteria) are already in the Nevada Administrative Code (NAC).

Standards for water quality are covered in NAC 445A.11704 through NAC 445A.2234. Beneficial uses are described in NAC 445A.122. Water quality standards tables for designated waters provide the water quality criteria values for beneficial uses that apply to each designated waterbody and its tributaries. These tables are found in NAC 445A.1242 through NAC 445A.2234. Currently the antidegradation component in these tables is provided as “requirements to maintain higher quality” (RMHQs). However, existing RMHQs apply only to a limited set of waterbodies, and procedures to apply antidegradation to all of Nevada’s waters was needed; hence, the proposed antidegradation regulations.

An antidegradation review analysis will be required as part of the process of permitting a new or expanded point-source discharge. NDEP has proposed that antidegradation protection be done using a “parameter-by-parameter” approach. (States may use either a waterbody-by-waterbody approach or a parameter-by-parameter approach. See: <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-D/part-131/subpart-B/section-131.12>)

See <https://ndep.nv.gov/uploads/water-wqs-docs/DRAFTAntidegPermitWriterGuidance.pdf> for details on the process of conducting an antidegradation review.

2. Does receiving a permit on a waterbody unknown or previously not monitored by the State automatically trigger such a review by NDEP? Determining the beneficial uses firsthand at the permit site is important as Uses aren’t always apparent to permit applicants, while field measurements and analytical data do not tell the whole story of a waterbody. The State needs to take time to conduct habitat assessments, wetlands delineation, and wildlife surveys of a waterbody on site before issuing any permit. The State should clarify the site assessment process that any waterbody goes through before determining Tier status and prior to issuing any permit. The R119-20 regulations are unclear and an assessment rubric should be available to the public, and be adhered to religiously by the Commission.

Yes, and as noted in the previous response, the proposed antidegradation regulation was designed to do just that: protect all waters from degradation. NDEP already has a process in place to determine beneficial uses, and does this to ensure that water quality criteria are applied to that water to protect those beneficial uses.

The proposed antidegradation regulation focuses on the antidegradation component of water quality standards. Waters for which there are no data or very limited data are automatically assumed to merit Tier 2 protection for all parameters, until data are collected that show otherwise.

3. The Tribe is concerned that the proposed regulations place too much emphasis on economic concerns, while the regulations do not propose any type of rubric for determining the benefits of economic versus social benefit. What is the economic criteria and what will it be based upon? Will the process for determining criteria be equitable, objective, and transparently applied throughout every permitting process? How will the State ensure that in its decisions are in the good faith of the stakeholder class? Will the rubric for determining the costs to benefits be transparently and uniformly applied to all? The regulations do not mention environmental justice nor has any framework as to how the Commission will apply it in their economic considerations. How will the State calculate the external costs that the stakeholders often bare, that are invariably omitted by project proponents/applicants? Here the regulations are unclear as to what structure the Commission will operate under; it seems the Commission intends to retain a great deal of subjectivity in enforcing these regulations.

The social or economic justification to be provided by a permittee or project proponent when a discharge will not meet Tier 2 protection levels in a receiving water must show that the social or economic benefits that will result from the project or activity are important to the affected community. The initial step in this justification demonstration would be to identify the affected community and the current economic and environmental conditions of that community. If a disadvantaged community was to be affected, then environmental justice would be a relevant factor that would need to be considered in the evaluation.

Establishing qualitative or quantitative metrics to evaluate the importance of a proposed project or activity based on social or economic development benefits is not feasible as each analysis will be case-specific and tied to the waterbody in question that will be affected. Each situation and community evaluated will be different and will require analysis of unique social or economic factors that characterize the area in which the water is located.

Further details on the social or economic justification evaluation are contained in the draft permit writers' guidance document (see response to comment 1). Additionally, the U.S. Environmental Protection Agency (EPA) has abundant guidance on conducting analyses to determine the social or economic benefits and impacts of environmental actions. See <https://www.epa.gov/environmental-economics/guidelines-preparing-economic-analyses>

A public hearing before the SEC is required for any draft permit that will result in lowering of the high water quality conditions for a parameter requiring Tier 2 protection. Prior to this public hearing, NDEP would schedule outreach meetings with the affected community to solicit input. Although the social or economic justification provided to NDEP may indicate that the project or activity may be socially or economically important, public comment during these community meetings could lead to a contrary conclusion. For example, the people in the affected area could feel that the jobs and other benefits associated with the proposed project

or activity are not important to them compared to the importance of protecting the quality of a local water resource, or the external costs to them outweigh the proposed benefits.

4. Why was the Truckee River not declared a Tier 3 AEW, while Lake Tahoe was without input from the public? How does water crossing hydrologic lines suddenly change the tier level of an EAW, despite the waterbody losing no apparent hydrologic (physical/chemical/biological) connection or character between two EAW Tier 3 waterbodies?

The California half of Lake Tahoe is already an Outstanding National Resource Water (ONRW). NDEP included Lake Tahoe in the regulations as an example.

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 separate regulatory action, NDEP will prepare a nomination package for Lake Tahoe and demonstrate to stakeholders how the process would be followed to classify the lake as an EAW with an appropriate tier of antidegradation protection.

5. How can the Commission use “social and economic benefits and impacts associated with an EAW classification” (Sec.1-3c) as a factor for determining EAW status, when social and economic benefits are not listed as an essential attribute of an EAW in Sec. 1-1.a-d, on page 1 of the proposed R119-20 regulations?

Social and economic benefits and impacts are not part of the essential characteristics of a waterbody. Outstanding recreational and aesthetic qualities of a water (e.g., outstanding wildlife and waterfowl habitat) can contribute to the local economy as birdwatchers flock to the area and spend money on lodging and meals.

The social and economic benefits and impacts would be factors that would be evaluated and assessed when a water is nominated as an EAW.

6. Tier 2 waters are subject to considerations primarily dealing with economic or social considerations, and not of environmental. At what point do economic interests override the State’s responsibility to protect its waterways upon which people rely for survival and sustenance?

An analysis of social or economic benefits and impacts looks at the value of ecosystem services, including uses of the waterbody (i.e., subsistence fishing), and assigns value to all components, including social benefits and impacts. See response to comment 3.

Various Comments regarding R119-20 proposed regulations

7. What does the term ‘Antidegradation’ mean to the Commission? The approach here seems to be that Antidegradation means allowing pollution right up to the point of a parameter approaching

impairment. Antidegradation is not allowing effluent that causes any parameter to rise over natural levels, nor is it allowing existing water quality to be degraded, for any parameter. For the Commission, it requires working with permittees to ensure they are upgrading to the latest technology and management practices to reduce their effluent loads, it is not pushing the limits further to impairment.

Tier 1 means a parameter is meeting water quality standards; Tier 2 means the quality is better than water quality standards. As stated by EPA, *“The intent of tier 2 protection is to maintain and protect high quality waters and not to allow for any degradation beyond a de minimis level without having made a demonstration, with opportunity for public input, that such a lowering is necessary and important.”*

NDEP has previously implemented antidegradation by establishing RMHQs for parameters with quality better than water quality standards. These RMHQs are then used as the permit limit for point-source discharges. RMHQs have historically been set at the 95th percentile of baseline, using five years of quarterly data. However, many waterbodies outside of the main river systems do not have sufficient data to calculate RMHQs. R119-20 is proposed to provide the same benefit to all waters, regardless of whether a sufficient amount data is available at the time when the permit application is submitted to NDEP.

The proposed antidegradation rule (Section 2.3c) contains the following language which is intended to prevent impairment of a receiving water:

“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 existing technology”

8. Focusing on the parameter-by-parameter approach could be problematic as most parameters are interconnected with each other, and negatively affecting just one parameter can affect another. The Tribe recommends utilizing a more comprehensive site-specific approach when determining the status of a waterbody. Nevada has a wide range of geographic and land form diversity, which requires different approaches in evaluating sites. While this is time-consuming and will delay permit actions, moving slowly will lead to less degradation over time.

As mentioned during the webinar presentation and listening sessions held in September 2021, NRS 445A.565 requires NDEP to use a parameter-by-parameter approach for implementation of antidegradation protection in Nevada surface waters.

As noted in the response to comment 2, the proposed approach makes the assumption that all parameters in a waterbody merit Tier 2 protection, until data show otherwise.

9. From Tier 3 down to Tier 1, the regulations repeatedly says if “The Division determines activities that may result in temporary or limited lowering of the water quality are necessary for the long-term ecological or water quality benefit...” Under what scenario is allowing increased pollution into a waterbody necessary for the long-term ecological or water quality benefit? For downstream users of the lower Truckee River, everything that flows down the river will end up in Pyramid Lake.

The proposed regulation (Section 2.0) states that *“The antidegradation policy will not apply when the Department determines activities that may result in temporary or limited lowering of the water quality are necessary for long-term ecological or water quality benefit, or to accommodate public health and safety or other allowable discharges, as determined by the Department. Such activities shall be non-recurring and necessary controls will be implemented to minimize impacts to water quality and water quality values.”*

Examples of public health and safety activities would include replacement or repair of water or sewer pipeline or a roadway bridge or an emergency action to prevent loss of life or property during a flood event. These would be temporary actions with limited lowering of water quality resulting. Likewise, any operation to restore river function, such as grading cut banks and restoring riparian vegetation, could temporarily increase suspended sediment and associated parameters in the water. The long-term benefits of riverbank restoration would entail temporary or limited impacts to water quality during the work.

10. In closing, the State is urged to include more transparent framework into its rulemaking to ensure that the permitting process is fair, consistent and equitable, while placing greater emphasis on environmental factors when determining a waterbody’s AEW status. The Commission must publish its rubrics it will use and consistently apply those in all AEW classification processes.

NDEP has been working with stakeholders, as well as EPA, during the process of preparing and revising R119-20. Thus far, NDEP has held small stakeholder meetings, as well as a 2-hour webinar to present the proposed regulation on September 2, 2021 and two listening sessions (September 9 and 16, 2021). Webinar slides and recordings of these sessions are available on NDEP’s webpage at: <https://ndep.nv.gov/water/rivers-streams-lakes/water-quality-standards/current-and-past-actions/antideg> . Formal workshops and a presentation in front of the State Environmental Commission will occur in the near future (dates not yet set).

NDEP encourages all stakeholders to continue to provide feedback throughout the process of adopting regulations for establishing EAWs and providing antidegradation protection for all of Nevada’s waters.

We would like to thank you for your continued coordination throughout this regulatory process. If you have any questions, please feel free to contact me at dnoel@plpt.nsn.us, or at (775) 574-0101 ext. 27.

Regards,



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