

Response to preliminary comments provided by Truckee Meadow Stakeholders during technical listening sessions on the agency draft regulatory petition R119-20.

These comments are submitted on behalf of the City of Reno, City of Sparks, Washoe County, and Truckee Meadows Water Authority. Collectively these public entities manage the region's water resources, supply clean drinking water to over 430,000 people, and treat and discharge wastewater. We support protecting Nevada's waterways for all beneficial uses and appreciate the Nevada Division of Environmental Protection's ("NDEP") leadership in developing these regulations.

These comments are general in nature and often seek clarification. We look forward to the opportunity to meet with you and to engage in the next workshop to further refine our comments. Below we have provided general and specific comments by section.

Section 1

While we support protecting our waterways, the draft regulations are vague and require further clarification and more specificity. Specifically, we would like to engage in a tabletop exercise with NDEP to understand how the Extraordinary Ecologic or Aesthetic Waters ("EAW") process would work. We have the following questions about the process:

- There are no clear criteria regarding the data and information needed to demonstrate "important ecological, aesthetic, or recreational value" that could be used to classify a waterbody as an EAW. The case-by-case basis may be problematic since no data standards are provided, and these factors could be largely qualitative. As drafted, there are no clear criteria defining how the EAW status would be decided.

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 has also been revised to expand the amount and type of background information that will be required to support an EAW classification. It is NDEP's intent to set a "high bar" for an EAW classification that will need to be supported by rigorous informational and data requirements such that informed decisions are made related to a EAW classification.

- NDEP has stated that the intent is that the classification of a waterbody as an EAW would not prohibit uses in any appropriated waterbody under NRS Title 48. The language should be amended to indicate that there will be no prohibition or impairment to using water rights.

Comment noted. The draft rule language has been revised to indicate that an EAW classification does not prohibit or impair the use of the water as authorized under title 48 of NRS.

- The public comment and engagement process is not specifically addressed in the regulations.

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.

- For citizen nominated EAWs, what criteria must be provided to demonstrate the water is a viable candidate before NDEP is required to undertake an evaluation?

The burden of compiling data and information falls on the nominator. NDEP has revised the draft rule language to outline the data and information that would be evaluated and assessed to determine whether the water is a viable candidate as an EAW.

- If a water body is nominated and ultimately not granted EAW status, what are the criteria before it can be re-nominated?

The same as the original nomination. If the original nomination lacked sufficient data and information to support the nomination, NDEP would inform the petitioner what additional information and data would be necessary to support the waterbody being considered as an EAW.

If a waterbody was deemed to be a viable candidate and was taken through the formal rulemaking process but not approved by the SEC, NDEP would request clarification from the SEC as to the issues or problems that prevented the water from being classified as an EAW.

- If a reach of the Truckee River was categorized as an EAW, particularly reaches downstream of Reno and Sparks, how would this impact current upstream dischargers and future discharge permits? What will be the effect of a nomination as an EAW on discharge permit applications or applications to change/increase existing discharges? Will all permit activity stop until the determination is made?

If the lower Truckee River was classified as a Tier 2.5 EAW, this tier of protection would not preclude a new or expanded point-source discharge, where such sources would have no effect on existing water quality in the reach designated as Tier 2.5 EAW. Existing discharges upstream or within the reach would not be affected unless a major modification was proposed that would result in a significant change to the existing permit conditions and requirements. The existing water quality in the reach would become the "baseline" to maintain and protect once classified as an EAW and this baseline would reflect inputs from current permitted discharges. If a major modification to an existing permit was proposed, an antidegradation review analysis would be required to assess the impact of the changed discharge on the baseline water quality conditions in the Tier 2.5 EAW section.

A waterbody being nominated as an EAW would not affect on-going permit activity for discharges into the waterbody. However, NDEP would have discretion to modify the permits that may have been

issued while the waterbody was being evaluated as an EAW for cause as provided in NAC 445A.261, if required based on the receiving water being classified as a Tier 2.5 EAW.

For the Truckee River, there are existing TMDLs for TDS, total nitrogen, and total phosphorus in the lower section of the river downstream of East McCarran and to the boundary of the Pyramid Lake Paiute Tribe land. The existing TMDLs would still be in-effect if the lower Truckee River was classified as an EAW.

- The regulations state that existing point-source discharges at the time an EAW is approved will be exempt from Tier 3 antidegradation requirements – what would happen if these discharge permits upstream of an EAW needed to be expanded in the future? Would they be allowed if not directly discharging into the section of the waterbody designated as an EAW?

A similar analysis as contained in previous response would apply. The antidegradation review analysis of the expanded upstream discharge would need to demonstrate that there would be no impact to water quality conditions in the EAW.

Sections 2 and 3

Initially, it was noted by NDEP staff that Section 3 has not been reviewed in its entirety by LCB staff. Any changes made by LCB staff should be made available for review prior to the public comment closing.

Comment noted.

Additionally, we have the following specific comments and questions:

- Antidegradation is necessarily predicated based on a concentration of a particular pollutant. How will the flow be determined for the baseline condition? How will flow for waterways with highly variable flow rates – both annually and seasonally – be determined? Will dischargers be required to respond if/when drought conditions cause a lower flow rate with a corresponding increase in concentration of a pollutant?

NAC 445A.121, Section 8 would apply for high and low flow conditions:

8. The specified standards are not considered violated when the natural conditions of the receiving water are outside the established limits, including periods of **extreme high or low flow**. Where effluents are discharged to such waters, the discharges are not considered a contributor to substandard conditions provided maximum treatment in compliance with permit requirements is maintained. [Environmental Comm'n, Water Pollution Control Reg. § 4.1.2 subsecs. a-g, eff. 5-2-78]—(NAC A 9-26-90; R017-99, 9-27-99).

“Extreme flow” is defined in NDEP’s Continuing Planning Process document (2004) as flows above the upper 7Q10 (i.e., 7-day high flow with a 10-year recurrence) or below the lower 7Q10 (i.e., 7-day low flow with a 10-year recurrence).

NDEP maintains that existing regulatory language provides the necessary flexibility to account for seasonal and variable flow conditions in characterizing the water quality conditions in a receiving water.

- For interstate surface waters, what impact, if any, will a higher level of protection from the downstream state have on a Nevada discharger?

This question is beyond the scope of this proposed rule. A separate discussion from a policy perspective level would be warranted to provide a response to the question.

- Waterbodies could have multiple tier levels if the water has higher water quality for certain parameters. Waters would be categorized on a parameter-by-parameter basis for Tier 1 and Tier 2 waters but Tier 2.5 and Tier 3 would be applied to all parameters. While not inherently problematic, how would this be regulated?

This Tier 1/Tier2 combination is already being implemented. Segments of the Truckee River have RMHQs for some parameters (Tier 2) and WQs (Tier 1) for other parameters. In such cases, the permit writers use RMHQs and water quality standards on a parameter-by-parameter basis in each permit.

Tier 2.5 and Tier 3 are reserved for EAWs, with the distinction being that new or expanded discharges are not allowable under Tier 3 but are permissible under Tier 2.5 as long as the discharge does not impact the existing water quality of the EAW.

This existing water quality may mean some parameters are at Tier 2 protection levels (which must be maintained) while others may be at Tier 1 protection levels. If there is an existing TMDL for one or more parameters in the EAW, the waste load allocation in the TMDL is used in setting permit limits for those parameters.

Tier 3 and Tier 2.5 are a designation assigned to EAWs that may be based on water quality but allows for consideration of other surface water characteristics. Tier 1 and Tier 2 levels are dependent on numerical water quality parameter levels. A surface water that is polluted or impaired for a number of water quality parameters and would be subject to Tier 1 protection could be designated as an EAW based on an attribute or characteristic other than water quality conditions.

- NDEP has stated that this process will streamline the discharge permit process, however it seems like it will take just as long or longer under the new regulations. How is NDEP envisioning these regulations would streamline the process?

The proposed process may create some additional effort on the part of NDEP staff in reviewing an antidegradation review analysis submitted by permittee or applicant but should not make the permitting process longer. It takes roughly 3 months or more to prepare a permit for a new discharge or major modification. Any requirement for sampling can be done concurrently with the permitting process. Antidegradation reviews are a requirement of the CWA and have been applied in Nevada via RMHQs. However, only a very limited number of waterbody-parameter pairings have RMHQs, and EPA

has put NDEP on notice that issuance or renewal of NPDES permits involving a major change need to include a complete antidegradation review for parameters of concern in the discharge.

- Additional clarity is needed on how the tributary waters could be impacted by an EAW designation (both Tier 2.5 and Tier 3 designations). NDEP stated that the tributaries would be considered separately. However, the regulations state that new or expanded discharges into tributaries will maintain and protect the higher water quality condition or unique water quality characteristic of the downstream EAW.

The EAW status does not transfer up into the tributaries; however, any proposed discharge to those tributaries must undergo routine antidegradation evaluation and any discharge cannot adversely impact the downstream EAW. NDEP has not identified a specific framework for making such a demonstration. Instead, a discharger would have discretion as to whether to make the demonstration that there would be no probable impact of the discharge from a water quality perspective, or by some other means such as modeling to show the downstream EAW will not be adversely affected by the discharge. As is currently done, NDEP would review any demonstrations provided by the permit applicant.

- Language should be added to confirm that changing an existing discharge permit which does not increase the flow or concentrations to the receiving water will be exempt from an antidegradation review.

Such language is already included, under Section 3, Part 1(b), Antidegradation Implementation Procedures, which specifies when an antidegradation review analysis would need to be provided for a permit renewal or permit modification:

b. At the time of permit renewal or permit modification, if there is a request for an expanded point-source discharge. An expanded point-source discharge would include the following: an increased limit of flow, in gallons per day, of the discharge authorized by the permit, a change in the pollutant composition of the discharge requiring different effluent limitations, or a relocation of the discharge outfall and the relocation represents a significant change based on an evaluation by the Division; or

- Section 3.1 states that Interim Baseline Values (“IBV”) will be determined in the pre-application. Section 4.2.2 states that parameter-by-parameter analysis for Tier 2.5 will be based on the conditions at the time of the EAW classification, however Section 5.2.2 says that existing data sources should be used in the calculation of the IBVs and to determine the level of antidegradation protection appropriate. These sections appear to be in conflict, where the IBVs will reflect current conditions but historic data can be used to determine the IBVs. Please clarify.

When water quality in a receiving water for a parameter is better than the water quality standard level, the intent is to calculate an IBV to function as a “temporary RMHQ” (assuming a RMHQ has not been set for the parameter). Ideally, calculation of this IBV would be based on available water chemistry data that has been collected from the receiving water in question. This water chemistry data set could

be large if routine monitoring has been conducted on the waterbody or may be limited if the water has not been routinely monitored and sampled.

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.

The reference to the IBVs in the pre-application permitting phase is to encourage timely notification and early consultation with NDEP to determine if water chemistry data are available to characterize the existing quality of the receiving water, and if not, what sampling will be required to determine whether or not IBVs need to be established for parameters of concern in the discharge.

When a waterbody is classified as an EAW, the existing or baseline water quality at that point is what must be maintained and protected going forward. The baseline conditions would be based on water quality data submitted with the EAW nomination. Sufficient water quality data would need to be provided to adequately characterize the baseline water quality conditions in the EAW. Although discharges may be allowed in Tier 2.5 EAWs, there is no option for degradation of the existing water quality, as there is with Tier 2.

- Section 3.2 states that permit application must be 180 days prior to date on which discharge is to commence/permit is expired. Does this mean that the antidegradation review will be completed within those 180 days?

An antidegradation review analysis will be required to be submitted with a new permit application or permit renewal if permit conditions and requirements change, as explained in the draft rule, which would require an antidegradation review analysis.

- Section 5.2.2 states that the samples must be collected during periods of non-extreme flow conditions to calculate the IBV. Will the receiving water flow rate be documented each time the sampling occurs? How is “non-extreme” defined?

Water samples collected for establishing IBVs would need to be collected based on a sampling and analysis plan prepared by the applicant and approved by NDEP. A stipulation in approving the plan would be that samples not be collected during periods of extreme high or low flows, as extreme conditions can markedly affect parameter concentrations. The overall objective of the sampling and analysis plan would be to acquire representative water quality data needed to characterize baseline water quality of the segment of the waterbody that is under consideration.

Extreme high and low flows are typically defined as those above the upper 7Q10 (i.e., 7-day high flow with a 10-year recurrence) or below the lower 7Q10 (i.e., 7-day low flow with a 10-year recurrence). There may be circumstances where a 7Q10 analysis is not appropriate, such as when the flow is highly regulated by reservoir releases, or in effluent-dominated systems, or when sufficient flow data are lacking to conduct the 7Q10 analysis. In such cases, best professional judgment will be used to identify

an alternative method for defining high and low flow. (reference: *NDEP Continuing Planning Process, 2004*)

- Section 5.2.2 outlines the establishment of IBVs for the receiving waters. The example provided is a concentration standard. How will the IBV concentrations be translated to a permit requirement for discharge?

IBVs function as a “temporary RMHQ” and will be handled the same as an RMHQ in permits. The IBV would be the permit effluent concentration limit for the parameter.