



Response to comment letters submitted to the Division after the August 31, 2022 workshop for R113-22

Response to comments submitted by *The Pew Charitable Trusts*, *Trout Unlimited*, and the *Nevada Conservation League* questioning the reason for the information requirements listed in Section 2, Subsection 3 (a) through (i) of R113-22

As has been mentioned in previous responses to comments, the intent of the proposed rule is to develop a process for nominating an EAW, describing how a nomination would be assessed, and what information will be required for the nominated water to be thoroughly vetted in the decision-making process. The Division drafted the proposed rule language with the intent that it would be up to the nominating party to identify and describe the qualification criteria or factors that would make a waterbody a candidate EAW. For example, the nominating party would need to provide supporting information and data that the surface water had pristine or naturally occurring water quality conditions which would make the waterbody special; or demonstrate that it has outstanding biological diversity that gives the waterbody ecological value; or show that the presence of an outstanding fishery provides a regionally unique recreational value; or demonstrate that water has an exceptional or unique aesthetic quality.

The additional informational requirements contained in the proposed rule are to substantiate the nomination and to ensure that a complete regulatory petition package is prepared for consideration by the State Environmental Commission (SEC). This level of information will establish a complete administrative record for the public to review and upon which the SEC can make an informed decision. If a person or a group desire to have a water classified as an EAW, they need to realize that it will take some work and commitment to take a nominated water through the regulatory process. The intent is not to put an undue burden on a nominating party or deter the party from submitting a nomination.

The SEC listens to petitions, hears public testimony, reviews supporting documentation and information, and deliberates on petitions. The SEC then votes whether to adopt the regulatory petition. The SEC relies on an evidence-based approach to render a decision.

The comment has been repeatedly expressed during the stakeholder meetings and regulatory workshops that the additional informational requirements outlined in Sections 2.3 (f)-(i) of R113-22 are aimed at factors well outside the scope of what should qualify a water for EAW status and are unnecessary because the activities to be documented by these sections cannot be impacted in any way by this rule according to the language currently contained in Section 2.7.

If an EAW nomination petition was submitted to the SEC, the SEC does not have an independent body to review and evaluate the merits of the petition. Nor does the SEC have the staff to compile the information as listed in Sections 2.3 (f)-(i) that will be needed to evaluate whether an EAW designation will have unintended consequences such as impacting

authorized water rights or water appropriations, affecting permitted discharges into and upstream of the EAW, and affecting or restricting existing land uses adjacent to the EAW nominated waterbody. The Commission will want this information to accompany the regulatory petition so that the above factors can be evaluated and to ensure that a decision to designate a surface water as an EAW will not conflict with the criteria outlined in Section 2.7. In evaluating a nominated waterbody, the Commission will want to know the level of local government, businesses and stakeholder support for the nomination, but the Commission would not initiate consultation with the above entities to gauge the level of support. The expectation would be that the nominating party would provide such with the petition.

Whether the nominated waterbody has been identified for a future use in a local land use and water resource plans would be important during the Commission's consideration of the petition, and if the nominated water was on federal managed land, the Commission would want to know the current, and planned future uses of the waterbody in the federal agency's land use and resource management plans, and recognition from the federal land managers that they support the proposal. Here again, the Commission would not independently review these plans and compile information or seek the federal land manager's level of support, the expectation would be that such would be included with the petition as supporting information.

The Division has stated in prior responses that the information requirements listed in the proposed rule is not to set an insurmountable bar to nominate a waterbody for EAW status. Instead, the intent is to provide a complete information package that not only addresses the qualities, characteristics or significance which would make the waterbody a candidate EAW but also to provide supporting information that address other pertinent factors that the Commission will need to consider in order to make an informed and evidence-based decision whether to designate a waterbody as an EAW.

As suggested during the public workshop, the Division is adding to the Antidegradation Implementation Procedures document, available sources and links that can be used as a starting point to collect the above information which will aid a nominating party in compiling the supporting information and documentation to submit a successful petition.

Response to comments submitted by *Nevada Gold Mines*

- Consistent use of the defined term “baseline concentration” versus using “existing water levels” in receiving water: Comment noted. Editorial edits have been made to language of R113-22 to consistently refer to the baseline concentration of the parameter of concern in the receiving water.
- Clarification of “seasonal or controlled discharge” in the alternative analysis: Clarification has been provided to state that the alternative analysis (Section 14.1(e)) must include the evaluation of the potential for a seasonal or controlled discharge.
- Rule versus Guidance Language: As noted, the language in the Draft Antidegradation Implementation Procedures guidance document should track the language of any final rule.

The Division is reviewing the guidance document to ensure consistent terminology and language with R113-22.

- **Public Review of the Guidance:** As noted, the antidegradation guidance document is an iterative document that may be amended as the Division works on rule implementation. The Division will provide public notice and time for review and comment when revisions are made to procedural requirements or concepts related to the antidegradation review process.
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Response to comments submitted by *Nevada Farm Bureau*

- The package of information for a submitted EAW should contain all the information listed in Section 2, Subsection 3 (a) through (i) of R113-22. This level of information, presented to the State Environmental Commission (SEC) as part of the nomination process, establishes a necessary public record on which the SEC can offer a solid decision. Short-cuts and less complete information will open wide the issue of the decision being arbitrary in nature, whatever decision is made.

The Division agrees with this comment for the reasons listed.

- The Farm Bureau has concern that an EAW designation may impact expansion of existing land uses and future land uses that do not degrade water quality. Suggest the following bolded language be added to Section 2, Subsection 7 (f):

The classification of a surface water or segment of a surface water as a water of extraordinary ecological, aesthetic or recreational value does not:

*(f) Prohibit or impair any property rights or any land use activities authorized under a state or federal permit occurring on any federally managed land adjacent to the water of extraordinary ecological, aesthetic or recreational value. **Designation as an EAW does not prohibit future activities when effective and responsible management practices adequately prevent water quality degradation.***

The Division has made “green-line” edits to the proposed rule language to stipulate that land uses authorized under a state or federal permit occurring on adjacent lands to an EAW cannot be restricted or altered and property rights and associated easements on any private, state or federal managed land adjacent to an EAW cannot be prohibited or impaired.

- It seems when a water is classified as a water of extraordinary ecological, aesthetic or recreational value (EAW) and assigned a tier level of antidegradation protection of 3 or 2.5, with basically no degradation allowed of water quality, there would be a conflict with (e) and (f) of Section 2, Sub. 7 which states that an EAW cannot restrict or alter existing land uses or prohibit or impair a person’s property rights or adjacent land use activities authorized under a state or federal permit.

The antidegradation protection level assigned to a designated EAW would regulate new or expansion of existing point-source discharges to the waterbody. The assigned antidegradation protection level does not restrict or alter existing

land uses adjacent to the EAW or prohibit or impair any property rights or authorized land use activities covered by a federal or state permit on land adjacent to an EAW. The Division has made “green-line” edits to the proposed rule language to clarify this.

Response to comments submitted by *Humboldt River Basin Water Authority*

- The HRBWA strongly support keeping the requirements for nominators to provide the information listed in Section 2, Subsection 3 (a) through (i) in the regulation. This information is essential for establishing a complete administrative record for the public to review and upon which the State Environmental Commission can make an informed decision.

The Division agrees with this comment for the reasons listed.

- The HRBWA strongly support the need for consultation with local government, and state and federal agencies during the nomination process and for community outreach to ensure that all potentially impacted parties have the opportunity to provide comment on a proposed EAW designation.

Comment noted.

- The HRBWA previously provided a comment expressing concern that there is no mention of how the expansion of existing land uses and future land uses would be impacted by an EAW designation. The Division’s response to this prior comment was that an EAW designation would provide protection against new or increased sources of pollution in the future.

We would request that the Division add the following bolded language to Section 2, Sub. 7 to allow for the expansion of existing land uses and new land uses that do not degrade water quality: The classification of a surface water or segment of a surface water as a water of extraordinary ecological, aesthetic or recreational value does not:

*(f) Prohibit or impair any property rights or any land use activities authorized under a state or federal permit occurring on any federally managed land adjacent to the water of extraordinary ecological, aesthetic or recreational value. **Designation as an EAW does not prohibit future activities when effective and responsible management practices adequately prevent water quality degradation.***

The Division has made “green-line” edits to the proposed rule language to stipulate that land uses authorized under a state or federal permit occurring on adjacent lands to an EAW cannot be restricted or altered and property rights and associated easements on any private, state or federal managed land adjacent to an EAW cannot be prohibited or impaired.