



April 22, 2022

Dave Simpson
Nevada Division of Environmental Protection
Bureau of Water Quality Planning
901 S. Stewart Street, Suite 4001
Carson City, Nevada 89701
via email: dsimpson@ndep.nv.gov

Dear Mr. Simpson,

Western Resource Advocates again thanks you and the Nevada Division of Environmental Protection (NDEP) staff for your work drafting regulations intended to protect Nevada's Ecological and Aesthetic Waters (EAW). We strongly support NDEP developing a program that will safeguard some of our state's most outstanding water bodies and allow the public to nominate and advocate for the designation of waters that qualify for this protection. After participating in the various public workshops on the proposed EAW regulation R119-20, providing and listening to stakeholder input and again reviewing the draft rules, we submit these formal comments.

I. Introduction

Western Resource Advocates protects the West's land, air and water to ensure that vibrant communities exist in balance with nature. We envision a future in which the West will have clean water to support healthy communities for current and future generations and vital habitat for fish and wildlife. WRA works with Nevada and other western states to establish and defend strong water quality standards so that communities and nature thrive.

As residents of the most arid state in the nation, Nevadans understand how precious our water resources are. We value our rivers, streams, lakes, springs and wetlands because of their recreation opportunities, unique scenic beauty, and importance to fish and wildlife. For some water bodies, the highest and best use of the water is to protect these priceless and irreplaceable ecological and aesthetic values and other unique characteristics worthy of protection. This includes those characteristics that are not captured by traditional water quality parameters, but are highly valued by Nevadans and should be preserved. For these reasons, we continue to believe in the importance of establishing a strong Ecological and Aesthetic Waters designation so that the state and the public have this tool available to prevent water quality degradation in our most extraordinary waters.

The public must have an accessible way to express its preference for granting the state's highest level of protection to these water bodies, so that current and future generations of Nevadans can enjoy our state's most extraordinary water resources and the variety of values they protect.

While we appreciate NDEP's efforts to initiate these regulations and set up a process to protect Nevada's outstanding waters, we feel that the most recent draft of these regulations is a significant step back from the initial draft of a few months ago. As we explain in detail below, this is because the most recent draft of R119-20 creates a severely limited avenue for the public to nominate waters as EAWs that is almost impossible to satisfy.

The draft rule mandates that the nominator provide extensive information and analysis addressing several multi-faceted factors unconnected to water quality or ecological or recreational significance, as well as any other information or data the Commission may request. As a result, we believe that the draft regulations are not in keeping with the Clean Water Act and the requirement that Nevada Water Quality Standards include an antidegradation provision that provides for the maintenance and protection of high quality waters and waters of exceptional recreational or ecological significance.

The Clean Water Act requires that, as a key element of their water quality standards, states must incorporate an "antidegradation" policy. To implement this requirement, EPA promulgated 40 C.F.R. § 131.12, the regulation that governs how states will comply with this antidegradation mandate. Section 131.12 specifies that states must adopt and implement an antidegradation policy that is, at a minimum, consistent with the rule. 40 C.F.R. § 131.12(b) ("The State shall develop methods for implementing the antidegradation policy that are, at a minimum, consistent with the State's policy and with paragraph (a) of this section."); 40 C.F.R. § 131.12(a) ("The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with," section 131.12(a)). Thus, pursuant to the Clean Water Act, Nevada is required to adopt and implement water quality standards that incorporate and implement and are, at a minimum, consistent with the federal antidegradation policy set forth in section 131.12.

Specific to Nevada's EAW rule, section 131.12(a)(3) provides that the state's antidegradation policy and procedures must ensure that:

Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

While section 131.12(3) designations are extended to waters of high quality, waters of exceptional recreational or ecological significance also qualify for "Tier 3" or as "outstanding national resource waters," even where the quality in those waters may not be particularly high.¹

¹ EPA, Water Quality Standards: Regulations and Resources, Key Concepts Module 4: Antidegradation (Tier 3) available at <https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation#tab-7> ("Tier 3 of the State or Tribe's antidegradation program protects outstanding national resource waters (ONRWs) – waters that have unique characteristics to be preserved (e.g., waters of exceptional recreational, environmental, or ecological significance)"); EPA, Water Quality Standards Handbook, Chapter 4: Antidegradation at 12, available at: <https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf> ("ONRW

The antidegradation policy further requires that qualifying high quality waters be protected from degradation. This is achieved by prohibiting new or increased discharges to the outstanding waters and by banning new or increased discharge to tributaries to ONRWs that would lower water quality in the water.

Under section 131.12(a)(3), then, a water qualifies for outstanding water designation where that water is of high quality or has unique characteristics, including because it is a water of exceptional recreational, environmental, or ecological significance.² Therefore, the process of nominating and designating an outstanding water must focus on these same attributes – whether the water is of high quality, is a water of exceptional recreational, environmental, or ecological significance or otherwise has unique characteristics to be preserved.

In stark contrast to section 131.12(a)(3), proposed R119-20 requires the public to provide information on and the Commission to consider a list of factors that largely focus, not on the qualities of the nominated water, but on other information and analysis that will be highly onerous for public – even with the assistance of the Department – to collect and undertake. R119-20, section 2.3.(a).

Simply put, the majority of the section 2.3.(a) factors are not relevant to the considerations that qualify a water as an Tier 3 or EAW water – whether the water is of high quality, is a water of exceptional recreational, environmental, or ecological significance or otherwise has unique characteristics to be preserved. Further, the public generally lacks the information, expertise and resources necessary to submit a petition that meets the data and analysis requirements of the majority of the section 2.3.(a) factors. This is true even if the public receives the full cooperation and support of the Department. After all, as the rule makes clear, the members of the public nominating a water for EAW designation are ultimately responsible for addressing the section 2.3.(a) factors. Indeed, the current burden on the public seeking to nominate a water as an EAW is significant enough as to be prohibitive, frustrating the implementation of the federal antidegradation policy in Nevada. As a result, R119-20 is inconsistent with 131.12(a)(3) and 131.12(b), and so runs afoul of the Clean Water Act.

II. Specific Analysis and Suggested Amendments

Based on the analysis above, we have suggested changes to R119-20. These revisions (with the exception of the single proposed revision to Section 3) are specified in the document attached. Below, we explain the basis for our proposed amendments to R119-20.

designation also offers special protection for waters of ‘exceptional ecological significance.’” These are water bodies that are important, unique, or sensitive ecologically, but whose water quality, as measured by the traditional parameters such as dissolved oxygen or pH, may not be particularly high or whose characteristics cannot be adequately described by these parameters (such as wetlands).”).

² *Id.*

Importantly, should our suggested edits to the section 2.3.(a) factors be accepted, the resulting rule would still provide the particular criteria by which the Commission would determine whether a water should be designated as an EAW. Indeed, these remaining criteria would properly focus on the attributes of the water that would qualify it as an EAW – whether the water is of high quality, is a water of exceptional recreational, environmental, or ecological significance or otherwise has unique characteristics to be preserved. In other words, a modified R119-20 according to our suggestions would still provide ample direction to the Commission and specify exactly what the Commission should consider as it reviews an EAW nomination.

Section 2.3.(a): First, we suggest language clarifying that when a person comes to the Department with an EAW nomination, the Department will cooperate with the that person to gather the information and analysis required by section 2.3.(a). Given that meeting the section 2.3.(a) factors is highly burdensome and largely beyond the expertise or capabilities of members of the public, it is likely that members of the public will opt to work with the Department in order to complete their nomination petition. As the rule is currently written, the Department has no obligation to work with the public and therefore to provide its support and expertise to individuals as they attempt to comply with these onerous criteria.

Second, we propose adding language to explain that members of the public nominating a water for EAW designation are responsible for providing the information required by the section 2.3.(a) factors “to the extent” that information “is available.” This provision clarifies that an EAW nomination should not be rejected simply because the information required by the section 2.3.(a) factors is not available. Further, to mandate that the public create and supply information that is not readily available would add to the already untenable burden placed on the public by R119-20. Note that the phrase “to the extent it is available” only modifies “the following **information** in support of the nomination”.

Section 2.3.(a)(2): Our proposed amendments seek to limit the almost boundless information and mapping requirements of this section. Currently, a proponent of an EAW nomination must provide a “map of the location of the surface water or segment thereof which includes, without limitation, the upstream and downstream boundaries[.]” Sec. 2.3.(a)(2). Taken at face value, this provision requires a proponent to “map” both the entire watershed containing the nominated water as well as all downstream waters ending with the ocean or a terminal basin, and presumably to do so using mapping technology that is not accessible or routinely used by the public.

Section 2.3.(a)(3): Similarly, our proposed amendments to limit the expansive mandates of this section by striking the phrase “without limitation” and the word “specific.”

Section 2.3.(a)(4): Again, our suggested edits seek to explain that persons wishing to nominate a water as an EAW need only provide **available** water quality data to support their claim that the water is of high quality, is a water of exceptional recreational, environmental, or ecological significance or otherwise has unique characteristics to be preserved. Our amendments also clarify that available water quality data should be used to establish the baseline water quality of the proposed EAW. This baseline water quality is the level of water quality that should be maintained and protected if and when the water is designated as an EAW.

Sections 2.3.(a)(5) through (8): We recommend striking these subsections as they require data and analysis that: 1) are not directly relevant to whether the water is of high quality, is a water of exceptional recreational, environmental, or ecological significance or otherwise has unique characteristics to be preserved; 2) are beyond the expertise and resource capabilities of most members of the public; 3) may not exist; 4) places an onerous burden on persons seeking to nominate a water as an EAW; and 5) is not properly consistent with the federal Antidegradation Policy and the Clean Water Act.

Though we believe that requiring the information in these subsections is inappropriate, we do understand that this information and analysis could be of interest to the Commission and thus strengthen a nomination. We propose that the information in these subsections, and any other information NDEP believes would be persuasive to the Commission, be listed in a non-regulatory guidance document or other resource available to the public to assist nominators in developing nominations with a greater chance of success.

As noted above, should these subsections be struck, the resulting rule would still provide the particular criteria by which the Commission would determine whether a water should be designated as an EAW and the modified R119-20 would still provide sufficient direction to the Commission and specify exactly what the Commission should consider as it reviews an EAW nomination.

Sections 2.3.(a)(9): We recommend striking this subsection because there is no way for persons seeking to nominate an EAW and preparing their petitions to know what other information the Commission may require. Moreover, because the rule does not specify what this information might be or how the Commission might evaluate it, this subsection would run afoul of standard administrative procedures.

Section 2.3.(b): We recommend that this section be amended to establish a presumed timeframe during which members of the public and the Department would work together to finalize an EAW nomination. Importantly, if the persons and Department agree, that timeframe can be extended to allow more time to prepare an EAW nomination. Our suggested changes to this section also clarifies that persons seeking to nominate an EAW would continue to have a role in making recommendations to the Commission, including a recommendation on the tier of antidegradation that should be applied to the nominated water.

Section 2.4.(a): We propose adding language to explain that, when petitioning directly to the Commission, members of the public nominating a water for EAW designation are responsible only for providing the information required by the section 2.3.(a) factors to the extent that information is available.

Section 3 – Definition of “Baseline Concentration”: We recommend that the reference to “the 95th percentile” included in the definition of “baseline concentration” – which determines whether Tier 2 review will be applied to water body for a particular parameter – be changed to “50th percentile.” Under 40 C.F.R. 131.12(a)(2), Tier 2 antidegradation review must be applied “where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water[.]” By limiting Tier

2 review to waters where the 95th percentile value for a parameter is at or cleaner than the relevant water quality standard is setting the bar much higher than anticipated by section 131.12(a)(2). Therefore, as currently proposed, the definition of “baseline concentration” is inconsistent with the federal Antidegradation Policy, which requires, at a minimum, that waters that are cleaner than water quality standards be subject to Tier 2 review.

Further, allowing a mere three samples to establish baseline concentration is inappropriate. With three samples, for the 95th percentile value to be at or cleaner than the water quality standard would require that all three samples be at or cleaner than the relevant water quality standard. Initially, three samples cannot reflect water quality in a water. Second, by defining baseline concentration this way, a water would be exempted from Tier 2 review for a particular parameter where only one out of three monitored values is below the relevant water quality standard.

Substituting 95th percentile with 50th percentile is consistent with section 131.12(a)(2) and will more appropriately apply Tier 2 review to Nevada waters with water quality that exceeds levels necessary to protect fish, wildlife and recreation.

Thank you again for the opportunity to comment on this proposed regulatory action. We appreciate the time and effort that has been put into developing these draft regulations and engaging in outreach to stakeholders. We hope that you will consider our input as you finalize the regulations, and look forward to continued dialogue and collaboration to protect the quality of Nevada’s waters for current and future generations.

Respectfully,

A handwritten signature in black ink, appearing to read 'Joro Walker', with a stylized, cursive script.

Joro Walker, General Counsel
WESTERN RESOURCE ADVOCATES