

LCB File No. R024-08

**PROPOSED REGULATION OF
THE STATE ENGINEER**

The following provisions are hereby added to chapter 532 of NAC:

Administrative Procedures for Enforcement Proceedings

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NAC 532A-1. Authority.

- (1) As provided in NRS 532.120, the State Engineer is empowered to promulgate rules and regulations to ensure proper and orderly execution of Nevada Water Law.*
- (2) The State Engineer's powers and duties include acting on behalf of the State of Nevada to administer the distribution and use of all surface and ground waters within the state in accordance with statutory authority, including but not limited to Nevada Revised Statutes, Chapters 533 through 536.*
- (3) Specifically, NRS 533.481, 534.193, 535.200 and 536.200 provide statutory authority to the State Engineer for assessing fines and penalties.*

NAC 532A-2. Application and Preamble.

- (1) These regulations are applicable statewide to the use of the waters of the state. Additional regulations may be promulgated to address water enforcement for specific hydrologic areas.*
- (2) The Division may initiate an Enforcement Action for any violation of Nevada Revised Statutes, Chapters 533 through 536, regulations, waivers, permits, certificates or orders.*
- (4) The respondent may appeal the Violation Order in a proceeding before an Independent Advisory Committee appointed by the State Engineer. The respondent has the ability to appeal that decision to a court of proper jurisdiction.*
- (5) These regulations shall be liberally construed to allow the State Engineer to administer Nevada Water Law.*
- (6) These regulations in no way are meant to supersede any powers associated with federal or civil decree courts.*

NAC 532A-3. Purpose.

- (1) These regulations are intended to:*
 - a. Assure the protection of Nevada's water resources and the public welfare by promoting compliance and deterring noncompliance with the statutes, regulations, permits, certificates, waivers and orders administered and issued under the Division's authority; and*
 - b. Assure that the State Engineer assess any administrative penalties lawfully, fairly, and consistently, which reflect:*
 - i. The nature and gravity of the violation and the potential for harm to Nevada's water resources and the public welfare by the violation;*
 - ii. The length of time which the violation was repeated or continued;*
 - iii. Any economic benefit realized as a result of the violation; and*
 - iv. The actual costs expended by the Division during the course of the investigation and subsequent enforcement efforts.*
 - c. Clarify the Division's authority to enforce the statutes, regulations, permits, certificates, waivers and orders administered by the State Engineer.*
- (2) The following three elements of an assessed penalty are intended to achieve different, but equitable, retribution, as determined by the State Engineer:*

- a. *Administrative fines are intended to remove the financial incentive of the violation by removing the economic benefit as well as imposing a punitive measure.*
- b. *Replacement of water is intended to make whole the resource and impacted water users, as far as this is possible, by requiring respondents to leave an amount of water undiverted or undiminished in the resource for use by others. The allowance of up to 200% replacement indicates the penalty can incorporate a punitive element, as appropriate.*
- c. *Reimbursement of enforcement costs is intended to make whole the state by requiring a violator to replace the public funds expended to achieve compliance with the law*

NAC 532A-4. Overview of Process

- (1) *After there is an alleged violation, and depending on how egregious the violation is, one of three steps will be taken:*
 - a. *Issue a warning letter that sets forth alleged violation(s) and requires compliance;*
 - b. *Issue a Finding of Alleged Violation (FOAV) & Violation Order;*
 - c. *Seek injunctive relief pursuant to NRS 533.482, 534.195, 535.210 and/or 536.210.*
- (2) *If a FOAV is issued, a date certain will be required of the respondent to come into compliance or at a minimum, begin the process to come into compliance.*
- (3) *Included in the Violation Order will be a date set for scheduling a Show Cause Meeting before the Division. The purpose of the Show Cause Meeting is to allow the respondent the opportunity to show why they shouldn't be penalized for the alleged violation.*
- (4) *After the Show Cause Meeting, there are three (3) possible steps:*
 - a. *If no violation was found, the case is closed;*
 - b. *If a violation was found to have occurred but the respondent acted expediently and responsibly to achieve compliance, the matter may or may not be sent to the Penalty Panel to decide if a penalty is justified under those conditions;*
 - c. *If the respondent refuses to comply, the matter will be sent to the Penalty Panel.*
- (5) *The Penalty Panel decision in (4)(b) and (4)(c) can be appealed to an Independent Advisory Committee or directly to District Court pursuant to NRS 533.450.*
- (6) *If the respondent feels aggrieved by the final decision after a hearing before the Independent Advisory Committee, he may then appeal that decision to the district court pursuant to NRS 533.450.*

Definitions.

532A-5 As used in this chapter, unless the context otherwise requires, the words and terms defined in NAC 532A-5 to 532A-24, inclusive, have the meanings ascribed to them in those sections.

532A-6 "Division" means the Division of Water Resources. The term State Engineer or Division may be used interchangeably unless clearly indicated otherwise by the context of the sentence in which it appears.

532A-7 "Economic Benefit" means the benefit actually or potentially realized and/or a cost avoided by a violator as a result of the unlawful activity defined as a violation in the Enforcement Action.

532A-8 "Enforcement Action" consists of a Finding of Alleged Violation (FOAV) and a Violation Order (VO) as well as injunctive relief.

532A-9 "Enforcement Cost" means a monetary sum assessed by the State Engineer for any expense incurred by the Division in investigating and stopping a violation of, or a failure to comply with, a statute, regulation, permit, waiver and order adopted pursuant to the Division's authority.

532A-10 "Finding of Alleged Violation (FOAV)" is a notice of violation alleged by the Division that cites the statute, regulation, permit, waiver or order that has been violated.

532A-11 "Independent Advisory Committee (IAC)" means a committee whose members are appointed by the State Engineer. The members cannot be employed by the Division of Water Resources but must be known to have water resource related experience and who will be fair and impartial. When a Penalty is appealed, the IAC will review it and make a recommendation to the State Engineer to uphold, modify or overturn the order.

532A-12 "Mitigation" means to provide compensation or reparation acceptable to the Division for injury caused by the violation.

532A-13 "Noncompliance" or "Nonconformance" or "Failure to Comply" or "Violation" each mean any act or failure to act which constitutes or results in:

- (1) Engaging in any activity prohibited by, or not in compliance with, any statutes, regulations, permits, waivers and orders administered under Division's authority;
- (2) Engaging in any activity without a necessary permit or approval that is required by law or regulation;
- (3) The failure to perform, or the failure to perform in a timely fashion, anything required by a law administered by the Division or by a statute, regulation, waiver, permit or order adopted pursuant to the Division's authority.

532A-14 "Penalty" means a monetary sum assessed by the State Engineer in response to a violation of, or a failure to comply with, a law administered by the Division, or any regulation, waiver, permit or order adopted pursuant to the Division's authority. The penalty may also include reimbursement of enforcement costs incurred by the Division and replacement of water – up to a maximum of 200% of water illegally taken.

532A-15 "Penalty Panel" means a committee whose members are comprised of senior staff employed by the Division of Water Resources. Their goal is to ensure consistency and fairness in the issuance of a Penalty.

532A-16 "Person" has the definition ascribed to it pursuant to NRS 533.010 and 534.014.

532A-17 "Record" means the official collection of all written and electronic materials in water enforcement proceedings, including but not limited to the administrative action, pleadings, motions, exhibits, orders and testimony that took place during the proceeding.

532A-18 "Respondent" means any person to whom the Division issues an Enforcement Action.

532A-19 "Requirement" means any statute, regulation, permit, waiver or order adopted or granted pursuant to the Division's authority.

532A-20 "Schedule of Compliance (SOC)" means a schedule outlining a date, or series of dates, for which compliance is to be achieved. The SOC can either be initiated by the State Engineer as part of an alleged violation; submitted by the Respondent in response to an allegation of violation; or a stipulated schedule between the State Engineer and the Respondent in regard to the alleged violation.

532A-21 "Settlement Offer" is the total amount assessed for an enforcement action. The offer may include enforcement costs and replacement/mitigation water. This settlement is offered to the respondent in lieu of the State Engineer filing suit.

532A-22 "Show Cause Meeting" is a meeting between the respondent and the Division for the purpose of finding out how the respondent dealt with the FOAV and Order. Information from this meeting will be used to decide whether or not to send the matter to a Penalty Panel.

532A-23 "State Engineer" is the Administrator of the Division of Water Resources appointed pursuant to NRS 532.020. The terms State Engineer or Division may be used interchangeably unless clearly indicated otherwise by the context of the sentence in which it appears. In the case of an enforcement action proceeding, the State Engineer can mean the State Engineer himself, persons appointed by the State Engineer, or persons designated by the Division's rules, or statute.

532A-24 "Violation Order" is a decision issued by the State Engineer in conjunction with a FOAV. The order identifies actions and timeframes necessary to achieve compliance.

532A-25 "Water Commissioner" means a person appointed to distribute water on a stream system.

NAC 532A-26. Options for Adjudicative Enforcement.

- (1) The State Engineer may, at his discretion, pursue any combination of the following administrative and judicial enforcement actions depending upon the circumstances and gravity of each case:
 - a. Issue a warning letter that sets forth alleged violation(s) and requests compliance;
 - b. Commence an Enforcement Action consisting of a:
 - i. Finding of Alleged Violation which is a formal notice of a suspected violation which:
 - a) Cites the law, regulation, permit and/or order allegedly violated;
 - b) States the facts which form the basis for the Division's belief that a violation has occurred; and
 - ii. Violation Order which:
 - a) Specifies a reasonable deadline or deadlines by which the respondent:
 - i) Must come into compliance with the requirements described in the Finding of Alleged Violation, and/or
 - ii) Must submit a written mitigation plan or proposal setting forth how and when that respondent proposes to achieve compliance that must be approved by the Division.

- iii) *Must meet with the Division staff to show cause why the Division should not seek a civil penalty.*
- iv) *Must submit any other information the Division deems appropriate.*

c. Seek Injunctive Relief

NAC 532A-27. Computation of Time.

- (1) *Computation of any time period referred to in these regulations shall begin with the issuance date of the act that initiates the running of the time period. The last day of the time period computed is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the Division is closed, in which event the period shall run until the end of the business hours of the following business day. When the time period is less than seven (7) days, intervening days when the Division is closed shall be excluded in the computation.*
- (2) *The State Engineer may, for good cause shown, extend any time limit contained in these regulations. All requests for extensions of time shall be timely submitted in writing.*
- (3) *Information or data required or permitted to be filed under these regulations shall be filed with the Division within the time limits as set forth in the following:*
 - a. *Information or data hand delivered during regular business hours shall be deemed filed on the date of hand-delivery.*
 - b. *Information or data deposited in the U.S. mail shall be deemed filed on the date stamped received by the Division.*
 - c. *Information or data transmitted by facsimile, telecopier or other electronic transmission shall not be accepted for filing unless approved in writing by the State Engineer.*

NAC 532A-28. Penalty Panel - Assessment of Administrative Penalties and Administrative Costs.

- (1) *Pursuant to NRS 533 through 536 and these regulations, the State Engineer, may assess penalties for any violation of the Nevada Water Law and no penalty shall exceed the maximum penalty allowed by State law.*
- (2) *Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The State Engineer may assess an administrative penalty, not to exceed ten thousand dollars (\$10,000) per day for each violation, not including assessed enforcement costs and water reparation penalties.*
- (3) *The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Enforcement Action is issued until the date compliance is achieved.*
- (4) *The amount of the penalty shall be calculated based on:*
 - a. *The value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;*
 - b. *The gravity of the violation, including the economic injury or impact to others;*
 - c. *Whether the respondent subject to fine or replacement attempted to comply with the State Engineer's orders;*
 - d. *Prior violations; and*

- e. The respondent's economic benefit from the violation.*
- (6) Enforcement costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:*
 - a. Enforcement costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.*
 - b. Late payment charges: due at the monthly percentage rate assessed by the Nevada Division of Business and Finance.*
 - c. Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.*
 - d. Collection costs: actual collection costs.*
- (7) The Division may report the total amount of civil penalties and/or enforcement costs assessed to consumer reporting agencies and pursue collection as provided by Nevada law.*
- (8) Penalty calculations, not including enforcement costs, are a settlement offer and are not required to be part of the Record.*
- (9) Any monies collected under the penalty provisions of NRS 533 through 536 and these regulations, shall be deposited into the school district of the county where the violation occurred.*

NAC 532A-29. Replacement and Mitigation.

- (1) In addition to civil penalties and enforcement costs, the State Engineer may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.*
- (2) The State Engineer shall consider, before ordering replacement of water, the following factors:*
 - a. The value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;*
 - b. The gravity of the violation, including the economic injury or impact to others;*
 - c. Whether the respondent attempted to comply with the State Engineer's orders; and*
 - d. The respondent's economic benefit from the violation.*

NAC 532A-30. Appeal Process to the Independent Advisory Committee.

- (1) Upon issuance of a Penalty, which represents the Division's offer to settle outside of court (Settlement Offer), a request for a hearing before the Independent Advisory Committee can be made. The request shall be in writing and shall be filed with the Division within thirty (30) calendar days of the date of the Penalty.*
- (2) The Independent Committee must schedule a hearing within thirty (30) days after receiving the appeal request. This timeframe may be extended by the Division for good cause.*
- (3) The location of the hearing will be decided by the State Engineer in conjunction with the Independent Advisory Committee.*

- (4) *Within thirty (30) calendar days following the conclusion of the hearing before the Independent Advisory Committee, a final decision will be issued by the State Engineer.*
- (5) *If the respondent feels aggrieved by the final decision, he may appeal the decision pursuant to NRS 533.450*

NAC 532A-31. Failure to Pay Penalty.

If the respondent fails to pay the fine portion of a penalty, the State Engineer is empowered to place a lien on the property associated with the violation or sue the respondent in a court of proper jurisdiction, for the amount in question. Additionally, any cost accrued by the state in pursuing this legal action, will be added to the penalty amount.

NAC 532A-32. Appeals to District Court.

The respondent may appeal any order or decision of the State Engineer to the court of proper jurisdiction pursuant to NRS 533.450.