

**ADOPTED REGULATION OF THE
STATE ENGINEER**

LCB File No. R024-08

Effective September 18, 2008

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: §§1-17, NRS 532.120; §§18-26, NRS 532.120, 533.481, 534.193, 535.200 and 536.200.

A REGULATION relating to water; authorizing the State Engineer to assess a penalty for a violation of certain provisions governing the use of water; setting forth the requirements for computing certain periods of time; setting forth the procedures for a hearing to show cause before the Division of Water Resources of the State Department of Conservation and Natural Resources; authorizing the State Engineer to order the replacement of water unlawfully used, wasted or diverted under certain circumstances; and providing other matters properly relating thereto.

Section 1. Chapter 532 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 26, inclusive, of this regulation.

Sec. 2. *As used in this chapter, unless the context otherwise requires, the words and terms defined in sections 3 to 17, inclusive, of this regulation have the meanings ascribed to them in those sections.*

Sec. 3. *“Alternative penalty” means a settlement proposal submitted by a respondent that, if approved by the Division, ends an enforcement action upon satisfaction of the penalty proposed.*

Sec. 4. *“Division” means the Division of Water Resources of the State Department of Conservation and Natural Resources.*

Sec. 5. *“Economic benefit” means any benefit actually or potentially realized or a cost avoided by a person because of a violation.*

Sec. 6. *“Enforcement action” means a finding of alleged violation, a violation order or injunctive relief, or any combination thereof.*

Sec. 7. *“Enforcement cost” means an amount of money imposed by the State Engineer pursuant to NRS 533.481, 534.193 535.200 or 536.200 for any costs of a proceeding, including investigative costs and attorney’s fees, incurred by the Division in investigating and stopping a violation.*

Sec. 8. *“Finding of alleged violation” means a notice of an alleged violation sent by the Division to a person which cites the requirement allegedly violated by the person.*

Sec. 9. *“Hearing to show cause” means a hearing between a respondent and the Division to determine the manner in which the respondent acted upon a finding of alleged violation or a violation order issued by the Division to the respondent.*

Sec. 10. *“Independent advisory committee” means a committee that:*

1. Consists entirely of members appointed by the Director of the State Department of Conservation and Natural Resources who have knowledge of and experience in the laws and regulations of this State relating to water; and

2. Is formed to review an appeal of a penalty assessed for a violation.

Sec. 11. *“Penalty” means an administrative fine imposed by the State Engineer in response to a violation pursuant to NRS 533.481, 534.193, 535.200 or 536.200, as appropriate, which may include a requirement to reimburse enforcement costs pursuant to those sections and a requirement to replace not more than 200 percent of any water unlawfully used, wasted or diverted pursuant to NRS 533.481 or 534.193.*

Sec. 12. *“Person” has the meaning ascribed to it in NRS 533.010 and 534.014.*

Sec. 13. *“Requirement” means:*

- 1. Any provision of chapter 533, 534, 535 or 536 of NRS;*
- 2. Any provision of a permit, certificate, order or decision issued or regulation adopted by the State Engineer; or*
- 3. Any provision for the development and use of water from a well for domestic purposes pursuant to NRS 534.013 and 534.180.*

Sec. 14. *“Respondent” means any person to whom the Division issues a notice of an enforcement action.*

Sec. 15. *“State Engineer” has the meaning ascribed to it in NRS 533.015.*

Sec. 16. *“Violation” means any act or failure to act which violates a requirement. The term includes, without limitation:*

- 1. Engaging in any activity that is prohibited by or not in compliance with a requirement;*
- 2. Engaging in any activity without a required permit or without approval required to engage in that activity; or*
- 3. The failure to perform a requirement or the failure to perform a requirement in a timely manner.*

Sec. 17. *“Violation order” means a decision issued by the State Engineer in conjunction with a finding of alleged violation which sets forth the required actions and periods of time for the respondent to correct a violation specified in the order.*

Sec. 18. *If a person under the jurisdiction of the Division, including an owner of a well constructed for the development and use of water for domestic purposes, commits a violation, the State Engineer may:*

- 1. Issue a warning letter setting forth the alleged violation and requesting the person to correct the violation;*
- 2. Commence an enforcement action which will include:*
 - (a) A finding of alleged violation which:*
 - (1) Specifies the requirement allegedly violated; and*
 - (2) Supports the allegation with facts determined by the Division; and*
 - (b) A violation order which specifies a reasonable deadline by which the respondent must:*
 - (1) Comply with the requirements set forth in the finding of alleged violation;*
 - (2) Submit to the Division a written mitigation plan approved by the Division setting forth the circumstances under which the respondent intends to comply with those requirements;*
 - (3) Meet with Division staff to show cause why the Division should not seek injunctive relief; and*
 - (4) Submit any other information relating to the violation specified by the Division; or*
- 3. Seek injunctive relief pursuant to NRS 533.482, 534.195, 535.210 or 536.210, as appropriate.*

Sec. 19. *1. In computing any period of time prescribed by this chapter, the day of the act from which the designated period begins is included. The last day of the period so computed is included unless it is a Saturday, Sunday or legal holiday. If the last day is a Saturday, Sunday or legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. If the period prescribed is less than 7 days, intermediate Saturdays, Sundays or legal holidays are excluded.*

2. The State Engineer may extend any time limit contained in this chapter for good cause. All requests for extensions must be submitted in writing within the period specified by the State Engineer.

3. Any information which is hand-delivered to the Division during regular business hours shall be deemed filed on the date of delivery.

4. Any information deposited in the United States mail shall be deemed filed on the date of the postmark on the envelope in which it was mailed, as provided in NRS 238.100.

5. Unless the State Engineer gives prior written approval, any information transmitted electronically will not be accepted for filing.

Sec. 20. *1. The State Engineer may assess a penalty not to exceed \$10,000 per day for each violation, not including any assessed enforcement costs or requirement to replace any water.*

2. The period for which the State Engineer may impose an administrative fine pursuant to NRS 533.481, 534.193, 535.200 or 536.200 begins on the first day the violation occurs and continues to accrue until the day the respondent corrects the violation. In calculating a period of time pursuant to this subsection, the State Engineer will not include delays which are not caused by the respondent.

3. In addition to an administrative fine, the State Engineer may assess enforcement costs and the cost of compliance inspections as follows:

(a) For enforcement costs, time spent to enforce actions surrounding the violation by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the hourly rate of each employee, including, without limitation, salary, benefits, overhead and other directly related costs.

(b) For compliance inspections, the amount due based on staff time at the full cost of the hourly rate of the employee, including, without limitation, salary, benefits, overhead and other directly related costs.

4. The amount of a penalty assessed pursuant to this section is based on:

(a) The gravity of the violation, including, without limitation, any economic injury or impact to other persons;

(b) Whether the respondent made significant progress toward correcting the violation and attempted to comply with any applicable orders of the State Engineer;

(c) Any prior violations committed by the respondent;

(d) The economic benefit, if any, derived by the respondent from the violation;

(e) In the case of unlawfully using, wasting or diverting water:

(1) The relative amount of water involved; and

(2) The method used to measure the water in question; and

(f) Any other relevant facts established at a hearing to show cause before the State Engineer.

Sec. 21. 1. *The parties may appear in person at a hearing to show cause and may be represented by counsel. All testimony must be given under oath and recorded.*

2. *The Division:*

(a) Shall determine the order of the presentation of evidence; and

(b) May limit the time and scope of the examination of witnesses and disallow repetitive testimony.

Sec. 22. 1. *A person who appears at a hearing to show cause shall conform to the recognized standards of ethical and courteous conduct as determined by the Division. All*

parties to the hearing, their counsel and the spectators shall conduct themselves in a respectful manner.

2. The Division may take any action which it determines is necessary to maintain order during a hearing to show cause, including, without limitation:

- (a) Excluding a party or his attorney or authorized representative from the hearing;*
- (b) Excluding a witness from the hearing; and*
- (c) Limiting the taking of testimony and presentation of evidence during the hearing.*

Sec. 23. 1. *In addition to any penalty assessed pursuant to section 20 of this regulation, the State Engineer may, pursuant to NRS 533.481 or 534.193, order the respondent against whom the penalty is assessed to replace not more than 200 percent of any water unlawfully used, wasted or diverted.*

2. Before ordering a replacement of water, the State Engineer will consider:

- (a) The value or quantity of water unlawfully used, wasted or diverted, including, without limitation, the cost or difficulty of replacing the water;*
- (b) The gravity of the violation, including, without limitation, any economic injury or impact to other persons;*
- (c) Whether the respondent attempted to comply with any applicable orders of the State Engineer; and*
- (d) The economic benefit, if any, derived by the respondent from the violation.*

Sec. 24. 1. *A respondent may request, in writing, a hearing before an independent advisory committee within 30 days after the date the State Engineer imposes a penalty against the respondent.*

2. The independent advisory committee shall schedule a hearing within 30 days after receiving the request, unless the Division extends the time for good cause.

3. The State Engineer, in conjunction with the independent advisory committee, will determine the time, date and location of the hearing and notify the respondent of that fact.

4. The State Engineer will issue a final decision concerning the appeal within 30 days after the hearing.

Sec. 25. *At any time after a violation is committed, the respondent may propose an alternative penalty for the violation. If it is accepted by the State Engineer, the matter may be resolved pursuant to the proposal.*

Sec. 26. *Pursuant to NRS 533.481, 534.193, 535.200 or 536.200, as appropriate, the respondent may appeal any order or decision of the State Engineer to a district court.*

NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R024-08

The State Engineer adopted regulations assigned LCB File No. R024-08 which pertain to chapter 532 of the Nevada Administrative Code.

INFORMATIONAL STATEMENT

1. Copies of the proposed regulations, notices of workshop and notices of intent to act upon the regulation were sent by U.S. mail and email to persons who were known to have an interest in Nevada's water law and the regulation of its law, as well as any persons who had specifically requested such notice. These documents were also made available at the website of the Division of Water Resources (NDWR), www.water.nv.gov, and mailed to all county libraries in Nevada. In addition, for the second round of workshops, press releases were sent and subsequently published in the newspapers where the workshops were to be held. The workshop notices were also sent to the County Commissioners of all counties in the state as well as to the Nevada Association of Counties.

Two rounds of workshops were held in Carson City, Winnemucca, Elko, Ely, Tonopah and Las Vegas comprising a total of thirteen (13) workshops, for the purpose of receiving comment and input to the regulations. Round 1 was held in April and May, and Round 2 in July. See **Appendix A** for locations, dates and a summary of comments received at the workshops.

2. The Final Adoption Hearing was held:

DATE: July 24, 2008
TIME: 9:00 a.m. – 11:00 a.m.
PLACE: Bryan Building (NDWR Office)
Tahoe Hearing Room, 2nd Floor
901 S. Stewart Street
Carson City, Nevada

- a. Four members of the public attended the Adoption Hearing:

- George Benesch, Virgin Valley Water District
- Steve Walker, Truckee Meadows Water Authority
- Bennie Hodges, Pershing County Water District
- Matt Leck, Southern Nevada Water Authority

- b. Testified at hearing:

- George Benesch spoke in favor of the regulations and stated that “they were a long time in coming.”

- Steve Walker spoke in favor of the regulations and suggested adding that members of the Independent Advisory Committee have knowledge and experience in Nevada water law. This suggestion is incorporated in the final regulations adopted.
 - Bennie Hodges spoke in favor and applauded the adoption of the regulations.
- c. See **Appendix B** for a summary of written comments and responses to those written comments.
3. Comments were solicited from affected businesses in the same manner as they were solicited from the public. The summary may be obtained as instructed in the response to question #1.
 4. The permanent regulations were adopted at the hearing on July 24, 2008. The regulations adopted were the July 16, 2008 version of the regulations reviewed by the Legislative Counsel Bureau, plus minor changes from the July workshops and the final adoption hearing. The hearing was transcribed by a court reporter and three of the four members of the public that attended provided testimony in favor of adoption.
 5. The regulated community will not be adversely impacted by these regulations as long as they remain in compliance with Nevada's water law. If the various laws and regulations under the purview of the State Engineer are violated, fines and penalties may be assessed in accordance with these regulations to compel compliance of said laws and regulations. It is important to note that there are numerous opportunities for a respondent to come into compliance and depending on how egregious the violation is, in many cases, no penalty will be issued.
 6. The benefits of having this regulation are numerous and substantial. Current provisions for enforcing Nevada's law are ineffective, cumbersome and costly to the state. Through these regulations, the state's most precious resource will be regulated to ensure compliance of Nevada's water law within a framework that minimizes enforcement; assures 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 issued by the State Engineer; and assure that if the State Engineer does assess an administrative penalty, it be done lawfully, fairly, and consistently. The immediate and long-term effects of these regulations are the same – better and more efficient protection of existing water rights and the better and more efficient protection of all of the water resources within the state.
 7. These regulations were mandated as part of the passage of Senate Bill 274 in the 2007 Legislative Session. When SB 274 was introduced, a fiscal impact of \$421,393 was submitted by our agency as an expected cost of enforcing these regulations for the biennium with the money used to hire two enforcement engineers. Subsequently, SB 274 was passed, however no additional monies were given to NDWR for this program. As such, enforcement of these regulations will have to be borne by existing staff and will have no fiscal impact to the state.

8. There are no other state or government agency regulations that the proposed amendments duplicate.
9. There are no federal rules that regulate the same activity as these regulations therefore these regulations cannot be more stringent than any such federal rule.
10. These regulations do not require a new fee or an increase to an existing fee. The only fees that will be collected, if any, will be as fines for violations of Nevada's water law. If fines are collected, the money will be deposited in the state's general fund.

The NDWR has determined that the proposed regulation does not impose a direct and significant economic burden upon a small business or restrict the formation, operation or expansion of a small business. In making this determination our division considered the fact that the proposed regulations will only impact those who violate Nevada's water law. If the regulated community remains in compliance with NRS Chapters 533, 534, 535 and 536, there is no impact whatsoever.