

**REVISED PROPOSED REGULATION OF
THE STATE ENGINEER**

LCB File No. R024-08

July 16, 2008

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

AUTHORITY: §§1-17, NRS 532.120; §§18-24, 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; 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 24, 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 or 534.193 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. *“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; and*
- 2. Is formed to review an appeal of a penalty assessed for a violation.*

Sec. 10. *“Meeting to show cause” means a meeting 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. 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; or*

2. Any provision of a permit, certificate, order or decision issued or regulation adopted by the State Engineer.

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 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 attempted to comply with any applicable orders of the State Engineer;

(c) Any prior violations committed by the respondent; and

(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 the administrative hearing before the State Engineer.

Sec. 21. 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. 22. 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. 23. *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. 24. *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.*