

**Proposed Regulations on Fines and Penalties**  
Nevada Division of Water Resources  
2<sup>nd</sup> Draft

**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.

**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.
3. The process for which penalties may be issued will provide numerous opportunities for the respondent to meet with Division staff in order to demonstrate that no violation did in fact occur, or show the Division that efforts are being made to achieve compliance. If a penalty is issued by the Division, the respondent will have the opportunity to appeal the Violation Order in a proceeding before an Independent Advisory Committee appointed by the Director of the Department of Conservation and Natural Resources. The respondent has the ability to appeal that decision to a court of proper jurisdiction.
4. These regulations shall be liberally construed to allow the State Engineer to administer Nevada Water Law.
5. These regulations in no way are meant to supersede any powers associated with federal or civil decree courts.

## 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 not diverted 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.

**Section 1.** Chapter 532 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 22, 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 16, inclusive, of this regulation have the meanings ascribed to them in those sections.

**Sec. 3.** “Alternative, But Equal Penalty” means a settlement proposal submitted by the respondent, that if approved by the Division, ends the enforcement action upon satisfaction of that agreement.

**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 cost 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 and violation order issued by the Division to the respondent.

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

1. Consists of members appointed by the Director of the Department of Conservation and Natural Resources; 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 Penalty Panel 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 cost 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.** “Penalty Panel” means a panel consisting of State Engineer’s staff that will review the facts and evidence from the Show Cause Hearing. The purpose of convening the penalty panel is to review the facts established at the Show Cause Hearing and decide whether or not to assess a penalty, and if so, quantify the penalty. The meeting of the penalty panel is an internal staff meeting of the State Engineer.

**Sec. 13.** “Person” has the meaning ascribed to it in NRS 533.010 and 534.014.

**Sec. 14.** “Requirement” means:

1. Any provision of Chapters 533, 534, 535 or 536 of NRS; or

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

**Sec. 15.** “Respondent” means any person to whom the Division issues a notice of an enforcement action.

**Sec. 16.** “State Engineer” has the meaning ascribed to it in NRS 533.015.

**Sec. 17.** “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. 18.** “Violation order” means a decision issued by the State Engineer in conjunction with a finding of alleged violation which sets forth the actions and timeframes for the respondent to correct a violation specified in the order.

**Sec. 19.** 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:
    - i. Specifies the requirement allegedly violated; and
    - ii. Supports the allegations with facts determined by the Division; and
  - b. A violation order which specifies a reasonable deadline by which the respondent must:
    - i. Comply with the requirements set forth in the finding of alleged violation;

- ii. Submit to the Division a written mitigation plan for approval by the Division setting forth the circumstances under which the respondent intends to comply with those requirements;
    - iii. Submit any other information related to the violation specified by the Division; and
  - c. Notice that the matter must be set for a Show Cause Hearing before the State Engineer.
3. Seek injunctive relief pursuant to NRS 533.482, 534.195, 535.210 or 536.210, as appropriate.

**Sec. 20.**

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 so, 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 dated by the post office, 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. 21.**

1. The State Engineer may, after notice and opportunity for a hearing, 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 or 534.193 begins on the first day the violation occurs and continues

to accrue until the day the respondent corrects the violation. In calculating the time period, the State Engineer shall not include time delays not caused by the respondent.

3. The amount of the 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;
  - 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 using water in excess of that allowed by law, the State Engineer shall consider
    - i. The relative amounts of water involved; and
    - ii. The method(s) used for the measurement of the water in question; and
  - f. Any other relevant facts established at the administrative hearing before the State Engineer.
4. In addition to an administrative fine, the State Engineer may assess enforcement costs and cost of compliance inspections as follows:
  - a. For enforcement cost, time spent to enforce actions surrounding the violation by Division 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 Division staff, including, without limitations, salary, benefits, overhead, and other directly related costs.

## **Sec. 22.**

1. In addition to any penalty assessed pursuant to section 19 of this regulation, the State Engineer may, after notice and opportunity for a show cause hearing, 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 made significant progress toward correcting the violation; and
- d. The economic benefit, if any, derived by the respondent from the violation.
- e. Any other relevant facts established at the administrative hearing before the State Engineer.

**Sec. 23.**

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 must schedule a hearing within 30 days after receiving the request, unless the Division extends the time for good cause.
3. 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. 24** At any point during the process outlined in these regulations, the respondent may propose an alternative, but equal penalty. If it is accepted by the Division, the matter can be closed pursuant to that proposed alternative.

**Sec. 25.** 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.