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November 4, 2021

MEMORANDUM

TO: Jon Pennell, DVM, Chairperson
Nevada State Board of Health

FROM: Sheryl Fontaine, Executive Secretary
Nevada State Environmental Commission

SUBJECT: Vacant State Environmental Commission Seat

Dear Chairman Pennell;

The Nevada State Environmental Commission (SEC), established in 1973 by the Nevada Legislature, hears all Nevada Division of Environmental Protection (NDEP) regulation amendments and is also the body that handles contested cases/appeals. More about the SEC can be found on their website (<https://sec.nv.gov/>).

Our SEC Chairman, Tom Porta, would like to fill the long-vacant seat as provided for in statute to a member of the State Board of Health, to be designated by that Board (NRS 445B.200).

I have attached a copy of the SEC Information Packet. Although the packet is slightly outdated with regard to some staffing and regulatory changes, it provides a good overview of the roles and responsibilities of Commission members.

We are respectfully requesting that this item be added to the agenda for the Board of Health December 3, 2021 meeting.

Thank you for your consideration, and please let me know if you have any questions or need any additional information.

Sincerely,

A handwritten signature in blue ink, appearing to be "Sheryl Fontaine".

Sheryl Fontaine
Executive Secretary

ecc: Tom Porta, SEC Chairman



Nevada State Environmental Commission Information Packet 2021

<http://sec.nv.gov>

**State of Nevada
Department of Conservation and Natural Resources**

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-----A MESSAGE FROM THE STATE ENVIRONMENTAL COMMISSION CHAIR-----

Welcome, Commissioners, and congratulations on being either appointed by the Governor or appointed statutorily to the State Environmental Commission (SEC). I want to acknowledge my predecessor, Mr. Jim Gans, who initiated this document to help new members become familiar with and understand the activities of the SEC. It is a convenient resource and I hope you will find it useful.

The SEC handles a wide range of issues from regulatory approvals to conducting appeal hearings. After reading through this packet, you'll have a better understanding of the Nevada Division of Environmental Protection's (NDEP) organization and the SEC's role to implement and enforce our State's environmental laws. I would like you to pay particular attention to the Open Meeting Law requirements. This section explains the steps necessary to avoid serious consequences and maintain the integrity of the SEC. Most importantly, the Open Meeting Law ensures transparency with the public and our regulated community.

This document has been prepared through the efforts of the SEC's executive secretary, NDEP, and the Attorney General's Office. This packet does not include every issue brought before the SEC, but it does cover a majority of what we do. I encourage you to make comments or suggestions for future revisions.

Tom Porta

PURPOSE

This information packet is intended to provide members of the State Environmental Commission (SEC) with information regarding their roles and responsibilities. This packet also includes the statutory and regulatory authorities to which the SEC is subject, as well as other helpful information that can be used for reference.

The SEC works independently, but in coordination with the Nevada Division of Environmental Protection (NDEP) to achieve the mission of preserving and enhancing Nevada's environment to protect public health, sustain healthy ecosystems, and contribute to a vibrant economy.

NDEP is statutorily required to implement specific regulatory programs. The SEC is responsible for facilitating that effort by adopting regulations, conducting appeal hearings, establishing air penalties, approving variances and, on extremely rare occasions, establishing a declaratory order or an advisory opinion.

GENERAL OVERVIEW

Pursuant to the Nevada Attorney General's "Nevada Board and Commission Manual," pages 4 and 5 (please see Attachment 1), members of a board or commission are part of the executive branch of Nevada's state government. In general, the function of the executive branch of government is to carry out or enforce laws enacted by the state legislature that pertain to its particular jurisdiction. The SEC's jurisdiction is limited to that which is set forth in the statutes and regulations associated with the following NDEP programs: air, water, safe drinking water, mining, hazardous waste and solid waste. See Attachment 2 for the Legislative Declaration of public policy for each NDEP program. Although mining is a separate program from the water program, it shares the same public policy. A general overview of the NDEP programs is provided below; however, more detailed information may be found on the NDEP website located at <http://ndep.nv.gov>. Also, see Attachment 3 for a NDEP Organizational Chart.

Air Program

Air program functions are organized into two bureaus: a regulatory bureau and a planning bureau.

The Bureau of Air Pollution Control is the regulatory bureau that issues air pollution control permits, conducts inspections and, when necessary, pursues enforcement actions to compel compliance. The Bureau also implements the Chemical Accident Prevention program, which is a chemical process safety program.

The planning bureau, the Bureau of Air Quality Planning, develops regulations, standards and State Implementation Plans (SIPs) necessary to ensure that federal authorization is maintained at the State level for implementation of the Clean Air Act, as opposed to the United States Environmental Protection Agency (EPA) implementing the program in Nevada. The bureau also monitors ambient air quality in the State, conducts annual inventories of air emissions, conducts air modeling and increment tracking to support permit functions, implements a smoke

management program to minimize the impacts from controlled burns and implements alternative fuels and mobile sources programs in coordination with Motor Pool, DMV and other agencies.

Statutory Authority: NRS 445B.100 to 445B.845, NRS 486A.010 to 486A.250 and NRS 459.380 to 459.658.

Water Program

Water program functions are also organized into two bureaus: a regulatory bureau and a planning bureau.

The Bureau of Water Pollution Control is the regulatory bureau that issues permits for discharges to surface and/or ground water and ensures compliance with water pollution control laws. The bureau conducts inspections to ensure compliance and takes enforcement actions when necessary. This bureau reviews the design of wastewater treatment plants and infrastructure. The bureau also reviews subdivision plans to ensure that adequate systems and system capacities will be present to treat the anticipated wastewater flows. In addition, the bureau implements the Underground Injection Control program and the Source Water Protection program, both of which are groundwater protection programs. The bureau implements federal Clean Water Act provisions at the State level, as opposed to EPA implementing the Clean Water Act in Nevada.

Statutory authority: NRS 445A.300 to 445A.730.

The planning bureau, the Bureau of Water Quality Planning, protects Nevada's surface waters. This bureau establishes water quality standards, conducts monitoring, provides public education and provides funding of water quality improvement projects. The bureau develops local, regional and statewide plans to ensure that water quality standards are maintained and that impaired surface waters are restored where possible. This bureau is responsible for implementing various provisions of the federal Clean Water Act, which maintains implementation of this program at the State level.

Statutory authority: NRS 445A.420 to 445A.450.

Drinking Water Program

The Bureau of Safe Drinking Water implements the Public Water System Supervision Program (PWSSP) authorized under the federal Safe Drinking Water Act (SDWA) and maintains primacy for implementation of this program in Nevada. State implementation of the PWSSP ensures Nevada's public water systems comply with state and federal drinking water standards. The bureau enforces sampling and monitoring requirements for water quality, enforces surface water treatment requirements and enforces required corrosion control. The program assesses water sources, including identification of potential contaminant sources, conducts annual sanitary surveys, certifies the qualifications of public water system operators and requires public notification when systems are out of compliance. The bureau reviews engineering plans for public water systems and the subdivision of land. Additionally, the bureau administers a laboratory certification program to ensure laboratories performing water analysis are adhering to prescribed methods and procedures pursuant to Safe Drinking Water, RCRA and/or Clean Water Act.

Statutory authority: NRS 445A.800 to 445A.955.

Mining Program

The Bureau of Mining Regulation and Reclamation is responsible for regulating fluid management, mine closures and reclamation at mining operations. It is the mission of the bureau to ensure that Nevada's waters are not degraded by mining operations and that lands disturbed by mining operations are reclaimed to safe and stable conditions to ensure a productive post-mining land use.

Statutory authority: NRS 445A.300 to 445A.730 and NRS 519A.010 to 519A.280.

Waste Management Program

The Bureau of Waste Management is responsible for ensuring safe management of hazardous waste by regulating its handling, transportation, treatment, storage and disposal. The bureau also ensures safe collection and disposal of solid waste. The bureau encourages businesses, institutions and individuals to reduce the amount of waste generated and to also participate in recycling programs and conserve natural resources. The Bureau implements provisions of the federal RCRA law related to hazardous and solid waste management in lieu of EPA.

Statutory authority: NRS 444.440 to 444.645; NRS 444A.010 to 444A.110; and NRS 459.400 to 459.600.

SEC STRUCTURE

The SEC was originally created by the legislature in 1973 and consisted of nine commissioners; five were statutorily assigned and four were appointed by the Governor. In 1977 the SEC was increased by one commissioner, a licensed general contractor or builder. In 1983, the administrator of the Division of Minerals was added to the commission. Since that time, the structure has remained the same. Today, pursuant to NRS 445B.200, the SEC consists of the following members:

Six Statutory Members:

- Director of the Department of Wildlife
- State Forester Firewarden
- State Engineer
- Director of the State Department of Agriculture
- Administrator of the Division of Minerals of the Commission on Mineral Resources
- Member of the State Board of Health to be designated by that Board.

Five Governor Appointed Members:

- Person who is either a licensed general engineering contractor or a licensed general building contractor
- Person with expertise in performing mining reclamation
- Person with experience and expertise in advocating issues relating to conservation
- Two members of the general public.

The Governor-appointed SEC members serve a term of three years and those members may be reappointed. The Governor appoints the Chairman (please See Attachment 1, pages 40 - 42,

duties of President or Chair) and the SEC members nominate and vote on the Vice-Chairman position.

Executive Secretary

Pursuant to NRS 445B.200 (7), NDEP provides technical advice, support and assistance to the SEC. An executive secretary is assigned by NDEP to coordinate meetings and appeal hearings, prepare regulatory petitions for SEC adoption, coordinate with the legislative Counsel Bureau (LCB), coordinate with NDEP and the public on SEC matters, and manage the SEC website.

The executive secretary ensures all meetings and hearings conform to the Open Meeting Law (NRS 241) and that all regulatory petitions are adopted consistent with the Nevada Administrative Procedure Act (NRS 233B).

Recording Secretary

NDEP also assigns a recording secretary to the SEC. The recording secretary assists the executive secretary. Some of the duties are to prepare meeting minutes, manage travel, track the budget, prepare correspondence, prepare SEC meeting packets, and manage meeting records and files.

SEC Deputy Attorney General

The Attorney General assigns a deputy attorney general (DAG) to represent and advise the SEC. The DAG attends all meetings and appeal hearings to ensure legal counsel is available to the SEC. In addition, the DAG provides legal counsel outside of meetings and appeal hearings as SEC issues arise.

SEC COMPENSATION AND REIMBURSEMENT

Each Governor-appointed SEC member is entitled to receive \$80.00 for each day's attendance at a meeting or hearing. All SEC members are entitled to receive per diem and travel expenses for meetings or hearings. Per Diem is established at the current State rates, which are subject to change. Please visit the following website to find Nevada's current Per Diem rates: <http://www.gsa.gov/portal/content/104877>. Travel arrangements are made by SEC staff. This includes airplane reservations, vehicle transportation, hotel reservations and subsequent reimbursement paperwork. Each member must provide all parking and hotel receipts and sign the reimbursement paperwork.

Rates as of December 2014 are listed below:

Primary Destination		Max lodging (excluding taxes)	Meals & Inc. Exp.*
Standard Rate	Applies for all locations without specified rates	83	46
Incline Village / Reno / Sparks	Washoe	95	51
Las Vegas	Clark	96	71
Stateline / Carson City	Douglas / Carson City	87	61

*Meals and incidental expenses include breakfast, lunch, dinner and \$5.00 for incidental expenses such as tips

Each member must complete a direct deposit card, provided by SEC staff, and a voided check to receive direct deposit. The amount claimed each meeting/hearing will be deposited into the member's account within 7 to 10 days.

SEC MEETINGS

SEC Meetings are typically held to adopt regulations, determine penalties for violations of air quality regulations, approve variances, and to address items of interest as requested by the SEC. Although extremely rare, the SEC also has the authority to issue declaratory orders and advisory opinions.

The SEC meets three to four times a year. Meetings are typically scheduled in advance but may also be held as needed. An agenda is developed for each meeting by the executive secretary based upon input from NDEP and SEC members. Agendas include both items that are before the SEC for a vote (action item) and items that are before the SEC for discussion only. Each agenda will contain two opportunities for public comment, one at the beginning of the meeting and one immediately prior to the end of the meeting.

All SEC meetings are subject to the Open Meeting Law (NRS 241) and the meeting agenda must be noticed in accordance with NRS 241.020 (2) to (4), inclusive. The meeting agenda must be posted at least 3 working days before a meeting and no additions can be made to the agenda during this time. Each item in the agenda must be identified either "FOR DISCUSSION" or "FOR POSSIBLE ACTION." An agenda item may be voted on only if the item has been identified "FOR POSSIBLE ACTION."

Before each meeting the executive secretary provides each SEC member with a packet that contains the agenda, the draft minutes from the previous meeting, all matters before the SEC and supportive information.

The SEC must have a quorum of at least six members present to vote on any item. A SEC member may recuse himself or herself from voting on an agenda item if he or she believes there is a direct personal or financial interest which is not common to the other SEC members. If the SEC member chooses to do this, the conflict should be disclosed at the beginning of the agenda item and he or she may not participate in either the discussion or the vote for that agenda item. Alternatively, a SEC member may disclose any relevant information associated with an agenda item that may appear to be a conflict but indicate it will not influence his or her vote and participate in both the discussion and the vote.

The meetings are conducted consistent with "Roberts Rules of Order." A summary of Roberts Rules of Order is attached (please see Attachment 4) and may also be found on the internet at <http://www.asce.org/pplcontent.aspx?id=2147489901>.

SEC Meeting – Adoption of Regulations

One of the primary functions of the SEC is to adopt the environmental regulations implemented by NDEP and, in cases related to vehicle emissions, the Department of Motor Vehicles (DMV). Regulations can be adopted as permanent, temporary or in some cases, as emergency regulations. An overview of the rule making process is delineated below.

NDEP first drafts the regulatory petition, completes SEC Form 1 "Petition to adopt, file, amend, or repeal regulations," and SEC Form 4 "Small Business Impact Statement." (please see Attachment 5 for all SEC Forms.) NDEP submits the drafted regulatory petition and the two forms to the SEC executive secretary. The executive secretary posts the three documents on the SEC website and submits NDEP's draft regulatory petition to the Legislative Counsel Bureau (LCB) where it is assigned a petition number. LCB reviews and, if necessary, redrafts the petition to ensure it is clear, concise, consistent with statute, and suitable for incorporation into the Nevada Administrative Code. LCB has 30 days to complete its redrafting of the NDEP regulatory petition.

NDEP must hold a public workshop on the proposed regulation. The workshop must be publicly noticed by NDEP no less than 15 days prior to the workshop date. The notice must be physically located in various public areas and sent out to an electronic mailing list. It must also be posted on the SEC website, the LCB website, and Department of Administration website. If there is an expected impact to small businesses, the completed SEC Form 4, "Small Business Impact Statement," must be posted along with the notice of the pending workshop.

No less than thirty days prior to the SEC meeting date, the executive secretary must publish the regulatory petition in both a southern and northern Nevada newspaper and notice the regulatory petition on the SEC website, LCB website, Department of Administration website, in the State library, the NDEP buildings (Carson City and Las Vegas), the DCNR office, and in one other selected location such as the Department of Wildlife. The notice must also be emailed to an electronic mailing list maintained by the SEC executive secretary. The SEC members are included on the list.

During the SEC meeting, NDEP presents the regulatory petition to the SEC members for consideration and adoption. The SEC may choose not to adopt the regulatory petition if sufficient concerns are raised. In this case, the SEC may direct NDEP to address the concerns and resubmit the regulatory petition for adoption at a future meeting. If the SEC votes in favor of the regulatory petition, the newly adopted regulation will be transmitted by the executive secretary to the Legislative Commission for final approval and filing with the Secretary of State. The date the regulation is filed with the Secretary of State is the date the regulation becomes effective. An abbreviated summary of the rule-making process can be found in Attachment 6.

The LCB only accepts regulatory petitions for drafting between July 1 of an odd-numbered year and June 30 of the succeeding even-numbered year. Outside of this time period the LCB is focused on the legislative session and will not review or

draft regulations.

Permanent Regulation

A regulation adopted by the SEC becomes a permanent regulation if the petition is submitted to LCB for drafting between July 1 of an odd-numbered year and June 30 of the succeeding even-numbered year.

After the SEC adopts a NDEP regulation, the executive secretary prepares a regulation package to submit to the Legislative Commission for final approval. This package includes, in part, the adopted regulation, an Informational Statement and a Small Business Impact Statement. The Informational Statement is generated from the information NDEP provides in the SEC Form I and the Small Business Impact Statement is the SEC Form 4. When the Legislative Commission approves the adopted regulation it becomes effective. The LCB files the active regulation with the Secretary of State's office and a copy is also provided to the State Library and Archives.

Temporary Regulation

The LCB will not accept an agency's regulatory petitions between August 1 of an even-numbered year and July 1 of the succeeding odd-numbered year due to its workload associated with each legislative session. A regulation is temporary if the regulatory petition is not submitted to LCB during the above referenced "Permanent Regulation" timeframe and the SEC adopts the regulation between the timeframe of August 1 of an even-numbered year and July 1 of the succeeding odd-numbered year.

If the SEC adopts the temporary regulation, the executive secretary files the adopted regulation directly with the Secretary of State no sooner than 35 days after it was adopted. An Informational Statement and a Small Business Impact Statement must be included with the submittal.

Upon request of a Legislator, the Legislative Commission may examine a temporary regulation adopted by the SEC to ensure it conforms to statutory authority and meets the Legislative intent. A temporary regulation expires on the following November 1st of the odd-numbered year and must be processed again as a permanent regulation, which includes a SEC hearing, to maintain effectiveness.

Emergency Regulation

If NDEP determines an emergency exists, NDEP will submit to the Governor a written statement that describes the emergency and outlines the reasons for the determination. If the Governor endorses the emergency regulation, for it to become effective, the SEC must adopt it and file it with the Secretary of State. An emergency regulation is effective for no longer than 120 days.

SEC Meeting - Establish Air Penalties

By statute, the Bureau of Air Pollution Control (BAPC) is the only NDEP bureau for which the SEC establishes monetary penalties for violations of statutes and regulations. When the BAPC determines that a violation has occurred and issues a notice of violation and order, it will present the violation and a recommended penalty amount to the SEC at the meeting. After the owner or operator of the facility has an opportunity to address the commission, the commission will set the final penalty amount.

As is true of most regulatory programs administered by NDEP, the air program is primarily a federal program implemented by NDEP in lieu of EPA but with broad federal oversight. The air program, and any penalties assessed in association with that program, must be implemented consistently by BAPC and the SEC to ensure that the air program maintains its federal delegation. Maintaining program delegation by NDEP is important because implementation of these programs by that EPA is significantly more onerous, time-consuming, and expensive for Nevada businesses.

EPA has established national ambient air quality standards for specific pollutants that have been determined to be protective of human health and the environment. Those standards are converted into industry emission limits and operational requirements, which are prescribed in each air quality permit issued by the BAPC. Other Clean Air Act requirements are also contained in the air quality operation permit. See Attachment 7 for overview of permit types and air quality standards.

Consistent with all NDEP regulatory programs, the BAPC is responsible for determining compliance at all of the facilities it regulates. If a facility is determined to be in noncompliance, a Notice of Alleged Violation and Order (NOAV & Order) is issued that describes the violation(s) that occurred and an order that directs the facility to take specific actions that will result in compliance. BAPC holds an enforcement conference with the owner or operator of a facility to discuss the violation and the recommended penalty. This provides an opportunity for the facility representative to provide additional or mitigating information regarding the alleged violation. The recommended penalty amount is provided verbally during the enforcement conference and in writing in the final issuance of the NOAV.

Minor violations are not brought before the SEC. Instead, minor violations are subject to an administrative regulatory fine schedule pursuant to NAC 445B.281; see Figure 1 below.

Figure 1 MINOR VIOLATION SCHEDULE

	<u>First</u>	<u>Second</u>	<u>Third</u>
	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>
NAC 445B.22037, fugitive dust.....	\$500	\$1,000	\$2,000
NAC 445B.22067, open burning.....	250	500	1,000
NAC 445B.2207, incinerator burning.....	250	500	1,000
NAC 445B.22087, odors.....	250	500	1,000
Subsection 3 or 4 of NAC 445B.232, reporting of excess emissions.....	250	500	1,000
Subsection 8 of NAC 445B.252, testing and sampling reporting.....	250	500	1,000
Subsection 2 of NAC 445B.265, reporting of monitoring systems.....	250	500	1,000
Paragraph (e) of subsection 1 of NAC 445B.275, recordkeeping, monitoring, reporting or compliance certification.....	250	500	1,000
NAC 445B.331, change of location.....	250	500	1,000

The penalties for major violations are determined through the use of a penalty matrix that NDEP uses to calculate the recommended penalty amount. (Please see Attachment 8). This amount is then presented to the SEC for a final determination.

The penalty matrix and worksheet were developed by NDEP and the SEC pursuant to EPA guidelines. By establishing an unbiased and consistent approach to establishing penalties, the process was designed to ensure an adequate level of deterrence and to create a level playing field for all facilities. The penalty matrix establishes a base penalty for each violation type by permit class, with smaller base penalties for sources with fewer emissions and higher base penalties for higher emitting sources. The base penalty is then subject to a penalty worksheet (Please see Attachment 9) that takes into consideration the gravity of the violation for various components such as, opacity, toxicity, or public health risk. Each component is associated with a specific multiplier. The multipliers are applied to the base penalty, adjusting the final penalty amount that BAPC recommends to the SEC.

During the SEC meeting, the BAPC provides the SEC an overview of the violation(s) and a detailed breakdown of how the Penalty Matrix and Penalty Worksheets were applied to determine the recommended penalty amount. The SEC has the authority to adjust the recommended penalty amount; however, any adjustment made should take into consideration the SEC's original intent regarding an unbiased and consistent approach in assessing penalties as well as the federal oversight component, on which the BAPC's program authority hinges. Should the EPA determine that a fine levied by the SEC is inadequate; the EPA has authority to assess additional penalties against a violator.

The BAPC may also resolve certain violations outside of issuing a NOAV & Order. Compliance may be achieved, in some cases, via warning letters, an Administrative Order on Consent, a Consent Decree issued by the court, or through the use of a Supplementary Environmental Project (SEP). A SEP is an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action, but which the respondent is not otherwise legally required to perform. When a SEP is used to settle a violation, the NDEP SEP policy (see Attachment 10) is applied. SEPs are typically used only in situations where NDEP is confident the respondent will be accountable for the successful completion of the SEP. Typically, SEP agreements are part of the Consent Decree process with judicial oversight and the monetary cost of performing the SEP must be 25% above the matrix and worksheet calculated penalty value.

When a NOAV & Order is issued, the respondent has 10 days to appeal that action to the SEC. The basis of the appeal must only address the alleged violation(s) and Order, not the recommended penalty information included in the NOAV & Order transmittal letter. This is because only final NDEP decisions may be appealed and the penalty recommendation is not a final NDEP decision; it is only a NDEP recommendation that the SEC must make the final determination on.

If a NOAV & Order is not appealed within the prescribed 10 days, the NOAV & Order's alleged violation(s) permanently stand. If the NOAV & Order is appealed and the appeal hearing results in the SEC upholding the NOAV & Order's alleged violations, the next step is to establish the penalty amount during a regularly scheduled SEC meeting.

When a penalty is presented to the SEC during its regularly scheduled meeting, the violation(s) associated with the penalty are final and cannot be modified or reversed. The SEC's responsibility is to ensure that BAPC's penalty recommendation is fair and consistent with the historical use of the penalty matrix and worksheet.

All penalties established by the SEC are paid to the school district in the county where the violation occurred.

SEC Meeting – Grant Variances (NRS 445B.400, NRS 459.546, and NRS 445A.935)

Although variances are not common, a number of statutes allow for owners or operators to apply to the SEC for specific variances or exemptions from the regulations of the SEC. A request for a variance must be noticed for 30 days prior to the SEC meeting. See Attachment 11 for the statutes which provide for variances. Examples of past SEC variances which have been granted include

alternative fueled vehicles (See Attachment 5 for SEC Form 6) and public water suppliers' schedules for compliance with the federal arsenic rule.

SEC Meeting – Grant Declaratory Orders and Advisory Opinions (NAC 445B.888)

Although extremely rare, the SEC may be petitioned by any member of the public for a declaratory order or an advisory opinion regarding the applicability of any statutory provision, SEC regulation or decision of the agency. A SEC Form 2 (see Attachment 5) must be completed. The SEC has 30 days to issue the order or opinion. The order or opinion must be in writing and must include the justification.

SEC Meeting – Informational Items

During each SEC meeting, the NDEP administrator typically briefs the SEC on current issues or new developments within NDEP. If the SEC wants to be informed about a specific environmental issue, it may request an informational presentation to be included on the next SEC meeting agenda. A SEC member may make this request during a SEC meeting or at a later date by simply contacting the executive secretary or the NDEP administrator. The request must be approved by the chairman prior to scheduling.

Examples of informational presentations previously requested by the SEC include topics related to hydraulic fracturing, Nevada's Mercury Control Program and specific federal regulations such as "Waters of the United States."

APPEAL HEARINGS

The SEC conducts all business at either a SEC Meeting or at a SEC Appeal Hearing. An appeal hearing is held when a person is aggrieved by a final NDEP decision and submits a "SEC Form 3" to the SEC within 10 days of the of NDEP decision (30 days for Water programs). Examples of final NDEP decisions are the issuance, denial, renewal, suspension or revocation of a permit or certification, as well as the issuance, modification or rescission of any other order. In 2012, the SEC updated its regulations associated with the SEC's Rules of Practice which are also identified as "Practice before the SEC." The regulations can be found at NAC 445B.875-899 (see Attachment 12). This body of regulations provides direction for the appeal process.

Appeal Hearing – Request for an Appeal

To appeal a NDEP final decision, the appellant must complete a SEC Form 3, "Request for an Appeal Hearing" (see Attachment 5). As a NDEP matter of practice, all enforcement actions are issued with a SEC Form 3 attached and all permits are issued with a transmittal letter, which clearly states the permit may be appealed. The timeframe to submit an appeal is 10 days after notice of the NDEP action (NAC 445B.890.1). An exception is the NDEP Water Programs, which allow an appeal to be submitted 30 days after notice [NRS 445A.690 (2)].

An appeal must be based upon one or more of the following grounds regarding NDEP's final decision [NAC 445B.890(2)]:

1. It was in violation of any constitutional or statutory provision;
2. It was in excess of the statutory authority of the Department;
3. It was made upon unlawful procedure;
4. It was affected by other error of law;
5. It was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
6. It was arbitrary or capricious or characterized by abuse of discretion.

Pursuant to NAC 445B.890(3), the appeal must include the following: a statement of the legal authority and jurisdiction under which the hearing is to be held, a reference to each of the specified grounds the appeal is identified to be based upon with a reference of the law allegedly violated, and a brief and concise statement of the facts that provide the basis for the appeal.

Appeal Hearing – SEC Procedure Prior to Appeal Hearing

An SEC Panel consists of at least three SEC members. The SEC executive secretary selects the panel by giving the chairman, if available, attendance priority and then randomly selecting the other available members needed to complete the panel. If the chairman is not available, he or she will assign one of the three panel members to preside as the chairman.

The appeal hearing must be held within 20 days of the appeal request submittal unless both parties agree to waive the 20 days (NAC 445B.891). A letter or motion must be filed with the SEC that is signed by all parties. The executive secretary will notice the hearing to comply with the Open Meeting Law.

The SEC may, upon its own motion or a motion made by another party, order briefs to be filed. The SEC will provide a schedule for brief submittals. The party which requested the hearing shall file an opening brief which does not exceed 20 pages. NDEP and any other intervening party shall file a response brief which does not exceed 20 pages (each). The party which requested the hearing shall file a reply brief which does not exceed 10 pages. In the reply brief, the SEC will consider only those portions which directly address matters provided in the response brief submitted by NDEP and the intervener(s).

Prior to an appeal hearing, the SEC may also, upon its own motion or a motion made by a party, conduct a prehearing conference. A prehearing conference is useful to address issues that may expedite the orderly conduct and disposition of the proceedings or a settlement of the matter. Issues addressed at a prehearing conference may include:

- Formulation, simplification or limitation of issues involved in a hearing;
- Admissions of fact or any stipulation of the parties which will avoid unnecessary proof;
- Arrangement for the exchange of proposed exhibits or prepared expert testimony;
- Identification of witnesses and the subject matter of their expected testimony and, if necessary, limitation of the number of witnesses or the scope of their testimony;
- Rulings on any pending prehearing motions or matters;

- Establishment of a schedule for the filing of motions or the submission of briefs; and
- Consider any other action or procedure which may expedite the orderly conduct and disposition of the proceedings or a settlement of the matter.

If a prehearing conference is held, notice of the prehearing must be provided to each party. Failure to attend the conference without good cause constitutes a waiver of any objection to any agreement reached or ruling made at the prehearing conference.

The SEC may also issue subpoenas to compel attendance of a person at a hearing or to require the production of books, records or other documents.

The SEC may elect to dismiss an appeal if it does not meet the criteria outlined in NAC 445B.890 (2), which are the six itemized grounds for an appeal.

In addition, if one of the parties files a motion to dismiss an appeal, the opposing party will have an opportunity to reply. The SEC will hold a hearing to consider and rule on the motions prior to the commencement of a hearing.

Lastly, the SEC may also dismiss an appeal for want of prosecution on the motion of any party or on the motion of the SEC if the party filing the appeal has failed to bring the appeal to hearing within one year after filing the appeal, unless the parties have stipulated, in writing, to extend the period during which the hearing must take place [NAC 445B.894(4)].

Appeal Hearing – SEC Authority – Affirm, Modify or Reverse

The SEC, by statute, has authority to affirm, modify or reverse a NDEP final decision (NRS 444.570, NRS 445A.606, and NRS 445B.360)

The SEC will affirm a NDEP decision if it determines NDEP applied all pertinent laws and regulations and did not exceed its authority.

Although the statutes allow for the SEC to directly modify a NDEP decision, members must be cognizant of negative impacts that may be realized by the program(s) affected by a SEC modification. Specifically, NDEP implements many federal programs that contain detailed planning, permitting and monitoring requirements. Plans and permits issued by NDEP under these programs are developed under federal oversight and designed to meet all federal requirements and provide consistency among regulated parties. A direct modification made by the SEC has the potential to jeopardize that consistency and ultimately Nevada’s delegated authority. If the SEC determines NDEP’s action should be amended, the most effective way to proceed is to remand the decision back to NDEP so the agency may address the SEC’s concern.

The SEC will reverse a NDEP decision if it determines NDEP exceeded its authority or the action did not follow applicable statutes or regulations. In this case, an alternative is to remand the decision back to NDEP with direction to apply the identified authority. If the applicable regulation, itself, is in question, the SEC may also direct NDEP to review the regulation in question for a potential modification.

Again, during the proceedings of an appeal hearing, the SEC may elect to dismiss the appeal if it is determined to not meet the criteria outlined in NAC 445B.890(2). These criteria are the six itemized grounds for an appeal, enumerated above in the “Request for an Appeal” section.

Appeal Hearing – SEC Procedure during an Appeal Hearing

A SEC appeal hearing is conducted in a quasi-judicial proceeding [NRS 223B.121(6)]. This means the SEC must develop a full record, including all pleadings, motions and intermediate rulings, and must provide both the appellant and NDEP a fair opportunity to present their cases. SEC members must not have ex-parte communication with any of the parties or conduct their own research into cases.

Pursuant to NAC 445B.8914 (5), during a hearing to affirm, modify or reverse a NDEP action, the SEC will not consider evidence that was not submitted to NDEP before the issuance of the final decision or order that is the subject of the appeal unless **BOTH** of the following occur: 1) NDEP allowed a period for public comment before the action; and 2) The SEC determines that reasonable cause exists for the failure of a party to submit the evidence.

The SEC may, if the basis of an appeal is an alleged irregularity in procedure by NDEP and is not reflected in the record, consider evidence concerning the alleged irregularity in procedure. NAC 445B.8914(6).

The SEC will not consider any evidence, including, without limitation, the testimony of a witness, which does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. The SEC will also not consider any evidence that is not directly related to the subject matter of the proceeding. NAC 445B.8914(7).

The record must contain statements of matters officially noticed.

It is important to remember that everything said, including all SEC discussion and deliberation and all testimony from witnesses, will be part of the public record. The record contains questions, offers of proof, objections and rulings thereon. The chairman makes the rulings of objections. The chairman will either sustain the objection, meaning he or she agrees with the objection and the evidence will not be admitted, or will overrule the objection, meaning he or she disagrees with the objection and the evidence will be admitted.

The record must also contain all proposed findings and exceptions. It must contain any decision, opinion or report by the hearing officer presiding at the hearing and must have marked and identified exhibits in addition to all rulings on the admission of each exhibit (NAC 445B.8914).

Every appeal hearing will have a court reporter present who will produce a verbatim record of all proceedings.

The SEC must provide both the appellant and NDEP a fair opportunity to present their cases. The process is generally as follows:

1. The SEC chairman begins the appeal hearing by making opening statements.

2. The parties then make opening statements. The appellant is first, NDEP is second, and if an intervener is present, the intervener is last.
3. The appellant presents his or her case by calling witnesses and introducing exhibits. The opposing parties may cross-examine the witnesses. The SEC then has the opportunity to ask questions of the witnesses.
4. NDEP then presents its case by calling witnesses and introducing exhibits. The appellant may cross-examine the witnesses. The SEC then has the opportunity to ask questions of the witnesses.
5. When a permit is being appealed, the permit holder commonly participates in the appeal hearing as an intervener. When an intervener is present, that party then presents its case by calling witnesses and introducing exhibits. The appellant may cross-examine the witnesses. The SEC then has the opportunity to ask questions of the intervener's witnesses.
6. Lastly, the parties make closing statements. The appellant is first, NDEP is second, and if an intervener is present, the intervener is last.
7. The SEC panel then begins its deliberations regarding the evidence submitted. The SEC decision must be based only upon the evidence provided during the appeal hearing. The chairman will call for a motion and the SEC panel will vote, providing the ruling on the appeal. The SEC will notify all parties of its findings and all recommendations in writing within 30 days after the date of the hearing [NAC 445B.896(1)].

Appeal Hearing – SEC Decision May be Petitioned for Reconsideration or Rehearing

Pursuant to NAC 445B.899, a petition for reconsideration shall be served upon all parties of record within 15 days after the effective date of the SEC decision. The petition shall identify each portion of the challenged decision that the petitioner deems to be unlawful, unreasonable or based on erroneous conclusions of law or mistaken facts. The reconsideration petition must also cite those portions of the record, the law or the rules of the SEC which support the allegations in the petition but may not include additional evidentiary matter or require the submission or taking of evidence.

An answer to a petition for reconsideration may be filed with the SEC by any party of record within 5 days after the reconsideration petition is filed. The SEC will grant or deny a petition for reconsideration or rehearing within 10 days after the filing date of the petition. If reconsideration is granted, the SEC will re-examine the record and decision and issue a modified final decision or affirm its original decision. If a rehearing is granted, the SEC will conduct the hearing within 20 days, allowing the parties to present additional evidence. The regulations are silent on the make-up of the SEC panel reconsidering the case; therefore, it may be the same panel as the original hearing or a different panel, depending upon availability of the SEC members. The SEC will issue a modified final decision or affirm its original decision. A modified final decision issued by the SEC upon reconsideration or rehearing, will incorporate those portions of the original decision for the purposes of judicial review.

Petitions for Judicial Review – SEC Decision may be subject to a Petition for Judicial Review

Pursuant to NRS 233B.130, a party who is aggrieved by an SEC final decision may file a petition for judicial review within 30 days after service of the SEC's final decision. Under NRS 233B.135, the

court may remand or affirm the final decision or set it aside in whole or in part if substantial rights have been prejudiced because the final decision of the SEC is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the SEC; (c) made upon unlawful procedure; (d) affected by other error or law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole of the record; or (f) arbitrary or capricious or characterized by abuse of discretion.