

**Summary Minutes of the
STATE ENVIRONMENTAL COMMISSION (SEC)**

Meeting of November 07, 2011, 1:00 AM

Nevada Division of Environmental Protection
901 S. Stewart Street, Carson City Nevada

Members Present:

E. Jim Gans, Chairman
Alan Coyner
Kathryn Landreth
Jim Barbee
Mark Turner
Tom Porta
Cary Richardson
Pete Anderson
Ken Mayer

Members Absent:

Frances Barron
Jason King

SEC Staff Present:

Rose Marie Reynolds, SEC/DAG
John Walker, Executive Secretary

BEGIN SUMMARY MINUTES

The meeting was called to order at 1:00 pm by Chairman Gans who stated the hearing was properly noticed and there was a quorum; Chairman Gans noted this was a video conference between Carson City and Las Vegas. Chairman Gans asked for a roll call of all present at the two meeting locations; he then moved to the first agenda item.

1) **Public Comments (Action Item)**: Chairman Gans called for public comments and hearing none he proceeded to the next agenda item.

2) **Discussion and possible action regarding amending State Environmental Commission's (SEC) Rules of Practice in NAC 445B.875 to 445B.899.** (For possible action see Attachment 1 - Meeting Agenda). Chairman Gans asked Rose Marie Reynolds, Deputy Attorney General for the SEC to address proposed changes to the Commission Rules of Practice.

Ms. Reynolds began by referencing a handout that included some of the suggested changes under consideration; she noted the handout (see Attachment 2) was previously provided to the Commission. Before proceeding with the discussion she acknowledged the changes were needed to address certain difficulties with a recent appeal heard by the Commission. She began by addressing the *standard of review* the Commission applies to permit decisions made by the Nevada Division of Environmental Protection (NDEP). In that regard she suggested the Commission adopt in its rules the standards set forth in subsection 3 of NRS 233B.135 (See Attachment 3.)

Ms. Reynolds then suggested that attorneys appearing before the Commission (in matters involving contested cases) should be Nevada licensed attorneys or affiliated with a Nevada licensed attorney. She noted that Nevada attorneys would be knowledgeable about Nevada's administrative procedures -- whereas non-licensed Nevada attorneys might not.

She then discussed issues involving evidence the Commission could consider during the appeal process as well as changes to SEC Form 3 noting that changes to Form 3 could be done without changes to the Commission's Rules of Practice. Ms. Reynolds went on to address briefs and time frames for submitting briefs (i.e., as part of the appeal process), noting that specific time-lines associated with the submittal of briefs might be incorporated into the Commission's rules. She then addressed motions, remarking the Commission had recently entertained several motions accompanying recent appeals. She suggested the Commission's rules might be amended to define time frames for submitting motions during the appeal process. Ms. Reynolds then discussed a process for dismissing appeals, where appellants had failed to pursue their appeals in a timely manner.

Chairman Gans proceeded by asking "staff" if they had any additional input on the proposal presented by Ms. Reynolds. Dr. Colleen Cripps, Administrator of NDEP agreed with what had been stated and commented that NDEP was most interested in revising the Commission's rules to improve efficiency for all parties, particularly during the appeal process. Counsel for NDEP Lina Tanner concurred with Dr. Cripps suggesting the Commission's rules need more specificity in certain areas while still maintaining flexibility.

Commissioner Ken Mayer commented that he supported the notion about excluding evidence during the appeal process, which was not previously considered by agency staff in making permit decisions; Commissioner Kathryn Landreth agreed, noting however that in certain circumstances unexpected new evidence, not previously known to the parties of an appeal -- should be considered.

Following this discussion, members of the Commission and counsel for the SEC and NDEP had a wide-ranged conversation about the proposed requirement to restrict the appeal process to Nevada licensed attorneys or attorneys affiliated with a Nevada attorney. Following the discussion a consensus was reached that appeals before the Commission should be restricted to Nevada licensed attorneys or attorneys affiliated with a Nevada attorney, with the stipulation that any person, not an attorney, who files an appeal with the Commission could represent themselves in the process.

Chairman Gans then pursued the question about the introduction of new evidence at an appeal hearing - i.e., evidence not previously considered (or seen) by the permitting agency in its decision making process.

Commissioner Tom Porta concurred suggesting that the agency makes a decision based on a set of facts and when an appellant appeals that decision to the Commission, the Commission needs to have the same set of facts for consideration during the appeal process. Mr. Porta remarked that allowing a new set of facts into the process that was not considered by the agency raises the question of fairness in the process.

Commissioner Alan Coyner chimed in asking "under what circumstance the Commission would consider new evidence" -- observing that the marked-up draft language (i.e., rules of practice) would allow such; he further questioned how an appeals panel might address good cause for

consideration of new evidences introduced outside of the appeal process. Would the panel vote on such an action, he questioned?

Commissioner Landreth suggested that you could have a situation where evidences did not exist at the time of an agency decision; she gave the example of a whole new set of scientific experiments that were revealed in the aftermath of an agency decision and were material to a given decision.

In continuing the discussion Commissioner Porta suggested the Commission could remand back to the agency a directive to consider such new evidence as a potential ruling, which would not preclude appellants from re-filing an appeal after consideration of new evidence contained in a permit modification. Dr. Cripps also suggested that such permit modifications could well satisfy “appellants” precluding the need for additional appeals.

Chairman Gans proceeded by asking the Commission if some appellants come to the Commission believing they may get further with the Commission than they would with the agency. Commissioner Coyner responded suggesting probably not -- given that an appeal is the last stop in decision making process - and that NDEP’s decision procedures allows permittees and/or interveners ample opportunities to weigh-in on the decision process. Dr. Cripps also stated that NDEP works very hard to make sure their decisions are as bullet proof as possible, thereby avoiding unnecessary appeals. She said that the agency typically does everything possible to address all issues by issuing permits that are not appealable.

The discussion then moved to the question of when appeals are ripe (or not). Commission staff indicated that many appeals are filed and then withdrawn because potential appellants discover their “issues” are outside the scope of the appeal (e.g., outside the authority of NDEP and/or a given permit). Lina Tanner (Counsel for NDEP) reminded all present that the suggested language changes to the Commission’s rules would adopt “standards of review” directly from NRS 233B.135. She indicated that these standards could be used to guide the Commission in defining appeals that were ripe (or not) for consideration. She further stated the Commission has the power to consider motions to dismiss appeals (even before a given appeal is considered on its merit), if an appeal fails to meet such standards. She recited examples of such standards including: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; clearly erroneous in view of substantial evidence; and/or arbitrary or capricious.

Commissioner Pete Anderson raised the question about restricting the appeal process, questioning whether or not the adoption of specific standards would place limits on appellants. Ms. Tanner responded observing that during past appeals the Commission had done a good job to refine issues on appeal; moreover, she stated that by incorporating standards into the rules it would only make this job easier for all concerned.

Chairman Gans responded by saying he supports the standard of review concept, however he would not support actions that would unduly restrict appeals. Commissioner Porta suggested that such standards should be incorporated into the SEC’s form 3 (i.e., the appeal form) which would give potential appellants a better understanding of the type of actions that are appealable. Ms. Tanner concurred.

Chairman Gans asked for additional input and hearing none he asked about the process of amending the Commission's Rules. Ms. Reynolds explained that after the Rules of Practice is revised, they would be sent to the Legislative Counsel Bureau for "drafting" and to the Governor's office as required under the Governor's executive order on the review of regulations. A regulatory workshop would then need to be held, whereby members of the public (and the Commission) could provide comments on the draft regulation. Ms. Reynolds said the goal is to get the regulation before the Commission at its next regulatory hearing, which is scheduled on February 15, 2012. Commissioner Porta added that he would like to see a revised Form 3 available at the workshop along with information about any potential conflicts the new regulations might have with existing regulations of the Division.

Chairman Gans asked if there were any additional comments; hearing none he asked Ms. Reynolds what would be the next step. She suggested that a motion should be made directing staff to proceed with amending the Commission's Rules of Practice.

Motion: Commissioner Landreth moved to direct staff to proceed with the process of amending the Commission's Rules of Practice; Commissioner Mayer seconded the motion, which was passed by unanimous vote.

3) Public Comments: (Action Item): Chairman Gans once again called for public comments and hearing none he concluded the meeting.

ATTACHMENTS

- ATTACHMENT 1: Meeting Agenda.
- ATTACHMENT 2: Preliminary Suggested Draft Changes to the State Environmental Commission's Rules of Practice.
- ATTACHMENT 3: NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.



State of Nevada

Dept. of Conservation & Natural Resources

State Environmental Commission sec.nv.gov

901 South Stewart Street, Suite 4001 -- Carson City, Nevada 89701-5249

Meeting Agenda -November 7, 2011

The State Environmental Commission (SEC) will hold a public meeting on November 7, 2011 at 1:00 p.m. at the following locations:

**Bryan Building
901 S. Stewart
4th Floor, South Conference Rm.
Carson City, NV**

**VIDEO CONFERENCE TO:
Nevada Division of Environmental Protection
2030 E. Flamingo Rd., Suite 230
Las Vegas, NV**

Items on this agenda may be removed from the agenda or the SEC may delay discussion relating to items on the agenda at any time.

1.) Public Comments: (Discussion) Members of the public will be invited to speak before the SEC; however, no action may be taken on a matter during public comment until the matter itself has been included on an agenda as an item for possible action. Public comment may be limited to ten minutes per person at the discretion of the chairperson.

2.) Discussion and possible action regarding amending State Environmental Commission's Rules of Practice in NAC 445B.875 to 445B.899. (For possible action)

3.) Public Comments: (Discussion) Members of the public will be invited to speak before the SEC; however, no action may be taken on a matter during public comment until the matter itself has been included on an agenda as an item for possible action. Public comment may be limited to ten minutes per person at the discretion of the chairperson.

4). Adjournment

As required by the provisions of chapters 233B and 241 of Nevada Revised Statutes, this agenda will be posted no later than three working days prior to the hearing at the following locations:

- Nevada State Library & Archives, 100 N. Stewart St., Carson City, NV;
- Dept. of Conservation & Natural Resources, 901 South Stewart Street, Carson City, Nevada);
- Nevada Division of Environmental Protection in Las Vegas, 2030 E. Flamingo Rd;
- Nevada Department of Wildlife in Reno, 11 Valley Road.

Persons wishing to comment on the proposed actions of the State Environmental Commission (SEC) may appear at the scheduled public hearing or may address their comments, data, views, or arguments in written form to: State Environmental

Commission, 901 South Stewart Street, Suite 4001, Carson City, Nevada 89701-5249. The SEC must receive written submissions at least five days before the scheduled public meeting.

If no person who is directly affected by the proposed action appears to request time to make an oral presentation, the SEC may proceed immediately to act upon any written submissions.

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify, in writing, the Nevada State Environmental Commission, in care of John B. Walker, Executive Secretary, 901 South Stewart Street, Suite 4001, Carson City, Nevada 89701-5249, facsimile (775) 687-5856, or by calling (775) 687-9308, no later than 5:00 p.m. on November 03, 2011.

**Proposed Draft Regulation of
The State Environmental Commission
LCB File No. Rxxx-11 SEC File No P2011-08**

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

AUTHORITY: §1, NRS 445B.200 and 233B.050

A REGULTION relating to the Rules of Practice of the State Environmental Commission

Section 1. NAC 445B.893 is hereby amended to read as follows:

1. Three or more members of the Commission constitute a proper panel, where appropriate, in accordance with NRS 445A.610 and 445B.350, and a majority of those present must concur in any decision. The decision will be in writing and is a public record.

2. An appeal to the Commission must be based upon one or more of the grounds set forth in subsection 3 of NRS 233B.135.

3. The Commission will not review evidence which was not submitted to the Nevada Division of Environmental Protection or the permitting authority unless it determines that good cause exists for a failure to submit the evidence.

Section 2. NAC 445B.895 is hereby amended to read as follows:

1. The parties may appear in person and may be represented by ~~counsel~~ an attorney. An attorney who appears before the Commission must be an active member in good standing of the State Bar of Nevada or associated with such a member of the State Bar of Nevada.

2. All testimony must be given under oath and recorded verbatim pursuant to the provisions of NAC 445B.897.

[2.] 3. The Commission:

(a) Will 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.

[3.] 4. Hearings are open to the public until such time as confidential information, within the meaning of chapter 445B of NRS or applicable sections of this chapter or chapter 445A of NAC, is admitted to the record, at which time the hearing will be closed.

NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

1. Judicial review of a final decision of an agency must be:

- (a) Conducted by the court without a jury; and
- (b) Confined to the record.

↳ In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

(Added to NRS by 1989, 1650)