

**STATE OF NEVADA
BOARD OF WILDLIFE COMMISSIONERS**

Commission Policy Number 62

Number: **P-62**
Title: Mitigation Policy
Reference: NRS 501.105
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PURPOSE

The purpose of this policy is to guide the Department of Wildlife in mitigation of activities which have the potential to adversely impact fish and wildlife resources in Nevada.

BACKGROUND

The natural expansion of human populations in Nevada has resulted in increased demands on many of the natural resources of the state, which in numerous cases has had an adverse impact on fish and wildlife resources and their habitat. One only needs to look at the continued loss of wetland habitat in the Truckee Meadows, the loss of deer winter range along the Sierra front, the historical decrease in numbers and distribution patterns of bighorn sheep, and loss of their habitats, or the large scale conversions of natural shrub and grasslands to significantly degraded conditions. As some of these losses may be considered acceptable as the price paid for improving the quality of life and insuring the stability of economic development and diversification, it is important that we not take wildlife for granted in assuming that this important natural resource will always receive appropriate consideration.

The real challenge in fish, wildlife and habitat protection stems from the fact that most of man's activities affect these resource values in one way or another, either beneficially or detrimentally. The methods by which problems are addressed are further compounded in Nevada because of the large number of federal, state and local government agencies responsible for land use planning and associated project development. Each of these agencies has their own set of rules, regulations and policies governing individual actions or project proposals. An approach by our agency aimed at minimizing adverse impacts for a specific proposal may be acceptable to one agency, but unrealistic or unacceptable for another.

The basis for the development of this program and procedure lies in the Department's statutory charge that the protection of fish and wildlife values are in the public interest and that proper land use planning, including wildlife input and consideration, can result in positive protective measures. The overall objective of the Department and this policy is to guide or mitigate those activities which have the potential to adversely impact fish and wildlife resources in Nevada.

JUSTIFICATION

The Department's basic responsibility as a conservation agency is derived by state law which gives the Commission the authority to "...establish policies and adopt regulations necessary to the preservation, protection, management and restoration of wildlife and its habitat." (NRS 501.105). Numerous other state laws outside of Title 45 also provide for the consideration and protection of wildlife in the state. Some of the more prominent state statutes are as follows:

NRS 321.5977 – "The public lands of Nevada must be administered in such a manner as to conserve and preserve natural resources, wildlife habitat, ...and to permit the development of compatible public uses for recreation, agriculture, ranching, mining..."

NRS 278.160 – As part of the master planning process, conservation plans are to be developed "For the conservation, development and utilization of natural resources, including water, ...fisheries, wildlife, ...and other natural resources."

NRS 278.020 – With respect to the improvement of land as regulated by cities and counties: "(2) Any such regulation, restriction and control shall take into account the potential impairment of natural resources and the total population which the available natural resources will support without unreasonable impairment."

NRS 445.132 – The legislature declares that it is the policy of this state and the purpose of NRS 445.131 to 445.354 inclusive: "To maintain the quality of the waters of the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, ..."

NRS 445.244 – "The water quality standards must reflect water quality criteria which define the conditions necessary to support, protect and allow the propagation of fish, shellfish and other wildlife and to provide for recreation in and on the water if these objectives are reasonably attainable."

NRS 528.053 – "No felling of trees, skidding, rigging or construction of tractor or truck lands or landings, or the operation of vehicles, may take place within 200 feet, measured on the slope, of the high water mark of any lake, reservoir, stream or other body of water unless a variance is first obtained from a committee composed of the state forester fire warden, the Director of the Department of Wildlife and the state engineer."

NRS 533.367 – "Before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, he must ensure that wildlife which customarily uses the water will have access to it."

NRS 503.400 – "Every person who has erected, or who may hereafter erect, any dams, water weirs or other obstructions to the free passage of fish in the rivers, streams, lakes, or other waters of the State of Nevada shall construct and keep in repair to the

satisfaction of the Department fishways or fish ladders at all such dams, water weirs or other obstructions so that at all seasons of the year fish may ascend above such dams, water weirs or other obstruction to deposit their spawn.”

In an effort to recognize the importance of mitigation as a tool in minimizing wildlife losses, the policy plan which was adopted by the Commission on December 9, 1983 and endorsed by the Governor on August 20, 1984 identified the following Department goals:

“Recommend alternative approaches in federal, state or private projects to prevent or minimize degradation of fishery habitat or seek mitigation.”

“Maintain close coordination and cooperation with user groups and land managers, seeking the most favorable land use alternatives for big game and emphasizing mitigative measures to replace irrevocable losses.”

Since approximately 87% of the land in Nevada is public domain administered by several different agencies of the federal government, and because these lands provide diverse habitat types supporting a wide variation of wildlife species, it is important that federal law pertaining to state agency involvement be reviewed. These federal regulations also provide opportunities for state involvement in potential mitigation matters involving federal lands or the use of federal funds which may or may not be applicable to private lands. In addition to the public trust doctrine which is founded in common law, a few of the more important regulations pertaining to mitigation include the following:

Fish and Wildlife Coordination Act authorized ...state agencies responsible for fish and wildlife resources to investigate all proposed federal undertakings and nonfederal actions needing a federal permit or license which would impound, divert, deepen, or otherwise control or modify a stream or other body of water and to make mitigation and enhancement recommendations to the involved federal agency.

National Environmental Policy Act (NEPA) gives all governmental agencies in addition to private citizens an opportunity for greater involvement for all federal projects and private projects involving federal funds or federal land. One of the primary purposes of NEPA as listed in section 2 is “To promote efforts which will prevent or eliminate damage to the environment.”

POLICIES

1. It is the policy of the Commission that the Department will continue to emphasize a program of wildlife data collection and dissemination so that wildlife values can be fully and accurately considered in the land use decision making process.

In order to insure that wildlife resources are adequately considered in various planning processes at the local, state and federal levels, the Department will continue to provide

all available data in a useable form. Emphasis in this arena will be toward the development of a standard report format describing resource values within geographic areas of the state and will include economic considerations. These data will be made available for a reasonable fee, where appropriate to government agencies, private consultants, and others where it is determined that information is needed in the land use planning and/or decision making process and for individual project proposals on an as needed basis.

2. It is the policy of the Commission that the Department will provide recommendations for mitigation, enhancement and/or replacement as appropriate for individual project proposals where without such actions significant adverse impacts to the wildlife resources are expected to occur, recognizing that mitigation can not always equally replace loss.

The approach of the Department relative to mitigation matters takes into account the public need for fish and wildlife habitat protection measures while at the same time recognizing other public needs for sometimes conflicting activities. The program is further intended to provide recommendations or guidance for project development which will help to decrease or minimize adverse impacts rather than being used as a tool to stop proposed projects.

3. It is the policy of the Commission that costs associated with mitigation are all normal costs of land or water development projects and therefore should be borne by the developers and/or beneficiaries of the project.
4. It is the policy of the Commission that cash payments or donations may only be accepted: 1) to support projects designed to directly offset potential resource losses related to the development of the project; or 2) for deposit into a special habitat mitigation account. Monies from this account are to be used for habitat restoration, enhancement, or acquisition projects as determined by the development of a cooperative mitigation agreement between the project proponent and the Nevada Department of Wildlife.

PROCEDURES

The Department will implement the above listed policies in accordance with the definitions as described in the National Environmental Policy Act and as promulgated in the federal regulations under 40 CFR 1508.20. Mitigation will include in order of priority implementation:

1. Avoiding the impact altogether by not taking a certain action or parts of an action

The Department's major program emphasis will be directed toward providing wildlife input and associated recommendations which avoid or divert conflicting land uses with an overall objective of maintaining as much existing natural habitat as possible. This approach is particularly important for projects conflicting with threatened or endangered species and in areas of critical environmental concern

or key habitat types. Emphasis on the preservation of wetlands should also fall under this category because of the limited nature and resultant importance of these habitat types. In accomplishing this objective, it is important that the Department provide sufficient supporting information to the decision makers as a means of justifying the need for protection. Recommendations in this arena would normally be for a no action alternative or for relocation of the proposed action into a less sensitive area.

2. Minimizing impacts by limiting the degree or magnitude of the action or its implementation

This mitigative approach to habitat management is directed at making any impacts less severe or to minimize potential losses. Minimal habitat disruptions often may be achieved through permit stipulations and/or alterations in project design. Necessary activity in the vicinity of a deer winter range, for example, might be less disruptive if confined to the summer months. Although habitat and associated animals might be stressed temporarily, this approach assumes that recovery will take place through natural processes within a reasonable time frame.

3. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment

The primary objective of this measure is to restore the same functions in an affected area to pre-disturbance conditions. Since many proposed activities create temporary disruptions, it is often possible to mitigate adverse impacts by restoring or even improving conditions. Examples of such activities might include revegetation of temporary roads needed for exploratory purposes or streambank stabilization after completion of a bridge project. Although the Department recognizes there may be situations where complete rehabilitation is not possible or feasible, it should be a consideration in the review process and implementation of other mitigation (compensation) evaluated as an alternative to the loss of habitat.

4. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action

The primary objective of this measure is to offset potential losses by project design which may require operation and maintenance obligations. The use of a fence to protect wildlife species from cyanide ponds used in mining operations, for example, not only needs to be designed to accomplish specified objectives but also needs to be maintained during the life of the project to insure continued protection.

5. Compensating for the impact by replacing or providing substitute resources or environments

It should be noted that compensation or replacement for habitat losses affecting wildlife resources under the normal multiple use concept of federal land management is not a requirement of the land managing agencies. Requests for recommendations for this type of mitigation where significant or irrevocable damage is likely to occur, however, is a reasonable approach and may be used as a viable alternative to protect the public interest. Compensation must necessarily be addressed through negotiation since all parties should be in agreement with the type and amount of compensation necessary for each proposed action. This form of mitigative action is the least desirable since it accepts the loss of natural habitat values at the outset and oftentimes cannot result in total reparation for those losses. It can be a viable method of offsetting losses, however, for those actions which will occur regardless of other natural resource values. Since compensation may be a highly sensitive subject and has the potential for considerable controversy, the following specific procedures will be in effect:

- a. The Department will accept monetary contributions or donations as mitigation which are tied to programs or activities designed to offset potential resource losses or for mitigation banking for habitat restoration, enhancement, and/or acquisition projects provided that an appropriate and cooperatively developed mitigation agreement has been finalized between the project proponent and the Nevada Department of Wildlife.
- b. Compensation or replacement mitigation should be oriented within or adjacent to the project area and designed to rectify the same functions, habitat types and species being impacted wherever possible. Off-site compensation should be considered when mitigative measures cannot be applied to adjacent areas or to benefit the same species that are impacted.
- c. All final actions associated with compensation mitigation will be approved by the Director to insure that agreements are consistent with Commission policy and program direction. This measure is not intended to preclude Bureau personnel, under appropriate program and procedures, from negotiations but it is directed at insuring a uniform statewide approach to wildlife mitigation.

This policy shall remain in effect until amended, modified or repealed by the Board of Wildlife Commissioners

BY ORDER OF THE BOARD OF WILDLIFE COMMISSIONERS IN REGULAR SESSION, DECEMBER 1, 2001.

John T. Moran, Jr., Chairman
Board of Wildlife Commissioners