STATE OF NEVADA

DEPARTMENT OF WILDLIFE

Habitat Division

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#15

MEMORANDUM

MAY 13, 2016

To: Nevada Board of Wildlife Commissioners, County Advisory Boards to Manage Wildlife, and Interested Publics

From: Alan Jenne, Administrator, Habitat Division

Title: **Commission General Regulation 461, Industrial Artificial Pond Permits, LCB File No. R014-16 – Habitat Division Administrator Alan Jenne – Workshop/Public Comment Allowed.**

Description: The Commission will hold a workshop to consider regulation changes relating to amending Chapter 502 of the Nevada Administrative Code. It revises provisions relating to artificial industrial ponds; adds a provision on the purpose of permits; adds definitions for permanent closure, and stabilized; adds new provisions and revises existing provisions relating to application, compliance, modification, renewal, and transfer of permits; modifies provisions relating to assessment fee structure and payment tiers; and providing other matters properly relating thereto.

Presenter: Habitat Division Administrator Alan Jenne

Agenda No: 15

Summary:

The regulation change regarding application, compliance, modification, renewal and transfer of permits will provide clarity on how to manage permits when certain operational or administrative changes occur. The regulation change regarding assessment fee structures and payment tiers will expand the number of active permit holders required to pay an annual assessment and will increase certain payment tiers. Existing NAC language results in only 55 percent of active IAP permit holders paying an annual assessment, yet NDOW is responsible for managing permits and conducting inspections at all facilities with an IAP permit. The proposed regulation change will

eliminate this shortfall, which is currently offset with sportsman dollars, and will create an industry-funded permitting program.

Program History

The Industrial Artificial Pond (IAP) program issues, manages and inspects industrial projects that include artificial bodies of water defined under NRS 503.150. Permitted ponds are often associated with certain mining projects, groundwater lithium concentration projects, metallurgical processing/refining plants, coal-power generation plants, geothermal power plants, and solar-energy plants. There are currently 87 active IAP permits. The program has been widely successful in establishing a regulatory platform for toxic ponds that have the potential to result in wildlife mortalities. Since implementing the program, the number of mortalities has declined dramatically. Although this permitting program does not permit the take of migratory birds, it does help ensure the State of Nevada and its industry partners are taking the steps necessary to reduce mortalities and comply with the Act.

Existing Conditions and Need for Revised Regulations

The existing regulation language requires certain permittees to pay an annual assessment to the Department. The existing assessment fee structure is based on the "tons of material processed through a mill or heap leach pad" and range from $0 to $10,000 per year. Since the current regulation is limited to ore-processing facilities, approximately forty active permits do not pay an annual assessment, but still require an expense of NDOW funds. The assessment fee revenue collected by NDOW is used to offset the cost of writing permits, inspecting permitted facilities for compliance, and coordinating with permittees on wildlife protection efforts. At full staffing levels, the cost of running the IAPP is approximately $578,000 per year. The current assessment fee structure generates an average of $258,000, leaving an annual shortfall of approximately $320,000.

A combination of several factors has created this funding shortfall, including:

1) Many permitted projects to do not fit the definition of "processing ore," and no assessment fee is collected for such a permit. Because of this existing language only 55 percent of permittees pay an annual assessment, yet NDOW is required to issue permits and perform inspections on all qualifying industrial ponds, per NRS 502.390.
2) The assessment fee structure was placed into regulation in 1991 and has not been adjusted since. Average annual inflation of 2.37 percent each year since 1991 (75 percent, cumulatively) has diminished the purchasing power of the assessment fee revenue structure established in 1991.
3) Prior to 2011, Federal and State sportsmen dollars were matched with assessment fees to help cover operating costs and generate funding for a Mining Level B Program. In 2011, the practice of using sportsmen dollars to subsidize the mining program was cancelled, which dramatically reduced the amount of funding for this program.

The removal of sportsman's dollars, combined with the other listed factors, has resulted in a mining account balance that is being depleted quickly and a continuing shortfall that is not

sustainable. The average existing assessment payment is $2,870 per permittee. The average cost for NDOW to operate this program is approximately $6,500 per permittee per year. Program requirements include writing and managing permits, inspecting permitted facilities for compliance, monitoring wildlife mortalities, and coordinating with permittees and industry groups to protect wildlife.

The number of permittees that do not pay an assessment or pay less than the cost to issue the permit results in a significant funding shortfall that can be resolved with the proposed regulation change. The objective of the regulation change is to create a self-sustaining IAP program that is funded through industry-provided assessment fees. Modification to existing NRS language is not required to achieve this objective, but a change of NAC regulations is required. The proposed modifications to the assessment fee regulations are expected to generate approximately $578,000 per year (an increase of $320,000 per year), which will fully fund the cost of the IAP program.

Commission Authority

NRS 502.390, Section 4 demonstrates a legislative intent to have all IAP permittees pay an assessment:

> A person holding a permit issued pursuant to this section shall, in addition to the fee for the permit, pay to the Department an assessment. The amount of the assessment must be determined pursuant to regulations adopted by the Commission. The assessment must be no more than $10,000 per year for each permit.

Proposed Regulatory Solution

The proposed regulation changes modify the assessment fee requirement by adding language that will increase the number of active permittees required to pay an annual assessment. The proposed regulation change does not modify any language that requires which industries, projects, or artificial bodies of water require an IAP permit. Without the proposed changes, there are insufficient funds to have a self-funded IAP program. Since NDOW is required per NRS to operate the program, a continued funding shortfall would need to be addressed with sportsmen dollars. The proposed regulation changes will modify and increase the assessment fee structure to an extent that will alleviate the current budget shortfall. The proposed revenue target of $578,000 per year is in line with annual IAP program costs and creates a cost-recovery system.

Stakeholder Input

NDOW Staff met with industry and environmental focus groups and conducted three stakeholder meetings with relevant partners to receive and incorporate stakeholder comments. NDOW received comments from industry interests, primarily the Nevada Mining Association, and has adjusted the proposed language based on those comments.

Small Business Impact Statement Summary

A small business impact survey and impact statement were completed and submitted along with the proposed regulation language. Six valid small business responses were received, but only two were fully completed and contained information suitable for analysis. The analysis concluded small business may encounter a slight to moderately negative effect on certain small business as a result of the regulation change; however the potential cost increase varies based on the specifics of each permit. Based on internal predictions, the average cost increase is approximately $3,000 per year. This has the potential to adversely affect small business to some degree; however, only one company provided quantitative financial data. As such the *significance* and *extent* of the impact is expected to be minor. A beneficial effect may be realized by small business contractors as NDOW would re-vitalize the Level B Program. This fund traditionally funded habitat and research projects associated with industrial development and created a mutual benefit for sportsman and industrial development partners. These projects often use contractors that specialize in habitat improvement work such as re-seeding, pinion-juniper thinning, or installation of bat gates and wildlife surveys, thus presenting a beneficial effect to small businesses.

No outstanding and unresolved comments or issues with regards to the proposed regulation changes exist between NDOW and the Nevada Mining Association. No other formal comments or outstanding issues have been brought forth by interested publics within the scope of existing public outreach, coordination, and solicitation efforts.

Recommendation: This information and proposed regulation language is presented as a hearing/workshop item.

REVISED PROPOSED REGULATION OF THE

BOARD OF WILDLIFE COMMISSIONERS

LCB File No. R014-16

April 25, 2016

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

AUTHORITY: §§1-11, NRS 501.105 and 501.181, as amended by sections 1 and 1.2, respectively, of Assembly Bill No. 78, chapter 202, Statutes of Nevada 2015, at page 956, and NRS 502.390.

A REGULATION relating to wildlife; revising provisions relating to artificial or artificially created bodies of water that contain certain chemicals or substances; adopting provisions relating to the modification, renewal or transfer of a permit to operate, maintain or develop such a body of water; revising the manner in which a certain annual assessment required for such a permit is calculated; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law requires the Board of Wildlife Commissioners: (1) to establish policies and adopt regulations necessary to preserve, protect, manage and restore wildlife and its habitat; and (2) in establishing such policies and adopting such regulations, to consider the recommendations of the Department of Wildlife, the county advisory boards to manage wildlife and other persons who present their views at an open meeting of the Commission. (NRS 501.105, as amended by section 1 of Assembly Bill No. 78, chapter 202, Statutes of Nevada 2015, at page 956)

Under existing law, a person who develops or maintains an artificial or artificially created body of water that contains certain chemicals or substances that cause or will cause the death of any wildlife, and an operator of a mining operation which develops or maintains an artificial or artificially created body of water containing chemicals directly associated with the processing of ore, is required to obtain first a permit from the Department authorizing the development or maintenance of the body of water. (NRS 502.390) Existing law also requires the Commission to adopt regulations: (1) governing the provisions of the permit, and the issuance, renewal and revocation of the permit; and (2) establishing the method for determining the amount of an assessment and the time and manner of payment necessary for the collection of the assessment. (NRS 501.181, as amended by section 1.2 of Assembly Bill No. 78, chapter 202, Statutes of

Nevada 2015, at page 956) Existing regulations set forth the provisions for the issuance of a permit to develop or maintain an artificial or artificially created body of water. (NAC 502.460-502.495)

Section 2 of this regulation declares that the purpose of NAC 502.460 to 502.495, inclusive, and sections 2 to 5, inclusive, of this regulation is to ensure the protection of wildlife from artificial or artificially created bodies of water for which a permit is required pursuant to NRS 502.390.

Sections 3-5 of this regulation establish the procedures that an applicant must follow to modify or renew a permit for an artificial or artificially created body of water which is required pursuant to NRS 502.390. **Sections 3-5** also require an applicant for renewal, modification or transfer of a permit to fill out a form to calculate certain assessments and return it with the permit application.

Existing regulations: (1) require the Department to provide a form for a permit to develop or maintain an artificial or artificially created body of water which is required pursuant to NRS 502.390; and (2) set forth the fee for such a permit. (NAC 502.475) **Section 6** of this regulation repeals the requirement that the Department provide such a form and instead requires the Department to make available on its Internet website a form to calculate certain assessments, along with the permit application form. **Section 6** also requires an applicant to obtain a new permit, or to modify or renew an existing permit, to complete the provided form to calculate the assessment and return it and any documentation to support the data included in the form with the permit application.

Existing regulations require the holder of a permit to develop or maintain an artificial or artificially created body of water for which a permit is required pursuant to NRS 502.390 to pay an annual assessment based on the tons of material processed through a mill or heap leach pad in the previous fiscal year. The Department is required to send to each holder of a permit a form to indicate the number of tons processed in the previous fiscal year, and the holder of the permit is required, upon receipt of the form, to complete and return it with the assessment within 45 days. (NAC 502.482) **Section 8** of this regulation makes various changes that require a holder of a permit to calculate the annual assessment based on the specifications for the design of any facility associated with the artificial or artificially created body of water in lieu of the tons of ore processed in the previous fiscal year, including revising the assessment schedule to reflect that requirement. **Section 8** also requires each holder of a permit to pay the assessment on or before June 30 of each year. **Section 10** of this regulation requires each person who holds an existing permit on the effective date of this regulation to complete and return the form to calculate the assessment, accompanied by the assessment, on or before June 30, 2017. **Section 11** of this regulation makes this regulation effective on July 1, 2016, or upon filing with the Secretary of State, whichever occurs later.

Section 1. Chapter 502 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this regulation.

Sec. 2. ***The purpose of NAC 502.460 to 502.495, inclusive, and sections 2 to 5, inclusive, of this regulation is to ensure the protection of wildlife from artificial or artificially created bodies of water for which a permit is required pursuant to NRS 502.390.***

Sec. 3. ***1. A modification to an existing permit:***

(a) Is not subject to a fee; and

(b) May not extend the term of the permit.

2. For the purpose of this section, a modification to an existing permit includes:

(a) The expansion or addition of an existing artificial or artificially created body of water for which the permit was issued or renewed that was not described in the initial application for the permit;

(b) A modification, that significantly alters the risk of death to wildlife, to any:

(1) Fencing or covering that was installed to ensure the exclusion of wildlife from an artificial or artificially created body of water;

(2) Operational standards used to maintain an artificial or artificially created body of water in a state which will not cause the death of any wildlife; or

(3) Other conditions for the permit required by the Department pursuant to NAC 502.480; and

(c) A change in the contact information for the holder of the permit or contact person for any facility associated with the artificial or artificially created body of water.

3. An application for modification to an existing permit must include a completed form to calculate the assessment required by NAC 502.482 and any documentation to support the data included in the form, including, without limitation, any engineering plans for the facility.

Sec. 4. *1. The Department may renew a permit if the holder of the permit:*

(a) Submits an application to renew the permit and a completed form to calculate the assessment provided by the Department pursuant to NAC 502.475; and

(b) Is in substantial compliance with the conditions of the existing permit.

2. The application to renew and the completed form to calculate the assessment must:

(a) Be submitted to the Department at least 30 days before the expiration of the existing permit;

(b) Include the fee for the permit required by NRS 502.390 and NAC 502.475; and

(c) Include any new information required to update any information previously submitted to the Department.

3. If the Department fails to renew a permit on or before the date of expiration of the existing permit, the holder of the permit may continue to operate the facility pursuant to the terms and conditions of the existing permit until a new permit is issued by the Department.

4. An application for renewal of a permit must include a completed form to calculate the assessment specified in subsection 1 and any documentation to support the data included in the form, including, without limitation, any engineering plans for the facility.

Sec. 5. *1. A permit for an artificial or artificially created body of water may be transferred to a new owner or operator.*

2. Before a permit specified in subsection 1 may be transferred to a new owner or operator during the term of the permit, the holder of the permit must:

(a) Notify the new owner or operator in writing of the requirements of the existing permit and the requirements of NRS 502.390 and NAC 502.460 to 502.495, inclusive, and sections 2 to 5, inclusive, of this regulation; and

(b) Provide a copy of the written notice to the Department.

3. Pursuant to subsection 3 of NRS 502.390, the existing permit remains in effect for 30 days after the transfer of ownership or operation.

Sec. 6. NAC 502.475 is hereby amended to read as follows:

502.475 1. The Department will provide ~~[a]~~ *:*

(a) A standard form *to apply* for a permit required by NRS 502.390 ~~[.]~~ *; and*

(b) A form to calculate the assessment required by NAC 502.482.

2. *The form to apply for a permit and the form to calculate the assessment:*

(a) May be obtained from the Internet website of the Department; and

(b) Must be completed when an applicant:

(1) Applies for a new permit; or

(2) Modifies or renews an existing permit.

3. The fee for the *issuance or renewal of a* permit is $125 per year and must be paid to the Department before the permit will be issued ~~[.]~~ *or renewed.* If the Department issues *or renews* a temporary permit or a permit for less than 1 year, the fee is $68.

4. An applicant for a permit shall complete the form to calculate the assessment provided by the Department and include the form with the application for the permit, along with any

documentation to support the data included in the form, including, without limitation, any engineering plans for the facility.

Sec. 7. NAC 502.480 is hereby amended to read as follows:

502.480 1. The Department will design a permit required by NRS 502.390 to address the specific measures for the protection of wildlife and operating standards to be taken by a holder of the permit.

2. A person who holds a permit must comply with all of the conditions for the permit which the Department requires, including, but not limited to ~~[:]~~ ***, the designation of an artificial or artificially created body of water which must be:***

(a) ~~[The type of fence which must be installed]~~ ***Fenced*** to ensure the exclusion of wildlife from hazardous water ~~[.]~~ ***and the type of fence that must be installed.***

(b) ~~[The designation of bodies of water which must be covered]~~ ***Covered*** to ensure the exclusion of wildlife.

(c) ~~[The designation of a body of water which must be maintained]~~ ***Maintained*** through operational standards, in a state which will not cause the death of any wildlife.

Sec. 8. NAC 502.482 is hereby amended to read as follows:

502.482 1. The holder of a permit ***for an artificial or artificially created body of water*** issued pursuant to NRS 502.390 shall pay an annual assessment required by that section based on the ~~[tons of material processed through a mill or a heap leach pad during the previous fiscal year. The amount of the assessment will be determined as follows:~~

~~Tons of material processed~~ ~~Amount of assessment~~

~~1 - 40,000 ..... $50~~

~~40,001 - 100,000 ..... 1,750~~

~~100,001 - 300,000 ..... 3,750~~

~~300,001 - 600,000 ..... 6,750~~

~~600,001 - 1,500,000 ..... 8,750~~

~~More than 1,500,000 ..... 10,000]]~~

specifications for the design of any facility associated with the artificial or artificially created body of water according to the following schedule:

(a) Fee Schedule A – The number of tons of ore the facility is designed to process per year:

Tier 1: Facility designed to process chemically less than 36,500 tons per year $1,500

Tier 2: Facility designed to process chemically 36,500 tons or more per year but less than 100,000 tons per year $3,000

Tier 3: Facility designed to process chemically 100,000 tons or more per year but less than 500,000 tons per year $6,000

Tier 4: Facility designed to process chemically 500,000 tons or more per year $10,000

Permanent Closure: Facility in a state of permanent closure $1,000

(b) Fee Schedule B – The maximum cumulative acres the facility is designed to have in artificial or artificially created bodies of water:

Tier 1: Facility designed with a maximum capacity of less than 5 cumulative acres of artificial or artificially created bodies of water.....$1,500

Tier 2: Facility designed with a maximum capacity of 5 cumulative acres or more but less than 10.1 cumulative acres of artificial or artificially created bodies of water.....$3,000

Tier 3: Facility designed with a maximum capacity of 10.1 cumulative acres or more but less than 100.1 cumulative acres of artificial or artificially created bodies of water.....$6,000

Tier 4: Facility designed with a maximum capacity of 100.1 cumulative acres or more of artificial or artificially created bodies of water.....$10,000

Permanent Closure: Facility in a state of permanent closure.....$1,000

(c) Fee Schedule C – The maximum number of individual artificial or artificially created bodies of water associated with the facility:

Tier 1: Facility designed with less than 25 artificial or artificially created bodies of water.....$1,500

Tier 2: Facility designed with 25 or more but less than 75 artificial or artificially created bodies of water *$3,000*

Tier 3: Facility designed with 75 or more but less than 151 artificial or artificially created bodies of water *$6,000*

Tier 4: Facility designed with 151 or more artificial or artificially created bodies of water *$10,000*

Permanent Closure: Facility in a state of permanent closure *$1,000*

2. ~~[The Department shall send to each holder of a permit a form to indicate the number of tons of material processed in the previous fiscal year. The Department shall send the form not later than the end of each fiscal year.]~~ The holder of a permit shall ~~[complete and return the form, accompanied by]~~ *pay* the assessment ~~[, to the Department within 45 calendar days of receipt.]~~ *on or before June 30 of each year.*

3. If the ownership of any artificial or artificially created body of water for which a permit has been issued is transferred, *the Department shall specify in the permit* the amount of the assessment required to be paid by the new owner during his or her first year of ownership . ~~[must be based on the tons of material processed during the previous fiscal year.]~~

4. As used in this section, "permanent closure" means that time in the operating life of a facility when activities for the final stabilization of the facility or removal of chemicals or substances within or associated with an artificial or artificially created body of water are initiated and the body of water no longer poses a risk of death to wildlife.

Sec. 9. NAC 502.485 is hereby amended to read as follows:

502.485 A person who has been issued a permit required by NRS 502.390 must report to the Department on forms provided by the Department, each death of wildlife associated with the ***artificial or artificially created*** body of water for which the permit was issued ~~.~~ ***and any facility associated with the artificial or artificially created body of water.*** If no death occurs, the person must also report this to the Department. The permit will state the time and manner the information must be reported to the Department.

Sec. 10. 1. A person who, on the effective date of this regulation, holds a permit to develop or maintain an artificial or artificially created body of water issued by the Department of Wildlife pursuant to NRS 502.390 shall complete and return the form to determine the assessment required by NAC 502.482, as amended by section 8 of this regulation, accompanied by the assessment, on or before June 30, 2017.

Sec. 11. This regulation becomes effective on July 1, 2016, or upon filing with the Secretary of State, whichever occurs later.