

**STATE OF NEVADA
BOARD OF WILDLIFE COMMISSIONERS**

Commission Policy Number 62

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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

Anthropogenic activities associated with human population growth and economic development result in various demands on the State's natural resources. In some cases, these activities create adverse impacts on wildlife and habitat resources. The severity and scale of these impacts on wildlife and habitat resources is wide-ranging and can vary significantly based on the intensity and location of the activity.

Examples of these impacts include habitat degradation by wild horse and burro, the loss of mule deer migration corridors and winter range from residential and mineral development, and greater sage grouse habitat loss and fragmentation from various anthropogenic impacts.

Addressing these negative impacts is possible, but also complex in Nevada due the high percentage of federally administered public land. Development of public land provides an opportunity for stakeholders to engage in the process, but is simultaneously complex because it can include different federal, state, and local government agencies with different rules, regulations, and policies for land and resource management. An approach by the Department aimed at avoiding or minimizing adverse impacts for a specific proposed project may be acceptable to one agency, but unrealistic or unacceptable for another.

The basis for the development of this mitigation policy (and the Department's Technical Review Program) lies in the Department's statutory charge that the protection of fish and wildlife resources are in the public interest and that comprehensive participation in land use management decision-making, and National Environmental Policy Act (NEPA) processes, are rooted in robust science and professional expertise.

For the purposes of this policy, "impacts" may include direct, indirect, and cumulative effects, may be short, medium, or long in duration, and may vary in significance. "Mitigation" will be defined as: Avoid, Minimize, Mitigate, and shall consist of:

1. Avoiding the impact(s) altogether by not taking a certain action or parts of an action, or through moving all or part of a proposed action to a less critical area.
2. Minimizing, reducing, or rectifying impacts by protective measures, or through limiting the degree or magnitude of the action and its implementation during the life of the action.

Rectifying the impact by repairing, rehabilitating, or restoring the affected environment may also minimize impacts and is often achieved through reclamation requirements.

3. Mitigating the impact(s) by replacing or providing substitute resources or environments, or through compensation (also referred to as “compensatory mitigation”). This may occur near/adjacent to the proposed action(s), or off-site.

The overall objective of this policy is to provide guidance for the Department’s role in land use, project, and conservation planning processes where avoidance, minimization, and/or compensatory measures may be necessary to offset activities which have the potential to adversely impact fish, wildlife, and habitat 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:

NAC 232.400-480 – “Sagebrush Ecosystem Council: Mitigation of Adverse Impact to Greater Sage-Grouse and Habitat”, and the establishment and implementation of the Nevada Conservation Credit System to achieve mitigation.

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 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 278.337 – With respect to the Commission adoption of regulations for Department review of tentative subdivision maps for impacts to wildlife resources.

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 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.”

NRS 701.610-640 - Notice of energy development project: Filing with Department of Wildlife; form; contents; regulations and associated review and recommendations provided by the Department on behalf of energy development projects.

In an effort to recognize the importance of mitigation as a tool in minimizing wildlife losses, this policy guides the Department to:

- Recommend alternative approaches in federal, state, or private projects to avoid or minimize degradation or loss of fish and wildlife resources or, where impacts are unavoidable seek mitigation.
- Develop suitable Best Management Practices (BMP) and/or Design Features (DF) for avoiding and/or minimizing adverse impacts to fish and wildlife and habitat resources. These will incorporate BMPs and DFs already accepted by land and resource managers where appropriate, and may require development of new BMPs and/or DFs where none currently exist or are unsuitable.
- Maintain close coordination and cooperation with user groups and land and resource managers, seeking the most favorable land use alternatives for all fish and wildlife and emphasizing mitigative measures to replace irrevocable losses.

Since approximately 87% of Nevada is public land administered by several federal land management agencies, and these lands include diverse habitats essential to a wide variety of wildlife species, it is important that federal law pertaining to state agency involvement and recommendations be reviewed. These federal regulations provide opportunities for state involvement in activities on federal lands or using 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 (16 U.S.C. § 661-666) 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, 42 U.S.C. § 4321) 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.”

- Federal Land Policy and Management Act (FLPMA, 43 U.S.C. § 1712); to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located.

POLICIES

The approach of the Department relative to mitigation emphasizes the public need for healthy and sustainable fish and wildlife populations and habitats while recognizing other public needs or agency mandates (e.g. multiple use) may result in potential conflicts between resources. The program is further intended to provide recommendations which will help avoid and minimize adverse impacts.

1. It is the policy of the Commission that the Department will continue to emphasize wildlife data collection and dissemination so that wildlife and habitat values can be disclosed and considered in federal, state, and local decision-making processes. The Department will fulfill data requests and use a standard reporting process to describe resource values within or proximate to the location of the proposed activity when that information is useful to inform decision-making processes. More detailed and project-specific data may also be shared when appropriate.
2. It is the policy of the Commission that the Department will provide technical assistance to the permitting entity and applicants when reviewing proposed development actions. Department biologists may assist in identifying fish and wildlife species and habitats, identify the type, extent, and duration of potential impacts, and identify or recommend avoidance and minimization measures. When impacts are anticipated to occur after avoidance and/or minimization measures have been incorporated, the Department may recommend mitigation measures to achieve the goals and standards of the Policy to offset impacts to fish and wildlife resources. The Department will formally provide any recommendations to the permitting entity and project developer.
3. It is the policy of the Commission that the Department should coordinate closely with the Sagebrush Ecosystem Technical Team, who is charged with implementation of the Nevada Conservation Credit System for greater sage-grouse mitigation.
4. It is the policy of the Commission that the Department should coordinate closely with any other governing body or entity with authority over a Department, State of Nevada, or federally approved mitigation program in Nevada.
5. It is the policy of the Commission that costs associated with mitigation are all normal costs of development projects, independent of state or federally required reclamation, and therefore should be borne by the developers and/or beneficiaries of the project. Costs associated with mitigation for greater sage-grouse in Nevada will be accounted for through the Nevada Conservation Credit System, unless otherwise accounted for as approved through the Sagebrush Ecosystem Council.
6. It is the policy of the Commission that cash payments or donations may be accepted:
 - a. To support projects designed to directly offset potential resource losses related to the development of the project; or
 - b. For deposit into a special mitigation account. Monies from this account are to be administered by the Department and used for fish, wildlife, or habitat restoration,

enhancement, acquisition projects, or, under special circumstances, research related to the loss of such resource(s).

7. It is the policy of the Commission that any mitigation negotiated with the Department shall include establishment of a cooperative mitigation agreement between the project proponent and the Department, to be completed prior to initiation of ground disturbance for the development project. Any such agreement will describe party responsibilities and timelines for mitigation.

PROCEDURES

The Department will implement the above listed policies in accordance with the definitions as described in the National Environmental Policy Act and consistent with 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 emphasis will be directed toward providing input and recommendations which avoid 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, spring sites and associated vegetation, riparian habitat, and meadow systems, should also fall under this category due to the limited nature and importance of these habitat types in the Great Basin. The Department shall provide sufficient supporting information to the decision makers as a means of justifying the need for avoidance measures. Recommendations for avoidance measures should 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 includes:

- (a) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (b) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

This approach is intended to reduce the duration, scope, or intensity of the adverse impacts and/or losses to wildlife and/or habitat resources and may require operation and/or maintenance obligations. Minimizing wildlife and habitat disruptions may be achieved through permit stipulations, restrictions in timing of activities, repairing, rehabilitating, or restoring the affected environment, protective measures such as fences, alterations in project design, Best Management Practices, and Required Design Features. 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. Necessary aFor example, aActivities proposed within mule deer winter range might be less disruptive if confined to the summer months, thus implementing the activity during less critical timeframes may result in fewer adverse impacts. The Department shall provide sufficient supporting information to the decision makers as a means of justifying the need for minimization measures.

3. Mitigating/Offsetting for the impact(s) by compensating, replacing, or providing substitute resources or environments.

Compensation or replacement for habitat losses affecting wildlife resources under the multiple use concept of federal land management should be of last resort. Requests for recommendations for this type of mitigation where significant or irrevocable damage is likely to occur, however, is an appropriate approach when impacts cannot be avoided and have been minimized to the greatest degree possible. Compensatory mitigation may be negotiated between the project developer/project beneficiary, permitting entity, and the Department, and all parties should be in agreement with the type and amount of compensation necessary for each proposed action. This form of mitigation is the least desirable since it accepts the loss of natural habitat values and oftentimes cannot result in total replacement for lost values. Compensation is best applied to wildlife and habitat values that will be adversely impacted after all reasonable measures to avoid and minimize impacts have been implemented; it is not intended nor desirable to use compensation in place of avoidance and minimization strategies. As compensatory mitigation may be a highly sensitive subject, the following specific procedures will be in effect:

- a) The Department may 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, acquisition projects, or, under special circumstances, research related to the loss of resource(s), provided that a cooperative mitigation agreement has been finalized between the project proponent and the Department.
- b) Compensatory mitigation should be oriented within or adjacent to the project area in a suitable area as to be effective and successful and should be designed to compensate for 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 compensatory mitigation will be approved by the Director of the Department to ensure that agreements are consistent with Commission policy and program direction. This measure is not intended to preclude land management or other resource management agencies under appropriate program and procedures, from negotiations, but it is directed at ensuring a uniform statewide approach to fish and wildlife resource mitigation.

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

BY ORDER OF THE BOARD OF WILDLIFE COMMISSIONERS IN REGULAR SESSION,
January 27, 2023.



Tommy Caviglia, Chairman
Board of Wildlife Commissioners