

# Administrative Rulemaking in Nevada

Office of Attorney General CLE

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# A Few of My Favorite Things

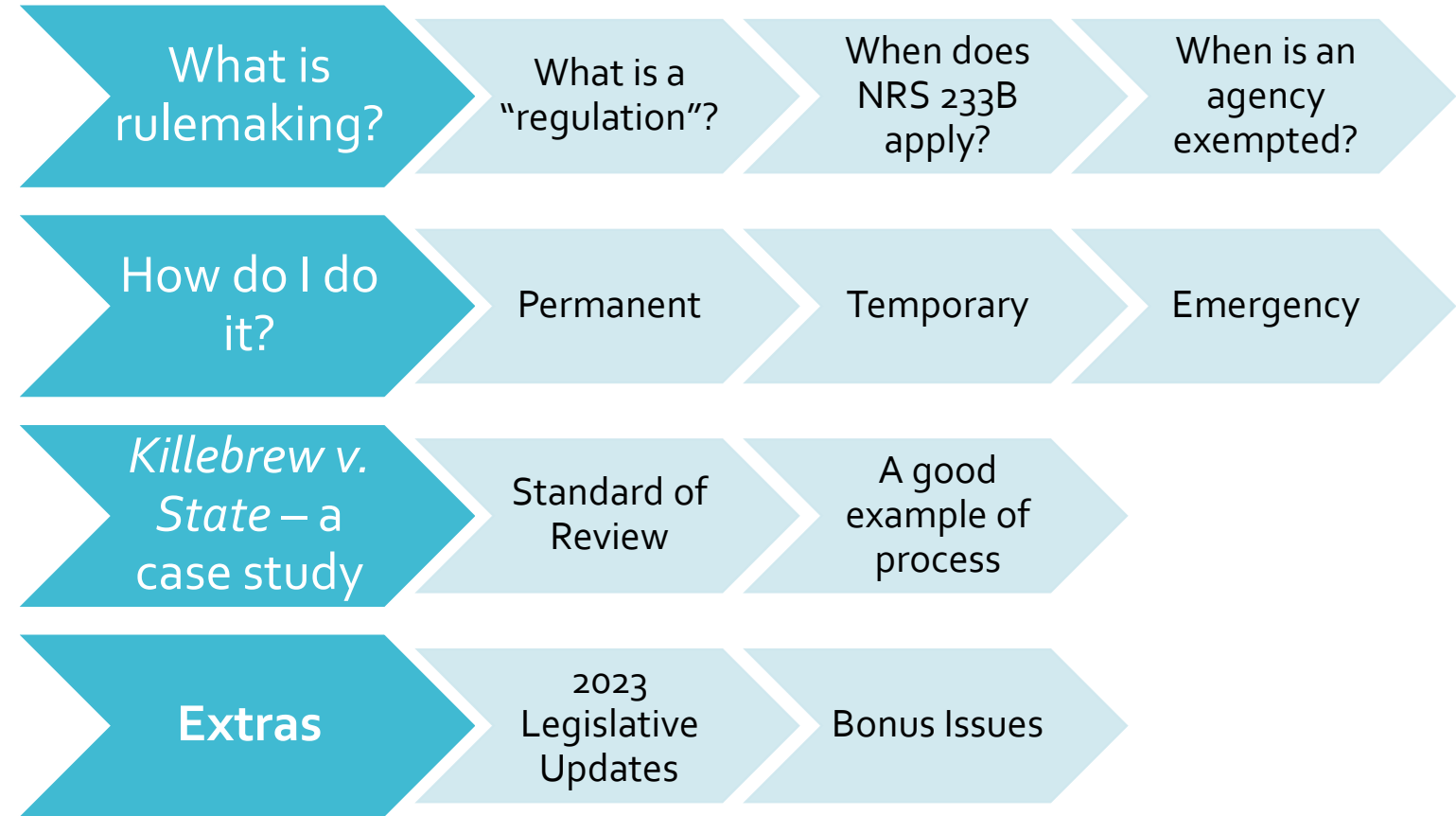
## Resources



- AGO Administrative Rulemaking Manual, Tenth Edition (2023)  
<https://ag.nv.gov/Publications/Manuals/>
- State of Nevada Register of Administrative Regulations  
<https://www.leg.state.nv.us/register/>
- Legislative Council's Preface to the NRS  
<https://www.leg.state.nv.us/Division/Research/Documents/LegislativeCounselsPreface.pdf>
- *Killebrew v. State of Nevada*, 139 Nev. Adv. Op. 43 (2023)  
[https://nvcourts.gov/supreme/decisions/advance\\_opinions](https://nvcourts.gov/supreme/decisions/advance_opinions)

# Road Map:

Overview of administrative rulemaking under NRS Chapter 233B



# What is a "regulation"?

## NRS 233B.038 "Regulation" defined

1. "Regulation" means:

- (a) An agency rule, order, or statement of general applicability which describes the policy, or describes the organization, of any agency;
- (b) A rule, order, or statement of a written policy, whether a person is in compliance with the rule, order, or policy in order to assess a fine, mo



# What are we really talking about?

*Let's start with the basics.*

- The Legislature passes laws (“statutes”), which are codified in the Nevada Revised Statutes (NRS).
- Regulations (also referred to as rules) are created by the Executive Branch agencies, boards and commissions, and explain how that body intends on carrying out or administering the statutes.
- Regulations are codified into the Nevada Administrative Code (NAC), and carry with them the “force of law and must be enforced by all peace officers.” *See NRS 233B.040.*
- NRS Chapter 233B, passed by the Legislature, sets forth the process for state agencies to create regulations.

# What is a “regulation”?

## **NRS 233B.038 “Regulation” defined.**


1. “Regulation” means:

(a) An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;

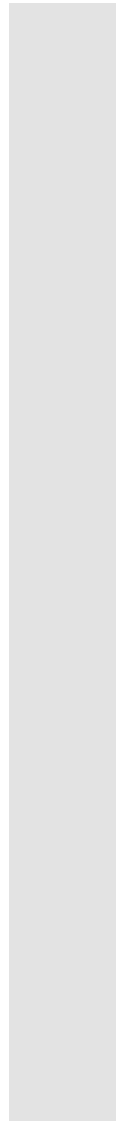
(b) A proposed regulation;

(c) The amendment or repeal of a prior regulation; and

(d) The general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.



## “General Applicability”

- Applies to the public in general or to all licensees.
  - Contains a mandatory requirement or standard that the agency will use.
  - Affects private rights or procedures available to the public.
- 

# “General Applicability” Case Law

- *Public Service Com’n of Nevada v. Southwest Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983).
  - If the rule affects other licensees and the public, as well as a general policy decision of the agency, it must be a regulation.
  - “Major policy concern” and “such significance to all licensees and consumers that it cannot be characterized as a simple adjudication in a contested case.” *Id.*
- *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986).
  - “An agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function.”
- *Dunning v. Nevada State Board of Physical Therapy Examiners*, Nevada Supreme Court Case No. 67322, filed May 26, 2016.
  - “[W]here an interpretive ruling affects other market participants, appears to be part of a general policy, and ‘is of such major policy concern and of such significance’ that it may be characterized as being of general applicability, the ruling is a regulation.” *Dunning*, at 4 quoting *State Farm Mut. Auto Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535, 543, 958 P.2d 733, 738 (1998)



## General vs. Specific

- Declaratory, decisional, advisory, and fact-specific interpretive rulings are NOT regulations. *Dunning*, at 4 citing NRS 233B.038(2)(b), (e), (f) and (h).
- It becomes “general” when the intent is that everyone must follow the ruling or interpretation.

## What ISN'T a "regulation"?

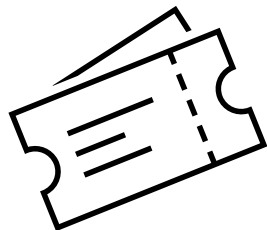
2. The term does not include:
  - (a) A statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
  - (b) A declaratory ruling;
  - (c) An intraagency memorandum;
  - (d) A manual of internal policies and procedures or audit procedures of an agency which is used solely to train or provide guidance to employees of the agency and which is not used as authority in a contested case to determine whether a person is in compliance with a federal or state statute or regulation;
  - (e) An agency decision or finding in a contested case;
  - (f) An advisory opinion issued by an agency that is not of general applicability;
  - (g) A published opinion of the Attorney General;
  - (h) An interpretation of an agency that has statutory authority to issue interpretations;
    - (i) Letters of approval, concurrence or disapproval issued in relation to a permit for a specific project or activity;
    - (j) A contract or agreement into which an agency has entered;
    - (k) The provisions of a federal law, regulation or guideline;
    - (l) An emergency action taken by an agency that is necessary to protect public health and safety;
    - (m) The application by an agency of a policy, interpretation, process or procedure to a person who has sufficient prior actual notice of the policy, interpretation, process or procedure to determine whether the person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest;
    - (n) A regulation concerning the use of public roads or facilities which is indicated to the public by means of signs, signals and other traffic-control devices that conform with the manual and specifications for a uniform system of official traffic-control devices adopted pursuant to [NRS 484A.430](#);
    - (o) The classification of wildlife or the designation of seasons for hunting, fishing or trapping by regulation of the Board of Wildlife Commissioners pursuant to the provisions of title 45 of NRS; or
    - (p) A technical bulletin prepared pursuant to [NRS 360.133](#).

## Also excluded...

- NRS 233B.039 further exempts:
  - The Governor
  - The Department of Corrections (in some but not all cases)
  - The Nevada System of Higher Education.
  - The Office of the Military.
  - The Nevada Gaming Control Board.
  - AND MORE!

Oh, one more  
thing....

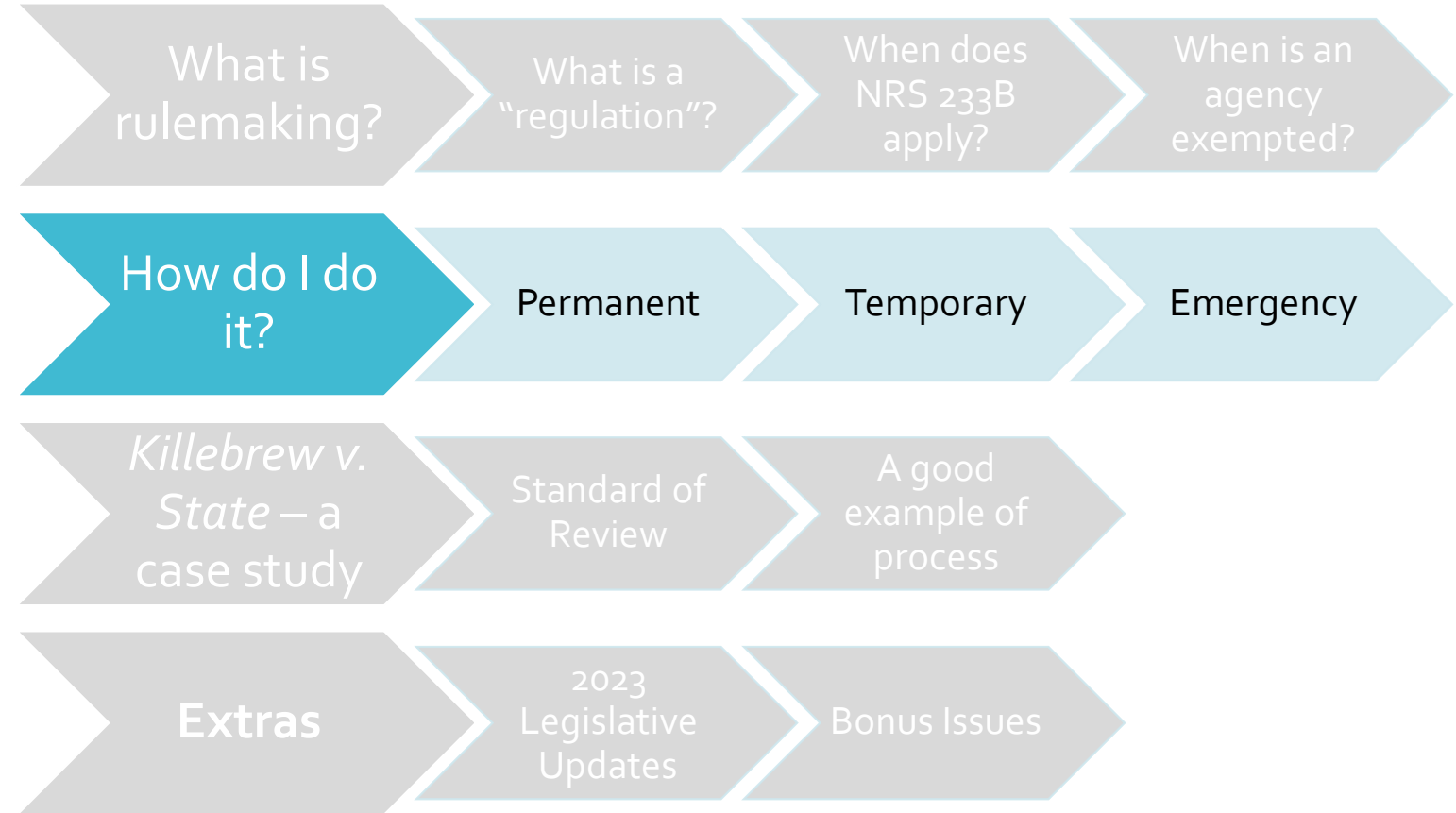
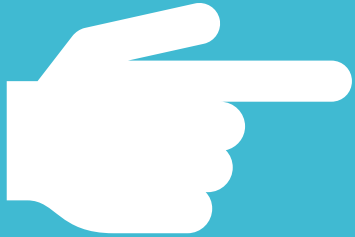
*Authority*



- An agency must be specifically authorized to pass regulations
- The enabling statute will set forth the agency's scope of authority relating to regulations
  - May be broad, e.g. NRS 385.080: State Board of Education is authorized to "...adopt regulations for its own government and as necessary for the execution of the powers and duties conferred upon it by law."
  - Or specific, e.g. NRS 441A.410: State Board of Health "shall adopt regulations governing the control of rabies" providing for "the periodic inoculation of animals . . ."



# Road Map:



# Permanent vs. Temporary:

*What day is it??*

## Permanent Regs

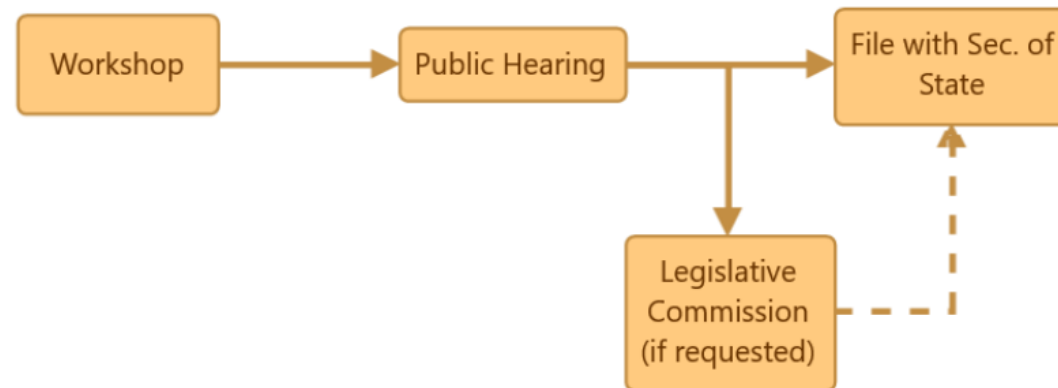
(Must submit between July 2 of an odd-numbered year and June 30 the following even-numbered year)



\*\*Order of Workshop and LCB Review can be reversed, based on agency discretion

## Temporary Regs

(May submit from August 1 of an even-numbered year to July 1 the following odd-numbered year. Valid through Nov. 1 of the odd-numbered year)



# Permanent Regs

*pages 7-9 AGO Administrative  
Rule Making Manual*

- Conduct survey of impact on small business
- Draft Small Business Impact Statement (NRS 233B.0609) and post at least 15 days before public workshop is held
- Post Notice of Workshop at least 15 days before workshop is held.
- Hold Workshop (comply with Open Meeting Law)
- Send agency draft to LCB
  - Email to [regulations@lcb.state.nv.us](mailto:regulations@lcb.state.nv.us)
  - This is the trigger that officially starts the rulemaking. NRS 233B.060
  - Regulation will be assigned an R#
- Post Notice of Intent to Act upon Regulation 30 days prior to public hearing
- Hold Public Hearing (comply with Open Meeting Law)
- Submit to LCB: agency approved regulations, an informational statement, the Form for Filing Administrative Regulations, and Notice of Adoption of Regulation
- Approval by Legislative Commission. If approved, LCB will file automatically with Secretary of State



# Temporary Regs

*pages 7-9 AGO Administrative  
Rule Making Manual*

- Conduct survey of impact on small business
- Draft Small Business Impact Statement (NRS 233B.0609) and post at least 15 days before public workshop is held
- Post Notice of Workshop at least 15 days before workshop is held.
- Hold Workshop (comply with Open Meeting Law)
- Post Notice of Intent to Act upon Regulation 30 days prior to public hearing
- Hold Public Hearing (comply with Open Meeting Law)
- No Legislative Commission, unless requested by a Legislator.
- File with Secretary of State, no sooner than 35 days after the date the temporary regulation was adopted.
- Within 10 days after filing with the Secretary of State, deliver stamped copy to the State Library, Archives and Public Records Administrator.
- Within 10 days after filing with the Secretary of State, deliver stamped copy with Joint Interim Standing Committee on Health and Human Services if agency is a licensing board and regulation is regarding issuance or renewal of licenses, permits, or certificates.
- Expires on November 1 of the odd year, permanent regulation must be adopted to continue.

# Small Business Impact Statements

NRS 233B.0608

"Show your work!"



- **Required!**
  - Agency must make a concerted effort to determine whether the regulation is likely to “[i]mpose a direct and significant economic burden upon a small business” or “[d]irectly restrict the formation, operation or expansion of a small business.” NRS 233B.0608(1).
- **Small business defined**
  - A business conducted for profit which employs fewer than 150 full-time or part-time employees.” NRS 233B.0382
- The agency must **prepare a statement** identifying the method used by the agency to determine small business impact. NRS 233B.0608(3).
- SBIS must contain information as outlined in NRS 233B.0609. See *Appendix H of AGO Rulemaking Manual*

# Legislative Commission

*Who are they?*

*What do they review?*



- The body that supervises LCB, and consists of 12 legislators, six from each house.
- **Final approval:**
  - Permanent regulation does not become effective until the Commission or Subcommittee approves the regulation and the LCB files the regulation with the Secretary of State. NRS 233B.0675.
  - \*\*Legislator may request to review temporary regulations. NRS 233B.0633.
- May object to regulation on one of the following grounds (NRS 233B.067(5)):
  - In the case of a regulation purportedly required by federal law, the regulation is not required by federal law;
  - The regulation does not conform to statutory authority;
  - The regulation does not carry out legislative intent; or
  - The agency did not provide a satisfactory explanation for the need for the regulation or the informational statement is insufficient or incomplete.
- If there is an objection, the agency must revise the regulation and return it to the LCB within 60 days.

# Emergency Regs

- Valid for 120 days only (no extensions)



- What constitutes an “emergency”?
  - ***“If an agency determines that an emergency exists, it shall submit to the Governor a written statement of the emergency which sets forth the reasons for the determination. If the Governor endorses the statement of the emergency by written endorsement at the end of the full text of the statement of emergency on the original copy of a proposed regulation, the regulation may be adopted and become effective immediately upon its being filed in the Office of the Secretary of State. . .”*** NRS 233B.0618



# Emergency Regs

- Reduces public comment. NRS 233B.0613
  - The agency shall, not later than 9 a.m. on the first working day before the date on which the emergency regulation is filed in the Office of the Secretary of State pursuant to subsection 3 of NRS 233B.070, make the emergency regulation available to the public by:
    - (a) Providing a copy of the emergency regulation to a member of the public upon request; and
    - (b) Making a copy of the emergency regulation available on its website on the Internet, if any.
  - If practicable, the agency shall, not later than 9 a.m. on the first working day before the date of any hearing at which the agency considers the emergency regulation, make the version of the proposed emergency regulation that will be considered at the hearing available to the public by:
    - (a) Providing a copy of the proposed emergency regulation to a member of the public upon request; and
    - (b) Making a copy of the proposed emergency regulation available on its website on the Internet, if any.

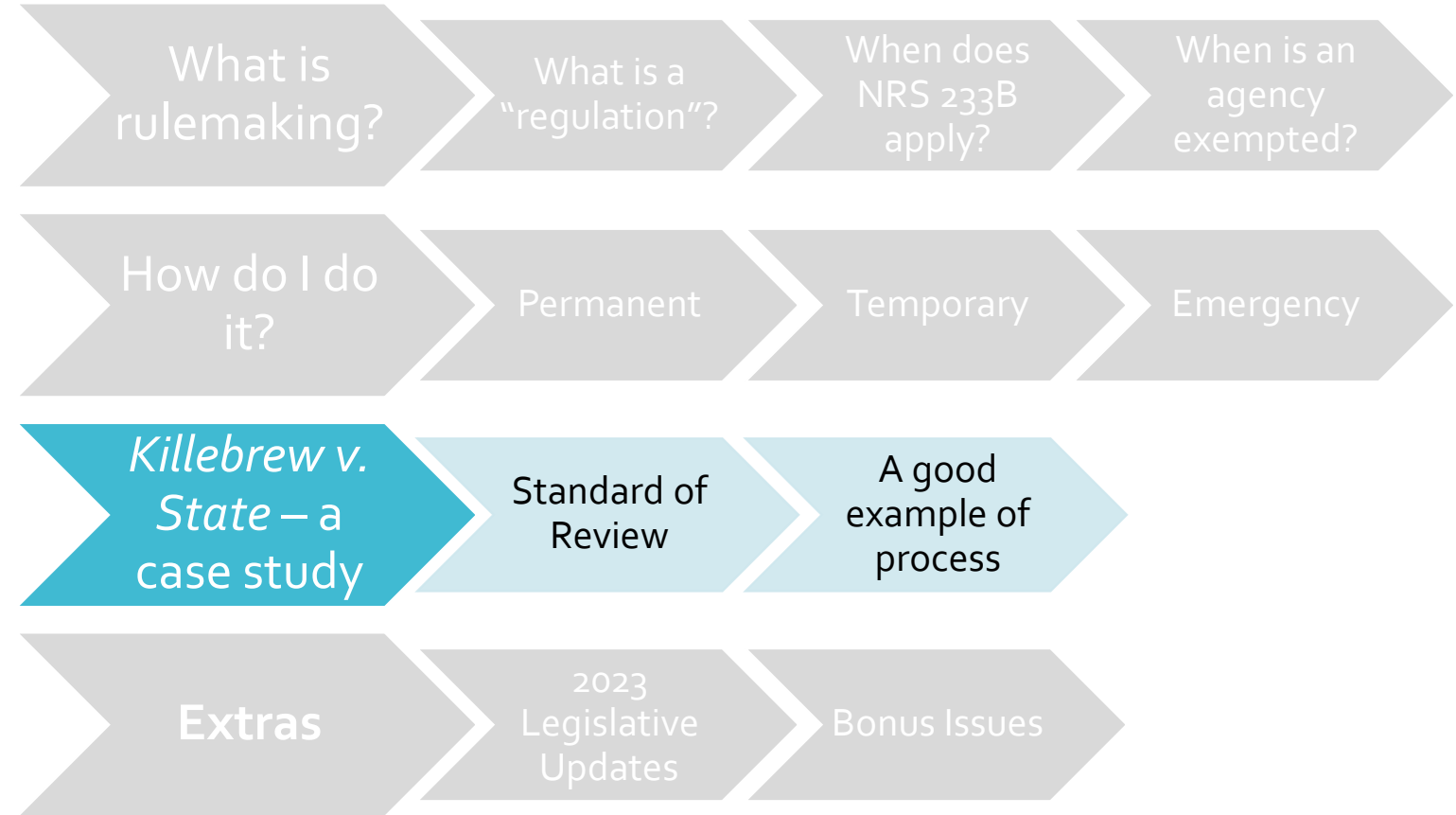
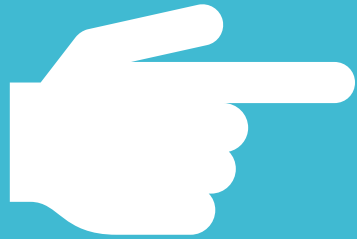


# Drafting Tips



- Start with subject matter experts (e.g. the agency!)
  - Use DAG for review and problem solving
  - LCB will do more thorough review and edit
- Cite to the enabling NRS.
- Include the whole section of NAC being amended; but not necessary to include the whole chapter
- *See also* Legislative Counsel's Preface, page 7-8 for section formatting.
- Check NRS 233B.062 and 220.125 for terms preferred and not preferred
  - Gender neutral language.
  - Refer to person before disability.
- For text formatting, look at State Register for examples
  - New language in *color*;
  - deleted language in ~~[strikethrough]~~
- Double check LCB draft to ensure it conveys intent
- Caution: Be wary of "wishing for three more wishes."

# Road Map:





*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*When a regulation is  
challenged.*

- Question: What is the standard of review for challenges to the validity of an agency's regulation (Div. of State Lands)?



*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Facts*

- In 2017, the Legislature amends NRS 322.120 to require the Registrar of the Div. of State Lands to establish the permit fee for piers and buoys by regulation.
  - The preamble of the bill stated “this fee schedule has not been modified since 1995” and that “the fees charged under this fee schedule are less than the fair market value for the use of state land and less than what other western states and agencies charge for comparable use.”
- Div. undertook rulemaking! In drafting the fee schedule, the Div. took into consideration five methodologies:
  - Historical review of statutory fees set in 1993
  - A comparative analysis of fees in other Western states;
  - An evaluation of fees charged by marinas and other businesses in NV adjacent states;
  - An in-house evaluation of method to estimate fair market value of piers on NV side;
  - An independent appraisal



*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Facts*

- The Div. also:
  - solicited specific public comment from stakeholders such as the Tahoe Lakefront Owners Association (one of the Appellants);
  - Provided individual notice to all permittees;
  - Posted at every Nevada library;
  - Advertised in newspapers;
  - Held five public workshops.
- In response to comments, Div. reduced its proposed fee schedule and phased in fee increases over time.
- The fee schedule was approved by the Legislative Commission as follows:
  - A uniform annual fee for residential use of piers at \$750 and buoys at \$250 (an increase of previously set fees of \$50 for piers and \$30 for buoys)

*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Appeal & Issue*

- Appellants own property in Nevada along the Lake Tahoe shoreline, and have piers or buoys on the lake.
- In March 2020, Appellants petitioned per NRS 233B.110 for a declaratory judgment that the fee-setting regulation was invalid.
- District Court granted summary judgment finding the regulation did not violate statutory or constitutional provisions and did not exceed the Division's statutory authority.
- Appellants appealed, arguing that the district court should have reviewed whether the regulation was "arbitrary or capricious."
- **Issue:** What is the standard of review for challenges to the validity of an agency's regulation (Div. of State Lands)?



*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Appeal & Issue*

- **Reminder (footnote 1)**: This is not a petition for judicial review, reviewing an agency's final decision.

*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Footnote 2*

- In order to remain within the authority provided by statute, an agency must articulate a basis or reason for the adoption of the challenged regulation that rationally relates to a reasonable interpretation of the agency's governing statutory authority.
  - See NRS 233B.040(1) - "To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law . . . . [This] power . . . is limited by the terms of the grant of authority pursuant to which the function was assigned."
  - *The Nev. Indep. v. Whitley*, 138 Nev. 122, 126, 506 P.3d 1037, 1.042 (2022) (stating that "regulations cannot contradict or conflict" with the statute they are intended to implement).
  - 73 C.J.S. Public Administrative Law and Procedure § 275 (2014) (noting that courts reviewing "whether a regulation that has been promulgated is consistent with the statutes" only defer when the agency's determination is reasonable and not arbitrary").



*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

"Arbitrary and  
capricious"  
standard?

- *State, Division of Insurance v. State Farm Mutual Automobile Insurance Co.*, 116 Nev. 290, -995 P.2d 482 (2000).
- *Romano. v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022)
- *Felton v. Douglas County*, 134 Nev. 34, 410 P.3d 991 (2018)
- *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 81 P.3d 516 (2003).

*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Standard*

- The standard for reviewing the validity of a regulation is outlined in NRS 233B.110(1), which states that "[t]he court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency."
- Holding #1: "we clarify that the standard for reviewing the validity of a regulation under NRS 233B.110 is that which is provided for in NRS 233B.110(1)-whether the regulation 'violates constitutional or statutory provisions or exceeds the statutory authority of agency.'"



*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Application of  
standard*

- NRS 322.100(1) provides that the fee charged for issuing a permit "for any lawful use of state land" be "in such an amount as the State Land Registrar determines to be reasonable based upon the fair market value of the use."
  - Appellants argue that the "reasonable based upon the fair market value of the use" language in NRS 322.100(1)(b) means that the fee must be based solely on the fair market value of the state-owned submerged land that a pier or buoy occupies, without regard to other factors. Further, a uniform fee cannot be based on fair market value.
- Holding #2: the Division did not exceed its statutory authority by referencing multiple methodologies.
  - The statutes do not identify a particular formula for calculating the fair market value of the use of piers and buoys on state land. And the Division employed a range of approaches to obtain varying estimates. The Division then determined a reasonable amount to charge for pier and buoy permits based on those varying estimates. All of this was done within the authority provided by NRS 322.100 and NRS 322.120.

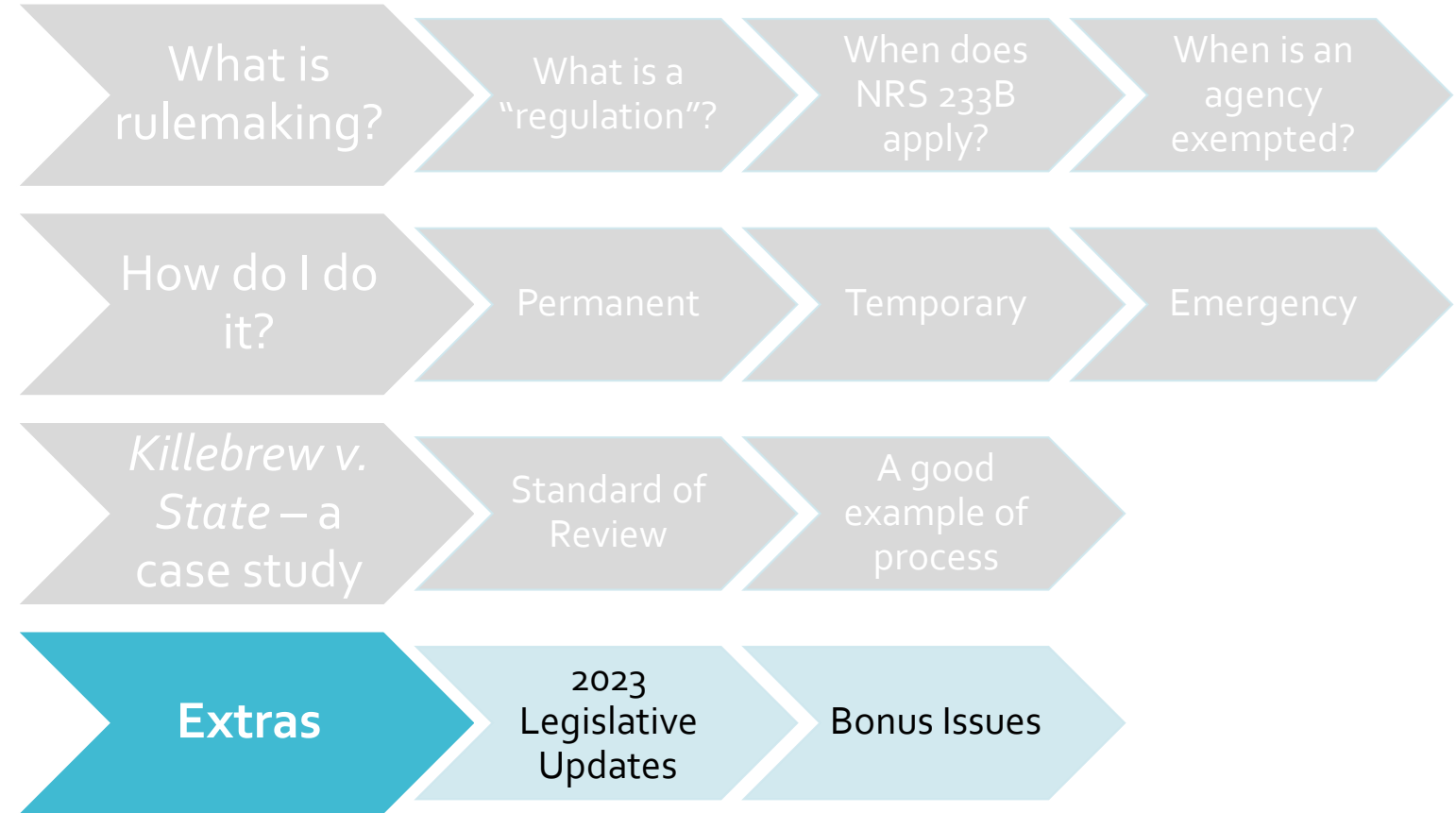
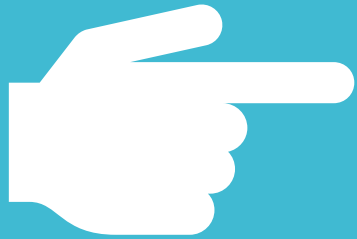


*Killebrew v. State*  
*139 Nev. Adv. Op. 43*  
*(2023)*

*Takeaways*

- Double check that enabling statute! Do you have authority to draft this regulation? Does it exceed that authority?
- Have you checked all the boxes? (And then some!)

# Road Map:



## Update: A.B. 219 (2023)



- Section 3 of AB 219 (2023) amends NRS 241.023 to include the following language:

*4. Notwithstanding the provisions of subsections 1, 2 and 3, a public body may not hold a meeting to consider a contested case, as defined in NRS 233B.032 or a regulation as defined in NRS 233B.038 by means of a remote technology system unless there is a physical location for the meeting where members of the general public are permitted to attend and participate.*

## Bonus Issues!

- What if a member of the public thinks an agency should adopt, amend or appeal a regulation? Can they prompt an agency to start the rulemaking process?

- *Yes!*

NRS 233B.100(1) provides “Any interested person may petition an agency requesting the adoption, filing, amendment or repeal of any regulation and shall accompany the petition with relevant data, views and arguments. Each agency shall prescribe by regulation the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such a petition, the agency shall within 30 days either deny the petition in writing, stating its reasons, or initiate regulation-making proceedings.”



## Bonus Issues!

- If I have adopted temporary regulations and am promulgating the exact same language as a permanent language, do I need to redo the SBIS and public workshop?

- **No!**

NRS 233B.060(2) provides “[e]xcept as otherwise provided in subsection 3, if an agency has adopted a temporary regulation after notice and the opportunity for a hearing as provided in this chapter, it may adopt, after providing a second notice and the opportunity for a hearing, a permanent regulation, but the language of the permanent regulation must first be approved or revised by the Legislative Counsel and the adopted regulation must be approved by the Legislative Commission or the Subcommittee to Review Regulations appointed pursuant to subsection 6 of NRS 233B.067.”





## Bonus Issues!



- Does the agency have to complete the rulemaking process in a certain amount of time?

- *Yes!*

NRS 233B.040(4) provides “An agency shall adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the Legislative Counsel pursuant to subsection 1 of NRS 233B.063. If an agency does not adopt a proposed regulation within the time prescribed by this subsection, the executive head of the agency shall appear personally before the Legislative Commission and explain why the proposed regulation has not been adopted.”

## Bonus Issues!

- If an agency is enabled to promulgate regulations, can they also set fees?
- *Sometimes! But only if there is also specific authority enabling the agency to set the fees through regulation.*



## Bonus Issues!

- Can an agency approve a draft regulation with changes not included in the LCB draft?
- ***Maybe! (But probably not)***
  - An Agency may change a proposed regulation and adopt it as changed as long as the changes are not substantive.
  - If the changes are substantive then the proposed regulation would need to be reviewed by LCB again and the adoption would be postponed, allowing the agency to re-notice the regulation and hold a new public hearing.





## Bonus Issues!

- Is an agency required to review its regulations periodically?
- **Yes!**
  - Per NRS 233B.050, an agency must “review its regulations at least once every 10 years to determine whether it should amend or repeal any of the regulations. Within 30 days after completion of the review, the agency shall submit a report to the Legislative Counsel for distribution to the next regular session of the Legislature. The report must include the date on which the agency completed its review of the regulations and describe any regulation that must be amended or repealed as a result of the review.”





Questions?