

Administrative Rulemaking in Nevada

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Before We Start: Some Important Resources

- ▶ Chapter 233B of the Nevada Revised Statutes
<https://www.leg.state.nv.us/nrs/nrs-233b.html#NRS233B>
- ▶ 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. 401 (2023)
<https://lands.nv.gov/news/killebrew-v-donohue>

Roadmap

- ▶ Part 1: What is a Regulation and what isn't
 - ▶ Laws, Regulations and Other
 - ▶ Exempt Entities
 - ▶ General Applicability
- ▶ Part 2: Creating Regulations
 - ▶ Permanent, Temporary, and Emergency
 - ▶ Workshops, Hearings and the Legislative Commission
- ▶ Part 3: Killebrew Case Study
 - ▶ How Many Years Does it Take to Go from an Idea to a Nevada Supreme Court Decision?
- ▶ Part 4: Final Thoughts

Part 1: What Is a Regulation and What Isn't

Laws, Regulations, and Other

- ▶ Laws are enacted by an elected legislature
 - ▶ The legislature cannot be expected to anticipate and address every issue that may arise in statute
 - ▶ So, the legislature may delegate rulemaking authority to agencies. When agencies exercise that delegated authority, the product is a regulation
 - ▶ Agencies need no authorization from the legislature to adopt a policy
- ▶ Agencies must have delegated authority from the Legislature to create a regulation
 - ▶ General Authority (for example NRS 385.080, ‘as necessary for the execution of the powers and duties conferred upon it by law)
 - ▶ Specific Authority (for example NRS 441A.410 ‘adopt regulations governing the control of rabies’)

Laws, *Regulations*, and Other

- ▶ A regulation is defined by NRS 233B.038(1)(a) as “[a]n 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.”
- ▶ “A properly adopted substantive rule establishes a standard of conduct **which has the force of law.**” *State ex rel. Tax Comm’n v. Safeway*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983). *See also* NRS 233B.040.
- ▶ NRS Chapter 233B sets forth the process for state agencies to adopt regulations.

Laws, Regulations, and *Other*

- ▶ Not every action an agency takes must go through the administrative rule making process.
- ▶ Many Specifically exempted items in [NRS 233B.038\(2\)](#)
 - ▶ A manual of internal policies and procedures ... of an agency which is used solely to train or provide guidance to employees of the agency and ... not used as authority in a contested case to determine whether a person is in compliance with a federal or state statute or regulation;
 - ▶ A statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
 - ▶ An agency decision or finding in a contested case;
 - ▶ An advisory opinion issued by an agency that is not of general applicability;
 - ▶ A contract or agreement into which an agency has entered
- ▶ Common theme for what makes a regulation: **General applicability.**

Exempt Entities

- ▶ NRS 233B.039 Exempts certain agencies
 - ▶ 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 (in some cases).

AND MORE!

General Applicability

- ▶ When a rule will be applied to the public and effectuates or interprets law or policy-Regulation
 - ▶ Often contains a mandatory requirement
 - ▶ Affects private rights or procedures of the public
 - ▶ Applies to the general public or some subset thereof
- ▶ When a ruling applies to a specific set of facts before it-Not a Regulation
 - ▶ Also when it applies only to internal policies/procedures
 - ▶ State Farm Mutual V. Commissioner of Insurance 114 Nev. 535, 544 (1998)

General Applicability Examples

- ▶ *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)

What happens if we're wrong?

- ▶ If you try to put something into a regulation that you lack authority for, or conflicts with state law, LCB may reject it
 - ▶ Or it might get challenged in court under NRS 233.110
- ▶ If you don't put something into regulation that should've been there, a court will determine that the agency has engaged in improper rulemaking and will interpret the statute on its own without considering the improperly adopted rule.

Part 2: Creating Regulations

How do we make some Regulations?

- ▶ First, do you have authority from the Legislature?
- ▶ Second, understand the process is long and slow with 2 primary aims
 - ▶ Maximize the opportunity for public comment
 - ▶ Ensure permanent regulations do not conflict with existing laws
- ▶ Three types of Regulations
 - ▶ Permanent (NRS 233B.061)
 - ▶ Temporary (NRS 233B.063(3))
 - ▶ Emergency (NRS 233B.0613)

Emergency Regulations (NRS 233B.0613)

- ▶ Very rarely used
 - ▶ None adopted in 2025, only 6 since 2021
 - ▶ Agency submits a request to the Governor which he may endorse or reject
 - ▶ Requires a state of emergency in addition to regulatory text
 - ▶ Only exists for 120 days
 - ▶ Require an emergency (life, health, safety)
 - ▶ Public Notice requirements in 233B.0613(2) and (3)
- ▶ Start Temporary or Permanent Regulation Process Simultaneous with the E-reg Adoption

Temporary Regulations (NRS 233B.063(3))

- ▶ Only available between August 1 of an even numbered year and July 1 of the next odd numbered year.
- ▶ Expire automatically on November 1 of the next odd numbered year (identical permanent regulation may be adopted).
- ▶ Process identical to the Permanent regulation process, but no submission of language to LCB.

Temporary Regulation Checklist

- ▶ 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.

Permanent Regulations (NRS 233B.061)

- ▶ Multi-step process with several requirements
 - ▶ Submission to LCB for language
 - ▶ Workshop
 - ▶ Public Hearing
 - ▶ Final review by Legislative Committee
- ▶ Timeline For Adoption
 - ▶ Language from LCB (at least 30 days)
 - ▶ Workshop (at least 15 Days)
 - ▶ Public Hearing (at least 30 days)
 - ▶ Legislative Committee (usually every 2/3 months)

Permanent Regulation Checklist

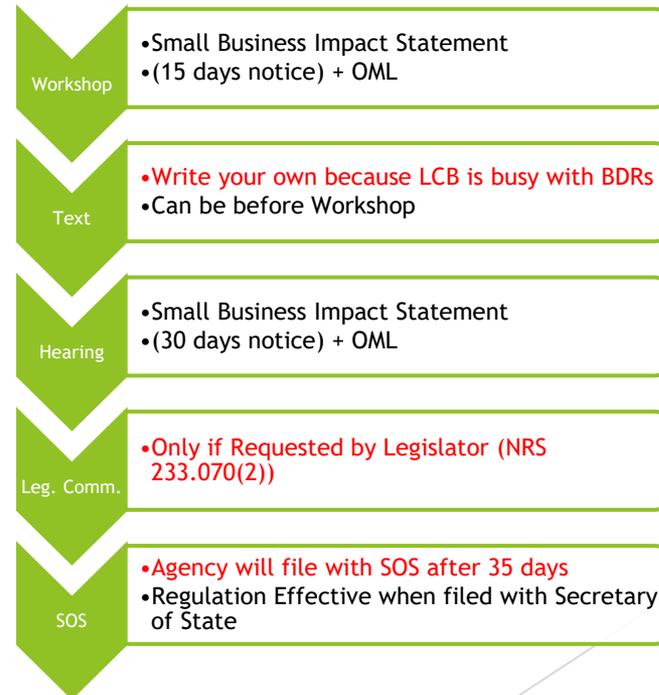
- ▶ Conduct survey of impact on small business
- ▶ Draft Small Business Impact Statement (NRS 233B.0609) and post at least 15 days before public workshop is held
- ▶ Post Notice of Workshop at least 15 days before workshop is held.
- ▶ Hold Workshop (comply with Open Meeting Law)
 - ▶ Send agency draft to LCB Email to regulations@lcb.state.nv.us
 - ▶ 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 vs. Permanent Regulations Comparison

Permanent



Temporary



Submission to LCB

- ▶ Permanent Regulations must be submitted to LCB for official language.
- ▶ The LCB will deliver the approved language within 30 days of a request (NRS 233B.063(2))
 - ▶ Sometimes this can be extended if there are questions or clarifications regarding the draft that is submitted to the drafters
- ▶ Language not needed for workshop, but is needed for public hearing

Workshops

- ▶ Specific Notice Requirements (NRS 233B.0608)
 - ▶ Must post notice 15 days before workshop
 - ▶ Do not need LCB language
 - ▶ Form in AG manual, cite NAC's to be changed if possible
 - ▶ Cannot have workshop on the same day as a public hearing
 - ▶ Must post notice, small business impact statement
 - ▶ Must follow open meeting law procedures (chapter 241) and take public comment
 - ▶ Can have more than 1 if necessary
 - ▶ No workshop required before the second or subsequent public hearing (NRS 233B.061(2))

Public Hearings

▶ Specific Notice Requirements

- ▶ Approved text must come from LCB prior to posting the notice of intended action
- ▶ 30 Days Posting (NRS 233B.060) of intended action
- ▶ Notice must be on required form (NAC 233B.010)
- ▶ Must follow open meeting law procedures and take public comment
- ▶ Must have approved language from LCB, though some (non substantive) modification is allowable at the hearing

Public Hearings

- ▶ Read your language multiple times to make sure it says what you want it to.
- ▶ Ask a coworker in a different department to read it too
- ▶ “The agency shall consider fully all written and oral submissions respecting the proposed regulation.” NRS 233B.061
- ▶ Be prepared to speak regarding opposition from those who oppose the regulation. Record should reflect all submissions have been considered

Final Legislative Commission Review

- ▶ After approval at a public hearing the Regulation is submitted to LCB for Legislative Commission Review (233B.067(1))
 - ▶ Leg. Comm. can reject or approve a regulation
 - ▶ If rejected it does not become a regulation, but the agency may request a written explanation
 - ▶ If rejected the agency can move to another public hearing without a workshop but should address whatever concerns the Legislative Commission raised.
 - ▶ If accepted it is filed with the Secretary of State. At which time it becomes effective.

Legislative Commission Preparation

- ▶ Be prepared to explain the need for your regulation to the legislators and address any questions constituents may have raised to them and to you
- ▶ Be prepared to explain the need for the regulation
- ▶ Be prepared to explain policy choices that were made and why the regulation reflects good policy
- ▶ Questions are often unexpected so be familiar with your entire regulation (even the non-controversial portions)

Part 3: Killebrew, A Case Study

Killebrew v. State of Nevada, 139 Nev. 401 (2023)

- ▶ 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 of Nevada (Prior to Adoption)

- ▶ 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 of Nevada (Regulation Challenged)

- ▶ Appellants owned 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 of Nevada (Final Decision, 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 of Nevada

(Final Decision)

- ▶ 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.” we clarify that the
- ▶ Holding #1: “The standard for reviewing the validity of a regulation is outlined in NRS 233B.110(1)-which states ‘the court shall declare the regulation invalid if it finds that it ‘violates constitutional or statutory provisions or exceeds the statutory authority of agency.’”
- ▶ 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.
- ▶ “There is no room for us to read arbitrary and capricious review into the standard provided by the statute.

Part 4: Final Thoughts

Other things to be aware of

- ▶ 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.”

Other things to be aware of

- ▶ 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.”

With Great Power, Comes Great Responsibility

- ▶ 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? (and CLE Credit)

CLE Certifying Attendance for
Credit Form - Administrative
Rulemaking

