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Division of Environmental Protection
Division of Water Resources
Division of Forestry
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Division of State Lands

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DOMINIQUE ETCHEGOYHEN
Deputy Directors

State Historic Preservation Office
Nevada Natural Heritage Program
Conservation Districts Program
Sagebrush Ecosystem Program
Off-Highway Vehicles Program

Office of the Director
901 S. Stewart Street, Suite 1003/Carson City, Nevada 89701
Phone: 775.684.2700/Fax: 775.684.2715
www.dcnr.nv.gov

October 10, 2018

To: Sagebrush Ecosystem Council

From: Jim Lawrence, Deputy Director
Department of Conservation and Natural Resources

Subject: Authority to Adopt Regulations Regarding Use of the Conservation Credit System
and Compensatory Mitigation

Background:

The Bureau of Land Management (BLM) issued Instructional Memorandum (IM) 2018-093 stipulating that the BLM cannot require compensatory mitigation. In a separate "question and answer" document that the BLM released on the same day as the IM, it was further clarified that offsite compensatory mitigation is appropriate under the following conditions:

- When it is voluntarily offered by a project proponent, and/or when it is legally required by a third party, such as a State government; or
- If asked by the project proponent, the BLM may identify voluntary compensatory mitigation opportunities to address impacts of the project proposal.

At the August 30, 2018 Sagebrush Ecosystem Council (SEC) meeting, BLM staff further clarified that it was their understanding that whatever the State requires for mitigation on state-owned or private land can meet as being "legally required". The SEC requested staff to explore whether regulatory authority exists for any state agency to adopt regulations for the CCS to be used as required mitigation.

Existing State Laws:

Mitigation for Greater Sage-grouse habitat disturbances is found in two separate chapters/sections in Nevada Revised Statutes. They are NRS 232.162 and NRS 321.594.

NRS 232.162 creates the Governor appointed Sagebrush Ecosystem Council in the Department of Conservation and Natural Resources (DCNR). NRS 232.162 7(b)(1) requires the Council to “establish and carry out strategies for the conservation of the greater sage grouse and sagebrush ecosystems”. NRS 232.162 7(e) further requires the Council to “establish a program to mitigate damage to sagebrush ecosystems in this State by authorizing a system that awards credits to persons, federal and state agencies, local governments and non-profit organizations to protect, enhance or restore sagebrush ecosystems”.

The Council unanimously adopted the CCS in December 2014 therefore meeting the statutory requirements of NRS 232.162 7(e). In 2014, the Council also unanimously adopted the 2014 Nevada Greater Sage-Grouse Conservation Plan. A foundation of this plan is utilization of the CCS to mitigate anthropogenic disturbances.

Further NRS 321.594 2(a) requires the Administrator of the Division of State Lands to “oversee and administer a program to mitigate damage to sagebrush ecosystems through a system that awards credits.....to protect, enhance or restore sagebrush ecosystems established by the Sagebrush Ecosystem Council created by NRS 232.162.” To carry out this provision, an inter-agency team (SETT) has been established to carry out the state conservation plan as well as the CCS, including managing the associated CCS manual and habitat quantification tool.

Given the provisions of NRS 232.162 and NRS 321.594, an argument can be made that Nevada has mitigation requirements that meets the test of IM 2018-093 regarding that a state has a legal requirement for compensatory mitigation.

Authority to adopt regulations:

While state requirements for the development of a mitigation program are clearly outlined in NRS 232 and NRS 321, the adoption of regulations to carry out the program have not been established. This is primarily because it was deemed unnecessary given the current NRS chapters, the state conservation plan and the adoption of the CCS manual and Habitat Quantification Tool. However, if it is determined necessary and desirable to adopt specific regulations in order to meet IM 2018-093, both the SEC and the Division of State Lands have the authority to adopt regulations. The authority for the Council is found in NRS 232.162 6(a) and the authority for the Division of State Lands is found in NRS 321.594 3(e).

Sagebrush Ecosystem Council NRS 232.162

The following is statutory language related to the SEC. Although the statutes provide the SEC authority to adopt regulations, the language is specific to the management and operation of the Council and does not mention regulations regarding mitigation. However, the statutes also state that responsibilities of the SEC, among other responsibilities, is to establish and carry out a long term system for carrying out strategies to manage sagebrush ecosystems, oversee the technical team, and establish a mitigation program.

NRS 232.162 Sagebrush Ecosystem Council: Creation; members; terms; vacancies; compensation; powers and duties; biannual report to Governor.

1. The Sagebrush Ecosystem Council is hereby created in the Department. The Council consists of:
 - (a) The following nine voting members appointed by the Governor:
 - (1) One member who represents agricultural interests;
 - (2) One member who represents the energy industry;

- (3) One member who represents the general public;
 - (4) One member who represents conservation and environmental interests;
 - (5) One member who represents mining interests;
 - (6) One member who represents ranching interests;
 - (7) One member who represents local government;
 - (8) One member who acts as a liaison for Native American tribes; and
 - (9) One member of the Board of Wildlife Commissioners or his or her designee.
- (b) In addition to the members appointed pursuant to paragraph (a), the following nonvoting members:
- (1) The Director of the State Department of Conservation and Natural Resources;
 - (2) The Director of the Department of Wildlife;
 - (3) The Director of the State Department of Agriculture;
 - (4) The State Director of the Nevada State Office of the Bureau of Land Management;
 - (5) The State Supervisor of the Nevada State Office of the United States Fish and Wildlife Service;
 - (6) The Forest Supervisor for the Humboldt-Toiyabe National Forest; and
 - (7) Any other members appointed by the Governor as nonvoting members.
2. The provisions of subsection 6 of [NRS 232A.020](#) do not apply to the appointment by the Governor of the members of the Council.
3. After the initial terms, each member of the Council appointed pursuant to subparagraphs (1) to (8), inclusive, of paragraph (a) of subsection 1 and subparagraph (7) of paragraph (b) of subsection 1 serves a term of 4 years, commencing on July 1.
4. A vacancy in the membership of the Council must be filled in the same manner as the original appointment for the remainder of the unexpired term. A member may be reappointed.
5. While engaged in the business of the Council, each voting member is entitled to receive a salary of not more than \$80 per day, as established by the Council, and the per diem allowance and travel expenses provided for state officers and employees generally.
6. The Council may:
- (a) Adopt regulations to govern the management and operation of the Council;
 - (b) Establish subcommittees consisting of members of the Council to assist the Council in the performance of its duties; and
 - (c) Consider and require the recovery of costs related to activities prescribed by paragraph (d) of subsection 2 of [NRS 321.594](#) pursuant to [NRS 701.600](#) to [701.640](#), inclusive, or any other authorized method of recovering those costs.
7. The Council shall:
- (a) Consider the best science available in its determinations regarding and conservation of the greater sage grouse (*Centrocercus urophasianus*) and sagebrush ecosystems in this State;
 - (b) Establish and carry out strategies for:
 - (1) The conservation of the greater sage grouse and sagebrush ecosystems in this State; and
 - (2) Managing land which includes those sagebrush ecosystems, taking into consideration the importance of those sagebrush ecosystems and the interests of the State;
 - (c) Establish and carry out a long-term system for carrying out strategies to manage sagebrush ecosystems in this State using an adaptive management framework and providing for input from interested persons and governmental entities;
 - (d) Oversee any team within the Division of State Lands of the Department which provides technical services concerning sagebrush ecosystems;
 - (e) Establish a program to mitigate damage to sagebrush ecosystems in this State by authorizing a system that awards credits to persons, federal and state agencies, local governments and nonprofit organizations to protect, enhance or restore sagebrush ecosystems;
 - (f) Solicit suggestions and information and, if necessary, prioritize projects concerning the enhancement of the landscape, the restoration of habitat, the reduction of nonnative grasses and plants and the mitigation of damage to or the expansion of scientific knowledge of sagebrush ecosystems;
 - (g) If requested, provide advice for the resolution of any conflict concerning the management of the greater sage grouse or a sagebrush ecosystem in this State;
 - (h) Coordinate and facilitate discussion among persons, federal and state agencies and local governments concerning the maintenance of sagebrush ecosystems and the conservation of the greater sage grouse;
 - (i) Provide information and advice to persons, federal and state agencies and local governments concerning any strategy, system, program or project carried out pursuant to this section or [NRS 321.592](#) or [321.594](#); and

(j) Provide direction to state agencies concerning any strategy, system, program or project carried out pursuant to this section or [NRS 321.592](#) or [321.594](#) and resolve any conflict with any direction given by another state board, commission or department jointly with that board, commission or department, as applicable.

8. On or before June 30 and December 31 of each year, the Council shall submit a written report to the Governor. The report must include, without limitation:

(a) Information concerning the overall health and population of the greater sage grouse within this State and in the United States and the overall health of sagebrush ecosystems within this State, including, without limitation, information concerning any threats to the population of sage grouse and any sagebrush ecosystems within this State;

(b) Information concerning all strategies, systems, programs and projects carried out pursuant to this section and [NRS 321.592](#) and [321.594](#), including, without limitation, information concerning the costs, sources of funding and results of those strategies, systems, programs and projects; and

(c) Any other information specified by the Council.

(Added to NRS by [2013, 3383](#))

Division of State Lands (SETT) - NRS 321.594

The following is statutory language pertaining to the SETT. The statutes require the SETT to oversee and administer a mitigation program as established by the SEC. NRS 321.594 3(e) provide that the Division of State Lands may adopt any regulations to carry out the provisions of this NRS section.

NRS 321.594 Powers and duties of Administrator and Division regarding programs to improve sagebrush ecosystems; Division authorized to make certain grants and enter into certain contracts and agreements; regulations.

1. The Administrator of the Division shall coordinate the establishment and carrying out of a program of projects to improve sagebrush ecosystems in this State. The Division shall cooperate, without limitation, with:

(a) The Department of Wildlife;

(b) The State Department of Agriculture; and

(c) The Division of Forestry of the State Department of Conservation and Natural Resources.

2. In carrying out the program described in subsection 1, the Division, on behalf of the Director of the State Department of Conservation and Natural Resources, shall:

(a) **Oversee and administer a program to mitigate damage to sagebrush ecosystems through a system that awards credits to persons, federal and state agencies, local governments and nonprofit organizations who take measures to protect, enhance or restore sagebrush ecosystems established by the Sagebrush Ecosystem Council created by [NRS 232.162](#);**

(b) Identify and, if necessary, prioritize any projects concerning the enhancement of the landscape, the restoration of habitat, the reduction of any nonnative grasses and plants and the mitigation of damage to or the expansion of scientific knowledge of sagebrush ecosystems;

(c) Coordinate activities with federal agencies;

(d) If requested, consult with persons proposing to conduct activities in any area which includes any habitat of the greater sage grouse (*Centrocercus urophasianus*) to suggest measures to avoid, minimize or mitigate the effect of the activities on any sagebrush ecosystem;

(e) Solicit grants and private contributions for projects to improve sagebrush ecosystems; and

(f) On or before August 1 of each year, submit a report to the Sagebrush Ecosystem Council created by [NRS 232.162](#). The report must include, without limitation:

(1) A description of each project conducted or planned to be conducted pursuant to the program described in subsection 1, including the cost, source of funding and, for projects that have been carried out, the results of the project;

(2) A description of any agreement between the Division and any person, federal or state agency, local government or nonprofit organization, including the purpose and provisions of the agreement;

(3) A list of all grants and private contributions solicited and all grants awarded to further the purposes of the program;

(4) A description of any significant activities conducted in any area which includes habitat of the greater sage grouse and all measures adopted to avoid, minimize or mitigate the effect of the activities on any sagebrush ecosystem; and

(5) Any other information specified by the Division or requested by the Council.

3. The Division may:

(a) Enter into any agreement with a person, federal or state agency, local government or nonprofit organization to further the preservation, restoration and enhancement of sagebrush ecosystems on public land or on privately owned land with the consent of the owner of the land;

(b) In accordance with subsection 3 of [NRS 321.001](#), acquire and hold land and any interest in land or water required to carry out the program described in subsection 1;

(c) Sell or lease land and any interest in land or water that the Division determines is no longer necessary to carry out the program described in subsection 1;

(d) Within the limits of available money, award grants of money to other state agencies, local governments and nonprofit organizations to carry out the program described in subsection 1;

(e) Adopt any regulations to carry out the provisions of this section; and

(f) Conduct any other activities specified by the Division to carry out the program described in subsection 1.

4. The proceeds from the sale or lease of land or of any interest in land or water pursuant to paragraph (c) of subsection 3 must be deposited in the Account to Restore the Sagebrush Ecosystem created by [NRS 232.161](#).

(Added to NRS by [2013, 3382](#))

Nevada rulemaking process specifies that any regulations adopted between August 1 of an even-numbered year and November 1 of an odd-numbered year may only be adopted as temporary regulations. The adoption of temporary regulations requires at least one public workshop and an adoption hearing. The workshop requires a 15 day public notice and the adoption hearing requires a 30 day public notice. After the adoption hearing, the regulation becomes effective once filed with the Secretary of State (but no sooner than 35 days). As such, the minimum time necessary to adopt regulations is 80 days.

Any regulations should specify conditions for which use of the CCS is required (e.g. project location, type of project etc.) as well as regulatory review process. The regulatory review process should include the Sagebrush Ecosystem Technical Team as well as the Sagebrush Ecosystem Council.

Statutory Amendment:

As stated above, the requirement of a mitigation program for Greater Sage-grouse already exists in NRS. In lieu of, or in addition to, adopting regulations requiring the use of the CCS as mitigation for anthropogenic disturbances, NRS 232 and NRS 321 could also be amended to require use of the CCS as compensatory mitigation. The most expeditious path for this option would be to have a bill introduced in the upcoming 2019 legislative session, otherwise the next opportunity for a statutory change will be in 2021.

Executive Order:

Prior to the adoption of statutory language, the Sagebrush Ecosystem Council was first established through Executive Order (EO). Executive Order 2012-19 was issued by Governor Sandoval in November of 2012. This EO established the council and listed, among other duties, that the council was responsible for establishing “a mitigation banking & credit program for sagebrush ecosystems, tailored specifically to the needs of the Greater Sage-grouse”. The SEC and responsibilities were placed in statutes the following year during the 2013 legislative session.

Similarly, Montana issued an EO regarding their Greater Sage-grouse program that was followed by the adoption of statutory language. The Montana EO established their program structure, program funding and mitigation requirements. The following is in the Montana EO as it pertains to mitigation:

“Montana Sage Grouse Oversight Team shall oversee and approve development of a program that provides for appropriate mitigation, including compensatory mitigations (financial, off-set, or off-site). All new land uses or activities that are subject to state agency review, approval, or authorization shall follow the sequencing provisions required herein (avoid, minimize, reclaim, compensate as appropriate). Mitigation shall be required even if the adverse impacts to sage grouse are indirect or temporary. A variety of mitigation tools may be used, including conservation banks, habitat exchanges, and approved conservation plans”.

The SEC could recommend to the Governor’s Office that an EO, similar to Montana, be issued for Nevada’s program clarifying mitigation and use of the CCS as it pertains to anthropogenic disturbances on state owned or managed lands.

Summary

The requirement for the establishment of a compensatory mitigation program pertaining to Greater Sage-grouse currently resides in Nevada law (NRS 232.162 and NRS 321.594). If additional requirements are needed or desired, there are several different options:

1. Both the SEC and the SETT have statutory authority to adopt regulations;
2. NRS could be amended as there is an opportunity with the upcoming legislative session; or
3. An Executive Order could be utilized similar to Montana.