STATE OF NEVADA
**SAGEBRUSH ECOSYSTEM COUNCIL**
201 South Roop Street, Suite 101
Carson City, Nevada 89701-5247
Phone (775) 684-8600 - Fax (775) 684-8604

# MITIGATION REGULATIONS HEARING MINUTES

**Date:** **Tuesday, March 19th, 2019**
**Time:** **8:30 a.m.**
**Place:** **Department of Conservation and Natural Resources Building – PEBP Room**
**901 South Stewart Street, Carson City, NV 89701**

---

**Council Member Present**: JJ Goicoechea, Chris MacKenzie, Allen Biaggi, Bevan Lister, Sherman Swanson, William Molini, John Raby, Meghan Brown for Jennifer Ott, Jim Lawrence for Brad Crowell, Carolyn Swed, Ray Dotson, Cheva Gabor for Bill Dunkelberger, Tony Wasley, Craig Burkett.

**Council Members Absent**: Starla Lacy.

## 1. OPEN HEARING, INTRODUCTION

Chairman Goicoechea opened the hearing at 8:50 AM.

## 2. PUBLIC COMMENT

Shane Hall representing Crawford Cattle expressed support for the proposed regulation to funnel projects through the Sagebrush Ecosystem Program. Mr. Hall commented that if there are ways for projects to go around the system the viability of the system will not be long term. Mr. Hall also expressed the desire for penalties to project proponents for purchasing credits not in the immediate area to remain in place as many landowners signed up for the program under that understanding. Without a requirement to require mitigation the program will not go forward.

## 3. PRESENTATIONS AND DISCUSSION OF PROPOSED REGULATION

Mr. McGowan gave a presentation available on the Sagebrush Ecosystem Program website outlining the authorities, history, purpose, and content for the regulation. Proposed changes made in response to comments received by the SETT were reviewed. Member Biaggi asked if certain comments that had been submitted were rejected. Mr. McGowan responded no, the comments were not rejected, but that the first review of changes to the regulations were minor changes anticipated to result in little to no discussion submitted by multiple groups. Mr. McGowan pointed out various changes made to the draft regulation. Chairman Goicoechea asked for comment on the changes proposed by Mr. McGowan. Member Biaggi asked if the council was voting on the changes that had been presented. Chairman Goicoechea answered that he would like to, and then go back and address other changes. Member Biaggi would like to review some of the proposed changes because some wording offered by way of comment by the mining industry were not incorporated in the document.

Member Biaggi offered wording changes in section 3 of the regulation. Member Biaggi asked for the wording “Where Feasible” be added in the “Avoid” and “Minimize” definitions, and that “Project Proposal” be used instead of “Plan.” Mr. Wasley asked for clarification of the phrase “where feasible,” given that feasibility is subjective and why “Project Proposal” was suggested instead of “Plan.” Member Biaggi discussed that project proposal is a better descriptor.

Chairman Goicoechea also offered that Project Proposal would apply more readily to multiple industries. Mr. Wasley mentioned that a plan is a concrete document, where a proposal may change through time and be dynamic. Member Lister mentioned that plan of operation is a specific term used in the mining industry and may cause confusion. The term used needs to be broad. Member Molini did not have a concern with project proposal but did have a problem with "where feasible." Member Molini felt that feasibility is in the eye of the beholder.

Chairman Goicoechea asked Mr. Raby of the use of project proposal vs. plan mattered to the BLM? Mr. Raby answered that project proposal would be more inclusive and would include a broader range of activities. Authorized actions are preceded by proposals so the proposed language is not problematic for the BLM. Mr. Wasley indicated that if the BLM was ok with it then NDOW was ok with it. Chairman Goicoechea moved back to the "where feasible" discussion. Member Biaggi wanted this addition to add recognition of other alternatives that might be available, and flexibility in the regulation. Member Swanson added that he thought feasible would be soft in terms of how hard the regulations are in light of alternatives that are CCS related vs. something else. Member Molini asked who would determine feasibility. Member Molini expressed that this would provide a point of contention and argument and that it provided to much wiggle room. Member Molini thought that requiring actions would be realistic and that if things were not truly feasible the SETT or the Council would require it anyway. Member Molini felt that it allowed too much wiggle room. Chairman Goicoechea was looking through the definitions in the state plan to find something to reference. Mr. Lawrence commented that one of the goals of the regulations is that they would be in complete alignment with the state plan. Mr. Lawrence recalled a robust discussion relating to this question particularly relating to avoidance. There would be times where it would not be realistic to expect avoidance so language was put in the conservation plan on page 13 under "Avoid," the third paragraph. Reasonably accomplished is used in the state plan. This question is related to a larger process called "Avoid, Minimize, and Mitigate." Just because it might not be feasible to avoid, does not mean that Minimize and Mitigation are not implemented. If an activity is too costly to avoid, it might mean that it is not feasible at that point to avoid the action, but that does not mean that Minimization and Mitigation are not still required. Member MacKenzie mentioned that he could not find where "Avoid" was used in the regulation. Member Swanson mentioned that the term "avoid" is used in terms of the intent to avoid, but does not require that avoidance. The intent of the program is to avoid where possible by the cost of doing business in habitat would be higher than the cost of doing business elsewhere. Member Swanson felt that there was no need to modify the definition, but that there is no real authority in a definition, just a description of the intent. Chairman Goicoechea asked if "Avoid" could be referenced as contained in the State Plan, and those definitions are already adopted. Member MacKenzie asked if the definition of "avoid" could be located within a "avoid and minimize process" instead of having each separately defined? Member MacKenzie thought that avoidance and minimization would be better represented as a connected concept rather than separate and distinct and reference to the state plan might be better. Chairman Goicoechea mentioned that if the state plan is referenced, the regulation would not need to be changed every time the state plan was changed. Mr. Lawrence brought up that there is not specific definitions for minimize and avoid and mitigate in the definitions section, however in chapter 3.1.2 conservation policies describe the whole "Avoid, Minimize, and Mitigate" process and that the regulations would need to be drafted to reference the whole process rather than the definitions. Member Biaggi offered the suggestion in the mitigation definition to add the words "when impacts cannot be avoided" rather than "when impacts are not avoided."

Other minor wording changes were offered by member Biaggi. Mr. Wasley offered a comment about whether mitigation being done in response to when impacts can or cannot be avoided is not really relevant, the issue is when impacts are not avoided. Whether they can or cannot be avoided, the issue is whether they are or aren't. Perhaps they can be avoided, but aren't. Member Biaggi responded that there was not anything policy-wise, it was a suggestion based in clarity of language. Mr. Wasley mentioned that it could be interpreted narrowly to avoid the mitigation definition. It creates uncertainty in the definition. It creates an opportunity for debate. Member Biaggi offered that he was not committed to the wording changes. Mr. Wasley mentioned that the wording "are not" is broader than "cannot." The word "Certain" was not required by Member Biaggi either. Chairman Goicoechea asked if other comments would be offered, and if other comments received via letter had been incorporated? Mr. McGowan answered that all other minor changes requested had been made, but that other major changes can be addressed from this point forward. Mr. McGowan asked if changes made at this point could be accepted. Chairman Goicoechea asked if any other council member had issues with the changes made at this point. Member Lister wanted to know why a "which" was changed to a "but". A discussion ensued relating to the grammatical and policy implications of "but" vs. "which." Chairman Goicoechea asked for the word "which" to be retained. Member Molini received confirmation that "where feasible" had been removed. Ms. Swed asked for the language in section 2 bullet two to read "endorsed" rather than "signed" or "authorized." Mr. McGowan asked if the Reno U.S. Fish and Wildlife Service office should be specified.

Ms. Swed answered that the document was fine as is. Chairman Goicoechea clarified that the consensus was that the changes made were accepted by all.

Mr. McGowan asked if those who submitted comments would now present the comments for discussion. Member Biaggi mentioned that the Nevada Mining association does not oppose the regulations, and supports the conservation concept. Member Biaggi recognized that exploration activities of 5 acres or less being exempt is good, but commented that de minimis activities are not well defined and provides discretion to the program. Chairman Goicoechea asked if member Biaggi would like the state plan referenced where de minimis is concerned. Member Biaggi answered yes, but does not know what the plan says. Mr. Lawrence replied that there is no definition of de minimis in the state plan. Ms. Petter acknowledged that there is no definition currently, but we have added a definition in the state plan updates to be reviewed, and there is a definition in the manual. Chairman Goicoechea asked if de minimis would be in the state plan. Ms. Petter answered yes. Member Biaggi answered that he was ok with the understanding that a de minimis definition would be in the state plan, and the 5 acre rule for exploration would be retained. Member Swanson mentioned that all acres are not equal and asked if the 5 acre happened in a meadow it would not be de minimis. Member Swanson asked if the 5 acres would be present in the BLM record of decision and if it would apply to riparian areas as well? Member Biaggi answered that it was a criteria for the BLM and that it was an appropriate reference both for state and federal agencies. Mr. Raby answered that it was a well-established threshold for what is considered de minimis and it is consistent with BLM regulations. Mr. Raby answered that member Swanson brought up a good point. Member Swanson asked if the point was addressed by the BLM processes. Mr. Raby answered that it was addressed when proposals come in.

Chairman Goicoechea confirmed with Member Biaggi that he accepted the de minimis definition. Member Biaggi expressed that it is still not clear how a state regulation can compel a federal agency to act on compensatory mitigation. Member Biaggi expressed that until federal agencies can identify the mechanism that will be used to allow mitigation the mining association cannot support these regulations. Mr. Raby expressed that the relationship with these regulations is found in the Federal Land Policy and Management Act, it also relates to the 3809 federal mining regulations where regulations relating to unnecessary and undue degradation is found, and describe how unnecessary and undue degradation occurs when an operator fails to comply with a), a performance standard in section 3809.420, b) terms and conditions of approved plan of operations, or c) state laws related to environmental protection. These requirements are listed in 43 C.F.R. section 3809.5. This would be a tie specific to the mining regulations. Member Biaggi expressed that he was not referencing the mining regulations specifically, but to agriculture, power and other activities more broadly as it relates to how the BLM will use a mechanism to enforce compensatory mitigation. Mr. Raby pointed back to the Land Use Plan where there is a requirement to require mitigation if it is consistent with State Law. This then refers back to FLPMA which allows the authority for the BLM to have that requirement in the Land Use Plan. Member Biaggi asked how that comported with the decision from the Secretary of Interior that stated the BLM does not have the specific regulatory authority to compel compensatory mitigation. Mr. Raby clarified that it is voluntary unless it is a requirement under state law, and then the BLM can require it. Member Molini expressed that the solicitor's opinion which stated "unless required by state law" was what precipitated this regulation effort. Mr. Raby concurred. Mr. Raby expressed that the primary sticking point at the secretary office level had been with net conservation gain. The question was how can the BLM require net conservation gain when the regulations reference unnecessary and undue degradation rather than a different standard, which was the question which precipitated the clarification on mitigation at the department level. Chairman Goicoechea clarified that the Land Use Plan Amendment and the Signed Record of Decision do not reference state law, it says if required by the state and the executive order is already requiring this, and the regulations are the next step. Chairman Goicoechea asked if the BLM was operating under that assumption. Mr. Raby replied in the affirmative.

Member Biaggi asked Mr. Raby to repeat what was said regarding mining laws, exemptions, and unnecessary and undue degradation. Mr. Raby expressed that the regulations describe when unnecessary and undue degradation occurs, and it is when an operator fails to comply with one of three things: a), a performance standard in section 3809.420, b) terms and conditions of approved plan of operations, or c) state laws related to environmental protection. If an operator fails to comply with any of these three points, unnecessary and undue degradation occurs. Member Biaggi expressed concern that he has heard of conflicting mechanisms and would have liked to have something in writing rather than spoken conversation. Mr. Raby clarified that his information was prepared by the Washington Office Solicitor, and would make it available for the record. Chairman Goicoechea asked if that would satisfy Member Biaggi's concerns. Member Biaggi answered that no, he would need to see that document. Member Lister asked where Mr. Raby's statement and document fits in in the context of stating authorities in either the regulations or the MOU.

Mr. Lawrence responded that it would not be applicable in the state regulations, and best served in the MOU. Member Biaggi asked whether or not an executive order should or could be cited in a regulation based on the fact that it could be rescinded at the discretion of the executive. Mr. Burkett responded that it was a stylistic convention and left to the discretion of the writers.

Member Biaggi expressed the desire for clarification regarding on who is approving land uses (e.g., USFS or BLM). Mr. Vacca answered that more clarification was present, but that it was changed to authorized land use to broaden the term to any state or federal action. Member Biaggi expressed that his copy had record of decision, and the copy being presented has authorized land use, and asked if that was a change that was made. Mr. McGowan answered yes. Member Biaggi then suggested adding wording in section 7 regarding authorized activities predating the executive order. This change was already in place in the document being presented before the council. Mr. McGowan clarified that the language proposed by the Mining Association was incorporated in the document and Member Biaggi was satisfied by the inclusion. Member Biaggi expressed the concern that agreements between the Department of Interior and Barrick and Newmont Mining be listed in the regulations. Member Lister asked if there were any agreements present in Nevada between mining companies and the USFS. Ms. Gabor replied that there were not. Chairman Goicoechea asked for clarification that "any amendments thereto" would be prior to December 7th or in the future? Member Biaggi expressed that it references the future for those agreements only. Chairman Goicoechea clarified that it could amend land area and uses, etc. Member Biaggi said that would be reasonable. Mr. Lawrence commented that the intention of section 2 subsection 1 was to grandfather in previous decisions by land use agencies, whether state or federal. Subsection 2 was to recognize the specific conservation mitigation agreements agreed to by the USFWS. Mr. McGowan commented regarding uncertainty around what amending the service area of the mitigation agreements would mean. Chairman Goicoechea was concerned about the worth of the CCS in Eureka County if the Barrick Bank Enabling Agreement could be expanded and not participate in the CCS. Chairman Goicoechea asked if Member Biaggi was satisfied with the current language displayed. Member Biaggi answered in the affirmative. Member Biaggi then commented on section 3 subsection 5, roman numeral 6. Member Biaggi asked whether the Council should be referenced or the SETT? Member Biaggi asked Mr. McGowan if the language was intentional for the council to be there. Mr. McGowan replied that it was intentional, due to proposed projects may be brought to the SETT that are outside the HQT parameters and that those plans could be reviewed by the council. Member Biaggi asked whether the written notification of mitigation adequacy should be provided with a timeframe attached. Mr. Lawrence commented that he deferred to the SETT for determination of the time period, but what should start the clock? Mr. McGowan replied that 10 days would be more than adequate to provide written notice. Mr. Lawrence asked about additional information that would be needed. Mr. Lawrence expressed that the SETT should be empowered to ask for more information to determine if a proposed plan would be adequate. Chairman Goicoechea expressed that the SETT should be comfortable to come before the council to present plans that are proposed, and so the language should include the SEC or the SETT.

Member Lister asked whether a decision maker was made clear in the case of an appeal. If the council was involved would they be barred from being involved in the appeals process? Mr. Burkett clarified that an appeals process does not need to be built in to the regulations. The council can have a hearing and those hearings would be subject to judicial review. Member Biaggi clarified that these are temporary regulations and will be revisited in November with a process to become permanent. Member Biaggi also clarified that these regulations are housed under state lands because that is where the authority is coming from? Mr. Lawrence said that two authorities are being used. The way the law is constructed mitigation for sage grouse is found in two places with both places having the authority to adopt regulations. The sagebrush ecosystem council authority may adopt regulations or the mechanics of the program which is found in state lands have the authority to adopt regulations. The permanent regulations may end up in either place or both. In this regulation both are cited. Ms. Gabor expressed that the USFS land use plan amendment has retained the net conservation gain, and that one difference between the forest service and these regulations are that the USFS does not require compensatory mitigation in OHMA. Chairman Goicoechea asked if the state required it, what that would mean for the Forest Service? Ms. Gabor replied that similar to the BLM the USFS has a compliance with state law compliance. Ms. Susan Ellsworth commented that if state regulations are more restrictive than the USFS significant coordination with the SETT will be required. Ms. Gabor also commented that the MOU between the state and the USFS may need to be revisited to align with the state and BLM. Member Lister asked what would happen to the regulation if the sage grouse were listed. Chairman Goicoechea commented that the State could ask for an exemption based on the actions being taken currently. Ms. Swed concurred with Chairman Goicoechea that efforts regarding mitigation would be evaluated under a listing scenario. The intent of the conservation frameworks entered into by the USFWS would be that a net conservation gain has occurred and are adequately offsetting impacts. These efforts would come into play

through a section 7 consultation or habitat conservation plan. These sorts of considerations would be considered should the species become listed in the future. Member Lister asked if landowners who enroll in the future need to have any sorts of protections in a future listing scenario be built into this regulation (e.g., safe harbor agreements etc.). Member Lister also felt like State Lands got a pass on mitigation and would like to see a more direct approach with state lands. Mr. Lawrence expressed that the regulations should be specific enough that it is readable to relevant people and that is why the process for state lands were broken into a different section. Mr. Lawrence also recognized that with the exception of NDOT, the University system and the Legislative system, any permits need to be authorized by the state lands registrar. This regulation intent tried to make it clear that if the state lands registrar authorizes a land use, it would be subject to mitigation. Mr. Lawrence expressed that state land in sage-grouse habitat is very minimal. There are some state parks that are in habitat, and those lands are subject to mitigation. Mr. Lawrence will try to identify areas where habitat could be managed better, but that for the most part lands in habitat are owned by NDOW and State Parks and they are already being managed to their potential. Chairman Goicoechea at this point expressed confusion about different versions that were available to people publically, and thought that a clean version needed to be brought forward for official approval. Member Biaggi expressed the same hesitancy and would like time to review the authority provided by the BLM and the changes made to date. Member Biaggi moved to approve the changes outlined on the document presented on the screen, direct the SETT to provide a revised version of the regulation at a meeting in the future. Member Lister seconded the motion. Chairman Goicoechea asked Mr. McGowan if the 30 days for posting is calendar days or working days. Mr. McGowan replied it was calendar days.

## 4. PUBLIC COMMENT

No public comment was given at this time.

## 5. CLOSE OF HEARING

Member Lister moved to close the hearing, Member Molini seconded the motion.

## 6. ADJOURNMENT

Hearing was adjourned at 10:45 AM.