IN THE SUPREME COURT OF THE STATE OF NEVADA

GREAT BASIN MINE WATCH,
Appellant,
vs.
STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; DIVISION OF ENVIRONMENTAL PROTECTION; BUREAU OF MINING REGULATION AND RECLAMATION; STATE ENVIRONMENTAL COMMISSION; AND NEWMONT MINING CORPORATION,
Respondents.

No. 43726

FILED

FEB 15 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a petition for judicial review of a final agency decision. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Great Basin Mine Watch (GBMW) sought review in the district court of the State Environmental Commission's (SEC) affirmation of the Nevada Division of Environmental Protection's (NDEP) decision to renew Newmont Mining Corporation's water pollution control permit issued for the Lone Tree Mine. The district court denied GBMW's petition. On appeal, GBMW argues that: (1) NDEP arbitrarily and capriciously approved Newmont's permit renewal, (2) the district court and the SEC erred in concluding that there is no appeal available for NDEP's decision to classify the Lone Tree tailings impoundment expansion as a minor modification, (3) the district court erred by not granting GBMW extraordinary relief to challenge NDEP's decision approving the minor

modification, and (4) the district court erred by not allowing GBMW to present additional evidence.

We conclude that the district court correctly denied GBMW's petition for judicial review, and we affirm the decision of the district court.[1] The parties are familiar with the facts, and we do not recount them except as necessary for our disposition.

Standard of review

When reviewing an administrative agency decision, we, like the district court, must review the record before the agency and determine whether the agency's decision was "'arbitrary or capricious and was thus an abuse of the agency's discretion.'"[2] We independently review the agency's legal determinations, but an "'agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence.'"[3] "Substantial evidence is that 'which a reasonable

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[1]GBMW also appealed the district court's finding that its appeal was untimely. We have concluded that there is no right of appeal regarding the classification of the permit modification as minor, and therefore, the issue of whether GBMW's appeal was timely is moot.

[2]Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1137-38 (2001) (quoting Clements v. Airport Authority, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995)); see NRS 233B.135(3)(f).

[3]Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003) (quoting SIIS v. Montoya, 109 Nev. 1029, 1031-32, 862 P.2d 1197, 1199 (1993)).

person might accept as adequate to support a conclusion.'"[4] Statutory construction is a legal determination, which we review de novo.[5]

Renewal of Newmont's water pollution control permit

GBMW argues that NDEP acted arbitrarily and capriciously when renewing Newmont's permit because it did not first review Newmont's Pit Lake Optimization Plan (PLOP). We disagree.

It is uncontested that NDEP has a duty to ensure that permitted mining facilities comply with the regulations to protect the waters of the state[6] and that this duty extends to pits and resulting pit lakes.[7] The regulations do not expressly require NDEP to review a PLOP prior to renewing a permit, but NDEP nevertheless required Newmont to submit a PLOP pursuant to a schedule of compliance.[8] After reviewing the record, we conclude that there is substantial evidence that NDEP fulfilled its duty to ensure that Newmont complied with the regulations and that NDEP did not act arbitrarily and capriciously by not requiring Newmont to submit the PLOP prior to renewing its permit.

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[4]Id. at 235, 71 P.3d at 491-92 (quoting Montoya, 109 Nev. at 1032, 862 P.2d at 1199).

[5]Roberts v. SIIS, 114 Nev. 364, 367, 956 P.2d 790, 792 (1998).

[6]See Helms v. State, Envtl. Protection Div., 109 Nev. 310, 313, 849 P.2d 279, 282 (1993).

[7]NAC 445A.429(2)–(3).

[8]NDEP has authority to use schedules of compliance within the permitting process. See NRS 445A.500(1)(e).

GBMW is also incorrect in contending that NDEP acted in contravention of NAC 445A.420(1)(c), which requires a permit renewal application to "[i]nclude any new information to update information previously submitted to [NDEP]." This statute relates to the burden of the applicant seeking the permit renewal and does not require that NDEP ensure that it has all new information prior to renewing a permit. Additionally, to read NAC 445A.420(1)(c) as requiring that a permit will not issue until all new information is received would abrogate NRS 445A.500(1)(e)'s allowance of schedules of compliance for submission of information after permit approval. We do not interpret statutes in this manner,[9] and thus, NDEP did not arbitrarily and capriciously approve an incomplete permit application. We finally conclude that there was substantial evidence to support the SEC's determination that NDEP complied with the notice requirements for issuance of the permit and that NDEP did not deprive the public of its right to fully participate in the permitting process.

SEC's authority to review NDEP's approval of the expansion of the tailings impoundments as a "minor modification"

GBMW asserts that although a permit modification is not specifically enumerated in NRS 445A.605(1)(a), it can appeal the decision to modify the permit as a minor modification under the broad authority granted the SEC under NRS 445A.605(1)(b) and NAC 445A.388. GBMW

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[9]We give effect to each statutory provision such that "'[n]o part of a statute [is] rendered nugatory, nor any language turned to mere surplusage.'" County of Clark v. Doumani, 114 Nev. 46, 51, 952 P.2d 13, 16 (1998) (quoting Paramount Ins. v. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)).

is correct that a permit modification is not described in NRS 445A.605(1), and we conclude that, because of this, there is no right to appeal a permit modification.

Under NRS 445A.605(1)(a), a person aggrieved by "[t]he issuance, denial, renewal, suspension or revocation of a permit" issued by NDEP may appeal the determination to the SEC. Because modification is excluded from the list of appealable permitting actions, we conclude that it does not provide for an appeal of NDEP's decision to classify the modification as minor.[10] GBMW's reliance on NRS 445A.605(1)(b) for the right of appeal is unfounded. NRS 445A.605(1)(b) pertains to "issuance, modification or rescission" of an order. At issue here is a permit modification, not an order. Thus, NRS 445A.605(1)(b) is inapplicable, and to construe it otherwise would render NRS 445A.605(1)(a) mere surplusage.[11]

Regarding the right of appeal under NAC 445A.388, that section permits a person aggrieved by NDEP's actions to appeal to the SEC "in accordance with NRS 445A.605." (Emphasis added.) We have concluded that there is no right of appeal of NDEP's decision to classify the permit modification as a minor modification, and therefore, NAC 445A.388 also does not permit an appeal.

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[10]Where the Legislature specifically mentions one thing, we construe it as an exclusion of all other things. Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 87 (2004) (Gibbons, J., concurring in part and dissenting in part).

[11]Doumani, 114 Nev. at 51, 952 P.2d at 16.

Denial of extraordinary relief

GBMW argues that the district court improperly denied its request for writ relief to review NDEP's approval of the leaking tailings impoundment as a minor modification. GBMW also asks this court to grant it extraordinary relief to review the decision. We conclude that the district court did not err by denying extraordinary relief, and we also decline to grant certiorari.

This court or a district court shall grant certiorari when "an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer."[12] NDEP has authority to modify existing permits upon application by a party.[13] The regulations provide that a modification is either a major or minor modification, and the regulations include standards for this determination.[14] Generally, the phased expansion of a tailings impoundment is a minor modification.[15] After review of the record, we conclude that there was substantial evidence that NDEP did not exceed its

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[12]NRS 34.020(2). Whether the tribunal, board, or officer was exercising a judicial function is the threshold determination for certiorari relief, and thus, it is unnecessary for us to address the other requirements. State v. Washoe Co. Commrs., 23 Nev. 247, 248, 45 P. 529, 529 (1896) ("[O]nly [in] the exercise of [judicial] functions . . . a writ of certiorari will lie").

[13]NRS 445A.600(2).

[14]NAC 445A.416–.417.

[15]NAC 445A.416(4)(a).

jurisdiction by classifying Newmont's tailings impoundment expansion as a minor modification. Extraordinary relief of its decision is therefore unavailable.

Denial of GBMW's request to submit additional evidence

GBMW argues that the district court erred by denying its request to submit the April 2003 investigative report as additional evidence because the report was not released until after the SEC hearing. Generally, the scope of judicial review of an agency decision is limited to the record before the agency.[16] However, NRS 233B.131(2) permits the district court to grant leave to admit additional evidence if "the additional evidence is material and . . . there were good reasons for failure to present it in the proceeding before the agency." Although GBMW's reason for not submitting this evidence during the administrative hearing is valid, we conclude that because the report dealt with allegations that do not pertain to the permit or components at issue in the instant case, the district court did not abuse its discretion in refusing to admit the additional evidence.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Rose

_____, J.
Douglas

_____, J.
Parraguirre

[16]NRS 233B.135(1)(b); Nevada Industrial Comm'n v. Horn, 98 Nev. 469, 471, 653 P.2d 155, 156 (1982).

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