

RECORDABLE

1 Case No. 03-01140A

2 Dept. No. 2

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4 CLERK

5 BY _____
6 DEPUTY

7 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR CARSON CITY

9 -000-

10 GREAT BASIN MINE WATCH,

11 Petitioner,

12 vs.

13 STATE OF NEVADA DEPARTMENT OF
14 CONSERVATION AND NATURAL
15 RESOURCES; DIVISION OF
16 ENVIRONMENTAL PROTECTION;
17 BUREAU OF WATER POLLUTION
18 CONTROL; STATE ENVIRONMENTAL
19 COMMISSION; AND NEWMONT
20 MINING CORPORATION

21 Respondents.

**ORDER GRANTING IN PART AND
DENYING IN PART PETITION
FOR JUDICIAL REVIEW**

22 This matter comes before this Court pursuant to a petition for judicial review filed
23 by Great Basin Mine Watch (GBMW) on August 6, 2003. On October 10, 2003, in
24 support of its petition, Petitioner filed its opening brief. Respondent Newmont Mining
25 Corporation (Newmont) filed its answering brief on November 10, 2003. On November
26 12, 2003, Respondents for the State, the State Environmental Commission (SEC) and the
27 Nevada Division of Environmental Protection (NDEP) filed a joint answering brief.
28 GBMW filed its consolidated reply on December 12, 2003. This Court heard oral
argument on April 9, 2004. Having heard arguments from all parties; and having
reviewed the briefs, the record below, and the applicable law, this Court deems itself fully
advised, and hereby enters judgment as follows:

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PROCEDURAL HISTORY

1
2 This is a petition for judicial review pursuant to the Nevada Administrative
3 Procedures Act (APA), from a final decision in a contested case issued by the SEC on
4 July 8, 2003, regarding Discharge Permit NV0022268 for the Gold Quarry Mine. The
5 Nevada Division of Environmental Protection first issued Discharge Permit NV0022268
6 to Newmont Mining Corporation in 1994. That permit expired on April 22, 1999.

7 Newmont submitted an application for renewal on October 13, 1998. NDEP
8 published notice of the draft renewed permit on July 30, 2002. The permit was open for
9 comment until August 29, 2002. GBMW submitted comments on the draft renewed
10 permit on August 28, 2002.

11 NDEP issued the final permit on September 20, 2002. GBMW filed an appeal of
12 Discharge Permit NV0022268 with the SEC on September 30, 2002. The SEC held a
13 hearing on the matter on June 9 and 10, 2003, in Elko, Nevada. Prior to the hearing, in
14 response to GBMW's appeal, NDEP reissued the permit with a revised cadmium
15 limitation. NDEP did not notice the public of the permit revision, nor did it notify GBMW
16 of the revision until the day of the hearing below. Following the hearing, on July 8, 2003,
17 the SEC entered its Findings of Fact, Conclusions of Law and Order denying GBMW's
18 appeal.

FACTS

19
20 The Gold Quarry Mine is a large open pit gold mine operated by Newmont near
21 Carlin, Nevada. The Gold Quarry Pit spans across 518 acres and to a depth of 955 feet
22 below the pre-mined surface. Because the open pit extends below the water table,
23 Newmont must continuously pump groundwater from the area around the pit in order to
24 maintain access to the ore. Newmont then discharges the pumped groundwater to Maggie
25 Creek and into the Humboldt River at a rate of approximately 12,000 - 26,000 gallons per
26 minute. Although the water is non-process water, it has characteristics that differ
27 markedly from the receiving surface waters. Most importantly, it has a higher temperature

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1 than the receiving water, as well as elevated levels of Total Dissolved Solids (TDS, or
2 salts) and cadmium.

3 Maggie Creek is a Class C stream. NAC 445A.126(4). Its flow fluctuates widely
4 and is often dry at the point of discharge. Maggie Creek flows directly into the Humboldt
5 River. The Humboldt River is a designated stream with more stringent water quality
6 standards than Maggie Creek. NAC 445A.202-208. The Humboldt River is an important
7 waterway and is already listed on Nevada's list of impaired waters.

8 The discharge of pollutants from a point source into waters of the state, except as
9 authorized by permit, is prohibited under Nevada's Water Pollution Control Law, NRS
10 445A.300 et seq., and the Federal Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. The
11 Nevada Division of Environmental Protection (NDEP)'s Bureau of Water Pollution
12 Control is responsible for issuing discharge permits pursuant to state and federal law.
13 Accordingly, NDEP issued Discharge Permit NV0022268 to Newmont when it began the
14 discharge of dewatering water at its Gold Quarry Mine in 1994. More recently, NDEP
15 issued a renewal of Discharge Permit NV0022268 on September 20, 2002. The 2002
16 renewal is the subject of this appeal.

17 The 2002 permit changed several of the permit terms that were originally set forth
18 in 1994. In relevant part, the permit changed the effluent limitation for temperature from
19 25 degrees Celsius to 34 degrees Celsius, the TDS effluent limitation from 350 to 445
20 milligrams per liter, and the effluent limitation for cadmium from 2 micrograms per liter
21 to 5 micrograms per liter. In addition, the renewed permit decreased the number of
22 monitoring points in the Humboldt River and Maggie Creek from nine to four points. Of
23 those points removed, two were located in the Humboldt River, 10 and 150 meters
24 downstream from the confluence with Maggie Creek. In their place, a new monitoring
25 point was established in the Humboldt River one-third of a mile downstream from the
26 confluence with Maggie Creek. GBMW is a member and science based advocacy
27 organization in Reno, Nevada. Its mission is to protect the people, land, air, water and
28 wildlife of the Great Basin from the adverse impacts of hardrock mining.

1 Thus, GBMW reviews and, where necessary, comments on permitting decisions
2 NDEP makes with regards to mining in the Great Basin. GBMW commented on the
3 underlying permit during the permitting process. Members of GBMW use and enjoy the
4 areas and waters that are affected by Discharge Permit NV0022268.

5 APPLICABLE LAW

6 A. Standard of Review

7 In a Petition for Judicial Review, this Court must follow the parameters of the
8 Administrative Procedure Act codified at NRS 233B.135 which limits this Court to
9 consideration of the Record on Appeal. This Court is to review the evidence presented
10 below and determine whether the Officer acted arbitrarily or capriciously and by doing so
11 abused her discretion in reaching a decision. *State Industrial Insurance System v.*
12 *Khweiss*, 108 Nev. 123, 126 (1992). Further, although this Court may decide purely legal
13 questions without deference to an Officer's determination, her conclusions of law which
14 are closely related to her view of the facts are entitled to deference and should not be
15 disturbed if supported by substantial evidence. *Id.* Substantial evidence is that quantity
16 and quality of evidence which a reasonable man could accept as adequate to support a
17 conclusion. *State Employment Security Department v. Hilton Hotels*, 102 Nev. 606
18 (1986), citing *Richardson v. Perales*, 203 U.S. 389 (1971). This Court is not to substitute
19 its judgment for that of the Appeals Officer's concerning the weight of the evidence
20 regarding questions of fact. *Dredge v. State ex. rel. Dept. of Prisons*, 105 Nev. 39, 43
21 (1989).

22 B. Cadmium limitation

23 Maggie Creek is a Class C stream pursuant to NAC 445A.126(4). The standard
24 for toxics in a Class C stream is aquatic life. NAC 445A.126(3)(c). Pursuant to the
25 formula set forth in NAC 445.144, the aquatic life limitation for Maggie Creek is
26 approximately two micrograms per liter.

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1 NAC 445A.126 provides in pertinent part:

2 1. Class C waters include waters or portions of waters which are located in
3 areas of moderate-to-urban human habitation, where industrial development
4 is present in moderate amounts, agricultural practices are intensive and
5 where the watershed is considerably altered by man's
6 activity.

7 2. The beneficial uses of class C water are municipal or domestic supply, or
8 both, following complete treatment, irrigation, watering of livestock,
9 aquatic life, propagation of wildlife, recreation involving contact with the
10 water, recreation not involving contact with the water, and industrial
11 supply.

12 3. The quality standards for class C waters are:

9	Item	Specifications
10		
11	(a) Floating solids, solids that	Only those amounts attributable to the activities of man which will not make the receiving waters injurious to fish or wildlife or impair the waters for any beneficial use established for this class.
12		
13		
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15		
16	(b) Sewage, industrial wastes or other wastes.	None which are not effectively treated to the satisfaction of the department.
17		
18		
19	(c) Toxic materials, oils, deleterious substances, colored or other wastes or heated or cooled liquids.	Only such amounts as will not render the receiving waters injurious to fish and wildlife or impair the waters for any beneficial use established for this class.
20		
21		
22		
23	(d) pH.	Range between 6.5 to 8.5.
24	(e) Dissolved oxygen.	For waters with trout, not less than 6.0 mg/l; for waters without trout, not less than 5.0 mg/l.
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26	(f) Temperature.	Must not exceed 20 [degrees] C for waters with trout or 34 [degrees] C for waters without trout. Allowable
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temperature increase above normal
receiving water temperature: 3
[degrees] C.

(g) Fecal coliform. The more stringent of the following
apply:

(h) Total phosphates. Must not exceed 1.0 mg/l.

(i) Total dissolved solids. Must not exceed 500 mg/l or one-third
above
that characteristic of natural conditions
(whichever is less).

NAC 445A.144 provides in pertinent part:

Except as otherwise provided in this section, the following standards for
toxic materials are applicable to the waters specified in NAC 445A.123 to
445A.127, inclusive, and 445A.145 to 445A.225, inclusive. If the standards
are exceeded at a site and are not economically controllable, the
commission will review and adjust the standards for the site.

f. The criteria for trihalomethanes (total) is the sum of the concentrations of
bromodichloromethane, dibromochloromethane, tribromomethane
(bromoform) and trichloromethane (chloroform). See reference b.

g. This standard applies to the dissolved fraction.

(1) Single concentration limits and 24-hour average concentration limits
must not be exceeded. One-hour average and 96-hour average concentration
limits may be exceeded only once every 3 years. See reference a.

(2) Hardness (H) is expressed as mg/l CaCO₃.

(3) If a criterion is less than the detection limit of a method that is
acceptable to the division, laboratory results which show that the substance
was not detected will be deemed to show compliance with the standard
unless other information indicates that the substance may be
present.

(4) If a standard does not exist for each designated beneficial use, a person
who plans to discharge waste must demonstrate that no adverse effect will
occur to a designated beneficial use. If the discharge of a substance will
lower the quality of the water, a person who plans to discharge waste must
meet the requirements of NRS 445A.565.

(5) The standards for metals are expressed as total recoverable, unless
otherwise noted.

1 C. Notice

2 A change in a permit's effluent limitation constitutes a major modification. NAC
3 445A.263(4). NDEP is required to re-notice a permit, and provide for public comment
4 prior to modifying or re-issuing a discharge permit unless the grounds for re-issuing
5 constitute minor modification. NAC 445A.263(1).

6
7 NAC 445A.263 provides in pertinent part:

8 1. Except as otherwise provided in this section, the director may, after
9 notice and opportunity for a public hearing, modify, suspend or revoke any
10 permit in whole or in part during its term for cause, including, but not
11 limited to, the causes listed in NAC 445A.261, or for failure or refusal of
12 the holder of the permit to carry out the requirements of NAC 445A.247.

13 4. With the consent of the holder of the permit and without public notice,
14 the director may make minor modifications to a permit to:

15 (a) Correct typographical errors;

16 (b) Clarify the language of the permit;

17 (c) Require more frequent monitoring or reporting by the holder of the
18 permit;

19 (d) Change an interim compliance date;

20 (e) Allow for a change in ownership or operational control of a facility if the
21 department determines that no other change in the permit is necessary and a
22 written agreement containing a specific date for transfer of permit responsibility,
23 coverage and liability between the current and new holders of the permit has been
24 submitted to the department;

25 (f) Change the construction schedule for a discharger which is a new source if such
26 a change does not affect an obligation of the discharger to have all pollution
27 control equipment installed and in operation before
28 discharge;

(g) Delete a point source outfall when the discharge from that outfall is terminated
and does not result in discharge of pollutants from other outfalls except in
accordance with permit limits; or

(h) Reduce the limit of flow, in gallons per day, of the discharge authorized in the
permit.

25 D. Temperature Limitation

26 The water quality standard for temperature for Maggie Creek provides in pertinent
27 part that the temperature must not exceed 34 degrees Celsius and the temperature cannot
28

1 be more than 3 degrees Celsius above the normal receiving water temperature. NAC
2 445A.126(3)(f). Nevada's water quality standards are mandatory and NDEP must
3 enforce them. NRS 233B.040(1)(a); *Nevada Tax Commissioners v. Saveway Super*
4 *Service Stations, Inc.*, 99 Nev. 626 (1983).

5 **E. Compliance with Humboldt River's Water Quality Standards**

6 The Humboldt River is listed as an impaired water for TDS on Nevada's 303(D)
7 list. Maggie Creek flows into the Humboldt River. The TDS standard for the Humboldt
8 River at its confluence with Maggie Creek is 350 mg/L. NAC 445A.204. NDEP has a
9 duty to ensure that permitted discharges do not exceed downstream water quality
10 standards. NRS 445A.500(1)(c).

11 **F. Antidegradation Law**

12 NRS 445A.565 provides in pertinent part:

13 1. Any surface waters of the state whose quality is higher than the
14 applicable standards of water quality as of the date when those standards
15 become effective must be maintained in their higher quality. No discharges
16 of waste may be made which will result in lowering the quality of these
17 waters unless it has been demonstrated to the commission that the lower
18 quality is justifiable because of economic or social considerations. This
19 subsection does not apply to normal agricultural rotation, improvement or
20 farming practices.

17 **G. Antibacksliding Provision**

18 A discharge permit may not be renewed to contain effluent limitations which are
19 less stringent than the comparable effluent limitations in the previous permit. 33 U.S.C.
20 1342 (e)(1). State discharge permits must at a minimum conform with the requirements
21 of the CWA and EPA's implementing regulations. *Northern Plains Resource Council*,
22 325 F.3d 1155 (2003).

24 **DISCUSSION**

25 NDEP's revision and re-issuance of the permit in question, modifying the
26 cadmium limitation after the final permit had already been issued, without providing for
27 public notice and comment was contrary to the requirements of law. Under federal and
28

1 state law, NDEP is required to re-notice a permit and provide for public comment prior to
2 modifying or reissuing a discharge permit, unless it qualifies as a minor modification. 40
3 C.F.R. § 122.62; NAC 445A.263(1). Furthermore, it is recognized under federal and state
4 law that a change in a permit's effluent limitation constitutes a major modification. 40
5 C.F.R. § 122.62(a)(15); NAC 445A.263.(4). While the modifications to the original
6 permit were made in response to GBMW's complaint and request for the cadmium
7 limitation to be adjusted to 2 micrograms per liter from 5 micrograms per liter, changing
8 the permit with a major modification without public notice and comment is a dangerous
9 precedent. Therefore, this issue will be remanded to NDEP with instructions to re-issue
10 the permit revision in accordance with proper notice and comment procedures. The
11 SEC's contrary decision is similarly set aside.

12 The record reflects that NDEP originally established the background temperature
13 of Maggie Creek between 0.5 and 25 degrees Celsius. The renewed permit established a
14 maximum effluent limitation of 34 degrees Celsius. The water quality standard for
15 Maggie Creek provides that : (1) the temperature must not exceed 34 degrees Celsius; and
16 (2) the temperature cannot be more than 3 degrees Celsius above the normal receiving
17 water temperature. NAC 445A.126(3)(f). The latter part of the regulation is referred to as
18 the "delta three" standard. While the reissued permit qualifies under the maximum
19 temperature set forth in NAC 445A.126(3)(f), NDEP did not apply the delta three
20 standard required under the latter part of the Administrative Code. The 34 degrees Celsius
21 limitation far exceeds the record maximum temperature for Maggie Creek when the delta
22 three standard is applied to the established background temperature of 25 degrees Celsius.
23 Furthermore, the record shows that Newmont Mining Corporation has the capacity to cool
24 the subject water in cooling towers before discharge into Maggie Creek. On that basis,
25 the permit shall be set aside in so far as the temperature limitation is concerned and
26 remanded to NDEP with instructions to apply the delta three standard in determining the
27 maximum temperature standard.
28

1 In regards to the TDS discharge limitation and the antidegradation law, NDEP's
2 background TDS concentration for Maggie Creek is 334.15 mg/L. The applicable water
3 quality standard for TDS in the stretch of the Humboldt River that receives Maggie Creek
4 is 350 mg/L as an annual average. NDEP reissued the permit pursuant to NAC
5 445A.126(3)(i), which requires the water quality standard for TDS to be 500 mg/L or
6 one-third above natural conditions (whichever is less). In this case, one-third above the
7 natural conditions yields a TDS value of 445 mg/L. NDEP has a duty to ensure that
8 discharges do not exceed downstream water quality standards, 40 C.F.R. § 131.10(6)
9 ("the state shall take into consideration the water quality standards of downstream waters
10 and shall ensure that its water quality standards provide for the attainment and
11 maintenance of the water quality standards of downstream waters"). NDEP has
12 established a TDS discharge limitation that exceeds the standard for the Humboldt River.
13 Moreover, pursuant to NRS 445A.565, NDEP is required to maintain Maggie Creek at its
14 level of higher quality, or at the 334.15 mg/L TDS. As such, the permit shall be set aside
15 and remanded to NDEP with instructions to establish a discharge limitation in the permit
16 which does not exceed the standard for the Humboldt River and to comply with the
17 antidegradation law. Therefore, the SEC's decision that the permit's TDS limitation does
18 not violate the antidegradation law is likewise set aside.

19 The Clean Water Act provides that a discharge permit cannot be renewed to
20 contain limitations less stringent to those contained in the previous permit unless an
21 exception applies. 33 U.S.C. 1342(o). The exceptions to the antibacksliding provision of
22 the CWA provide permissible backsliding where:

23 (1) there has been a material and substantial alteration to the facility, since
24 the last permit was issued, that justifies the application of a less stringent
effluent limitation;

25 (2) information is available, which was not available at the time the permit
26 was issued, that would have justified the application of a less stringent
effluent limitation;

27 (3) the administrator determines that technical mistakes or mistaken
interpretations of law were made in issuing the permit;

28 (4) a less stringent effluent limitation is necessary because of events over

1 which the permittee has no control and for which there is no reasonable
2 available remedy, 33 U.S.C. § 1342(o)(2).

3 The TDS limitations for the 1994 permit were established at 350 mg/L and relaxed
4 to 445 mg/L in 2002. The temperature limitation likewise was relaxed from the 1994 limit
5 of 25 degrees Celsius to 34 degrees Celsius in 2002. There has been no evidence of any
6 exception except a post hoc argument that there was a mistake in setting the initial
7 limitations. The NDEP's established background for the TDS level in Maggie Creek is
8 334.15 mg/L and there is no evidence of any exception that would allow a change in the
9 limitation standards for TDS. Once the public gets clean water, it has a right to keep it.
10 Furthermore, there have been no uncontrollable events that would explain the relaxation
11 of the limitations. The Newmont Mining Corporation can control the temperature of the
12 discharge with its cooling towers. NDEP's relaxation of the TDS and temperature
13 limitations constitutes impermissible backsliding and shall not be upheld. The SEC's
14 decision that the relaxation constituted permissible backsliding is set aside. Further, the
15 permit shall be set aside and remanded to NDEP with instructions to restore the
16 preexisting 1994 permit limits for TDS and temperature.

17 In regards to the mixing zone issue, a zone of mixing means the volume of water
18 near the point of waste discharge within which the waste immediately mixes with the
19 receiving water due to the momentum of the waste discharge and the difference in density
20 between the waste and the receiving water. NAC 445A.115. When the NDEP grants a
21 discharge permit there is broad discretion in establishing monitoring locations. NAC
22 445A.250. The 1994 Permit listed nine monitoring points along Maggie Creek and the
23 Humboldt River, which helped establish an understanding of the dynamics between the
24 two waterways. In 2002, NDEP determined that several of the locations could be
25 consolidated for more efficient monitoring. NDEP monitored locations "f," "g," and "h"
26 in the Humboldt River and determined that these locations did not provide wholly
27 representative samples of the Maggie Creek impact on Humboldt River water quality.
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1 Due to the aforementioned circumstances, NDEP's moved the monitoring
2 locations "g" and "h" to location "j," and determined that a better representative measure
3 of the effect of Maggie Creek on the Humboldt River could be obtained by sampling
4 locations "f" and "j." The mixing zone regulations apply where a discharger seeks to
5 dilute its discharge in order to meet with water quality standards. However, in this case,
6 by moving location from "h" and "g" to location "j" the record shows no such effect.
7 Dilution was not the reason for the change of location and is evidenced by the locations
8 "g" and "h" regularly meeting the 1994 Permit limits and standards. NDEP's selection of
9 monitoring locations in the Permit is subject to substantial deference. This Court shall not
10 upset the lower decision on this issue as it was a question of law closely tied to the
11 Officer's view of the facts. Furthermore, NDEP's decision was based on substantial
12 evidence and was neither arbitrary nor capricious.

13 As to the compliance with the preexisting permit, GBMW has failed to show clear
14 error in the determination of NDEP and the SEC that Newmont did not substantially
15 comply with the 1994 permit. The historic sampling data for Newmont for years 1994-
16 2002 had a 95 percent or better compliance with all constituents other than TDS. The
17 NDEP carefully examined the evidence in light of EPA guidance that establishes
18 standards for substantial noncompliance. Because of the Officer's view of the facts and
19 their familiarity with the case and the standards for substantial compliance with discharge
20 permits, this Court will not disturb the determination of the NDEP and the SEC.
21 Moreover, there was substantial evidence on the record to support the determination.

22 JUDGMENT

23
24 Therefore, good cause appearing, IT IS HEREBY ORDERED that the permit in
25 question is set aside and remanded with instructions to comply with all of the instructions
26 delineated in this order.

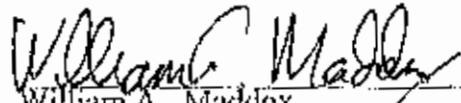
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IT IS FURTHER ORDERED that the SEC's decision affirming Discharge Permit NV0022268 be set aside.

DATED this 18th day of August, 2004.


William A. Maddox
District Judge

cc: Nicole Rinke, Esq.
William Frey, Esq.
Susan L. Gray, Esq.
Deanne M. Rymarowicz, Esq.
Scott Hardt, Esq