

Case No.: 11 OC 0001 1B

1 Dept. No.: 1

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ALAN GLOVER
J. HARKLEROAD
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6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY

8 SIERRA CLUB, a California non-profit
9 corporation,

Petitioner,

10 vs.

~~PROPOSED~~

11 NEVADA DIVISION OF
12 ENVIRONMENTAL PROTECTION, an
13 administrative agency of the State of
14 Nevada,

**ORDER DENYING SIERRA CLUB'S
PETITION FOR REVIEW**

&

15 NEVADA POWER COMPANY, a Nevada
16 corporation d/b/a NV ENERGY,

17 Respondents.

18 This matter comes before the Court on Petitioner the Sierra Club's Petition for Judicial
19 Review, which was filed with this Court on January 3, 2011. Sierra Club filed its opening brief
20 on June 27, 2011. Respondents Nevada Division of Environmental Protection ("NDEP") and
21 Nevada Power Company ("Nevada Power") filed their Responses in opposition on August 29,
22 2011. Sierra Club filed its Reply on November 1, 2011, and the matter was submitted for
23 decision on November 3, 2011. This Court has read the documents filed with the Court and has
24 reviewed the law applicable to the issues raised in the various pleadings. This Court, deeming
25 itself fully advised of the matter, hereby enters its decision as follows.

26 Petitioner asks the Court to reverse the decision of the Nevada State Environmental
27 Commission ("SEC") upholding NDEP's reissuance of Nevada Power's groundwater discharge

1 permit, No. NEV91022 (the "Permit"). According to its Statement of Issues for Review,
2 Petitioner purports to identify six bases for reversing the SEC's decision or remanding for further
3 proceedings. Petitioner's opening brief, however, discusses only five, which do not match those
4 in its Statement and to some extent overlap. For clarity, the Court, below, identifies those issues
5 Petitioner actually briefs. All other issues—to the extent Petitioner purports to identify them as
6 issues to be reviewed by this Court, whether through its opening brief or to the extent it attempts
7 to provide argument in its reply—are waived. *See, e.g., Edwards v. Emperor's Garden Rest.*, 122
8 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (reviewing court need not consider issues
9 when an appellant fails to present any arguments or authority regarding those issues); *State ex rel.*
10 *Masto v. Montero*, 124 Nev. 573, 577 n.9, 188 P.3d 47, 49 n.9 (2008) (court need not address
11 issues raised for the first time in reply). Petitioner asserts that the SEC's decision affirming
12 reissuance of the Permit must be reversed based on essentially four grounds:

13 1. Petitioner argues the SEC incorrectly interpreted the "substantial compliance" term
14 in NRS 445A.495(1), which the agency concluded must be determined with respect to whether
15 NDEP had issued findings of alleged violation of a permit. Subsumed within this issue is
16 Petitioner's argument that Nevada Power was not in "substantial compliance" with its 2005
17 permit, No. NEV 91022 (the "2005 Permit"¹) because it did not submit certain quarterly
18 monitoring data to NDEP.

19 2. Petitioner asserts that the SEC erred by restricting the scope of evidence that was
20 admitted at the hearing regarding Nevada Power's "substantial compliance."

21 3. Petitioner argues that the Court should reverse the SEC's decision for failure to
22 allow Petitioner to present evidence regarding groundwater monitoring.

23 4. Finally, Petitioner asserts that the SEC's decision must be overturned because its
24 written order included a finding of fact regarding the need for groundwater monitoring (finding of
25 fact number three), which Petitioner asserts was improperly included.

26
27 ¹ The Permit before it was renewed by NDEP is referred to herein as the "2005 Permit." The
28 Permit after it was renewed by NDEP on June 24, 2010 is referred to as the "2010 Permit."
Generally, the Nevada Power permit here at issue is referred to as "the Permit."

1 ROA, 2. In the 2005 Permit, five ponds were required to be double-lined or removed from
2 service over the life of the Permit. ROA, 2005 Permit. The 2010 Permit, at issue in this case,
3 provides for the first time that *all* of the evaporation ponds at the Station are required to be
4 double-lined with a leak-detection and -collection system between the liners. ROA, 2-3.

5 Nevada Power sought to move the ponds to the Mesa area in the 2010 Permit. The Mesa
6 area has a much greater depth to groundwater than the location of the existing ponds on the
7 floodplain. ROA, 3. The existing double-lined ponds are lined with a 60-mil plastic primary
8 liner and a 40-mil secondary liner. ROA, 3. The ponds on the Mesa are required by the Permit
9 to be lined with an 80-mil primary liner and a 60-mil secondary liner. ROA, 3. All double-lined
10 ponds are required to have a leak-detection and -collection system in the interstitial space
11 between the liners that measures the rate of leakage and pumps any leakage from the interstitial
12 space between the liners back to the evaporation ponds. ROA, 3.

13 NDEP publicly noticed the application for the 2010 Permit on October 21, 2009, and
14 proposed to renew the Permit subject to certain effluent limitations and special conditions. ROA,
15 63-64. The public had thirty days to provide comments on the proposed renewal, which period
16 ended November 30, 2009. ROA, 63. NDEP also conducted a public hearing regarding the
17 proposed permit on June 3, 2010. ROA, 37. On June 24, 2010, NDEP issued its Notice of
18 Decision (“NOD”) to reissue the Permit to Nevada Power. ROA, 66. NDEP also responded to
19 public comments raised during and before the June 3 public hearing, including detailed comments
20 from Petitioner. ROA, 68-77. Among the comments to which NDEP responded were those
21 submitted by Petitioner in a June 3, 2010, letter to NDEP. NDEP’s response noted that,
22 “[b]ecause the comments have been answered and the follow[up] comments raised no new permit
23 issues, NDEP has made the determination to re-issue the permit.” ROA, 67.

24 Having fully considered and responded to all public comments, including Petitioner’s,
25 NDEP reissued the Permit on June 24, 2010, effective the next day, stating that “[s]ufficient
26 information has been provided, in accordance with Nevada Administrative Code (NAC)
27 445A.228 through NAC 445A.263, to assure the [NDEP Bureau of Water Pollution Control] that
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1 the waters of the State will not be degraded from this operation and that public safety and health
2 will be protected.” ROA, 66.

3 Petitioner appealed NDEP’s decision on July 2, 2010 (ROA, 16) by submitting a
4 completed Form #3: Form for Requesting an Appeal Hearing Before the Nevada State
5 Environmental Commission. ROA, 14–16. Petitioner listed five issues for consideration by the
6 SEC. *Id.* Shortly thereafter, Nevada Power sought and obtained leave to intervene in the
7 administrative appeal. ROA, 17–19; 21.

8 A three-Commissioner SEC panel (the “Panel”) held a hearing on Petitioner’s appeal on
9 November 4, 2010. At the opening of the hearing, the Sierra Club identified just three grounds
10 for reversal of NDEP’s action. ROA, 285:18–286:10 (Petitioner stating three issues for review),
11 404–06 (SEC listing three issues for appeal and summarizing its decision), 305:5–11 (NDEP
12 Senior Deputy Attorney General Bill Frey’s motion to dismiss), 379:6–23 (Panel’s granting that
13 motion). First, Petitioner alleged that reissuance was unlawful because Nevada Power had
14 violated the 2005 Permit. ROA, 285:23–286:2, 404. Second, it alleged that reissuance was
15 unlawful in light of “evidence” regarding whether Nevada Power could meet the compliance
16 schedule in the 2010 Permit. ROA, 286:3–6, 405. Finally, Petitioner contended that reissuance
17 without groundwater monitoring was unlawful because NDEP did not know whether new storage
18 ponds authorized under the Permit would leak. ROA, 286:7–10, 405. Petitioner has raised only
19 the first and third issues for review by this Court.

20 By oral motion at the SEC hearing, NDEP argued that these issues should be dismissed
21 because the SEC could not take action on them pursuant to NRS 445A.605, which states that the
22 SEC may “affirm, modify or reverse any action of the Director which is appealed to it.” ROA,
23 305:5–11. First, NDEP’s counsel pointed out that NDEP considered Nevada Power’s compliance
24 with the Permit and properly determined that Nevada Power was in compliance. ROA, 305:22–
25 306:2. NDEP—the agency charged with determining whether Nevada Power has complied—has
26 never found any violations that the agency in its discretion would choose to formally enforce.

27 With respect to Petitioner’s third argument regarding whether groundwater monitoring is
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1 necessary to assure that the double-lined ponds would sufficiently protect the environment, NDEP
2 contended that whether the new evaporation ponds would leak was a “question of construction
3 and engineering and design and weather and all kinds of variables,” ROA, 306:22–23, and to
4 insure against leakage NDEP sets state-of-the-art requirements for compliance. ROA, 306:24–
5 307:9.

6 At the heart of the Panel’s decision to affirm reissuance of the Permit² was whether NDEP
7 correctly determined that Nevada Power was in “full or substantial compliance” with the 2005
8 Permit under NRS 455A.495. ROA, 321:14–20 (Assistant Attorney General to the Panel stating
9 445A.495(1) standard is “what you are going to be looking at”). In an attempt to show that
10 NDEP failed properly to evaluate Nevada Power’s “full or substantial compliance” and to
11 demonstrate Nevada Power’s lack of compliance, Petitioner intended to offer evidence of what it
12 considered Nevada Power’s “violations,” along with evidence showing that the 2010 Permit
13 could, in Petitioner’s view, better protect the environment. Petitioner explained that it was
14 prepared to offer some “92 pounds of evidence,” ROA, 282:23–24, regarding its allegations.

15 Nevada Power responded, stating that “[t]his appeal is about whether NDEP complied
16 with your regulatory requirements. It’s not about reinvestigating all the groundwater
17 characterization efforts [Nevada Power has] done And all of [Nevada Power’s] previous
18 filings under [its] 2005 [P]ermit. There are specific guidelines that are set forth for renewing the
19 permits. They have [been] complied with.” ROA, 295:21–296:9; *see also* ROA, 317:24–318:2,
20 366:23 and 367:8–23 (NDEP explaining that Petitioner’s appeal was an improper attempt to
21 convert a permit renewal setting into a lengthy adjudicatory evidentiary hearing and was a
22 “collateral attack” on the agency’s enforcement responsibility).

23 After deliberation, the Panel decided not to allow Petitioner to turn its appeal into an
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26 ² The SEC’s Order discusses the case in terms of a “motion to dismiss.” As discussed above,
27 NDEP did move to dismiss the case at the hearing, and though speaking in such terms, the Panel
28 essentially conducted an evidentiary hearing limited to the relevant questions pertaining to the
appeal, as discussed herein. This Court therefore views the use of the terminology regarding
dismissal as immaterial to the resolution of this case.

1 exhaustive evidentiary hearing over whether Nevada Power might have violated the Permit.
2 Instead, the Panel allowed testimony on one question relevant to the issues before it: whether
3 NDEP had issued any notices of alleged violation to Nevada Power. *See* ROA, 324:20–21;
4 322:7–9 (“[T]he NOV [stet] is prima facie evidence whether [Respondent was] in substantial
5 compliance.”). The Panel decided, effectively, that if there were no notices of violation (or, in the
6 parlance of NDEP’s Bureau of Water Pollution Control, responsible for water discharge permits,
7 a “finding of alleged violation”) issued to a permit-holder during the term of the permit, the
8 permit-holder is in “substantial compliance.”

9 To determine whether Respondent was in substantial compliance with the 2005 Permit,
10 the Panel asked NDEP’s Bureau of Water Pollution Control Enforcement Branch Supervisor to
11 testify. When asked by Petitioner’s attorney how many findings of alleged violation were issued
12 during the five-year period of the 2005 Permit, the NDEP supervisor answered, “None.” ROA,
13 333:24–334:3. The NDEP supervisor did testify that Nevada Power had failed to sample water
14 used for dust control, but that these failures were so minor that NDEP exercised its discretion not
15 to formally enforce them. ROA, 329:15–332:4. Petitioner’s counsel then asked how NDEP
16 decides to issue findings of violation. The NDEP supervisor stated that “every case is unique,”
17 that some violations are minor, and that some violations are not in the agency’s opinion an
18 “environmental threat.” ROA, 344:9–18. The witness repeated that Nevada Power never was
19 subject to formal enforcement action. ROA, 336:16–22.

20 The Panel also considered, *sua sponte*, whether to modify the 2010 Permit instead of
21 simply affirming it. *See* ROA, 353:24–354:2. Therefore, the Panel asked another of NDEP’s
22 supervisors, this one within the NDEP Permit Branch, to tell it whether the 2010 Permit includes
23 a requirement for groundwater monitoring. He responded that it did not. ROA, 339:14–17.
24 When asked why, the permit supervisor explained that the ponds governed by the Permit are
25 double-lined with 80-mil liners, with a leak-detection system. ROA, 339:14–340:19. The permit
26 supervisor further testified that such a design is “state of the art,” and “there [are] no better pond
27 systems out there.” ROA, 347:23–24.
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1 The Panel held that because “NDEP has met the substantial compliance requirement,” it
2 would affirm NDEP’s reissuance of the Permit. ROA, 379:15–17.

3 Approximately one month after the hearing, on December 3, 2010, the SEC issued its
4 Order Granting Motion to Dismiss and Affirming Permit of the Nevada State Environmental
5 Commission (the “SEC Order”), in which it set out its findings of fact and conclusions of law.
6 ROA, 404–06. The SEC Order is the basis for Petitioner’s appeal here.

7 CONCLUSIONS OF LAW

8 I. Standard of Review

9 When reviewing an administrative decision, the review is limited to reviewing the agency
10 record to decide “whether the agency’s decision was arbitrary or capricious and was thus an abuse
11 of the agency’s discretion.” *Secretary of State v. Tretiak*, 117 Nev. 299, 305, 22 P.3d 1134, 1138
12 (2001), *cert. denied*, 534 U.S. 963 (2001); NRS 233B.135(3)(f).³ This Court may not substitute
13 its judgment for the agency’s as to the weight of the evidence on questions of fact, and it is
14 limited to the agency record in its review. *Tretiak*, 117 Nev. at 305, 22 P.3d at 1138.

15 This Court shall affirm administrative agency factual decisions if substantial evidence
16 supports them. *Helms v. State, Div. of Env’tl. Prot.*, 109 Nev. 310, 313, 849 P.2d 279, 282 (1993)
17 (citing *State Indus. Ins. Sys. v. Swinney*, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987)). “Substantial
18 evidence is that which a reasonable person might accept as adequate to support a conclusion.”
19 *Ayala v. Caesars Palace*, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003) (internal quotation
20 omitted). The standard does not allow this Court “to pass on credibility or to reverse an
21 administrative decision because it is against the great weight and clear preponderance of the
22 evidence, if there is substantial evidence to sustain it.” *State Emp’t Sec. Dep’t v. Hilton Hotels*
23 *Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 n. 1 (Nev. 1986), *superseded in part by statute as*
24

25 ³ Petitioner alleges that the SEC’s decision violated every standard of review listed in NRS
26 233B.135(3) because its order was based on an erroneous interpretation of the law. Whether the
27 SEC correctly interpreted the law, as described in this section, is a question that under the
28 circumstances must be reviewed for an abuse of discretion. Because Petitioner alleges the SEC’s
interpretation of the law is the starting point for the remainder of the errors it claims, the
remaining standards of review are immaterial.

1 stated in *Aguilera v. CME Enters., Inc.*, 2010 WL 3822451 (Nev. Sep 28, 2010) (table) (internal
2 citation omitted). Moreover, this Court may not substitute its judgment of the record developed at
3 the agency level for that of the SEC, and may not substitute its judgment as to the weight of the
4 evidence or credibility of witnesses. *Gilman v. Nev. State Bd. of Veterinary Med. Exam'rs*, 120
5 Nev. 263, 89 P.3d 1000, 1003 (2004); *Tretiak*, 117 Nev. 299, 22 P.3d at 1138.

6 The agency's conclusions of law, which will necessarily be closely related to the agency's
7 view of the facts, are entitled to deference, and will not be disturbed if they are supported by
8 substantial evidence." *Ayala*, 119 Nev. at 235, 71 P.3d at 491.; see also *City of Reno v. Reno*
9 *Police Protective Ass'n.*, 118 Nev. 990, 999, 59 P.3d 1212, 1219 (2002) (noting court "'will not
10 readily disturb an administrative interpretation of statutory language'"). Such deference is
11 particularly appropriate where, as here, the agency made determinations within its area of
12 expertise, because this Court "should not foreclose the exercise of the administrative agency's
13 independent judgment on matters within its competence." *Washoe Cnty v. John A. Dermody,*
14 *Inc.*, 99 Nev. 608, 612, 668 P.2d 280, 282 (1983); see also *City of Reno* (holding "great deference
15 should be given to the agency's interpretation when it is within the language of the statute"
16 (quotation omitted)); *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743,
17 748, 918 P.2d 697, 700 (1996).

18 This Court must "independently review[] an agency's legal determinations," *Ayala*, 119
19 Nev. at 235, 71 P.3d at 491 (internal quotation omitted). In conducting a de novo review of
20 issues pertaining to statutory construction, however, this Court will "defer to an agency's
21 interpretation of its governing statutes or regulations if the interpretation is within the language of
22 the statute." *Dutchess Bus. Serv. Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d
23 1159, 1165 (2008). The regulation of water quality in Nevada is governed by the Nevada Water
24 Pollution Control Law. See NRS 445A.300–730. The SEC and NDEP are charged with
25 administering those statutes and promulgating regulations for carrying out the provisions thereof.
26 See NRS 445A.425; NRS 445A.440. Consequently, this Court gives "great deference" to the
27 SEC's interpretation of the Nevada Water Pollution Control Law and its implementing
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1 regulations, and will uphold such interpretations unless they are clearly inconsistent with the
2 express statutory language. *See Nevada Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 6, 866
3 P.2d 297, 300 (1994). The Court cannot disturb an agency's permissible interpretation of an
4 ambiguous phrase in a statute. *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev.
5 630, 635, 81 P.3d 516, 519 (2003).

6 **II. Analysis**

7 **A. The SEC Properly Interpreted and Applied NRS 445A.495**

8 *1. The Agency's Interpretation is Reasonable and Within the Statutory* 9 *Language*

10 Petitioner argues NDEP did not have an adequate basis to renew the Permit because
11 NDEP did not consider evidence regarding so-called "violations" alleged by Petitioner.
12 Petitioner's argument requires this Court to reject the SEC's interpretation of the statute at issue,
13 a decision that would be directly at odds with the Nevada Supreme Court's direction regarding
14 the standards of review this Court should apply to an agency's interpretation of its governing
15 statutes. This Court concludes that the SEC's interpretation of the statute was not arbitrary and
16 capricious nor an abuse of discretion. The SEC properly interpreted NRS 445A.495 and properly
17 exercised its discretion by limiting its inquiry to whether the agency had issued findings of
18 alleged violation to Nevada Power regarding the Permit.

19 NRS 445A.495(1) states in relevant part that NDEP "may issue a new permit upon
20 expiration of an existing permit if . . . [t]he holder of the permit is in full or substantial
21 compliance with all the requirements and schedules of compliance of the expired permit. . . ."
22 The statute does not define or interpret "substantial compliance." But ambiguity is common in
23 statutes establishing regulatory authority and standards. The phrase "substantial compliance" is
24 not defined in the statute, but its plain meaning is defined in the dictionary as "considerable in
25 quantity" or "being largely but not wholly that which is specified." Webster's Collegiate
26 Dictionary 1174 (10th ed. 1993). Thus, the SEC's interpretation of "substantial compliance" to
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1 mean the absence of any findings of violation is within the plain meaning of the term;⁴ substantial
2 does not mean full compliance. The agency acted reasonably and within its discretion to
3 determine that substantial compliance would be defined by whether NDEP as the expert agency
4 had made a determination that a violation had occurred and was significant enough to warrant
5 enforcement action. The Court gives significant weight to the agency's interpretation and will not
6 disturb it. *See, e.g., Helms*, 109 Nev. at 313–14, 849 P.2d at 282; *see also State Div. of Ins. v.*
7 *State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (holding interpretation of a statute
8 should be upheld if it is reasonable and comports with legislative intent⁵); *Meridian Gold*, 119
9 Nev. at 635, 81 P.3d at 519 (Nev. 2003) (same).

10 The Court rejects Petitioner's contention that the inquiry should have required NDEP to
11 have assessed "all information that was submitted, or was required to be submitted, to NDEP by
12 the permittee relevant to its compliance with the terms of its prior permit," as Petitioner
13 characterized such information. Petitioner's Opening Brief, 14. The Panel, in the exercise of its
14 reasonable discretion, afforded due weight to NDEP's discretionary determinations regarding
15 whether to take enforcement action against Nevada Power. *E.g., ROA*, 354:20–24, 355:1. This
16 was for good reason. NDEP, in its capacity as enforcement agency charged with ensuring permit
17 compliance, decides whether permittees are in compliance. *See, e.g., NAC 445A.261* (providing
18 NDEP with authority to modify, suspend, or revoke a permit if a violation occurs). NDEP had
19 not taken enforcement action against Nevada Power because it had no evidence of alleged
20 violations that would lead it—in its discretion—to take such action. Thus, the Panel properly
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22 ⁴ The Panel stated that the question of whether Nevada Power was in substantial compliance
23 should be determined by whether there were "any NOAVs issued and it's an up-or-down
24 question." *See, e.g., ROA*, 324:20–21.

25 ⁵ The SEC's interpretation does not conflict with legislative intent. "[W]here a statute has no
26 plain meaning, a court should consult other sources such as legislative history, legislative intent
27 and analogous statutory provisions." *State Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116
28 Nev. 290, 995 P.2d 482 (2000). NRS 445A.495 was promulgated through Laws 1973, p. 1712,
amended by Laws 1979, p. 1917 and Laws 1985, p. 766, where it was substituted for NRS
445.227. The legislative history does not address the meaning of "full or substantial compliance,"
and there is nothing in the legislative history to suggest that the Legislature would have opposed
the Panel's interpretation.

1 concurred with NDEP's finding. ROA, 70 ("The facility is in compliance with all NDEP-BWPC
2 regulations and the current BWPC permit requirements.").

3 Petitioner cites *Williams v. Clark Cnty Dist. Attorney*, 118 Nev. 473, 480, 50 P.3d 536,
4 541 (2002), for the notion that "[c]ourts have defined substantial compliance as compliance with
5 essential matters necessary to ensure that every reasonable objective of the statute is met." That
6 opinion did not involve use of the phrase "substantial compliance" as a statutory term; instead,
7 the opinion dealt with whether a petitioner challenging a residency requirement for an elected
8 official had substantially complied with express statutory procedural requisites to filing. Use of
9 the phrase "substantial compliance" is different, here, where it appears in the context of a statute
10 administered by an expert agency that had authority to interpret that term. Thus, the Court does
11 not find *Williams* to be persuasive in this context.

12 Even assuming the *Williams* standard applies here, however, the Panel's assessment of
13 "substantial compliance" *does* "ensure that every reasonable objective" of the Permit was met.
14 The Permit's objective, as stated by NDEP in its NOD is "to assure . . . that the waters of the State
15 will not be degraded from this operation and that public health and safety will be protected."
16 ROA, 66. Certainly, if Nevada Power's ponds—governed by the Permit—have not drawn
17 criticism or enforcement action by the agency overseeing those ponds, the Panel's substantial
18 compliance finding means that the waters of the State will not be degraded, and that health and
19 safety will be protected. That finding was well within reason and should not be disturbed.
20 Moreover, the record demonstrates that NDEP *did* fully consider Nevada Power's compliance
21 with the Permit. *See* ROA, 66 (stating that NDEP had reviewed sufficient information pursuant
22 to the water discharge permit regulations, which include monitoring and reporting requirements,
23 "to assure . . . that the waters of the State will not be degraded . . . and that public health and
24 safety will be protected").

25 Even if a violation *were* found to exist, that does not mean the permittee is not in *overall*
26 substantial compliance. Whether a permittee is in substantial compliance could depend—in
27 NDEP's or the SEC's discretion—on the nature of the violations (e.g., major or minor), how
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1 many occurred, how often they occurred, how quickly a violation was reported, what efforts were
2 made to correct it, how quickly those efforts were implemented, and impact on the environment.
3 Agencies, using their enforcement discretion, make these kinds of decisions regularly. And
4 “substantial” compliance under any interpretation does not mean “perfect” compliance.
5

6 Here, Petitioner takes particular issue with the SEC’s interpretation of “substantial
7 compliance” because it alleges that Nevada Power failed to submit interstitial monitoring reports
8 (for which there was not a formal finding of alleged violation issued), and it argues that that
9 alleged failure alone should prohibit permit renewal.⁶ Petitioner’s Reply at 23-25. Although the
10 2005 Permit required interstitial monitoring reports, the Permit never specified how or precisely
11 when that information was to be reported. There is no schedule in the 2005 Permit for reporting
12 the results. NDEP explained at the October 21, 2010, SEC hearing that because “there was no
13 specific date that [any interstitial monitoring report] was required to be turned in” there were “no
14 compliance issues.” ROA, 212:18–25, 213:1–3. The permit supervisor for NDEP stated during
15 the SEC proceeding that the interstitial fluid leakage rate was not required to be reported by the
16 terms of the 2005 Permit. ROA 209:2–15.

17 The fact that the 2005 Permit is ambiguous with regard to Nevada Power’s requirement to
18 report its interstitial monitoring results to NDEP is further evidenced by clarification of the
19 monitoring requirement in the 2010 Permit. ROA, 209:2–15. Furthermore, because some of the
20 ponds in the 2005 permit had only earthen clay liners, there was no need or ability to conduct
21 interstitial leakage monitoring on the single-lined ponds. Double-lining allowed for interstitial
22 monitoring between the first and second liners. ROA 3. Interstitial monitoring cannot be
23 performed on unlined or single-lined ponds. All of the evaporation ponds in the 2010 Permit
24 must be double-lined, and NDEP added the reporting requirement by requiring interstitial leakage

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26 ⁶ Petitioner does not contend that Nevada Power failed to timely collect the interstitial data, only
27 that it failed to timely report them. Petitioner also apparently claims that this alleged violation
28 should cause the Court to enjoin Nevada Power from operating and constructing wastewater
ponds. The Court has no authority to issue an injunction in this setting. NRS 233B.135 does not
provide for injunctive relief. The request for injunctive relief therefore is denied.

1 monitoring and quarterly reporting in the 2010 Permit. ROA, 2–3. The SEC correctly concluded
2 that Nevada Power was in substantial compliance with its 2005 Permit despite the failure to report
3 the interstitial monitoring data because Nevada Power could not be deemed to be out of
4 compliance with a permit that failed to specify when such data was required to be submitted.

5 Still, even if there were no ambiguity in the 2005 Permit and Nevada Power simply failed
6 to report to NDEP as required, NDEP has the broad discretion to decide whether such a failure
7 should lead to formal agency enforcement action. NDEP and the SEC could decide that Nevada
8 Power’s overall permit compliance was sufficient despite the reporting shortcoming.⁷ Again,
9 “substantial” compliance does not mean “perfect” compliance. The agency’s discretionary
10 determinations are sufficient to find such substantial compliance.

11 Finally, Petitioner argues that the SEC’s interpretation of “substantial compliance” is
12 wrong because the requirement in subsection one of the statute, NRS 445A.495, must be read
13 with subsection two of the statute,⁸ which Petitioner contends requires the agency to consider all
14 information “required to be submitted” when evaluating a permittee’s substantial compliance.
15 Petitioner relies for this conclusion on subsection two of NRS 445A.495, which states that to
16 reissue a permit, NDEP must have “current information on the nature and frequency of the
17 discharge” from the permittee “pursuant to submission of new forms and applications or pursuant
18 to continuing observation of records and reports submitted to the Department by the holder of the
19 permit.” NRS 445A.495(2). Contrary to Petitioner’s suggestion, subsection two does not require
20 perfect compliance (that *all* reports “required to be submitted” must have been submitted, as
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22 ⁷ As the NDEP enforcement supervisor testified before the SEC, “every case is unique.” For
23 example, as the NDEP supervisor explained, although Nevada Power failed to conduct sampling
24 of dust control fluids, the agency did not issue a finding of alleged violation because the agency
25 understood exactly what was happening, and that the failure was a “minor violation of the permit”
26 that was not an environmental threat. ROA, 334:9–18.

27 ⁸ The statute states as follows: “1. The holder of the permit is in full or substantial compliance
28 with all the requirements and schedules of compliance of the expired permit; 2. The Department
has current information on the nature and frequency of the discharge or injection of fluids through
a well by a holder of a permit, either pursuant to the submission of new forms and applications or
pursuant to continuing observation of records and reports submitted to the Department by the
holder of the permit. . . .”

1 Petitioner urges), or that the agency should have reviewed *all* records required to be submitted
2 before reissuing a permit.

3 Subsection two of the statute plainly provides that to reissue a permit the agency must
4 have “current information” on the nature and frequency of the discharge, which it may obtain
5 from review of “records and reports *submitted* . . . by the holder of the permit.” This language
6 does not require that every report called for under the permit should have been submitted and that
7 the agency should have reviewed all of that information. Instead, the plain language of
8 subsection two is consistent with the plain language of subsection one—that the only requirement
9 is “substantial,” not perfect, compliance. Moreover, because the agency also may obtain “current
10 information” from review of “new forms and applications,” it is clear that subsection two does
11 not require compliance as a precondition to renewal additional to that identified in subsection
12 one: simple substantial compliance.

13 ***2. The SEC’s Statutory Interpretation is Consistent with the Fact that Litigation***
14 ***of Alleged Violations Requires Specific Constitutional and Procedural***
15 ***Safeguards***

16 NDEP found that Nevada Power was in full or substantial compliance with the 2005
17 Permit. The SEC concluded the same based upon its permissible interpretation of the undefined
18 term in the statute, determining that substantial compliance should be determined by the NDEP’s
19 decision whether to find Respondent in formal violation of the Permit.

20 Petitioner nevertheless sought to introduce extensive evidence of numerous alleged
21 violations found in “92 pounds” of evidence and based on the testimony of an expert witness.
22 Permitting Petitioner to introduce such evidence at the SEC hearing would have been to allow
23 Petitioner and the SEC to bypass fundamental permit-enforcement mechanisms under Nevada law
24 designed to provide permittees notice of alleged violations, opportunities for permittees to defend
25 themselves, and the opportunity for NDEP to evaluate the alleged violations and to make the
26 decision, in the first instance, whether to take or refrain from taking enforcement action against
27 permittees if an alleged violation is found. These procedures are fundamental to Nevada Power’s
28 due process rights. It would be impermissible and unfair to allow a party like Petitioner here,

1 which proposed to offer extensive evidence at the SEC hearing, much of it for the first time in any
2 procedural context, to back-door permit enforcement through the separate permit renewal process,
3 much less during the administrative appeal of an NDEP permit decision.⁹

4 *a. NDEP's Permitting Role*

5 NDEP is charged by statute with issuing and reissuing permits to regulated parties such as
6 Nevada Power. *See* NRS 445A.495. The record reflects that NDEP properly considered Nevada
7 Power's application, properly considered all public comments, including Petitioner's, and
8 properly considered whether Nevada Power was in compliance. ROA, 66-77. The SEC then
9 reviews that process to ensure that permits are legally issued. NRS 445A.605. All this is a check
10 on the permit applicant to ensure it has earned permit reissuance, and a check on NDEP to ensure
11 that it properly issues permits. None of it, however, is meant to allow Petitioner, without the due
12 process safeguards provided in NDEP's formal permitting process and in citizen suits, to obtain
13 an agency ruling that a permit-holder has violated its permit terms.

14 *b. NDEP's Enforcement Role*

15 NDEP also is charged by statute with enforcing the permits it issues and reissues to ensure
16 compliance. That process is separate from the process NDEP employs to decide whether to issue
17 or reissue a permit. If NDEP "finds that any person is engaged or is about to engage in any act or
18 practice which violates any provision of . . . any permit issued by the Department pursuant to [the
19 Water Pollution Control Act]," NRS 445A.675, the agency may issue a compliance order, NRS
20 445A.690, commence a civil action, NRS 445A.695 or 445A.700, or request that the Attorney

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22 ⁹ Petitioner argues that, by highlighting the mechanisms by which it may contest Respondent's
23 alleged noncompliance with Permit terms, this Court is preconditioning Petitioner's ability to
24 appeal the permit renewal on first pursuing an enforcement action. Petitioner misses the point.
25 The Court notes the fact that there is a separate enforcement process, complete with rights for
26 both a petitioner *and* the permit-holder. The Court makes this observation not to impose a
27 precondition to appeal a permit renewal, but to support the SEC's permissible interpretation of the
28 "substantial compliance" statutory term. The SEC's conclusion that substantial compliance exists
if there were no FOAVs is supported by the fact that there exist specific procedures and attendant
rights that must be followed and recognized before a permit-holder can be found to be out of
compliance with—i.e., in "violation" of—a permit.

1 General institute a criminal prosecution, NRS 445A.705. The agency also should “conduct an
2 independent investigation of the alleged act or practice for which the Director is making the
3 determination.” NRS 445A.707. Permittees, in response, can answer the agency’s complaint,
4 attempt to recharacterize the allegations, assert defenses to the alleged violations, and work to
5 reach a compromise with the agency that would reduce its potential liability.

6 For example, although a raw data point on a reporting form might appear on its face to be
7 a “violation,” any number of circumstances could undermine that conclusion. The data could be
8 in error or misreported. An exception or exemption might apply to excuse the error. In the
9 Permit itself, for instance, there is a provision for “upsets,” incidents in which “there is
10 unintentional and temporary noncompliance with the permit effluent limitations because of
11 factors beyond the reasonable control of the Permittee.” ROA, 10 (Permit, II.A.4.e.). The Permit
12 provides that, “[i]n selecting the appropriate enforcement option, the Division shall consider
13 whether or not the noncompliance was the result of an upset.” *Id.* at II.A.4.f. Nevada Power is
14 explicitly allowed an opportunity to establish that an upset occurred: “the Permittee must
15 provide, in addition to the information required under Part II.A.4.b. above, properly signed
16 contemporaneous logs of other documentary evidence” to show that an upset occurred. *Id.* at
17 II.A.4.g.

18 A permittee cannot attempt to establish its defense, of course, unless it is given an
19 opportunity to do so before a violation is determined to have occurred. In an enforcement action
20 by NDEP, the permittee has critical due process rights, allowing it to investigate and defend
21 against the allegations of violation. For example, an order alleging a violation by NDEP must
22 specify “the regulation or order alleged to be violated” as well as identify the “facts alleged which
23 constitute a violation thereof.” NRS 445A.690(a), (b). The permittee thus has specific notice of
24 the alleged violation, and an opportunity to research the allegation and defend against it in a
25 hearing before the SEC pursuant to NRS 445A.690(c). None of these rights are vindicated if a
26 party can allege and prove violations of a permit through the permit renewal process.

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c. Petitioner Did Not Bring a Citizen Action

Finally, if citizens are concerned that a permittee is noncompliant, they may bring lawsuits to enforce the permit themselves. *See* NRS 41.540. A citizen suit also mandates certain due process requirements that are not available as part of the permit renewal process. For example, a citizen suit requires written notice. Attempting to raise what amounts to a citizen enforcement action in the permit appeal is not fair to the permit holder and could result in violations of the permit-holder’s due process rights.

In sum, as a matter of policy, if the SEC were to look beyond NDEP’s assessment of Nevada Power’s compliance, it would effectively redesign the permitting process, allowing citizens to attempt to enforce permits after ignoring legal procedures specially designed for citizen enforcement, based on mere allegations of non-compliance drawn from subjective interpretations of raw data, bereft of the agency’s rigorous mechanisms designed to elicit whether alleged violations actually may be considered evidence of noncompliance or deserving of enforcement. Such a redesign is outside the Panel’s discretion and its jurisdiction: if the Legislature wanted to allow enforcement actions within permit appeals, it could say so.

B. The SEC Properly Limited the Scope of the Hearing to the Question at Issue

Petitioner also argues that the SEC’s decision must be reversed because the Panel should have allowed it to put on any and all evidence of what it alleges are Nevada Power’s failures to comply with the 2005 Permit. It bases its contention on the Nevada Administrative Procedure Act’s pronouncement that “[e]ach party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues. . . .” NRS 233B.123(4). But that provision limits evidence to “any matter relevant to the issues” at hand—here, whether the agency in charge of determining Nevada Power’s compliance had determined that the company was in substantial compliance. The relevant witness on behalf of NDEP responded that the company was in compliance. Receiving that answer, the SEC had all the information it needed on the only issue at hand as to whether Nevada Power was in substantial compliance. The SEC took no more evidence on the issue of compliance because no more was necessary. This is

1 exactly the kind of substantial evidence that “a reasonable person might accept as adequate to
2 support a conclusion.” *Ayala*, 119 Nev. at 235, 71 P.3d at 491–92; *Hilton Hotels Corp.*, 102 Nev.
3 at 608 n.1, 729 P.2d at 498 n.1.

4 Moreover, pursuant to NRS 445A.425(4), “[t]he Commission may hold hearings, issue
5 notices of hearings, issue subpoenas requiring the attendance of witnesses and the production of
6 evidence, administer oaths and take testimony *as it considers necessary to carry out the*
7 *provisions of this section* and for the purpose of reviewing standards of water quality.”
8 (Emphasis added). Pursuant to statute, “evidence *may* be admitted in contested cases such as this
9 one” NRS 223B.123(1) (emphasis added). And finally, “[i]rrelevant, immaterial or unduly
10 repetitious evidence must be excluded.” *Id.* These provisions operate to ensure that the
11 Commission has discretion to allow the evidence it determines germane to the questions to be
12 answered. The SEC properly exercised its discretion to hear that evidence necessary for it to
13 make its determination.

14 Even if there were any reason to believe Petitioner’s claims that NDEP failed to assess all
15 the information it should have, Petitioner’s comments and the agency’s responses to them during
16 the hearing show that the agency assessed everything it should have considered before affirming
17 reissuance of the Permit. The Record demonstrates that Petitioner took painstaking efforts to
18 inform the agency of the compliance issues it believed existed.¹⁰

19 Although the Panel could have chosen to entertain Petitioner’s desire to put on evidence
20 of what Petitioner considers “violations” of the Permit, and although its own advisory Assistant
21 Attorney General told the Panel the agency *may* look beyond notices of alleged violation to assess
22 compliance, ROA, 321:21–22, the Panel was well within its discretion not to do so. This is
23 especially true given that NDEP already had comprehensively reviewed the Permit and Nevada
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27 ¹⁰ See, e.g., ROA, 70–77. NDEP considered Petitioner’s comments and indicated that it had fully
28 reviewed the Station’s compliance. See *id.* And NDEP’s Enforcement Branch Supervisor
confirmed that the agency carefully assessed Nevada Power’s record. See ROA, 332:15–24.

1 Power's actions pursuant to the Permit and found that Nevada Power was in compliance.¹¹ Based
2 on its careful review of Nevada Power's five-year compliance record, NDEP decided that Nevada
3 Power was in substantial compliance and that the Permit should reissue. The SEC properly
4 concurred based on its interpretation of "substantial compliance" and the limited testimony
5 necessary to prove compliance that was received at the hearing. Because Petitioner has failed to
6 show that either NDEP's findings or the SEC's decision were in violation of constitutional or
7 statutory provisions, in excess of statutory authority, made upon unlawful procedure or in error of
8 law, clearly erroneous in view of the substantial evidence or record, or otherwise arbitrary and
9 capricious under NRS 233B.135, the SEC Order is affirmed.¹²

10 **C. The Permit Complies with NDEP Regulations and Is Sufficiently Protective of the**
11 **Environment**

12 Petitioner argues that the SEC's Order must be reversed because Petitioner was not
13 permitted to introduce evidence that the Permit is not sufficiently protective of the environment
14 because it does not require groundwater monitoring. As an initial matter, Petitioner has waived
15 any opportunity it may have had to raise this argument. Even if it had not, the evidence in the
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17 ¹¹ See, e.g., ROA, 332:15-24 (agency review of DMR files); ROA, 336:3-23 (NDEP never issued
18 a "finding of alleged violation"); ROA, 70 ("[t]he facility is in compliance with all NDEP-BWPC
19 regulations and the current BWPC permit requirements"); ROA, 73 ("[t]he facility is in
20 compliance with the BWPC zero-discharge permit"); ROA, 66 ("Sufficient information has been
provided . . . to assure . . . that the waters of the State will not be degraded from this operation and
that public safety and health will be protected.").

21 ¹² To the extent the Panel's use of the dismissal terminology, as discussed *supra* at n.2, were to be
22 viewed as material, the Panel's decision nevertheless is affirmed for the reasons stated in NDEP's
23 Response brief, which are adopted herein by reference. In short, Nevada Rule of Civil Procedure
24 12(b)(5) governs motions to dismiss for failure to state a claim. Although the SEC received
25 evidence, which often converts a motion to dismiss into a motion for summary judgment, the
26 evidence received by the Panel was the type of evidence for which the SEC could take judicial
27 notice. See NRS 233B.123(5). Further, even if the motion to dismiss were converted to a
28 summary judgment motion because of the admission of testimony, NRCP 12(b), the motion was
still properly granted because there was no genuine issue of any material fact and NDEP and
Nevada Power were entitled to judgment as a matter of law, NRCP 56(c), and the SEC was
entitled to utilize "[t]he experience, technical competence and specialized knowledge of the
agency" to evaluate the evidence. NRS 233B.123(5).

1 record shows that the Permit is in fact sufficiently protective of the environment.

2 First, Petitioner did not sufficiently raise this issue before the agency to allow further
3 review by this Court. During the hearing before the SEC, Petitioner stated that NDEP erred in
4 reissuing the permit based on “unsubstantiated or erroneous presumptions as to the performance
5 of the newly authorized Mesa ponds or its unenforceable no discharge permits.” See ROA,
6 285:18–286:10. Petitioner never raised the issue again after first identifying it as an issue for
7 appeal. Later during the hearing, however, it did argue that groundwater monitoring wells should
8 be required as a check to make sure the pond liners do not leak. ROA at 315:10–24, 316:1–4.
9 That issue, however, is not the same as any of the three issues Petitioner identified for review by
10 the SEC. See ROA, 285:18–286:10. Thus, the SEC was correct in restricting the issues in the
11 hearing to those that Petitioner itself had identified as the basis for its appeal of NDEP’s
12 reissuance of the Permit. Because Petitioner did not properly raise the issue before the SEC, it
13 cannot raise the issue before this Court. See *Dubray v. Coeur Rochester Inc.*, 112 Nev. 332, 337
14 n.2, 913 P.2d 1289, 1292 n.2 (1996) (stating failure to raise an issue at the administrative level
15 results in a waiver of the issue on appeal).

16 Second, even if the Petitioner properly raised groundwater monitoring before the agency,
17 the SEC’s decision was correct. To the extent the issue of groundwater monitoring was discussed
18 at the hearing, Petitioner itself objected to the SEC hearing evidence on this issue. ROA, 348:9–
19 22. The limitation of evidence on this issue, therefore, is a consequence of Petitioner’s own
20 actions for which it cannot now be heard to complain.

21 Further, Petitioner did not object to or move to strike any of the evidence that the
22 Commission did hear from the NDEP permitting supervisor, who testified that the pond-liner and
23 leak-monitoring system is state of the art. See generally ROA, 273–380 (hearing transcript
24 showing complete absence of motion to strike), 339:14–340:18 (NDEP permitting supervisor
25 testifying, without objection, that groundwater monitoring is not necessary to protect the
26 environment). After the NDEP permitting supervisor testified under questioning by Nevada
27 Power’s counsel, Petitioner’s counsel, and the Commissioners themselves, Petitioner’s counsel
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1 objected to the witness *expanding* his testimony into how effective the pond liners might be. The
2 Commission Chairman sustained this objection and ended further testimony on that issue. ROA,
3 348:8–348:14. Petitioner’s counsel did not object to the content of the NDEP permitting
4 supervisor’s testimony until the witness expanded discussion to the effectiveness of the pond
5 liners. In fact, Petitioner’s counsel elicited much of the witness’s evidence himself, questioning
6 the NDEP permitting supervisor at length. ROA, 342:3–345:6. Failure to move to strike
7 evidence means the evidence is properly part of the record and its presence in the record cannot
8 be a basis for appeal. *See, e.g., Clark v. State*, 89 Nev. 392, 393, 513 P.2d 1224, 1224–25 (1973);
9 C.J.S. TRIAL § 232.¹³ Thus, there was proper record evidence based on which the SEC could
10 decide that the Permit was adequate and did not require groundwater monitoring.¹⁴

11 Specifically, the NDEP permitting supervisor testified that there was no groundwater
12 monitoring requirement in the 2010 Permit because the ponds were required to be double-lined
13 and there was a leak-detection system between the two liners. ROA, 339:14–24, 340:1–18. The
14 NDEP witness also testified that in the mining industry, which often deals with cyanide, a
15 potentially harmful chemical, 80-60-mil double liners were adequate to contain cyanide. ROA,
16 345:14–24, 346:1–13. The witness further testified that whether groundwater monitoring was to
17 be required depended on numerous factors, including the chemicals that would be in the ponds,
18 depth to groundwater, and the thickness of the liner. ROA, 346:7–13. As counsel for the
19 Petitioner conceded, the ponds on the Mesa would be further removed from the Muddy River as
20 well as from groundwater, since the Mesa area has much greater depths to groundwater. ROA, 3,

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22 ¹³ Based on these procedural failures, Petitioner’s arguments that the NDEP permitting
23 supervisor’s testimony could not be considered because Petitioner was precluded from cross-
24 examining or providing expert testimony of its own to rebut the witnesses testimony that the
25 ponds are “state of the art,” and related testimony, cannot prevail. Even if they could, Sierra Club
26 *did* cross-examine the witness. ROA, 342:3–345:6. And, as further explained below, to the extent
27 Petitioner complains of not being able to admit its own expert testimony regarding whether
28 groundwater monitoring is necessary, such testimony would be immaterial because the
conclusion that the ponds are state of the art was not material to the SEC’s affirmance of the
permit reissuance.

¹⁴ There was also proper record evidence that such groundwater monitoring for the new Mesa
ponds would be provided in any case by Nevada Power. *See, e.g., ROA, 377–78.*

1 121:12–17. Just as importantly, by double-lining the ponds with a leak-detection system in
2 between the liners, NDEP is catching the leak at its source, before it has had the chance to
3 migrate into groundwater.

4 **D. The SEC’s Finding Regarding Groundwater Monitoring Cannot Require Reversal**
5 **of the SEC’s Order**

6 Petitioner last claims that the SEC’s Finding of Fact Number 3 (that “the newly proposed
7 wastewater ponds . . . do not require [groundwater] monitoring wells”) is a basis for reversing the
8 SEC’s Order because Petitioner had no opportunity to present evidence regarding its basis for
9 demanding such monitoring. It is not. As just described, the reason Petitioner was barred from
10 presenting such evidence is a consequence of its own actions. Whether or not that monitoring
11 was necessary, therefore, is immaterial to the SEC’s conclusion that the Permit should be
12 affirmed, which was based on the issues properly raised before the Commission and addressed by
13 the parties.

14 Further, it should be noted that the evidence received regarding a groundwater monitoring
15 plan was not germane to the SEC’s decision to dismiss the appeal. The SEC did not seek to
16 modify NDEP’s decision to issue the permit without a requirement for groundwater monitoring.
17 ROA, 379:6–23. The SEC’s order granting the motion to dismiss the appeal and affirming the
18 issuance of the renewed permit relies on the finding that NV Energy was in substantial
19 compliance with its 2005 Permit. ROA, 406. Because the SEC did not rely on such evidence for
20 its dismissal, the Petitioner’s argument that it was denied the opportunity to present evidence on
21 that issue is inapposite. The evidence taken with respect to groundwater monitoring is analogous
22 to dictum in a case. A statement in a case that is not necessary to a determination of the issues is
23 dictum, and is not controlling authority. *City of Oakland v. Desert Outdoor Advertising, Inc.*, ___
24 P.3d ___, ___, 127 Nev. Adv. Op. No. 46, 2011 WL 3359742, *4 (Aug. 4, 2011). Similarly, the
25 groundwater monitoring testimony was not necessary to determine the motion to dismiss the
26 appeal for failure to state a claim upon which relief could be granted. Therefore, it was not
27 necessary to allow the Petitioner to present rebuttal testimony.

1 For these two reasons, whether the Court strikes finding of fact number three or not,
2 because the finding is immaterial, the SEC's decision must stand.

3 Finally, even if the finding were material, for the reasons also described above, the finding
4 was proper based on the testimony received, without objection or motion to strike from Petitioner,
5 regarding the adequacy of the pond-lining system without groundwater monitoring.

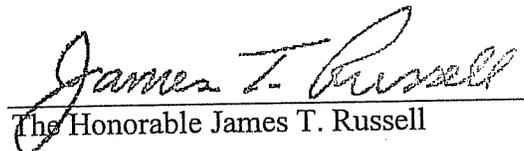
6 **III. Conclusion**

7 NRS 445A.605 states that on appealable matters "[t]he Commission shall affirm, modify
8 or reverse any action of the Director which is appealed to it." The SEC had substantial evidence
9 on which to affirm the reissuance of the Permit here. The decision and the SEC Order are sound,
10 based on permissible interpretations of the law and well-supported determinations of fact upon
11 which this Court will not substitute its judgment for that of NDEP or the SEC. Pursuant to NRS
12 233B.135 and NRS 445A.605, the substantial rights of the Petitioner have not been prejudiced.
13 The Court affirms the SEC's decision to affirm reissuance of the Permit.

14 Therefore, for good cause appearing,

15 IT IS HEREBY ORDERED that the Petition for Judicial Review is DENIED.

16 Dated this 22nd day of November 2011.

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18 The Honorable James T. Russell