IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

PATAGONIA AREA RESOURCE ALLIANCE, *Appellant*,

v.

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, *Appellee*.

SOUTH32 HERMOSA, INC., *Intervenor/Appellee*.

No. 1 CA-CV 23-0725
FILED 01-30-2025

Appeal from the Superior Court in Maricopa County
No. LC2022-000259-001
The Honorable Joseph P. Mikitish, Judge

AFFIRMED

COUNSEL

Hofmeyr Law, PLLC, Tucson
By Adriane Janet Hofmeyr
Co-Counsel for Appellant

Arizona Center for Law in the Public Interest, Phoenix
By Chanele N. Reyes, Nicholas Ansel
Co-Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Paul Phelps
Counsel for Appellee ADEQ

Perkins Coie, LLP, Phoenix
By Christopher D. Thomas, Benjamin Longbottom, Diane M. Johnsen
Co-Counsel for Intervenor South32 Hermosa, Inc.

Todd Gwillim, Tucson
Co-Counsel for Intervenor South32 Hermosa, Inc.

OPINION

Judge David D. Weinzweig delivered the opinion of the Court, in which Presiding Judge Brian Y. Furuya and Judge James B. Morse Jr. joined.

W E I N Z W E I G, Judge:

¶1 Arizona law directs mines to test the water (known as effluent) leaving their facilities to ensure it does not pollute the groundwater further downstream. To that end, mines are legally required to "determine" whether groundwater meets pollution standards at a particular "point of compliance" down the watercourse. We are asked to decide what that means. An environmental non-profit interprets those words to mandate that mines gather and test the groundwater as it hovers on the designated point of compliance, which would require mines to dig a monitoring well at that point. The Arizona Department of Environmental Quality ("ADEQ") disagrees, insisting that mines can determine that groundwater is clean at the point of compliance with assorted methods and measurements, without having to dig the well at that point. An administrative law judge agreed with ADEQ. So do we.

¶2 Patagonia Area Resource Alliance ("Patagonia") appeals the superior court's acceptance of ADEQ's approval of South32 Hermosa Inc.'s ("South32") proposed amendment to an aquifer protection permit. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Hermosa Project

¶3 South32 owns and operates a mine in Santa Cruz County named the Hermosa Project, which straddles two watersheds, the Alum Gulch and Harshaw Creek. The Hermosa Project taps into one of the world's largest undeveloped zinc-lead deposits, which will eventually be

sold to power "electric vehicles, wind turbines, solar panels, and lithium-ion batteries, among other uses."

Arizona Aquifer Protection Permit Program

¶4 To regulate the discharge of effluent into groundwater, the Arizona Legislature enacted the Aquifer Protection Permit Program in 1986. *See City of Sierra Vista v. Dir., Ariz. Dep't of Env't Quality*, 195 Ariz. 377, 379, ¶ 3 (App. 1999); A.R.S. §§ 49-241 through -252. This program requires "any person who discharges or who owns or operates a facility that discharges" effluent into groundwater to secure an Aquifer Protection Permit from ADEQ. A.R.S. § 49-241(A).

The Original Permit

¶5 ADEQ first issued a permit for the Hermosa Project in 2018. South32 was granted permission to build three facilities at the time, including a water treatment plant, a lined tailings storage facility (to protect the aquifer from tailings leaching) and an underdrain collection pond (to collect seepage from the storage facility). That original permit authorized South32 to discharge 172,000 gallons of treated effluent from its water treatment plant into the Alum Gulch.

¶6 ADEQ designated three points of compliance on the watercourse, physical locations where South32 had to prove the groundwater was free from pollutants. South32 agreed to dig a monitoring well at the first point, located about 200 feet downstream from the water treatment plant.

The Significant Amendment

¶7 ADEQ granted South32 a Significant Amendment ("Amendment") in the summer of 2020, which authorized South32 to increase its water treatment capacity for the purpose of accessing submerged ore. The Amendment increased the Hermosa Project's discharge limit by 3,750 percent. South32 built a separate water treatment plant at a second outfall which discharged into Harshaw Creek.

¶8 ADEQ designated a new point of compliance for the Amendment, located 9.4 miles downstream from Harshaw Creek. South32 agreed to determine the water quality at this point without digging a monitoring well.

¶9 Patagonia unsuccessfully appealed ADEQ's approval of the Amendment to the Water Quality Appeals Board and the Maricopa County Superior Court. Patagonia timely appealed. We include the administrative record on appeal under the parties' stipulation. *See* ARCAP 11(g)(1)(A). We have jurisdiction. *See* A.R.S. §§ 12-120.21(A)(1), -2101(A)(1) and -913.

DISCUSSION

¶10 Patagonia argues South32 must dig a monitoring well at the point of compliance under Arizona law, and the superior court abused its discretion by finding the Amendment complied with Arizona law.

I. Point of Compliance (A.R.S. § 49-244).

¶11 At issue here is Arizona Revised Statutes § 49-244, which directs Arizona mines to "determine" if groundwater meets Aquifer Water Quality Standards at a particular "point of compliance" designated by ADEQ. A "point of compliance" is defined as "the point at which compliance [for Aquifer Water Quality Standards] must be determined." *See* A.R.S. §§ 49-243(B)(2), -244. We must decide whether § 49-244 requires South32 to dig a monitoring well at the point of compliance to test the groundwater.

¶12 We interpret Arizona statutes de novo and do not defer to prior agency decisions. *Indus. Comm'n of Ariz. Lab. Dep't v. Indus. Comm'n of Ariz.*, 253 Ariz. 425, 427, ¶¶ 10–11 (App. 2022). We are not bound by an agency's legal conclusions. *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436, ¶ 12 (App. 2009).

¶13 When the language of a statute is "clear and unequivocal," we look no further to determine the statute's meaning, "for if the statutory language is clear, judicial construction is neither required nor proper." *Planned Parenthood Ariz., Inc. v. Mayes*, 257 Ariz. 110, 115, ¶ 15 (2024) (cleaned up). We aim to "determine the plain meaning of the words the legislature chose to use, viewed in their broader statutory context." *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 255 Ariz. 382, 385, ¶ 11 (2023); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (courts must interpret a statute's plain language in context because "[c]ontext is a primary determinant of meaning"). Only if a statute "can be reasonably read in two ways" will we rely on "alternative methods of statutory construction." *Planned Parenthood Ariz., Inc.*, 257 Ariz. at 115, ¶ 17 (citation omitted).

¶14 Because Arizona water quality laws do not define the word "determine," that word is "to be understood in [its] ordinary, everyday meaning[]." Scalia & Garner, *supra*, at 69. The American Heritage Dictionary defines "determine" as "[t]o establish or ascertain definitely, as after consideration, investigation, or calculation." *Determine*, American Heritage Dictionary (5th ed. 2011). This court has defined the word "determine" as synonymous with "finds." *Wineinger v. Wineinger*, 137 Ariz. 194, 197 (App. 1983).

¶15 Using that definition, South32 need only ascertain through investigation and calculation that the groundwater at the point of compliance meets water quality standards. South32 met that requirement.

¶16 ADEQ employs a comprehensive regulatory scheme to determine whether groundwater meets water quality standards at the point of compliance—including record keeping and reporting requirements, maintenance schedules, contingency plans in the event of a spill, assessments of environmental conditions in the area, and any "other terms and conditions as the director deems necessary to ensure compliance." *See* A.R.S. § 49-243(K). ADEQ considered this overall regulatory framework to determine the Amendment would not pollute groundwater at the point of compliance.

¶17 ADEQ relied on South32's comprehensive system of monitoring and controls at and near the new treatment plant—all in lieu of requiring that South32 dig a monitoring well at the point of compliance.

¶18 ADEQ required South32 to measure the effluent for pollution as that effluent is discharged from South32's water treatment plant and returned into the groundwater at Harshaw Creek. ADEQ concluded that this approach was more protective of the environment than measuring for pollutants nine miles downstream—long after the effluent had mixed with the groundwater. ADEQ also required South32 to measure flow volume.

¶19 Beyond that, ADEQ officials studied the design and technology of the water treatment plant to ensure it would discharge water that meets the Aquifer Water Quality Standards. South32 employed the best available technology like an automatic shutoff and response system that shuts down the water treatment plant if it identifies pollutants in the releases.

¶20 Arizona law envisions a holistic approach to determine whether effluent meets water quality standards when returned to the groundwater from a water treatment plant. Just as a physicist can

determine the speed of a falling object without a stopwatch, Arizona mines can determine the quality of groundwater at a physical location without digging a monitoring well at that location.

¶21 Even assuming the statute is ambiguous, ADEQ's interpretation is supported by a pair of statutory interpretation canons.

¶22 First, the surplusage canon teaches to read a statute so that no language is rendered devoid of meaning. *Cao v. PFP Dorsey Invs., LLC*, 257 Ariz. 82, 88, ¶ 29 (2024); Scalia & Garner, *supra*, at 174. Applied here, Arizona law require mines to measure the water quality at a particular spot *if* reason exists "to suspect the presence of [specific pollutants] in a discharge." A.R.S. § 49-203(A)(11). If Patagonia is correct and mines must always measure for pollution at the designated point of compliance, then §§ 49-203(A)(11) and -244 are meaningless.

¶23 Second, the mandatory/permissive canon emphasizes the difference between mandatory and permissive words so that mandatory words impose a duty while permissive words grant discretion. *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 564–65, ¶ 41 (2018); Scalia & Garner, *supra*, at 112. Applied here, Arizona law says ADEQ "may prescribe" monitoring requirements in permits. A.R.S. § 49-243(K). That permissive language is incompatible with Patagonia's interpretation that ADEQ must always dig a well at the point of compliance to test the quality of groundwater.

¶24 In sum, Arizona mines can determine the quality of groundwater at a particular point of compliance without digging a monitoring well at that point, unless ADEQ finds and requires otherwise.

II. Abuse of Discretion.

¶25 Patagonia next argues the record lacks substantial evidence to support the ADEQ's finding that groundwater was clean at the point of compliance. Our review is de novo. *Ariz. Dep't of Transp. v. Ariz. Motor Vehicle, LLC*, 255 Ariz. 139, 145, ¶ 32 (App. 2023). An agency's decision should be reversed if contrary to law, not supported by substantial evidence, arbitrary and capricious, or an abuse of discretion. A.R.S. § 12-910(F).

¶26 The record has ample evidence to support ADEQ's decision. As explained above, South32 regularly measures effluent for pollution as it is released back into the groundwater from South32's water treatment plant. What is more, ADEQ thoroughly reviewed the technology used at

the second water treatment plant and evaluated the risk of increasing the tailing storage facility's capacity.

¶27 For its part, Patagonia concedes the effluent meets water quality standards as it leaves South32's mining facility, but insists that the groundwater might still become contaminated downstream. We are not persuaded by that argument. ADEQ's decision need not be supported by all record evidence; indeed, the record might even support a different conclusion. *Gaveck*, 222 Ariz. at 436, ¶ 11. The record has ample evidence to support ADEQ's finding.

CONCLUSION

¶28 We affirm. South32 seeks its attorney fees under A.R.S. § 12-348(A)(2), but that statute does not cover intervenors who support the state's position. *Grand Canyon Tr. v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 40, ¶ 45 (App. 2005). We also deny Patagonia's request for attorney fees. Still, South32 is granted its costs as the prevailing party upon compliance with ARCAP 21. A.R.S. § 12-342(A).

AMY M. WOOD • Clerk of the Court
FILED: JR