DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 --- POWERTECH (USA) INC., A SOUTH DAKOTA CORPORATION, Plaintiff, v. STATE OF COLORADO MINED LAND RECLAMATION BOARD, Defendant; and Defendant-Intervenor(s): COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY; SHEEP MOUNTAIN ALLIANCE.	▲ **COURT USE ONLY** ▲
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DEFENDANT MINED LAND RECLAMATION BOARD'S ANSWER BRIEF	

TABLE OF CONTENTS

PAGE

INTRODUCTION 2

STATEMENT OF FACTS 4

Administrative Rulemaking Process 4

2008 Legislation 7

ARGUMENT 8

I. Standard of Review 8

II. The Board Has Broad Rulemaking Authority Regarding Reclamation Performance Standards Related to Prospecting and Mining 9

A. Baseline Water Quality Information and Pit Liners Related to Prospecting are Reclamation Performance Standards 11

B. Public Comment on Confidential Designations and the Ability to Dispute such Designations is Consistent with SB 228 13

C. Public Comment and Appeal of Transfer of ISL Permits is a Reasonable Rule Respecting the Administration of the Act 14

D. Notice to Local Governments of Prospecting Activities is Authorized and Consistent with the Act 16

III. The Board's Request for Alternate Language Complied with the APA and the Rules Promulgated were Within the Scope of the Notice 17

A. The Board's Notice of Rulemaking was Proper and Sufficient under the APA 18

B. The Rulemaking Record is Replete with Comments Regarding the Topics Raised in the July 19 Order 20

1. The Oral Comment Record was Exhaustive with Regard to the Five Topics in the July Order 22

TABLE OF CONTENTS

PAGE

2. The Written Record Also Reflects Ample Comment on the Five Topics ByBoth Parties and Non-Parties..... 26

3. Plaintiff Had Ample Opportunity to Discuss the Five Topics of the July Order..... 28

C. The Rules Ultimately Adopted Were a Logical Outgrowth of the Notice and Comments Received and Therefore Valid..... 30

D. Plaintiff's Reliance on Caselaw Where the Record was Non-Existent Is Misplaced.....33

IV. The Rules Complied with the APA Process, Have a Reasonable Basis in Law, and are Supported by Substantial Evidence in the Record 35

A. Challenged Rules Are Not Arbitrary or Capricious..... 35

B. Rulemaking Process Complied with APA Process..... 36

C. Challenged Rules are Reasonable and Based on Substantial Evidence..... 36

CONCLUSION 39

INTRODUCTION

This case concerns a challenge to amendments to the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal, and Designated Mining Operations ("Rule or Rules"), 2CCR 407-1, adopted by the Colorado Mined Land Reclamation Board ("Board") on August 12, 2010 (effective September 30, 2010). The driving force behind the rulemaking was the General Assembly's directive to the Board to implement two pieces of legislation: Senate Bill 08-228 concerning prospecting, codified at Colo. Rev. Stat. [1] § 34-32-113; and, House Bill 08-1161 concerning uranium mining, codified at §§ 34-32-103, 110, 112, 112.5, 115, 116, and 121.5. The rules promulgated by the Board were based in large part on the proposed rules of the Division of Reclamation, Mining, and Safety ("Division") that were published and available for review and comment on January 26, 2010.

Over the course of the eight-month rulemaking process both parties and non-parties presented for Board consideration extensive written briefs and exhibits, thousands of comment letters, and proposed new and alternate rules language. The Board took testimony on the rules for three days. In addition, over a five-month period, the Board heard hours of public non-party oral comment and formal party

[1] All statutory citations are to the Colorado Revised Statutes (2011).

testimony. The Board was presented with extensive documentary and oral testimony evidence representing differing opinions about the Division's proposed rules. The record is exhaustive regarding issues related to prospecting notices of intent ("NOIs"), protection of ground water and surface water, and uranium mining operations.

Powertech (USA) Inc. ("Plaintiff") claims the Board's promulgation of certain amendments to the rules lacked authority under the Colorado Mined Land Reclamation Act ("Act"), §§ 32-34-101, *et seq*., and relevant regulations, as well as violated the rulemaking provisions of the Colorado Administrative Procedures Act ("APA"), §§ 24-4-103.[2] Plaintiff's Opening Brief at 2-3. Plaintiff alleges that the Board's rulemaking failed to comply with sections of the Act and APA in several respects, most notably, that the Board failed to follow proper public notice and comment procedures outlined in the APA. Plaintiff specifically cites an order issued by the Hearing Officer dated July 19, 2010 ("July Order") that directed the Division and parties to submit alternate and additional rule language for Board consideration related to six specific topics that arose during public comment and formal testimony. Opening Brief at 5. Plaintiff asserts that the July Order and related rules were a surprise and an "ambush" on the parties and "should render the entire set of rules invalid." Opening Brief at 6-7.

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[2] Plaintiff's Opening Brief is vague and its arguments lack specificity. Moreover, Plaintiff fails to cite even a single specific rule number regarding the challenged amended rules.

Plaintiff has mischaracterized the nature of the rulemaking proceedings and facts giving rise to the July Order, and is disingenuous in asserting that the Board's request for alternate rule language was procedurally deficient. As explained below, each of Plaintiff's claims must fail as they are, among other things, a misstatement of the law and an inaccurate account of the rulemaking proceedings.

STATEMENT OF FACTS

The rules promulgated by the Board implement new statutory requirements as well as update existing regulations, and are intended to protect the public health, safety and welfare as required by the Act. They also are intended to foster and encourage the development of the State's natural resources and the development of a sound and stable mining and minerals industry. *See* § 34-32-102.

Administrative Rulemaking Process

The Board considered this new legislation against the backdrop of its broad rulemaking authority respecting the administration of the Mined Land Reclamation Act. § 34-32-108. The Division, acting as staff to the Board, was tasked with drafting the proposed rules implementing the new legislation for consideration by the Board and interested persons. In addition, the Division was responsible for setting and administering the numerous informal stakeholder meetings that preceded the formal rulemaking process. To that end, the Division considered extensive written comment, oral discussion, and legal argument, which occurred

during eight months of informal stakeholder meetings held by the Division during 2009.

The Division posted proposed rules on its website and held its first in formal stakeholder meeting on May 27, 2009, at which the Division provided an overview of its proposed draft set of rules. Throughout the informal stakeholder process, interested persons were given opportunities to submit written comments on each version of the draft and to orally discuss the draft and comments thereto at subsequent meetings.

In total, the Division held nine informal stakeholder meetings in 2009: May 27; June 11; July 9; July 30; August 19; September 16; and, September 30. In response to the discussions and comments, the Division amended the proposed rules, posted a complete version of the proposed rules with all edits on the rulemaking website, and accepted additional comments prior to the final stakeholder meeting on December 3, 2009.

The Board commenced the formal rulemaking process on January 26, 2010, with the filing of the Notice of Public Rulemaking Hearing with the Secretary of State ("Notice"). The Notice stated the Board would consider other proposed changes to its rules that correspond or conform to the proposed changes required for the implementation of the legislation and also amend areas to reflect new information or current practice or procedure. R000206. The Notice also stated that

the Board may accept, reject or modify any or all of the Division's proposed new rules and amendments, or may propose its own new rules and amendments. *Id.*

The Board held four public meetings around the state to receive comment from nonparties: in Loveland on April 15, in Grand Junction on May 13, in Salida on May 26, and in Denver on June 10, 2010. Seventeen parties were granted party status, and were given until March 19, 2010, to submit their pre-hearing statements and until March 23, to file rebuttal statements. The public and non-party local governments had until March 15, to file comments.

Mike King, the Executive Director of the Division of Natural Resources and sitting Board member, served as Hearing Officer for the rulemaking. Over several months, he issued seven pre-hearing orders establishing the scope of the rulemaking hearing, which the Board held on July 13-14, and August 12, 2010, in Denver.

After consideration of all of the relevant statements, arguments, suggestions, and proposed alternate rules Board members had received from the public and parties, the Board asked for alternative and additional rule language from the Division and the parties related to six topics previously raised and discussed during public comment and formal testimony. The Board issued the July Order directing the Division to submit its proposed language, and explanation of language, by July 30, 2010 regarding:

1. Pit Liners for drilling-related activities (including prospecting);

2. Providing copies and or notices of Notices of Intent to Conduct Prospecting to local governments (Proposed Rule 5);
3. The collection of baseline water quality information related to prospecting activities;
4. The issue of de minimis amounts of uranium recovered incidental in situ leach mining for other minerals (Proposed Rule 1.1(25));
5. A deadline for the Division receiving a written request regarding confidential information in Proposed Rule 1.3(4)(IV); and,
6. Changes to Exhibit S in Proposed Rule 6.4.19.

The July Order also requested similar proposed language and explanation of language from the Parties, due by August 6, 2010. All proposed language received by the Board was posted on the rulemaking website.

At the hearing on August 12, 2010, the Board discussed the proposed language and took comments thereon. The Board ended party testimony and deliberated on August 12, 2010, at which time the rules were unanimously adopted by the Board.

2008 Legislation

As previously stated, the amendments to the rules stems, in large part, from legislation passed in 2008. House Bill 1161 increased the regulatory authority of the Board and Division over uranium mining operations, including in situ leach ("ISL) operations, as well as ensured the continued protection of surface and ground water. Senate Bill 228 increased public disclosure of information related to prospecting NOIs by eliminating the blanket confidentiality for all information related to NOIs. (Exhibit A: Summary of Legislation. R005237.)

ARGUMENT

I. Standard of Review

The Administrative Procedure Act sets forth the applicable standard of review of agency action. Under that standard, a court must affirm agency action unless it is arbitrary or capricious, a denial of statutory right, unconstitutional, in excess of statutory authority, not in accord with the APA, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law. § 24-4-106(7). Further, when an agency engages in rulemaking, the APA requires "substantial compliance" with its procedures. *Brighton Pharm. v. Colo. State Pharm. Bd.*, 160 P.3d 412, 415 (Colo. App. 2007). "Substantial compliance is more than minimal compliance but less than strict or absolute compliance." *Id.* (citing *Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63 (Colo. 1990)).

Additionally, the customary review courts give to agency rulemaking is one of reasonableness. *Amax, Inc. v. Water Quality Control Commission,* 790 P.2d 879, 883 (Colo. App. 1989); See also, *Brown v. Colo. Ltd. Gaming Control Commission,* 1 P.3d 175, 176 (Colo. App. 1999). Rules adopted pursuant to a statutory rulemaking proceeding are presumed valid. See § 24-4-106(7); *Colorado Div. of Ins. v. Auto-Owner's Ins. Co.*, 219 P.3d 371, 376 (Colo. App. 2009), *See also*, *Brown* 1 P.3d at 176. An agency's construction of its own governing statute is entitled to great weight.

Mile High Greyhound Park v. Racing Comm'n, 12 P.3d 351, 353 (Colo. App. 2000). Accordingly, the burden is upon the challenging party to establish the invalidity of adopted rules by demonstrating that the rulemaking body acted in an unconstitutional manner, exceeded its statutory authority, or otherwise acted in a manner contrary to statutory requirements. *Regular Route Common Carrier Conference v. Pub. Utils. Comm'n*, 761 P.2d 737, 743 (Colo. 1988). *See also*, *Amax, Inc.* at 884.

When an appellant challenges an agency's findings of fact, the Court must determine whether there is substantial evidence in the record as a whole to support the agency's decision. *Lawley v. Department of Higher Educ.* 36 P.3d 1239, 1247 (Colo. 2001). A reviewing court may not reweigh evidence, substitute its judgment for the agency's, or modify or set aside an agency decision supported by substantial evidence. *Microsemi Corp. of Colo. v. Broomfield County Bd. of Equalization*, 200 P.3d 1123 (Colo. App. 2008). On appeal, the Court must examine the record in the light most favorable to the agency decision. *See* § 24-4-106(7). *Lawley*, 36 P.3d at 1252.

II. The Board Has Broad Rulemaking Authority Regarding Reclamation Performance Standards Related to Prospecting and Mining

Plaintiff asserts that certain rules promulgated by the Board, specifically: 1) pit liners; 2) collection of baseline water quality information related to prospecting activities; 3) public comment and appeal at the time of filing an NOI for

prospecting;[3] 4) public comment and appeal on transfer of mine; and 5) notice of NOI to local governments lack a basis in statute and, therefore, are invalid. Opening Brief at 10. A review of the broad authority delegated to the Board and Division by the General Assembly proves that the challenged rules have a clear basis in the Act and are in full compliance with the Board's statutory mandate.

The General Assembly delegated broad rulemaking authority to the Board respecting the administration of the Act at § 34-32-108. Moreover, the Division and Board have exclusive jurisdiction over the reclamation of prospecting and mining activities in Colorado. *See* § 34-32-101-127.

As described above, the Legislature passed HB 1161 and SB 228 in 2008, which set forth new statutory requirements and increased the regulatory authority of the Board and the Division related to prospecting operations and confidentiality, protection of surface and ground water, and ISL and traditional uranium mining operations. These new statutory mandates in conjunction with the Board's existing authority under the Act provide it with ample authority to promulgate the rules at issue in this case.

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[3] Again, Plaintiff's lack of specific rule citation in this instance makes its precise objections to the rules unclear. Plaintiff's general heading on this topic is comment and appeal of NOIs generally, however, the actual argument in its Opening Brief pertains only to the public's ability to "comment on and appeal the Division's determination that certain information in the NOI is confidential." Opening Brief at 12. Therefore, Defendant responds only to that aspect of rule 1.3(4)(A)(IV)(a) (confidentiality disputes) raised by Plaintiff.

A. Baseline Water Quality Information and Pit Liners Related to Prospecting are Reclamation Performance Standards

The Division and Board have exclusive jurisdiction over the reclamation of prospecting and mining activities in Colorado. *See,* §34-32-109(6). Reclamation performance standards, as established by the Board and Division, require operators to not only minimize the surface disruption caused by a prospecting and mining operation, but also require operators to take measures for the protection of water resources and minimize disturbance to the hydrologic balance, which includes both surface and ground water quality and quantity.[4] *See* Rule 3.1 implementing §34-32-116(7)(g).

The Board, fully aware of its statutory authority regarding protection of water resources, adopted language that fit squarely into the existing agency discretion to determine what technical performance measures are necessary for the protection of both surface and ground water. The rules promulgated for drill pit regulation and the collection of baseline water quality information related to prospecting activities have a statutory basis in the Act. Moreover, they are consistent with and properly implement the Act's mandate that prospector's

[4] Pursuant to § 25-8-202(7) (commonly referred to as Senate Bill 181) the Water Quality Control Commission sets state wide standards for water quality. However, the statute provides that the Division is an "implementing agency", which means it is charged with the responsibility to implement the groundwater standards set by the WQCC related to active prospecting and mining activities and final reclamation.

"reclaim any affected land consistent with the requirements of § 34-31-116." §34-31-113(2)(f). Section 34-32-116(7) requires, among other things, that "disturbances to the prevailing hydrologic balance of the affected land and of the surrounding area and to the quality and quantity of water in surface and ground water systems both during and after the mining operation and during reclamation shall be minimized." § 34-31-116(7)(g). In addition, §34-32-116(9) states that's operators of ISL mining operations shall take all necessary steps to prevent and remediate any degradation of preexisting ground water uses during the prospecting…phase[s] of the operation."

The range of activities that can occur under an NOI as "exploration" is expansive and the Division regulates prospecting operations that are large in scale, yet still exploratory in nature. The Board heard testimony during the public comment hearing in Salida regarding a prospector drilling upwards of 100 uranium exploration wells in which radionuclides and/or heavy metals could be brought to the surface and placed into drill pits for storage during the exploration stage. Comments went on to discuss the potential impact to ground water that could result from such practices, and how easily those possible impacts could be minimized or eliminated. (R006198-6207; R006212).

The rules promulgated at 3.1.6 (4) and (5) are reasonable rules within the Board's exclusive authority regarding the protection of groundwater at active operations. Current designated mining operation ("DMO") statutory and regulatory provisions coupled with the new surface and ground water protections created by

HB 1161 provide sufficient control of drilling pits and baseline information while still allowing the Division and Board discretion to determine the necessary safeguards on site specific information and conditions.

Therefore, the adopted rules that specifically address drill pits and collection of baseline information related to prospecting activities have a basis in, and comply with, the Act and are consistent with existing rules. See Rule 5.3.1(b) (In Rule 3.1 the Board added language similar to the existing language of Rule 5.3.1(b) to emphasize that the reclamation performance standards contained in Rule 3 are applicable to prospecting operations).

B. Public Comment on Confidential Designations and the Ability to Dispute such Designations is Consistent with SB 228

SB 228 eliminated the blanket confidentiality that previously existed for prospecting NOIs in Colorado. The intent of the General Assembly was to balance the interests of affected communities and mining interests by ensuring the availability of information about potential impacts from prospecting activities, while keeping legitimate competitive and trade-secret information confidential. The Board determined, based on public comment and the intent of SB 228, that the interested public should be provided effective access to NOI information, should be allowed to submit comments regarding that information,[5] and should be able to challenge

[5] After posting of NOI on the Division's website, there is a ten (10) day public comment/confidentiality challenge period. As government agencies, the Division and Board routinely receive public comment regarding the matters before them. Providing structure to govern the receipt of public comment and confidentiality disputes is a reasonable rule respecting the administration of the Act.

information believed to be incorrectly designated as confidential. Based on legislative intent of SB 228,[6] the Board adopted language in Rule 1.3(4)(IV)(A) that allows interested persons a *very limited* appeal with regard to information designated by prospector's as confidential.

Moreover, prior to the rules implementing SB 228, the Board created a well thought-out interim process to implement the "disclosure and public access to information" purpose of SB 228. The Rules as adopted by the Board appropriately tracked this interim process, as it worked very well during the two years it was utilized. In addition, SB 228 makes NOIs subject to the Colorado Open Records Act ("CORA"), which requires disclosure of all requested public records and a hearing process to challenge claims of confidentiality. § 24-72-101, *et seq*. Under CORA, any person can request public records and challenge a denial of access. The process regarding confidentiality disputes provided by the Board in the rules is consistent with CORA and is within the Board's statutory authority. The basis for this rule is firmly planted in the Act and is backed by legislative intent.

C. Public Comment and Appeal of Transfer of ISL Permits is a Reasonable Rule Respecting the Administration of the Act

Under HB 1161, applicants for an ISL uranium mining permit are required to show, at the permit application stage, that they have not exhibited a pattern of violating statutes and

[6] Plaintiff grossly mischaracterizes the weight given to the two letters submitted by members of the General Assembly. Opening Brief at 13. Both letters were treated as public comment only. The second letter was mistakenly added to the Regulatory Analysis section on the rulemaking webpage and immediately removed upon notice of the posting error. At no time were the letters considered an "official codicil of the Act" or given preferential treatment as Plaintiff asserts.

regulatory requirements designed to address environmental impacts[7]. See § 34-32-115(5)(d). The Act, through HB 1161, seeks to prevent operators who have a demonstrated pattern of violating ISL uranium mining related requirements from obtaining a permit. Permit transfers, however, generally do not require submission of a new application for a permit.[8] Instead, the Division merely approves a successive operator to take over operations for the transferring party.

Unlike operators of traditional mining operations, HB 1161 requires that ISL uranium operators are subject to different treatment and closer scrutiny and explicitly subjects operators with a pattern of violations to permit application denial. Therefore, the Board was reasonably concerned that the existing rules applicable to mine transfers might create a loophole for ISL uranium operators with a pattern of violations. In other words, the Board was concerned that while an initial applicant may a have history free of violations, a successive operator might not. Moreover, the Board was concerned that it might not have full and efficient access to all relevant information concerning a pattern violations occurring outside of Colorado. Accordingly, the Board's intent was to allow for a very limited third party comment and appeal concerning only whether or not the successive operator was in compliance with the requirements of §34-32-115(5)(d).

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[7] Rule 1.12 implements HB 1161's requirement that in situ leach mining permit applicants certify in applications that the applicant or an affiliate, officer or director of the applicant has not violated or committed a pattern of willful violations of environmental protection requirements and rules.

[8] Successive Operators are required to complete a Board approved transfer of mine form and submit a financial warranty prior to commencement of operations; however, the information required in this form, and the level of technical review, is not comparable to the detail mandated in a reclamation permit application.

Overall, the points discussed herein regarding the intent of HB 1161 to protect the public's interest in water quality, and the Board's broad rulemaking authority under the Act justify allowing the public to participate in the transfer process related to ISL uranium operations. The challenged rule has a clear basis in the Act and is a proper and reasonable exercise of the Board's rulemaking authority.

D. Notice to Local Governments of Prospecting Activities is Authorized and Consistent with the Act

The language adopted by the Board in rule 5.1.2(m) is supported by the Act's mandate regarding notice of activities to local governments. §§ 34-32-110, 112. The Board received comment letters from various local governments with an understandable interest in potential impacts to their communities from the broad range of activities that can be commenced under a NOI. The Town of Nunn (R001648-1649), Town of Wellington (R003071-3072), Freemont County Commissioners (R004439-4440), the City of Fort Collins (R003133-3134), as well as the leaders of the Town of Ault (R004443), all specifically addressed this issue, urging the Board to recognize the importance of providing notice to local governments at the earliest time that prospecting activities may impact local water resources.

In addition, the language adopted by the Board is consistent with pre-existing statutory and regulatory practice of requiring that notice of mining operations be provided to local governments prior to commencement of activities. See §§34-32-110,112. Pre-existing Rule 1.6.2(1)(a) states, "The Applicant shall: (a) *Prior to* submitting the application…send a notice, on a form approved by the Board, to the local Board of County Commissioners…" (emphasis added). The similar notice requirement for prospecting would neither jeopardize any

confidential information nor generate "considerable risk to the company's investment" (Opening Brief at 14), as the NOI information becomes publicly available immediately upon submission to the Division. If a company is concerned with having a prospecting claim "jumped," there need not be any significant gap between the time the local government receives notice and when the NOI is filed with the Division. However, without having this timing requirement tied to the notice, there is no assurance that the local government would be given effective notice of proposed activities.

III. The Board's Request for Alternate Language Complied with the APA and the Rules Promulgated were Within the Scope of the Notice

When an agency engages in rulemaking, the APA requires "substantial compliance" with its procedures. *Brighton Pharm. v. Colo. State Pharm. Bd.* In its Opening Brief, Plaintiff asserts that the Board failed to follow the APA rulemaking process when it requested alternate and additional rules language. Plaintiff alleges the rulemaking process was flawed because the Division's initial proposed rules evolved during the lengthy rulemaking process. Opening Brief at 6. The Plaintiff interprets the Hearing Officer and Board's request for alternative and additional language as an "invitation for new language" that "renders the entire set of rules invalid." Opening Brief at 6. Further, Plaintiff asserts that the timing of the Board's request prevented the public from commenting on the requested topics. Opening Brief at 7. Plaintiff not only misstates the law under the APA, but fails to recognize that the exhaustive written and oral record provide ample evidence that there was sufficient time to comment on the alternative language.

A. The Board's Notice of Rulemaking was Proper and Sufficient under the APA

The Board adopted the challenged rules after a properly noticed rulemaking proceeding. "The purpose of a public rule-making hearing is to 'afford interested persons an opportunity to submit written data, views, or arguments.'" *Brighton Pharm.*, 160 P.3d at 415 (quoting § 24-4-103(4) of the APA). The rulemaking process set forth in the APA has been characterized as "informal notice and comment rulemaking." *Citizens for Free Enterprise v. Dept. of Revenue*, 649 P.2d 1054, 1063 (Colo. 1982).[9] The notice of proposed rulemaking need only state either the terms or the substance of the proposed rule or a description of the subjects and issues involved." § 24-4-103(3)(a).

The Board's Notice in this case provided adequate and sufficient notice of the subject matter of this rulemaking and an opportunity for meaningful participation and comment by all interested persons. The Board issued notice of its rulemaking proceeding on January 26, 2010. That Notice stated, in relevant part,

> The Board will also consider other proposed changes to its rules that correspond or conform to the proposed changes required for the implementation of the above-cited legislation and also amend areas of the existing rules that need clarification, correction or to reflect new information or current practice or procedure. The proposed new rules

[9] Because this is similar to notice and comment rulemaking under the federal APA, "for purposes of the State APA, the appropriate references for comparison with federal law are those cases interpreting the Federal APA requirements contained in 5 U.S.C. § 553." *Citizens for Free Enterprise*, 649 P.2d at 1063.

> and amendments include proposed changes to the Board's existing Rules 1 through 8. **Please note that the Board may accept, reject or modify any or all of the Division's proposed new rules and amendments, or may propose its own new rules and amendments.** (Emphasis in original)
>
> The Board will consider the promulgation of the following list of proposed new rules and amendments;[10] this list is not exhaustive. In addition, modifications to other Board rules may be necessary to conform with the new rules and amendments and to make clarifying changes.
>
> [P]arties may file Alternate Proposed Rules to be adopted by the Board in lieu of or in addition to all or a portion of the Division's proposed new rules and amendments.

R000206, R000211.

In addition to the formal Notice filed with the Colorado Secretary of State, the Division issued a press release on January 28, 2010, reiterating the bolded language in the Notice so it was unequivocal that the Board was open to alternative proposals. Hence, "The Board may accept, reject or modify any or all of the Division's proposed new rules and amendments, or may propose its own new rules and amendments." R000213.

In this manner, the Board's Notice alerted all interested persons that it would accept arguments related to the 2008 legislation and would permit parties to

[10] Included in the noticed list of existing rules subject to amendment are Rule 1.1 - Definitions; 1.3 --Public inspection of documents; 3.1 - Reclamation performance standards, which includes 3.1.6 - General water reclamation requirements; and 5.1—Prospecting application requirements. All amended language stemming from the July Order were properly placed within one of these noticed rules.

suggest alternatives to the Division proposed language. The Board's Notice indicates that, if an interested person wished to provide more detailed comments, arguments, and alternate language for Board consideration, it should seek party status in the formal rulemaking proceedings and avail themselves of the additional rights afforded to a party. The Notice was thus broad enough in scope to encompass all aspects of the rules ultimately adopted, including the five challenged topics and related rules.

B. The Rulemaking Record is Replete with Comments Regarding the Topics Raised in the July 19 Order

Plaintiff argues that the Board improperly invited hearing participants to provide new additions or suggested provisions for possible incorporation into the rules without regard to notice and comment. Opening Brief at 5. Therefore, the Board's failure to re-open the rulemaking process and allow for additional comment renders the entire set of rules invalid. Opening Brief at 4-6. These assertions are simply not supported by the substantial record, and must be rejected.

In this matter, the scope of the Notice was clearly sufficient as it generated a considerable amount of comment, from both parties and non-parties, regarding the topics raised in the July Order. Board Member King was correct in his statement regarding the request for alternate and additional rule language when he said, "During the course of the testimony we heard around the state as well as yesterday during the presentations of the parties three issues came up that I would like to have…language submitted by staff on at least three issues." R005824. Board Member

King continued: "The questions that I just raised and the language came from both the public testimony and testimony from parties yesterday requesting that there [be] modifications on these three issues." R005827.

Responding in agreement, Board Member Peterson concurred that there needed to be Board modifications to the Division's proposed rules, saying "I would certainly agree with Mike [King] in his comments that we have heard this over and over and over again in our public hearings and I think we absolutely have to respond to it in some way." R005828.

The substantial comment record supports the Board's decision to ask for alternate and additional rule language from the parties. In addition, the discussion on the record of the July 14, 2010 hearing regarding the extent of that comment shows the Board was responding to public comment with its request, not preventing it. The Board ultimately decided to ask for alternative and additional rule language regarding six topics; Plaintiff objects to topics 1-5 of the July Order.

The Plaintiffs assert these five topics, and language related to them, constitute an "ambush" on the parties and the public, as they were "new rules that were not part of the proposed rules or the notice of rulemaking." Opening Brief at 7. In fact, the five topics were hotly debated throughout the rulemaking process. In its request for additional rule language the Board was exercising its broad rulemaking authority under the Act and expressly raised in the Notice. Plaintiff's characterization of the five topics in the July Order as an "ambush" is disingenuous and clearly not supported by the extensive comment record.

1. The Oral Comment Record was Exhaustive with Regard to the Five Topics in the July Order

If, as Plaintiff alleges, the public had been unable to make comments regarding the first three topics contained in the July Order then it stands to reason the record would be barren of public comments regarding pit liners, notice to local government, and the collection of baseline water quality information for prospecting. A review of the record shows the contrary is true; the public hearing transcripts are replete with testimony on these issues.

At the April 15, 2010 hearing for oral public comment, the *very first commenter* stated that "baseline measurements should be taken before uranium exploration has begun," and that "pitless drilling should be required within sensitive areas near surface water." She also stated that uranium prospectors should be required to notify the county in which they will be prospecting before receiving an NOI. R005316-5317. The next commenter echoed her concerns about unlined pits containing uranium (R005318-5319). Yet another discussed her concerns that, since public input is so important, the notices be given to rural communities about prospecting in their area. R005333. Additional specific and technical testimony was provided at the May 26, 2010 hearing in Salida. Commentors again spoke about the need for baseline characterization prior to commencement of prospecting activities (R006207), pitless drilling or lined pits in

sensitive areas in close proximity to surface and ground water (R006208), and that notice of prospecting activities must be provided to local governments. *Id*.

The protection of water quality, which was a driving force behind HB 1161, was a recurrent public concern raised during public comment. Comments were provided throughout the hearings in favor of pit lining in the exploration phase, pitless drilling, notices to local government, and the establishment of baseline water quality before prospecting continued throughout all the hearings. (See for example R005507, lines 22-25 and R005545 lines 20-25 and (pits should be lined); R005508, lines 5-10 (county should be contacted prior to prospecting); R005515 lines 10-25, R005548-5549, lines 24-5 and 1-3 (establish baseline water quality prior to prospecting)). Public commenters raised pit lining and baseline site characterization as tools for the protection of their water sources. One commenter succinctly stated: "The board should expressly provide for board review of prospecting baseline characterization plan approvals and reject industry attempts to exclude the public and local government from the premining [sic] approval process." R005358.

The public turned out in force with hundreds of public comment letters submitted to the Division and Board, entreating for the Board to adopt rules requiring operators to restore water resources to baseline conditions. The Board was responding to the weight of public comment, not preventing it, when it called for the rules to correspondingly evolve. Board Member King was correct when he

asserted, in response to questions from Plaintiff, that "the record is more than complete to establish the basis for this board to consider those three issues. (pit liners, local government notice, and baseline water quality for prospecting). R005827. It is simply untrue that the public never had an opportunity to review and comment on these topics - it was members of the public who raised these specific topics that generated Board response.

The Plaintiff also challenges the fourth topic and related rule from the July Order, which addresses de minimis amounts of uranium recovered incidental to in situ operations mining for other minerals. Again, this topic was not unexpected or an ambush. As explained by the Colorado Mining Association ("CMA") at the August 12, 2010 hearing, there was concern a miner's attempt to extract a different mineral might yield "de minimus" [sic] amounts of uranium, and the miner could fall under the uranium rules and regulations haplessly. R006028. CMA and Coloradans Against Resource Destruction ("CARD") had agreed on language to address this concern during the early stages of the stakeholder process, which the Division ultimately rejected. R006021. Again, this topic was not new by the time the parties sought to resolve the proper rule language on August 12, 2010. David Berry representing the Division noted on August 12 that "a year ago our discomfort was that the language presented a situation where we would have to make a subjective call about what is - [de minimus]. R006029. After thorough discussion

(R006020-R006401) and comment by the parties, the Board settled on the appropriate language to resolve the issues related to the topic, now Rule 1.1(25)(a).

The fifth topic was not a new one either. A sharp-eyed commenter noted in a February 5, 2010, letter that proposed Rule 1.3(4) did not set a deadline for a request for information. R001554-1555. During the July 14, 2010 hearing in response to the discussion of alternate and additional rules language, David Berry noted the lack of deadline related to confidentiality disputes was brought to his attention, stating: "through our oversight and the draft we left out a – sort of a calendar, a deadline delineation on the confidentiality-dispute issue." R005849-5850. During the August 12, 2010 hearing, the Board considered one sentence establishing a ten-day deadline for what was already in Rule 1.3 (4)(IV)(A), regarding an interested person's ability to dispute information a prospector had designated confidential. R006042. Board member Kraeger-Rovey noted this was just to put a time line on this process for scheduling. *Id*.

The Board discussed in minute detail proposed language regarding these long-debated topics during the August 12, 2010 hearing, at which parties were present to contribute their opinions. The Board provided multiple recesses to allow the parties to meet and discuss proposed language. The transcript of that hearing establishes the Board spent the entire day evaluating Division proposed language and explanation alongside Parties' suggested language. The transcript confirms that after considering public and party comment for two years, the Board was

putting the fine points on familiar themes, not deliberating entirely new concepts. R006014-R006184.

2. The Written Record Also Reflects Ample Comment on the Five Topics ByBoth Parties and Non-Parties

In addition to oral testimony regarding the five topics of the July Order, the written record shows that the five topics were consistently raised and discussed in the comment letters and pleadings submitted to the Board. This is further indication that the Board's Notice was sufficient to solicit relevant comment, argument, and alternate language form interested persons regarding the five topics of the July Order.

In prehearing statements submitted to the Board on March 12, 2010 comments were received from: CARD regarding protection of groundwater, baseline site characterization and prospecting, and comment and appeals related to prospecting (R003674); Tallahassee Area Community ("TAC") regarding pit liners/pitless drilling, notice to local governments of prospecting activities, and public comment related to prospecting (R003827); and CMA regarding de minimis amounts of uranium recovered incidental to non-uranium in situ operations (R003493).

Additional comment and discussion regarding the five topics were further raised and address in rebuttal statements submitted to the Board on March 29, 2010 from: The Division, regarding public comment related to prospecting and

confidentiality, pit liners and other water protection reclamation performance standards, and notice to local governments related to prospecting activities (R004366); CARD regarding notice to local government regarding prospecting activities, concerns for protection of groundwater related to prospecting, baseline site characterization, comments related to prospecting, and de minimis or incidental uranium extraction (R004411); and High Country Citizen's Alliance regarding public comment related to prospecting confidentiality (R004693).

In addition, there was similar involvement and interest in these topics from non-parties as is evidenced by the hundreds of comment letters submitted to the Board for consideration. As an example, a comment letter submitted by an interested citizen on February 24, 2010 raised issues related to notice to local government regarding prospecting activities, baseline water quality collection, and expressed general concern regarding continued protection of the State's water quality. R001628. Another written comment letter was a form letter that was received from hundreds of interested persons, and it addressed the need for notice to be provided to local governments regarding prospecting, the public's ability to comment on prospecting NOIs, and also expressed concern for the protection of groundwater related to prospecting and mining. R001635. Additionally, as discussed above, letters were received from local government representatives, each discussing the topics of baseline related to prospecting, notice to local governments

of prospecting activities, and enhanced protection of surface and ground water generally.

3. Plaintiff Had Ample Opportunity to Discuss the Five Topics of the July Order

Plaintiff's arguments regarding insufficient notice and noncompliance with the APA rulemaking procedures should be rejected because Plaintiff received ample notice regarding these topics, as is evidenced by its own pleadings and testimony. Courts look to comments and pleadings by the party that evince knowledge of the alternative ultimately adopted, as well as information the party is known to have received. *See Sierra Club v. Costle*, 657 F.2d 298, 355 (D.C. Cir. 1981).

The record shows that Plaintiff had ample opportunity throughout the eight-month rulemaking process to thoroughly research all of the so called "ambush" topics. As such, Plaintiff was not surprised by the July Order and suffered no actual prejudice or harm. Therefore, there was no need to re-open the rulemaking proceedings.

As discussed above, written comments submitted as early as February 2010 raised the topics later addressed in the July Order. Plaintiff had more than sufficient time to "solicit input from other industry members and the mining and regulated community" in order to present comments, argument, or alternate language to the Board for consideration. Plaintiff's March 12, 2010 Prehearing Statement demonstrates that it was fully aware of the possibility of rule language

concerning the five topics. R006265. In its prehearing statement Plaintiff objected to the proposed rules on the ground that they included "a set of new time consuming, expensive and redundant opportunities for public notice and comment on myriad aspects of the prospecting, baseline site characterization and reclamation permit process." R006268. It argued against baseline site characterization at the prospecting stage (R006269) and against rule language implementing HB 1161 which requires operators to "take all necessary steps to prevent and remediate any degradation of preexisting ground water uses during the prospecting [phase]." R006273.

Additionally, in its rebuttal statement Plaintiff generally discussed the topics of notice to local governments (R004358) as well as pitless drilling or pit liner requirements (R004362-4363), but summarily dismisses them as unnecessary obstacles to prospecting operations.

The record establishes the Notice did draw Plaintiff's attention to a consideration of rules regarding pit liners, providing notice to local governments, and the collection of baseline water quality information related to prospecting activities. Plaintiff's own pre-hearing statement reveals it anticipated, and had an opportunity to comment on, these topics. It is insincere for Plaintiff to argue lack of notice and ability to comment at this time, when it failed to avail itself of the opportunity to fully participate in meaningful discussion during the rulemaking process.

C. The Rules Ultimately Adopted Were a Logical Outgrowth of the Notice and Comments Received and Therefore Valid

Even if, *arguendo*, the express language of the Notice was insufficient to properly inform interested persons, the rules promulgated by the Board were a "logical outgrowth" of the noticed proposal and comment.

A reviewing court will not disturb a rule for insufficient notice if the final adopted rule constitutes a "logical outgrowth" of the noticed proposal and comment. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000). *See also Am. Mining Cong. v. Thomas*, 772 F.2d 617, 639 (10th Cir. 1985) (adopting the logical outgrowth test). A final rule will be deemed to be the logical outgrowth of the notice and comment if a new round of notice and comment would not provide commenters with "their first occasion to offer new and different criticisms which the agency might find convincing." *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

Plaintiff concedes that "proposed rules are not presented to the Board on a take-it or leave-it basis." Opening Brief at 4. "A contrary rule would lead to the absurdity that in rulemaking under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Am. Med. Ass'n v. U.S.*, 887 F.2d 760, 768 (7th Cir. 1989). It is

inherent in a public rulemaking process that proposed rules will necessarily change and evolve as a result of the implementation and incorporation of relevant public comment into the final rules.

Nevertheless, throughout its Opening Brief, Plaintiff advocates interpretations of the APA that are needlessly restrictive; rendering it seemingly impossible for the Board to implement the 2008 legislation and solicit and properly respond to public comment, while still adhering to the procedures of the APA.

The rules ultimately adopted by the Board were a "logical outgrowth" of the noticed proposal and comment. First, additional notice would not have provided Plaintiff or other interested persons with its first opportunity to comment on the five topics and rules ultimately adopted by the Board. Second, based on the Notice and the resulting written and oral comment, a reasonable party would have understood issues surrounding the protection of water quality as it relates to prospecting and mining operations (pit liners and baseline characterization) and notice to local governments were "on the table" as a possible outcome of the rulemaking proceeding. In fact, the Board's request for additional language was a direct response to the outpouring of public comment and interest on those very topics.

Plaintiff had ample opportunity to submit comments in its prehearing statement and rebuttal statement. For all its arguments about insufficient notice

and lack of opportunity to submit comments, Plaintiff does not identify any new comments or criticisms it would have offered upon re-noticing of the proposed rules. In addition, Plaintiff had a clear opportunity to present direct comments on the Division's proposed language on August 6, 2010.[11] R005826-5827 (Board Member King, speaking to Plaintiff: "Any of the parties can submit their own language on those three issues if they would like their language to be considered in August as well"). Because a new round of notice and comment would not have provided Plaintiff its first opportunity to offer comments that could persuade the Board to modify its rules, the adopted rule constitutes a logical outgrowth of the noticed proposal and comment, and should therefore be upheld. *See Am. Water Works Ass'n*, 40 F.3d at 1274.

Further, the Notice alerted reasonable interested persons that the Board might adopt its ultimate position. A final rule will be considered to be a logical outgrowth of a noticed proposal if it is not "wholly unrelated or surprisingly distant" from the proposal as originally noticed. *Ariz. Pub. Serv.*, 211 F.3d at 1299. In other words, "the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table' and was to be addressed by a final rule." *Am. Med. Ass'n*, 887 F.2d at 768.

[11] In its response to the Board's July Order and Division's proposed additional and alternate language, Plaintiff once again failed to avail itself of the opportunity to submit detailed and meaningful comments or its own alternate language. Plaintiff submitted a 4-page letter outlining the legal consequences of the Board's July Order, but only submitted comments on two of the six topics of the July Order.

Indeed, the Board's Notice specifically alerted interested persons that it would "also consider other proposed changes to its rules". R000206. Based on the Notice, the Board received substantial response from interested persons related to the five topics. Plaintiff's arguments about insufficient notice and time to provide comment are not supported by the record and should therefore be rejected.

D. Plaintiff's Reliance on Caselaw Where the Record was Non-Existent Is Misplaced

In contrast to this case, where the rulemaking record is replete with written and oral testimony on the topics in the July Order, would be the nonexistent public hearing transcripts and written record in the case Plaintiff heavily relies upon, *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency,* 824 F.2d 1258 ("NRDC"), in which the court noted: "It is not surprising that the petitioners are now raising so many challenges to this provision since this court provides the first and only forum that they have had in which to express their concerns." *NRDC* at 1285.

The EPA had changed the definition of a ground water source so that the designation sharply narrowed the types of ground water that would be protected, to the extent that "the rule does not really protect any ground water that is likely to be contaminated." *Id.* The EPA did this one month after official public notice ended. In *NRDC*, the court felt that if comment had been reopened, commenters would "have their first occasion to offer new and different criticisms which the Agency

might find convincing." *Id.* at 1284, citing *BASF Wyandotte Corp. v. Costle,* 598 F.2d 637 (1st Cir. 1979).

The *NRDC* court writes that, "A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can even make substantial changes from the proposed version, as long as the final changes are "in character with the original scheme" and "a logical outgrowth" of the notice and comment period." *NRDC* at 1283, citing *BASF Wyandotte Corp.* at 642 and *South Terminal Corp. v. EPA*, 504 F.2d 646, 658 (1st Cir. 1974).

In the instant case, the final rule language absorbed public and party comment and properly evolved in response to it. Under the test established in *NRDC* and *BASF Wyandotte Corp.*, the public and the parties to this rulemaking would have had nothing new to consider and respond to regarding the topics raised in the July Order. The final language of the rules was entirely in character with the original scheme posed to the public and parties in 2009, and the rules' evolution was a logical outgrowth from the large volume of public comment and interest.

Additionally, Plaintiffs are not helped by their reliance upon *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506 (D.C. Cir. 1983) ("*Small Refiner*"). In *Small Refiner*, the D.C. Circuit Court reviewed EPA regulations which set lead-content limits for leaded gasoline produced by certain "small" refiners. The EPA revised the definition of a small refinery and, after reviewing the record, the Court found that the revised definition

derived "from a single comment" in an EPA rulemaking process that had received 1100 written comments. *Id*.

These cases, although heavily relied upon by Plaintiff, do not support its argument. In fact, when read along with the statutory language of the APA, these cases support the Board's rulemaking process in this case. Here, the Board did not amend or create new rule language based on one comment at the last moment but based its decisions on extensive comments made throughout the rulemaking. Given the exhaustive record in this case and the inapposite caselaw cited by Plaintiff, its argument that the five topics constituted a late-game ambush in violation of the APA must fail.

IV. The Rules Complied with the APA Process, Have a Reasonable Basis in Law, and are Supported by Substantial Evidence in the Record

A. Challenged Rules Are Not Arbitrary or Capricious

Plaintiff presents a very short and repetitive argument that "the specific rules discussed herein" are invalid as arbitrary and capricious and an abuse of discretion. Opening Brief at 15. However, the Plaintiff fails to specifically identify and challenge the application of any rule.

As outlined above, the rules were the result of a thorough, well-reasoned, and fully vetted deliberative process. In light of the exhaustive record and thorough process, it is difficult to understand Plaintiff's cursory, unsupported assertion that "certain rules promulgated by the Board were arbitrary or capricious in nature." Opening Brief at 15. Plaintiff's repetitive arguments and unsupported assertions fail to meet its legal burden, thus, its claims must be rejected.

B. Rulemaking Process Complied with APA Process

The Board's request for alternate and additional and rules language was in conformity with the rulemaking authority granted in the APA. Section 24-4-1-3(13) states "Any agency conducting a hearing shall have authority *on its own motion* to:…*issue appropriate orders which shall control the subsequent course of the proceeding …*" (*Emphasis added.)*

The July Order was within the rulemaking authority of the Board and was a proper and valid delegation of authority to Hearing Officer King. The timeline established for the submittal of alternate language was fair and reasonable. The July Order required that the Division submit alternate language, together with an explanation of the language, by July 30, 2010 for consideration and open discussion at the August 12, 2010 hearing. The July Order also provided all parties an opportunity to review the Division's proposal and submit their own alternate and additional language by August 6, 2010. The Board's request for additional language was an open process, providing the parties nearly two weeks to review the Division's proposed language; this is more than sufficient time according to the five day notice requirement under § 24-4-103(4)(a) of the APA.

C. Challenged Rules are Reasonable and Based on Substantial Evidence

Again, in cursory fashion, Plaintiff contends that the Board adopted the challenged rules "despite a complete lack of evidence in the record." Opening Brief at 15. Plaintiff's argument wholly ignores the voluminous record upon which the Board based its rulemaking decisions.

As has been discussed in great detail, all of the challenged rules have a reasonable basis in the Act and were promulgated in conformity with the Act's mandate to "aid in the protection of …aquatic resources…and promote the health, safety and general welfare of the people of this state." § 34-32-102(1).

In this rulemaking process, the Board was presented with issues that involved a combination of factual/technical determinations and policy considerations. Promulgation of rules need not be based solely on scientific or technical evidence to be valid. Inasmuch as the rules address concern weighty public policy determinations, judicial review is limited to considerations of reasonableness. *See*, *Amax, Inc.*, at 884, *quoting Citizens for Free Enterprise v. Department of Revenue*. In this matter, all policy based rules (public comment and appeal of confidentiality, transfer of ISL permits, providing notice of NOIs to local governments) are reasonable. In addition, there is sufficient technical evidence in the record to support the performance standard based rules (pit liners, baseline characterization for NOIs). *See* generally, public comment from Salida, Colorado at R006198-6211 (provides an example of the significant scientific and technical information and testimony received by the Board throughout the rulemaking process). The challenged rules reflect the Board's adherence to its statutory mandates and its own regulatory framework regarding current and future protection of surface and ground water. Moreover, all of the adopted rules are aimed at further protection of public health and the environment.

Plaintiff also argues that the Board did not take economic reasonableness into account when promulgating the rules.[12] Opening Brief at 16-17. However, the Board's consideration of economic costs is evident throughout the record, especially as to the Regulatory Analysis. R003399-3476. Moreover, the record shows that the Board properly adhered to the legislative declaration by ensuring "the economic cost of reclamation measures utilized bear a reasonable relationship to the environmental benefits derived from such measures." § 34-32-102(2). In order to achieve the balance contemplated under the Act, the Board took into consideration the potential impact on surface and ground water that could result from some types of prospecting and uranium mining activities in relation to the costs, and promulgated the rules accordingly. Findings by an administrative board may be express or implied from the facts. *Colo. Office of Consumer Counsel v. Public Utils. Comm'n*, 786 P.2d 1086 (Colo. 1990) (holding that, upon review of the record as a whole, absence of specific findings did not warrant reversal).

Plaintiff's broad-stroke assertions and unsupported arguments fail to meet its legal burden. The rules ultimately promulgated by the Board are fully

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[12] Plaintiff mistakenly asserts that the Board was *required* to consider the economic impacts of the proposed regulations on regulated entities. Opening Brief at 17. The only entity who can request a cost benefit analysis is the executive director of the department of regulatory agencies. § 24-4-103(2.5). After receiving a request for a cost-benefit analysis from Plaintiff, the executive director did not, in turn, request that a cost benefit analysis of the proposed rules be undertaken and, therefore, one was not required to be completed. Nevertheless, the Division did complete a thorough regulatory analysis which took into consideration, among other things, fiscal impacts of proposed rules.

supported by a reasonable basis in the Act, consistency with the statutory mandate, and sufficient evidence in the record.

CONCLUSION

The Board complied with all applicable requirements under the Mined Land Reclamation Act and the Administrative Procedures Act when promulgating the challenged rules. As such, this Court should not disturb the Board's adopted rules.

Dated this 25th day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within DEFENDANT'S ANSWER BRIEF upon all parties herein by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 25th day of May, 2012 addressed as follows:

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