DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO **Address: City and County Building** **1437 Bannock Street** **Denver, CO 80202**	
Plaintiff: POWERTECH (USA) INC., a South Dakota Corporation, **v.** **Defendant: STATE OF COLORADO MINED LAND RECLAMATION BOARD,** **and** **Intervenors: COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY, INC.; AND SHEEP MOUNTAIN ALLIANCE.**	**COURT USE ONLY** **Case No. 10CV8615** **Courtroom 215**
ORDER	

THIS MATTER comes before the Court on Plaintiff's Complaint for Judicial Review filed originally on November 1, 2012. The Court has reviewed all briefs presented, reviewed applicable authority and reviewed relevant portions of the record. The Court is fully advised.

Standard of Review

Under the provisions for judicial review of an agency action, if the reviewing court finds no error, it shall affirm the agency action. On the other hand, the court shall set aside the agency action if it finds certain circumstances exist, including that the agency action was either arbitrary or capricious; not in accord with the procedures or procedural limitations of the Act, or as otherwise required by law; an abuse or clearly unwarranted exercise of discretion; based upon findings of fact that are clearly erroneous on the whole record; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law. C.R.S. § 24-4-106(7).

The party seeking judicial review bears the burden of proving that sufficient grounds exist to reverse the agency decision. C.R.S. § 24-4-106(7); Orsinger Outdoor Advertising, Inc. v. Dept. of Highways, 752 P.2d 55, 62 (Colo. 1988). In rulemaking cases, the APA requires "substantial compliance" with its procedures. Brighton Pharm. V. Colo. State Pharm Bd., 160 P.3d 412 (Colo.App. 2007). Substantial compliance does not require "strict or absolute" compliance. Id. The Court's review is one of reasonableness. Amax, Inc. v. Water Qual. Control Comm'n, 790 P.2d 879 (Colo.App. 1989). Rules pursuant to statutory rulemaking are presumed valid. Colorado Div. of Ins. V. Auto-Owner's Ins. Co., 219 P.3d 371 (Colo.App. 2009). This is especially true of an agency's construction of its own governing statute, which is entitled to "great weight." Mile High Greyhound Park v. Racing Comm'n, 12 P.3d 351 (Colo.App. 2000).

Agency actions are presumed valid, and reasonable doubts as to the correctness of the agency's action must be resolved in favor of the agency. Atchinson, Topeka & Santa Fe Railway Co. v. Public Utilities Comm'n, 763 P.2d 1037 (Colo. 1988); Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990). Factual determinations of the agency are entitled to deference. Atchinson, Topeka & Santa Fe Railway Co., *supra.* This is especially true when the decision relates to technical issues within the agency's expertise. El Paso County Bd. of Equalization v. Craddock, 850 P.2d 72 (Colo. 1993).

To set aside findings of fact by an agency, the Court should determine whether there is "substantial" evidence in the record as a whole, sufficient to support the agency's decision. Lawley v. Dept. of Higher Ed., 36 P.3d 1239 (Colo. 2001). The Court must review the record in the light most favorable to the agency's decision. Id. Finally, the Court may not substitute its own judgment for that of the agency's, and cannot modify or set aside the agency's decision so long as it is supported by substantial evidence. Microsemi Corp. of Colorado v. Broomfield Cty. Bd. of Equalization, 200 P.3d 1123 (Colo.App. 2008). Whether the record contains substantial evidence to support the agency decision is a question of law. Rigmaiden v. CO Dept. of Health Care Policy & Fin., 155 P.3d 498 (Colo.App. 2006).

PROCEDURAL HISTORY

A Complaint for Review of Agency Action and for Declaratory Judgment was initially filed November 1, 2010. Plaintiff sought to challenge the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal, and Designated Mining Operations ("MLRB"), specifically Rules 2CCR 407-1, adopted on August 12, 2010, and effective September 30, 2010.

This Court previously dismissed Mike King, the Executive Director, who had been named in his official capacity. Further, by Order dated April 26, 2011, the Court dismissed the Second and Fourth Claims for Relief. Accordingly the First Claim for Relief (Failure to Comply with the Rulemaking Requirements of the Colorado Administrative Procedure Act) and the Third Claim for Relief (Claim under C.R.S. § 24-4-106(7) based upon the Unreasonable, Arbitrary, Capricious or Contrary to Law Adoption of Rules) remain for adjudication.

By Order dated June 28, 2011, the Court granted an Unopposed Motion to Intervene, filed by Defendants/Intervenors.

After some delay, and the request for a modification of the briefing schedule, this matter is now fully ripe for adjudication on those claims.

RELEVANT FACTS

The facts that are relevant to this Court's resolution of Plaintiff's claims are set forth in the Answer Brief filed on behalf of the MLRB (Brief, pp. 4-7) and this Court hereby incorporates those Facts as if set forth fully in this Order.

ANALYSIS

Compliance with Rulemaking Procedures

Powertech claims that the Board violated the APA when it adopted regulatory language that was not included in the original draft prepared by the Division and release for comment at the start of the rulemaking process. Powertech claims that the topic areas were too far outside of the scope of rulemaking as it was officially noticed.

C.R.S. § 24-2-103(4)(a) requires that any proposed rule or revision of a rule to be considered at a public hearing, together with a proposed statement of basis, specific statutory authority, purpose and the regulatory analysis required under subsection 4.5 shall be made available to any person at least five days before the hearing. The Division provided draft rules by July 30, in advance of the August 12, 2010 hearing date. (000037-38). The Division also included an Explanatory Statement (000060-61) detailing the basis, statutory authority and purpose of the proposed language. Further, throughout the process, the Division's website provided formal notice to any interested person regarding dates, prehearing orders, filing deadline and other information relating to the rulemaking hearing. (000206). There is nothing in the record to suggest that this policy was not followed.

Any party challenging an administrative agency's action bears the burden of overcoming the presumption that the challenged acts were proper. Lieb v. Trimble, 183 P.3d 702 (colo.App. 2008). The essential inquiry is whether the commenters have had "a fair opportunity" to present their comments on the content of the plan. BASF Wyandotte Corp. v. Costle, 548 F.2d 637, 642 (1st Cir. 1979). In this case, the Board sought and received comment and input from Powertech throughout the rulemaking process, and prior to deliberations on proposed additional language. (000037-38). Powertech has not established that any issues were not raised early in the process, or that they had no opportunity to address those rules. In fact, the May 5, 2010 Order describes and documents the April Conference, and specifically identifies the issues that were raised in the July 19, 2012 Order. (000025-26; 000037-38).

First, as to the pit liner issue, TAC addressed the issue in its Prehearing Statement (003828-30), and Powertech addressed it in its Rebuttal Statement. (004362-63). Further, Powertech addressed the issue in a letter dated August 6, 2010 to the Board. (000094).

On the issue of notice to local governments, the record against shows that the issue was raised in the early stages of the rulemaking process. The Town of Nunn addressed the issue on February 22, 2010. (001649). Further, the issue was raised in the parties' Prehearing and Rebuttal Statements. (003831; 004358).

Regarding Collection of Baseline Water Quality Information for Prospecting, both Fremont County and TAC raised the issue during the public comment period. (001967; 003829). Powertech responded in its Rebuttal Statement. (004363; 000076).

Regarding the *de minimus* Incidental Uranium Recovery, Powertech has to admit that the Colorado Mining Association raised the issue in its Prehearing Statement. (003493). Powertech in fact endorsed those comments, and incorporated them into its own letter by reference. (006266).

Finally, reagarding the deadline for written requests regarding confidential information, This issue was raised in Powertech's own Prehearing Statement (006277) as well as the statement filed by the Colorado Mining Association. (003496-97). Once again, Powertech incorporated the CMA's statements into its own statements.

Accordingly, as to each of these specific instances, Powertech had a fair opportunity to present its arguments. The mere fact that the Board did not follow Powertech's arguments does not mean that Powertech did not have a fair opportunity to make comments during the rulemaking process. Accordingly, the Court concludes that the Board substantially complied with the requirements of the APA.

Statutory Authority for the Board's Rules

Powertech also argues that the Board lacked the authority to promulgate Rules on these various topics. The MLRA has granted the Board expansive rulemaking and regulatory authority under C.R.S. §34-32-108. This has been recognized by the Colorado Supreme Court:

> * * * [T]he General Assembly granted the Board broad authority to permit and regulate mining operations both during and after mining activities. . .

Colorado Mining Association v. Summit County, 199 P.3d 718, 727 (Colo. 2009).

The provisions of C.R.S. § 34-32-113(2)(f) which directs the Board and Division to conduct a detailed review of the development and implementation of all measures to be taken to reclaim affected land, read with C.R.S. § 34-32-103(1) which defines "reclamation" broadly, demonstrates that the Board has been granted expansive authority to set Rules governing reclamation for prospecting. Those Rules may affect the

reclamation both during and after the subject mining activity. The record establishes both a rational and reasonable explanation for each of the rules involved in this case: the pit liner issue (000060-61; collection of baseline water quality information for prospecting (000061); public comments and appeal for prospecting operations (SB08-228; 000069; 004526-27); public comments and appeal on transfer of in situ leach mine permits (HB 08-1161; 004390-91); and Notice of NOI to Local Governments (C.R.S. § 34-32-109(6).

The Board's Rules are not Arbitrary and Capricious

Powertech does not specifically identify any particular rule as arbitrary and capricious, but instead repeats its earlier arguments in support of this position. Contrary to Powertech's assertions, however, the Board did not remove the public from the process of rulemaking, as shown previously in this Order, given the Division's inclusion of its materials throughout the process on its website. This was in accord with its Notice of Public Rulemaking Hearing. (000206). The record shows that various members of the public, including the CMA, Powertech and others, made comment through those procedures.

The Board's Rules are supported by Substantial Evidence

Powertech's final argument is that the rules have no evidentiary support in the record. This Court is without aurhority to reweigh evidence considered by the Board. Microsemi Corp. of Colo. v. Broomfield Bad. of Equalization, 200 P.3d 1123 (Colo.App. 2008). Instead, the Court must view the record to determine whether there is "substantial evidence" – that is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, regardless of whether there is also contradictory information in the record. Ward v. Department of Natural Resources, 216 P.3d 84, 94 (Colo.App. 2008). Powertech concedes that the rules regarding pit liners and baseline water quality information were based upon concerns that had been expressed in public comments. (Opening Brief, p. 16).

Powertech's arguments relating to public participation and local government notice are to be viewed on the "policy consideration" end of the spectrum on these issues, where factual determinations are not quite as important. Those issues were all raised and discussed repeatedly throughout the filings in the rulemaking process. Fremont County, the Towns of Nunn and Wellington and the City of Fort Collins all addressed these issues. (004435-43). Accordingly, the Court concludes that there is substantial evidence contained in the record sufficient to support the issues raised by Powertech.

CONCLUSION

Powertech has failed to meet its burden in establishing the allegations contained in its Complaint. Accordingly, this Court AFFIRMS the MLRB action, and this case is DISMISSED. Appropriate costs shall be awarded upon proper filing.

Dated: Friday, July 13, 2012.

BY THE COURT:

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Christina M. Habas
Denver District Court Judge