DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1435 Bannock Street Denver, CO 80202	
Plaintiff(s): POWERTECH (USA) INC.; **v.** **Defendant(s):** COLORADO MINED LAND RECLAMATION BOARD; **and** **Defendant-Intervenor(s):** COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY; SHEEP MOUNTAIN ALLIANCE.	**COURT USE ONLY**
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RESPONSE BRIEF
OF DEFENDANT-INTERVENORS

I. INTRODUCTION

The Opening Brief filed by plaintiff Powertech (USA) Inc. ("Powertech") fails to substantiate any violation of either the Colorado Administrative Procedure Act ("APA"), C.R.S. §§ 24-4-101, et seq., or the Colorado Mined Land Reclamation Act ("MLRA"), C.R.S. §§ 34-32-101, et seq. As a result, the September 2010 Final Amended Rules[1] ("Rules") of defendant Colorado Mined Land Reclamation Board ("MLRB" or "Board") should be upheld in their entirety as consistent with the procedural requirements of the APA and the Board's broad authority to adopt rules implementing the MLRA.

Powertech makes four separate arguments challenging the Rules. First, the company contends that the Board violated the APA by amending the Rules to address five issues related to the subject matter of the proposed Rules that arose throughout the public comment process. Plaintiff/Appellant's Opening Brief ("Powertech Opening") at 3-10. The gravamen of Powertech's contention on this point is that the Board failed to provide APA notice regarding its consideration of these issues. However, the Record shows that the Board identified these issues as contested issues at the very start of the formal rulemaking process. Further, the Board provided Powertech and mining industry representatives multiple opportunities for extensive comment, both written and in hearing testimony, on these precise issues. The Record is clear - Powertech and industry advocates such as the Colorado Mining Association had actual notice and opportunity to address these issues during rulemaking.

Powertech next claims that the Board's adoption of Rules that implement reclamation standards for protection of ground and surface waters, as well as providing for public

[1] 2 CCR 407-1, available on-line at: http://mining.state.co.us/rulesregs/HardRockRulesAdoptedAug%20122010actcites12032010correction.pdf

participation and local government notice of prospecting activity, are outside the Board's statutory authority. Powertech Opening at 10-14. However, Powertech fails to recognize the MLRA's broad grant of authority to the Board to establish reclamation standards. Powertech's statutory authority argument is also contrary to the provisions of the MLRA providing the Board with broad authority and direction to establish a functional and public permitting process.

Third, Powertech asserts that "the specific rules discussed herein" are arbitrary and capricious. Powertech Opening at 15. However, Powertech fails to specifically identify the "specific rules" it challenges in this regard. Indeed, throughout its entire argument, Powertech alludes to the subject matter included in the Rules with which it disagrees, but rarely (and never coherently) identifies by section the specific provisions of the Rules that it challenges. In any case, Powertech's dissatisfaction with the results of the rulemaking does not provide a basis for a facial APA challenge.

Fourth, Powertech asserts that the Board adopted portions of the Rules without any evidentiary basis in the Record, specifically bemoaning the lack of any "scientific or technical" evidence. Powertech Opening at 15-17. These arguments are again based on Powertech's general disagreement with Rule provisions that protect water quality and ensure the involvement of the affected public in permitting processes. Further, Powertech's evidentiary argument simply ignores substantial support in the Record for each of these challenged provisions. Lastly, the Colorado APA does not require "technical or scientific" evidence for every provision of the Rules, particularly those dealing solely with policy determinations relating to the crafting of the Board's public notice, comment, and hearing processes.

II. FACTUAL BACKGROUND

This lawsuit concerns protective state mining regulations enacted by the Board in August 2010 and made effective September 30, 2010. These regulations were subject to an extensive public hearings process where the regulations enjoyed widespread support of the citizens, elected officials, and local governments of Colorado. The Rules provide for the protection of natural resources, particularly ground and surface waters, upon which large portions of the state's economy are dependent, while still allowing appropriate mineral exploration and development to occur. The regulations also allow and define the process for public participation in mineral prospecting approvals, without which the public would have no voice in the mineral exploration and mine site baseline characterization process.

The Rulemaking at issue originated out of the passage of substantial legislation amending the MLRA by the Colorado General Assembly in 2008. R. at 000174. These pieces of legislation focused on ensuring protection of natural resources from uranium mining operations (HB 08-1161) and on ensuring involvement by the affected public in the mineral exploration/prospecting stage of all mining operations (SB 08-228). R. at 000176-000178.

The Colorado Division of Reclamation Mining and Safety ("DRMS" or "Division") began informal rulemaking proceedings in 2009. R. at 000175. These informal proceedings lasted a full eight months and included eight meetings for any and all stakeholders. R. at 000175. Powertech participated prominently in these informal proceedings, with most of its participation focused on mining uranium via in situ leach mining, which involves the injection of chemicals into Colorado's aquifers for the purpose of mobilizing and extracting uranium from the relevant water-saturated geological formation. R. at 006266. Several

organizations that are representative of the broader mining industry participated as well, including the Colorado Mining Association. R. at 000024-000025.

On January 26, 2010, the Board submitted its formal notice of proposed rulemaking to the Colorado Secretary of State's Office. R. at 000213. The notice provided the initial time line for public participation in the rulemaking process, including instructions on becoming a formal party to the administrative proceedings. R. at 000206-000212. The Board set a deadline of March 15, 2010 for public comments. R. 000011. The Board conducted a pre-hearing conference on April 6, 2010. R. at 000212. The Board held public hearings in Loveland on April 15, 2010 (transcript R. at 005293-005389), Grand Junction on May 13, 2010 (transcript R. at 005390-005410), Salida on May 26, 2010 (transcript R. at 006185-006264), and Denver on June 6, 2010 (transcript R. at 005491-005577). The Board held formal hearings on July 13, 2010 (transcript R. at 005578-005817), July 14, 2010 (transcript R. at 005818-006013), and August 12, 2010 (transcript R. 006014-006184). In all, the Board issued seven Orders during the rulemaking process in order to ensure a coherent and well-organized rulemaking process. R. at 000001-000041.

Coloradans from across the state participated in the process, including multiple local governmental entities. The majority of these comments urged the DRMS and the Board to move forward with and adopt Rules protective of ground and surface waters, and inclusive of full public participation and local government notice of proposed operations. R. at 000215-003398.

Ultimately, the Board adopted the Rules unanimously. R. at 006183. This unanimous support for the Rules came despite the wide diversity required by statute for Board membership. Pursuant to the MLRA, the Board is made up of equal representation

from the mining industry, agriculture, and conservation, along with a designated representative from the Colorado Department of Natural Resources. C.R.S. § 34-32-105(2).

III. STANDARD OF REVIEW

While Powertech included some recitation of the applicable statutory provisions of the APA in its Introduction (Powertech Opening at 2-3), the company neglected to provide any relevant Colorado caselaw providing the applicable standard of review. This is little wonder, as Colorado caselaw demonstrates Powertech's high burden in attempting to overturn the MLRB regulations, particularly given the extensive administrative record and statutory support underlying the Board's decision.

Rules adopted by an administrative or regulatory agency are presumed valid, and the challenging party has a heavy burden to establish a rule's invalidity. Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd., 919 P.2d 212 (Colo.1996). The invalidity of a rule may be established by demonstrating that a rulemaking body (1) acted in an unconstitutional manner; (2) exceeded its statutory authority; or (3) acted in a manner contrary to statutory rulemaking requirements. C.R.S. § 24-4-106(7); Brown v. Colo. Ltd. Gaming Control Comm'n, 1 P.3d 175 (Colo.App.1999).

The appropriate standard of review for a rulemaking proceeding is one of reasonableness. Brown, supra. A reviewing court may not substitute its judgment for that of the administrative agency on the merits of the adopted rule. Citizens for Free Enter. v. Dep't of Revenue, 649 P.2d 1054 (Colo.1982). Whether an action is reasonable turns on the nature of the determination or action by the administrative agency, such that the Court applies a flexible test to its determination of whether a rule is valid:

> In Citizens for Free Enterprise v. Department of Revenue, 649 P.2d 1054 (Colo. 1982), the Supreme Court described the types of rules promulgated by an agency as a continuum. At one end of the continuum, rules are based primarily upon policy considerations with factual determinations playing only a tangential role. For such rules, specific factual support is not required, although the reasoning process that led to the adoption of the rule must be defensible.
>
> At the other end of the continuum, the necessity for the administrative rule turns upon discrete facts capable of demonstrative proof. The reasonableness of the agency action in such cases depends upon the presence of factual support. Citizens for Free Enterprise v. Department of Revenue, supra.
>
> Under that standard, a reviewing court must ensure that the regulation is the product of reasoned decision-making fairly defensible in light of the material before the agency, but the court may not substitute its judgment for that of the administrative agency. Citizens for Free Enterprise v. Department of Revenue, *supra*; Wine & Spirits Wholesalers of Colorado, Inc. v. Colorado Department of Revenue, *supra.*

Brown v. Colorado Ltd. Gaming Control Comm'n, 1 P.3d 175, 176-177 (Colo. App. 1999).

Further, recognizing that the legislative nature of rulemaking differs from the quasi-adjudicatory nature of other agency actions that may be presented for judicial review, the APA rulemaking provisions (C.R.S. § 24-4-103) do not require strict or absolute compliance, only "substantial compliance":

> The statutory rulemaking requirements are set forth in § 24-4-103, C.R.S. 2006. The APA requires "substantial compliance" with the procedures, and an agency's failure to meet that standard renders the rule invalid. Section 24-4-103(8.2)(a), C.R.S.2006. Substantial compliance is more than minimal compliance, but less than strict or absolute compliance. Woodsmall v. Reg'l Transp. Dist., 800 P.2d 63 (Colo. 1990). To determine whether there has been substantial compliance, we look, inter alia, to the extent of the noncompliance and the purpose of the provision violated. Studor, Inc. v. Examining Bd. of Plumbers, 929 P.2d 46 (Colo.App.1996).

Brighton Pharmacy, Inc. v. Colorado State Pharmacy Bd., 160 P.3d 412, 415 (Colo. App. 2007).

> In determining whether there has been substantial compliance we look, *inter alia,* to the extent of the noncompliance and the purpose of the provision violated. *See* Bickel v. City of Boulder, 885 P.2d 215 (Colo.1994). *See also* Woodsmall v. Regional

> Transportation District, 800 P.2d 63 (Colo.1990) (substantial compliance is more than minimal compliance but less that strict or absolute compliance). Thus, we must examine the agency's actions in light of the legislative objectives of the rule-making provisions at issue, as well as the objectives of the APA procedures in general.

Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, 929 P.2d 46, 48 (Colo. App. 1996).

IV. ARGUMENT

A. The Board Complied with the APA Rulemaking Procedures.

Powertech's lead contention is that the Board violated the APA where the Board considered and adopted regulatory language that was not included in the original draft that was prepared by the Division and released to the public for comment at the very beginning of the formal rulemaking process. Powertech asserts that the topic areas of the adopted regulations were so far outside the scope of the rulemaking as it was officially noticed, that Powertech was "ambushed" by the adoption of final rules addressing in situ uranium leaching, water protection, public involvement, and prospecting. Powertech Opening at 7. A review of the Record demonstrates that the Board provided Powertech with ample opportunity to address both the subject matter and the specific language ultimately considered and adopted.

Powertech challenges the Board's inclusion in the Rules of language addressing the issues listed in the Board's July 19, 2010 Order Regarding Additional Submittals. R. at 000037-000038. These topics included:

1. Pit liners for drilling-related activities (including prospecting).
2. Providing copies and/or notice 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 to 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).

R. at 00037.[2]

The Colorado APA and established Colorado and federal caselaw directly support the Board's rulemaking procedures. Powertech cites to two federal cases as the basis for its argument that the Board violated the Colorado APA by adopting language pertaining to the five issues identified in the Board's July 19, 2010 Order Regarding Additional Submittals. Powertech Opening at 4 (*citing* Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 824 F.2d 1258 (1st Cir. 1984) ("NRDC") and Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d 506 (D.C. Cir. 1983) ("Small Refiner"). However, these cases do not support Powertech's argument – and in fact, when read along with the statutory language of the Colorado APA, these cases support the Board's rulemaking process in this case.

Under the Colorado APA:

> Any proposed rule or revised proposed rule by an agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose and the regulatory analysis required in subsection (4.5) of this section, shall be made available to any person at least five days prior to the hearing.

C.R.S. § 24-4-103(4)(a). In this case, the Record demonstrates that such notice was indeed provided. The Board specifically ordered that the Division provide all draft rules by July 30, 2010, in advance of the August 12, 2010 hearing date. R. at 000037-000038. The Division did so, and included an Explanatory Statement detailing the basis, statutory authority and purpose of that language. R. at 000060-000061. Powertech appears to argue that in its view,

[2] The Order lists a sixth, largely ministerial, issue not addressed or challenged by Powertech.

this time period was insufficient, but this does not change the fact that agency complied with the specified APA procedures.[3]

Regarding the federal caselaw relied upon by Powertech, in NRDC, the D.C. Circuit found EPA's rulemaking insufficient due to a lack of notice to relevant parties of language included in the final rule. Importantly, the holding in that case was entirely premised on the fact that the EPA failed to provide any opportunity for input as to the language ultimately adopted. 824 F.2d at 1285. In reaching its conclusion, the Court recognized that agencies may make changes that respond to the give and take of the legislative nature of rulemaking.

> A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can make even 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.

Id. at 1283 (citations omitted). Importantly, and omitted from Powertech's discussion of the NRDC case, was the Court's additional discussion demonstrating that there are no bright-line rules on how an agency incorporates changes from the original proposal, except that in order

[3] While not entirely clear, Powertech also appears to contend that the Division's proposed Rules were only served on the parties, thereby failing to make the language available to "any person" as required by the APA. However, Powertech ignores the Division's express statement that "[t]hroughout the formal rulemaking process, the Division's website will provide formal notice to interested persons and parties regarding important dates, prehearing orders, filing deadlines, and other information concerning the rulemaking hearing and process." R. at 000206 (Notice of Public Rulemaking Hearing Before the Colorado Mined Land Reclamation Board). In accordance with this policy, all documents pertaining to the rulemaking were made available (and still are) on the Division's website. *See* http://mining.state.co.us/Rulemaking.htm. Powertech provides no evidence, or even any indication, that this explicit policy was somehow not followed with respect to the Division's July 30, 2010 submittal. The party challenging an administrative agency's action bears the burden of overcoming the presumption that the agency's acts were proper. *See, e.g.*, Lieb v. Trimble, 183 P.3d 702 (Colo. App. 2008). Powertech has not done so here.

to prevail in a challenge such as that brought by Powertech here, the person challenging the rule must have been denied all opportunity to influence the final rule.,

> The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing. Thus, where the final rules "are a result of a complex mix of controversial and uncommented upon data and calculations," remand may be in order. *Similarly, where the Agency adds a new pollution control parameter without giving notice of intention to do so or receiving comments, there must be a remand to allow public comment.* The question, however, always requires careful consideration on a case-by-case basis. BASF Wyandotte, 598 F.2d at 642 (emphasis added).

Id.[4]

Thus, the entire basis for remand in NRDC was that EPA had issued a final regulation with language for which it provided no opportunity at all for comment by the challenging party. Similarly, in Small Refiners, the 1st Circuit struck down a portion of an EPA rule because the EPA failed to provide any notice or opportunity to comment at all to the challenging party that the agency was considering including the challenged language. 705 F.2d at 550. As demonstrated below, this scenario from NRDC and Small Refiners is wholly distinguishable from the case at bar, where the Board specifically sought and received comment and input from Powertech throughout the informal and formal rulemaking, and again prior to deliberations on the proposed additional language. *See* July 19, 2010 Order Regarding Additional Submittals (R. at 000037-000038).

[4] Notably, the NRDC Court applied what it referred to as a "strict compliance" test with the procedural requirements of the federal Administrative Procedure Act). 824 F.2d at 1286 ("insist[ing] that the required procedures be strictly complied with."). In contrast, as discussed, the test under the Colorado APA is one of "substantial compliance" with the procedural requirements.

Contrary to Powertech's argument, the Record demonstrates that each of the allegedly "new" issues were raised early on in the rulemaking, and Powertech and other mining industry representatives had multiple opportunities to address them. In fact, the Board Order dated May 5, 2010 describing and documenting the April 6, 2010 prehearing conference for this matter specifically identified each of these issues as points of contention specifically raised in the prehearing and rebuttal statements. R. at 000025-000026 (Sixth Prehearing Order). Specifically, the May 5, 2010 Order lists:

A. Definitions
    4. In situ leach mining
. . .
C. Baseline site characterization and monitoring plans.
D. Public comment on Baseline Site Characterization and monitoring plans and Board review of Division decisions regarding plans.
E. Adoption of Colorado Oil and Gas Conservation Commission Rules Related to Surface and Ground Water Protection During Prospecting.
. . .
I. Public Comment, Appeals, and Confidentiality for Notices of Intent to Conduct Prospecting.
. . .
K. Confidentiality disputes as adequacy concerns.

R. at 000037-000038. The correlation between these issues identified in the May 5, 2010 Prehearing Conference Order to the issues identified in the July 19, 2010 Order is as follows:

1. pit liners = item E. arising from Oil and Gas Conservation Commission Rules.
2. providing copies of Notices to local governments = item I. pertaining to public notice.
3. collection of baseline = item C. and D. pertaining to baseline characterizations
4. de minimis incidental uranium recovery = item A.4. pertaining to the definition of in situ leach mining
5. challenges to confidentiality = item K. confidentiality disputes as adequacy concerns.

A review of the Prehearing and Rebuttal Statements from the various parties, along with public comments, confirms that each issue for which Powertech claims to have been "ambushed" was fully presented and addressed by the parties, including Powertech.

Pit Liners to Protect Water Resources

With regard to pit liners, the Tallahassee Area Community ("TAC") specifically addressed this issue at length in its Prehearing Statement. R. at 003828-003830 (quoting and advocating for pit liners as provided for in the Colorado Oil and Gas Conservation Commission Rules). TAC also cites to and quotes public comments sent to the Board dated February 28, 2010 from the Fremont County Board of County Commissioners which also specifically requested consideration and adoption of pit liner requirements for uranium exploration drill hole mud pits. R. at 003829 (the Fremont County letter itself is located at R. 001967-001968). Further, the transcript of the Board's May 26, 2010 public meeting in Salida contains numerous requests from members of the public that the Board adopt increased protections for uranium exploration drill hole mud pits, including pit liner requirements. R. at 006185-006264 (*see* specifically R. at 006205-006208, 006218-006220, 006225-006232, 006235-006236, 006238-006239).

Importantly, Powertech took full advantage of the opportunity to respond to the pit liner issue in its Rebuttal Statement. R. at 004362-004363 (specifically addressing issue of including Oil and Gas Conservation Commission requirements, such as pit liners, to uranium mining activities). Thus any claim that the July 19, 2010 Board Order somehow "ambushed" Powertech must be rejected – as the precise issue of water-protective pit liners was raised at the earliest possible time in the initial comment period on the Rules, and carried forward throughout the formal party prehearing and rebuttal statements.

In any case, Powertech's response to the Board's July 19, 2010 Order gave Powertech yet another opportunity to specifically address the pit liner issue, which it did in a letter dated

August 6, 2010. R. at 000094. Powertech argues in this letter that inclusion of any pit liner issue is improper, as the issue "was not noticed in any way in the rulemaking documents or in the stakeholder process or MLRB hearings…." Id. However, the repeated references in the Record cited herein demonstrate the gross inaccuracy of this characterization.

Notice to Local Governments

Similar to the pit liner issue, the Record in this case demonstrates that the issue of notice to local governments was raised repeatedly from the earliest stages of the rulemaking process. For instance, in a February 22, 2010 letter, the Town of Nunn specifically requested that the Board require notice of new prospecting activities to affected local governments. R. at 001649 ("We urge the Board to adopt rules that expressly provide the affected public and local governments the opportunity both to submit comment and to seek administrative review of prospecting approvals."). Further, in its February 28, 2010 letter, Fremont County specifically commented that "[n]otification must be made to local government entities of a pending NOI for any prospecting/exploration." R. at 001968.

Apart from public comments, the issue of notice to local governments was included in the parties' Prehearing and Rebuttal Statements. For instance, TAC specifically requested that the Board adopt a local government notice provision such as that requested by Fremont County. R. at 003831. Again, Powertech specifically addressed this issue in its Rebuttal Statement, urging the Board (unsuccessfully) to provide for county notice only at the full-blown mining stage, rather than the initial prospecting stage. R. at 004358. Of course, Powertech had an additional opportunity to fully address this issue a second time in its Response to the Board's July 19, 2010 Order. R. at 000075-000076.

Collection of Baseline Water Quality Information for Prospecting

The issue of baseline information for prospecting was explicitly raised in the public comment period by Fremont County and by TAC. In its February 28, 2010 letter, Fremont County stated that "Groundwater characterization requirements should be standardized for all exploration, regardless of methods proposed or utilized for future extraction." R. at 001967. This issue was also expressly included in TAC's prehearing statement. R. at 003829. Powertech responded to this issue, albeit in general terms, in its Rebuttal Statement. R. at 004363. The company took full advantage, however, of its opportunity to respond to this issue in its Response to Order Regarding Additional Submittals. R. at 000076. The fact that the Board was not persuaded by Powertech's arguments does not equate to a lack of opportunity to address and present argument on this issue.

De Minimis Incidental Uranium Recovery

Although Powertech acknowledges that the concept of incidental de minimis uranium recovery was raised by the Colorado Mining Association ("CMA"), it nevertheless includes the issue as a point of contention in this case, arguing that the company was never provided a chance to address the issue. Powertech Opening at 5-10. Again, the Record clearly contradicts any such assertion. CMA raised this issue squarely in its Prehearing Statement. R. at 003493. In its Prehearing Statement, Powertech acknowledged the CMA Prehearing Statement and went so far as to "endorse those comments and incorporate them and any exhibits into this letter by reference." R. at 006266. Powertech should not now be heard to challenge the inclusion in the rulemaking of the very provisions it endorsed and incorporated into its own materials.

Deadline for Written Request Regarding Confidential Information

Similar to each and every other issue for which Powertech claims a lack of notice, the issues regarding public comment on assertions of confidentiality are evident throughout the rulemaking process. Notably, this issue was raised explicitly in Powertech's Prehearing Statement, R. at 006277, as well as in CMA's Prehearing Statement. R. at 003496-003497. As noted, Powertech expressly incorporated CMA's materials into its own. R. at 006266. Indeed, CMA specifically requests that if the Board decides to permit public input on confidentiality determinations, "then it is critical that a strict timeframe be established…" for the submittal of such public input. R. at 003497. As such, the Record demonstrates that this issue was fully presented in the rulemaking process, and that Powertech had ample opportunity to present argument to the Board – and certainly a fair opportunity. Simply because the Board rejected Powertech's position does not equate to a lack of adequate notice.

Overall, the Record demonstrates that Powertech had a "fair opportunity" to address each of the issues it complains of. As such, the Board easily satisfies the "substantial compliance" test applicable here.

B. The MLRA Provides Ample Statutory Authority for the Board's Rules.

Powertech's second main argument is that the Board lacked statutory authority to promulgate rules on five topics: 1) pit liners; 2) collection of baseline water quality information related to prospecting; 3) public comments and appeal at time of NOI; 4) public comment and appeal on transfer of mine; and 5) notice of NOI to local governments. Powertech Opening at 10. However, a review of the MLRA and the administrative record fatally undermines each of these arguments.

As a general matter, the MLRA grants the Board expansive rulemaking and regulatory authority. C.R.S. § 34-32-108. The Colorado Supreme Court has explicitly recognized this fact with respect to the establishment of reclamation and environmental protection standards:

> The General Assembly granted the Board authority to promulgate standards for reclamation plans and to promulgate rules and regulations concerning mined land reclamation. §§ 34-32-106, -108, C.R.S. (2008). The statute also establishes a permitting program for mining operations. §§ 34-32-109, -112, C.R.S. (2008). The MLRA vests the Board with sole authority for reclamation permitting and standard setting:
>
> > *No governmental office of the state, other than the board, nor any political subdivision of the state shall* have the authority to issue a reclamation permit pursuant to this article, to *require reclamation standards different than those established in this article,* or to require any performance or financial warranty of any kind for mining operations.
>
> § 34–32–109(6) (emphasis added). Although the word ‘‘reclamation’’ may seem to imply only post-mining activity, **the General Assembly granted the Board broad authority to permit and regulate mining operations both during and after mining activities occur**….

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

The MLRA specifically provides that with respect to prospecting, the Board and Division are to conduct a detailed review of the development and implementation of all "[m]easures to be taken to reclaim any affected land consistent with the requirements of section 34-32-116, C.R.S." C.R.S. § 34-32-113(2)(f). These substantive requirements include protection of local drainage systems from pollution, minimizing impacts to the hydrologic balance, water quality, water quantity, as well as protection of properties surrounding the proposed activities. C.R.S. § 34-32-116(7). Lastly, "reclamation" is defined

in the MLRA very broadly to mean all "procedures reasonably designed to minimize as much as practicable the disruption" from the approved activities. C.R.S. § 34-32-103(13). Taken together, these provisions demonstrate the Board's expansive authority to set Rules governing reclamation for prospecting, both during and after the subject activity. As such, each of the challenged provisions meets the "reasonableness" standard of review applicable under the APA.

Pit Liners

Powertech challenges the Board's statutory authority to provide for, in appropriate cases, the imposition of a reclamation standard requiring pit liners for protection of water quality. Specifically, the Rule states:

> (5) Drilling pits used during prospecting or mining shall be constructed and operated to minimize impacts to public health, safety, welfare and the environment, including soil, waters of the State, including groundwater, and wildlife. In its discretion, the Office may require the use of pit liners, fencing, netting or other measures to minimize impacts to the public health, safety, welfare and the environment.

Rule 3.1.6(5). Importantly, this requirement is implemented by the Division on a case-by-case basis where the site-specific evidence warrants such a requirement. The requirement for pit liners is not mandatory for all prospecting drill holes.

The Record provides a rational and reasonable explanation for this discretionary pit liner provision, as explained in the Division's Explanatory Statement. R. at 000060-000061. Specifically, the agency clarified that "these changes are designed to fit within the existing structure of the Board's rules which provide the Division discretion to determine what measures are necessary for the protection of groundwater and surface water." R. at 000061. The Division goes on to explain how the pit liner language implements the same process as

exists in other rules regarding protection of water quality – and that on a case-by-case basis, depending on the site-specific information, the Division may take additional measures to minimize impacts to water quality.

Simply put, there is nothing remarkable about the Division's discretionary ability to require pit liners to the extent necessary to achieve the water protection requirements of the Act. Thus, the MLRA provides ample statutory basis for this requirement in requiring the Division and Board to minimize impacts to water quality and the hydrologic balance, as discussed.

Collection of Baseline Water Quality Information for Prospecting

Powertech contends that the Board's decision to include reference to the collection of baseline water quality information for prospecting operations is beyond its authority under the MLRA. Powertech Opening at 11-12. The basis for Powertech's argument revolves around a perceived substantive distinction between prospecting activities and mining activities. Id. at 12. Specifically, the company argues that there is "no evidence that the legislature intended" to require such measures as baseline water quality data gathering at the prospecting stage. Id.

The language of the MLRA directly contradicts Powertech's argument. As discussed above, the MLRA specifically requires that all prospecting operators implement all "[m]easures to be taken to reclaim any affected land consistent with the requirements of section 34-32-116." C.R.S. § 34-32-113(2)(f). As noted, these substantive requirements from section 116 are broad in nature, including such categories as protection of local drainage systems from pollution, and minimizing impacts to the hydrologic balance, water

quality, and water quantity, as well as protection of properties surrounding the proposed activities. C.R.S. § 34-32-116(7). These statutory provisions leave substantial discretion to the Board to interpret the requirements of the Act and provide statutory authority to require a baseline characterization should it be found by the expert agency to be warranted in a particular case.[5]

As with pit liners, the requirement for collection of baseline water quality information applies only on a case-by-case basis where deemed necessary by the Division to ensure that impacts from prospecting will be detected. *See* Board Rule 3.1.6(4). The Division explained in the Record that this requirement "fit[s] within the existing structure of the Board's rules which provide the Division discretion to determine what measures are necessary for the protection of groundwater and surface water," and "incorporates this same type of discretion to allow the Division to respond to site-specific conditions and changes in technology." R. at 000061. This rational and lawful justification surpasses the "reasonableness" test applicable in this case.

Public Comments and Appeal for Prospecting Operations

Powertech argues that the Board's policy decision to formalize its internal administrative procedures for accepting public comment and participation in Board review processes is contrary to the MLRA. Powertech Opening at 12-13. Instead of addressing the MLRA itself, Powertech instead offers a letter from State legislators as its sole demonstration of statutory interpretation. Id. at 13. However, the MLRA and APA confirm the Board's

[5] CMA's submittal in response to the Board's July 19, 2010 Order Regarding Additional Submittals echoes this precise point, acknowledging the Division's case-by-case authority to impose measures necessary to protect water quality. R. at 000069.

authority to manage its own procedures and to provide for public involvement in agency prospecting decisions.

The MLRA specifically provides that "[a]ny person aggrieved by a final action of the office may file an appeal of such action with the board. Such appeals shall be conducted in accordance with the provisions of article 4 of title 24, C.R.S." C.R.S. § 34-32-107(2). Further, through SB 08-228, the Colorado General Assembly eliminated the special treatment previously afforded prospecting information with respect to confidentiality. *See* C.R.S. § 34-32-113(3). As a result, the rules were amended to recognize that there is no remaining bar to the Board implementing its own administrative process to ensure interested and affected persons could be involved in the Division's regulation of prospecting. This interpretation is in accord with the APA, which provides broad discretion to agencies to craft their own hearing procedures, including directing all manner of issues regarding the course of such proceedings. C.R.S. § 24-4-105(4).

Without identifying any bar against the participation by elected officials in the rulemaking process, Powertech selectively quotes a March 15, 2010 letter sent to the Board by Colorado legislators, and makes much of the fact that the letter states that SB 08-228 did not specify an administrative process for public comment and Board review of prospecting decisions. Powertech Opening at 13. However, Powertech selectively quotes the letter, and ignores the relevant MLRA provisions. When read as a whole, the letter supports the reasonableness of the Board's decision codifying a public process:

> It is our understanding that current Division of Reclamation Mining and Safety policy allows for public comments on such pre-mining activities, to the extent they raise credible questions or issues as to the necessary protection of natural resources through adequate reclamation standards or as to protections for taxpayers through adequate

> reclamation bonding. Such a policy properly allows for public evaluation and input, but does not burden the state's professional staff with having to address other concerns not connected to the technical reclamation and bonding standards.
>
> * * *
>
> Lastly, we encourage the Board to strongly consider granting the public administrative review of prospecting. SB 08-228 did not expressly provide for this opportunity. However, the Mined Land Reclamation Act does expressly provide the Board with the authority to create such a process: "Any person aggrieved by any final action of the office may file an appeal of such action with the board." Given that the scope of the Board's current rulemaking includes amending and correcting current practice or procedure, we think such a change is appropriate at this time. The Board could provide more regulatory certainty and cost-savings for the State of Colorado by providing administrative review at the agency level rather than relying on state court litigation under the Colorado Administrative Procedure Act as the sole option for aggrieved parties to seek review….

R. at 004526-004527 (Letter dated March 15, 2010 from Sen. Gail Schwartz, Rep. Kathleen Curry, Rep. Randy Fischer, and Rep. John Kefalas).

Instead of addressing MLRB's statutory scheme, Powertech relies entirely on the baseless argument that because SB 08-228 itself did not contain a public comment and Board review procedure, the MLRA forbids it. This argument ignores existing provisions of the very Act that SB 08-228 amended. The General Assembly did not need to add a provision establishing such a process because the grant of board review already existed at C.R.S. § 34-32-107(2). "When the General Assembly chooses to legislate, it is presumed to be aware of its own enactments…." Anderson v. Longmont Toyota, Inc., 102 P.3d 323, 330 (Colo. 2004). Deference to the Board's amendment of the rules to conform with parallel statutory amendments eliminating special provisions for prospecting approvals is proper in this case. Ager v. Pub. Employees' Retirement Ass'n Bd., 923 P.2d 133, 137 (Colo. App. 1995) (Colorado courts defer to an agency's interpretations of a statute it is charged with administering).

Public Comments and Appeal on Transfer of In Situ Leach Mine Permits

Powertech challenges Rule 1.12.2(2) giving aggrieved persons the opportunity to comment and appeal on the transfer of an in situ leach mining permit to another operator. Powertech Opening at 13-14. Powertech contends that this provision "specifically targeted in situ leach mining operations unnecessarily and without proper statutory authority or justification." Id. at 14. However, the Board's Rule 1.12.2(2) is reasonable given the requirements of the MLRA specifically applicable only to in situ leach uranium mining, as enacted through HB 08-1161.

HB 08-1161 included a provision directed exclusively at in situ leach uranium mine permit applicants, restricting the ability to apply for a permit should an in situ leach uranium mine permit applicant be found to be in violation of environmental protection requirements of the MLRA *See* C.R.S. §§ 34-32-112(2)(i), 115(5)(d). Thus, the MLRA explicitly distinguishes between in situ leach uranium mine applicants and other mine applicants, thereby justifying distinct treatment in the Rules.

The Division succinctly explained the rational and reasonable justification for this provision in its Rebuttal Statement. R. at 004390-004391. In that document, the Division explained that a public comment and appeal procedure on this narrow issue of transfer of in situ leach mine permits was necessary to ensure compliance with the MLRA's prohibition on some in situ leach permit applicants. Id. at 004391. Rule 1.12.2.(2) ensures that applicants who would otherwise be prohibited from obtaining a permit cannot do so simply by availing themselves of a permit transfer instead of submitting an original permit application. Id.

Notice of NOI to Local Governments

Powertech asserts that the Board requirement that prospecting applicants confirm submission to the county government within which the operation is proposed violates the MLRA. Powertech Opening at 14. Powertech cites no provision of the MLRA so stating, but instead asserts that "the rule subjects the company to unnecessary and lengthy delays at the NOI stage simply because the Board requires notice to local governments which have no authority over the NOI or reclamation permitting process." Id. at 14.

However, Powertech fails to explain or provide any evidence of any delays, or explain how any delays could occur from a simple requirement that a prospecting applicant notify local governments of a prospecting application. Further, contrary to Powertech's central contention, local governments do have authority to regulate prospecting operations. Indeed, the Board rules that predated the current revision (and carried forward in the amended Rules) specifically requires that "[a]ll prospecting shall be conducted in such a manner as to comply with all applicable local, state and federal laws, including but not limited to air and water quality laws and regulations, the Act, and these Rules and Regulations." Rule 5.3.6 (Compliance with Other Laws). *See also* C.R.S. § 34-32-109(6)("any mining operator subject to this article shall also be subject to zoning and land use authority and regulation by political subdivisions as provided by law.").

C. The Board's Rules Are Not Arbitrary or Capricious.

Powertech presents a very short and repetitive argument that "the specific rules discussed herein" are invalid as arbitrary and capricious and an abuse of discretion. Powertech Opening at 15. Despite the fact that nowhere does Powertech identify any

specific rule so challenged, the argument is largely a summary of other arguments made under other headings in the brief. The only possible exception is where Powertech asserts that the Board violated the MLRB by "completely cut[ting] the public out of the process" by allegedly not making the language prompted by the Board's Order Regarding Additional Submittals available to the public. Id.

However, Powertech fails to recognize that the Division provided all material on its publicly available website throughout the rulemaking process, in accord with its Notice of Public Rulemaking Hearing. R. at 000206 (informing the public that throughout the rulemaking process, all documents would be provided on the Division's website). Thus, the public was not "cut out" of the process in any way. The Record contains comments by various stakeholders, including Powertech, Colorado Mining Association, and other members of the public, that reveal the Board complied with the APA by providing the necessary and relevant information, including draft regulatory language, statements of basis and purpose, and a regulatory analysis more than five days before a hearing at which the matter would be determined.

D. The Board's Rules Are Supported by Substantial Evidence.

In cursory fashion, Powertech asserts that five provisions of the rules are without substantial evidence: pit liners, baseline information collection, public comments on mine permit transfers and prospecting operations, and local government notice of prospecting. Powertech Opening at 15-17. However, these arguments apply an improper standard and wholly ignore the voluminous record.

Powertech fails to recite the applicable standard for its argument regarding substantial

evidence. Under the Colorado APA, a reviewing court may not reweigh evidence, substitute its own judgment for the agency's, or modify or set aside an agency decision supported by competent evidence. Microsemi Corp. of Colo. v. Broomfield Bd. of Equalization, 200 P.3d 1123 (Colo. App. 2008). "Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existing of contradictory testimony." Ward v. Dep't of Natural Resources, 216 P.3d 84, 94 (Colo. App. 2008).

In addition, when determining whether substantial evidence exists for a particular issue, the court reviews each issue on a continuum.

> At one end of the continuum, rules are based primarily upon policy considerations with factual determinations playing only a tangential role. For such rules, specific factual support is not required, although the reasoning process that led to the adoption of the rule must be defensible.
> At the other end of the continuum, the necessity for the administrative rule turns upon discrete facts capable of demonstrative proof. The reasonableness of the agency action in such cases depends upon the presence of factual support. Citizens for Free Enterprise v. Department of Revenue, *supra.*

Brown v. Colorado Ltd. Gaming Control Comm'n, 1 P.3d 175, 176-177 (Colo. App. 1999).

Here, the Record substantiates each of the provisions challenged by Powertech. Indeed, Powertech concedes the "rules relating to pit liners and baseline water quality information prior to prospecting were based on concerns expressed in public comments…." Powertech Opening at 16. These written comments include those from TAC, which set forth bases and precedent for including discretionary pit liner and baseline provisions. R. at 003828-003830 (prehearing statement); R. at 000085-000090 (explanatory statement); R. at 002010-002017 (public comment). Fremont County also provided a basis for pit liners and baseline characterization. R. at 001967. Denver Water similarly provided evidence from one

of its professional water treatment engineers that pit liners and baseline information is necessary to ensure protection of water resources. R. at 000062-000063. Further, public testimony, particularly at the Salida, Colorado public hearing presents significant technical and scientific bases for discretionary water quality protection measures such as pit liners and baseline information collection. R. at 006202-006209; 006226-006234. Lastly, at the formal Board hearings, significant discussion was devoted to these issues. For example, the Division specifically acknowledged that "there has been much comment received about whether we should or should not require specific drilling pit requirements…." R. at 005616. Denver Water's testimony in the hearings also addressed pit liners and baseline information. R. at 005790-005792. Taken together, these Record documents provide the Board with sufficient basis to include pit liner and baseline collection provisions in the Rules, particularly given the deferential "substantial evidence" standard applicable to agency rulemaking findings.

With respect to Powertech's arguments regarding public participation and local government notice, these are issues that fall on the "policy consideration" end of the continuum, where factual determinations play only a tangential role. In any case, the Record provides substantial support for these provisions. As discussed *supra*, these issues were raised and discussed repeatedly in the parties' filings in the formal rulemaking process. These policy determinations were also supported by the MLRA and APA.

Of significance on this point are the letters submitted to the Board during the public comment period from various local governments with a concrete interest in what impacts may be occasioned by the broad extent of activities considered as prospecting. For instance,

the Town of Nunn, Town of Wellington, Fremont County Commissioners, and the City of Fort Collins, as well as leaders of the town of Ault all specifically address this issue, urging the Board to recognize the importance of allowing for public and local government involvement at the earliest possible time when mining activities may impact local water resources. R. at 004435-004443.

Overall, the Record includes substantial evidence supporting each of the issues raised by Powertech. As such, this Court should uphold the Rules in their entirety.

V. CONCLUSION

For the reasons given above, the Court should reject each of Powertech's arguments and uphold the Rules in their entirety.

Respectfully submitted,

Date: May 25, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2012, a true and correct copy of the foregoing Response was served by via the e-filing system.

*/s/ Jeffrey C. Parsons*_____
Jeffrey C. Parsons