DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock Street Denver, CO 80202	
Plaintiff/Appellant: POWERTECH (USA) INC., a South Dakota Corporation; v. **Defendant/Appellee:** STATE OF COLORADO MINED LAND RECLAMATION BOARD; and **Defendant-Intervenors:** COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY, INC.; and SHEEP MOUNTAIN ALLIANCE.	▲ **COURT USE ONLY** ▲
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PLAINTIFF/APPELLANT'S REPLY BRIEF	

INTRODUCTION

Late in the rulemaking process to amend the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal, and Designated Mining Operations, 2 CCR 407-1, the Mined Land Reclamation Board ("Board") decided to add several new, substantive requirements to the collection of regulatory amendments being considered by

the Board. The Board did this with virtually no regard to the requirements of the Colorado State Administrative Procedure Act, C.R.S. §§ 24-4-101 *et seq.* ("APA"), and the Colorado Mined Land Reclamation Act, C.R.S. §§ 34-32-101 *et seq.* ("MLRA").

At a very basic level, the Board failed to comply with the APA's public notice and comment procedures, including the requirement to provide a plainly stated explanation of the subject matter and the purpose of the newly proposed rules. Ignoring these requirements as it rushed to finish the rulemaking, the Board adopted the newly proposed rules without regard to the limitations of its statutory authority and despite the fact that the administrative record contained no evidence (including scientific or technical evidence required for at least two of the rules) demonstrating that the rules were either necessary or appropriate.

Both Defendants attempt to minimize and deflect attention away from the Board's APA and MLRA violations by arguing generally that (1) the Board is vested with broad rulemaking authority under the MLRA (essentially, the Board can do what it wants); (2) certain newly added rules were matters of public policy within the Board's discretion and do not require any underlying factual basis; (3) in any event, Plaintiff should not be complaining because it actually had notice of the new rules because the subject matter of the new rules had been broached before and during the public comment period; and (4) the Board's actions are excusable because the record contains sufficient evidence, basically in the form of public comment, to support the rules. Defendants' arguments notwithstanding, the Board's failure to follow both the letter and the spirit of the APA and the MLRA are without merit and its failure to acknowledge the necessary requirements and underlying purposes of both Acts cannot and should not be excused.

ARGUMENT

I. The Rules Related to Pit Liners and Baseline Water Quality at the Prospecting Phase Were Not Supported by the Record

Defendants argue that there is sufficient evidence in the record to support the Board's decision to adopt rules regarding pit liners and the collection of baseline water quality information for prospecting activities, even though these rules were never identified in the published, proposed rulemaking and statement of basis and purpose at the outset of the administrative process. In essence, Defendants contend that (1) certain members of the public and certain parties commented that these new rules should be added to the rulemaking; (2) these individuals' comments are part of the record; (3) since their comments are part of the record, the record supports the rules; therefore (4) any inquiry is complete, and the matter is closed. In reality, however, the record does not support the Board's actions, and Defendants' line of argument in this regard is inconsistent with both the APA and the MLRA.

In any rulemaking proceeding, it is imperative that the rulemaking record provide a justification for any rule adopted. In fact, under the APA, a rule *cannot* be adopted unless "[t]he record of the rule-making proceeding demonstrates the need for the regulation…." C.R.S. §24-4-103(4)(b)(I). This helps ensure that the agency acts reasonably, not arbitrarily or on a whim, in making its decisions. The Board, after all, is only empowered to adopt "*reasonable* rules and regulations respecting the administration of [the MLRA]." C.R.S. §34-32-108 (emphasis added).

As the United States Supreme Court has explained, "[an] agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n. of the United States v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866 (1983)

(citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 83 S.Ct. 239, 245-246 (1962)). Ultimately, the Court noted, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 2870. The statement of basis and purpose mandated under the APA is where this articulation of basis, based on "the facts found" in the record, takes place. Critically, for the Board, where a rule involving scientific or technological issues is involved (such as the new and unnoticed rules at issue here), the statement of basis and purpose must "include an evaluation of the scientific or technological rationale justifying the rule." C.R.S. 24-4-103(4)(c).

In the present case, not least because these new rules were never proposed as part of the rulemaking, the record is devoid of any scientific or technological evidence to support the Board's decision to promulgate rules for pit liners or baseline water quality information for prospecting activities. Those rules, therefore, are not supported by substantial evidence as Defendants argue. Furthermore, and contrary to Defendants' assertions, public comments and comments by parties expressing a desire for such regulations, without any scientific or technological evidence demonstrating the need for such regulations, cannot form the basis for the Board's decision to impose a whole new set of rules on Plaintiff and the regulated community. Defendant-Intervenors cite the testimony of Denver Water, but this testimony only addressed groundwater quality related to mining activities and not prospecting. (*See* R005584-5622; R005796-5816).

The lack of any supportive scientific or technical evidence in the record renders these rules unreasonable and void for lack of a proper basis in the record.

II. Certain New Rules Were Substantive Rules and Not Merely Public Policy Matters

The "alternative and additional" language requested by the Board near the end of the rulemaking hearing led to the promulgation of substantive rules that added significant regulatory requirements, expenses and delays to prospecting activities. These rules include those creating a process for public comment and appeal relating to Notices of Intent ("NOIs") for prospecting and with respect to mine permit transfers. Defendants essentially argue these rules involve public policy determinations within the discretion of the Board. That characterization is not accurate, however.

The public policy argument applies to rules that "reflect policy judgments of a generic character, 'with factual determinations playing a tangential role.'" *Colorado Ground Water Commission v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 216 (Colo. 1996). "For such rules, 'specific factual support for the regulation should not be required, although the reasoning process that leads to its adoption must be defensible.'" *Id.* The rules the Board promulgated with respect to public comment and appeals regarding NOIs and mine permit transfers are not mere policy judgments, but instead are significant regulatory requirements imposed on the regulated community. The substantive nature of the requirements takes these rules outside of the scope of public policy and such rules require the Board to articulate a reasonable basis on the record for its decision.

Furthermore, the addition of public comment and appeal rights for confidential information in NOIs and for mine permit transfer applications has no basis in the underlying legislation and overreaches the bounds of the authority vested in the Board by the MLRA. The Board created these rules out of whole cloth without any direction from the legislature with respect thereto. During the legislative process and debate there was no discussion or mention of

expanding the public's right to comment and appeal on issues related to prospecting and transferring permits. Hence the letter from four legislators purporting to speak for the entire legislative body regarding its intent in passing the legislation was sent in an artificial effort to bolster a deficient record. (*See* Plaintiff/Appellants Opening Brief at pp. 12-14). As Plaintiff argued in its Opening Brief, the four legislators who signed the letter did not have the authority to speak for the entire General Assembly and cannot create or attempt to articulate legislative intent where none existed before.

The MLRA allows for an appeal to the Board by any aggrieved person "for any final action by the office." C.R.S. § 34-32-107(2). Historically and appropriately, the only final agency action or final decision the public could appeal was the issuance of a reclamation permit. Adding comment and appeal rights to matters that are not "final agency action" is well outside the purview of the MLRA. The legislature did not contemplate or call for such dramatic changes to the MLRA and did not disturb the historical framework of the MLRA. The Board exceeded its statutory authority with these force-fed rules.

Given the substantive requirements imposed by these rules, any judicial endorsement of the Board's unauthorized actions under the guise of public policy insulates the Board from judicial review and does violence to both the letter and spirit of the APA and the MLRA.

III. The New Rules Were Not Properly Noticed and Subjected to Public Comment Pursuant to the APA

The new rules discussed herein were not properly noticed pursuant to the APA and therefore could not be subjected to critical comment as mandated by the APA. There was no basis in the notice filed with the Secretary of State for promulgating the rules. The Board's failure to properly notice the rules is an affront to the open and transparent rulemaking process that the APA is intended to foster. If rules imposing substantive requirements on the regulated

community do not require notice under the APA once the rulemaking process begins then administrative agencies such as the Board would have *carte blanche* to promulgate rules at any time during a rulemaking process on any seemingly related, or even unrelated, matter under the guise of "broad rulemaking authority" or public policy. Thus, the agency could render itself immune to corrective judicial appeals simply by declaring new, unpublished rules like those at issue here to be a matter of public policy and citing the well-worn refrain that the agency is vested with "broad rulemaking authority" under its enabling statute. Such "rights" would effectively stack the deck against parties and members of the public engaged in the rulemaking process and render completely useless the fundamental underpinnings of the APA to provide the regulated community and the public an opportunity to know in advance what the proposed rules will entail and to participate in the administrative process by providing meaningful comment and valuable technical and other information.

IV. The New Rules Were Not a Logical Outgrowth of the Proposed and Noticed Rules

As discussed in Plaintiff's Opening Brief (Plaintiff/Appellants Opening Brief, p. 7), an agency may make changes to original proposed rules without triggering new notice and comment requirements only if such changes "are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment." *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 824 F.2d 1258, 1283 (1st Cir. 1984). Absent such limitations, an agency could add virtually anything to a set of proposed rules after the notice and comment period had closed and thereby circumvent the APA's core purposes of providing for public participation and ensuring agency accountability in the rulemaking process.

In this case, the rules as noticed (and, for that matter, the legislation that prompted the rulemaking in the first place) are silent on the issues addressed in the Board's last-minute

additions to the rules. David Berry with the Division admitted as much in the rulemaking hearings with respect to the baseline water quality provisions:

Mr. Berry: . . . If we incorporate express provisions in the prospecting portion of our rules to gain baseline information before prospecting activities, that's brand-new.

(R005810).

The newly proposed rules are not a logical outgrowth of any previously noticed rule or idea. Accordingly, they needed to be noticed and commented upon and not simply slipped into an already published rulemaking as a convenient afterthought. Because the Board failed to follow proper notice and comment procedures with respect to these rules, they should be summarily dismissed and a new rulemaking noticed and effected.

V. Plaintiff's Involvement in the Rulemaking Process Does Not Excuse the Division's Duty to Properly Notice All Proposed Rules

Defendants in essence argue that Plaintiff has no reason to object to the Board's actions in this rulemaking because Plaintiff was involved throughout the process and was on notice of the matters that are the subject of the Board's unnoticed rules. However, Plaintiff's involvement in the rulemaking process is irrelevant and certainly does not excuse the Board from its duty to the public, the regulated community or the parties to properly notice the newly proposed rules. Defendants' argument is a misguided attempt effectively to place blame on Plaintiff for its participation in the rulemaking process and to divert this Court's attention away from the fact that the rules failed to comply with the APA. In effect, Defendants are asserting in this argument that anyone who did not happen to attend the hearings at which these matters were brought up, who otherwise may have been able to provide valuable insights and comments, has no right to expect to be informed of or allowed the opportunity to weigh in on substantial changes or additions to formally proposed and noticed rules. Such notion turns the APA on its ear and

defeats one of the fundamental purposes of the Act in giving notice and a meaningful opportunity to comment to the public as well as the regulated community.

Furthermore, Plaintiff was not the only party aware of the public comments regarding these issues, and Defendants' argument of Plaintiff's awareness is a double-edged sword that cuts both ways. The Board is charged with complying with the APA and had ample opportunities to make these issues part of the official rulemaking process at an early stage. The Board could have amended the proposed rules and notice to include the issues raised during the public comment period – or it simply could have advanced a new limited rulemaking to address these few additional and new issues and published a proposed rule to cover them. It then could have easily reopened a limited comment period to address the proposed, new rules. The Board did not amend the notice or mandate the issuance of a new rulemaking and failed to advance the matters to comply with the APA.

Before and during any rulemaking, parties and members of the public often make all sorts of suggestions about things they would like to see included in the proposed rules. Sometimes their suggestions are reasonable and appropriate, but sometimes they are not. In any case, a great many of those suggestions are ultimately *left out* of the draft rules that are ultimately presented in a formal notice to the public and considered by the agency. It is unreasonable to expect parties like Plaintiff to keep track of, anticipate and try to address everything that anyone ever suggested to include in the proposed rules on the off-chance that the agency might at the last minute decide to throw a few of them into the final rules. This is especially true with respect to those items that (as in this case) bear no logical connection to what was actually proposed and formally noticed. All the parties and the public can, and should be expected to, rely on is what has been presented in and published as the formal notice of rulemaking.

To now blame Plaintiff for not guessing that these matters would be considered as part of the rules allows the Board to ignore its legal duties under the APA and to push rulemaking proceedings and any agenda in an unfair and unbalanced way under the guise of broad rulemaking authority and public policy. This is precisely the type of behavior and outcome the APA was intended to prevent.

CONCLUSION

The new and additional rules drafted at the end of the rulemaking process failed to comply with the APA notice requirements and are therefore invalid. The Board also lacked an adequate basis in the record or legislative authority to support its decision to hastily promulgate these rules. Defendants' attempt to rescue the process by declaring them matters of public policy and valid under the Board's broad rulemaking authority cannot be judicially sanctioned. The excuses advanced in Defendants' briefs fail to cure the Board's breach of its duties to properly notice the rules, provide a statement of basis and purpose as required by the APA and act within the bounds of its statutory authority.

Dated this 15th day of June 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2012, a true and correct copy of the foregoing Plaintiff/Appellant's Reply Brief was filed with the Court and served via LexisNexis File & Serve™ upon the following:

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