

RECEIVED

MAR 02 2010 ✓

Division of Reclamation,
Mining and Safety

fr
WESTERN MINING ACTION PROJECT ✓

Roger Flynn, Esq.,
Jeffrey C. Parsons, Esq.
P.O. Box 349
440 Main Street, Suite 2
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
wmap@igc.org

NON CONFIDENTIAL ✓

via email, hardcopy to follow

March 1, 2010

to
Allen Sorenson, Reclamation Specialist
Div. of Reclamation, Mining and Safety ✓
1313 Sherman Street, Room 215
Denver, CO 80203

ACS ✓
MD-03 ✓
Comments on
RE: **Powertech (USA) Inc. Request for Modification to Notice of Intent (NOI) File**
No. P-2008-043 ✓

Dear Mr. Sorenson:

Thank you for your letter of February 24, 2010 acknowledging receipt of public comments and providing an update on the status of the Division's review of Powertech (USA) Inc.'s ("Powertech") Notice of Intent (NOI) File No. P-2008-043. In your letter, you make reference to the availability of "Well Construction and Test Reports required by the Colorado State Engineer and referred to by Powertech in MD-03." While we appreciate the availability of those documents, there appears to be significant additional information referred to in Powertech's application that is necessary for the Division's and public's review, yet has not been made available to the public. Further, the Division does not appear to have addressed in any way the issue of Powertech's proposal to move forward with additional baseline characterization activities despite the lack of an approved baseline characterization plan. As the Division is aware, commenters have submitted two previous comment letters on this proposed modification, in September and November of 2009, raising similar issues, and commenters reincorporate those concerns to the extent not specifically addressed herein.

With respect to the lack of necessary information, while the availability of Colorado State Engineer documents is appreciated, there still appears to be no information publicly available with respect to data obtained from previous aquifer pump tests in the area. This is despite the fact that Powertech specifically relies on this data to support its conclusions regarding the potential for vertical communication between aquifers in the context of the current proposal. For instance, Powertech's NOI modification application materials assert that "[b]ased on previous pumping tests conducted by Powertech in Section 33 and the observed aquifer response during development of pumping well PW-1, it is estimated that PW-1 can be produced at a sustainable rate of 8 to 10 gallons per minute for the planned test duration of 3 to 5 days." Petrotek Engineering Corporation dated October 27, 2009 ("Petrotek Report") at 3(emphasis added). See also Petrotek Report at p. 8 ("The results from the Theis simulations for the well development scenario and from the previous pump

tests are consistent and indicate the order of magnitude of hydraulic conductivity and storativity.”)(emphasis added). Thus, Powertech specifically relies on data from previous pumping tests, yet this underlying data does not appear to have been considered by the Division thus far in its review, as it is not available in the public file. See 34-32-113(9)(requiring all non-confidential information received by the Division to be placed in the public file).

Some portions of this previous pump test data may have been obtained by the Division through activities conducted under Powertech’s Notice of Intent to Conduct Prospecting File No. P-2007-015, approved prior to passage of SB 08-228. However, this fact does not preclude public review of this data in the context of NOI File No. 2008-043. Under the Mined Land Reclamation Act (MLRA), “[t]he design and operation of the baseline characterization and monitoring plan for in situ leach mining, together with all information collected in accordance with the plan, shall be a matter of public record regardless of whether such activities are conducted pursuant to a notice of intent to conduct prospecting operations under section 34-32-113.” C.R.S. § 34-32-112.5(5)(c). Thus, if Powertech in any way makes any use of the data obtained via previous pump tests for purposes of establishing its baseline site characterization (as it expressly purports to do in Appendix 1 at pp.1-2), that information must be made public. Absent the availability of that data, the public is denied its ability to meaningfully participate in this process.

Even more broadly, the MLRA states that “[a]ll information provided to the board in a notice of intent to conduct prospecting or a modification of such a notice is a matter of public record subject to the open records act, part 2 of article 72 of title 24, C.R.S., including, in the case of a modification, the original notice of intent....” C.R.S. § 34-32-113(3). Thus, because Powertech expressly relies on the previous pump test data as support for its application in NOI File No. 2008-043, that data must be made available to the public. If it has not been made available to the Division, despite being relied upon by Powertech to support its conclusions regarding impacts from the proposed activities, then the record in this matter is incomplete, and insufficient to support a conclusion that the applicant has minimized disturbances to the prevailing hydrologic balance, and to ground water quality and quantity. See C.R.S. §§ 34-32-113(2)(f); 34-32-116(7)(g).

Lastly, as expressed in previous letters to the Division with respect to the impacts associated with conductivity between aquifers via historic well holes in the direct vicinity of the currently proposed aquifer pump test, Powertech simply asserts in its NOI application materials that “the condition of the exploration boreholes and monitoring wells installed by others is unknown but will be evaluated through ongoing monitoring during the pumping test and reinjection of the produced fluid.” Petrotek Report at 6. However, no information is provided as to what efforts Powertech has made to assess the condition of these holes, what methodology Powertech proposes to use in conducting these evaluations, nor why such information is unavailable from the apparent previous pump tests conducted in the vicinity. As with the previous pump test data, this information is necessary for the Division to discharge its duty under the MLRA to minimize impacts to the hydrologic balance, as well as to ground water quality and quantity.

Apart from the unavailability of necessary data, another issue raised by the public with respect to Powertech’s proposed pump tests has gone wholly unaddressed: the lack of an approved baseline site characterization plan prior to commencement of the proposed aquifer pump tests. As mentioned above, the express purpose of the proposed aquifer pump tests is to gather hydrologic and geologic information to be used in the creation of the “thorough” and “scientifically defensible” baseline site characterization required by the MLRA. Request for Modification, Appendix 1 at pp. 1-2. Yet, no baseline characterization plan has been approved by the DRMS.

The MLRA requires that any baseline characterization must be done in a systematic, sequential, and planned manner. In order to carry out this mandate, such a plan must be in place prior to the authorization of any activities that may compromise or otherwise distort or alter a baseline characterization. Indeed, this is precisely how the DRMS has interpreted the MLRA in the context of the ongoing MLRA rulemaking process. The proposed regulations explicitly preclude baseline characterization activities prior to approval of a baseline characterization plan. *See* proposed Rule 1.4.3(1)(A). While the proposed Rules allow for operators to conduct some baseline characterization prior to finalization of the rules in some circumstances, this allowance is wholly discretionary. In this case, because of the potential of the proposed activities to impact the baseline, the Division should decline to allow the activity prior to final approval of the baseline characterization plan. Critically in this case, Powertech has already submitted a proposed baseline characterization plan, which is currently under review by DRMS. Further, commenters understand that the Division is in the process of securing the services of a third-party expert to oversee baseline plan development and baseline site characterization activities, as provided by the MLRA. This third-party expert should be in place prior to the commencement of additional baseline characterization activities.

Overall, DRMS review of both the baseline characterization plan and the Request for Modification should be coordinated to ensure faithful implementation of the MLRA and the new Rules. As has been expressed by DRMS, activities conducted prior to finalization of the baseline characterization plan may impact the baseline ground water conditions at the site, thereby impairing, or even precluding, the ability of the Division to obtain an accurate baseline characterization. Because of this potential to impact the baseline, the Division should ensure that the baseline characterization plan is finalized and have a third-party expert retained prior to approving the currently proposed baseline and site characterization activity.

We look forward to your response to these important issues, and the prompt disclosure of all necessary information necessary to assess the impacts of Powertech's proposed activities, including all relevant data from previous pump tests and the status of historic wells at the site. At that time, commenters reserve the right to provide additional comment on this project. Please do not hesitate to contact me directly with any questions.

Sincerely,

/s/ Jeffrey C. Parsons



Jeffrey C. Parsons, Esq.

On behalf of Coloradoans Against Resource Destruction (CARD), Environment Colorado, Clean Water Action, and Information Network for Responsible Mining (INFORM)

cc: David Berry, DRMS