COLORADO DISTRICT COURT **DISTRICT COURT, DENVER COUNTY, COLORADO 80202**	
Plaintiff: POWERTECH (USA) INC., a South Dakota Corporation, **Defendants: STATE OF COLORADO MINED LAND RECLAMATION BOARD AND MIKE KING, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES**	**▲ COURT USE ONLY ▲**
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COMPLAINT AND PETITION FOR JUDICIAL REVIEW	

Plaintiff, Powertech (USA) Inc. ("Powertech"), by and through its undersigned counsel, files this Complaint and alleges as follows:

INTRODUCTION

1. On August 12, 2010, the Colorado Mined Land Reclamation Board ("MLRB") adopted amendments to the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal and Designated Mining Operations (the "Regulations") pursuant to the Mined Land Reclamation Act (the "Act") (C.R.S. §34-32-108).

2. This civil suit challenges both the substance of the Regulations and the procedures employed to promulgate them.

3. Plaintiff seeks judicial review of agency action under C.R.S. §24-4-106, and declaratory relief under C.R.C.P. 57.

JURISDICTION

4. Jurisdiction and venue are proper in this Court pursuant to Section 9, Article VI of the Constitution of the State of Colorado and C.R.S. §24-4-106(4) (residence of MLRB deemed to be the City and County of Denver).

5. This Complaint has been timely filed pursuant to C.R.S. §24-4-106(4) as it is within 30 days after the Regulations became effective.

6. Plaintiff has exhausted its administrative remedies pursuant to C.R.S. §§34-32-108(2), 24-4-103(5) and 24-4-106(2).

THE PARTIES

7. Plaintiff Powertech owns and operates the Centennial Project in Weld County, Colorado. The Centennial Project will be a uranium mine that uses safe, economical in-situ recovery as a means of extracting uranium from underground ore bodies and pumping it to the surface. Powertech's prospecting and mining activities will be governed and affected by the new Regulations.

8. Defendant Mike King is the Executive Director of the Colorado Department of Natural Resources (the "DNR") and sits as a member of the MLRB. As Executive Director he is charged with developing policy on matters that overlap divisional responsibilities, providing comments on federal programs and legislation affecting Colorado, advising the Governor on natural resources issues and coordinating the legislative activities of the DNR.

9. Defendant MLRB is an agency of the DNR. The MLRB is composed of seven citizens and establishes the regulations, standards and policies that guide the Division of Reclamation and Mining Safety (the "DRMS") which, in turn, carries out the statutory requirements of the Act. The MLRB is charged with issuing and enforcing mining and reclamation permits for all non-coal mines in Colorado on state, federal and private lands.

FACTUAL ALLEGATIONS

10. In 1976, the Colorado General Assembly enacted the Act, which sets forth specific and extensive performance standards for the activities associated with and reclamation

of mining operations (C.R.S. §34-32-101, et seq.). In the Act, the General Assembly created the MLRB and DRMS, and delegated to them the authority to administer and enforce the provisions of the Act (C.R.S. §34-32-105).

11. The MLRB is vested with rulemaking authority respecting the administration of the Act at C.R.S. §34-32-108.

12. The Act was amended by several pieces of legislation that were passed by the General Assembly in 2008. On May 20, 2008, May 29, 2008, and June 2, 2008, the Governor signed into law House Bill ("HB") 08-1161, an Act increasing the regulatory authority of the MLRB over uranium mining, codified at C.R.S. §§34-32-103, 110, 112, 112.5, 115, 116, and 121.5; Senate Bill ("SB") 08-169, an Act concerning hardrock mining fees, codified at C.R.S. §34-32-127; and SB 08-228, an Act concerning prospecting, codified at C.R.S. §34-32-113, respectively.

13. In part, HB 08-1161 requires the reclamation of lands affected by in-situ uranium recovery, specifies that uranium mining is a type of designated mining operation and requires all in-situ recovery operations to restore all affected ground water to premining quality or better for all water quality parameters that are specifically identified in the baseline site characterization or in the Colorado Water Quality Control Commission's regulations. It also requires applicants for in-situ recovery mining permits to notify the owners of record of lands within 3 miles of the affected land, to describe in their permit applications at least 5 similar mining operations that did not result in ground water contamination and to demonstrate their environmental regulation compliance history.

14. HB 08-1161 requires the MLRB to require the restoration of ground water to begin immediately upon any cessation of extraction or production or the detection of contaminated ground water outside of the affected land, to require as a condition of permit issuance, that the applicant for an in-situ recovery operation pay for an initial site characterization and ongoing monitoring of the affected land and affected surface and ground water, to deny a permit if the applicant fails to demonstrate that reclamation will be accomplished and to act on permit applications within 240 days.

15. In part, SB 08-228 specifies that most information provided in a Notice of Intent ("NOI") to conduct prospecting, or a modification of such a notice, is a matter of public record subject to the Open Records Act. It also provides that local government notice is required for prospecting notices and public comment and appeal processes are allowed for prospecting notices.

16. SB 08-228 requires the MLRB to conduct a rulemaking hearing to implement the provisions of the bill.

17. The MLRB commenced formal rulemaking on April 15, 2010, to consider the promulgation of new rules and amendments to the Regulations proposed by the DRMS in order to implement HB 08-1161 and SB 08-228.

18. On December 9, 2009, Defendant King was appointed by the MLRB to serve as the Hearing Officer for the rulemaking.

19. By letter dated March 15, 2010, and sent to the MLRB, Representatives Fisher, Kefalas and Curry and Senator Schwartz, purported to state the intent of the General Assembly in passing the authorizing legislation and give specific direction to the MLRB on how to implement the legislation.

20. The March 15, 2010 letter encouraged the MLRB to "strongly consider granting" public administrative review of NOIs. The legislators conceded in the letter that the legislation pursuant to SB 08-228 "did not provide for this," but stated nonetheless, "we think such a change is appropriate at this time."

21. Later, Representatives Fischer, Kefalas and McFadyen submitted a second letter to the MLRB, dated July 5, 2010, purporting to state the intent of the General Assembly in passing the authorizing legislation and directing the MLRB how the legislation should be implemented. Instead of posting this letter on the DRMS website with other letters from the public, DRMS posted it as part of the Regulatory Analysis of the proposed rules, thereby according it official stature as a directive of Colorado state government.

22. Both of these letters were included in the rulemaking record and their contents later adopted by the MLRB.

23. Toward the end of the rulemaking process, on July 19, 2010, Defendant King issued an Order (the "Hearing Officer Order") directing the DRMS to submit "alternative and additional language" regarding the following five new substantive issues that were not addressed in the notices for the above captioned proposed rules and not contained in the proposed and published rulemaking: (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; (3) collection of baseline water quality information related to prospecting activities; (4) regulatory treatment of de minimis amounts of uranium recovered incidental to in-situ recovery for other minerals; and (5) a deadline for the Division receiving a written request regarding confidential information.

24. The DRMS drafted and provided to the MLRB alternative and additional language pursuant to the Hearing Officer Order that was not part of the proposed rulemaking.

25. The MLRB adopted the new mining regulations on August 12, 2010, that became

effective on September 30, 2010. The regulations as adopted include alternative and additional language provided by the DRMS in response to the Hearing Officer Order.

FIRST CLAIM FOR RELIEF

Failure to Comply with the Rulemaking Requirements of the Colorado Administrative Procedures Act

26. The allegations set forth in paragraphs 1 through 25 are incorporated as if fully set forth herein.

27. C.R.S. §24-4-103 requires state agencies to provide public notice of the substance and basis of a proposed rule, and to make available the text of the proposed rule in order to give interested persons an opportunity to comment and participate in the rulemaking.

28. Neither the statutorily required Statement of Basis, Specific Statutory Authority, and Purpose for this rulemaking; nor the Notice of Public Rulemaking Hearing before the Colorado Mined Land Reclamation Board: Subject Matter and Scope of Rulemaking Hearing; nor the proposed rules addressed any of the issues raised in the Hearing Officer's Order. Nor were the issues otherwise noticed or addressed in the rulemaking proceeding.

29. As a result, Plaintiff was deprived of its right to participate effectively in the rulemaking.

30. The inclusion of the additional issues late in the rulemaking was not sufficiently noticed and therefore violated the procedural requirements of the Colorado Administrative Procedures Act (the "APA") (C.R.S. §24-4-101, et seq.).

SECOND CLAIM FOR RELIEF

Violation of the Separation of Powers Clause of the Colorado Constitution

31. The allegations set forth in paragraphs 1 through 30 are incorporated as if fully set forth herein.

32. Article III of the Colorado Constitution guarantees separation of powers between legislative, executive and judicial departments by providing that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others."

33. The March 15, 2010 and July 15, 2010 letters from the Colorado state legislators

expressed only their personal views and desires with respect to the underlying legislation, not the intent of the legislature. Nevertheless, they were improperly filed in an attempt to influence the process and ultimately the regulatory decision.

34. These legislators had no authority to speak for the entire Colorado legislature.

35. Even if the legislators' letters were improperly taken to speak for the legislature, separation of powers prevents the legislature from meddling in the details of agency implementation rules. *See generally Colo. State Bd. Of Med. Exam'rs v. District Court*, 331 P.2d 502 (Colo. 1958); *McManus v. Love*, 499 P.2d 609 (Colo. 1972); *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985).

36. The legislators' attempt to control the details of how executive agencies implement the legislation violated the Constitutional separation of powers.

THIRD CLAIM FOR RELIEF

The MLRB's Adoption of the Regulations was Unreasonable, Arbitrary, Capricious and Otherwise Contrary to Law

37. The allegations set forth in paragraphs 1 through 36 are incorporated as if fully set forth herein.

38. C.R.S. §24-4-106(7) provides that if a court finds the agency action at issue is "arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article 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, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review" and compel the agency to take any proper action in accordance therewith.

39. As set forth more fully below, Plaintiff challenges, pursuant to C.R.S. §24-4-106, the following rules of the MLRB as unreasonable, arbitrary, capricious or otherwise contrary to law: 2 CCR §407-1, Rules 1.4.3(1)(a), 1.3(4)(a)(i), 1.4.3(1)(c), 1.4.4(2)(A), 6.4.22(1), 6.4.22(1)(c), 1.4.10(1), 1.4.10(1)(c) and (d), 1.4.10(2)(b), 3.1.7(8), 5.1.3(b) and (d), 1.3(a)(iv)(A), 1.12.2(2), 3.1.6(5) and 1.3(4)(iii)(A) (collectively the "Challenged Rules").

40. Rule 1.4.3(1)(a) provides that "[t]he prospective applicant shall not conduct any baseline site characterization activities until the Office [of Mined Land Reclamation (the

"Office")] approves of the plan for conducting such activities…" Rule 1.3(4)(a)(i) refers to the prospector "us[ing] the Notice of Intent to conduct the baseline site characterization and monitoring plan." Taken together, these provisions indicate that a prospector could be required to obtain approval of a baseline site characterization and monitoring plan *before* even beginning sampling and testing activities associated with prospecting operations. There is no legal authority for imposing such a requirement. The requirement violates the Act which effectively exempts prospecting activities from burdensome and expensive requirements such as this. The regulations lack adequate standards for determining when a baseline site characterization and monitoring plan must be conducted. Rules 1.3(4)(a)(i) and 1.4.3(1)(a) are void for vagueness, and lack a basis in law.

41. Rule 1.4.3(1)(c) states that data from baseline site characterization activities conducted prior to approval of the baseline site characterization "*may*" be used at the discretion of the Office if conducted prior to the effective date of the draft rules. However, no standards are given to guide the Office's decision whether to allow data from baseline site characterization activities conducted prior to the effective date of the rules to be used in a reclamation permit application. This rule constitutes an impermissible retroactive rulemaking, fails to include adequate standards for determining when data from baseline site characterization activities may be used, is void for vagueness, and lacks a basis in law.

42. Rules 1.4.4(2)(A) and 6.4.22(1) require in-situ applicants to provide, as part of the application for a reclamation permit, information about five in-situ leach mining operations that "demonstrate the applicant's ability to conduct the proposed mining operation without leakage, vertical or lateral migration, or excursion of any leaching solutions or ground water containing minerals, radionuclides or other constituents mobilized, liberated or introduced by the mining operation into any ground water outside of the permitted in-situ leach mining area." These rules require information about other operations permitted at some time in the past or at other locations by an operator unrelated to the applicant, and are therefore arbitrary, capricious, prejudicial and void for vagueness.

43. Rule 6.4.22(1)(c) requires an applicant to report any "known accidents, failures, leaks, releases or spills" related to each of the five sites "that affected groundwater." This section is unduly burdensome, overreaching, prejudicial and void for vagueness. It is neither required nor supported by HB 08-1161.

44. Rule 1.4.10(1) authorizes a discretionary denial of a permit if the MLRB or Office has "uncertainty" about the feasibility of reclamation. This provision is confusing, vague and unnecessary, since the agency already has the authority, and responsibility, to deny a permit if the applicant fails to meet its burden with respect to meeting reclamation standards. This vaguely worded discretionary provision is prejudicial, void for vagueness and will result in unpredictable and arbitrary decisions.

45. Rules 1.4.10(1)(c) and (d) are "blackball" provisions that allow the MLRB or the Office to deny or revoke a reclamation permit because of one or more past or current violations by an applicant or by an entity or individual who is very loosely related, if at all, to the applicant. These provisions can be used to prevent a good operator from obtaining a reclamation permit when the previous violation or violations do not factually justify denial of the permit, given all the circumstances. These provisions are overly broad and punitive and could prevent a good company from conducting a mining operation because of isolated or administrative-type violations that may not even be related to that company.

46. Rule 1.4.10(2)(b) requires the denial of a reclamation permit if the applicant is unable to demonstrate by substantial evidence that it will

> [R]eclaim all affected ground water for all water quality parameters that are specifically identified in the baseline site characterization required in Rule 1.4.4, or in the statewide radioactive materials standards or tables 1 through 4 of the Basic Standards for Ground Water as established by the Colorado Water Quality Control Commission, to either of the following:
>
> > (i) premining baseline water quality or better, as established by the baseline site characterization required by Rule 1.4.4; or
> >
> > (ii) that quality which meets the statewide radioactive materials standards and the most stringent criteria set forth in tables 1 through 4 of the basic standards for ground water as established by the Colorado Water Quality Control Commission."

This rule fails to recognize and consider the value of groundwater and costs associated with groundwater restoration. No additional environmental benefit will be achieved without excessive and unnecessary consumption of groundwater or water from some other source and expenditure of funds which are contradictory to the purposes of the Act. This rule is arbitrary, capricious and contrary to the purposes of the Act.

47. Rule 3.1.7(8) states that "[a]n Operator shall demonstrate, to the satisfaction of the Office, that reclamation has been achieved so that existing and reasonably potential future uses of groundwater are protected. In addition, an operator of any in-situ recovery operations shall reclaim ground water as required in subsection (1)(e) of this Rule 3.1.7." This provision effectively holds in-situ recovery operators to a higher standard for reclamation than any other mining operator would need to meet. There is no rational basis for such a distinction.

48. Rule 5.1.3(b) allows public comment concerning a NOI to Conduct Prospecting to

be filed within ten working days of the posting of the Notice. The MLRB does not have the statutory authority under the Act, as amended by SB 08-228, to adopt regulations that facilitate such broad public participation. Absent express authority, the formal provision for public comment during the DRMS's review of NOIs exceeds the DRMS's authority and renders this portion of the regulation invalid.

49. Rule 5.1.3(d) allows "any prospective prospector or person who filed a timely comment and who meets the definition of party [to] appeal an Office determination" with respect to a NOI "within five (5) business days from the date the Office sends notice of its decision." Additionally, under this Rule, "[t]he Board shall hear any such appeal at its next regularly scheduled meeting that is at least ten (10) calendar days from the date of such appeal." Administrative appeals and hearings are only allowed with respect to permits and an NOI is not a permit (C.R.S. §§34-32-114 and 34-32-115). Therefore, these reclamation provisions are without legal authority and cannot be supported.

50. Rule 1.3(a)(iv)(A) provides that third parties may request disclosure of confidential information and may request the MLRB to hold an administrative hearing on the matter. The prospecting statute C.R.S. §34-32-113 does not authorize, let alone require third party involvement; thus this portion of Rule 1.3 exceeds DRMS's authority, is arbitrary, capricious and prejudicial and should be stricken.

51. Rule 1.12.2(2) confers upon third parties demonstrating standing a right of administrative appeal to object to the transfer of operator of an in-situ recovery operation. No provision in C.R.S. §34-32-119 governing Succession of Operators authorizes or requires a right of third-party appeal. In-situ recovery operations should not be subject to an additional process that is not expressly provided for by C.R.S. §34-32-119 and more onerous than the process applied to a non-in-situ recovery operation. Therefore, this provision is without legal authority and cannot be supported.

52. Rule 3.1.6(5) was implemented as a result of the Hearing Officer's Order and provides that pit liners or other so-called protective measures may be required for drilling pits associated with prospecting or mining operations. This issue was not included in the underlying legislation, was not noticed in any way in the rulemaking documents or in the stakeholder process or MRLB hearings, and did not relate to the subject matter of the rulemaking. This provision concerns an operational (not reclamation) issue for which no factual record was developed in the rulemaking.

53. Rule 1.3(4)(iii)(A) was implemented as a result of the Hearing Officer's Order and requires the Office to "post on its website within five (5) days of receipt of such notice or modification all information in a notice of intent or modification except information that the applicant has designated as exempt from disclosure." This rule lacks a basis in law.

54. Plaintiff has been substantially prejudiced by agency action- promulgation of the regulations- that is otherwise unreasonable, arbitrary, capricious or otherwise contrary to law.

FOURTH CLAIM FOR RELIEF
Declaratory Judgment

55. The allegations set forth in paragraphs 1 through 54 are incorporated as if fully set forth herein.

56. The MLRB's action of adopting the Challenged Rules was arbitrary and capricious, beyond statutory and constitutional authority, in violation of procedural requirements and otherwise contrary to law

57. Plaintiff's legitimate interests are directly affected by the MLRB's action.

PRAYER FOR RELIEF

WHEREFORE, Powertech (USA) Inc. respectfully demands judgment as follows:

A. Determine and declare that Defendants violated the Colorado statutory rulemaking requirements under the APA and the Colorado Constitution;

B. Determine and declare that the Challenged Rules are arbitrary, capricious, exceed Defendants' statutory authority under the Act and are otherwise contrary to law;

C. Award Plaintiff all reasonable costs and attorney's fees incurred in bringing this action; and

D. Award such other and further relief as the Court deems necessary and just in this action.

Respectfully submitted this 1st day of November, 2010.

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