

FOGNANI & FAUGHT, PLLC

Attorneys at Law

August 6, 2010

Colorado Mined Land Reclamation Board
Attn: Irene Stanton
1313 Sherman Street, Room 215
Denver, CO 80203

Re: Proposed Rules and Amendments to the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal and Designated Mining Operations, 2 CCR 407-1/Request to Limit Scope of Rulemaking and Clarify Rulemaking Record

Dear Ms. Stanton:

For the following reasons, Powertech (USA) Inc. ("Powertech") by this letter requests that the Colorado Mined Land Reclamation Board ("MLRB") limit the scope of the above-referenced rulemaking and clarify the rulemaking record.

Under Colorado law, the invalidity of a rule adopted by a State agency 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. *See* Colorado State Administrative Procedure Act ("APA"), C.R.S. 24-4-106 (7); *Brown v. Colo. Ltd. Gaming Comm'n*, 1 P.3d 175 (Colo. App. 1999). As detailed below, recent developments in this rulemaking indicate existing or imminent violations of Colorado statutory rulemaking requirements and the Colorado Constitution. Powertech respectfully requests that the MLRB take the following actions to avoid judicial invalidation of certain aspects of this rulemaking.

The Hearing Officer's July 19, 2010 Order Requiring the Division of Reclamation, Mining and Safety ("DRMS") to Provide Additional or Alternative Language Regarding New Issues Violates the Colorado Administrative Procedure Act and Should be Rescinded

On July 19, 2010, Hearing Officer Mike King issued an Order (the "Hearing Officer Order") Regarding Additional Submittals in the above-captioned rulemaking. The Hearing Officer Order directed DRMS to submit "alternative and additional language" regarding five new or additional issues not addressed in the notices for the above captioned proposed rules nor in the proposed rule itself, and also invited parties to the rulemaking to submit alternative and additional language.

FOGNANI & FAUGHT, PLLC

Attorneys at Law

Colorado Mined Land Reclamation Board

Attn: Irene Stanton

August 6, 2010

Page 2

Powertech respectfully submits that the inclusion of the additional issues at this late stage of this rulemaking has not been sufficiently noticed, is outside the scope of the rulemaking and the enabling statute, and therefore violates the procedural requirements of the Colorado APA. We respectfully urge the MLRB to reconsider adding these issues to the rulemaking at this time.

The Colorado APA requires an agency initiating a rulemaking to provide public notice of the substance and basis of the proposed rule, and to make available the text of the proposed rule. *See* C.R.S. 24-4-103. Neither the statutorily required Statement of Basis, Specific Statutory Authority, and Purpose for this rulemaking, the Notice of Public Rulemaking Hearing before the Colorado Mined Land Reclamation Board: Subject Matter and Scope of Rulemaking Hearing, nor the proposed rules address any of the issues raised in the Hearing Officer's July 19, 2010 Order, nor were the issues otherwise noticed or addressed in the rulemaking proceeding.

This rulemaking, including an extensive series of DRMS meetings with stakeholders, has been ongoing since the first quarter of 2009. DRMS circulated several iterations of draft rules beginning in mid-2009 and interested parties worked closely with the agency to identify problems with the draft rules and to address certain issues. The MLRB's formal consideration of the proposed rules resulting from the stakeholder process began in early 2010 and has consisted of numerous public meetings in locations throughout the State of Colorado, as well as the instant hearing for formal Parties to the rulemaking.

Yet, well after the proposed rule was published, the Hearing Officer's Order requests new language from DRMS and Parties to the rulemaking covering new issue areas heretofore not addressed throughout the extensive rulemaking process. (DRMS compounds this legal infirmity by proposing to address yet more new issues in its proposed additional language.) Indeed, after 1 ½ years of rulemaking process, the new issues and new language are being added less than *one week* prior to the final MLRB action on the proposed rules (scheduled for August 13-15, 2010). This last-minute expansion of the scope of issues included within the rulemaking will allow for essentially no public or formal Party consideration for input into whether or how the MLRB addresses those issues in the rulemaking.

The first new issue listed in the Hearing Officer Order, "Pit liners for drilling-related activities (including Prospecting)" presents an especially compelling case for rescission. 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 MLRB hearings, and does not relate to the subject matter of the rulemaking. It concerns an operational (not reclamation) issue for which no factual record has been developed in this rulemaking, and

Colorado Mined Land Reclamation Board
Attn: Irene Stanton
August 6, 2010
Page 3

which is particularly inappropriate for a summary, “on-the-fly” determination at this late date.

The MLRB Should Not Consider as Part of this Rulemaking Docket the Two Letters from Colorado Legislators Alleging the General Assembly’s Intent in Enacting HB 1161 and SB 228 and Directing the MLRB How to Implement the Legislation Because Reliance on the Letters is Improper

By letter dated March 15, 2010, and included in this rulemaking record, four Colorado state legislators – Representatives Fischer, Kefalas, and Curry and Senator Schwartz – purport to state the intent of the General Assembly in passing the authorizing legislation and give specific direction to the MLRB on how to implement that legislation. For example, the legislators encourage the MLRB to “strongly consider granting” public administrative review of NOIs. The legislators concede that SB 08-228 “did not provide for this,” but state nonetheless, “we think such a change is appropriate at this time.”

Later, three Colorado state legislators – Representatives Fischer, Kefalas and McFadyen – submitted a second letter dated July 5, 2010 to the MLRB in this docket again purporting to state the intent of the General Assembly in passing the authorizing legislation and directing the MLRB how the legislation should be implemented. Oddly, instead of posting this later letter on the DRMS website with other letters from the public, DRMS has posted it as part of the Regulatory Analysis of the proposed rules, thereby according it official (and erroneous) stature as a directive of Colorado State government.

In fact, the March 15, 2010 and July 5, 2010 letters, though written on letterhead of the Colorado General Assembly, originate with a handful of legislators who are communicating their personal views and desires with respect to the underlying legislation not the intent of the legislature. However, with all due respect, these individuals are not authorized to convey the intent of the entire Colorado legislature – that intent is expressed solely in the legislation and cannot be modified or expanded by legislators after the fact with a personal interest in the outcome of the matter acting outside the authority of their offices. Nor do their post hoc statements or rationalizations constitute legislative history in any regard.

Article III of the Colorado Constitution states: “The powers of the government of this state are divided into three distinct departments,--the legislative, executive and judicial; and 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, except as in this constitution expressly directed or permitted.”

FOGNANI & FAUGHT, PLLC

Attorneys at Law

Colorado Mined Land Reclamation Board

Attn: Irene Stanton

August 6, 2010

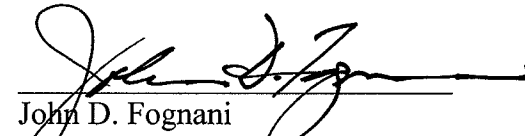
Page 4

Under Colorado law, it is the duty of legislature to write the laws, and the duty of the executive agency to carry laws into effect. *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). Therefore, any attempt by individual State legislators to control the details of how executive agencies implement the legislation could violate the Constitutional separation of powers.

Because the legislators who penned the two letters are attempting to direct the MLRB in how to carry the underlying legislation into effect, issuance of the letters arguably violates the Colorado Constitution and the MLRB should not rely on the letters in this rulemaking. In any event, the letters seek to influence improperly the rulemaking process and seek now to achieve what the legislators did not or could not achieve in the General Assembly. The letters should be removed from the DRMS website relating to Regulatory Analysis, the Hearing Officer's Order raising the legislators' issues should be rescinded and the MLRB should clarify that the letters are not a part of the record in this rulemaking and will not be considered

Thank you for your attention to this important matter.

Very truly yours,



John D. Fognani
Of Fognani & Faught, PLLC

cc: Mr. Richard F. Clement

Colorado Mined Land Reclamation Board
Attn: Irene Stanton
August 6, 2010
Page 5

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of August 2010, she did file one original plus fifteen three-hole punched copies of the foregoing letter with the Division of Reclamation, Mining and Safety and did provide an electronic copy in PDF format to Irene.Stanton@state.co.us. She did also deliver a true and accurate copy to the following via U.S. Mail.

Colorado Water Action
Colorado Environmental Coalition
Coloradoans Against Resource Destruction (CARD)
Environment Colorado
Information Network for Responsible Mining (INFORM)
Save Our South Park Water 08

Represented by:
Jeffrey C. Parsons, Sr. Attorney
Western Mining Action Project
P.O. Box 349
Lyons, Colorado 80540
wmap@igc.org

Colorado Mining Association
Dianna L. Orf
Orf & Orf, P.C.
P.O. Box 102036
Denver, CO 80250-2036
dianna@orfco.net

FOGNANI & FAUGHT, PLLC

Attorneys at Law

Colorado Mined Land Reclamation Board

Attn: Irene Stanton

August 6, 2010

Page 6

Denver Water

Jim Miller

MC 500

1600 West 12th Avenue

Denver, CO 80204-3413

Jim.Miller@denverwater.org

High Country Citizens' Alliance

Dan Morse

P.O. Box 1066

Crested Butte, CO 81224

dan@hccaonline.org

Patsy Moran

10306 Tracewood Drive

Highlands Ranch, CO 80130

patsysmail@yahoo.com

Petrotek Engineering Corporation

Hal Demuth

hdemuth@petrotek.com

Ken Cooper, PW

Ken.cooper@petrotek.com

10288 W. Chatfield Ave, Suite 201

Littleton, CO 80127

R Squared, Inc.

George M.L. Robinson, President

9034 E. Easter Placem Suite 100

Centennial, Co 80112

GeorgeRobinson@R2Incorporated.com

FOGNANI & FAUGHT, PLLC

Attorneys at Law

Colorado Mined Land Reclamation Board

Attn: Irene Stanton

August 6, 2010

Page 7

Sheep Mountain Alliance

Travis E. Stills, Managing Attorney

Energy Minerals Law Center 1911

Main Street, Suite 238

Durango, CO 81301

stills@frontier.net

Jeffrey C. Parson, Sr. Attorney

Western Mining Action Project

P.O. Box 349

Lyons, CO 80540

wmap@igc.org

Tallahassee Area Community

Michael W. Meyrick

Law Office of Michael Meyrick, P.C.

1525 Josephine Street

Denver, CO 80206

mwmeyrick@aol.com

Wellington Water Works, LLC

Bradley A. Pomeroy

6065 S. Quebec Street, #201

Centennial, Co 80111

pomoco@msn.com

By first class mail to:

Thomas E. Varra

9080 Weld County Road 102

Nunn, CO 80648

Jillian Allison, Esq.

Colorado Department of Law

FOGNANI & FAUGHT, PLLC

Attorneys at Law

Colorado Mined Land Reclamation Board

Attn: Irene Stanton

August 6, 2010

Page 8

1525 Sherman Street, 7th Floor

Denver, CO 80203

Cheryl Linden, Esq.

Colorado Department of Law

1525 Sherman Street, 7th Floor

Denver, CO 80203

Jeff Fugate, Esq.

Colorado Department of Law

1525 Sherman Street, 7th Floor

Denver, CO 80203

Peter Hack, Esq.

Colorado Department of Law

1525 Sherman Street, 7th Floor

Denver, CO 80203

