STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF POWERTECH (USA), INC. APPLICATION FOR LARGE SCALE MINING PERMIT (Dewey-Burdock Project)	))))	ORDER

At the conclusion of the first week of the contested case hearing on the application of the Large Scale Mining Permit of Powertech (USA) Inc., the Board requested the parties file briefs concerning the following:

1. Whether SDCL 45-6B-32 requires compliance with "all applicable local, state, and federal laws" (i.e. permits under the jurisdiction of the NRC and EPA etc.) as a condition precedent to the granting of a state permit? and
2. If so, what are those "laws" that need to be complied with?

The hearing examiner has reviewed the briefs and considered the statutory construction of SDCL 45-6B in total to determine whether the Board of Minerals and Environment (BME) is further able to fully consider the grant or denial of the permit without waiting for the other agencies and boards of the local, state and federal government to first rule on the licenses or permits within their respective jurisdictions. The failure of any of those other agencies or boards to grant their licenses, permits or other approvals may render a predetermination of the BME on the permit moot or potentially in conflict.

The Board of Minerals and Environment is charged by statute to grant or deny a large scale mining permit in accordance with SDCL 45-6B. "The application for the permit must

comply with the requirements of this chapter and all applicable local, state and federal laws." SDCL 45-6B-32. Further, the permit may only be denied for the specific reasons set forth in the statute including whether "[a]ny part of the proposed mining operation, the reclamation program, or the proposed future use is contrary to the laws or regulations of this state or the United States." Id at (3). The Board is also required to set a surety, and as part of the consideration, "shall also consider any surety... required by an agency of the federal government..." 45-6B-21.

The federal government has largely preempted the States' ability to regulate nuclear materials. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238,248, 104 S.Ct. 615 (1984). This authority primarily lies with the Nuclear Regulatory Commission (NRC). Further South Dakota is not an agreement state and has not been granted any regulatory authority otherwise possessed by the NRC. The Board recognizes its limited jurisdictional role in this matter especially where the principle of "dual regulation" would prevent the Board from acting. *Northern States Power Co. v Minnesota,* 447 F.2d 1143, 1154 (8th Cir. 1971).

Federal influence on the BME's decision is also recognized in SDCL 45-6B-21 in setting the required surety. The Board "shall also consider any surety .... required by an agency of the federal government..." The surety must not only be set, but "posted" under 45-6B-32(1) before the permit is granted.

In addition to the NRC and Environmental Protection Agency (EPA), the South Dakota Water Management Board must determine amongst other issues whether the state will allocate its water resources to this large scale mining operation.

All of the involved agencies have commenced their processes of acting on the applications of Powertech. The parties agree that 45-6B-4 appears to be the only statute that provides express guidance on the BME conditionally approving a permit. However, the

conditional permit approval applies only to local government and is based on substantial compliance by the operator or administrative delay by the local entity. No other statute in 45-6B appears to expressly provide for a conditional approval for requirements of any state or federal agency.

The briefs of the parties also appear to agree on the law of statutory construction, but draw opposite conclusions. The Hearing Examiner concludes that had the Legislature desired conditional approval for state and federal agencies' requirements, it would have so indicated. Rather, the language of the statute read in conjunction with the Chapter compels the legal conclusion that compliance with "all applicable local, state and federal laws" are conditions precedent to granting a permit.

The Hearing Examiner is mindful of the apparent statutory intent to procedurally provide timely action on an application (eg. 45-6B-30). However, if the Board is substantively charged with seeing that "all applicable local, state, and federal laws" have been complied with, if the Board in setting the surety "shall also consider any surety .... required by an agency of the federal government (45-6B-22) and if the BME is to evaluate whether "the proposed mining operation will result in the loss or reduction of long-range productivity of aquifer[s]...."(45-6B-33(4)) before the Water Management Board rules, the BME cannot conditionally approve the permit and fulfill its statutory duties. Granted there will be post permit administrative duties that will be necessary if the permit is approved that the DENR is authorized to administer or are part of the Board's monitoring jurisdiction, however the above are not. *See* DENR Recommended Conditions.

Therefore, the BME will continue its hearing scheduled for November 11, 2013 until such time as the NRC and EPA have ruled and set the federal surety, and the Water Management

Board has decided the allocation rights and issues affecting SDCL 45-6B-33(4). This will greatly affect not only the repetitiveness of evidence necessary for the BME to decide the matter, but will also significantly narrow the issues and grounds upon which the permit can be denied under SDCL 45-6B-32 and 33 if approval is attained from the other agencies and boards. This would seem most consistent with federal preemption, statutory construction and the duties of the Board, especially in setting the surety. Powertech may expect that the BME will act timely upon receipt of such decisions.

The motion of Wild Horse Sanctuary to deny the application is denied. The motion of Clean Water Alliance to dismiss is denied, and the motion to defer is granted in part to the extent consistent with this Order.

Dated this 5th day of November, 2013.

Rex Hagg
Hearing Chairman
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