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November 1, 2013

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MINERALS & MINING PROGRAM

Mr. Mike Cepak  
DENR Minerals & Mining Program  
523 East Capitol Ave.  
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Pierre, SD 57501-3182

**Re: LARGE SCALE MINING PERMIT - POWERTECH (USA) INC.**

Dear Mr. Cepak:

I enclose for your information and records the following original documents:

1. **Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Motion to Deny Powertech's Large Scale Mine Permit Application;**
2. **Brief in Support of Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Motion to Deny Powertech's Large Scale Mine Permit Application;** and
3. **Certificate of Service.**

By a copy of this correspondence, all counsel of record and the Status A List are being served. Thank you.

Sincerely,

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

Michael M. Hickey

MMH:ke  
Enclosures

cc w/enc.: Clients; Rex Hagg; Charles McGuigan; Steven R. Blair/Richard Williams; Max Main; Bruce Ellison; Status A Participants

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MINERALS & MINING PROGRAM

**STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
BOARD OF MINERALS AND ENVIRONMENT**

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**IN THE MATTER OF THE LARGE  
SCALE MINE PERMIT APPLICATION  
OF POWERTECH (USA) INC.**

**Black Hills Wild Horse  
Sanctuary, Susan Watt &  
Dayton Hyde's  
Motion to Deny Powertech's  
Large Scale Mine Permit  
Application**

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Black Hills Wild Horse Sanctuary, Susan Watt, and Dayton Hyde, by and through their attorney, Michael M. Hickey, hereby move the Board of Minerals and Environment to deny Powertech's Large Scale Mine Permit Application as a matter of law because the application is incomplete within the meaning of SDCL § 45-6B-32(1).

Dated this 1<sup>st</sup> day of November, 2013.

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

BY:

  
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**STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
BOARD OF MINERALS AND ENVIRONMENT**

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**IN THE MATTER OF THE LARGE  
SCALE MINE PERMIT APPLICATION  
OF POWERTECH (USA) INC.**

**Brief in Support of Black Hills  
Wild Horse Sanctuary, Susan  
Watt & Dayton Hyde's Motion  
to Deny Powertech's Large  
Scale Mine Permit Application**

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Black Hills Wild Horse Sanctuary, Susan Watt, and Dayton Hyde, ("Wild Horse") by and through their attorney, Michael M. Hickey, hereby submit the following Brief concerning the interpretation of SDCL 45-6B-32.

**INTRODUCTION**

The Board asked the parties to brief the meaning of the requirement found in SDCL § 45-6B-32 that the Board grant a permit to an operator if the application . . . "complies with all applicable local, state, and federal laws." Wild Horse's research suggests that the most appropriate manner of presenting its conclusion about the interpretation of that statute would be in the form of a Motion to Deny Powertech's Large Scale Mine Permit Application as a matter of law because the permit application is incomplete.

**FACTUAL BACKGROUND**

Only one fact is relevant to this motion. That fact is that Powertech has not received any of the permits<sup>1</sup> required by federal law to operate its proposed *in situ* mining operation.

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<sup>1</sup> As of the date of the filing of this Brief, Powertech has not received a Source and Byproduct Material License from the Nuclear Regulatory Commission (NRC), Aquifer Exemption and Class III and Class V Underground Injection Control permits from the Environmental Protection Agency (EPA), and a Plan of Operations from the Bureau of Land Management.

## **ARGUMENT AND AUTHORITY**

### **A. THE GOVERNING STATUTE.**

Wild Horse respectfully suggests that SDCL § 45-6B-32 cannot be read in isolation. Instead, the language of SDCL § 45-6B-32(1) must be considered.

The relevant portion of the governing statute provides:

The Board of Minerals and Environment shall grant a permit to an operator if the application complies with the requirements of this chapter and all applicable local, state, and federal laws. The board may not deny a permit except for one or more of the following reasons: (1) [t]he application is incomplete ....

### **B. CANONS OF STATUTORY CONSTRUCTION.**

As the South Dakota Supreme Court has often observed:

The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

*Rowley v. South Dakota Bd. of Pardons & Paroles*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363 quoting *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162).

“When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *Id.*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363-64 quoting *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814

N.W.2d 141, 143 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611).

Of course, a court is not at liberty to read into the statute provisions which the Legislature did not incorporate. *City of Deadwood v. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9, 777 N.W.2d 628 (citations and quotations omitted). For a court to add a statutory requirement by judicial decree, that would require that it assume a role the Constitution forbids. *Id.* In interpreting legislation, a court or administrative board cannot add language that simply is not there. *Id.*, citing *In re Estate of Gossman*, 1996 S.D. 124, ¶11, 555 N.W.2d 102, 106 (quoting *Helmbolt v. LeMars Mut. Ins. Co.*, 404 N.W.2d 55, 59 (S.D. 1987) (additional citations omitted)).

As noted above, statutes must be construed according to their intent, and the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. *Krukow v. South Dakota Bd. of Pardons & Paroles*, 2006 S.D. 46, ¶ 12, 716 N.W.2d 121. See also *Moss v. Guttormson*, 1996 S.D. 76, ¶10, 551 N.W.2d 14, 17; *U.S. West Communications, Inc. v. Public Utilities Comm'n.*, 505 N.W.2d 115, 122-23 (S.D. 1993)).

### **C. CONDITIONS PRECEDENT OR SUBSEQUENT.**

A condition precedent is distinguishable from a condition subsequent. A condition precedent must be shown to have been performed as a precursor to establishing that a right or obligation exists, while a condition subsequent presumes a valid right or obligation, the performance of which is excused by

the occurrence or non-occurrence of the condition. *Point Development, Inc. v. Enterprise Bank & Trust*, 316 S.W.3d 543, 547 n.3 (Mo. Ct. App. WD 2010) citing *St. Louis Police Relief Ass'n v. Am Bonding Co. of Baltimore*, 17 Mo.App. 430, 196 S.W. 1148, 1152 (1917).

Conditions subsequent are not favored by the law. *Point Development*, 316 S.W.2d at 546; *State v. Allen*, 625 P.2d 844, 848 (Alaska 1981); *DeBlois v. Crosley Bldg. Corp. of Main, Inc.*, 117 N.H. 626, 629, 376 A.2d 124, 145 (1977); *Kindler v. Anderson*, 433 P.2d 268, 270 (Wyo. 1967); *United States v. Haynes Sch. Dist. No. 8*, 102 F.Supp. 843, 851 (E.D. Ark. 1951).

**D. COMPLIANCE WITH FEDERAL LAW IS A CONDITION PRECEDENT.**

The use of “and” in the phrase “all applicable local, state, and federal law” in SDCL § 45-6B-32 expresses a conjunctive requirement. See *Black Hills Novelty Co. v. South Dakota Gaming Comm’n*, 94 SDO 637, 520 N.W.2d 70, 74 (S.D. 1994). An applicant must, unless otherwise provided, obtain the necessary local, state, and federal permits before the Board of Minerals and Environment may issue a mining permit.

A companion statute found under SDCL Chapter 45 is SDCL § 45-6B-4. That statute applies in cases where city or county permits are required.

SDCL § 45-6B-4 provides in relevant part:

However, if the applicant has substantially complied with the procedure for obtaining any necessary county or city permits but has not obtained such permits due to administrative delay, the Board of Minerals and Environment may grant a mining permit which is conditioned upon the issuance of all necessary county or city permits within sixty days of the date of the board's issuance of the conditioned mining permit. If a county

or municipality has adopted an ordinance governing mining operations, any proceedings of and any action taken by the county or municipality with regard to the proposed mining operation may be considered by the Board of Minerals and Environment before the issuance or denial of a permit pursuant to this chapter, including a permit conditioned upon the issuance of all necessary county or city permits.

The Legislature obviously knew how to create a conditional permit and did so, where a mining application is complete except for necessary county or city permits. Just as obviously, the Legislature chose not to include federal agencies within the language of SDCL 45-6B-4. There simply is no authority which allows the Board of Minerals and Environment to issue a so-called “conditional permit” where an applicant needs a federal permit in conjunction with an application for a state mining permit, but has not obtained one. Without the necessary federal permits, Powertech’s application is incomplete and must be denied pursuant to SDCL § 45-6B-32(1).

The Board may believe it has the authority to issue such a conditional permit, however it lacks the authority to substitute its judgment for that of the Legislature. As noted above, a court or administrative board is not at liberty to read into the statute provisions which the Legislature did not incorporate. *City of Deadwood v. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9. For a court or administrative board to add a statutory requirement, would require that it assume a role the Constitution forbids. *Id.* In interpreting legislation, a court or administrative board cannot add language that simply is not there. *Id.*, citing *In re Estate of Gossman*, 1996 S.D. 124, ¶11, 555 N.W.2d 102, 106.

One can all but hear the hue and cry from Powertech at this plain reading of SDCL § 45-6B-32. Wild Horse anticipates Powertech will argue that such a reading violates the time lines for conducting a hearing and issuing a final decision on the application as provided in SDCL § 45-6B-30. Such a suggestion is meritless. The deadline to issue a permit is triggered by the submission of a completed application, not one that lacks essential federal permits. The onus is on Powertech to submit a complete application and if it fails to do so the application must be denied.

Moreover, it makes good sense that any required federal permits would be a condition precedent to a state mining permit. To allow a Large Scale Mining Permit to be issued prior to receipt of a federal permit would be an unconstitutional delegation of the authority to issue a permit. Cf. *Independent Community Bankers Ass'n of S.D. v. State by and through Meierhenry*, 346 N.W.2d 737, *passim* (S.D. 1984)(Legislature could constitutionally incorporate by reference in state enactment relating to regulation and taxation of banks and their subsidiaries the federal definition of "bank holding company," and such incorporation was not improper delegation of legislative power, at least where the Legislature clearly adopted existing definitions and did not intend to include future amendments of the pertinent federal legislation.)

The legislative findings and policy so clearly expressed in SDCL § 45-6B-2 impose a duty on the Board of Minerals and Environment to "prevent waste and spoilage of the land"; to "ensure that the health and safety of the people

are not endangered”; and that “water and other natural resources are not endangered.” Here, if the provision is considered a condition subsequent, there would be complete abdication of the Board’s duty. South Dakota law simply does not contemplate any delegation of the duty to protect our land, people, water and natural resources to the undefined and variable whim of a nameless and faceless federal bureaucracy.

Additionally, recognizing a condition subsequent in SDCL § 45-6B-32 would deny South Dakotans of their right for meaningful intervention in the permitting process. As the Board is aware, SDCL § 1-26-17.1 grants to South Dakotans, and others, a right to intervene in the permitting process. As the Board is also aware, a great number of South Dakotans have availed themselves of this right. To characterize SDCL § 45-6B-32 as allowing the Board to issue a conditional mining permit before all necessary federal permits are obtained, operates to deny the interveners and the public of the right to participate in the process in a meaningful way.

The terms and conditions of the as yet unissued federal permits may play a significant part in defining the operation of this project, if the project is to operate at all. By characterizing the federal permits as a condition subsequent and issuing a so-called conditional permit, the Board would effectively shift the forum for the exercise of the right of intervention to a location far removed from the vitally affected area.

The interveners participating in the proceedings before this Board would be undermined as well. By characterizing the necessary federal permits as conditions subsequent to the mining permit, the Board has, in effect, created a moving target for the interveners. The interveners cannot effectively comment on a permit issued on conditions imposed only after these proceedings have closed. To put it bluntly, one cannot meaningfully review and intelligently comment on something that does not as yet exist.

Lastly, brief mention must be made concerning the provisions of SDCL § 34A-2-126. That statute provides:

The legal force and effect of the underground injection control Class III rules promulgated under subdivision 34A-2-93 (15) are tolled until the department obtains primary enforcement authority for underground injection control Class III well from the United States Environmental Protection Agency. The in situ leach mining rules promulgated under subdivision 45-6B-81 (10) as they relate to uranium are tolled until the department obtains agreement state status from the United States Nuclear Regulatory Commission.

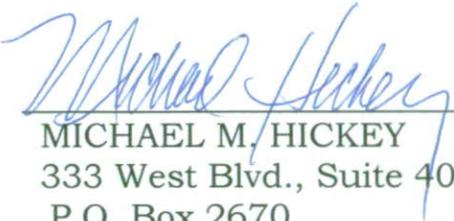
Subsection (10) of SDCL 45-6B-81 deals with the requirements for construction, operation, monitoring, and closure of uranium and other mineral mines using in situ leach processes. Pursuant to this statute, the Board is without jurisdiction to make a determination in these areas. The exact parameters of the Board's remaining jurisdiction is uncertain and unknown. Should not the Board wait until the federal agencies make a determination before it proceeds? It makes both practical and legal sense to do so.

**CONCLUSION**

Federal permits are a condition precedent to a complete application for a South Dakota mining permit. Powertech's application must be denied pursuant to SDCL § 45-6B-32(1) because it is incomplete.

Dated this 1<sup>st</sup> day of November, 2013.

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BY: 

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**STATE OF SOUTH DAKOTA**

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
BOARD OF MINERALS AND ENVIRONMENT**

**IN THE MATTER OF THE LARGE  
SCALE MINE PERMIT APPLICATION  
OF POWERTECH (USA) INC.**

**Certificate of Service**

The undersigned hereby certifies that he filed the originals with Mike Cepak and served copies of the following:

- 1. Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Motion to Deny Powertech's Large Scale Mine Permit Application;**
- 2. Brief in Support of Black Hills Wild Horse Sanctuary, Susan Watt, & Dayton Hyde's Motion to Deny Powertech's Large Scale Mine Permit Application**

upon the persons herein next designated, all on the date below shown:

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and upon each of the persons shown in the attached list, including Libraries, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, which are the last addresses of the addressees known to the subscriber.

Dated this 1<sup>st</sup> day of November, 2013.

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