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WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT
APPLICATIONS 2685-2 AND 2686-2,
POWERTECH (USA) INC.

IN THE MATTER OF THE 2012
GROUNDWATER DISCHARGE PLAN
APPLICATION SUBMITTED BY POWERTECH
(USA) INC. (GWD 1-13)

POWERTECH'S
BRIEF ADDRESSING TOLLED
ADMINISTRATIVE RULES,
FEDERAL PERMIT PROCEEDINGS
AND WELL CONSTRUCTION
STANDARDS

POWERTECH submits this brief to address the questions raised by the Water Management Board (WMB) on October 31, 2013.

Senate Bill 158, now codified as SDCL 34A-2-126, did not deprive the DENR of jurisdiction.

The intervenors have repeatedly accused Powertech of "stripping" the South Dakota Department of Environment and Natural Resources (DENR) of jurisdiction by lobbying the South Dakota Legislature to adopt Senate Bill 158 (SB 158) during the 2011 legislative session. This is a gross exaggeration. The purpose of SD 158 will be explained to help the Board understand the jurisdictional limitations inherent with in situ recovery (ISR) uranium mining.

The United States Constitution provides that federal law "shall be the supreme Law of the Land." U.S. Const. Art. VI, §2. Under the doctrine of federal preemption, "state laws that interfere with, or are contrary to the laws of Congress . . . are invalid." *Dakota Systems Inc. v. Viken*, 2005 S.D. 27, ¶25, 694 N.W.2d 23, 33 (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532, 542-43 (1991)).

Most elements of ISR uranium mining are regulated by the United States Nuclear Regulatory Commission (NRC) and the United States Environmental Protection Agency (EPA).

The doctrine of preemption applies equally to regulation by the NRC as well as regulation by the EPA.

NRC Regulation.

“Since the inception of the Manhattan Project in the 1940’s, the United States Government has exercised exclusive control over nuclear/radiological safety.” *Wyatt v. Kundert*, 375 N.W.2d 186, 189 (S.D. 1985). In 1954, Congress gave the Atomic Energy Commission (now known as NRC) exclusive jurisdiction to “license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.” *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 207, 103 S.Ct. 1713, 1724, 75 L.Ed.2d 752 (1983). “Upon these subjects, no role was left for the states.” *Id.*

ISR uranium mining is regulated by the NRC because it involves the transfer, delivery, receipt, acquisition and possession of nuclear material. 42 U.S.C. §2014(z). Uranium is considered source material. 10 CFR §40.4.

Under the Atomic Energy Act, the NRC is authorized to relinquish some of its regulatory jurisdiction to states that have adopted a “suitable regulatory program.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250, 105 S.Ct. 615, 622 (1984). In such cases, the NRC may enter into an agreement with the governor of a state that relinquishes certain regulatory authority from the NRC to the state. 42 U.S.C. 2021. States that have adopted a “suitable regulatory program” and entered into an agreement are referred to as “agreement states.”

South Dakota has not entered into an agreement with the NRC for regulatory authority. South Dakota is not an agreement state. Consequently, it does not have authority to regulate most aspects of ISR mining for uranium.

In adopting the Atomic Energy Act, Congress commented, “[The Act] is not intended to leave any room for the exercise of dual or concurrent jurisdiction by states to control radiation hazards by regulating by-product, source or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the state and local governments, but not by both.” *Northern States Power Co. v. State of MN*, 447 F2d 1143, 1151 (8th Cir.1971) (quoting comments by Joint Committee of Congress).

Nevertheless, SDCL 45-6B-81(10) authorized the Board of Minerals and Environment (BME) to promulgate the rules for ISR uranium mining found at ARSD ch. 74:29:11.

EPA Regulation.

The EPA is responsible for administering the Safe Drinking Water Act (SDWA). *Hydro Resources Inc. v. US EPA*, 608 F3d 1131 (10th Cir. 2010). Regulation of Underground Injection Control (UIC) Class III wells is regulated by the EPA under the SDWA. 42 U.S.C. ch. 6A. Congress anticipated that some states would be interested in serving as the primary entities responsible for granting or denying UIC Class III well permits. *Hydro Resources Inc., supra*. In such cases, Congress provided that the EPA could “either approve, disapprove, or approve in part or disapprove in part, [each] state’s” application to become a primary UIC permitting authority. *Id.* (quoting 42 U.S.C. § 300 h-1(b)(2)).

South Dakota has not obtained primary UIC Class III permitting authority from the EPA. Consequently, UIC Class III wells are permitted by the EPA, not the state of South Dakota. 40 CFR §147.2101.

Nevertheless, SDCL 34A-2-93(15) authorized the WMB to promulgate the rules for UIC Class III wells found at ARSD ch. 74:55:01.

Federal Preemption.

Because the EPA and NRC preempt state law in regards to ISR mining for uranium and UIC Class III wells, the legislature adopted Senate Bill 158 (now codified as SDCL 34A-2-126) which provides:

Administrative rules on underground injection control Class III wells and in situ leach mining tolled

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 wells 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.

The intervenors' claim that SDCL 34A-2-126 stripped the state of South Dakota of its authority is an exaggeration. This statute simply eliminates the potential for "dual regulation" by the federal and state governments.¹

One author cogently observed, "independent state licensing would retard the effectiveness of [the NRC] in meeting its responsibilities under the Atomic Energy Act" and "the cost of the licensing process might reach such proportions as to retard the development of [nuclear power]" if dual regulation existed. *Northern States Power Co., supra*, at 1154. "In short, a dual system of licensing and regulation with control exerted by both the states and the federal government . . . would create an 'obstacle to the

¹ It is noteworthy that SDCL 34A-2-126 provides that state administrative rules will apply if and when DENR obtains primary enforcement authority over underground injection control Class III wells from the EPA and agreement state status from the NRC.

accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581.)

Don't be fooled. SDCL 34A2-126 does not deprive the state of any authority. It simply clarifies that certain state rules will not apply until the DENR obtains regulatory authority from the federal government.

- 1. What effect, if any, does SDCL 34A-2-126 have on the Water Management Board's jurisdiction and authority in considering Powertech's water permit applications, and application for groundwater discharge plan and related permits; generally and specifically as it relates to determinations concerning beneficial use and public interest under SDCL 46-2A-9, and the application of the financial assurance provisions in SDCL 34A-10-2.1 through 2.4 and ARSD ch. 74:07:01?**

As discussed, SDCL 34A-2-126 clarifies that the administrative rules for UIC Class III wells and ISR mining rules as they relate to uranium are tolled until the DENR obtains primary enforcement authority and agreement state status. None of these administrative rules affects the WMB's authority to review or grant water right permits or groundwater discharge plans and related permits.

Nevertheless, the WMB should consider the EPA's actions as strong evidence that the proposed water use is beneficial and in the public interest because the EPA has primary enforcement authority over UIC Class III wells.

Likewise, because the NRC has “exclusive control over nuclear/radiological safety” regarding uranium ISR mining in South Dakota, its decision to issue a source and byproduct material license to Powertech is compelling evidence that Powertech's proposed use of water is beneficial and in the public interest. *Wyatt*, at 189. After all, when the Atomic Energy Act was adopted, Congress determined that development of

atomic energy is vital to the common defense and security of the United States. 42 USC §2012.

Finally, SDCL 34A-2-126 has no effect on the financial assurance provisions of SDCL 34A-10-2.1 through 2.4 and ARSD 74:07:01.

- 2. What effect, if any, do the NRC and EPA proceedings, permits and licenses regarding Powertech's ISR mining operations for the Dewey-Burdock project have on the Water Management Board's jurisdiction and authority in considering Powertech's water permit applications, and application for groundwater discharge plan and related permits; generally and specifically as it relates to the determinations regarding beneficial use and public interest under SDCL 46-2A-9, and the application of the financial assurance provisions in SDCL 34A-10-2.1 through 2.4 and ARSD ch. 74:07:01?**

As discussed above, the actions of the NRC and EPA are compelling evidence that Powertech's use of water is beneficial and in the public interest. The NRC and EPA have extensive experience with ISR uranium mining.

In regards to financial assurance, the DENR is developing a Memorandum Of Understanding (MOU) with the NRC. *See* Exhibit 1. According to correspondence from the NRC that is contained in the administrative record, DENR has requested NRC "to hold the surety bond for the land application areas, which the SDDENR permits through an approved groundwater discharge plan." *Id.*

SDCL 34A-10-2.1 provides that the WMB may require financial assurance if the permit "is not covered by a performance or damage bond or other financial assurance instrument." (Emphasis added). In this case, the NRC surety bond will cover the land application areas. This eliminates the need for the WMB to require its own financial assurance.

Powertech has agreed to provide financial assurance to the NRC before construction or operation as required by ARSD 74:07:01:02.

3. What effect, if any, does the fact the NRC and EPA permits and licenses for Powertech's Dewey-Burdock project still pending have on the determination of whether Powertech's application for water discharge plan and related permits are procedurally complete as provided in ARSD 74:54:02:01 (20) and 74:54:02:06?

None.

"Procedurally complete" is defined as "an application for a groundwater discharge plan that contains all information necessary to fully address §75:54:01:06." ARSD 74:54:02:01.

The application requirements set forth in ARSD 74:54:02:06 require a detailed explanation of an applicant's plan to discharge wastes to groundwater. Powertech's application provides all of the required information.

Nothing in these rules requires the applicant to apply for or receive other federal permits as part of completing the application.

The pending NRC and EPA permit applications have no bearing on whether the application for groundwater discharge plan is procedurally complete. Powertech's application is procedurally complete.

4. Are the well construction standards under ARSD ch. 74:02:04 applicable to the Class III wells given the provisions in SDCL 34A-2-126 and the references to these provisions in ARSD ch. 74:55:01?

Yes. SDCL 34A-2-126 merely tolled the administrative rules for UIC Class III wells under ARSD 74:55:01. Although the well construction standards are referenced in

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these rules, the statute did not toll, suspend or impact the well construction standards. In Section 2.4.3 of its Inyan Kara application, Powertech agreed that all ISR production and injection wells will be completed in accordance with South Dakota well construction standards and EPA standards for UIC Class III wells.

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