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.

HEARING BRIEF OF CLEAN WATER ALLIANCE AND MOTION TO DISMISS OR DEFER DETERMINATION OF COMPLETENESS

The Clean Water Alliance (CWA), by and through its below-signed Counsel hereby submits the following Hearing Brief and Motion to Dismiss or Defer Determination of Completeness of Powertech's Large Scale Mine Permit Application.

INTRODUCTION.

The Board has asked the parties to brief the requirement of compliance "with all applicable local, state, and federal laws" as provided in SDCL §45-6B-32, and in conjunction therewith, whether the Board as authority to issue the pending permit prior to issuance of necessary and related permits by the Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency (EPA).

The CWA hereby respectfully submits that it does not. The CWA therefore moves this Board to dismiss or defer determination whether to issue the pending Large Scale Mine Permit Application until after both the NRC and the EPA have

finally determined whether to issue their respective, related permits, to determine whether Powertech's application before this Board is then in compliance with all applicable local, state laws, and federal laws, as well as being complete in the absence thereof, pursuant to the provisions of SDCL §45-6B-32, and other statutes and regulations.

FACTUAL BACKGROUND

The factual issues relevant to the Board's lack of authority to grant the pending application of Powertech for a large scale mining permit and this Motion are that Powertech has not received any of the permits required by federal law or to construct, operate, and close its proposed in-situ leach mining and related plant project, previously within the Board's jurisdiction and authority as voided by SB 158,[1] for which the federal agencies have been given sole authority to issue a permit or license.

ARGUMENT AND AUTHORITY

A. SDCL §45-6B-32.

[1] Powertech's drafted and successfully lobbied SB 158, which voided this Board's authority for any proposed uranium ISL mining operations, pursuant to SDCL §45-6B-81(10): "The requirements for construction, operation, monitoring, and closure of uranium and other mineral mines using in situ leach processes." See, SDCL 34a-2-126. Powertech and the Department of Environment and Natural Resources (DENR) have taken the position that the permits before the respective federal agencies are carrying out the functions of the DENR with respect to such voided authority.

The CWA respectfully suggests that SDCL §45-6B-32 cannot be read in isolation. Instead, the CWA respectfully submits, that other provisions of SDCL §45-6B-32, particularly sub-sections (1), (3), (6) and (8) are applicable.

45-6B-32. Grant of permit if application in compliance with law--Grounds for denial.

> 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) The **application is incomplete or** the **surety has not been posted;....**
> (3) **Any 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....**
> (6) The proposed mining operation and **reclamation can not be carried out in conformance** with the requirements of §45-6B-35;...
> (8) The **land is unsuitable** for a mining operation, as determined pursuant to **§45-6B.** (Emphasis added).

Additionally, pursuant to SDCL §45-6B-21, in order to determine the sufficiency of the amount and duration of surety, the Board is required to consider "factual information as to the magnitude, type, & costs of reclamation activities planned for the affected land and the nature, extent, and duration of the mining operation" as to be reviewed awaiting determination by the NRC and EPA in establishing the bond to be required by the federal agencies in lieu of a bond

requirement by the State. Specifically, the **board shall also consider any surety** or cash bond for the proposed mining operation **required by** an agency of the **federal government** which surety is **required for reclamation purposes.**" (Emphasis added). See, Application for Large Scale Mine Permit, p. 1-4. See, also, SDCL §45-6B-20 ("Inspection of site prior to issuance of permit--Surety for reclamation costs required"); §45-6B-20.1 ("Board may require additional proof of financial assurance from certain operators"); and §45-6B-22 ("Surety bond--Surety other than bond--Considerations by board").

The CWA further respectfully submits, the include the Board's responsibilities to ensure that other State statutes and regulations are satisfied by any permit or license issued by the NRC or EPA, including the public policy "**to achieve and maintain safe drinking water for the public which will protect human health and safety...**" (Emphasis added). SDCL §34A-3A-1;

The Board must also determine whether the federal permits, if issued, properly ensure they result in compliance with:

> 34A-2-21. Causing pollution of waters prohibited--Placement of wastes--Violation, which states in pertinent part that: "No person may cause pollution of any waters of the state, or place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state...";
>
> 34A-2-22. Reduction of existing water quality by discharge of waste prohibited--Violation as nuisance. "No person may discharge any

wastes into any waters of the state which reduce the quality of such waters below the water quality level existing on March 27, 1973....";

34A-2-1. Legislative findings and policy that "Whereas the pollution of the waters of this state constitutes a menace to public health and welfare,...it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for water supplies, for the propagation of wildlife, fish, and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate uses;...to provide for the prevention, abatement, and control of new and existing water pollution; and to cooperate with other agencies of the state, agencies of other states, and the federal government in carrying out these objectives." See, also, SDCL §34A-2-104 (and including: "It is hereby declared to be the public policy of this state...to conserve the groundwaters of the state and to protect, maintain and improve the quality thereof..." for present& future beneficial uses "through the prevention of pollution""; and

ARSD 74:55:01:23: "Criteria for underground source of drinking water. An underground source of drinking water shall be protected from underground injection..." (Emphasis added).

Until the respective federal permits are issued and reviewed by this Board for compliance with all such relevant provisions of SDCL §45-6B-32 and other applicable laws, the Board is without authority to grant the requested permit.

B. 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 (or it is submitted, this 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, 777 N.W.2d 628 (citations and quotations omitted). For a court (or this Board) to add a statutory requirement by judicial decree - or its agency equivalent -- 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 statue 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 that it could 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 or has not chosen to allow the Board to issue a conditional permit where federal permits

are required. 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 not has obtained one for whatever reason. Without the necessary federal permit, the Powertech's application to the Board is incomplete and must be denied pursuant to SDCL § 45-6B-32(1).

The Board may believe it would be prudent 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. Among other things, the CWA anticipates Powertech will offer the argument that such a reading violates the time line for the permit hearing and issuance of a permit as provided in SDCL § 45-6B-30. Such a suggestion is meritless. The time 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 as to why any required federal permits would be a condition precedent to a state mining permit. To allow the state permit to be (become effective) (issued) -- upon 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 adopted clearly adopted existing definition 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, as quoted above, 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 were considered a condition subsequent, there would be complete abdication of that 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.

Finally, recognizing a condition subsequent in SDCL § 45-6B-32 would deny South Dakotans of their right for meaningful intervention in the permitting process and a proper determination of the Board pursuant to all applicable statutes and regulations.[2] 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. Interveners would have to travel hundreds, if not thousands of miles to exercise their right of intervention.

Additionally, the interveners participating in the proceedings before this

---

[2] Including those referenced in footnotes 2 and 3.

Board would be undermined as well. By characterizing the necessary federal permits as conditions subsequent to the mining permit, the Board would, in effect, create 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 or intelligently and properly fulfill its statutory and regulatory duties premised on something that does not as yet exist – i.e., pre-requisite federal permits.

CONCLUSION

For all the above authority and argument, the 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), (3), (6), and (8), because it is incomplete or otherwise deficient or a determination thereof deferred until after the issuance of any related federal permits and an opportunity for further hearings thereon.

Dated this 14 day of November, 2013.

Respectfully submitted,

BRUCE ELLISON
P.O. Box 2508
Rapid City, SD 57709
belli4law@aol.com

Attorney for Clean Water Alliance

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

It is hereby certified that a true and correct copy of the Clean Water Alliance's Hearing Brief and Motion to Dismiss or Defer was mailed, US postage paid to:

MAX MAIN
618 State Street
Belle Fourche, SD 57717

STEVEN BLAIR
RICHARD WILLIAMS
Office of Attorney General
Mickelson Criminal Justice Center
1302 E. Highway 14, Ste 1
Pierre, SD 57501

JILLIAN ANAWATY
2804 Willow Ave.
Rapid City, SD 57701

JERRI BAKER
705 N. River St.
Hot Springs, SD 57747

CINDY BRUNSON
11122 Ft. Igloo Rd.
Edgmont, SD 57735

KAREN ELLISON
8265 Dark Canyon Rd.
Rapid City, SD 57702

MARY GOULET
338 S 5th St.
Hot Springs, SD 57747

GARDNER GRAY
P.O. Box 153
Pringle, SD 57773

EDWARD HARVEY
1545 Albany Ave
Hot Springs, SD 57747

GARY HECKENLAIBLE
P.O. Box 422
Rapid City, SD 57709

SUSAN HENDERSON
11507 Hwy 471
Edgemont SD 57735

LILIAS JARDING
P.O. Box 591
Rapid City, SD 57709

MARVIN KAMMERER
22198 Elk Vale Rd
Rapid City, SD 57701

SABRINA KING
917 Wood Ave.
Rapid City SD 57701

RODNEY KNUDSON

KARLA LARIVE

P.O. Box 25
Hulett WY 82720

ROBERT LEE
338 S. 5th St
Hot Springs, SD 57757

GENA PARKHURST
P.O. Box 1914
Rapid City, SD 57709

REBECCA LEAS
RICK SUMMERVILLE
509 Seminole Ln.
Rapid City, SD 57702

SUSAN WATT
DAYTON HYDE
P.O. Box 790
Hot Springs SD 57747

839 Almond St.
Hot Spring, SD 57747

DAHL McLEAN
11853 Acord Ridge Rd.
Spearfish, SD 57783

ROGER & CHERYL ROWE
7950 Dark Canyon Rd.
Rapid City, SD 57701

DOUGLAS UPTAIN
3213 W. Maine #112
Rapid City, SD 57702

MICHAEL HICKEY
P.O. Box 2670
Rapid City, SD 57709

The original was mailed to Board Counsel for filing:
Charles McGuigan
Office of Attorney General
1302 E. Hwy 14, Ste 1
Pierre, SD 57501

Dated this *4th* day of November, 2013.