STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NOS. 2685-2 and 2686-2, POWERTECH (USA) INC.;	)	DENR WR AND GWQ JOINT RESPONSE TO BOARD INQUIRY
IN THE MATTER OF THE 2012 GROUNDWATER DISCHARGE PLAN APPLICATION SUBMITTED BY POWERTECH (USA), INC.	)	

The Water Rights Program ("WR") and the Groundwater Quality Program ("GWQ") of the South Dakota Department of Environment and Natural Resources ("DENR"), jointly submit their response to the October 31, 2013, inquiry of the Board.

I.

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 chapter 74:07:01.

SDCL 34A-2-126 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 of Environment and Natural Resources] 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.

This statute by its explicit language *tolls only rules promulgated under SDCL 34A-2-93(15) and SDCL 45-6B-81(10).* The language of the statute is plain and unambiguous. Courts assume that "statutes mean what they say and that legislators have said what they meant." *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984). Further, "while every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." *Wheeler v. Farmers Mutual Ins.* Co. of Nebraska, 2012 S.D. 83, ¶ 21, 824 N.W.2d 102.

Impact on Financial Assurance Rules.

SDCL 34A-10-2.1 establishes authority for financial assurance:

> Any person making application to the Water Management Board . . . for a permit, a license, . . . which authorizes activity that could result in a significant risk of pollution, contamination or degradation of the environment and that is not covered by a performance or damage bond or other financial assurance instrument, may be required, as a condition of the permit, to provide financial assurance guaranteeing the performance of corrective actions to contain, mitigate, and remediate all pollution, contamination, or degradation which may be caused by such activity . . .

The Water Management Board (WMB) has adopted rules concerning financial assurance at ARSD ch. 74:07:01. ARSD 74:07:01:02 states:

> In the discretion of the board pursuant to SDCL 34A-10-2.1, the board may require, as a condition of a permit, that the owner or operator of a proposed or existing facility which produces, stores or disposes of wastewater or associated solids to post financial

assurance to contain, mitigate, and remediate any impact provided the board finds that such financial assurance is necessary:

(1) To meet the public interest requirement of SDCL 46-2A-9 for approval of a permit or right to appropriate water; or
(2) As a condition of a water quality variance permit, ground water discharge facility construction permit, or ground water discharge permit to ensure that beneficial uses are not impaired and that no hazard is posed to human health in accordance with 74:54:02:09. . . .

These financial assurance rules were *not* promulgated under SDCL 34A-2-93(15) or SDCL 45-6B-81(10). The source notes and implementing authority listed under the rules indicate, with one exception, that the rules were promulgated under completely different chapters of South Dakota law: SDCL chs. 34A-10, 46-1, 46-2A, 46-2, and 46-6. The one exception, ARSD 74:07:01:02, was promulgated under other statutes in SDCL ch. 34A-2 (SDCL 34A-2-28 and SDCL 34A-2-30), *not* SDCL 34A-2-93.

Of course, none of these financial assurance rules refer to the mining laws in SDCL 45-6B-81(10) at all; the mining laws established in SDCL ch. 45-6B relate to the authority of the South Dakota Board of Minerals and Environment, an entirely different Board. The WMB does not have authority to adopt rules under the legal authority of SDCL 45-6B-81(10).

A. *Impact on Water Permits Applications: Beneficial Use and Public Interest Under SDCL 46-2A-9.*

SDCL 34A-2-126 does not toll SDCL 46-2A-9 or remove the Board's authority to consider water permit applications. The Board has jurisdiction and authority to consider the presently pending permits. However, the inquiry also appears to seek information on how the changes in SDCL 34A-2A-126

might affect the factual evidence to be presented (and decision to be made) on beneficial use and public interest.

B. Beneficial use.

One of the elements in SDCL 46-2A-9 is whether the proposed use of water would be a beneficial use: a use that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL 46-1-6(3). Water is to be put to the maximum beneficial use under SDCL 46-1-4:

> . . . the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use of the water in the interest of the people and for the public welfare. . . .

The beneficial use analysis is to focus on the *water use*. It involves, for example, consideration of whether the proposed method of water use would be wasteful or unreasonable. *DeKay v. U.S. Fish and Wildlife Service*, 524 N.W.2d 855 (S.D. 1994). It also involves consideration of whether authorizing use of the water, as proposed by the applicant, would be beneficial when considering that water should be appropriated to the "fullest extent" of which it is capable, rather than remaining unused. SDCL 46-1-4. This requires a case by case inquiry considering matters such as whether the water use is wasted or recycled. In the case at hand, there is a significant recycling component involving water from the Inyan Kara aquifer. This and other beneficial use information is properly before the board.

By contrast, SDCL 34A-2-126 simply reveals that federal agencies and not state agencies will be handling *other* permitting issues, separate from whether state water rights ought to be granted. It defers to the NRC[1] to address

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[1] The NRC, regardless of SDCL 34A-2-126, has jurisdiction and authority over atomic energy, nuclear hazards, and regulation of byproduct source and nuclear materials. Atomic Energy Act, 42 U.S.C. 2014. State laws that purport to operate in these areas are pre-empted by federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). NRC is authorized by the Atomic Energy Act to turn some of its regulatory jurisdiction over to states adopting a "suitable regulatory program"; these states are referred to as "agreement states". South Dakota is not an agreement state. Thus, South Dakota is not authorized to "license or regulate, from the standpoint of radiological health and safety, byproduct, source and special nuclear material or production and utilization facilities". 10 C.F.R. 8.4(j).

NRC staff conducts environmental study under the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and NRC regulations in 10 C.F.R. ch. 51. When the NRC staff grants applications it must explain "why the public health and safety is protected and why the action is in accord with the common defense and security." 10 C.F.R. 2.1202(a). Under 42 U.S.C. 2133(b), the NRC shall issue licenses to entities:

> (1)whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3)who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public.

The NRC authority does not, however, govern all matters at the site. The NRC authorizing legislation provides that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. 42 U.S.C. 2021(k). *In other words, the NRC may analyze the environment as part of its licensing process, but its authority does not affect the authority of any State or local agency to regulate activities not directly related to licensing or*

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aspects of uranium production and to the EPA for regulation of Class III wells. The fact that federal agencies, rather than state agencies, must handle these issues says nothing about whether water use for ISR mining is beneficial within the water appropriation statutes.

C. *Public Interest.*

The fact that federal agencies, rather than state agencies, must handle certain uranium related issues does not bear directly on the public interest. If the Board considers the regulation by other government entities it should simply consider whether there are other regulations and/or permits in place to address public interest issues, not whether those regulations or permits ought to be more properly state law or federal law.

Moreover, the Board lacks authority to consider whether the statutes and rules of other agencies are adequate or to second guess other agency decisions. The scope of the Board's authority is defined by the legislature. *Parks v. Cooper,* 2004 S.D. 27, ¶ 53, 676 N.W.2d 823. State agencies hold only such jurisdiction as is granted to them by the legislature. *In the Matter of the Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Center,* 2013 S.D. 10, 826 N.W.2d 649; *In re Solid Waste Disposal Permit Application,* 268 N.W.2d 599, 601 (S.D. 1978).

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regulation, from the standpoint of radiological health and safety, of byproduct, source and special nuclear material or production and utilization facilities.

The *Hyperion* court was faced with a similar issue relating to the authority of the South Dakota Board of Minerals and Environment, another state administrative agency. The BME was asked to order an Environmental Impact Statement for a state air quality permit for consideration of issues such as water usage, un-related to the air permit. The court specifically stated:

> . . . , the [BME] Board's jurisdiction *in this proceeding* did not include regulatory authority over "all the [other environmental] factors which the [Citizens] deem relevant to the [permit] consideration." The Board's jurisdiction was limited to the specific requirements established in the statute and regulations for issuance of the air quality permit. Thus, the Board correctly recognized that its jurisdiction was limited to the PSD permit issues, and the Board had no jurisdiction to regulate the other environmental effects of the proposed facility in this PSD proceeding.

Matter of PSD, 2013 S.D. at ¶ 19. Similarly, the State Supreme Court held, in 1978, that the factors to be considered by the BME in considering issuance of a solid waste permit, *and the BME's jurisdiction,* was limited to those factors appearing in the statutes and rules governing that permit. *Solid Waste Disposal Permit,* 268 N.W.2d at 601. In that case, the parties asserted that the state agency must take a hard look at whether the project would comport with local zoning ordinances and must address matters that would be considered in a local zoning forum. The State Supreme Court unequivocally ruled that extending the state agency's authority to such issues was outside the jurisdiction of the agency involved and would be "not only erroneous, but also duplicitous." *Id.*

Similarly, here, the Board may only impose conditions "as necessary to protect the public interest and related to matters *within the jurisdiction* of the Chief Engineer or the Board." SDCL 46-2A-2

The Board also does not have authority to determine whether other agencies will carry out their statutorily required functions. Courts have long held that they will not assume that government officials will violate the rules they are governed by. *Ford v. Boerger*, 362 F.2d 999, 1008 (8th Cir. 1966); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999). The Board should not make such assumptions either.

The Board should recognize, of course, that other agencies do have authority over various aspects of the Dewey-Burdock project. For example, the NRC and its staff are decision makers on how uranium should be handled, including protection of the public health and safety and in accord with the common defense and security. The Board should defer to the NRC to carry out its separate responsibilities. *Ford*, 362 at 1008. This Board may or may not need to examine some of the same underlying factual information as the NRC, but need not reexamine whether the NRC's ultimate conclusions are proper.

The public interest criteria does involve several competing legal and factual considerations. First, water is to be put to the maximum beneficial use under SDCL 46-1-4 ("the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable"). Further, South Dakota law not only allows for uranium exploration and mining, but promotes and encourages it for economic development, so long

as the health and safety of the people are protected and water and other natural resources are not endangered. SDCL 45-6B-2 (mining and reclamation) and SDCL 45-6D-2 (uranium exploration). SDCL 45-6B-2 provides:

> The relatively unknown and as yet largely undeveloped mineral resources of this state consist in major proportion of minerals below the surface. The development and extraction of these minerals by means of entry through the surface and the processing of such ores are necessary for the economic development of the state and nation. Every effort should be used to promote and encourage the development of mining as an industry, but to prevent the waste and spoilage of the land and the improper disposal of tailings which would deny its future use and productivity. Proper safeguards must be provided by the state to ensure that the health and safety of the people are not endangered and that upon depletion of the mineral resources and after disposal of tailings the affected land is usable and productive to the extent possible for agricultural or recreational pursuits or future resource development; that water and other natural resources are not endangered; and that aesthetics and a tax base are maintained, all for the health, safety and general welfare of the people of the state. [sections pertaining only to gold and silver mining omitted]

The Applicant bears the burden of proof in showing that the water use at issue is in the public interest.

The Chief Engineer may make non-binding recommendations to the Board concerning public interest, including conditions, restrictions, or limitations. SDCL 46-2A-4(8); SDCL 46-2A-2. Because the Chief Engineer has training and experience in hydrology, she is equipped to make expert recommendations on water use and the public interest as it applies to the effect that withdrawing water from the aquifer would cause on the public or

public resources.[2] For example, the Chief Engineer's staff examined the Powertech proposal to see whether the proposed use would affect area springs and cave lakes, a public interest matter related to hydrology. Based on the review, the proposed Dewey-Burdock is far enough from the springs that the project would not impair the springs. Even so, a condition was proposed for the permit out of an abundance of caution.

Further, the hearing process provides the board with information from the public on public interest since "any interested person who intends to participate" may appear simply by filing a timely request. SDCL 46-2A-4(4).

Finally, the Board itself is entitled to draw on its own experience and background since it represents a cross-section of the public as it relates to water use. SDCL 1-40-16 (a member of the public at large, a well driller, a person experienced in municipal government, an irrigator, a member with knowledge of the concerns of domestic water users, a member with experience in industrial uses of water, and a member who is knowledgeable about fish and wildlife interests). While the Board may not prejudge specific facts or law on a particular case, they may draw on their life or work experience in general . *Northwestern Bell Tel. Co. Inc. v. Stofferahn,* 461 N.W.2d 129, 133 (S.D.1990).

Ultimately, it is the Board's job to consider the various views on public interest and grant or deny the application. SDCL 46-2A-9. In undertaking this

[2] The Chief Engineer is "a licensed engineer, trained or experienced in hydrology." SDCL 46-2-3. As such, the Chief Engineer does not purport to be an expert on public interest in socioeconomics or other areas.

responsibility there are often tensions between the general public good and the specific application at issue. After hearing all the evidence, the Board may issue a permit and impose conditions to protect the public interest:

> The Water Management Board may issue any permit or license subject to terms, conditions, restrictions, qualifications, quantifications or limitations on perpetuity consistent with this chapter which it considers necessary *to protect the public interest and which are related to matters within the jurisdiction of the board.* Water rights issued pursuant to this section may be amended by the board. . . .

SDCL 46-1-14. Finally, when the Board issues a permit and imposes conditions to protect the public interest, the conditions themselves may be considered in determining whether the matter is in the public interest. *DeKay,* 524 N.W.2d at 859.

As set forth above, the Board has a full range of factors to consider, but SDCL 34A-3-126 does not affect those factors.

D. Impact on the Groundwater Discharge Plan Application

The groundwater discharge plan application concerns Powertech's proposed alternate disposal method of treated wastewater from its operation: land application of the wastewater from center pivots.

This application does not concern the underground injection disposal well, which is Powertech's preferred method of disposing of treated wastewater. The federal Safe Drinking Water Act established the Underground Injection Control (UIC) program. 42 U.S.C. 300h. The Act authorizes states to implement the UIC program; South Dakota, while it has regulations applicable to UIC wells, is not an authorized state who has received "primacy" for the UIC program except

for Class II wells. EPA has, by rule, established itself as the administrator of the UIC program in South Dakota for all Class I, III, IV and V wells[3]. 40 C.F.R. 147.2101.

The WMB has adopted certain rules concerning these UIC wells: ARSD ch. 74:55:01 concerns Class III UIC wells. Class III wells are UIC wells that "inject fluid for extraction of minerals or energy, including those wells used for solution mining of minerals". These regulations were adopted under SDCL 34A-2-93(15), and are the regulations referenced by, and "tolled" by, SDCL 34A-2-126. They are therefore of no force and effect at this time.

The WMB also adopted certain rules regarding Class I, IV and V UIC wells; these rules, recognizing that EPA is administering these UIC programs in South Dakota, are limited to two things: a prohibition on certain wells; and reporting requirements. ARSD ch. 74:55:02. ARSD 74:55:02:01 defines the classes of UIC wells.[4]

The WMB has prohibited Class I and IV UIC wells in the State. ARSD 74:55:02:02. As a result, Powertech must comply with EPA's requirements for a Class V UIC well for its wastewater disposal well. Powertech has filed an

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[3] Class II wells are defined at ARSD 74:55:02:01 (and, by EPA, at 40 CFR 144.6). These are wells associated with oil and gas production and are regulated by the Board of Minerals and Environment at ARSD ch. 74:12:07.

[4] Class I wells are industrial and municipal disposal wells, including wells that are not Class IV; Class IV wells are wells used to dispose of hazardous or radioactive wastes; Class V wells are basically any other injection wells.

application for a Class V UIC well with EPA pursuant to 40 C.F.R. 147.2101. This permit application is still pending with EPA.

The rules in ARSD 74:55:02 do not concern Class III UIC wells, which were the subject of SDCL 34A-2-126. That statute specifically references only underground injection control Class III wells promulgated under SDCL 34A-2-93(15). Therefore, the prohibition and reporting requirements established in ARSD 74:55:02 remain legally effective. However, ARSD 74:55:02 does not require state permitting of a Class V UIC well; that has always been the jurisdiction of EPA under 40 C.F.R. 147.2101. SDCL 34A-2-126 had no effect on this requirement.

II.

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 chapter 74:07:01.

The effects of the NRC and EPA proceedings on the beneficial use and public interest issues associated with the water right application are discussed above.

The groundwater discharge plan application concerns the land disposal of treated wastewater that has been treated to NRC's requirements. It does not rest on NRC's or EPA's permitting decisions.

A. EPA Proceedings.

The groundwater discharge plan application is premised on the disposal of a limited quantity of treated wastewater. The limit is established by the allowable application rate. *See, e.g.*, ARSD 74:54:02:06(6) (application requirement of average and maximum daily amount of effluent to be applied). If this permitted limited land application does not dispose of all the wastewater, Powertech will need to dispose of the excess wastewater in another manner, through the EPA disposal well or by transport to a permitted disposal facility. These other manners of disposal of treated wastewater are not part of the groundwater discharge plan. EPA's approval of the Class V UIC wastewater disposal well therefore does not impact the groundwater discharge plan.

B. NRC Proceedings.

NRC has jurisdiction and authority over the wastes associated with Powertech's proposed operation. 10 C.F.R. Parts 20 and 40. As brought out in testimony, NRC recognizes the existence of the groundwater discharge plan application (testimony of Mays regarding Draft EIS). NRC therefore recognizes the WMB's concurrent jurisdiction over the land application disposal of the wastewater *once the wastewater is treated to NRC's requirements, which* are established by regulation at 10 C.F.R. 20, Appendix B.

As a result, NRC's permit does not affect the groundwater discharge plan, because the wastewater must meet the requirements established by law in NRC's rules. NRC's permit does not affect these requirements.

C. *NRC Financial Assurance.*

NRC requires the submission of financial assurance. 10 C.F.R. Pt. 40, Appendix A: Criteria Relating to the Operation of Uranium Mills and the Disposal of Tailings or Wastes Produced by the Extraction or Concentration of Source Material from Ores Processed Primarily for Their Source Material Content, Section II. Financial Criteria, Criterion 9-(a). This is the financial surety requirement specifically referenced in the Draft NRC License, Powertech Exh. 135 at Section 9.5. "Criteria 9" of these federal rules specifically applies to the "reclamation of any tailings or *waste disposal areas*". 10 C.F.R. Pt. 40, Appendix A, Section II, Criteria 9. Thus NRC's financial assurance requirements will include the land application wastewater disposal area.

If NRC holds financial assurance for the site, the site cannot become a Superfund site. The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, establishes the National Contingency Plan and the Superfund (42 U.S.C. 9605 and 9611) for the cleanup of releases of hazardous substances. Sites that become Superfund sites are remediated with funds from the Superfund, with the State being obligated to provide both ten percent of the costs of remedial action and future maintenance or removal and remedial actions. 42 U.S.C. 9604(c)(3).

Crucially, CERCLA creates a specific exemption for sites that are subject to financial assurance held by NRC:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . but *excludes . . (c) releases of source, byproduct, or special nuclear material from a*

> *nuclear incident, as those terms are defined in the Atomic Energy Act [42 U.S.C. 2011], if such release is subject to requirements with respect to financial protection established by the NRC under section 170 of such Act [42 U.S.C. 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title...*

42 U.S.C. 9601(22). This exemption basically means that a facility operating under a byproducts source material license from NRC, and subject to NRC financial assurance requirements, is exempt and cannot become a Superfund site. *See, e.g., Pennsylvania v. Lockheed Martin Corporation,* 684 F.Supp.2d 564 (M.D. Pa. 2010). NRC becomes entirely responsible for the site.

NRC's rules do not preempt the WMB's financial assurance rules, and the WMB can also require financial assurance. However, in order to ensure the continued applicability of the Superfund exemption, GWQ suggests that any financial assurance imposed by the WMB be held by NRC, pursuant to a Memorandum of Understanding between DENR and NRC, along with NRC's financial assurance for the site. This would ensure that the area would not become a Superfund site, with the attendant State financial obligations associated with the remediation of Superfund sites.

III.

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.

"Procedural completeness" is a defined term in the WMB's rules. ARSD 74:54:02:01(20) defines "procedurally complete" as "an application for a

groundwater discharge plan that contains all information necessary to fully address 74:54:02:06." ARSD 74:54:02:06 contains the application requirements for a groundwater discharge plan.

Whether Powertech's application for a groundwater discharge plan is procedurally complete is a factual issue that will be addressed at hearing. The evidence will show that the GWQ Program determined that the application was procedurally complete.

The application requirements of ARSD 74:54:02:06 and whether the application is "procedurally complete" are not dependent on the NRC or EPA permits, as explained supra.

IV.

Are the well construction standards under ARSD chapter 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 chapter 74:55:01.

SDCL 34A-2-126 plainly operates to toll only rules promulgated under SDCL 34A-2-93(15) and under subdivision 45-6B-81(10). As explained above, the statute is plain and unambiguous. *Petition of Famous Brands, Inc.*, 347 N.W.2d at 885 (statutes mean what they say and the legislature has said what it meant).

The only rule in the well construction chapter that is promulgated under SDCL 34-A-2-93 is ARSD 74:02:04:26, a rule pertaining solely to construction of wells in "the 100 year flood plain of Whitewood Creek" in Lawrence and Butte Counties. The matter at hand clearly does not involve that rule.

Further, none of the rules in the well construction standards is promulgated under the mining statutes in SDCL 45-6B-81(10).

The remainder of the well construction rules were promulgated under other provisions in SDCL chapters 34A-2, 46-2, and 46-6. *See*, source notes and implementing authority throughout ARSD ch.74:02:04. SDCL 34A-2-126 does not affect the well construction rules.

The well construction and well plugging standards in ARSD 74:02:04 are applicable for wells withdrawing water from the aquifer. Powertech has indicated that it will use wells variously for withdrawing water from the aquifer and also for its Class III *in situ* injection process. WR Exh. 3, p. 13 ("All wells will be completed for either injection or production wells, so that flow patterns can be changed as needed to recover uranium and restore groundwater quality in the most efficient manner.") As such, both the EPA standards for Class III *in situ* injection wells (40 C.F.R. 146.8, 146.10, and 146.32) and DENR standards for water wells apply. Some of the well construction or well plugging rules may be more stringent than others, but the most stringent rules apply. For example, the EPA rules require a written plan for abandonment and plugging and a mechanical integrity condition when the permit is issued. 40 C.F.R. 55.51. The DENR rules require detailed drilling standards. ARSD 74:02:04. In its application (WR Exh. 3, p. 22) and through testimony before the Board (cross-examination of witness John Mays), the applicant has agreed to comply with both.

Dated this 19th day of November, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of DENR WR AND GWQ JOINT RESPONSE TO BOARD INQUIRY in the above entitled matter was served upon the following by enclosing the same in envelopes with first class postage prepaid and affixed thereto, and depositing said envelopes in the United States mail on November 19, 2013:

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And on the same date the original was mailed interoffice to Eric Gronlund, Joe Foss Building, 523 E. Capitol Ave, Pierre, SD 57501 and a copy was hand delivered to Jeffrey P. Hallem, Office of the Attorney General 1302 E. HWY 14, Suite 1, Pierre, SD 57501.

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