From: Anna Applegate <aapplegate@gpna.com>
Sent: Thursday, August 14, 2025 4:18 PM
To: Binegar, Brenda <Brenda.Binegar@state.sd.us>
Cc: Matthew Naasz <mnaasz@gpna.com>
Subject: [EXT] In the matter of Clean Nuclear Energy Corp. Uranium Exploration Permit Application EXNI 453

Good Afternoon,

Attached are the following filings in this matter:

1. Clean Nuclear Energy Corp.'s Brief Regarding Fall River County's Uranium Ordinance;
2. Proposed Scheduling Order; and
3. Certificate of Service.

Thank you,

Anna Applegate

Legal Assistant to Talbot J. Wieczorek and Matthew E. Naasz

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STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE & NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION EXNI 453	)	**CLEAN NUCLEAR ENERGY CORP.'S BRIEF REGARDING FALL RIVER COUNTY'S URANIUM ORDINANCE**

TO: ALL INTERESTED PARTIES:

COMES NOW, Clean Nuclear Energy Corp., by and through Matthew E. Naasz of Gunderson, Palmer, Nelson & Ashmore, LLP, its attorneys, and respectfully submits its Brief Regarding Fall River County's Uranium Ordinance.

ARGUMENT AND AUTHORITIES

I. The Fall River County Ordinance addresses Uranium Mining, not exploration.

Fall River County Ordinance ostensibly declares uranium mining to be a nuisance in Fall River County. The current application of Clean Nuclear Energy Corp. requests an exploration permit, not a mining permit. *See* SDCL ch. 45-6D. Fall River County's ordinance regarding uranium mining does not apply to the present application.

II. Fall River County's Ordinance is invalid as preempted by South Dakota Law.

Even if the Fall River County Ordinance applied, it is preempted by state law and invalid. The South Dakota Supreme Court recently reiterated that "a county may not enact an ordinance which conflicts with state law." *Preserve French Creek, Inc. v. County of Custer*, 10 N.W.2d. 233, 2024 S.D. 45, ¶ 9. "When an ordinance conflicts with state law, 'state law preempts or abrogates the conflicting local law.'" *Id.* at ¶ 10 (citing *Rantapaa v. Black Hills Chair Lift Co.*,

2001 S.D. 111, ¶ 23, 633 N.W.2d 196, 203). Counties may not act contrary to state law because counties are creatures of statute which possess no power unless such authority is granted to them by the State Legislature. *Schafer v. Deuel Cnty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248 (citing *Pennington County v. State ex rel. Unified Judicial System*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 131). As further described in *Tibbs v. Moody Cnty. Bd. Of Comm'rs*, 2014 S.D. 44, ¶ 25, 851 N.W.2d 208, 2017:

> A county is a creature of statute and has "only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted." *State v. Quinn*, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38 (quoting *State v. Hansen*, 75 S.D. 476, 68 N.W.2d 480, 481 (1955)). Article IX, section 2 of the South Dakota Constitution provides that counties have the authority to "exercise any legislative power or perform any function not denied by its charter, the Constitution or general laws of the state."

Id.

In *Preserve French Creek* the Court noted the ways in which a local ordinance can conflict with state law:

> First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. *Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows.* And, third, state law may occupy a particular field to the exclusion of all local regulation.

Id. at ¶ 10 (citations omitted) (emphasis added). An ordinance that conflicts with state law is preempted even if the ordinance was passed by initiative measure. *See Rantapaa*, 2001 S.D. 111, ¶¶ 22-23, 633 N.W.2d at 203; *Heine Farms v. Yankton Cnty. ex rel. Cnty. Comm'rs*, 2002 S.D. 88, ¶ 16, 649 N.W.2d 597, 601 ("[i]t is fundamental that an ordinance or resolution proposed by the electors of a municipality [or county] under the initiative law must be within the power of the municipality to enact or adopt."); *see also In re Yankton Cnty. Comm'n*, 2003 S.D. 109, ¶ 15, 670 N.W.2d at 38.

As discussed above, the present application seeks a permit for uranium exploration pursuant to SDCL ch. 45-6D. Mining operations are also permitted by the South Dakota Board of Minerals and Environment. SDCL § 45-6B-5. A permit for mining operation "if approved, authorizes the operator to engage in the mining operation on the affected lands described in the application for the life of the mine." *Id.*

The Supreme Court recently confirmed preemption of state law in a similar context.

> "Here, the City's actions in constructing, establishing, operation, and maintaining the Facility and obtaining a permit to discharge wastewater into French Creek were likewise done pursuant to express statutory authority. Thus, pursuant to SDCL 21-10-2, the City's actions cannot constitute a nuisance. The Ordinance plainly conflicts with state law, as it seeks to declare the City's actions a nuisance when state law declares those actions are not a nuisance. Because the Ordinance attempts to prohibit what state law permits, the Ordinance is preempted by state law and invalid." *Preserve French Creek* at ¶14.

This Board need not determine Fall River County's ordinance to be invalid at this point as the ordinance addresses mining, not exploration. But should the time come when Clean Nuclear Energy receives a mining permit pursuant to SDCL ch. 45-6B, the Supreme Court's analysis in *Preserve French Creek* will control. When sought to be applied against a state-issued licensee, the ordinance is preempted by state law and invalid.

Dated: August 14th, 2025.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of CLEAN NUCLEAR ENERGY CORP.'S BRIEF REGARDING FALL RIVER COUNTY'S URANIUM ORDINANCE was electronically, and via U.S. First Class Mail, Postage Prepaid upon the following to be filed in the above-captioned matter:

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Secretary, Board of Minerals & Environment

Further, the undersigned certifies that a true and correct copy of the above-referenced document was served via U.S. First Class Mail, Postage Prepaid upon the following:

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STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE & NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION EXNI 453	)	**PROPOSED SCHEDULING ORDER**

TO: ALL INTERESTED PARTIES:

COMES NOW, Applicant, Clean Nuclear Energy Corp. and pursuant to the Hearing Officer's Order setting a Pre-Hearing Conference on Motion s submits the following Proposed Scheduling Order. The following Proposed Scheduling Order is aggressive, but allows for full opportunity for all involved to prepare for and be fully heard at the hearing. The aggressive schedule is proposed as the Application was filed on June 4, 2025. Pursuant to SDCL § 45-60-28, "a final decision on the application will be made within ninety days of the receipt of the application." The Proposed Scheduling Order pushes any decision well past that date. Applicant has the statutory right to have the Application considered in a timely manner. With that being said, the Proposed Scheduling Order is applicant's good-faith attempt to balance the need for pre-hearing submissions with its statutory right to a timely final decision.

1. Written discovery requests shall be served in full on or before August 29, 2025.

2. Discovery responses are due on or before September 29, 2025.

3. All expert and witness disclosures are due on or before October 3, 2025.

4. All motions, including motions in limine, together with supporting briefs, shall be served on or before October 17, 2025.

5. All responses to any motion, together with supporting briefs, shall be served on or before October 31, 2025.

6. The hearing dates on this matter shall be held November 10-21, 2025, and continue until completion.

Dated this 14th day of August, 2025.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: _____

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STATE OF SOUTH DAKOTA
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BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF CLEAN NUCLEAR ENERGY CORP. URANIUM EXPLORATION PERMIT APPLICATION EXNI 453	)	**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original of CLEAN NUCLEAR ENERGY CORP.'S PROPOSED SCHEDULING BRIEF was electronically, and via U.S. First Class Mail, Postage Prepaid upon the following to be filed in the above-captioned matter:

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Secretary, Board of Minerals & Environment

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Dated this 14th day of August, 2025.

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