

## STATEMENT OF LEGAL ISSUES

Hyperion appeals the CO BACT limit for large process heaters as set out in Permit #28.0701-PSD,<sup>1</sup> specifically:

Whether the lack of evidence and support in the record for the DENR's proposed CO limit of 0.007 lb/mmBtu on large process heaters renders the Board's findings of achievability of this limit for the large process heaters at the Hyperion Energy Center ("HEC") clearly erroneous?

The Board adopted the 0.007 lb/mmBtu CO limit in its *Final Decision* and *Findings of Fact and Conclusions of Law* issued by the South Dakota Department of Environment and Natural Resources ("DENR") Board regarding Permit #28.0701-PSD on August 20, 2009, as incorporated and adopted into its *Final Decision of Board of Minerals and Environment Regarding Amended Permit #28.0701-PSD* and *Findings of Fact and Conclusions of Law for Amended Permit #28.0701-PSD* issued by the Board on September 15, 2011 (App. 014-016, 071-126) and as affirmed by the Sixth Circuit Court on February 16, 2012 (App. 002).

Most relevant cases:

- 1) *Sopko v. C & R Transfer Company, Inc.*, 1998 S.D. 8, 575 N. W. 2d 225;
- 2) *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16, 711 N.W. 2d 244;
- 3) *McKibben v. Horton Vehicle Components, Inc.*, 2009 S.D. 47, 767 N.W. 2d 890; and

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<sup>1</sup> The specific paragraphs and language HEC contests is further set in the *Arguments* section of the brief. In addition to those specified paragraphs, to the extent that the CO MACT limits for large process heaters rely on the CO BACT determination, Hyperion objects to and appeals the CO MACT limits for large process heaters as well.

- 4) *In re Air Quality Construction Permit Application of Fisher Sand and Gravel Company*, 441 N.W. 2d 927 (S.D. 1989).

Most relevant constitutional and statutory provisions:

- 1) South Dakota Codified Law § 1-26-36;
- 2) South Dakota Codified Law § 1-26-37;
- 3) South Dakota Administrative Rule 74:36:09:02;
- 4) 40 C.F.R. § 52.21(b)(12); and
- 5) 42 USC § 7412(d)(2);

ORAL ARGUMENT CANCELLED. TO BE CONSIDERED ON BRIEFS.