

## LEGAL ISSUES INVOLVED

A. Whether the Circuit Court improperly affirmed the Board's decision not to require an Environmental Impact Statement ("EIS") under the South Dakota Environmental Policy Act ("Act"), S.D.C.L. § 34A-9, for the HEC, when:

- 1) Under the Act, the issuance by the Board of a PSD Permit to Hyperion to construct the HEC—a massive project which, if built, will be one of the largest refineries ever constructed in the United States—constituted a major permitting action significantly affecting the environment in South Dakota;
- 2) Absent an EIS under the Act, there will be no comprehensive detailed analysis of the environmental impacts of the HEC;
- 3) The Board had jurisdiction to issue an EIS under the Act, but improperly concluded that it lacked jurisdiction to do so; and
- 4) The Board had the authority or discretion to require an EIS, but improperly concluded that an EIS was neither necessary nor required under the Act.

In its February 9, 2012 Memorandum Decision (App. 0002-12)<sup>1</sup>, the Circuit Court affirmed the determination by the Board that an EIS was not required under the South Dakota Environmental Policy Act, concluding that an EIS is not mandatory in the PSD permitting process in South Dakota; that an EIS is outside of the jurisdiction of the Board; and that the DENR properly exercised its authority and discretion in choosing not to perform an EIS. (App. 0009.)

Relevant statutes include the South Dakota Environmental Policy Act, S.D.C.L. § 34A-9 (App. 0130-33). Relevant cases include *In re SDDS, Inc.*, 472 N.W. 2d 502, 507-10 (S.D. 1991).

B. Whether the Circuit Court improperly affirmed the Board's decision to issue an Amended PSD Permit for the construction of the HEC, when:

- 1) The Original PSD Permit, in its Condition 2.1, imposed an 18-month commence construction deadline, which required Hyperion to commence construction of the HEC by February 20, 2011;

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<sup>1</sup> Citations herein are: (i) to the 2009 and 2011 ("R." and "Supp. R.") Record; (ii) to testimony ("Tr.") at the contested case proceedings held in this case; (iii) to the 2009 Original and 2011 Supplemental Findings of Fact ("FOF" and "Supp. FOF") and Conclusions of Law ("COL" and "Supp. COL") entered by the Board; and (iv) to the Appendix submitted with the instant Brief ("App.").

- 2) It is undisputed that Hyperion failed to commence construction of the HEC by February 20, 2011, or by any date since that time;
- 3) Under the terms of Hyperion's Original PSD Permit Condition 2.1, Hyperion's failure to commence construction of the HEC, or to obtain an extension of the commence construction deadline before the expiration of that deadline on February 20, 2011, rendered the Original PSD Permit invalid, both by its express terms and as a matter of law under ARSD 74:36:09:02; and
- 4) The Board was, as a consequence, not subsequently entitled to amend and extend the commence construction deadline in the Original PSD Permit, when that Permit had already expired and was invalid.

In its February 9, 2012 Memorandum Decision (App. 0002-12), the Circuit Court affirmed the determination by the Board that Hyperion's failure to commence construction of the HEC, or to obtain an extension of the commence construction deadline before its February 20, 2011 expiration, did not render Hyperion's Original Permit invalid. The Court concluded that the filing of an extension application by Hyperion within the original 18-month commence construction deadline was timely and appropriate, and that the Amended Permit was properly issued. (App. 0010.)

Relevant statutes and regulations include 40 C.F.R. § 52.21(r)(2) (App. 0140-41); ARSD 74:36:09:02 (App. 0134-35); ARSD 74:36:05:08(3) (App. 0136-37); and S.D.C.L. § 1-26-28 (App. 0138-39). Relevant cases include *Sierra Club v. Franklin County Power of Illinois, Inc.*, 546 F.3d 918 (7th Cir. 2008).

- C. Whether the Circuit Court improperly affirmed the Board's decision that Hyperion met its burden of proving a satisfactory justification for the extension of the commence construction deadline for the HEC until March 15, 2013, when that proof was unsatisfactory and inadequate.

In its February 9, 2012 Memorandum Decision (App. 0002-12), the Circuit Court affirmed the determination by the Board that Hyperion satisfactorily justified the extension of the commence construction deadline until March 15, 2013 as provided in the Amended Permit, concluding that this extension was justified by the economic recession which caused delays in large capital projects like the HEC, by the pending appellate process, by the addition of another

emissions unit at the HEC, and by additional NAAQS analyses for two additional regulated pollutants. (App. 0010-11.)

Relevant regulations include 40 C.F.R. § 52.21(r)(2) (App. 0140-41) and ARSD 74:36:09:02 (App. 0134-35).