

SUPREME COURT OF SOUTH DAKOTA

In the Matter of the Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Center – Hyperion Refining, LLC – Permit #28.0701 – PSD

2013 S.D. 10 · No. #26290, #26293 · Decided January 23, 2013

SUMMARY

The South Dakota Supreme Court reviewed challenges to a Prevention of Significant Deterioration air-quality permit issued to Hyperion Refining, LLC for a proposed petroleum refinery and power plant. The court addressed whether an environmental impact statement was required, whether the permit remained valid while an extension request was pending, whether the extension was justified, and whether the carbon monoxide Best Available Control Technology limit was supported. The court affirmed the circuit court and the agency decisions.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Zinter, Justice; Gilbertson, Chief Justice; Konenkamp, Justice; Severson, Justice; Caldwell, Retired Circuit Court Judge, sitting for Wilbur, Justice
JURISDICTION	South Dakota
DECIDED	January 23, 2013
DOCKET	#26290, #26293
DISPOSITION	affirmed
PROCEDURAL POSTURE	Three citizens groups appealed the issuance of a PSD air-quality permit, and Hyperion separately appealed the permit's carbon-monoxide BACT limit. After the circuit court remanded for consideration of additional evidence concerning an amended permit and construction deadline, the circuit court consolidated the appeals and affirmed the Board's decisions. The parties appealed to the South Dakota Supreme Court.
STANDARD OF REVIEW	The Supreme Court reviews agency decisions in the same manner as the circuit court, gives great weight to agency findings and inferences on factual questions, reviews questions of law de novo, and may reverse when substantial rights have been prejudiced by statutory

	violations, errors of law, clearly erroneous findings, or an abuse of discretion. Whether to order an EIS is reviewed for a clearly unwarranted exercise of discretion; agency factual findings are reviewed for clear error.
PRECEDENTIAL VALUE	Published South Dakota Supreme Court opinion; precedential
PARTIES	Sierra Club, Save Union County, Citizens Opposed to Oil Pollution, Hyperion Refining, LLC v. South Dakota Department of Environment & Natural Resources, South Dakota Board of Minerals and Environment, Hyperion Refining, LLC

TOPICS

environmental impact review environmental law judicial review of agency action administrative law
statutory interpretation

PRACTICE AREAS

Environmental law Administrative law Air quality permitting Environmental impact review
Appellate procedure

QUESTIONS PRESENTED

1. Whether an environmental impact statement should have been ordered before issuance of the PSD permit.
2. Whether the original permit became invalid when the initial construction deadline expired while Hyperion's timely extension request was still pending.
3. Whether Hyperion presented satisfactory justification for extending the construction deadline.
4. Whether the Board clearly erred in determining that a carbon-monoxide BACT limit of 0.007 lb/mmBtu was achievable.

HOLDINGS

1. The Board and DENR had authority to order an EIS, but did not abuse their discretion by declining to do so because the EIS statute makes an EIS optional and the PSD permitting process addressed the relevant environmental concerns.
2. A PSD permit does not become invalid solely because the agency has not entered a final decision on a timely extension request before the original eighteen-month construction deadline expires.
3. Hyperion's amended request for a deadline extending eighteen months after the amended permit was issued was an amendment to its timely initial request, not a new untimely application.
4. The Board did not clearly err in finding that Hyperion presented satisfactory justification for extending the construction deadline.

5. The Board did not clearly err in determining that a carbon-monoxide BACT limit of 0.007 lb/mmBtu was achievable for Hyperion's proposed facility.

KEY QUOTATIONS

“Under SDCL 34A-9-4, “an EIS is optional, not mandatory.”” (¶ 20)

“We conclude the rule and condition necessarily contemplated that a final decision may not necessarily be made within the initial deadline.” (¶ 32)

“We conclude that the permit did not become invalid solely because the Secretary was procedurally unable to grant a final extension within the original eighteen-month period.” (¶ 35)

“To establish a proper BACT limit for a permit under this rule, the proposed limit must be shown to be both: 1) the maximum degree of reduction of a pollutant subject to regulation (considering energy, environmental, and economic impacts and other costs), and 2) achievable for such source.” (¶ 47)

FACTUAL BACKGROUND

Hyperion proposed to construct a large petroleum refinery and power plant in Union County and submitted a 613-page PSD permit application. DENR recommended approval after technical review and public comment, and the Board authorized a permit containing numerous conditions, including a deadline to commence construction and a carbon-monoxide BACT limit of 0.007 lb/mmBtu for process heaters. Hyperion did not commence construction by the original deadline because of economic conditions, regulatory developments, permit litigation, and the discovery of an additional emissions source; after further administrative proceedings, the Board approved an amended permit extending the deadline while retaining the BACT limit.

PROCEDURAL HISTORY

The South Dakota Board of Minerals and Environment authorized DENR to issue Hyperion a PSD permit in 2009. The citizens groups challenged the permit and the denial of an environmental impact statement, while Hyperion challenged the carbon-monoxide BACT limit. The circuit court remanded for additional proceedings concerning an extension and amendment of the permit's construction deadline. After a contested case hearing, the Board approved an amended permit and retained the BACT limit; the circuit court affirmed, and the Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- St. Pierre v. State ex rel. S.D. Real Estate Comm'n, 2012 S.D. 25, ¶ 14, 813 N.W.2d 151, 156
- Brown v. Douglas School District, 2002 S.D. 92, ¶ 9, 650 N.W.2d 264, 267
- In re Solid Waste Disposal Permit Application, 268 N.W.2d 599, 600-01 (S.D. 1978)
- In re SDDS, Inc., 472 N.W.2d 502, 507 (S.D. 1991)

- In re S.D. Water Mgmt. Bd. Approving Water Permit No. 1791-2, 351 N.W.2d 119, 124 (S.D. 1984)
- In re Knauf Fiber Glass, 8 E.A.D. 121, 35 (EAB 1999)
- AFSCME Local 1025 v. Sioux Falls School District, 2011 S.D. 76, ¶ 11, 809 N.W.2d 349, 352
- WestMed Rehab, Inc. v. Department of Social Services, 2004 S.D. 104, ¶ 8, 687 N.W.2d 516, 518
- Jundt v. Fuller, 2007 S.D. 62, ¶ 7, 736 N.W.2d 508, 512
- Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 929-31 (7th Cir. 2008)
- State v. Robert, 2012 S.D. 27, ¶ 10, 814 N.W.2d 122, 125
- Bitterroot River Protective Ass'n v. Siebel, 108 P.3d 518, 522, 524 (Mont. 2005)
- McKibben v. Horton Vehicle Components, Inc., 2009 S.D. 47, ¶ 11, 767 N.W.2d 890, 894
- Lends His Horse v. Myrl & Roy's Paving, Inc., 2000 S.D. 146, ¶ 15, 619 N.W.2d 516, 520
- Burke v. Butte County, 2002 S.D. 17, ¶ 16, 640 N.W.2d 473, 478
- Ky. Mountain Power, LLC v. Energy & Env't Cabinet, No. DAQ-29109-039, 2009 WL 6214729, at *38 (Ky. Env'tl. & Pub. Protection Cabinet Dec. 1, 2009)
- Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, ¶ 19 n.3, 793 N.W.2d 378, 386 n.3