DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

September 27, 2010

Colin Campbell, RTP Environmental Associates Inc.
Hyperion Energy Center – Hyperion Refining LLC
304-A West Millbrook Road
Raleigh, North Carolina 27609

Re: Hyperion Application for an Extension of the Construction Deadline in PSD Permit #28.0701-PSD

Dear Mr. Campbell:

The Department of Environment and Natural Resources' Air Quality Program reviewed your most recent submissions concerning Hyperion's application to extend the construction deadline in the Prevention of Significant Deterioration (PSD) preconstruction permit #28.0701-PSD. The Department considers three technical areas in reviewing a request to extend the construction deadline under the Prevention of Significant Deterioration program. These three technical areas are: 1) re-evaluation of the Best Available Control Technology (BACT) determinations applicable to the Prevention of Significant Deterioration program; 2) re-evaluation of the Ambient Air Quality Analysis (modeling); and 3) re-evaluation of any new regulations applicable to the federal Prevention of Significant Deterioration program. Extension of the construction deadline in a Prevention of Significant Deterioration permit requires amendments of that permit following all procedural permitting rules, including publication and opportunity for public review and comment.

As the Department indicated previously, any new regulations applicable to the federal Prevention of Sign cant Deterioration program that is or will be in effect as of the date of an amendment to a PSD permit must be addressed in the permit application. Hyperion's application does not identify or discuss any greenhouse gas rules such as EPA's May 13, 2010, tailoring rule. This rule requires the submission of a Best Available Control Technology analysis for all six greenhouse gases, to include carbon dioxide, to be completed for any permit issued after its effective date.

Hyperion's application to extend the construction deadline cannot be processed in accordance with the Prevention of Significant Deterioration procedural rules in a manner that would allow a final decision on the application prior to the effective date of these greenhouse gas rules. Further,

an amendment to Hyperion's Prevention of Significant Deterioration preconstruction permit #28.0701-PSD for an extension of the construction deadline is a permit issued after the effective date of the tailoring rule. Finally, the Sixth Judicial Circuit Court in South Dakota has ordered the Board of Minerals and Environment specifically to take additional evidence under SDCL 1-26-34 on "at least the issues resulting from" Hyperion's request to extend the construction deadline and any "final" greenhouse gas rules. Hyperion specifically represented to the Court at the last hearing that it agreed the Board would take evidence concerning any "final" greenhouse gas rules.

As a result, the Department has determined that Hyperion's application to extend the construction deadline remains incomplete at this time and the Department will not continue the processing of this application until it is supplemented with an identification and discussion of the applicable federal greenhouse gas rules together with a Best Available Control Technology analysis for all six greenhouse gases.

This determination is not an admission or waiver of any claims or rights asserted by the State of South Dakota in *Coalition for Responsible Regulation, Inc. v. US EPA* (D.C.Ct.App.), in *Texas v. US EPA* (D.C. Ct.App.), and similar litigation opposing EPA's greenhouse gas rules.

On another topic involving the modeling for nitrogen dioxide, Hyperion identifies an in-stack ratio of 0.21 nitrogen dioxide to nitrogen oxides for the diesel engines. The ratio is based on a study for the Air Resource Board of California. The study does not specifically identify this ratio. Please clarify how the ratio of 0.21 was developed or submit additional justification that this ratio is appropriate for diesel engines.

Please respond back with the necessary information as soon as possible so the Department can proceed with its review, inform the Sixth Judicial Circuit Court of South Dakota of the status of Hyperion's application as necessary, and develop a preliminary schedule for proceeding. Thank you for your help.

Sincerely,

Kyrik Rombough
Natural Resources Engineering Director
Air Quality Program

Cc: Roxanne Giedd (Attorney General's Office)
Preston Phillips (Hyperion)
Rick Addison (Munsch Hardt)