



**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

PMB 2020  
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PIERRE, SOUTH DAKOTA 57501-3182  
[www.state.sd.us/denr](http://www.state.sd.us/denr)

December 3, 2008

Robert L. Graham  
Jenner & Block LLP  
330 N. Wabash Avenue  
Chicago, IL 60611

Re: Proposed Hyperion Energy Center

Dear Mr. Graham:

Thank you for your letter requesting that the South Dakota Department of Environment and Natural Resources (DENR) prepare an Environmental Impact Statement (EIS) for the proposed Hyperion Energy Center. In your letter, you referenced an earlier request for an EIS from Minority Leader Scott Heidepriem, South Dakota State Senate. DENR studied Senator Heidepriem's request at length before deciding not to require an EIS for this project (copy of DENR reply to Senator Heidepriem enclosed for your information). After carefully considering your request, DENR has once again come to the same conclusions.

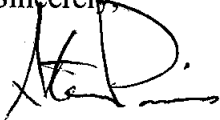
While the reasons behind our original decision still stand, we need to disagree with the assertions made in your letter concerning the impact of the proposed Hyperion Energy Center on the environment and natural resources of the State of South Dakota. We also disagree with your assertions that other environmental concerns, such as water withdrawals, water use, groundwater, surface water, water quality, stormwater, waste disposal, wastewater, and spill response, will not be considered. While these issues are not addressed in the draft Prevention of Significant Deterioration preconstruction air quality permit that is currently under review, those other environmental issues will be fully considered when Hyperion complies with a host of other permitting and regulatory processes, such as a water right permit, discharge permits, waste disposal permit, etc., some of which are listed in the attached letter.

Finally, you reference both state and federal laws regarding Environmental Impact Statements. DENR is not bound by the federal National Environmental Policy Act (42 USC 4321 to 4370(f)) as it pertains to federal agencies. As for state law, please note the South Dakota Legislature in SDCL 34A-9-3 has specifically exempted "actions of an environmentally protective regulatory nature" from the "action" for which an EIS may be prepared. The permitting actions taken by DENR are exactly such exempted actions. As a result, DENR is not authorized to assess the cost

and fee of an EIS as contemplated by SDCL 34A-9-4 against the persons seeking the environmental permits.

As you are aware, the extended public comment period for the draft Prevention of Significant Deterioration air quality permit for the Hyperion facility recently closed. In response to DENR's public notice, we received comments from approximately 3,000 people and organizations (all comments are available on DENR's website at <http://www.state.sd.us/denn/hyperion.htm>). As we now study and analyze all this additional information, we remain confident the permitting processes authorized by the South Dakota Legislature will provide the most complete, detailed, and best information for making the environmental decisions over which DENR has jurisdiction. Thank you again for your letter.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Pirner", with a horizontal line extending to the right.

Steven M. Pirner, P.E.  
Secretary

Enclosure

cc: Roxanne Giedd, Deputy Attorney General