

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF	)	PETITION TO REOPEN
Cheyenne Light, Fuel, and Power,	)	STATE-ISSUED TITLE V
A Subsidiary of Black Hills Corporation,	)	OPERATING PERMITS UNDER
Wygen II Station	)	THE CLEAN AIR ACT
	)	
Title V Permit Number: 3-0-229	)	
	)	
Issued by the Wyoming Department of	)	
Environmental Quality, Air Quality	)	
Division	)	
	)	

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**PETITION FOR REOPENING OF TITLE V PERMITS  
UNDER THE CLEAN AIR ACT**

Pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 553(e) and 555(b), WildEarth Guardians hereby petitions the Administrator of the U.S. Environmental Protection Agency (“EPA”) to reopen the Title V operating permit (hereafter “Title V Permit”) for Cheyenne Light, Fuel, and Power, a subsidiary of Black Hills Corporation (hereafter “Black Hills”), to operate the Wygen II Station, a 100 megawatt coal-fired power plant, in Campbell County, Wyoming (hereafter “Wygen II”). *See* Exhibit 1, Wygen II Title V Permit, Permit Number 3-0-229 (June 11, 2011) and Exhibit 2, Title V Permit Statement of Basis (March 14, 2011). The Title V Permit was issued by the Wyoming Department of Environmental Quality, Air Quality Division (hereafter “DEQ”) on June 11, 2011.

Specifically, we petition the Administrator to issue a rule finding that cause exists to terminate, modify, or revoke and reissue the Wygen II Title V Permit in accordance with Section 505(e) of the Clean Air Act, 42 U.S.C. § 7661d(e) (authority to make findings that cause exists to terminate, modify, or revoke and reissue), 40 C.F.R. § 70.7(g) (reopenings for cause by EPA), and the reopening conditions set forth at Condition (G7) of the Title V Permit. To put it simply, a reopening is warranted given that the Title V Permit fails to ensure that Wygen II is operated in compliance with the Clean Air Act.

Although this Petition primarily addresses the Wygen II Title V Permit, we further request that if the Administrator grants this petition in whole or in part, that the EPA also reopen the following Title V Permits issued by the DEQ due to the fact that they suffer from the exact same flaws identified within this Petition related to the Wygen II Title V Permit:

- Permit No. 30-205: Title V Permit allowing Black Hills Wyoming, LLC to operate Wygen Station I, an 80 megawatt coal-fired power plant located at the same site as

- Wygen II. *See* Exhibit 3, Wygen I Title V Permit, Permit Number 30-205 (Aug. 11, 2005);
- Permit No. 3-2-004-1: Title V Permit allowing Black Hills Power, Inc. to operate Neil Simpson I, a 21.7 megawatt coal-fired power plant located at the same site as Wygen II. *See* Exhibit 4, Neil Simpson I Title V Permit, Permit Number 3-2-004-1 (July 29, 2010);
  - Permit No. 3-2-158: Title V Permit allowing Black Hills Power, Inc. to operate Neil Simpson II, an 80 megawatt coal-fired power plant located at the same site as Wygen II. *See* Exhibit 5, Neil Simpson II Title V Permit, Permit Number 3-2-158 (June 24, 2009); and
  - Permit No. 3-2-101: Title V Permit allowing PacifiCorp Energy to operate the Wyodak Plant, a 362 megawatt coal-fired power plant located at the same site as Wygen II. *See* Exhibit 6, Wyodak Plant Title V Permit, Permit Number 3-2-101 (Feb. 18, 2009).

As will be explained in further detail within this Petition, the issues related to the Wygen II Title V Permit necessarily affect these other Title V Permits. Thus, it would not only be appropriate, but the EPA would be compelled, to remedy the deficiencies in these Title V Permits in addition to the deficiencies in the Wygen II Title V Permit.

## INTRODUCTION

Wygen II is a 100-megawatt coal-fired power plant located in Campbell County, Wyoming directly east of the town of Gillette. The facility consists of a coal-fired boiler, as well as coal, lime, and fly ash handling facilities. The facility is estimated to release 71 tons of particulate matter, including 12 tons of particulate matter than 10 microns in diameter (“PM<sub>10</sub>”), 569 tons of sulfur dioxide (“SO<sub>2</sub>”), 399 tons of nitrogen oxides (“NO<sub>x</sub>”), 854 tons of carbon monoxide (“CO”), 57 tons of volatile organic compounds (“VOCs”), and 5 tons of hazardous air pollutants (“HAPs”).

The Title V Permit for the facility was issued on June 11, 2011. Prior to that, on April 15, 2011, WildEarth Guardians submitted objections over the draft Title V Permit, but DEQ subsequently rejected those objections as untimely. On August 4, 2011, WildEarth Guardians petitioned the Administrator pursuant to Section 505(b) of the Clean Air Act to object to the issuance of the Title V Permit due to DEQ’s failure to respond to comments. That petition is awaiting a response from EPA.

In the meantime, all indications are that the Title V Permit for Wygen II is fatally flawed. Among other things, it fails to ensure that the entire source is subject to regulation under the Title V Permit, fails to appropriately limit hazardous air pollutant emissions, and fails to ensure adequate monitoring of emissions. This petition is necessary to ensure that, regardless of the outcome of WildEarth Guardians’ August 4, 2011 petition, these issues are substantively addressed.

Under the Clean Air Act, the Administrator of the EPA is authorized to find that cause exists to terminate, modify, or revoke and reissue a Title V Permit. *See* 42 U.S.C. § 7661d(e) and 40 C.F.R. § 70.7(g). A Title V Permit “shall” be reopened if the Administrator “determines that the permit must be revised or revoked to assure compliance with the applicable requirements [of the Clean Air Act].” 40 C.F.R. § 70.7(f)(1)(iv). Upon making such a finding, the Administrator must notify the permitting authority and the source. Within 90 days, the permitting authority must submit to the EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. *See* 42 U.S.C. § 7661d(e) and 40 C.F.R. § 70.7(g)(2). If the permitting authority fails to submit a proposed determination within 90 days, the EPA must independently terminate, modify, or revoke and reissue the Title V Permit. 40 C.F.R. § 70.7(g)(5).

WildEarth Guardians petitions the EPA pursuant to the APA. *See* 5 U.S.C. § 551, *et seq.* The APA specifically requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). A rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 551(4). The requested action constitute a request that the EPA find that cause exists to terminate, modify, or revoke and reissue the Wygen II Title V Permit, which constitutes a rule according to the APA.

The APA requires EPA to conclude the matter raised in this petition within a reasonable time. *See* 5 U.S.C. § 555(b). Furthermore, the Clean Air Act contemplates that the EPA will not delay unreasonably in addressing matters before it. *See* 42 U.S.C. § 7604(a) (providing for a citizen suit against the EPA over unreasonable delay). To this end, WildEarth Guardians requests EPA respond to this petition no later than 60 days after receipt. Such a deadline is consistent with Section 505(b)(2) of the Clean Air Act, which requires the Administrator to respond to Title V Petitions to object within 60 days, and is therefore reasonable.

## PETITIONER

Petitioner WildEarth Guardians is a Santa Fe, New Mexico-based nonprofit membership group dedicating to protecting and restoring the American West. WildEarth Guardians has offices in Santa Fe, Denver, and Phoenix, and members throughout the American West, including Wyoming. On April 15, 2011, Petitioner submitted detailed comments regarding the DEQ’s proposal to renew the Title V Permit for Wygen II. *See* Exhibit 7, WildEarth Guardians Comments on draft Title V Permit for Wygen II (April 15, 2011). WildEarth Guardians subsequently filed a Title V Petition pursuant to Section 505(b)(2) of the Clean Air Act requesting that the Administrator object to the issuance of the Wygen II Title V Permit. *See* Exhibit 8, WildEarth Guardians’ Petition to Object to issuance of Wygen II Title V Permit (Aug. 4, 2011).

## GROUNDS FOR REOPENING

The Wygen II Title V Permit must be reopened because it fails to assure compliance with applicable requirements under the Clean Air Act. As will be explained in more detail, the Title V Permit fails to assure compliance with Prevention of Significant Deterioration (“PSD”) and Title V Permitting requirements, with and with requirements set forth in the Wyoming State Implementation Plan (“SIP”), all of which are applicable requirements identified under 40 C.F.R. § 70.2. The Administrator must therefore make a finding that cause exists to terminate, modify, or revoke and reissue the Title V Permit for the following reasons:

### **1. The Title V Permit Fails to Ensure Compliance with PSD and Title V Permitting Requirements With Regards to Other Pollutant Emitting Activities at the Neil Simpson Energy Complex**

A Title V Permit is required to include emission limitations and standards that assure compliance with all applicable requirements at the time of permit issuance. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1). Applicable requirements include PSD requirements set forth under Title I of the Clean Air Act, regulations at 40 C.F.R. § 51.166, and the Wyoming SIP at Wyoming Air Quality Standards and Regulations (“WAQSR”) Chapter 6. *See* 40 C.F.R. § 70.2 (defining of applicable requirements). PSD requirements apply to the construction of major stationary sources and/or major modifications of major stationary sources of air pollution in areas designated as attainment. *See* 42 U.S.C. § 7475; 40 C.F.R. § 51.166(a)(7); WAQSR Chapter 6. Title V requirements apply to the operation of major sources. *See* 42 U.S.C. § 7661a(a) (requiring major source to operate with Title V permit and in compliance with all Title V requirements); *see also* 40 C.F.R. § 70.1(b).

PSD regulations at 40 C.F.R. § 51.166(b)(5) define a stationary source as, “any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.” *See also* AQCC Regulation No. 3, Part A, Section I.B.41. These regulations further define “building, structure, facility, or installation” as “all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)[.]” 40 C.F.R. § 51.166(b)(6); *see also* WAQSR Chapter 6, Section 4(a) (setting forth same definitions). These definitions are echoed in EPA’s Title V regulations. *See* 40 C.F.R. § 70.2 (providing definition of “major source” and “stationary source”).

Thus, a permitting authority must apply a three-part test to determine whether multiple pollutant emitting activities should be aggregated for PSD and Title V purposes in order to ensure accurate source determinations:



- (1) whether the sources belong to the same industrial grouping,
- (2) whether the sources are located on one or more contiguous or adjacent properties, and
- (3) whether the sources are owned or under the control of the same person.

40 C.F.R. § 51.166(b)(6). If multiple pollutant emitting activities meet this three-part test, then they must collectively be considered a “building, structure, facility, or installation,” and thus one

“stationary source” for PSD and Title V purposes. Such a single source must be permitted accordingly under PSD and Title V.

In this case, the Wygen II Title V Permit does not include all emissions from stationary pollutant emitting activities that belong to the same industrial grouping, that are located on one or more contiguous or adjacent properties, and that are owned or under common control by the same person. Namely, the Title V Permit fails to include emissions from other coal-fired power plants and other facilities at the Neil Simpson Energy Complex. According to the industrial siting application submitted by Black Hills Corp. for its related Wygen III power plant, “The Neil Simpson Energy Complex is a heavily industrialized site that contains five coal-fired power plants, two gas-fired turbines, and the Wyodak [coal] mine.” *See Exhibit 9, Wyoming Industrial Development Information and Siting Act 109 Application Permit, Wygen III, Campbell County, Wyoming*, Prepared for Black Hills Corporation by CH2MHill (October 2007) at ES-1. Altogether, the complex includes six coal-fired power plants—Neil Simpson I, Neil Simpson II, Wygen I, Wygen II, Wygen III, and Wyodak, two natural gas-fired simple cycle turbines, and the Wyodak coal mine. *See also* Image below.

## Black Hills Corp. - Local History



- **Long-standing Gillette Corporate Citizen**
  - 51 years in Gillette
  - Employs 200 people in Gillette
- **Neil Simpson Energy Complex Founded 1969**
  - **Wyodak Resources Development Corp. – 1956**
    - ± 4.5 million tons of annual coal production
  - **Neil Simpson I – 1969**
    - 20 Megawatt (MW) Power Plant
  - **Wyodak Power Plant – 1978**
    - 330 MW (20% Black Hills)
  - **Neil Simpson II – 1995**
    - 80 MW Power Plant
  - **Wygen I – 2003**
    - 80 MW Power Plant
  - **Wygen II Unit IV – 2007**
    - 100 MW Power Plant
  - **Natural Gas Fired Turbines – 2000**
    - Two @ 40 MW Simple Cycle Combustion Units

**Black Hills Corp. Overview of its Neil Simpson Energy Complex.**  
***See Exhibit 9 at Appendix C.***

The Wygen II Title V Permit does not include emissions from all or a portion of these pollutant emitting activities at the Neil Simpson Energy Complex. Yet according to the three-part test under the Clean Air Act, it appears that inclusion of all or a portion of these pollutant emitting activities is required to ensure compliance with applicable requirements.

As a threshold matter, the coal-fired power plants, gas-fired turbines, and the Wyodak coal mine are all pollutant emitting activities. Data from DEQ's Title V Permits indicates the other coal-fired power plants and natural gas-fired turbines on site all release significant amounts of air pollution. *See* Table below.

**Emissions from Neil Simpson I, Neil Simpson II, Wygen I, Wygen II, Wygen III, and Wyodak Coal-fired Units, in Tons/Year<sup>1</sup>**

<b>Power Plant</b>	<b>Owner</b>	<b>Generating Capacity (MW)</b>	<b>PM<sub>10</sub></b>	<b>NO<sub>x</sub></b>	<b>SO<sub>2</sub></b>	<b>HAPs</b>
Neil Simpson I	Black Hills Corp.	20	55.1	962.5	1540	0.9
Neil Simpson II (including two natural gas-fired turbines)	Black Hills Corp.	80 coal, 80 gas	161	1,323	924	4.5
Wygen I	Black Hills Corp. (76.5%)	80	91	736	755	9
Wygen II	Black Hills Corp. (Cheyenne Light, Fuel and Power)	100	12	399	569	5
Wygen III	Black Hills Corp. (52%)	100	68	285	512	N/A
Wyodak	Pacificorp (80%); Black Hills Corp. (20%)	362	1,241	5,930	8,979	19
	<b>TOTALS</b>	<b>742 coal, 80 gas</b>	<b>1,628.1</b>	<b>9,635.5</b>	<b>13,279</b>	<b>&gt;38.4</b>

The Wyodak coal mine is also a pollutant emitting activity. According to EPA's AirData website, the Wyodak coal mined reportedly emitted 62.3 tons of PM<sub>10</sub> and 50.8 tons of PM<sub>2.5</sub> in 1996 and onward. *See* EPA, *AirData*, "Facility Emissions Report—Criteria Air Pollutants," available at

[http://iaspub.epa.gov/airsdata/adnet.ranking?geotype=co&geocode=56005&geoinfo=co%7E56005%7ECampbell+Co%2C+Wyoming&pol=PM25+PM10&year=1996&fld=percent&fld=plnt\\_name&fld=addr&fld=county&fld=state&fld=sic&rpp=25](http://iaspub.epa.gov/airsdata/adnet.ranking?geotype=co&geocode=56005&geoinfo=co%7E56005%7ECampbell+Co%2C+Wyoming&pol=PM25+PM10&year=1996&fld=percent&fld=plnt_name&fld=addr&fld=county&fld=state&fld=sic&rpp=25) (last accessed Jan. 27, 2012).

<sup>1</sup> Emissions data for Neil Simpson I, Neil Simpson II, Wygen I, Wygen II, and Wyodak is found in their respective Title V Permits, Exhibits 1 and 3-6, while emissions data for Wygen III is found in Black Hills' Industrial Siting Application, Exhibit 9. HAP emissions are based on estimates set forth in the Title V Permits and do not represent actual limits. HAP emission estimates for Wygen III are not readily available online.

Given that the other activities at the Neil Simpson Energy Complex are pollutant emitting, the remaining questions to be answered are whether they belong to the same industrial grouping, whether they are contiguous or adjacent, and whether they are owned or under common control by the same entity. Here, the answer is affirmative on all counts.

With regards to ownership and common control, Black Hills Corp. either owns or commonly controls the pollutant emitting activities at the Neil Simpson Energy Complex. Indeed, Black Hills Corp.'s most recent Form 10-K Annual Report filing with the U.S. Securities and Exchange Commission indicates that the company owns 100% of Neil Simpson I and II (including the natural gas-fired combustion turbines), 76.5% of Wygen I, 100% of Wygen II (through its subsidiary Cheyenne Light, Fuel, and Power Co.), 52% of Wygen III, and also owns the Wyodak coal mine. *See* Exhibit 10, Black Hills Corp., Form 10-K Annual Report for Fiscal Year 2010 (Feb. 25, 2011) at 12 and 45. Black Hills Corp. also owns 20% of the Wyodak power plant as well (*see id.*), which indicates the existence of ownership and common control, a relationship bolstered by the fact that Black Hills Corp.'s Wyodak coal mine supplies 100% of the coal burned at the power plant.

It further appears that these multiple pollutant emitting activities are part of the same industrial grouping. All of the coal-fired power plants and natural gas-fired turbines belong to the standard industrial classification ("SIC") code 4911.

Although it is true that the Wyodak coal mine may have a different SIC code—in this case 1221—given the support role that the mine plays in providing coal to the coal-fired power plants, it is appropriate to classify the Wyodak mine within SIC 4911 in this case. Indeed, according to fuel receipt records file with the Energy Information Administration, more than 50% of all the coal produced at the Wyodak mine feeds the coal-fired power plants at the Neil Simpson Energy Complex. *See* Exhibit 11, EIA, "Monthly Utility and Nonutility Fuel Receipts and Fuel Quality Data," 2010-2011 (to August 31, 2011), available at <http://www.eia.gov/cneaf/electricity/page/eia423.html> (last accessed Jan. 27, 2011). According to this most recent data submitted to the EIA, of the 8,734,001 tons of coal from the Wyodak coal mine burned in power plants, 5,271,869 tons—or 60%—was burned in the Wyodak power plant, Wygen I, II, and III, and the Neil Simpson Power Plants. In other words, a majority of the output of the coal mine is dedicated to the operation of the on-site coal-fired power plants, indicating the coal mine serves as a support facility to the coal-fired power plants, which appear to be the primary pollutant emitting activity occurring at the Neil Simpson Energy Complex. Accordingly, the coal mine must be classified according to the primary activity, in this case the coal-fired power plants, even though the mine's SIC code differs. As the EPA has noted:

[S]ources [are] to be classified according to [their] primary activity, which is determined by [their] principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code.

45 Fed. Reg. 52676 (Aug. 7, 1980).



With regards to contiguousness or adjacency, there is no question that Wygen II is contiguous or adjacent to the other power plants and the Wyodak coal mine. The other power plants are clearly located at the same site as Wygen II. Wygen III is not only right next to Wygen II (and controlled via the same control room), but Wyodak, Neil Simpson I and II, and the combustion turbines are located on the same property less than a half of a mile away from each other. The Wyodak coal mine would also be considered contiguous or adjacent, if not due to the close proximity of the mine to Wygen II, then due to the functional interrelationship between the mine and the power plants. Indeed, the EPA has noted on a number of occasions that where pollutant emitting activities are interrelated, such as through the existence of dedicated connections (e.g., pipelines, conveyor systems, etc.), and where each activity is dependent upon the operation of the other, that the contiguous or adjacent prong is met. Finally, it is important to note that even Black Hills Corp. considers the pollutant emitting activities that are part of the Neil Simpson Energy Complex to be adjacent. With regards to Wygen III, which is right next to Wygen II, the company has explained “**Adjacent** industrial uses include the following power plants; Neil Simpson, Wyodak, Neil Simpson II, Wygen I, Wygen II, two gas-fired turbines, and the Wyodak Coal Mine.” Exhibit 9 at 4-9 (emphasis added). Just as Wygen III is adjacent to these activities, it logically stands to reason that Wygen II is as well.

The pollutant emitting activities at the Neil Simpson Energy Complex should therefore be aggregated together with Wygen II and regulated as a single source to ensure compliance with PSD and Title V requirements under Clean Air Act. These activities are pollutant emitting, they are owned or under common control by the same company, they belong to the same major industrial grouping, and they are contiguous or adjacent to each other. To this end, the pollutant emitting activities should be regulated as a single source under Title V and PSD.

That pollutant emitting activities at the Neil Simpson Energy Complex must be aggregated together as a single source is further supported by the fact that under the Clean Water Act, the entire Complex is permitted as a single discharge source. Indeed, the DEQ already regulates all of the activities at the Neil Simpson Energy Complex under a single discharge permit. See Exhibit 12, DEQ, Wyoming Pollutant Discharge Elimination System Renewal Permit No. WY0001384 (Feb. 23, 2010). The most recent Clean Water Act permit issued for the activities states, “This permit authorizes discharge of wastewater from six coal fired power plants, two combustion turbine power plants, and one coal mine.” *Id.* at 1. The permit explicitly regulates discharge from the Wyodak plant, Neil Simpson I, Neil Simpson II, Wygen I, Wygen II, Wygen III, the natural gas-fired combustion turbines, and the Wyodak coal mine. See *id.* at 1-3. The fact that DEQ regulates the Complex as a single discharge source under the Clean Water Act gives bolsters the need to regulate the Complex as a single source under the Clean Air Act.

Thus, to ensure compliance with applicable requirements, the Administrator must order the reopening of the Wygen II Title V Permit to ensure that it includes all pollutant emitting activities that should be aggregated together with Wygen II, as well as ensure that all pollutant emitting activities are appropriately permitted under and brought into compliance with PSD.<sup>2</sup>

To this end, the Title V Permit must be reopened to ensure that all emissions have been appropriately accounted for, including fugitive emissions at the Wyodak coal mine, and that all

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<sup>2</sup> To this end, the Title V Permits for Neil Simpson I, Neil Simpson II, Wygen I, and Wyodak must also be reopened.



relevant PSD requirements have been met (e.g., best available control technology requirements, source impact assessment requirements, etc.). If applicable PSD requirements have not been met, then the Administrator must order the reopening of the Title V Permit and ensure it contains a compliance schedule to bring the source into compliance with PSD requirements in accordance with the Clean Air Act. *See* 42 U.S.C. § 7661b(b) (setting forth compliance schedule requirements); 40 C.F.R. §§ 70.6(c)(3) and (4) (requiring that a compliance schedule with progress reports be included in a Title V Permit where a source is out of compliance).

## **2. The Title V Permit Inappropriately Identifies Ambient Air Quality Standards as State-only Enforceable**

The Wygen II Title V Permit states that ambient air quality standards for NO<sub>x</sub>, particulate matter, and ozone set forth at WAQSR Chapter 2, Sections 2, 3, and 6 are “State only requirements and are not federally enforceable.” Exhibit 1, Title V Permit at 24, Condition (S1). However, this is not the case. WAQSR Chapter 2, Sections 2, 3, and 6 have been approved by the EPA and incorporated into the Wyoming SIP. *See* EPA, “Approval and Promulgation of Air Quality Implementation Plans; Wyoming; Restructuring and Renumbering of Wyoming Air Quality Standards and Regulations,” 69 Fed. Reg. 44965 (July 28, 2004); *see also* 40 C.F.R. § 52.2620(c)(1). All SIP-approved ambient air quality standards must be identified as federally enforceable in order to ensure compliance with all applicable requirements in accordance with Title V of the Clean Air Act. *See* 42 U.S.C. § 7661c(a) (requiring that applicable implementation plan requirements be included in Title V Permit); *see also* 40 C.F.R. § 70.6(b)(2) (stating that Title V Permit can only exclude requirements that are not applicable).

That ambient air quality standards must be identified as federally enforceable in the Title V Permit is further bolstered by the fact that Wyoming’s Title V Permitting rules state that applicable requirements include “Any state ambient air quality standard or increment or visibility requirement of the WQASR.” WAQSR Chapter 6, Section 3(b)(v)(L). Thus, “applicable requirements” include all ambient air quality standards set forth at WAQSR Chapter 2, including ambient air quality standards for PM<sub>2.5</sub>, sulfates, fluorides, and odors. The Title V Permit must be reopened to ensure that all applicable ambient air quality standards are federally enforceable in accordance with the Wyoming SIP and Title V Permitting rules.<sup>3</sup>

## **3. The Title V Permit Fails to Require Sufficient Particulate Matter Monitoring**

Permitting authorities must ensure a Title V Permit contains monitoring that ensures compliance with the terms and conditions of the permit. *See* 42 U.S.C. § 7661c(c) and 70.6(c)(1). Although as a basic matter, Title V Permits must require sufficient periodic monitoring when the underlying applicable requirements do not require monitoring (*see* 40 C.F.R. § 70.6(a)(3)(i)(B)), the D.C. Circuit Court of Appeals has firmly held that even when the underlying applicable requirements require monitoring, permitting authorities must supplement

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<sup>3</sup> The Title V Permits for Neil Simpson I, Neil Simpson II, Wygen I, and Wyodak similarly identify ambient air quality standards as “state-only” enforceable and therefore these permits must also be reopened and revised to ensure compliance with the Clean Air Act.

this monitoring if it is inadequate to ensure compliance with the terms and conditions of the permit. As the D.C. Circuit recently explained:

[40 C.F.R. § 70.6(c)(1)] serves as a gap-filler....In other words, § 70.6(c)(1) ensures that all Title V permits include monitoring requirements “sufficient to assure compliance with the terms and conditions of the permit,” even when § 70.6(a)(3)(i)(A) and § 70.6(a)(3)(i)(B) are not applicable. This reading provides precisely what we have concluded the Act requires: a permitting authority may supplement an inadequate monitoring requirement so that the requirement will “assure compliance with the permit terms and conditions.”

*See Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008). In other words, “a monitoring requirement insufficient ‘to assure compliance’ with emission limits has no place in a permit[.]” *Id.* at 677.

In this case, the Wygen II Title V Permit fails to contain monitoring requirements that ensure compliance with underlying particulate matter emission limits.<sup>4</sup>

#### **A. Boiler Emissions**

The Title V Permit requires only once/year testing for particulate matter emissions. *See* Title V Permit at 7, Condition (F9)(e). This is too infrequent to ensure compliance with the particulate matter limits at Wygen II, especially given that the Title V Permit limits PM/PM<sub>10</sub> emissions on both a heat input basis (i.e., million Btu (“mmBtu”) basis) and hourly basis. In other words, although the Title V Permit imposes short-term limits on PM/PM<sub>10</sub>, the Title V Permit requires no short-term monitoring of PM/PM<sub>10</sub>.

It also appears that the Title V Permit fails to assure compliance with compliance assurance monitoring (“CAM”) requirements with regards to PM/PM<sub>10</sub> emissions. CAM rules state that after April 20, 1998, if an owner or operator has not yet submitted an application for an initial Title V Permit or has submitted an application that has not yet been determined to be complete by the permitting authority, the owner or operator is required to submit the information required by 40 C.F.R. § 64.4 with its Title V Permit application. The information required under 40 C.F.R. § 64.4 includes information demonstrating that monitoring will effectively ensure compliance with relevant emission limits. Ultimately, this information is incorporated into to a Title V Permit as the CAM Plan.

In this case, the initial Title V Permit application for Wygen II was submitted and deemed complete after April 20, 1998. Unfortunately, the DEQ states in the Statement of Basis for the Title V Permit that, “Compliance assurance monitoring (CAM) will be addressed upon renewal of this operating permit.” Exhibit 2, Statement of Basis at 2. In other words, even though CAM rules required that Black Hills submit the information required by 40 C.F.R. § 64.4 with its initial Title V Permit application, no such information was submitted and worse, the

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<sup>4</sup> The Title V Permits for Neil Simpson I, Neil Simpson II, Wygen I, and Wyodak must also be reopened to address the same issues related to the enforceability of particulate matter limits, particularly with regards to particulate matter emissions from the coal-fired boilers at these respective facilities.

DEQ condoned this failure to submit. The Title V Permit therefore fails to ensure compliance with applicable requirements because Black Hills failed to submit the information required by 40 C.F.R. § 64.4 with its Title V Permit application and the DEQ failed to ensure the Title V Permit includes a CAM Plan. The Administrator must therefore order the reopening of the Title V Permit.

## **B. Fugitive Particulate Matter**

The Title V Permit further fails to ensure compliance with relevant and applicable fugitive emission requirements. Under the Clean Air Act, fugitive dust must be effectively limited to ensure compliance with PSD requirements and to ensure compliance with applicable particulate matter ambient air quality standards. In this case, conditions related to the control of fugitive particulate matter are unenforceable as a practical matter.

We are first concerned over Condition (F3). *See* Exhibit 1, Title V Permit at 5. This condition requires the application of chemical dust suppressant for unpaved plant trafficked areas and that dust suppressant and water shall be applied at a “frequency sufficient to adequately control fugitive dust.” Unfortunately, it is unclear what “adequately control” means and it is unclear exactly what level of emissions control this condition is attempting to meet. Compounding this confusion is that it does not appear as if there are any applicable opacity or particulate matter limits related to fugitive emissions, both from Wygen II and other pollutant emitting activities at the Neil Simpson Energy complex. DEQ and the Permittee cannot possibly assess compliance with any work practice standards without referencing any applicable emissions limits or similar thresholds. This concern is especially on point given that the operative standard under Condition (F3) is only that dust be “adequately” controlled. With no explanation as to what “adequately” means, there is no basis to conclude that the Title V Permit will appropriately limit fugitive dust emissions such that any applicable particulate and visible emission limits will be met.

We are also concerned that the monitoring requirements set forth at Condition (F11) are insufficient to ensure that fugitive emissions are limited to ensure compliance. *See* Exhibit 1, Title V Permit at 8. These requirements simply require the permittee to monitor the amount and dates of application of dust suppressant and water, the quantity of water supplied to the pug mill and spray nozzles, the quantity of ash loaded, and the dates that the wet handling system is not operated. Although this is all valuable information to monitor, it is unclear how this monitoring will assure compliance with visible emission limits, namely the visible emission limit of 20% set forth at Condition (F4). Of particular concern is that no frequency of monitoring is set forth, it is unclear exactly how the permittee is required to conduct the monitoring, and more importantly it is impossible to determine how the required monitoring will effectively limit emissions such that applicable requirements will be met.

The Administrator must order the reopening of the Title V Permit to ensure that fugitive emission limits are enforceable and that monitoring and/or work practice standards effectively ensure compliance with applicable requirements.

#### 4. The Title V Permit Does not Require Prompt Reporting of Deviations

The Administrator must order the reopening of the Title V Permit because Condition (F25) does not suffice to constitute prompt reporting of permit deviations as required by Title V regulations. *See* Exhibit 1, Title V Permit at 12.

Prompt reporting is typically defined “in relation to the degree and type of deviation likely to occur and the applicable requirements.” 40 C.F.R. § 70.6(a)(3)(iii)(B). In explaining the meaning of “prompt,” the House Report for the Clean Air Act Amendments of 1990 stated that “the permittee would presumably be required to report that violation without delay.” H.F. Rep. No. 101-490, pt. 1, at 348 (1990). In commenting on other proposed state operating permit programs, the EPA has explained:

In general, the EPA believes that ‘prompt’ should be defined as requiring reporting within two to ten days for deviations that may result in emissions increases. Two to ten day is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems.

61 Fed. Reg. 39617-39602 (July 30, 1996). Most recently, the second circuit court of appeals held that “prompt” for purposes of prompt reporting of permit deviations must at least be less than every six months depending upon the source’s compliance history and public health risk. *NYPIRG v. Johnson*, 427 F.3d 172 (2<sup>nd</sup> Cir. 2005).

In this case, Condition (F25) has several issues and overall, is confusing. First, Condition (F25)(b) only requires that annual reporting of permit deviations occurs, which does not appear to constitute prompt.

Second, to the extent Condition (F25) it requires more frequent reporting of permit deviations, according to Condition (F25)(b), more frequent reporting only applies to sources and pollutants that are not continuously monitored and only when the limits are exceeded by 100%, or if a single episode of emission limit exceedance spans a period of 24 hours or more. This seems to indicate that if a source or pollutant is not continuously monitored, no deviations need to be reported unless the exceedance is 100% or more or if the episode spans 24 hours or more. This is contrary to prompt reporting requirements under Title V.

Finally, although condition (F25)(c) appears to require reporting of deviations within 30 days, it is impossible to understand how this Condition meshes with (F25)(b), which as explained, requires annual reporting of deviations. Regardless, there is no indication that 30 days constitutes prompt, particularly in light of the need to ensure that “prompt” is defined “in relation to the degree and type of deviation likely to occur and the applicable requirements.” A blanket 30 day reporting requirement is not based on any consideration of the degree and type of deviation likely to occur and the applicable requirements. The Administrator must therefore order the reopening of the Title V Permit to ensure that it appropriately requires prompt reporting of permit deviations as required by the Clean Air Act.<sup>5</sup>

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<sup>5</sup> The Title V Permits for Neil Simpson I, Neil Simpson II, Wygen I, and Wyodak must also be reopened to address the same flaws in the prompt reporting requirements.

## CONCLUSION

For the reasons stated above, we request the Administrator find that cause exists to terminate, modify, or revoke and reissue the Wygen II Title V Permit in accordance with Title V of the Clean Air Act. We further request that if the Administrator grant or deny this Petition in whole or in part, that the Title V Permits for Neil Simpson I, Neil Simpson II, Wygen I, and Wyodak also be reopened to ensure that the same flaws are similarly addressed. Particularly with regards to the need to ensure that all pollutant emitting activities are appropriately regulated under PSD and Title V, there is a critical need to ensure all Title V Permits are consistent with the Clean Air Act.

We request the Administrator respond to this petition within 60 days. Any delay in responding will be considered unreasonable.

Respectfully submitted this 27<sup>th</sup> day of January 2012

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## TABLE OF EXHIBITS

1. Wygen II Title V Permit, Permit Number 3-0-229 (June 11, 2011).
2. Wygen II Title V Permit Statement of Basis (March 14, 2011).
3. Wygen I Title V Permit, Permit Number 30-205 (Aug. 11, 2005).
4. Neil Simpson I Title V Permit, Permit Number 3-2-004-1 (July 29, 2010).
5. Neil Simpson II Title V Permit, Permit Number 3-2-158 (June 24, 2009).
6. Wyodak Plant Title V Permit, Permit Number 3-2-101 (Feb. 18, 2009).
7. WildEarth Guardians Comments on draft Title V Permit for Wygen II (April 15, 2011).
8. WildEarth Guardians' Petition to Object to issuance of Wygen II Title V Permit (Aug. 4, 2011).
9. *Wyoming Industrial Development Information and Siting Act 109 Application Permit, Wygen III, Campbell County, Wyoming*, Prepared for Black Hills Corporation by CH2MHill (October 2007)
10. Black Hills Corp., Form 10-K Annual Report for Fiscal Year 2010 (Feb. 25, 2011).
11. EIA, "Monthly Utility and Nonutility Fuel Receipts and Fuel Quality Data," 2010-2011 (to August 31, 2011).
12. DEQ, Wyoming Pollutant Discharge Elimination System Renewal Permit No. WY0001384 (Feb. 23, 2010).