

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

IN THE MATTER OF	)	PETITION TO OBJECT TO
Cheyenne Light, Fuel, and Power,	)	ISSUANCE OF A STATE
A Subsidiary of Black Hills Corporation,	)	TITLE V OPERATING PERMIT
Wygen II Station	)	
	)	
Permit Number: 3-0-229	)	
	)	
Issued by the Wyoming Department of	)	Petition Number: VIII-2011-
Environmental Quality, Air Quality	)	
Division	)	
_____	)	

**PETITION FOR OBJECTION**

Pursuant to Section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), WildEarth Guardians hereby petitions the Administrator of the U.S. Environmental Protection Agency (“EPA”) to object to the Wyoming Department of Environmental Quality, Air Quality Division’s (hereafter “DEQ’s”) issuance of an initial 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 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).

Unfortunately, DEQ refused to respond to WildEarth Guardians’ timely comments, arguing that they were not “received” in time. As will be explained, DEQ’s refusal to respond to WildEarth Guardians’ comments is not only contrary to applicable requirements, but also seemingly an effort to avoid responding to significant environmental concerns over the operation of Wygen II. As WildEarth Guardians demonstrated in its comments, the Wygen II Title V Permit suffered from a number of deficiencies, including, but not limited to, that it failed to appropriately permit the source in accordance with Title V and prevention of significant deterioration requirements under the Clean Air Act, failed assure compliance with Section 112 of the Clean Air Act, and failed to ensure adequate monitoring. *See* Exhibit 3, WildEarth Guardians’ Comments on Draft Title V Permit for Wygen II (April 15, 2011). Our grounds for objection are as follows.

## 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”).

According to EPA Region 8, the proposed Wygen II Title V Permit was submitted to EPA for review on April 21, 2011, meaning EPA’s 45-day review period ended on June 5, 2011. *See* Exhibit 4, E-mail from Christopher Razzazian, EPA Region 8 (May 20, 2011). Based on Petitioner’s conversations with EPA Region 8, the EPA did not object to the issuance of the Title V Permit. This petition is thus timely filed within 60 days following the conclusion of EPA’s review period and failure to raise objections.

## 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 Division’s proposal to renew the Title V Permit for Wygen II. *See* Exhibit 3. These comments provided clear and specific information and objections to the draft Wygen II Title V Permit. Petitioner requests the EPA object to the issuance of Permit Number 3-0-229 for Wygen II for the reasons set forth below.

## GROUND FOR OBJECTION

### I. THE DEQ FAILED TO RESPOND TO COMMENTS

Although Petitioner submitted detailed comments on the Wygen II Title V Permit on April 15, 2011, raising a number of detailed and specific objections, DEQ refused to respond to Petitioner’s comments, asserting that they were not received in a timely manner. *See* Exhibit 5, DEQ Refusal to Respond to Comments (May 12, 2011). DEQ’s assertion is contrary to applicable requirements and their failure to respond to significant comments from WildEarth Guardians is grounds for objection by the Administrator.

To begin with, indications are that WildEarth Guardians’ comments were in all likelihood received by DEQ prior to 5:00 P.M. on April 18, 2011, but that they were simply not delivered or otherwise were not accepted by DEQ until April 19, 2011. According to the U.S. Postal Service tracking report attached to DEQ’s Refusal to Respond to Comments, Petitioner’s comments arrived in Cheyenne, Wyoming—where DEQ is located—at 2:45 A.M. on April 18, 2011. The tracking report states that the comments were considered to be “Arrival at Unit,” which according to the U.S. Postal Service means that, “the item was scanned at the final postal unit

where delivery of the item will take place.” *See* [http://faq.usps.com/eCustomer/iq/usps/request.do?create=kb:USPSFAQ&view%28%29=cfc\\_usps0301c\]&varset%28source%29=sourceType:embedded](http://faq.usps.com/eCustomer/iq/usps/request.do?create=kb:USPSFAQ&view%28%29=cfc_usps0301c]&varset%28source%29=sourceType:embedded) (last visited August 4, 2011) (providing a description of what “Arrival at Unit” means). Mysteriously however, WildEarth Guardians’ comments were not considered to be “delivered” until April 19, 2011 at 7:01 A.M.—more than 28 hours after the comments were ready to be delivered at the final postal unit.

This major lapse in time between arrival at the final postal unit and actual delivery is exceptionally odd, especially in Cheyenne, Wyoming, which is not a large town. This lapse in time raises questions over whether DEQ was simply not available to accept the comments, or otherwise that the U.S. Postal Service did not obtain a scan demonstrating that the comments were delivered until the following day. In either case, DEQ cannot reasonably claim that WildEarth Guardians’ comments were not received by 5:00 P.M. on April 18, 2011.

However, and perhaps more importantly, DEQ’s position regarding the timeliness of WildEarth Guardians’ comments is just not supported by its own Title V rules and Title V regulations at 40 C.F.R. § 70.

Title V regulations state that permitting authorities “shall provide at least 30 days for public comment” on all permit proceedings, including initial permit issuance. *See* 40 C.F.R. § 70.7(h)(4). This requirement is echoed in Wyoming’s own Title V permitting rules, which state that, “The Division shall provide for a 30-day period for public comment[.]” Wyoming Air Quality Standards and Regulations (“WAQSR”) Chapter 6, Section 3(d)(ix)(D).

In this case, Petitioner in fact provided comments within the 30 days provided by DEQ for public comment. As DEQ notes in its Refusal to Respond to Petitioner’s comments, public notice of the draft Wygen II Title V Permit was published on March 17, 2011. Petitioner submitted their comments via Certified U.S. Postal Service Priority Mail on April 15, 2011, as DEQ notes in its Refusal to Respond to Comments. Thus, Petitioner submitted their comments on the 29<sup>th</sup> day after notice was provided, or within 30 days.

DEQ claims that comments were required to have been received by 5:00 P.M. on April 18, 2011, essentially arguing that submittal within the 30-day public comment period does not count as a timely submission. Although the published notice stated that comments were to be received by 5:00 P.M. on April 18, 2011, this notice, as well as DEQ’s position on this issue, is contrary to its own Title V permitting rules and 40 C.F.R. § 70.7(h)(4).

Indeed, nothing in the DEQ’s Title V permitting rules limit acceptance and consideration of public comments on Title V Permits only if received by 5:00 P.M. on the 30<sup>th</sup> day after publication of notice. As noted, DEQ’s Title V rules state only that, “The Division shall provide for a 30-day period for public comment.” WAQSR Chapter 6, Section 3(d)(ix)(D). This requirement is clear and unambiguous—at least a 30-day period must be provided for the public to comment.

The DEQ is certainly allowed to interpret its rules, but it cannot offer an interpretation that effectively subverts the rules, in this case effectively shortening the required public comment

period to less than 30-days. Here, DEQ's position that WildEarth Guardians' April 15, 2011 comments were to have been received, rather than postmarked, by 5:00 P.M. on April 18, 2011 has the effect of limiting the public comment period to less than 30 days. As explained, Petitioner submitted comments on the 29<sup>th</sup> day of the public comment period, as evidenced by postmark information attached to DEQ's Refusal to Respond to Comments.

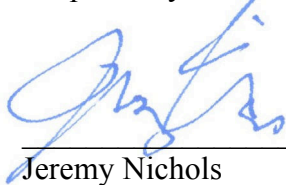
Although DEQ's Title V rules and Title V regulations at 40 C.F.R. § 70 do not directly speak to whether the 30-day comment period is based on whether comments are received or postmarked, EPA regularly interprets deadlines under Title V based on postmark dates, unless otherwise explicitly stated in the rules. As an example, EPA routinely considers Title V petitions filed pursuant to Section 505(b)(2) of the Clean Air Act that are submitted within 60-days to be timely. *See e.g., In the Matter of Georgia Power Company Bowen Steam-Electric Generating Plant, et al.*, Petitions IV-2002-3 and IV-2002-6 at 7 (March 15, 2006) (stating, "...EPA's 45-day review period ended on September 19, 2002. The sixtieth day following that date, which was the deadline for filing any petitions of this permit, was November 18, 2002. Petitioners' petition was postmarked November 18, 2002, and received by EPA on November 20, 2002. EPA considers this petition to be timely.").

The Administrator must object to the issuance of the Wygen II Title V Permit on the basis that DEQ failed to respond to Petitioner's comments. The DEQ's failure to respond to WildEarth Guardians' comments means that significant issues related to the ability of the Title V Permit to comply with the Clean Air Act have gone unaddressed. The EPA must object, particularly given the plain language of both DEQ's Title V rules and Title V regulations under the Clean Air Act, which clearly afford the public the opportunity to comment within 30 days.

## CONCLUSION

For the reasons stated above, Petitioners request the Administrator object to the issuance of the Title V Permit issued by the DEQ for Black Hills to operate the Wygen II Station. The Administrator has a nondiscretionary duty to issue an objection to the Title V Permit within 60 days in accordance with Section 505(b)(2) of the Clean Air Act.

Respectfully submitted this 4<sup>th</sup> day of August, 2011



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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. WildEarth Guardians' Comments on Draft Title V Permit for Wygen II (April 15, 2011) (with exhibits attached).
4. E-mail from Christopher Razzazian, EPA Region 8 (May 20, 2011).