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RE: Inadequate State Enforcement of North Dakota Coal Program Under SMCRA

Dear Mr. Klein and Mr. Holbrook:

The undersigned attorneys submit this letter on the behalf of the Dakota Resource Council and respectfully request immediate action by the Office of Surface Mining, Reclamation and Enforcement ("OSM") to halt imminent construction of a proposed coal processing facility at a mine site near South Heart, North Dakota. The North Dakota Public Service Commission ("ND PSC") has declined to exercise jurisdiction over this facility. Specifically, we request that OSM enforce the requirements of the Surface Mining Control and Reclamation Act ("SMCRA") and immediately notify ND PSC and the project proponents in writing that no ground-disturbing activities should be taken at the site unless and until OSM has ruled on the jurisdictional question and the permitting requirements of SMCRA have been achieved.

Toward this end, we respectfully request that OSM, after public notice and notice to the State of North Dakota, hold a hearing in the State to evaluate the State's capability and intent to enforce State programs and/or whether OSM is now the *de facto* permitting agency for the proposed coal processing facility.

Factual Background

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Dakota Resource Council (“DRC”) is a non-profit organization formed in 1978 to protect North Dakota's land, air, water, rural communities and agricultural economy. DRC works for the preservation of family farms, enforcement of corporate farming laws, soil and water conservation, regulation of coal mining and oil and gas development, protection of groundwater and clean air, renewable energy, and sound management of solid and toxic wastes. DRC members include farmers, ranchers and community members in the South Heart area who will be directly impacted by the proposed lignite mining and coal gasification operation, of which the proposed coal processing facility is a part. DRC and its members have participated in local land use proceedings and state permitting proceedings for the proposed mining and coal gasification operation, as well as for the proposed coal processing facility that is at issue here.

The proposed coal processing facility is a coal beneficiation facility to be owned and operated by GTL Energy (USA) Limited (“GTL”). GTL has a contractual agreement with Great Northern Power Development and Allied Syngas Corporation to construct and operate the beneficiation facility in connection with a proposed lignite mining operation and coal gasification facility near South Heart, North Dakota. Per the terms of the agreement, GTL's facility will upgrade the lignite mined at the South Heart site for use in the coal gasification facility. No permits have been issued under SMCRA or related North Dakota state laws for the beneficiation facility, the mining operation or the coal gasification facility.

On August 5, 2008, ND PSC responded to a request by GTL for a jurisdictional determination on GTL's proposed South Heart coal beneficiation facility, pursuant to North Dakota Century Code (“N.D.C.C.”) Chapter 38-14.1 (Surface Mining and Reclamation Operations). ND PSC found as follows:

Since the coal beneficiation facility proposed by GTL Energy (USA) Limited will not be operated “in connection with” the proposed coal mine near South Heart or any other coal mine and because it is not a “coal preparation plant”, the facility is not a “surface coal mining operation” under N.D.C.C. Chapter 38-14.1. Therefore, GTL Energy (USA) Limited does not have to obtain a surface coal mining permit from the Commission for the coal beneficiation facility.¹

We believe this finding is in error, contrary to plainly stated law and OSM regulations, and therefore warrants immediate OSM review and intervention. Compounding the problem is the ND PSC's failure to provide public notice or a hearing process in support of this finding, thereby effectively leaving the public without a voice or recourse.

The GTL Facility Is a Proposed Coal Processing/Preparation Plant Regulated Under SMCRA

Here, and as a direct result of ND PSC's behind-closed-doors jurisdictional determination, neither the ND PSC nor GTL has demonstrated that the facility is not a “coal preparation plant”, defined by OSM regulations as “chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.”² The ND PSC's finding includes no supporting legal reasoning whatsoever. As set forward below, ND PSC's determination is clearly erroneous and

¹ Attached as Exhibit A-1.

² 30 C.F.R. §701.5.

contrary to law.

OSM regulations make no distinction between coal preparation and coal processing:

Although OSMRE uses the term “preparation” in this final rule at 30 C.F.R. §785.21 and 30 C.F.R. Part 827 and also in the definition at 30 C.F.R. §701.5, because of numerous references to “processing” in the Act, earlier regulations, court decisions, and comments received, OSMRE continues to refer to the subject activity as “processing” as well as “preparation” in the preamble to this rulemaking.³

OSM’s Final Rule clearly requires permitting of coal processing facilities at mine sites.⁴ The D.C. Circuit has recognized that OSM regulates facilities “at or near” and also “in connection with” a surface coal mine as defined in 30 U.S.C. § 1291(28)(a).⁵ In *National Wildlife Federation v. Hodel*, the court held:

SMCRA gives the Secretary jurisdiction over “surface coal mining operations,” which are broadly defined by § 701(28) (A) as including “activities conducted on the surface of lands in connection with a surface coal mine. . . . Such activities include . . . in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine site.*” *Id.* (emphasis added by court). For its part, the companion subsection, 701(28) (B), states that “surface coal mining operations” include:

the areas upon which [those activities identified in § 701(28) (A)] occur or where [those activities identified in § 701(28) (A)] disturb the natural land surface. Such areas shall also include . . . repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, *resulting from or incident to* [those activities identified in § 701(28) (A).] SMCRA § 701(28) (B) (emphasis added by court).⁶

The North Dakota Administrative Code includes similar language at Section 69-05.2-01-02(11):

“Coal preparation plant” means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following; loading facilities, storage and stockpile facilities, sheds, shops and other buildings, water treatment and water storage facilities, settling basins and impoundments, and coal processing and other waste disposal areas.

North Dakota law and federal law therefore provide plain definitions of coal preparation plants regulated under SMCRA that have been ignored by ND PSC in this case.

In sum, we respectfully assert that GTL’s facility, as a matter of law, is a coal

³ 53 Fed. Reg. 47384 (Nov. 22, 1988) at 2.

⁴ 53 Fed. Reg. 47378 and 47384 (Nov. 22, 1988).

⁵ *National Wildlife Federation v. Hodel*, 839 F.2d 694, 742-743 (D.C. Cir. 1988).

⁶ *Id.*

preparation/processing plant regulated under SMCRA. For this reason, we respectfully assert that the ND PSC's jurisdictional determination is unlawful and contrary to the requirements of SMCRA.

Request for OSM Intervention

As a direct result of ND PSC's unnoticed jurisdictional determination, the public has been compelled to seek recourse and request intervention from OSM.

The enforcement section of SMCRA provides OSM with a clear course of action in response to inadequate state enforcement of approved state programs:

(b) Inadequate State enforcement; notice and hearing. Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act [30 USCS §§ 1201 et seq.], the Secretary shall enforce, in the manner provided by this Act [30 USCS §§ 1201 et seq.], any permit condition required under this Act [30 USCS §§ 1201 et seq.], shall issue new or revised permits in accordance with requirements of this Act [30 USCS §§ 1201 et seq.], and may issue such notices and orders as are necessary for compliance therewith: *Provided*, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this Act [30 USCS §§ 1201 et seq.] before suspending or revoking the State permit.⁷

“Secretary” means the “Secretary of the Interior” but is essentially OSM.⁸

“Surface coal mining operations” covered by SMCRA include “the cleaning, concentrating, or other processing or preparation” of coal “at or near the mine site...”⁹ SMCRA's application to coal preparation plants, including coal plants not within a mine permit area, is supported by OSM regulations as cited *supra*.

Any person who operates a coal preparation plant not located within a mine permit area is nonetheless required to obtain a permit from the regulatory authority.¹⁰ Performance standards for coal preparation plants outside of mine permit areas are also provided by regulation.¹¹

⁷ 30 U.S.C. §1271(b).

⁸ 30 U.S.C. §1291.

⁹ 30 U.S.C. §1291(28)(A).

¹⁰ 30 C.F.R. §785.21(a).

¹¹ 30 C.F.R. §827.1 *et seq.*

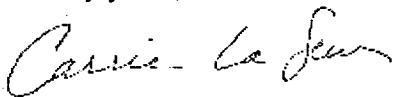
Here, PSC's determination not to regulate GTL's coal preparation plant under North Dakota law implicates SMCRA and OSM's implementing regulations. By refusing to act as the regulatory authority, North Dakota has failed to enforce its state program.

Conclusion

We respectfully request that the Secretary hold a hearing on the State's failure to enforce the requirements of SMCRA. In the interim, we hereby request that the Secretary and OSM enforce SMCRA until such time as North Dakota has adequately demonstrated its capability and intent to enforce its State program. As a first step, we respectfully request that OSM immediately direct GTL to take no ground-disturbing actions which would jeopardize the *status quo ante* while this important matter is resolved and addressed by the agency.

Because time is of the essence and because we believe ground-disturbing activities for this facility by GTL may be imminent, we request that you respond to this letter within five (5) working days. Thank you for your consideration of this matter. We look forward to your timely response.

Sincerely yours,



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