STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Resource Council et al.
vs. GTLE Dakota Plant 1, LLC
Complaint

Case No. RC-09-32

ORDER GRANTING MOTION TO DISMISS
February 24, 2010

Preliminary Statement

On January 22, 2009, Dakota Resource Council (DRC), Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt (Complainants) filed a Complaint alleging GTLE Dakota Plant 1, L.L.C., (GTLE) is in violation of N.D.C.C. § 38-14.1-10, N.D.A.C. § 69-05.2-05-01, 30 U.S.C. § 1256, and 30 C.F.R. § 773.4 for conducting surface coal mining operations without a permit through its alleged connection with the proposed South Heart lignite mine owned and operated by South Heart Coal L.L.C. (SHC), Great Northern Project Development L.P. (GNPD).

The Complainants alleged that the coal beneficiation facility being constructed by GTLE southwest of South Heart, North Dakota, is a "coal preparation plant" as defined in the reclamation rules and therefore must be permitted by the Public Service Commission as "surface coal mining operations" under the reclamation law. The Complainants also alleged that by GTLE's construction and operation of the coal preparation plant, North Dakota's land, air, water, rural communities, and agricultural economies would be adversely impacted.

On February 11, 2009, the Public Service Commission found that the Complaint stated a *prima facie* case, and served the complaint on the GTLE on the same date.

On March 5, 2009, GTLE filed its Answer to the Complaint.

On March 25, 2009, GNPD filed a letter on behalf of SHC indicating its decision to withdraw its Surface Coal Mining Permit application for the South Heart lignite mine, Application No. SHSH-0801.

On April 8, 2009, the Complainants filed a Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof.

On April 13, 2009, GTLE filed a Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief can be Granted, or in the Alternative, Motion for Summary Judgment, along with a supporting brief.

On April 15, 2009, GTLE filed the original Affidavit of Robert R. French; a copy of which was included as an attachment to its brief in support of its motions.

On April 21, 2009, GTLE filed a response to Complainants' Motion for Leave to Amend and Supplement Complaint.

On April 23, 2009, Complainants filed a Motion to Strike Respondent's Motion to Dismiss and Memorandum in Support Thereof and a Motion Pursuant to N.D.R.Civ.P. 56(f) to Refuse or Continue Respondent's Motion for Summary Judgment and Memorandum in Support Thereof, with attached Affidavit of Paul C. Blackburn.

On May 1, 2009, GTLE filed a response to Complainants' Motion for Leave to Amend and Supplement Complaint.

On May 5, 2009, GTLE filed a response to Complainants' motions of April 23, 2009.

On May 19, 2009, Administrative Law Judge Wahl issued a Memorandum of Procedure for Determination of Pending Motions.

On June 24, 2009, the Commission granted the Complainants' Motion to Amend and Supplement Complaint, dismissed without prejudice GTLE's motions, and dismissed as moot Complainants' responsive motions. The Commission also requested that Judge Wahl issue the corresponding order implementing decision and setting forth the procedure for going forward.

On July 1, 2009, Administrative Law Judge Wahl issued an Order implementing the Commission's June 24, 2009 decision.

On July 17, 2009, the Complainants filed a First Amended and Supplemented Complaint.

On July 29, 2009, the Public Service Commission found that the First Amended and Supplemented Complaint stated a *prima facie* case, and served the complaint on GTLE on July 30, 2009.

On August 13, 2009, GTLE filed an Answer to the amended complaint of the Complainants.

Also on August 13, 2009, GTLE filed a Motion to Dismiss the First Amended and Supplemented Complaint for Failure to State a Claim upon which Relief can be Granted, or in the Alternative, Motion for Summary Judgment, along with a supporting brief, exhibits and the Affidavit of Robert R. French.

On August 31, 2009, the Complainants filed a Motion Pursuant to N.D.R.Civ.P. 56(f) to Refuse or Continue Respondent's Motion for Summary Judgment with the Affidavit of Paul C. Blackburn.

Also on August 31, 2009, the Complainants filed a Response in Opposition to Motion to Dismiss.

On September 14, 2009, GTLE filed its response to Complainants' motion and opposition.

On October 2, 2009, Administrative Law Judge Wahl issued a Memorandum of Procedure for Further Proceedings directing that the pending motions are each referred for determination upon consideration and vote by the Commissioners.

On November 25, 2009, GTLE filed a Motion for Protective Order and Brief. On December 10, 2009, Complainants filed an opposing response. On December 17, 2009, GTLE replied to Complainants opposition.

On December 28, 2009, Complainants filed a Surreply to Motion for Protective Order.

On December 31, 2009, Administrative Law Judge Wahl issued a Protective Order and an Order Denying Motion to Reschedule Prehearing Conference.

Analysis

Motion to Dismiss

The first issue to be addressed by the Commission is whether the Amended Complaint should be dismissed under Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure for failure to state a claim upon which relief can be granted. If the pleadings disclose with certainty the impossibility of proving a claim upon which relief can be granted, dismissing the complaint for failure to state a claim is permissible if an administrative agency cannot discern a potential for proof to support the claim. *Voigt vs. State*, 759 N.W.2d 530, 532 (N.D. 2008).

Coal mining in North Dakota is regulated by the Commission under North Dakota Century Code Chapter 38-14.1. Section 38-14.1-02(33) defines "surface coal mining operations" to mean:

> a. Activities affecting the surface of lands in connection with a surface coal mine. Such activities include extraction of coal from coal refuse piles, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, and loading of coal at or near the minesite, except that such activities do not include coal exploration subject to chapter 38-12.1, or the extraction of coal incidental to reclamation operations under chapter 38-14.2; and

b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all adjacent lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, 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, <u>resulting from or incident to such activities.</u>

(Emphasis added).

It is undisputed that there is no coal mine anywhere in the vicinity of GTLE's coal beneficiation facility, nor is there a permit pending with this Commission for a coal mine in the vicinity. As a result, it becomes a question of law for this Commission to determine if the mining law, and particularly the phrase "in connection with" in N.D.C.C. Section 38-14.1-02(33)(a) extends to mines anywhere in the United States and around the world. As this is a question of law for this Commission to determine, additional facts or information are not required for us to address this issue.

North Dakota's coal mining and reclamation laws and rules are patterned after the federal coal mining and reclamation program and must be consistent with that program. The federal Office of Surface Mining Reclamation Enforcement (OSM) adopted what is known as the Final Rule set forth in the *Federal Register* at 53 F.R. 47378 and 53 F.R. 47384 (November 22, 1988). The preamble discussion for this Final Rule offers federal guidance regarding what activities are deemed to be in connection with a coal mine.

In the Final Rule, OSM stated that "it continues to believe that the ability of mine operators, or coal handlers directly serving such operators to have control of processing operations is essential to establishing that a processing plant is being operated in connection with a coal mine." Final Rule at 47385. OSM went on to state that it is "only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which mine operators and coal handlers who directly serve them, such as coal processors, have or could have control of operations." *Id.* OSM also stated that "it is valid to consider whether a facility has a useful life independent of a specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine . . ." *Id.* at 47389.

OSM did note that the term "in connection with" is not defined. OSM indicated that it did not want to define the phrase such that it would unduly restrict the discretion the regulatory authority must have in order to make valid decisions about the applicability of the law. *Id.* at 47385.

The federal Surface Mine Control and Reclamation Act is found at 30 USCS 1201, et seq. (SMCRA). OSM clarified "there is nothing in the Act or in its history that implies that SMCRA was meant to apply nationwide to all industrial facilities that process coal irrespective of whether or not they are operating in connection with a mine." *Id.* at 47386. Rather, OSM "wishes to appropriately limit and concisely state the jurisdiction provided in (SMCRA) over coal preparation which results from or is incident to an activity "in connection with" a coal mine. *Id.* at 47388.

GTLE will sell its processed coal through wholesale markets to end users in commerce. Therefore, GTLE's facility will be closely linked to ultimate end users, those facilities which desire to obtain a process to beneficiate their coal to meet environmental requirements. GTLE's facility will test coals from mines in the United States and around the world, and will have a useful life independent of any specific mine. OSM's discussions in the Final Rule indicate that coal processing facilities which are for the purpose of the end user, are not "in connection with" a surface coal mining operation. *Pacificorp vs. Office of Surface Mining Reclamation and Enforcement*, IBLA 95-175, 143 IBLA 237 (1998).

With respect to mining support facilities, OSM stated in the Final Rule that it "would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which a facility results from or is incident to regulated mining activity." Final Rule at 47381. With respect to GTLE's facility, there is no mine in the vicinity so there is no mine to be dependent upon and no mine operator to control it.

In *National Wildlife Federation vs. Hodel*, 839 Fed.2d 694, 745 (Cir. D.C. 1988), the Court of Appeals held that "some type of limiting principle of proximate causation" is very significant in determining what support facilities are subject to SMCRA. The most likely "proximate cause" is that the processing facility depends upon a particular mine's requirements. The court considered the language of 30 USC § 1291 (28)(B) indicating that "surface coal mining operations" could apply to activities on adjacent land "resulting from or incident to such activities." The court felt that this language indicated an intent by Congress to suggest a causal connection, otherwise every support facility would be considered a "but for" result of a surface coal mining operation and subject to regulation under SMCRA. The court noted that the language "resulting from or incident to" connotes an element of proximity to the activity, and that proximity is used as a guiding principle in a flexible implementation of SMCRA.

In a case from the Interior Board of Land Appeals, it was also noted that the Final Rule indicates that use of the words "resulting from or incident to" connotes an element of proximity. The Board quoted with favor from the Final Rule in which OSM stated it will address three factors when deciding whether a facility is properly considered to result from or be incident to a surface coal mining activity: (1) whether the facility is geographically proximate to the producing mine, (2) whether the facility is functionally tied to that particular mine in question, and (3) whether the facility is economically dependent upon that particular mine. *Citizen's Coal Council, et al.*, 142 IBLA 33, 37

(1997). The Board held that such support facilities must have a direct and meaningful connection to a surface coal mine, as to hold otherwise would bring facilities within the ambit of SMCRA regulation that are not functionally and/or economically tied to a regulated surface coal mining activity. *Id.* at 38.

There is no mine in the vicinity of South Heart. There clearly is no proximity, functional tie or economic dependence where there is no mine. The Complainants assert that the coal beneficiation facility will be operated "in connection with" coal mines anywhere in the United States and around the world which may provide coals to the facility for testing. We find no basis for such a broad interpretation of the law. In fact, a contrary intention is shown. For example, we note that North Dakota Century Code § 38-14.1-02(33)(a) provides in part that for coal loading facilities to be "in connection with" a coal mine, such facilities must be located "at or near the mine site."

OSM clarified "that it is valid to consider whether a facility has a useful life independent of the specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine . . ." Final Rule at 47388. As the GTLE facility will process coals from around the world, it will have a useful life independent of any specific mine.

This Commission has ruled on similar issues in two prior cases. *In Schulte Coal, Inc., Termination of Permit SLTC-8703,* Case No. RC-1070-92-936, our order dated November 10, 1992, included findings that the plant operator, Schulte Coal, bought its coal from the nearby Center Mine; and at its plant crushed, screened and sized coal for retail sales. We concluded that because Schulte Coal also had the ability to purchase coal from other mines, its coal preparation plant was not operating in connection with the Center Mine or any other mine. The Commission ordered that Schulte Coal's permit be terminated and the performance bond cancelled.

In a more recent case, we found that a proposed coal beneficiation facility to be constructed near the Falkirk Mine was not being operated "in connection with" the coal mine. *The North American Coal Corporation, Proposed Coal Beneficiation Facility – McLean County, Jurisdictional Determination,* Case No. RC-07-686 (2007). Even though there was an existing coal mine operating in close proximity to the proposed coal beneficiation facility, which coal mine would supply coal to the facility, and the facility was to be owned in part by the parent company of the mine operator; we found that no surface coal mining permit was needed because the coal beneficiation facility was to be operated for the benefit of the end user - the nearby power plant.

In both of these prior cases, there was a coal mine in proximity to the facility, yet we found the mining law did not apply in either case. In the instant case, Complainants acknowledge there is no coal mine anywhere near the GTLE facility. Yet, Complainants are essentially asserting that this Commission would have jurisdiction over any mine located either in the United States or around the world simply because it provides coal to the facility for testing purposes. This interpretation ignores the "geographical proximity" factor and is inconsistent with our prior decisions.

The determination by the Reclamation Director is in accord with relevant facts and applicable law. For this Commission to find that GTLE's facility is a surface coal mining operation would, in effect, require us to assert jurisdiction over every mine that supplies coal to it, wherever located in the United States or around the world.

We find that the meaning of the statutory phrase "in connection with" a surface coal mine is central to our determination whether to grant GTLE's Motion to Dismiss. There is currently no mine in the vicinity of the coal beneficiation facility, nor is there an application pending for any such coal mine. GTLE's facility will have a useful life independent of any one coal mine and will operate primarily for the benefit of end users. GTLE's facility is not operated in connection with a surface coal mine and no permit is required. Even if there would be a mine in the vicinity of the beneficiation plant, we conclude that the GTLE facility will have a useful life independent of that mine and the facility will be operated for the benefit of end users. Consequently, we affirm the decision of the Reclamation Director and conclude that the beneficiation plant is not operated in connection with a coal mine subject to our jurisdiction.

Motion for Summary Judgment
Motion to Refuse or Continue Motion for Summary Judgment

Because we grant GTLE's Motion to Dismiss we do not need to reach GTLE's alternative Motion for Summary Judgment, nor Complainants' corollary Motion Pursuant to N.D.R.Civ.P. 56(f) to Refuse or Continue Respondent's Motion for Summary Judgment. The Motion for Summary Judgment and Motion to Refuse or Continue should be dismissed as moot.

Order

The Commission Orders:

1. The motion of GTLE to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted is GRANTED.

2. Other pending motions are moot and are DISMISSED.

PUBLIC SERVICE COMMISSION

Tony Clark **Commissioner**	**Kevin Cramer** **Chairman**	**Brian P. Kalk** **Commissioner**