**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF NORTH DAKOTA**

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| Dakota Resource Council,<br>Neil and Laura Tangen,<br>Myron and Nancy Eberts, and<br>Frank and Lucy Hurt,<br>Complainants,<br><br>vs.<br><br>GTLE Dakota Plant 1 LLC<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Case No. RC-09-32** |

## COMPLAINANTS' PETITION FOR RECONSIDERATION

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, by their attorneys hereby petition the Public Service Commission ("Commission") pursuant to N.D.C.C. § 28-32-40 and N.D.A.C § 69-02-06-02 to reconsider its February 25, 2010, Order Granting Motion to Dismiss ("February 25 Order"). Complainants assert that new evidence and clear errors of law show that the Commission must deny the motion to dismiss.

## STATEMENT OF FURTHER SHOWING

The following statement contains additional facts relevant to the Commission's February 25 Order. Additional facts relevant to this Petition that already in the record are also included for the Commission's convenience.

On February 22, 2010, Great Northern Project Development (hereinafter Great Northern Project Development and its corporate predecessor, Great Northern Power Development are

referred to as "GNPD") filed an Application for Amendment to rezone property from agricultural to industrial ("Zoning Application") (Exhibit A). The Zoning Application lists a number of conditional uses, including use of the land for a coal mine and for mineral and other substance exploration or excavation and mining. It also describes the land to be rezoned, including all or parts of 17 sections of land near South Heart, North Dakota. Included in this description is the northern half and southeast quarter of Section 20 in Township 139 North, Range 98 West. The Zoning Application is proof of GNPD's intent to open and operate a coal mine near South Heart, North Dakota.

According to the Application to Obtain Coverage Under NDPDES General Permit for Storm Water Discharges Associated with Construction Activities submitted by Respondents to the Department of Health on September 3, 2008, (Exhibit B) the legal description of Respondent's "coal drying plant" near South Heart is "SW1/4NW1/4Section 20."

Therefore, GNPD's Zoning Application seeks to permit coal mining in Section 20, immediately adjacent to Respondent's proposed coal drying and briquetting facility ("Preparation Plant").

This is the third time that GNPD has submitted a zoning application to Stark County that would permit it to mine for coal near South Heart. GNPD filed its first zoning application in 2008, which was approved by the Stark County Commission on September 8, 2008, 2008, (Exhibit C) but then overturned by court order dated July 23, 2009 (Exhibit D). GNPD filed its second zoning application on November 24, 2009, but abruptly withdrew it just prior to a February 1, 2010, public hearing on this application. *GNPD to Reschedule Hearing*, Dickinson Press, February 2, 2010 (Exhibit E).

GNPD has announced three different proposals to develop coal conversion facilities near South Heart, each of which included development of a mine at the site. On August 18, 2005, GNPD submitted a Letter of Intent to the Commission to build a coal-fired power plant ("2005 Letter of Intent") (Exhibit F). By letter dated January 23, 2008, GNPD updated and revised the 2005 Letter of Intent by stating an intention to not construct a power plant but instead to construct a coal gasification facility and related mine at the same location ("2008 Letter of Intent") (Exhibit G). Most recently, GNPD announced that it applied for a Department of Energy grant to build a coal-to-hydrogen electrical plant and related coal mine at this same site. *A Change in Plant Plans*, Dickinson Press, August 1, 2009 (Exhibit H).

By letter dated October 15, 2008, GNPD submitted an application for a proposed 300,000 ton per year mine near South Heart (Exhibit I), which was rejected by the Commission as incomplete, and by letter dated March 25, 2009, GNPD withdrew this application. (Exhibit K). Since then, GNPD has stated an intent to submit a revised surface coal mining operations permit later this year. *GNPD to Reschedule Hearing*, Dickinson Press, February 2, 1010.

## STATEMENT OF GROUNDS FOR PETITION

### I. The Commission's Jurisdictional Investigation Did Not Comply with State and Federal Law and Is Therefore Materially Inadequate and Did Not Include Evidence Required for a Jurisdictional Determination

The Commission is required by law to conduct an adequate investigation of facts necessary to determine whether or not the Preparation Plant is subject to regulation under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (2010) ("SMCRA") and the North Dakota Surface Mining and Reclamation Operations Act, N.D.C.C. § 38-14.1-01 *et seq.* (2010) ("State Mining Law"), specifically N.D.C.C. §§ 38-14.1-03(15), 30(3)(b) (2010) and

30 U.S.C. § 1267 (2010) (made applicable to North Dakota by 30 U.S.C. § 1253 (2010). Although the Commission may use the complaint procedure contained in N.D.A.C. Chapter 69-02-02 to hear complaints from parties who claim a violation of the State Mining Law, use of this procedure does not relieve the Commission from its independent and affirmative obligation to investigate alleged violations of law, including investigations necessary to determine jurisdiction over surface coal mining operations.

The Commission has violated its duty under SMCRA and the State Mining Law to itself conduct an adequate investigation, or in the alternative, to allow Complainant to conduct such investigation through discovery and provide the fruits of discovery to the Commission for its consideration.

A number of federal court and Interior Board of Land Appeals ("IBLA") decisions demonstrate that SMCRA implementing agencies must investigate whether a preparation plant is "in connection with" the coal mine or mines that currently supply or that are intended to supply such preparation plant with coal. *See*, *NWF v. Hodel*, 839 F.2d 694 (1988); *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, 31 ERC (BNA) 2034; *Citizens Coal Council*, 142 IBLA 33 (1997); *PacifiCorp v. OSMRE*, 143 IBLA 237 (1998). This precedent describes the scope of such investigation, including the facts that must be investigated. Specifically, implementing agencies must investigate facts sufficient to determine the geographic, functional, and economic relationships between a preparation plant and the mine or mines that do or are intended to supply coal that is or will be processed for sale. *See Citizens Coal Council*, 142 IBLA at 37. Also, implementing agencies must determine whether coal processing is necessary for the transportation or marketing of coal from a mine, *Id.* at 35, and whether or not a preparation plant is at the point of ultimate use of coal. *PacifiCorp*, 143 IBLA 237.

Even though the Commission found that Respondent "will sell its processed coal through wholesale markets to end users in Commerce," it failed to adequately investigate, or allow Complainants to investigate through discovery, the source of coal to be processed at the Preparation Plant for commercial sale. As a consequence, the Commission did not investigate and does not know the identity or location of the mine or mines that will supply Respondent's Preparation Plant with coal to be sold in commerce. Given this lack of information, it is impossible for the Commission to apply federally required jurisdictional tests.

Rather than conduct an investigation into the intended sources of coal to be commercially processed, the Commission found only that no mine currently exists near South Heart and that the Preparation Plant will test process coal from distant mines in the United States and around the world. Such findings are not an adequate basis for a jurisdictional determination because they do not affirmatively determine the source of coal to be processed for commercial sale. Instead these findings relate only to possible sources of coal that the Commission believes, or the facts show, cannot be sources of coal.

The February 25 Order essentially concludes that because no mine currently exists near South Heart, that therefore no coal will come from a mine near South Heart. Thus, the Commission has identified and dismissed a possible source of coal.

With regard to coal provided from distant mines in the United States and from around the world to be test processed at the Preparation Plant, Respondent has repeatedly stated that such coal will be returned to its distant source mine for evaluation by its owner and will not be sold into commerce in the United States, with the result that tested coal cannot serve as the source of coal for sale into commerce. Further, Complainants have provided evidence that the amount of coal needed from a mine for testing is approximately 0.2% of the annual capacity of the

Preparation Plant (approximately 500 tons out of an annual capacity of up to 300,000 tons), Complainants' Surreply to Motion for Protective Order p. 10-11, such that this quantity of coal cannot serve to provide enough coal to operate the Preparation Plant at a commercial scale. Further, it is well known that it is not economically viable to ship unprocessed lignite coal long distances due to its low energy content and tendency to spontaneously combust, such that distant mines cannot serve as source of coal for viable commercial operation of the Preparation Plant. One of the purposes of the Preparation Plant is to process lignite so that it may be shipped economically and safely, which is not now commercially feasible. As a consequence, the evidence before the Commission regarding processing of coal from distant mines proves only that Respondent does not intend to process such coal for sale into commerce and that such coal cannot serve as the source of coal to be sold into commerce.

Although Respondent filed affidavits in this proceeding indicating that it was in negotiation with BNI Coal to acquire commercial quantities of coal from the Center Mine in North Dakota, there is no evidence before the Commission about whether such negotiations resulted in a coal supply agreement or other evidence of mutual intent that the Center Mine would be the source of coal for the Preparation Plant. In any case, the Commission did not mention or consider the Center Mine in the February 25 Order, with the result that the Commission did not apply the required jurisdictional analysis to the Center Mine. Therefore, the Center Mine did not and cannot serve as the subject of a proper jurisdictional determination.

Remarkably, the Commission found that Respondent "will sell its processed coal through wholesale markets to end users in Commerce," February 25 Order at 5, but then did not identity even a single mine that Respondent intends to be the source of coal to be processed for commercial sale.

Federal law reasonably requires that jurisdictional investigations for preparation plants analyze the connections between preparation plants and the mine or mines that are intended to supply coal or currently do supply coal to be processed for sale. Here, the Commission could not have conducted such an analysis because it did not identify the mine or mines from which Respondent intends to acquire coal for commercial sale. Therefore, the Commission does not have an adequate evidentiary foundation on which to base the jurisdictional analysis required by federal law. This failure to acquire necessary evidence is the result of the Commission's failure to itself conduct an adequate investigation or to allow Complainants to use discovery to investigate Respondent's intended sources of coal for commercial processing. Therefore, the February 25 Order violates federal and state law, is not supported by required evidence or findings of fact, does not adequately consider facts before the Commission, and is arbitrary and capricious.

## II. The February 25 Order Is in Violation of Law, Is Without Evidentiary Foundation, and Is Arbitrary and Capricious

### A. The February 25 Order

The February 25 Order states that the Commission has no jurisdiction because:

1. there is no mine currently in the vicinity of Respondent's Preparation Plant near South Heart, North Dakota, with the result that an extension of jurisdiction over the Preparation Plant could only be based on connections to mines located anywhere in the United States or around the world, which mines are not within the Commission's jurisdiction, February 25 Order at 4;
2. the operator of the Preparation Plant, Respondent, does not directly serve a mine operator, *Id.*;

3. the Preparation Plant has a useful life independent of any particular mine, *Id.* at 5, 6, 7;
4. the Preparation Plant will be closely linked to end users, *Id.*;
5. the Preparation Plant is a "support facility" such that for jurisdiction to attach it must be economically dependent on a mine, but here it cannot be dependent on a mine because there is no mine currently near the Preparation Plant, *Id.*;
6. The Preparation Plant is not proximately related to a mine because it is not dependent on a particular mine's requirements and because there is no mine currently in the vicinity of the Preparation Plant, *Id.* at 5-6;

The Commission also analogizes to its two prior decisions related to coal preparation plants, one related to a preparation plant the processed coal for retail sale and the other related to processing of coal for the benefit of a nearby power plant. *Id.* at 6. Finally, it states that even if there were a mine in the vicinity of the Preparation Plant, that jurisdiction does not exist because: (1) the Preparation Plant will have a useful life independent of that mine; and (2) the Preparation Plant will be operated for the benefit of end users. *Id.* at 7. Based on these legal findings, the Commission concludes that Respondent's Preparation Plant is, as a matter of law, not subject to the State Mining Law and SMCRA and therefore dismissed the Complaint for failure to state a claim upon which relief may be granted. *Id.* at 7.

The Commission also found that Respondent "will sell its processed coal through wholesale markets to end users in Commerce." *Id.* at 5.

Finally, the Commission makes the following false statement of fact: "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." *Id.* at 6.

All of the Commission's legal findings violate SMCRA and the State Mining Law.

### B. The Absence of a Mine at South Heart Does Not Preclude Jurisdiction Over Respondent's Preparation Plant if a Mining Company Has an Intent to Mine Coal Immediately Adjacent to the Preparation Plant

In its February 25 Order the Commission relies heavily on the fact that no coal mine currently exists near South Heart. Specifically, the Commission finds that because no coal mine currently exists near South Heart the question before the Commission is whether its jurisdiction extends to "mines located in the United States and around the world." On page 5 the February 25 Order states, "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." On page 6 the Commission states, "There is no mine in the vicinity of South Heart. There clearly is no proximity, functional tie, or economic dependence where there is not a mine." The Commission is in error that jurisdiction may be found only where a mine currently exists, because in the context of permitting new mines and new preparation plants it has jurisdiction when an operator intends to conduct surface coal mining operations, such that the absence of an existing mine is not dispositive.

N.D.C.C. § 38-14.1-10 states, "It is unlawful for any operator to engage in surface coal mining operations without first obtaining from the commission a permit to do so." (Emphasis added). N.D.C.C. § 38-14.1-13(1) states that operators "desiring to engage in surface coal mining operations shall make written application to the commission for a permit." (Emphasis added). N.D.A.C. § 69-05.2-05-01 states, "Each operator or permittee who conducts or expects to conduct surface coal mining and reclamation operations shall file a complete permit

application." (Emphasis added). NDAC § 69-05.2-09-19, which requires applications for off-site coal preparation plants, states that a person "who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine" must obtain a permit from the Commission, including but not limited to a permit to construct and operate the preparation plant. (Emphasis added). Therefore, State regulation makes clear that an intent to engage in surface coal mining operations is a sufficient basis for jurisdiction.

That the Commission's jurisdiction can be based on future intent makes sense because the Commission's regulations apply to permits to conduct future surface coal mining operations and are not limited to permitting current surface coal mining operations. If intent were not a basis for jurisdiction, it would be impossible for the Commission to issue permits before the start of surface coal mining operations, which pre-operational permits are required by N.D.C.C. § 38-14.1-13(1) and N.D.A.C. § 69-05.2-05-01.

Where a mine and adjacent coal preparation plant are proposed by separate entities, the intent of both the mine operator and preparation plant operator are relevant to the Commission's jurisdictional determination over the preparation plant. If the intent of a coal mine operator may be considered and the Commission's jurisdiction over a preparation plant must be based only on the presence of an existing coal mine, then the Commission could never permit a preparation plant before the coal mine that fed it came into operation – even if there was no doubt that the surface coal mine operator intended to build a mine to feed an independently owned preparation plant. In permitting of a new preparation plant built to service one or more new mines, the Commission must base its jurisdictional determination on both the intent of the future coal mine operator and the intent of the future preparation plant operator.

Here, Complainants have alleged that both Respondent and GNPD have an intent to conduct surface coal mining operations. Given the recent Zoning Application, GNPD's two prior zoning applications, its three proposals to construct mines at the site, and press statements indicating an intent to submit a surface coal mining operation application, there can be no doubt that GNPD currently intends to operate a coal mine near South Heart. The fact that GNPD withdrew an already rejected surface coal mining application does not change GNPD's intent because other evidence of GNPD's intent is overwhelming.

The Commission's reliance on the absence of a coal mine near South Heart in its jurisdictional determination instead of consideration of GNPD's unquestionable intent to operate a coal mine is a misapplication of the clear language of N.D.C.C. §§ 38-14.1-10, 13(1) and N.D.A.C. §§ 69-05.2-05-01, 09-19. Further, the Commission's reliance on the absence of an outstanding GNPD surface coal mining application is arbitrary and capricious given the overwhelming evidence of GNPD's intent to construct and operate a mine at near South Heart. The law requires the Commission to base its jurisdictional determinations on an investigation of intent rather than only on the existence of surface coal mining operations or existing surface coal mining application. The Commission has failed to consider the intent of GNPD even though Complainants' alleged such intent in their First Amended Complaint, which facts must be assumed to be true in consideration of a motion to dismiss. As such, the Commission's decision in this matter does not comply with Rule 12(b) of the North Dakota Rule of Civil Procedure, is in violation of the state surface mining law, and is arbitrary and capricious.

### C. Respondent Is a Coal Handler that Will Directly Serve a Mine Owner

On page 4 the February 25 Order states:

> 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."

However, the February 25 Order fails to discuss this regulatory guidance or make any findings of law or fact with regard to whether Respondent is a coal handler that directly serves the operator of a coal mine. As such, the Commission's February 25 Order is not based on this policy guidance.

Complainants have previously discussed this guidance and shown that the term "coal handler" may include coal preparation plant operators and that the term "directly servicing" does not limit jurisdiction to only those coal preparation plants that are under the control or ownership of a coal mine owner. Complainants' Response in Opposition to Motion to Dismiss, pp. 24-26. Complainants have cited statutory language and court precedence proving that jurisdiction under SMCRA and the State Mining Law is not based on ownership and control but rather on the types of activities undertaken. *Id.* at 15, n. 16. The practical result of limiting jurisdiction to only preparation plants owned or controlled by mine operators would be that the coal industry could exempt all coal preparation plants from SMCRA's jurisdictional reach by merely having all coal preparation plants be owned by separate corporate entities and owners. As such, the term "directly servicing" must be given its common meaning and not be interpreted narrowly. It is common sense that a company may "directly service" another company that does not own it.

Here, Complainants have alleged that Respondent intends to directly service GNPD by processing coal from a mine that GNPD intends to develop near South Heart, and that without such processing, that lignite from a mine near South Heart could not be marketed or transported to distant end users. Assuming these facts to be true, Respondent is a coal handler that will directly serve GNPD, such that it is subject to the Commission's jurisdiction.

### D. The February 25 Order Places Undue Weight on OSM's "Independent Useful Life" Consideration and Thereby Violates Federal Law

The February 25 Order states, " 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 47388. As the GTLE facility will process coals from around the world, it will have a useful life independent of any specific mine." This reasoning ignores the full guidance provided by OSM and would create a loophole that could be exploited by coal preparation plant operators with the result that all off-site preparation plants could be excluded from jurisdiction.

The full OSM "useful life" guidance is the following:

> OSMRE believes 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 (particularly in light of the intended effect of the Act as a reclamation statute). A facility lacking a useful life independent of the specific mine or mines which it currently serves would be operating in connection with a coal mine, while a facility having a useful independent life might not. In the latter case, regulatory authorities would have to consider the other aspects of the relationship between the facility and any particular coal mine or mines to determine if it operates in connection with a coal mine. OSMRE believes that this consideration is consistent with the economic and other considerations set forth in the May 5, 1983, preamble to the definition of "coal preparation or coal processing" *(48 FR 20393)* and is also consistent with the need for a limitation noted by the court of appeals *(NWF, 839 F.2d at 745).*

52 Fed. Reg. 47384, 47388 (emphasis added). Thus, OSM did not state that the ability of a coal preparation plant to have a useful life independent of particular coal mines exempts it from jurisdiction. Instead, OSM said that an independent useful life might mean that a preparation plant is not in connection with a mine, but that implementing agencies must "consider the other aspects of the relationship between the facility and any particular coal mine or mines to

determine if it operates in connection with a coal mine." In other words, while having a useful life independent of any particular mine is a relevant consideration, the mere fact of such useful life does not automatically exempt a preparation plant from jurisdiction. Instead, such independent useful life merely indicates that regulatory agencies must examine the particulars of the relationship of a coal mine or mines to a preparation plant using the jurisdictional tests developed by the federal courts and the IBLA. Thus, the "independent useful life" consideration is subsumed within established jurisdictional tests.

Also, the "independent useful life" consideration was stated by OSM in preamble language not related to a change in published federal regulations, is not included in any promulgated statute or regulation, and has not been adopted as law by any federal court, the IBLA, or the North Dakota courts. Therefore, this policy language is not binding law, but rather guidance that is useful only to the extent that it has "power to persuade." *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 338; 128 S. Ct. 999, 1016; 169 L. Ed. 2d 892, 912 (2008), n. 8, *citing Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 229-233, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

Here, the Commission found that one of the purposes for the Preparation Plant was to test process limited amounts of coal from distant mines. February 25 Order at 5. It held that this test processing proved that the mine had an independent life apart from a particular coal mine or mines. It then utterly ignored evidence provided by Complainants that the amount of coal to be test processed would likely be a very small portion of the coal processed at the Preparation Plant. Complainants' Surreply to Motion for Protective Order, pp. 10-11. The Commission did not investigate or allow discovery into the source or sources or proportion of coal to be processed for commercial sale, therefore the record contains no evidence of the amounts of coal to be

processed for commercial sale relative to the amounts to be test processed. As such, the Commission applied the independent useful life consideration so that any independent use – no matter how minimal – exempts a preparation plant from SMCRA jurisdiction. Thus, the Commission made the "independent useful life" policy factor into a litmus test for jurisdiction. It placed excessive weight on a nominal amount of coal testing, ignored evidence that Respondent intends to process large amounts of coal for commercial sale, and refused to investigate or conduct discovery into facts related to the relative amounts of testing versus commercial processing. The Commission's excessive reliance on a minor and supplemental piece of regulatory guidance to exempt the Preparation Plant violates federal law.

The Commission did attempt to apply the geographical, functional, and economic three-part test to this situation, but it did so only with regard to the current absence of a mine near South Heart, rather than to GNPD's oft-stated intention to mine coal immediately adjacent to Respondent's preparation plant. February 25 Order at 5-6. It stated that because there is currently no mine at South Heart, that therefore there can be no connection. *Id.* This finding ignores all of the evidence that evidence related to Respondent's intention to process coal from a mine that GNPD intends to develop immediately adjacent to the Preparation Plant. Moreover, the Commission refused to investigate or allow discovery about the source or sources of coal to be commercially processed, whether from a future mine or an existing mine.

Even though the Commission found that "GTLE will sell its processed coal through wholesale markets to end users in commerce" it failed to identify any source of coal that will be commercially processed. February 25 Order at 5. By focusing on the current absence of a mine near South Heart, the Commission draws attention away from the fact that it refused to investigate or allow discovery into facts about where Respondent will acquire coal to process for

commercial sale, such that the Commission has utterly no facts before it about the source of such coal. Since it is not possible to apply the three part jurisdictional test without specific facts about the sources of coal to be processed for commercial sale, the Commission's application of the federal jurisdictional test is mere feint and fatally flawed.

If the "independent useful life" consideration is applied so broadly, this "consideration" could be transformed into a loophole that would allow most if not all off-site preparation plants to avoid SMCRA jurisdiction. All a plant would need do to avoid jurisdiction is to occasionally test process nominal amounts of coal from a distant mine, or custom process some nominal amount of coal from a distant mine. Under the Commission's reasoning, such nominal processing would exempt an otherwise regulated preparation plant because it would have a useful life independent of any particular mine. Essentially, the Commission's holding here means that a nominal amount of unregulated activity serves to exempt the otherwise regulated activities of coal preparation plants. SMCRA, agency regulations, the courts, the IBLA, and agency guidance have never recognized that a small amount of unregulated activity exempts a preparation plant that otherwise is intended to process large amount of coal for commercial sale. Therefore, the Commissions has violated federal law by misapplying federal regulatory guidance and has an insufficient basis in fact for its February 25 Order such that its Order is arbitrary and capricious.

### E. Federal Law Has Never Recognized an Exemption from Jurisdiction for Preparation Plants that Are "Closely Linked to End Users" and, in Any Case, the Record Contains No Evidence of the Relationship Between the Preparation Plant and Any End User

The Commission states: "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 .

. . . 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." This statement of law is undoubtedly erroneous.

Federal law makes crystal clear that only preparation plants located "at the point of ultimate coal use" are exempt from SMCRA. *Pacificorp v. OSMRE*, 143 IBLA 237 (1998). The Commission completely ignores the federal proximity requirement that only preparation plants "at the point" of final coal use are considered to be "in connection with" an end user. If a preparation plant is not at the point of ultimate use of the coal, it cannot be "in connection with" an end user. Thus, the Commission grossly mischaracterizes the decision in *PacifiCorp* in an attempt to expand the "end user" ruling far beyond any language found in OSM guidance.

Since all coal processing is performed for the ultimate benefit of end users, any rule that would exempt preparation plants merely because it provides some benefit for end users would result in the exemption of all coal preparation plants. To avoid this absurd result, the operative limiting language in the *PacifiCorp* decision and the preamble language it cites is the term "at the point" of use of the coal. This proximity requirement draws a clear line. In contrast, the Commission's novel holding would have the effect of exempting all coal preparation plants such that it is useless for determining the connections between facilities.

Further, the Commission interprets the term "in connection with" narrowly when it is applied to the relationship between coal mines and coal preparation plants and insists that a mine must be existence for jurisdiction to attach, but then finds that coal preparation plants are "in connection with" end users even though no end user is currently in existence anywhere near the Preparation Plant, even though no nearby end use facility is proposed to be constructed in the

future that might consume the processed coal[1], and regardless of how far away the preparation plant is from the end users that buy the coal. Thus, the Commission has applied a rule under which any relationship with an end user, no matter how attenuated, can serve to exempt a preparation plant from jurisdiction. Further, the Commission applies this rule with not a shred of evidence regarding the identity or location of any future end user of coal to be processed by the Preparation Plant. Such double standard in the use of the term "in connection with" merely demonstrates the Commission's gross misinterpretation of the law.

Here, the Preparation Plant is not located at the "point of ultimate coal use" because there is no known user of coal anywhere near the Preparation Plant. Further, there is no evidence in the record of the identity or location of any future user of coal to be processed for commercial sale by the Preparation Plant. Therefore, the Commission's interpretation of federal law is undoubtedly erroneous and its decision is without basis in fact and is arbitrary and capricious.

### F. The Preparation Plant Is Not a Mere Support Facility Such that the "Economic Dependence" Test Is Not Applicable

The February 25 Order, page 5, states:

> 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.

(Emphasis added). The Commission's application of this "economic dependence" policy guidance is illegal because coal preparation plants are not mere "support facilities." *See NWF v. Hod*el, 839 F.2d 694, 742, 765 (distinction between coal preparation plants and support

[1] Respondent and GNPD have repeatedly stated that Respondent's proposed coal conversion facilities will not purchase coal processed by the Preparation Plant.

facilities); *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *29-*53; 31 ERC (BNA) 2034 (coal preparation plants not treated as support facilities). Even if this test were applicable, the Commission's application of it here is fatally flawed because the Commission has no evidence of the degree to which the Preparation Plant will result from or be incident to a regulated mining activity. Instead the Commission has evidence only that there is no mine currently in the vicinity of the Preparation Plant, no evidence of the sources of coal for commercial operation, and evidence that the Preparation Plant will test process limited amounts of coal as well as process large amounts of coal for commercial sale. Absent evidence showing the relative amount of economic dependence or independence on a regulated mining activity, it is not possible to apply this test. As such, the Commission's application of this policy guidance is fatally flawed.

### G. The February 25 Order Failed To Determine the Proximate Relationship Between Respondent's Preparation Plant and the Mine or Mines from Which Respondent Intends to Acquire Coal for Commercial Processing

The February 25 Order attempts to apply the three-part test to determine the proximate relationship between Respondent's Preparation Plant and the mine or mines that will provide it with coal to be processed for commercial sale. A previously discussed, *supra* 3-7, 15, the Commission's application of the three part test is fatally flawed because it did not identify the mine or mines that will supply coal to be processed for commercial sale such that this test could not be properly applied. To the extent that the Commission bases its decision on a rule that jurisdiction over a Preparation Plant can be found only if the plant serves a particular, meaning single mine, Complainants have already provided ample proof that no such rule exists. Complainants' Opposition to Motion to Dismiss, p. 20.

For all the foregoing reasons, the February 25 Order has no basis in law, has no evidentiary foundation, and is arbitrary and capricious.

## II. The February 25 Order Contains a False Statement of Fact that Must Be Stricken from the Order

The Commission makes the following false statements of fact:

> 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.
>
> * * *
>
> Complainants are essentially asserting that this Commission would have jurisdiction over any mine located either in the United State or around the World simply because it provides coal to the facility for testing purposes.

*Id.* at 6. For the second time in this proceeding, Complainants deny that they have ever made this assertion, either in fact or "essentially." Complainants' Surreply to Motion for Protective Order, pp. 12-14. The record does not contain a single statement by Complainants to this effect. As such, the Commission's statement is a false statement of fact and must be stricken from the February 25 Order. As described fully in Complainants' Surreply to Motion for Protective Order, pp. 12-14, these statements are based solely on illogical conclusions propounded by Respondent to make it appear that Complainants are making unreasonable arguments, when in fact Complainants have <u>never</u> made such arguments. Complainants can only speculate that Respondent included this false statement in its pleadings to serve as the basis for a claim for attorney's fees.

Complainants have consistently argued that jurisdiction must be based only on the processing of coal for sale. SMCRA and State Mining Law clearly state this requirement. Complainants have no reason to disbelieve Respondent's claims that it will return test-processed coal from distant mines to such distant mines, with the result that this test-processed coal will not be sold into commerce and does not provide a basis for jurisdiction. Complainants understand that coal from distant mines will only be shipped to the Preparation Plant <u>only</u> for the purpose of

test processing, and not for commercial sale. Since Respondent will not acquire coal to be processed for sale from distant out-of-state or overseas mines, it may acquire coal to be test processed for commercial sale only from either (1) GNPD's proposed mine; or (2) an existing mine in North Dakota. There are no other logical possibilities. Either of these later two possibilities are subject to the Commission's jurisdiction.

Therefore, the Commission must strike from its February 25 Order the false statements related to Complainants' alleged assertion that jurisdiction may be based on the processing of coals from anywhere in the United State or around the world, because the record shows that Complainants have not in fact made this assertion, but have instead expressly disavowed such argument.

## CONCLUSION

For the foregoing reasons the February 25 Order is in violation of law, contains insufficient evidence to support its findings, and is arbitrary and capricious. The Commission's determination that it does not have jurisdiction over Respondent's Preparation Plant as a matter of law is incorrect and it must find that Complainants have stated a claim upon which relief may be granted pursuant to N.D. Rule. Civ. P. 12(b).

Complainants request a oral hearing on this Petition.

Respectfully submitted,

SARAH VOGEL LAW FIRM, P.C.

Dated this 12th day of March, 2010

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PLAINS JUSTICE

Dated this 12th day of March, 2010

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **COMPLAINANTS' PETITION FOR RECONSIDERATION** was on March 12, 2010 mailed to the following:

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With courtesy copies emailed to:

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Illona Jeffcoat-Sacco
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