

September 14, 2018



Mr. Darrell Nitschke  
Executive Secretary  
North Dakota Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

**Re: Motion for Cease and Desist Order in DRC & ELPC v. Meridian  
Energy Group, Inc. (Case No. PU-18-223)**

Dear Mr. Nitschke:

Enclosed for filing in Case PU-18-223, please find an original and ten copies of a Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery, as well as materials in support of this motion, filed by Complainants/Petitioners DRC and ELPC.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "JJ England".

JJ England

Enclosures

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

<b>Environmental Law &amp; Policy Center and Dakota Resource Council,</b>	)	
	)	
	)	
<b>Complainants/ Petitioners,</b>	)	
	)	
	)	
<b>vs.</b>	)	<b>Case No. PU-18-223</b>
	)	
<b>Meridian Energy Group, Inc.,</b>	)	
	)	
<b>Respondent.</b>	)	

**MOTION TO REOPEN AND SUPPLEMENT THE RECORD  
AND TO PERMIT JURISDICTIONAL DISCOVERY**

Complainants Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”), on behalf of their members, respectfully move the North Dakota Public Service Commission (“PSC”) to reopen and supplement the record to include evidence that Meridian Energy Group, Inc. (“Meridian”) has not submitted information or documentation to the North Dakota Department of Health (“NDDOH”) regarding its alleged plan to build a 49,500 barrel per day (bpd) refinery instead of the 55,000 bpd refinery for which it received its existing air permit from NDDOH. N.D.A.C. § 69-02-06-01. Specifically, ELPC and DRC request that NDDOH’s response to a recent open records request (Exhibit B to Affidavit of JJ England) be included in the administrative record, and considered in combination with Meridian’s current air Permit to Construct, which was included as Exhibit D to the Complaint. In addition, Complainants request permission to conduct jurisdictional discovery.

ELPC and DRC filed a Complaint on June 29, 2018, alleging that Meridian was then or soon would be in violation of N.D.C.C. § 49-22.1-04, which provides that a company must obtain a certificate of site compatibility from the PSC *prior to construction* of an oil refinery

with a capacity of 50,000 barrels per day (“bpd”) or more. Docket #1. Despite Meridian’s numerous statements to the media, investors, and government agencies that it plans to construct a 55,000 bpd refinery, Meridian filed a Motion to Dismiss on August 8, 2018, alleging that it now plans to build only a 49,500 bpd refinery. Docket #11. Yet Meridian’s existing Permit to Construct issued by NDDOH is for a 55,000 bpd refinery and the permit requires Meridian to construct and operate the refinery in accordance with the information provided in the permit application and the specifications of the permit itself. As of today, Meridian has not submitted any information or documentation to NDDOH updating construction or operation information. Exhibit B to Affidavit of JJ England.

ELPC and DRC request that the PSC reopen and supplement the record to include evidence that Meridian has not submitted updated information or documentation to NDDOH. Additionally, ELPC and DRC request permission to conduct jurisdictional discovery to seek information in Meridian’s possession regarding the planned capacity of the refinery. The attached Brief more fully explains the grounds for and supports this Motion.

Dated this 14th day of September, 2018.

Respectfully submitted,

**BRAATEN LAW FIRM**

/s/ Derrick Braaten

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

<b>Environmental Law &amp; Policy Center and</b>	)	
<b>Dakota Resource Council,</b>	)	
	)	
<b>Complainants/</b>	)	
<b>Petitioners,</b>	)	
	)	
	)	
<b>vs.</b>	)	<b>Case No. PU-18-223</b>
	)	
<b>Meridian Energy Group, Inc.,</b>	)	
	)	
<b>Respondent.</b>	)	

**BRIEF IN SUPPORT OF  
MOTION TO REOPEN AND SUPPLEMENT THE RECORD  
AND TO PERMIT JURISDICTIONAL DISCOVERY**

The Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”), on behalf of their members, submit this brief in support of their Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery. N.D.A.C. § 69-02-06-01. ELPC and DRC have obtained evidence that Meridian Energy Group, Inc. (“Meridian”) has not taken steps to update or revise its Permit to Construct, as would be required for Meridian to build a 49,500 barrel per day (“bpd”) refinery instead of the originally planned 55,000 bpd refinery. Specifically, ELPC and DRC request that the North Dakota Department of Health’s (“NDDOH”) response to their recent open records request (Exhibit B to Affidavit of JJ England) be included in the administrative record, and considered in combination with Meridian’s current Permit to Construct, which was included as Exhibit D to the Complaint. Further, ELPC and DRC request permission to conduct discovery to obtain additional evidence regarding the planned capacity for Meridian’s refinery. This information is in the possession of Meridian, and is crucial to

accurately determine whether Meridian's planned refinery will have a capacity over the 50,000 bpd threshold for PSC jurisdiction.

### INTRODUCTION

ELPC and DRC filed a Complaint on June 29, 2018, alleging that Meridian was then or soon would be in violation of N.D.C.C. § 49-22.1-04, which provides that a company must obtain a certificate of site compatibility from the PSC prior to construction of an oil refinery with a capacity of 50,000 bpd or more. Docket #1. On July 9, 2018, the Public Service Commission ("PSC") approved a motion finding that ELPC and DRC's Complaint states a *prima facie* case. Docket #2.

On August 8, 2018, Meridian filed a Motion to dismiss the complaint. Docket #11. Meridian argued that the PSC did not have jurisdiction over ELPC and DRC's Complaint, alleging that it was now planning to only build a 49,500 bpd refinery. ELPC and DRC explained in their Response to the Motion that Meridian's new allegations "create[] a factual issue on which the parties need to do discovery." Docket #12 at 2. ELPC and DRC have not had an opportunity to conduct any discovery to explore the veracity and accuracy of Meridian's claims. Meridian likely has numerous documents, including communications with investors, engineering and technical analyses, and information about the economic viability of a refinery with a capacity less than 50,000 bpd, that could provide information critical to the PSC's determination of jurisdiction.

Meridian has now begun construction of the proposed refinery without a certificate of site compatibility. On September 4, 2018, ELPC and DRC filed a Motion requesting that the PSC issue a cease and desist order to Meridian to halt all construction activities to preserve the PSC's

jurisdiction over whether Meridian is required to obtain a certificate of site compatibility for the Davis Refinery, pursuant to N.D.C.C. § 49-22.1-04. Docket # 15.

On September 5, 2018, the PSC voted to approve designation of the Administrative Law Judge (“ALJ”) as a substantive ALJ. Docket #17. On September 10, 2018, ALJ Ward filed his Recommended Decision to grant Meridian’s Motion to Dismiss. The Recommended Decision accepts as true Meridian’s allegations that it has now changed its plans and will only build a 49,500 bpd refinery. Docket #21. The ALJ’s recommendation was made without a hearing or opportunity for discovery.

### **ARGUMENT**

The PSC should reopen and supplement the record with evidence that Meridian has not taken steps to revise or update its Permit to Construct from NDDOH. As an initial matter, the lack of hearing or opportunity for discovery justifies reopening of the record. ELPC and DRC have obtained additional evidence suggesting that Meridian plans to move forward with a 55,000 bpd refinery. Meridian’s air permit application and existing Permit to Construct from NDDOH are specifically for a 55,000 bpd refinery built in two stages. The permit states that Meridian must construct and operate its facility in accordance with the information and specifications included in the application and the permit itself. Yet based on NDDOH’s response to a recent open records request, Meridian has not taken steps to update or revise its permit. This strongly suggests that Meridian still intends to construct and operate a 55,000 bpd refinery.

**I. Complainants ELPC and DRC Were Not Provided the Opportunity to Introduce Evidence at a Hearing or Conduct Discovery.**

Despite ELPC and DRC’s requests for a hearing on their Complaint and on their Motion for Cease and Desist Order and for the opportunity to conduct discovery on jurisdictional matters, the ALJ issued a Recommended Decision without either scheduling a hearing or

allowing discovery. If the PSC follows ALJ Ward's recommendation, ELPC and DRC's Complaint will be dismissed without allowing the Complainants to present their position and evidence at a hearing, or to even gather critical evidence that is in the possession of Meridian. This is inconsistent with the requirements of the Administrative Agency Procedure Act, which requires a hearing on formal Complaints: "[f]or adjudicative proceedings involving a hearing on a complaint against a specific-named respondent," "[t]he administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon the respondent." N.D.C.C. § 28-32-21 (emphasis added). At the very least, this is sufficient grounds to reopen and supplement the record with relevant information.

Although ELPC and DRC have obtained information showing that Meridian has not taken steps to update or revise its air permit, Meridian undoubtedly has significant and more direct evidence of its intentions regarding the capacity of its planned refinery. ELPC and DRC can only obtain this information through discovery.

Further, the jurisdictional question at issue here goes to the very core of the Public Service Commission's function. N.D.C.C. § 49-02-01 states "[t]he general jurisdiction of the commission shall extend to ... [a]ll ... public utilities". N.D.C.C. § 49-02-02 likewise gives the PSC broad and explicit jurisdiction to, among other things, "[r]equire public utilities ... to conform with the laws of this state..."

Faced with a similar question regarding jurisdiction, the North Dakota Industrial Commission ("NDIC") explicitly rejected the recommended conclusions of law from an Administrative Law Judge in order to preserve that agency's jurisdiction. In that case, the NDIC brought an administrative enforcement action against Black Hills Trucking seeking penalties for a produced water spill that occurred on a roadway outside of a well pad location. NDIC Order

No. 23682. *After* an evidentiary hearing, the ALJ recommended as a conclusion of law that the NDIC did not have jurisdiction over the spill. In its Order, the NDIC stated it “respectfully disagrees with and rejects the ALJ’s analysis of jurisdiction and replaces the ALJ’s recommended conclusion of law (2) in its entirety.” *Id.* at 5. The North Dakota Supreme Court upheld NDIC jurisdictional determination, noting specifically that the Court would have reached the same result *even without deference*. *Black Hills Trucking, Inc. v. North Dakota Indus. Comm’n*, 2017 ND 284, ¶ 19, 904 N.W.2d 326.

**II. ELPC and DRC Have Obtained Relevant and Important Information that Supports their Position that Meridian Still Plans to Construct a 55,000 bpd Refinery.**

Meridian’s current Permit to Construct is for the construction of a 55,000 bpd refinery, and specifically states that Meridian must construct and operate its facility in accordance with the information and specifications included in the application and the permit itself. In response to ALJ Ward’s recommendation that the PSC dismiss the Complaint without a hearing or discovery, ELPC and DRC promptly submitted an open records request to NDDOH to determine whether Meridian has taken steps to update or revise its air permit application or the actual Permit to Construct. Exhibit A to Affidavit of JJ England.

**A. Meridian’s Final Permit to Construct Requires Meridian to Construct and Operate its Refinery as Described in its Application and Permit.**

Meridian’s Permit to Construct issued by the NDDOH explicitly provides in several places that Meridian must construct and operate its refinery in accordance with the plans and specifications described in its application and incorporated into the permit. For example, the permit provides:

Construction of the above described facility shall be in accordance with information provided in the permit application as well as any plans, specifications and supporting data submitted to the Department. . . . The issuance of this Permit to Construct may be suspended or revoked if the Department determines that a

significant deviation from the plans and specifications furnished has been or is to be made.

Any violation of a condition issued as part of this permit to construct as well as any construction which proceeds in variance with any information submitted in the application, is regarded as a violation of construction authority and is subject to enforcement action.

Exhibit D to Complaint at 43. Further, the permit requires that operations are carried out as described in the permit application:

Operations at the installation shall be in accordance with statements, representations, procedures and supporting data contained in the initial application, and any supplemental information or application(s) submitted thereafter.

*Id.* at 44. The permit also prohibits any operational changes that would result in new or increased air emissions:

Any alteration, repairing, expansion, or change in the method of operation of the source which results in the emission of an additional type or greater amount of air contaminants or which results in an increase in the ambient concentration of any air contaminant, must be reviewed and approved by the Department prior to the start of such alteration, repairing, expansion or change in the method of operation.

*Id.* at 44. Finally, the permit notes that it “is issued in reliance upon the accuracy and completeness of the information set forth in the application.” *Id.* at 45.

Meridian’s Permit to Construct clearly must be revised if Meridian plans to construct or operate the refinery according to different plans or specifications than represented in its application and current permit.

**B. Meridian’s Final Permit to Construct Is for a 55,000 bpd Refinery.**

Meridian’s application and final Permit to Construct both represent Meridian’s intent to construct and operate a 55,000 bpd refinery. Meridian’s most recent amended application stated that Meridian was requesting approval “for the construction of a new crude oil refinery, the Davis Refinery, with a nominal processing capacity of 55,000 barrels per day.” Exhibit B to

Complaint at 1. The proposed capacity of 55,000 bpd is then referenced numerous times throughout the application. The permit application also reflects a two-phase construction:

The initial phase of the Davis Refinery entails 27,500 BPD conventional distillation facilities to produce Tier 3 Gasoline and USLD from the atmospheric light and intermediate distillates and Fuel Oil from the atmospheric bottoms. The second phase will include upgrade [sic] adding another 27,500 BPD crude distillation unit and conversion units to improve gasoline, jet fuel and diesel yields, while minimizing the production of heavy residual fuel oil.

*Id.* at 2. The permit application includes descriptions of the differences in how the refinery will operate between the initial phase and after full construction. For example:

During the initial phase of the Davis Refinery, the catalyst will be periodically regenerated by in situ high temperature oxidation about every 6 to 24 months to maintain catalyst activity. During Phase 2 a closed loop catalyst-transfer equipment and special regenerator will be added to continuously transfer catalyst from the operating reactors to the regenerator and back to the reactors.

*Id.* at 12.

As expected, the actual Permit to Construct reflects the construction and operation information contained in Meridian's application. The very first page of the Permit to Construct explains that it is for a "Petroleum Refinery with a rated capacity of up to approximately 55,000 barrels of crude oil per day," and that "[t]he construction of the Davis Refinery is scheduled to take place in two separate phases." Exhibit D to Complaint at 1. The second page of the permit describes equipment at the facility to include two "[c]rude desalting and distillation unit[s]," each with a capacity of 27,500 bpd, for a total capacity of 55,000 bpd. *Id.* at 2.

Meridian's Permit to Construct for the Davis Refinery is clearly a permit for a 55,000 bpd refinery, built in two phases. Based on the conditions included in the permit, it is also clear that Meridian would need to file information with NDDOH to update or revise its permit before it could proceed with constructing or operating a one-phase 49,500 bpd refinery. In other words, if Meridian had truly changed its plans as it alleged in its Motion to Dismiss, it should have filed

updated information on its construction and operation plans with NDDOH. Instead, Meridian has begun construction of its refinery under its existing permit.

**C. Meridian Has Not Taken Action to Obtain an Updated or Revised Permit to Construct from NDDOH.**

Complainants ELPC and DRC submitted an open records request to NDDOH on September 12, 2018, requesting:

1. Any applications filed by Meridian Energy Group, Inc. or its representatives to modify air quality permit to construct #PTC17020, including requests for minor or administrative amendments to this permit;
2. Any written requests, of any type, received by the Division of Air Quality from Meridian Energy Group, Inc. or its representatives, seeking permission or approval to construct facilities different from those described by permit to construct #PTC17020 and the application for that permit; and
3. Any and all notices received by NDDH filed in regards to permit to construct #PTC17020, including but not limited to notices of construction, notices regarding specific equipment changes, etc.

Exhibit A to Affidavit of JJ England. ELPC and DRC received a response from NDDOH on September 14, 2018, stating that “[t]he Division of Air Quality has not received any communication nor applications from Meridian since the permit to construct (No. PTC17020) was issued and they paid their PTC fee to the Department per NDAC 33-15-23. Should any new applications or modifications be received by the Department it would be listed on our PTC In-progress page (<https://deq.nd.gov/AQ/permitting/PTCInProgress.aspx>).” Exhibit B to Affidavit of JJ England. Meridian’s failure to take steps to update or revise its Permit to Construct belies its claims that it now plans to construct and operate a 49,500 bpd refinery. Meridian would need to submit updated and revised information regarding its construction and operation of the Davis Refinery to NDDOH if it was truly planning to go forward with a 49,500 bpd refinery. Yet is has not done so.

## CONCLUSION

ELPC and DRC were not provided with an opportunity to present their position at a hearing or to conduct discovery prior to the ALJ's issuance of his Recommended Decision, despite the PSC's determination that their formal Complaint was sufficient and presented a *prima facie* case. ELPC and DRC respectfully request that the PSC reopen and supplement the record to include the evidence provided that Meridian has not taken steps to update or revise its Permit to Construct. Additionally, ELPC and DRC request permission to conduct jurisdictional discovery.

Dated this 14th day of September, 2018.

Respectfully submitted,

### **BRAATEN LAW FIRM**

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JJ England (ND 08135)  
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*Attorneys for the Environmental Law & Policy  
Center*

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Environmental Law & Policy Center and )  
Dakota Resource Council, )  
 )  
Complainants/ )  
Petitioners, )  
 )  
vs. )  
 )  
Meridian Energy Group, Inc., )  
 )  
Respondent. )

Case No. PU-18-223

AFFIDAVIT OF JJ ENGLAND

STATE OF NORTH DAKOTA )  
 ) ss:  
COUNTY OF BURLEIGH )

1. My name is JJ England. I am an attorney representing the Complainants/Petitioners in this matter.

2. On Wednesday, September 12, 2018, I sent an open records request via email to the North Dakota Department of Health. A true and correct copy of that records request is attached hereto as Exhibit A.

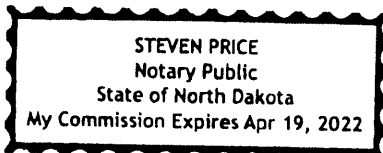
3. On Friday, September 14, 2018, I received an email from the North Dakota Department of Health in response to my September 14, 2018 records request. A true and correct copy of that email is attached hereto as Exhibit B.

DATED this 14<sup>th</sup> day of September, 2018.

JJ England  
JJ England

Subscribed and sworn before me this 14<sup>th</sup> day of September, 2018.

Steven Price  
Notary Public



September 12, 2018

sent via email only to: [ehsopenrecords@nd.gov](mailto:ehsopenrecords@nd.gov)

North Dakota Department of Health  
Division of Air Quality  
918 E. Divide Ave  
Bismarck, ND 58501

**Re: Open records request**

Dear North Dakota Department of Health Division of Air Quality:

I am writing to request several records, to the extent that they exist, pursuant to North Dakota's open records law. I request the following documents/records from the Division of Air Quality:

1. Any applications filed by Meridian Energy Group, Inc. or its representatives to modify air quality permit to construct #PTC17020, including requests for minor or administrative amendments to this permit;
2. Any written requests, of any type, received by the Division of Air Quality from Meridian Energy Group, Inc. or its representatives, seeking permission or approval to construct facilities different from those described by permit to construct #PTC17020 and the application for that permit; and
3. Any and all notices received by NDDH filed in regards to permit to construct #PTC17020, including but not limited to notices of construction, notices regarding specific equipment changes, etc.

To the extent feasible, I would appreciate NDDH providing any records responsive to this request electronically, by email, to [jj@braatenlawfirm.com](mailto:jj@braatenlawfirm.com). If you have any questions regarding this records request, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,



JJ England

Exhibit A to Affidavit of JJ England

## JJ England

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**From:** Kautzman, Rheanna M. <rKautzman@nd.gov>  
**Sent:** Friday, September 14, 2018 9:26 AM  
**To:** JJ England  
**Subject:** RE: Open records request

Good Morning Mr. England,

The Division of Air Quality has not received any communication nor applications from Meridian since the permit to construct (No. PTC17020) was issued and they paid their PTC fee to the Department per NDAC 33-15-23.

Should any new applications or modifications be received by the Department it would be listed on our PTC In-progress page (<https://deq.nd.gov/AQ/permitting/PTCInProgress.aspx>). We recommend checking this page periodically as it is updated regularly as new apps are received and current apps progress through our review process.

### Rheanna Kautzman Environmental Scientist Division of Air Quality

North Dakota Department of Health  
|P: (701) 328.5188|  
|F: (701) 328.5185|  
|email: [rkautzman@nd.gov](mailto:rkautzman@nd.gov)|  
|web: [www.deq.nd.gov/aaq](http://www.deq.nd.gov/aaq)|

**From:** JJ England <jj@braatenlawfirm.com>  
**Sent:** Wednesday, September 12, 2018 1:40 PM  
**To:** DOH, EHS Open Records <ehsopenrecords@nd.gov>  
**Subject:** Open records request

**CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Good afternoon:

Please see the attached request for records from NDDH's Division of Air Quality. If you have any questions about this request, please don't hesitate to contact me.

Thank you,

JJ England  
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Bismarck, ND 58501  
Phone: 701-221-2911  
Fax: 701-221-5842  
[jj@braatenlawfirm.com](mailto:jj@braatenlawfirm.com)

[www.braatenlawfirm.com](http://www.braatenlawfirm.com)

**\*PLEASE NOTE** new firm name and contact information

**PRIVILEGED COMMUNICATION**

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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing document was on the 14th day of September, 2018, served by e-mailing the same to:

Lawrence Bender  
[lbender@fredlaw.com](mailto:lbender@fredlaw.com)

Derrick Braaten  
[derrick@braatenlawfirm.com](mailto:derrick@braatenlawfirm.com)

JJ England  
[jj@braatenlawfirm.com](mailto:jj@braatenlawfirm.com)

Scott Strand  
[sstrand@elpc.org](mailto:sstrand@elpc.org)

and by mailing a copy via USPS First Class Mail to:

Patrick J. Ward  
Administrative Law Judge  
c/o Zuger Kirmis & Smith  
PO Box 1695  
Bismarck, ND 58502-1695

An original and ten copies of the foregoing document were also hand-delivered to the North Dakota Public Service Commission on said date.

/s/ JJ England  
JJ England