

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Environmental Law & Policy Center and Dakota Resource Council,)	Civil No. <u>08-2018-CV-02937</u>
Appellants,)	PSC Case No. PU-18-223
v.)	NOTICE OF APPEAL AND SPECIFICATIONS OF ERROR
North Dakota Public Service Commission, and Meridian Energy Group, Inc.,)	
Appellees.)	

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, NORTH DAKOTA ATTORNEY GENERAL WAYNE STENEHJEM, AND MERIDIAN ENERGY GROUP, INC.

PLEASE TAKE NOTICE that the Appellants Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”) (collectively, “Appellants”) hereby give notice of their appeal from the October 10, 2018 final decision of the North Dakota Public Service Commission (“PSC” or “Commission”) to dismiss Appellants’ formal Complaint against Meridian Energy Group, Inc. (“Meridian”) for lack of subject matter jurisdiction. In support of their appeal, Appellants state the following:

JURISDICTION AND VENUE

1. Jurisdiction and venue lie with this Court under N.D.C.C. § 28-32-42, which provides that “[a]ny party to any proceeding heard by an administrative agency” can appeal that decision, and that if no hearing was held, the appeal may be taken to the district court of Burleigh County.

PARTIES

2. Appellant ELPC is a non-profit Midwest-based advocacy organization with an office and staff in Jamestown, North Dakota. ELPC has long been involved in efforts to promote responsible energy development, and to protect public health and special places like the Theodore Roosevelt National Park. ELPC has members who use and enjoy the Theodore Roosevelt National Park and surrounding region, who intend to do so in the future, and who would be particularly aggrieved by negative impacts from a new oil refinery in the area.

3. Appellant DRC is a North Dakota nonprofit corporation with its principal place of business located in Bismarck, ND. Formed in 1978, DRC brings together people across North Dakota to organize around common goals of a sustainable economy and use of resources in North Dakota. One of DRC's enduring issues—since its founding—has been advocacy to minimize the negative impacts of oil and gas development by ensuring compliance with applicable laws. DRC is a member-driven organization with over 1,000 North Dakota members in good standing. DRC members work, live, and recreate in the immediate vicinity of and adjacent to the the proposed Davis Refinery, and they fear the significant health and aesthetic impacts of the construction and operation of the proposed new refinery.

4. Appellee PSC is an executive agency of the state of North Dakota charged with regulating utilities in the state, including siting of energy conversion and transmission facilities, pursuant to Chapter 49-22.1 of the Century Code.

5. Appellee Meridian Energy Group, Inc. is a privately held South Dakota corporation in the business of developing oil refineries, headquartered at 2070 Business Center Dr. Suite 160, Irvine, CA, 92612.

SPECIFICATIONS OF ERROR

6. Meridian has begun excavation and earthwork for a new crude oil refinery in Billings County, near Belfield, called the “Davis Refinery.” The Davis Refinery would be the first significant new oil refinery built in the United States in over forty years. The proposed location is less than three miles from Theodore Roosevelt National Park. Due to its proximity to the National Park, the Refinery would impact “existing scenic areas,” as well as natural resources and the environment, and may negatively impact historic sites and structures, paleontological or archaeological sites, and habitat for rare and endangered species. N.D.C.C. § 49-22.1-09. The refinery may also have negative direct and indirect economic impacts, for example, by reducing tourism to the area. N.D.C.C. § 49-22.1-09(7). Further, the property itself appears to be situated partly in a floodplain, which may present risks to public safety and the environment.

7. Meridian made numerous statements to the public, media, investors, and regulators that it planned to construct a 55,000 barrel per day (“bpd”) refinery.

8. North Dakota law provides that an oil refinery with a capacity of 50,000 bpd or more must obtain a certificate of site compatibility from the PSC prior to construction. N.D.C.C. § 49-22.1-04.

9. From the time the proposal to build the Davis Refinery became public, Meridian advised North Dakota regulators, potential investors, the oil and gas trade press, general media outlets, and the public that it intended to build a 55,000 barrels per day refinery. In an apparent attempt to avoid the North Dakota Public Service Commission’s siting process, Meridian changed its story, most recently claiming that it now only intended to build a 49,500 bpd refinery.

10. ELPC and DRC filed a formal Complaint in the PSC against Meridian on June 29, 2018, alleging that Meridian was currently or soon would be in violation of North Dakota law by beginning construction of a 55,000 bpd refinery without siting approval from the PSC. On July 9, 2018, the PSC found that the Complaint was sufficient and presented a *prima facie* case. On July 10, 2018, the PSC requested the assignment of an Administrative Law Judge (ALJ) from the Office of Administrative Hearings. The PSC served the Complaint on Meridian on July 18, 2018.

11. Instead of filing an Answer, Meridian filed a Motion to Dismiss on August 8, 2018, alleging that the PSC did not have subject matter jurisdiction over the proceeding. Meridian included an affidavit from its CEO and Chairman, William Prentice, stating that Meridian's current plans were to build a refinery with a capacity of 49,500 bpd.

12. ELPC and DRC opposed Meridian's motion to dismiss, explaining that it was procedurally improper, and that regardless, Meridian's arguments simply raised a factual dispute that must be resolved through the Administrative Agencies Practice Act's ("AAPA") formal hearing and discovery process. In other words, the proper procedure for Meridian to dispute ELPC's and DRC's factual allegation in their complaint that Meridian is constructing a 55,000 bpd facility was to deny that allegation in an Answer, rather than filing a motion to dismiss.

13. In addition to opposing Meridian's motion, as an alternative argument, ELPC and DRC asked for the opportunity to conduct jurisdictional discovery.

14. On September 10, 2018, the ALJ issued a recommended decision to grant Meridian's Motion to Dismiss. The ALJ's proposed order accepted Meridian's statements of fact as true and denied jurisdictional discovery.

15. On September 14, 2018, Appellants moved to supplement the record with additional evidence that the North Dakota Department of Health had issued Meridian a permit to

construct, that the permit to construct describes the refinery as a 55,000 bpd facility, and that Meridian was *presently* constructing its refinery pursuant to this permit. Appellants also reiterated their request for jurisdictional discovery and a hearing.

16. On October 3, 2018, the ALJ issued a recommended decision allowing the inclusion of the additional evidence in the record, but denying Appellants' request for jurisdictional discovery and a hearing.

17. On October 10, 2018,¹ the Commission adopted a slightly revised version of the ALJ's order granting Meridian's Motion to Dismiss. The decision included the following Findings of Fact:

- "The Davis Refinery currently being constructed in Billings County is a 49,500 bpd facility;" and
- "Previous representations as to the company's plans in other permit applications are not relevant."

18. The foregoing Findings of Fact were made without ever affording Appellants discovery or a hearing, even though both are required under the AAPA. *See, e.g.*, N.D.C.C. §§ 28-32-21, 28-32-33.

19. Thus, the proceeding at the PSC and the Commission's order did not "afford[] the appellant[s] a fair hearing" as required by N.D.C.C. § 28-32-46(3).

20. Further, the provisions of the Administrative Agencies Practice Act were not "complied with in the proceedings before the agency," as required by N.D.C.C. § 28-32-46(4).

¹ The parties were given approximately 20 minutes' notice that the case would be added to the meeting agenda.

21. WHEREFORE the appellants request that this Court reverse the PSC's order dismissing Appellants' Complaint, remand the case to the PSC for further proceedings, award appellants costs and attorney fees pursuant to N.D.C.C. § 28-32-50, and grant any and all other relief to which they may be entitled.

Dated: November 8, 2018

Respectfully submitted,

BRAATEN LAW FIRM

/s/ Derrick Braaten
Derrick Braaten (ND 06394)
JJ England (ND 08135)
109 North 4th St., Suite 100
Bismarck, ND 58501-4003
Tel. 701-221-2911
Fax 701-221-5842
derrick@braatenlawfirm.com
jj@braatenlawfirm.com

*Attorneys for the Dakota Resource
Council and associate attorney pursuant
to ND Rules of Admission to Practice Rule
3(A)(1)(a)(1)*

ENVIRONMENTAL LAW & POLICY CENTER

/s/ Scott Strand
Scott Strand (*Pro Hac Vice*)
60 South Sixth St., Suite 2800
Minneapolis, MN 55402
(612) 386-6409
SSstrand@elpc.org

Rachel Granneman (*Pro Hac Vice*)
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 673-6500
RGranneman@elpc.org

*Attorneys for the Environmental Law
& Policy Center*