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Case Number: 08-2018-CV-02937

Case Style: Environmental Law and
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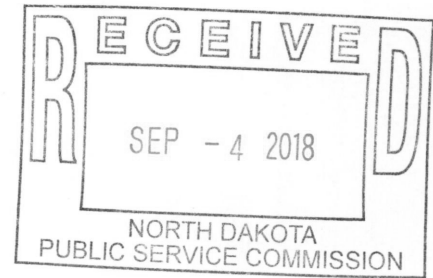
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August 31, 2018

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 for Cease and Desist Order and documents in support of that 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 cursive script, appearing to read "JJ England".

JJ England

Enclosures

15 **PU-18-223** Filed: 9/4/2018 Pages: 20
Motion for Cease and Desist Order, Brief, and supporting documents

Dakota Resource Council & The Environmental Law & Policy Center
JJ England

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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

MOTION FOR CEASE AND DESIST ORDER

The Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”), on behalf of their members, respectfully request that the North Dakota Public Service Commission (“PSC”) issue a cease and desist order pursuant to N.D.C.C. § 49-02-02 to Meridian Energy Group, Inc. (“Meridian”) to halt all construction activities for the Davis Refinery 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.

ELPC and DRC filed a formal 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. On July 9, 2018, the PSC approved a motion finding that ELPC and DRC’s Complaint states a *prima facie* case. Docket #2. Meridian has now begun construction of its proposed 55,000 bpd refinery without a certificate of site compatibility.

ELPC and DRC request that the PSC issue a cease and desist order. If the PSC determines that oral argument would be helpful to decide this motion under N.D.A.C. § 69-02-02-08, ELPC and DRC request that the PSC schedule that argument on an expedited basis.

The attached brief more fully explains the grounds for and supports this Motion.

Dated this 31st day of August, 2018.

Respectfully submitted,

BRAATEN LAW FIRM

/s/ Derrick Braaten

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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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

**BRIEF IN SUPPORT OF
MOTION FOR CEASE AND DESIST ORDER**

The Environmental Law & Policy Center (“ELPC”) and Dakota Resource Council (“DRC”), on behalf of their members, submit this brief in support of their Motion for Cease and Desist Order in the above-captioned proceeding. If the Public Service Commission (“PSC”) determines that oral argument would be helpful to decide this motion under N.D.A.C. § 69-02-02-08, ELPC and DRC request that the PSC schedule that argument on an expedited basis.

INTRODUCTION

ELPC and DRC filed a Complaint on June 29, 2018, alleging that Meridian Energy Group, Inc. (“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. On July 9, 2018, the PSC approved a motion finding that ELPC and DRC’s Complaint states a prima facie case. Docket #2.

With this action still pending, Meridian has now begun construction of the proposed refinery without a certificate of site compatibility. ELPC and DRC request that the PSC issue a

cease and desist order pursuant to N.D.C.C. § 49-02-02 to Meridian to halt all construction activities for the Davis Refinery 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.

ARGUMENT

I. MERIDIAN HAS BEGUN ILLEGALLY CONSTRUCTING A REFINERY WITH A CAPACITY OF AT LEAST 50,000 BPD.

Meridian has begun constructing its Davis Refinery in violation of North Dakota law. ELPC and DRC explained in their Complaint that Meridian plans to construct a 55,000 bpd oil refinery, known as the Davis Refinery, in Billings County, North Dakota, approximately 3 miles from the South Unit of the Theodore Roosevelt National Park. Meridian has previously taken the position that it can avoid siting review by the PSC by developing the refinery in two stages, the first of which would be under the 50,000 bpd threshold that triggers the requirement of a certificate of site compatibility, with the second stage expanding past that threshold.

In its Motion to Dismiss filed on August 8, 2018, Meridian changed its story, now claiming that it plans to build a 49,500 bpd refinery in a single phase (while still not precluding an imminent expansion beyond the threshold). Despite Meridian's various representations to the PSC that its refinery will not have a capacity greater than 50,000 bpd, Meridian has made numerous statements to the public, to investors, and to three separate government entities in official permit applications that it plans to build a 55,000 bpd refinery. *See* Complaint at ¶¶ 31-39, 41-44.

Despite the fact that the PSC found the Complaint to be sufficient and that this proceeding is ongoing, Meridian has now begun construction of the Davis Refinery. Meridian issued a press release on July 17, 2018 titled, "Meridian Energy Group, Inc. Begins Civil

Construction of the Davis Refinery.” Exhibit A to Aff. JJ England, Meridian, *Meridian Energy Group, Inc. Begins Civil Construction of the Davis Refinery*, <https://www.meridianenergygroupinc.com/meridian-energy-group-inc-begins-civil-construction-of-the-davis-refinery/> (July 17, 2018). “Initial construction activities will include the installation of erosion control devices, storm water pond development and ditch shaping.” *Id.* Meridian also distributed an email to a mailing list on August 15, 2018, which states that “[t]he Davis Refinery is now on its way to a physical reality with site preparation for construction well underway. Our civil construction and site preparation firm SEH Inc. began operations on July 17th.” Exhibit B to Aff. JJ England.

Further, Complainants ELPC and DRC have first-hand evidence that construction has begun. Laura Grzanic, a member of DRC, lives approximately one mile from the site of the proposed Davis Refinery. She has personally witnessed construction activities taking place at the site, including earth-moving activities. Exhibit C to Aff. Grzanic. A photograph of the site with earth-moving equipment is attached as Exhibit A to Ms. Grzanic’s Affidavit. Meridian has clearly begun construction of the Davis Refinery without a certificate of site compatibility.

II. THE PSC SHOULD ISSUE A CEASE AND DESIST ORDER TO HALT CONSTRUCTION.

The PSC should issue a cease and desist order to stop construction of the refinery in order to preserve its jurisdiction. Meridian’s construction of the Davis Refinery violates North Dakota law, N.D.C.C. § 49-22.1-04, and undermines the PSC’s authority to make determinations on site compatibility for large oil refineries, as well as its authority to determine when it has jurisdiction over a proposed project.

A. Allowing Construction to Continue Undermines the PSC's Authority and the Purpose of the Siting Review Requirements.

Meridian's construction of the Davis Refinery interferes with the ability of the PSC to carry out a fair proceeding to determine the application of the siting review requirements to Meridian's Davis Refinery and jeopardizes ELPC and DRC's right to just and effective relief. The Legislative Assembly enacted the siting review requirements because "[i]t is necessary to ensure the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and the welfare of the citizens of this state." N.D.C.C. § 49-22.1-02. The PSC must ensure that energy conversion facilities, including oil refineries, are sited "in an orderly manner compatible with environmental preservation and the efficient use of resources" and "to minimize adverse human and environmental impact." *Id.* Critically, site approval must be acquired *before* a company may "begin construction." N.D.C.C. § 49-22.1-04. Under the Facility Siting Act, "[c]onstruction includes any clearing of land, excavation, or other action that would affect the environment of the site..." N.D.C.C. § 49-22.1-03(3).

Both the Legislative Assembly and the PSC have set out considerations and requirements that guide the PSC's evaluation of proposed sites. N.D.C.C. § 49-22.1-09 (containing statutory factors); N.D.A.C. ch. 69-06-08 (containing PSC siting criteria). Not only has the PSC not had the opportunity to consider any of these factors and criteria with respect to the site for the Davis Refinery, but construction activities may actually affect the PSC's ability to apply those considerations to the site. For example, the PSC must consider "irreversible and irretrievable commitments of natural resources" and impacts on "existing scenic areas, historic sites and structures, [p]aleontological or archaeological sites," and on "areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species."

N.D.C.C. § 49-22.1-09(6), (9), (10); *see also* N.D.A.C. § 69-06-08-01(1), (3), (4), (5), (6). The consideration of these and other factors may be mooted by initial construction activities, including clearing and grading the site. These activities could destroy existing scenic areas, biological wealth, and important habitat before the PSC can even consider their existence. Similarly, earth-moving activities would make it more difficult for the PSC to identify historic sites and structures and paleontological or archaeological sites. In other words, allowing construction before the PSC makes a determination undermines the integrity of the siting review.

Case law interpreting requirements of the National Environmental Policy Act (“NEPA”) helps explain why it is so important that review occurs *prior to* any action. NEPA is a federal law that requires a thorough environmental analysis of impacts from major actions, before those actions can be carried out. 42 U.S.C. § 4321 *et seq.* NEPA is strictly a procedural statute,¹ however, while North Dakota’s siting review requirements include substantive requirements to reduce and avoid impacts, making correct timing even more critical. NEPA cases have long acknowledged the importance of the timing of environmental reviews. The Ninth Circuit has explained that “[a] central purpose of [the environmental analysis] is to force the consideration of environmental impacts in the decisionmaking process.” *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985) (abrogated on other grounds). Just like with NEPA, the purpose of the North Dakota siting review requirement is to ensure that consideration of impacts occurs *before* a siting decision is made.

In *Save the Yaak Committee. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988), the court found that it was impermissible under NEPA to begin construction of a timber road before the environmental review had been performed, noting that construction would inappropriately

¹ While NEPA requires environmental analysis and the consideration of alternatives, it does not require environmentally-friendly outcomes.

change the analysis: “[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated.” Because the agency allowed work to begin on the project before full review, the court held that this would “seriously imped[e] the degree to which their planning and decisions could reflect environmental values.” *Id.* at 718-19. The court accordingly enjoined further construction work on the road. The court’s concerns are just as applicable to the current proceeding.

Although principles of equity do not directly apply in this administrative proceeding, principles of equity nonetheless underscore why it is important for the PSC to issue a cease and desist order to preserve the status quo. Meridian’s continued construction of the refinery could potentially reduce the efficacy of relief, inappropriately affect the balance of equities, and/or moot the current proceeding. For example, if Meridian were to complete significant construction activities prior to siting review by the PSC, this may make it harder for the PSC to reject the site, both because of the resources invested by Meridian and the fact that certain values the siting law is intended to protect may already be irreparably lost.

B. The PSC Has the Authority to Issue a Cease and Desist Order and to Order.

The PSC has the authority to issue a cease and desist order to Meridian to halt all construction activity on its planned Davis Refinery until the PSC determines whether Meridian must obtain a certificate of site compatibility. N.D.C.C. § 49-02-02(2). It is axiomatic that courts and other tribunals have jurisdiction to determine their own jurisdiction, and that includes the ability to issue orders and sanction noncompliance with those orders while it makes that determination. *See e.g., United States v. United Mine Workers*, 330 U.S. 258, 291-94 (1947) (upholding temporary restraining order to preserve status quo until court could determine whether it had jurisdiction). If necessary, the PSC may also compel obedience to its orders by

mandamus or injunctive proceedings in a court of proper jurisdiction, pursuant to N.D.C.C. §§ 49-02-02(4) and 49-22.1-20(5), in order to preserve its jurisdiction.

CONCLUSION

For the foregoing reasons, ELPC and DRC respectfully request that the PSC issue a cease and desist order requiring Meridian to halt all construction activities for the Davis Refinery to preserve the PSC's jurisdiction over whether Meridian is required to obtain a certificate of site compatibility for the Davis Refinery. If the Public Service Commission ("PSC") schedules oral argument pursuant to N.D.A.C. § 69-02-02-08, ELPC and DRC further request that the argument is scheduled on an expedited basis.

Dated this 31st day of August, 2018.

Respectfully submitted,

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Center*

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

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Respondent.)

Case No. PU-18-223

AFFIDAVIT OF JJ ENGLAND


STATE OF MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

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

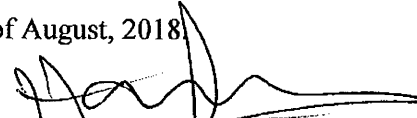
2. Attached hereto as Exhibit A is a true and correct copy of a press release issued by Meridian. This press release was downloaded from <https://www.meridianenergygroupinc.com/meridian-energy-group-inc-begins-civil-construction-of-the-davis-refinery/>.

3. Attached hereto as Exhibit B is a true and correct copy of an email sent to me on August 15, 2018 by Meridian Energy Group, Inc., via an email distribution list.

DATED this 31 day of August, 2018.


JJ England

Subscribed and sworn before me this 31 day of August, 2018


Notary Public

