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Subject: Filing Accepted for Case: 08-2018-CV-02937; Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.; Envelope Number: 3293206
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Envelope Number: 3293206
 Case Number: 08-2018-CV-02937
 Case Style: Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.



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Filing Details	
Court	Burleigh County - South Central District
Case Number	08-2018-CV-02937
Case Style	Environmental Law and Policy Center, et al. vs. North Dakota Public Service Commission, et al.
Date/Time Submitted	1/31/2019 7:16 PM CST
Date/Time Accepted	2/1/2019 9:11 AM CST
Accepted Comments	
Filing Type	Exhibit
Filing Description	CR Exhibit 28 Recommended Decision on Petitioner's Motion to Reopen and Supplement Record
Activity Requested	EFileAndServe
Filed By	John Hamre
Filing Attorney	Illona Jeffcoat-Sacco

Document Details	
Lead Document	CR Exhibit 28 Recommended Decision on Petitioner's Motion to Reopen.pdf
Lead Document Page Count	9

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08-2018-CV-02937

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Environmental Law & Policy Center and Dakota Resource Council,)	
)	Case No. PU-18-223
)	
Complainants/ Petitioners,)	OAH File No. 2018-0356
)	
-vs-)	
)	
Meridian Energy Group, Inc.,)	
)	
Respondent.)	

**RECOMMENDED DECISION ON PETITIONER'S MOTION TO REOPEN
AND SUPPLEMENT THE RECORD AND
TO PERMIT JURISDICTIONAL DISCOVERY**

On September 14, 2018, Complainants Environmental Law & Policy Center ("ELPC") and Dakota Resource Council ("DRC") requested the North Dakota Public Service Commission ("PSC" or "Commission") reopen and supplement the record to include evidence that Meridian has not submitted updated information regarding intended plant capacity to the North Dakota Department of Health ("NDDOH"). Specifically, ELPC and DRC request that NDDOH's response to a recent open records request be included in the administrative record, and considered in combination with Meridian's current NDDOH permit to construct, which was included as Exhibit D to the original Complaint. In addition, Complainants again request permission to conduct jurisdictional discovery. There is also a pending request from PSC staff to supplement the record with email correspondence between staff and the NDDOH dated September 19 and September 24 regarding interpretation of the permit to construct. [Exhibit A.]

1. The Motions to Supplement the Record

ELPC and DRC filed a brief in support of the motion to reopen and supplement the record on September 14, 2018 (Docket #22) accompanied by an Affidavit of JJ England and affidavit marked Exhibit A which is an open record request from Mr. England to NDDOH and a response from DOH. I recommend admitting both the PSC correspondence with DOH and Mr. England's request since the record is essentially still open.

The gist of the NDDOH response to Mr. England is that Meridian has not filed any updated communication or application since its permit to construct was issued. On that basis, ELPC and DRC request that the PSC reopen and supplement the record and also permit them to conduct jurisdictional discovery to seek information in Meridian's possession regarding the planned capacity of the refinery. As noted, with regard to the issue of whether 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, I recommend that ELPC and DRC be allowed to supplement the record accordingly.

2. Motion to Conduct Jurisdictional Discovery

Meridian has not supplemented its Permit Application to the Department of Health to seek a lower cap than the 55,000 bpd permit they originally received. However, in my opinion, this fact does not change the situation with regard to the potential jurisdiction of the Commission. Simply because Meridian originally obtained a permit for a 55,000 bpd refinery from the Department of Health and has not amended that since submitting sworn testimony to the PSC in this matter that it intends to actually build a maximum capacity 49,500 bpd refinery would not change the fundamental

jurisdictional threshold that the intended refinery does not require a permit from the PSC. The NDDOH permit to construct a 55,000 bpd refinery relates to the Health Department's permitting rules and regulations, not the PSC. Pollutant emissions from a larger facility have already been considered by DOH, and a refinery constructed to a lesser bpd rate would in my opinion be within the limits of the original permit and not require modification. This conclusion can be deduced independently, but is supported by the email from Jim Semerad to John Schuh dated September 24, admitted into the record and attached to this decision as Exhibit A.

As noted in Meridian's Brief in Opposition to Petitioner's Motion to Reopen, the fact that the NDDOH issued a permit for Meridian to build a refinery up to 55,000 bpd does not mean they need to construct one of that size. The proposed 49,500 bpd facility sworn to in the affidavit from the Chief Executive Officer of Meridian is beneath PSC jurisdiction and within the parameters of the NDDOH permit.

As noted previously in my Recommended Decision (Docket #21), jurisdiction is fundamental and the legislature has sought fit to permit refineries of under 50,000 bpd in this state without a permit and review process by the PSC. Merely because a third party complaint has been filed with the PSC and placed on the docket (or earlier representations to the contrary as to capacity have been made by the company building the refinery), does not change or alter the threshold or expand PSC authority. Regardless of how the action is initiated, whether by Complaint under the Administrative Agencies Practice Act or otherwise, once it appears the agency lacks subject matter jurisdiction, the case cannot proceed. A motion to dismiss for lack of subject matter jurisdiction is always an appropriate filing to challenge subject matter jurisdiction.

I have been provided no specific North Dakota statutory authority which gives the PSC authority to conduct jurisdictional discovery of a proposed facility to determine whether it might meet or exceed the jurisdictional minimum. Certainly the legislature could have done so, as it has with enrichment of uranium minerals, but it chose not to do so. NDCC § 49-22-63 (5)(3). Instead, they drew different but clear lines for various Energy Conversion Facilities like wind, gas, uranium, and liquid hydrocarbons.

A state agency which is a creature of legislative enactment, may not exceed its authority or subject matter jurisdiction. Likewise, neither can a court, state or federal, proceed in a case absent subject matter jurisdiction. See cases cited in my earlier analysis, Docket #21, such as *Albrecht v. Metro Ambulance*, 1998 ND 132, §§ 10-11.


Therefore, my recommendation to the Commission remains to dismiss the complaint for lack of subject matter jurisdiction. I would, therefore, deny the request for jurisdictional discovery. Therefore, my additional recommendations to the Commission are as follows:

RECOMMENDATIONS

1. Admit the supplement to the record of the affidavit from Mr. England and the response of NDDOH to his open records request.
2. Admit the email correspondence between Mr. Schuh and Mr. Semerad of NDDOH, Exhibit A hereto; and
3. Deny the motion to conduct jurisdictional discovery.

Dated this 3rd day of October, 2018.

State of North Dakota
OFFICE OF ADMINISTRATIVE HEARINGS

By: 
Patrick J. Ward ID#03626
Administrative Law Judge
ZUGER KIRMIS & SMITH
PO Box 1695
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pward@zkslaw.com

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Schuh, John M.

From: Schuh, John M.
Sent: Monday, September 24, 2018 8:38 AM
To: Fahn, Patrick J.
Subject: FW: Permitting Question

From: Semerad, Jim L.
Sent: Thursday, September 20, 2018 5:10 PM
To: Schuh, John M. <jschuh@nd.gov>
Subject: RE: Permitting Question

John:

Our rules and the permit's focus is on pollutant emission limits. Compliance is based on emissions from the facility.

The 55,000 bpd is used as an indicator for the maximum process rate that the refinery could process without further permit review. This is consistent with ND and EPA rules.

Please contact me if you have further questions.

Jim Semerad
Division of Air Quality
Manager, Permitting and Compliance
State Dept. of Health
918 E. Divide Ave. 2nd Floor
Bismarck ND 58501-1947
(701) 328-5188
jsemerad@nd.gov
Division Website:
<https://deq.nd.gov/AQ/>

From: Schuh, John M.
Sent: Wednesday, September 19, 2018 2:20 PM
To: Semerad, Jim L. <jsemerad@nd.gov>
Subject: Permitting Question

Mr. Semerad,

Public Service Commission Staff has been discussing how DOH permits are applied and the Director of Public Utilities asked me to request information from the DOH.

In a filing with the Commission that discusses a recent DOH permit for Meridian's Davis Refinery it states:

"[The] Permit to Construct issued by the NDDOH is for a 55,000 bpd refinery in accordance with the information provided in the permit application and the specifications of the permit itself."



If the company holding a permit to construct chooses to construct a lower capacity facility than permitted to construct, would the company be required to supplement the application or request an amendment of the permit?

Any feedback to put some light on this matter would be appreciated. Feel free to contact me if I can provide any clarification to this question.

John Schuh
NDPSC
701.328.2421

From: Schuh, John M.
Sent: Monday, September 17, 2018 1:15 PM
To: Semerad, Jim L. <jsemerad@nd.gov>
Subject: RE: contact info

Thank you very much for your time and the information that you provided.

John M. Schuh
North Dakota Public Service Commission
600 E Boulevard Dept. 408
Bismarck, ND 58505
701.328.2421

From: Semerad, Jim L.
Sent: Monday, September 17, 2018 1:08 PM
To: Schuh, John M. <jschuh@nd.gov>
Subject: contact info

My contact info is:

Jim Semerad
Division of Air Quality
Manager, Permitting and Compliance
State Dept. of Health
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Bismarck ND 58501-1947
(701) 328-5188
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BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Environmental Law & Policy Center and)
Dakota Resource Council,) Case No. PU-18-223
)
Complainants/) OAH File No. 2018-0356
Petitioners,)
)
-vs-)
)
Meridian Energy Group, Inc.,)
)
)
Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the following:

**RECOMMENDED DECISION ON PETITIONER’S MOTION TO REOPEN
AND SUPPLEMENT THE RECORD AND
TO PERMIT JURISDICTIONAL DISCOVERY**

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Lawrence Bender
1133 College Drive, Suite 100
Bismarck, ND 58501

Dated this 3rd day of October, 2018.

State of North Dakota
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/Patrick J. Ward
Patrick J. Ward ID#03626
Administrative Law Judge
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