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	Environmental Law and Policy Center: Scott Strand (sstrand@elpc.org) Rachel Granneman (rgranneman@elpc.org) North Dakota Public Service Commission:

Service Contacts

Illona Jeffcoat-Sacco (ijs@nd.gov)

John Schuh (jschuh@nd.gov)

John Hamre (jghamre@nd.gov)

Jennifer Verleger (jverleger@nd.gov)

Dakota Resource Council:

Derrick Braaten (derrick@braatenlawfirm.com)

JJ Englad (jj@braatenlawfirm.com)

Meridian Energy Group, Inc.:

Lawrence Bender (lbender@fredlaw.com)

Other Service Contacts not associated with a party on the case:

Katie Laib (klaib@fredlaw.com)

Emily Lewis (elewis@fredlaw.com)

Samantha Rage (srage@fredlaw.com)

Kiana Courtney (kcourtney@elpc.org)

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STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Environmental Law & Policy Center and Dakota Resource Council,)	
)	Civil No. 08-2018-CV-02937
Appellants,)	PSC Case No. PU-18-223
)	
v.)	
)	APPELLANTS' OPENING BRIEF
North Dakota Public Service Commission, and Meridian Energy Group, Inc.,)	
)	
Appellees.)	
)	

INTRODUCTION

¶1 Appellants Dakota Resource Council (“DRC”) and Environmental Law & Policy Center (“ELPC”) brought a formal Complaint before the Public Service Commission (“PSC”) against Meridian Energy Group, Inc. (“Meridian”) for beginning to build a 55,000 barrel per day (“bpd”) petroleum refinery without the required siting approval from the PSC. N.D.C.C. § 49-22.1-04. Instead of filing an answer, Meridian moved to dismiss the Complaint for lack of subject matter jurisdiction, solely on the basis of a new statement from Meridian’s CEO that now Meridian only planned a 49,500 bpd facility, under the PSC’s jurisdictional threshold. The PSC granted the motion and dismissed the Complaint without providing Appellants an opportunity to conduct discovery or to present evidence as required by the Administrative Agencies Practice Act (“AAPA”). The issue in this appeal is whether the PSC’s dismissal of Appellants’ Complaint at this preliminary stage based solely on the Appellee’s statement and without allowing a hearing or discovery was improper and violated Appellants’ right to a fair hearing and the procedural requirements of the AAPA.

STATEMENT OF THE CASE AND THE FACTS

[¶2] Under North Dakota law, a company must obtain a certificate of site compatibility from the PSC before it can begin building an oil refinery that is “designed for or capable of . . . manufacture or refinement of fifty thousand barrels or more of liquid hydrocarbons per day.” N.D.C.C. § 40-22.1-01(6); N.D.C.C. § 49-22.1-04. The specific purpose of the certificate of site compatibility is “to ensure the location, construction, and operation” of these major 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.

[¶3] Appellee Meridian applied to the North Dakota Department of Health (“NDDH”) for a “permit to construct” a “55,000 bpd” crude oil refinery near Belfield, North Dakota. Meridian calls this refinery the “Davis Refinery.” In its application to NDDH for this permit to construct, Meridian referred to the Davis Refinery’s “55,000 bpd” capacity in at least twenty-one separate locations. *See, e.g.*, Application for Permit to Construct, Doc. ID 31, at pp. 1, 2, 7, 8, 22, 27.

[¶4] On March 1, 2017, the PSC sent a letter to Meridian’s attorney citing to Meridian’s applications to other government agencies seeking permits for a 55,000 bpd refinery (including the above-referenced NDDH permit to construct). Letter from Patrick Fahn to Lawrence Bender (March 1, 2017), Doc. ID 129. In that letter, the PSC’s director of its Public Utilities Division explained:

Since Meridian is filing applications with other state agencies for permits based on a facility that can refine up to 55,000 barrels per day of oil, and since an oil refinery of that capacity is jurisdictional to the Commission for siting under North Dakota Century Code chapter 49-22, it appears that the proposed refinery is jurisdictional under the siting law.

Id. In December of 2017, the PSC also sought a meeting with Meridian representatives seeking further clarification due to Meridian’s continued efforts to obtain other permits for a 55,000 bpd refinery. *See generally* Transcript of Information Exchange Meeting, Doc. ID 117.

[¶5] On June 12, 2018, NDDH formally signed and granted Meridian the permit to construct the Davis Refinery that Meridian had applied for. Air Pollution Control Permit to Construct, Doc. ID 35. The permit to construct specifically refers to the Davis Refinery as a “Petroleum Refinery with a rated capacity up to approximately 55,000 barrels of crude oil per day.” *Id.* at p. 1. The permit is also quite specific and permits Meridian to construct two “crude desalting and distillation units,” each of which would be capable of desalting and distilling “27,500 bpd” of crude oil apiece for a total of “55,000 bpd.” *Id.* at p. 2. As explained in more detail below, this Permit to Construct remains unchanged and fully in effect.

[¶6] On June 29, 2018, Appellants Dakota Resource Council (“DRC”) and Environmental Law and Policy Center (“ELPC”) filed a formal complaint before the PSC, alleging that Meridian had begun construction of the Davis Refinery without a siting permit in violation of the Energy Conversion and Transmission Facility Siting Act, N.D.C.C. ch. 49-22 (hereinafter “Siting Act”), and the PSC’s regulations implementing the Siting Act. The PSC then determined that DRC and ELPC’s complaint stated a “prima facie case,” which resulted in the PSC formally serving the complaint on Meridian. Doc. ID 49.

[¶7] Instead of filing an answer to the complaint, Meridian filed a “Motion to Dismiss for Lack of Subject Matter Jurisdiction.” Doc. ID 58. Meridian attached to that motion an affidavit from William Prentice, who is Meridian’s CEO. Mr. Prentice’s affidavit said that Meridian “has no current plans for any addition to or expansion of the Davis Refinery beyond the capacity of 49,500 bpd.” *Id.* at p. 14. This statement flatly contradicted all publicly available

information, including the fact that Meridian had applied for and obtained a permit to construct a crude oil refinery capable of refining 55,000 bpd from the North Dakota Department of Health. Additionally, Meridian had made numerous statements to other government agencies, investors, and the public that it was building a 55,000 bpd refinery. Application for Billings County Building and Zoning Certificate and Conditional Use Permit, Doc. ID 30; Stock Placement Memorandum, Doc. ID 36; Complied URLs with Cross-References to Archived Links, Doc. ID 37; State Engineer Administrative Record for Conditional Water Permit No. 6858, Doc. ID 29, at p. 10. Based solely on the one sentence in Mr. Prentice's affidavit, Meridian argued that the PSC lacked subject matter jurisdiction to consider DRC's and ELPC's complaint because the PSC does not have jurisdiction over refineries not capable of refining 50,000 bpd.

[¶8] In their response brief, DRC and ELPC explained that, at most, Mr. Prentice's self-serving affidavit created an issue of disputed material fact on the key question of whether the Davis Refinery would be capable of refining 50,000 bpd or more of crude oil. Specifically, DRC and ELPC explained that they had alleged in their complaint, in great detail and with numerous supportive documents, that Meridian was constructing a refinery capable of refining up to 55,000 bpd of crude oil. Mr. Prentice's statement was no more than a denial of DRC's and ELPC's factual allegation.

[¶9] On September 10, 2018, the Administrative Law Judge ("ALJ") issued his recommended decision to dismiss the Complaint. Recommended Decision Granting Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint, Doc. ID 69. The recommended decision accepted Meridian's allegations as true, denied DRC and ELPC any opportunity for discovery, and denied a hearing. In an attempt to have the ALJ reconsider his decision, on September 14, 2018, DRC and ELPC filed a motion to supplement the record and to

allow discovery. Doc. ID. 70. Specifically, DRC and ELPC filed an open records request with NDDH to determine if Meridian had sought approval to modify its 55,000 bpd permit to reduce the capacity below the PSC's siting threshold. Notably, the permit included conditions that required Meridian to provide updated information to NDDH if Meridian deviated from the permitted construction and operation. Air Pollution Control Permit to Construct, at pp. 43-44, Doc. ID 35. In response, DRC and ELPC learned 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." E-mail from Rheanna Kautzman to JJ England (September 14, 2018), Doc. ID 70, at p. 16. Further, the Health Department's permit to construct the Davis Refinery as a 55,000 bpd facility remained in effect. These facts directly contradicted Mr. Prentice's statement that Meridian had no plans to build a 55,000 bpd facility.

[¶10] On October 10, 2018, the PSC adopted the ALJ's proposed order dismissing Appellants' Complaint. Order on Recommended Decision Granting Motion to Dismiss Complainants/Petitioners' Complaint, Doc. ID 109. In her remarks, Commissioner Fedorchak called the decision a "close call" and a "tough call." Partial Transcript of Commission Meeting (Oct. 10, 2019), Doc. ID 119, at p. 5 line 5. Commissioner Christmann said, "[o]ur decision today is about one thing, and that is whether or not the Davis refinery meets the threshold set by the legislature for PSC jurisdiction. And there's no evidence that the developers' current plan exceeds the legal threshold." *Id.* at p. 9, lines 10-14. The adopted order stated that the PSC was answering the question of whether "the PSC can exercise jurisdiction over a proposed crude oil refinery that as [Meridian] now plans to construct has a planned operating capacity of 49,500 barrels per day ("bpd")?" Order on Recommended Decision Granting Motion to Dismiss

Complainants/Petitioners' Complaint, Doc. ID 109, at p. 1. This is the ultimate factual question on the merits.

[¶11] Further, the PSC's final order contained "findings of fact." These findings of fact included the following:

1. The Davis Refinery currently being constructed in Billings County is a 49,500 bpd facility. . . .
3. Previous representations as to the company's plans in other permit application are not relevant to the final permitting requirement so long as the facility constructed stays below 50,000 bpd.

Id. at p. 10. The PSC adopted these findings of fact based solely on the one sentence in Mr. Prentice's affidavit. No factual development was allowed through discovery and a hearing, even though as explained in the following argument, both are required by the formal hearing process.

[¶12] On November 8, 2018, DRC and ELPC filed a Notice of Appeal to this Court. Doc. ID 01.

STANDARD OF REVIEW

[¶13] Administrative agencies in North Dakota must provide parties with a "fair hearing" and must comply with "the provisions of chapter [28-32] in proceedings before the agency." Failure to do so is reversible error. N.D.C.C. § 28-32-46; *E.g., Skjonsby Truck Line, Inc. v. Elkin*, 325 N.W.2d 271 (N.D. 1982) (reversing PSC decision due to failure to provide fair hearing); *Flink v. N. Dakota Workers Comp. Bureau*, 1998 ND 11, ¶ 22, 574 N.W.2d 784, 790, as corrected on denial of reh'g (Feb. 12, 1998) (reversing agency decision in part for failure to provide a fair hearing). The question of whether DRC and ELPC were afforded a fair hearing and whether the procedures of chapter 28-32 were complied with are questions of law. Under the

AAPA, a court “reviews questions of law de novo.” *See, e.g., Schlosser v. N. Dakota Dep’t of Transp.*, 2009 ND 173, ¶ 7, 775 N.W.2d 695, 698; *Olson v. N. Dakota Dep’t of Transp. Dir.*, 523 N.W.2d 258, 259 (N.D. 1994) (agencies’ decisions on questions of law are “fully reviewable”).

LAW AND ARGUMENT

[¶14] In this case, the substantive law is provided by the Siting Act. The procedural law is provided by the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. DRC and ELPC assert in this appeal that the PSC did not “afford [DRC and ELPC] a fair hearing” and that the provisions of the AAPA “were not complied with in the proceedings before the [PSC].” N.D.C.C. § 28-32-46(3),(4). In other words, the issue in this appeal is whether the PSC properly followed the AAPA’s formal complaint procedures when it denied discovery, denied a hearing, and simultaneously made material findings of fact contrary to DRC’s and ELPC’s allegations.

[¶15] It is undisputed that the complaint DRC and ELPC filed with the PSC against Meridian began a formal “adjudicative proceeding.” N.D.C.C. § 28-32-01(1). “‘Adjudicative proceeding’ means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative hearing includes administrative matters involving a hearing on a complaint against a specific named respondent.” *Id.* (emphasis added).

[¶16] Developing a factual record through discovery and an evidentiary hearing are the hallmarks of the formal hearing process. The AAPA says “[a]t any hearing in an adjudicative proceeding, the parties shall be afforded opportunity to present evidence and cross-examine witnesses.” N.D.C.C. § 28-32-21(2); *see also People to Save the Sheyenne River, Inc. v. North Dakota Dep’t of Health*, 2005 ND 104, ¶ 14, 697 N.W.2d 319 (“procedures for an adjudicative proceeding, includ[e] the right to present evidence and cross-examine witnesses.”).

[¶17] The AAPA also states “[i]n an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.” N.D.C.C. § 28-32-33(1). Thus, discovery rules under the AAPA’s formal hearing process are nearly identical to those in state court and are an important part of the formal hearing process. *Aalund v. North Dakota Workers Comp. Bureau*, 2001 ND 32, ¶ 7, 622 N.W.2d 210 (“Section 28–32–09(1), N.D.C.C., contemplates discovery for administrative hearings in accordance with the North Dakota Rules of Civil Procedure”).

[¶18] A “fair hearing” requires a fair and reasonable opportunity for a party to present its case, including access to the necessary information to put on that case. *See, e.g., Estate of Robertson by Robertson v. Cass Cty. Soc. Servs.*, 492 N.W.2d 599, 603 (N.D. 1992) (reversing and remanding agency decision when individual was not given a “meaningful opportunity to present evidence” on the relevant issues).

[¶19] Turning to the circumstances of this case, DRC and ELPC were not just denied a “fair hearing”—they were denied *any* hearing. N.D.C.C. § 28-32-46(4). It is difficult to understate the patent unfairness of the process (or lack thereof) that occurred below. The AAPA’s formal complaint and answer process is supposed to roughly track the complaint and answer process in state court. For example, both the AAPA and the PSC’s rules give the respondent twenty days to respond to a complaint, and if the complaint is not responded to in that time-frame, the complaint could be deemed admitted by the agency. N.D.C.C. § 28-32-21(1)(e); N.D.A.C. § 69-02-02-03(1). The PSC’s rules also explain that the PSC requires specific admissions and denials in the answer. N.D.A.C. § 69-02-02-03(2).

[¶20] Meridian never filed an answer. Instead, it filed a motion to dismiss with an affidavit attached purporting to deny the DRC’s and ELPC’s key factual allegation that

Meridian's refinery would be capable of refining up to 55,000 bpd of crude oil. In response, DRC and ELPC cited to Meridian's 55,000 bpd Permit to Construct (which was and is still in effect) and moved the ALJ to allow discovery, which the ALJ denied. Then, the PSC dismissed DRC's and ELPC's claim based solely upon Mr. Prentice's affidavit statement that Meridian "has no current plans for any addition to or expansion of the Davis Refinery beyond the capacity of 49,500 bpd." Doc. ID 58, at p. 14.

[¶21] If DRC and ELPC had been given an opportunity ask Mr. Prentice questions about his affidavit in discovery or at an evidentiary hearing, one basic question they would have asked would have been how Meridian planned to limit the refinery's capacity. For example, was Mr. Prentice referring to an actual design change? Or when he said "capacity of 49,500 bpd," was he simply referring to a refinery that would still have the physical equipment installed capable of refining 55,000 bpd of crude oil and that the refinery would simply choose to only refine 49,500 bpd of oil? These details matter because the Siting Act refers to whether the refinery is "designed for or capable of . . . manufacture or refinement of fifty thousand barrels or more of liquid hydrocarbons per day." N.D.C.C. § 40-22.1-01(6); N.D.C.C. § 49-22.1-04. DRC and ELPC could have presented that type of information to the PSC in a formal setting so that the PSC could make a proper factual finding based upon its agency expertise.

[¶22] To illustrate the complete inadequacy of the PSC's process, it may help to analogize. In essence, the PSC's decision to grant Meridian's motion to dismiss based upon this affidavit would be like a plaintiff filing a tort claim for battery in court, the defendant filing a motion to dismiss based upon an affidavit that says "I didn't touch him," and then the court

dismissing the case without even allowing discovery on the issue of physical contact.¹ This isn't a question of jurisdiction; it is a question of disputed material fact. *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 22, 855 N.W.2d 614 (explaining that to defeat a motion to dismiss for lack of jurisdiction, the plaintiff simply must make a *prima facie* showing of jurisdiction); *Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n*, 2001 ND 139, ¶ 17, 632 N.W.2d 407 (same); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir.1991) (same).

[¶23] A similar situation was presented in *Shark v. Northern States Power Co.*, 477 N.W.2d 251 (N.D. 1991). Shark, an intervenor in a PSC proceeding on a utility's cost recovery, appealed from the decision, arguing denial of a fair hearing in part due to the lack of an opportunity to carry out discovery:

Shark contends that he was denied due process and a fair hearing because the time period between the notice of hearing and the hearing was not reasonable in view of the nature, scope, and importance of the hearing. He asserts that that time period did not give him sufficient advance notice of the issues to permit reasonable time for discovery and preparation of his case. He argues that the PSC abused its discretion in denying his request for a continuance.

Id. at 254. The court agreed that Shark was denied a meaningful opportunity to participate in the hearing process and remanded the case. *Id.* at 255. Like in *Shark*, Appellants in the current case were similarly denied “an opportunity to fairly prepare [their] case” because they were not given an opportunity to conduct discovery and to present evidence at a hearing before the PSC made factual determinations. *Id.*

¹ Of course, under N.D.R. Civ. P. 12, a district court considering a motion to dismiss must treat all the allegations in a complaint as true, and may not dismiss a case simply because the defendant has raised an issue of material fact about jurisdiction. *Linberg v. Sanford Medical Ctr.*, 2016 ND 140, 881 N.W.2d 658, 660 (2016) (“we construe the complaint in the light most favorable to plaintiff, taking as true the well-pleaded allegations in the complaint.”).

CONCLUSION AND REQUEST FOR RELIEF

[¶24] The PSC's failure to follow the AAPA's mandates to allow an evidentiary hearing, cross examination, and discovery in this case was plainly unlawful. The PSC's issuance of important findings of fact based on no factual record whatsoever is similarly unlawful. But what is the most concerning is that these substantial procedural anomalies occurred on such a significant project with a complaint that was well-pled and supported by more facts and supporting documents than required to adequately state a claim.

[¶25] Meridian has known for years that the PSC believed Meridian needs to apply for a siting permit for the Davis Refinery. For years, Meridian has refused to apply, but all-the-while continued to apply to other government agencies for 55,000 bpd permits to construct. If Meridian is so steadfastly opposed to applying for this permit, it raises serious questions about whether there is something fundamentally problematic about this project that would prevent it from complying with the Siting Act's requirements.

[¶26] DRC and ELPC respectfully request that this Court:

- a. Enter a ruling that the PSC did not provide a fair hearing and did not comply with the requirements of the AAPA;
- b. Reverse the PSC's order dismissing DRC's and ELPC's complaint against Meridian;
- c. Vacate the PSC's findings of fact and conclusions of law; and
- d. Remand this proceeding to the PSC with instructions to allow discovery and an evidentiary hearing.

Dated this 22nd day of February, 2019.

Respectfully submitted,

ENVIRONMENTAL LAW & POLICY CENTER

/s/ Scott Strand
Scott Strand (*Pro Hac Vice*)
Senior Attorney
60 South 6th St., Suite 2800
Minneapolis, MN 55402
(612) 386-6409
SSstrand@elpc.org

Rachel Granneman (*Pro Hac Vice*)
Staff Attorney
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 795-3737
RGranneman@elpc.org
Attorneys for Environmental Law & Policy Center

BRAATEN LAW FIRM

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

*Attorneys for the Dakota Resource
Council and associate attorney pursuant
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