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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Environmental Law & Policy Center and
Dakota Resource Council,

Appellants,

v.

North Dakota Public Service Commission and
Meridian Energy Group, Inc.,

Appellees.

Case No. 08-2018-CV-02937

**MERIDIAN ENERGY GROUP, INC.'S
RESPONSE BRIEF**

INTRODUCTION

[¶1] In a continued effort to stymie progress on Meridian Energy Group, Inc.'s ("Meridian") Davis Refinery, the Environmental Law & Policy Center and Dakota Resource Council (collectively, "Appellants") have now appealed the Public Service Commission's ("PSC") Order dismissing their Complaint for lack of subject matter jurisdiction. The PSC—guided by its unambiguous statutory authority—held that it lacked subject matter jurisdiction over the Davis Refinery because its planned capacity was under the 50,000 bpd threshold necessary to subject the facility to siting review by the PSC under N.D.C.C. § 49-22.1-01.

[¶2] On appeal, Appellants do not allege that the PSC's ultimate determination—that it lacked subject matter jurisdiction—was erroneous. Instead, Appellants base their appeal on alleged procedural errors, claiming that they were denied a fair hearing under the Administrative Agencies Practices Act, N.D.C.C. § 28-32-01 *et seq.* ("AAPA"). Because jurisdiction is a necessary prerequisite to a hearing under the AAPA, Appellants' arguments on appeal lack merit and the PSC's Order dismissing Appellants' complaint should be upheld.

STATEMENT OF THE CASE AND THE FACTS

I. Meridian Energy's Davis Refinery Project.

[¶3] Meridian Energy is constructing a state-of-the-art crude oil refinery located on approximately 157 acres, with additional buffer acreage, in Billings County, North Dakota (the "Davis Refinery"). Compl., Doc. ID 29, ¶¶ 12, 20. The Davis Refinery is located near oil and gas activity in the Bakken Formation and is being constructed to a rated capacity of 49,500 barrels per day (bpd). Affidavit of William Prentice ("Prentice Aff.") ¶ 2, Doc. ID 58. Originally, the Davis Refinery was designed to be built with a rated capacity of 27,500 barrels per day (bpd). Compl. Ex. G, Doc. ID 38, Compl. Ex. I, Doc. ID 40. Meridian contemplated that, at some point in the future, the Davis Refinery might potentially be expanded to increase the capacity by another 27,500 bpd with a second phase of construction. *See generally* Compl. Ex. A, Doc. ID 30, Compl. Ex. C, Doc. ID 43–48. Meridian explained its proposal for the Davis Refinery in statements to regulators, the public, and investors.

[¶4] In the process of developing the Davis Refinery, however, Meridian revised its plans. Rather than constructing a 27,500 bpd first phase with a potential second phase expansion, Meridian prepared, revised, and updated the engineering and design plans to reflect a single phase refinery at a capacity of 49,500 bpd. The development and finalization of these plans represented a significant investment in additional design and engineering work and removed any ambiguity regarding the processing capacity of the Davis Refinery. To that end, Meridian explained its revised plan to its shareholders and others. Meridian Energy Group, Inc., Shareholder Information, www.meridianenergygroupinc.com/shareholders (explaining to shareholders that the Davis Refinery will "have a rated capacity of up to 49,500 barrels per day"); *see also* Erin Mundal, *New Refineries Show Oil Industry Betting American Production Here to Stay*, Inside Sources, (June 17, 2018), <http://www.insidesources.com/new-refineries->

show-oil-industry-betting-american-production-here-to-stay (“When completed, the Meridian refinery [Davis] will have a production capacity of 49,500.”); Prentice Aff. at ¶ 2, Doc. ID 58.) Meridian has obtained all the permits it requires to construct the Davis Refinery and has begun construction.

II. Appellants’ Repeated Attempts to Halt the Project.

[¶5] Appellants have made repeated, unsuccessful attempts to halt the construction of the Davis Refinery. First, Appellant Dakota Resource Council (“DRC”) initiated an action against Meridian in the South Central District Court, Burleigh County, North Dakota (Civil No. 08-2018-CV-01518). DRC alleged that the conditional use permit issued to Meridian by the Billings County Commission was invalid due to Meridian’s failure to institute the use of oil refining on the permitted property within one year of approval of the conditional use permit. Meridian answered the Complaint and moved for summary judgment. The Court granted Meridian’s motion and dismissed Appellants’ lawsuit.

[¶6] Second, Appellants, along with the National Parks Conservation Association, filed an appeal in the Southwest Judicial District, Stark County, North Dakota (Civil No. 45-2018-CV-00680). Appellants alleged that the air permit issued to Meridian by the North Dakota Department of Health to the Company does not meet certain legal requirements. The Court issued an Order dismissing the appeal with prejudice.

[¶7] Third, and finally, Appellants initiated this matter before the PSC. *See* Compl., Doc. ID 29. As explained below, at the recommendation of Administrative Law Judge Patrick Ward, the PSC dismissed this case for lack of subject matter jurisdiction. Order on Recommended Decision Granting Motion to Dismiss Complainants/Petitioners’ Complaint, Doc. ID 109. Appellants then appealed to this Court.

III. Appellants' Complaint to the PSC and Meridian's Motion to Dismiss.

[¶8] On June 29, 2018, Appellants filed a Complaint with the PSC (the "Complaint") pursuant to N.D.A.C. § 69-02-02-02. *See* Compl., Doc. ID 29. Appellants alleged that Meridian's proposal to construct a first phase of Davis Refinery with a capacity of 27,500 bpd and potentially expand the refinery in the future to increase the capacity by another 27,500 bpd was an impermissible attempt to evade the requirements of N.D.C.C. § 49-22.1-01, *et seq.* (also referred to as the "Siting Act"). Appellants alleged that the Davis Refinery would ultimately have a capacity of over 50,000 bpd and, consequently, Meridian was required to obtain a certificate of site compatibility from the PSC pursuant to the Siting Act. Appellants' arguments were based on the outdated statements regarding Meridian's proposal to construct the Davis Refinery in two possible phases. To that end, all of the statements Appellants cited in their Complaint were made over a year before the Complaint was filed.¹

[¶9] In response to the Complaint, on August 8, 2018 Meridian filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Dakota Rule of Civil Procedure 12(b)(1) and N.D.C.C § 28-32-22.² Motion to Dismiss, Doc. ID 58. In its Motion to Dismiss, Meridian stated that it currently intends to build an oil refinery with a capacity of 49,500 bpd, which falls outside of the PSC's statutory jurisdictional threshold of 50,000 bpd pursuant to the Siting Act. *Id.* In support of its Motion to Dismiss, Meridian cited to documents in the public record and submitted an affidavit from its Chief Executive Officer, which confirmed Meridian's proposal to construct the Davis Refinery in a single phase as a 49,500 bpd facility. *See id.*

¹ As the PSC has acknowledged, even if Meridian had proceeded with its prior proposal, the Davis Refinery still would not have exceeded the 50,000 bpd threshold, as the only construction proposed was for the first phase at 27,500 bpd. If Meridian went on to construct a second phase at 27,500 bpd, then Meridian could have approached the PSC and requested a Certificate of Siting Compatibility.

² N.D.A.C. § 26-02-02-08 likewise contemplates the filing of dispositive motions.

[¶10] For their part, Appellants opposed Meridian’s Motion to Dismiss arguing that the PSC has “jurisdiction to determine [its] own jurisdiction”—a principal with which Appellants now apparently disagree—and argued that it should be entitled to conduct discovery pursuant to Rule 56(f). Response to Motion to Dismiss, Doc. ID 59. Meridian, in turn, responded to the balance of Appellants’ arguments. Reply Brief in Support of Motion to Dismiss, Doc. ID 61. With regard to Appellants’ request for discovery under Rule 56(f), Meridian argued that: (1) such discovery is permissive only, (2) Appellants had failed to make the requisite showing to obtain such discovery, and (3) Appellants made clear that they intended to conduct overly broad and invasive discovery on irrelevant issues. *Id.*

IV. The Administrative Law Judge’s Finding That the PSC Lacks Jurisdiction.

[¶11] On September 5, 2018, the PSC moved to designate an Administrative Law Judge (“ALJ”) to make a recommended decision on Meridian’s Motion to Dismiss. Motion to designate administrative law judge, Doc. ID 65. On September 10, 2018, ALJ Patrick Ward issued a Recommended Decision Granting Meridian Energy Group, Inc.’s Motion to Dismiss Complainants/Petitioners’ Complaint (“ALJ’s Recommended Decision”). The ALJ’s Recommended Decision held that “[t]he PSC lacks statutory subject matter jurisdiction over [Meridian’s] proposed 49,500 bpd facility.” As explained by the ALJ:

The authority granted to the PSC by the North Dakota Legislature in Sections 49-22.1-01 and 49.22.1-04 is clear and unambiguous If the refinery Meridian presently intends to construct would have an operating capacity of 50,000 bpd or more, it would be within the PSC’s siting jurisdiction and the company must obtain a certificate of site compatibility. If the refinery has an operating capacity under 50,000 bpd, it is not within the PSC’s siting jurisdiction and the party need not obtain a certificate of site compatibility.

(ALJ’s Order on Recommended Decision Granting Mot. to Dismiss) (Doc. ID 69, at pp. 6-7).

[¶12] Critically, the ALJ noted that the PSC does not have “statutory authorization to assert jurisdiction below its threshold of 50,000 bpd,” regardless of possible future expansion:

It may be that Meridian originally intended to build the refinery in two phases. It may be that they planned to do so in order to try to circumvent PSC jurisdiction for the initial phase and build a second phase later. It may also be that the opposition by Petitioners and others here caused them to reconsider and downsize the project to 49,500 bpd in order to avoid PSC jurisdiction. However, even taking all those assumptions as true, the PSC does not have statutory authorization to assert jurisdiction below its threshold of 50,000 bpd or engage in speculation about the company’s plans for future expansion.

Id. Further, the ALJ’s Recommended Decision held that, due to the PSC’s lack of subject matter jurisdiction, Appellants’ request for discovery should be denied.

V. Appellants’ Motion to Reopen the Record.

[¶13] On September 14, 2018, following the ALJ’s Recommended Decision, Appellants filed their Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery (“Motion to Reopen”), Doc. ID 70. In support of their Motion to Reopen, Appellants argued the PSC should reopen the record to consider the fact that Meridian has not updated its air permit application or permit to construct from the North Dakota Department of Health, the latter of which permits Meridian to construct an oil refinery up to 55,000 bpd. Appellants also renewed their request to engage in jurisdictional discovery and—for the first time—argued that they were entitled to a hearing on Meridian’s Motion to Dismiss. Meridian opposed Appellants’ motion, arguing that: (1) Appellants have no right to a hearing in a matter where the PSC lacks jurisdiction, (2) there was no basis to reopen the record, as the NDDOH permits Meridian to construct a facility “up to 55,000 bpd” and Appellants were aware that Meridian had not sought to modify it, and (3) Appellants request for jurisdictional discovery was entirely unsupported. Brief in Opposition to Petitioners’ Motion, Doc. ID 104.

VI. The ALJ's Recommended Denial of Appellants' Motion to Reopen the Record.

[¶14] On October 3, 2018, the ALJ issued its Recommended Decision on Petitioners' Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery ("ALJ's Second Recommended Decision"), Doc. ID 106. The ALJ's Second Recommended Decision considered whether Appellants' proffered evidence—the lone permit—demonstrated that Meridian intended to build a refinery of more than 50,000 bpd; ultimately, the ALJ found that the permit had no bearing on Meridian's current intentions or the PSC's jurisdiction. The ALJ reiterated that the legislature only granted jurisdiction to the PSC over facilities with a capacity exceeding 50,000 bpd and stated that "[r]egardless of how the action is initiated . . . once it appears the agency lacks subject matter jurisdiction, the case cannot proceed." *Id.* Finding no statutory authority granting the PSC authority to conduct jurisdictional discovery over a facility outside of its subject matter jurisdiction, the ALJ once again determined that Appellants' request for jurisdictional discovery should be denied.

VII. The PSC Adopts the ALJ's Recommended Decision to Dismiss the Complaint.

[¶15] On October 10, 2018, the PSC adopted the ALJ's Recommended Decision to dismiss the Complaint. In its Order on Recommended Decision Granting Motion to Dismiss Complainants/Petitioners' Complaint ("PSC's Order"), Doc. ID 109, the PSC specifically noted that "[i]f Meridian operates a facility above the statutory threshold without a siting permit, or if Meridian files for a site certificate and does not have an appropriate showing of a previous design limitation, the project and company may be subject to criminal or civil action." The PSC further corrected the ALJ's Proposed Order to make clear that "[w]hen plans to increase the facility to 50,000 bpd or beyond are implemented, that plan subjects the entire facility to the review and approval process." *Id.* Finally, the PSC clarified that it "may, of its own volition, investigate and inquire into the actions of persons in pursuance of compliance." *Id.*

VIII. Appellants Appeal the PSC's Order.

[¶16] On November 8, 2018, Appellants filed a Notice of Appeal to this Court. In their Notice of Appeal, Appellants no longer describe the Davis Refinery as a two-phase construction project, and instead repeatedly state that Meridian intends or intended to build a 55,000 bpd refinery without siting approval. Appellants challenge the PSC's adoption of the ALJ's Recommended Decision, arguing that they were denied a fair hearing because they were not afforded discovery and a hearing.

STANDARD OF REVIEW

[¶17] In general, an agency's decision should be given great deference, and the Court should not make independent findings of fact or substitute its judgment for that of the agency. *Filkowski v. Director, N.D. Dep't of Transp.*, 2015 ND 104, ¶ 6, 862 N.W.2d 785. The review of non-adjudicative decisions is limited to whether the decisions are arbitrary, capricious, or unreasonable. *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2005 ND 104, ¶ 24, 697 N.W.2d 319 (holding that the arbitrary and capricious standard is particularly applicable where the subject matter is complex or technical and involves agency expertise). The review of adjudicative decisions is limited to the criteria described in N.D.C.C. § 28-32-46, and a court may reverse an agency's decision when, as alleged here by Appellants, "the provisions of [the AAPA] have not been complied with in the proceedings before the agency" or "the . . . procedure of the agency ha[s] not afforded the appellant a fair hearing." *Id.* Any evidentiary rulings are reviewed under the abuse of discretion standard. *Potratz v. N.D. Dep't of Transp.*, 2014 ND 48, ¶ 7, 843 N.W.2d 305. Finally, pure questions of law are reviewed *de novo*. *Steinmeyer v. N.D. Dep't of Transp.*, 2009 ND 126, 768 N.W.2d 491.

LAW AND ARGUMENT

I. Appellants Have Not Identified and Appealed the True Matter at Issue.

[¶18] Pursuant to N.D.C.C. § 28-32-42, an appellant must serve its notice of appeal and specifications of error on the agency and parties. *Id.* The specifications of error must “identify what matters are truly at issue.” *Vetter v. N. Dakota Workers Comp. Bureau*, 554 N.W.2d 451, 454 (N.D. 1996) (emphasis added). When a party does not enumerate an issue in its specifications of error, that issue cannot be considered on appeal. *Johnson v. N. Dakota Workforce Safety & Ins.*, 2010 ND 198, ¶ 16, 789 N.W.2d 565, 569–70; *Hopfauf v. N. Dakota Workers Comp. Bureau*, 1998 ND 40, ¶ 15, 575 N.W.2d 436, 439 (declining to address argument regarding the application of a heightened standard of proof when specifications of error only made general statement about standard of proof and did not “argue for the application of a heightened standard of proof”).

[¶19] Here, Appellants’ specifications of error do not address the matter truly at issue in this case—whether the PSC’s determination that it lacked jurisdiction was erroneous. Instead, Appellants base their appeal on alleged procedural errors, asserting that Appellants were improperly denied discovery or a hearing in response to Meridian’s Motion to Dismiss. (Appellants’ Notice of Appeal and Stip. of Error) (Doc. ID 1, at ¶¶ 18, 19); *see also* (Appellants’ Opening Br.) (Doc. ID 139, at ¶ 14) (“[T]he 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.”). Because Appellants’ specifications of error do not challenge the PSC’s jurisdictional determination, this Court cannot consider the propriety of that determination on appeal. *See Johnson*, 2010 ND 198, ¶ 16.

[¶20] While Appellants have raised arguments regarding the impropriety of the procedure followed by the PSC, such arguments (absent a proper appeal of the PSC’s jurisdictional determination) carry no weight; any alleged procedural errors are of no consequence when an agency has determined that the agency lacks subject matter jurisdiction. *See Citizens Utilities Co. of Illinois v. Illinois Pollution Control Bd.*, 639 N.E.2d 1306, 1309 (Ill. Ct. App. 1994) (“The dispositive issue, however, is whether the Board correctly ruled that it lacked subject matter jurisdiction. If the Board lacked jurisdiction, then review of alleged procedural errors committed by the Board will not cure the jurisdictional defect.”). Because Appellants have not enumerated the true matter at issue in their specifications of error, this Court should not consider Appellants’ arguments about alleged procedural deficiencies.

II. Appellants Were Not Entitled to a Hearing Prior to the PSC’s Jurisdictional Determination.

A. Subject Matter Jurisdiction is a Necessary Prerequisite to a Hearing.

[¶21] Because the PSC determined it lacks subject matter jurisdiction, it was not required to hold a hearing. In order to preside over any matter, the PSC, like all agencies and courts, must have subject matter jurisdiction. *See Albrecht v. Metro Area Ambulance*, 1998 ND 132, §§ 10-11, 580 N.W.2d 583, 585 (“For a [tribunal] to issue a valid order or judgment, the [tribunal] must have jurisdiction over both the subject-matter of the action and the parties.”). The AAPA makes it abundantly clear that subject matter jurisdiction is a threshold requirement that must be satisfied before the agency holds a hearing. N.D.C.C. § 28-32-21(1)(c) (“The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon the respondent [T]he parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction.”) (emphasis added); *see also* N.D.C.C. § 28-32-21(1)(a) (“For adjudicative proceedings involving a hearing on a complaint against a specific-named respondent, a complainant shall prepare and file a clear and

concise complaint with the agency having subject matter jurisdiction of the proceeding.”) (emphasis added); N.D.C.C. § 28-32-40 (“This section does not limit the right of any agency to reopen any proceeding or rehear any matter under any continuing jurisdiction which is granted to the agency by statute.”) (emphasis added). Not surprisingly, Appellants have cited no authority demonstrating that they are entitled to a hearing on the issue of subject matter jurisdiction when the PSC has otherwise satisfied itself that it lacks subject matter jurisdiction.

[¶22] Because an agency’s subject matter jurisdiction is “derived from the constitution and the laws,” *Cordie v. Tank*, 538 N.W.2d 214, 217 (N.D. 1995), the PSC’s authority only extends as far as contemplated by the Legislature. The question before the PSC was “simply, whether the statutory text forecloses the agency’s assertion of authority, or not.” *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 301 (2013). Here, the PSC considered all the pleadings and supporting material and satisfied itself that it did not have subject matter jurisdiction over the Davis Refinery. In fact, the PSC considered two construction scenarios—one presented by Appellants and one presented by Meridian—and correctly concluded that it lacked subject matter jurisdiction in either scenario: (1) if the Davis Refinery is constructed as a two-phase facility with an initial capacity of 27,500 bpd (as Appellants argued in their Complaint), the statutory threshold of 50,000 bpd is not met, and (2) if the Davis Refinery is constructed as a single-phase 49,500 facility (the current construction plan as sworn to by Meridian), the 50,000 bpd threshold is not met. (*See* PSC’s Order on Recommended Decision Granting Mot. to Dismiss) (Doc. ID 109, at p. 8-9.) The following statement by the ALJ dispels any doubt on the issue:

It may be that Meridian originally intended to build the refinery in two phases. It may be they planned to do so in order to try to circumvent PSC jurisdiction for the initial phase and build a second phase later. It may also be that the opposition by Petitioners and others here caused them to reconsider and downsize the project to 49,500 bpd in order to avoid PSC jurisdiction. However, even taking all those assumptions as true, the PSC does not have statutory authorization to assert jurisdiction below its threshold of 50,000 bpd or engage in speculation now about the company’s plans for future expansion.

(*Id.* at p. 9.)

[¶23] Because the PSC found that the Davis Refinery’s planned capacity is under the jurisdictional threshold requiring a certificate of site compatibility, the PSC lacked subject matter jurisdiction and, by statute, could not preside over a hearing.

B. The PSC’S Decision on Jurisdiction Was Not an Adjudicative Proceeding.

[¶24] Appellants contend that they were entitled to a hearing on Meridian’s Motion to Dismiss because it is “undisputed” that Appellants’ complaint began a formal “adjudicative proceeding” and adjudicative proceedings require an opportunity for a hearing. (Appellants’ Opening Br.) (Doc. ID 139, at ¶ 15.) This assertion is not “undisputed.” Under N.D.C.C. § 28-32-01, an “adjudicative proceeding” does not include “a decision . . . to file . . . a complaint” or “a decision or order to issue . . . an order that precedes an opportunity for a hearing[.]” *Id.* (emphasis added).

[¶25] As discussed *supra*, subject matter jurisdiction is a threshold requirement that must be met before an administrative agency presides over a matter. Thus, an agency’s decision on whether it has subject matter jurisdiction necessarily precedes the opportunity for a hearing. Consequently, under N.D.C.C. § 28-32-01, the PSC’s dismissal of the Complaint for lack of subject matter jurisdiction preceded the opportunity for a hearing, no adjudicative proceeding had begun, and Appellants had no right to a hearing.

C. Appellants’ Position Would Entitle Any Plaintiff to a Hearing On Any Complaint.

[¶26] If Appellants are correct and they were entitled to a hearing based upon their own speculation regarding the Davis Refinery’s future capacity, then the PSC and other agencies would be inundated with hearings on speculative matters. Any person that wanted to slow or halt the progress on a refinery could file a complaint with the PSC alleging that the refinery could potentially be expanded beyond the 50,000 bpd threshold at some point in the future. Such a result is contrary to the procedures under the AAPA, the siting jurisdiction granted to the PSC, and notions of judicial economy.

III. Appellants Were Not Entitled to Discovery Regarding the PSC's Jurisdictional Determination.

A. The PSC Did Not Abuse Its Discretion in Denying Discovery.

[¶27] The PSC was within its discretion to deny Appellants' request for discovery. "A hearing officer in an adjudicative administrative proceeding functions in a quasi-judicial capacity, and shares the broad discretion accorded to judicial officers." *Berger v. N. Dakota Dep't of Transp.*, 2011 ND 55, ¶ 7, 795 N.W.2d 707, 710. "Thus, it has been recognized that hearing officers have discretion to control procedural matters such as discovery and admission of evidence." *Id.*; see also *May v. Sprynczynatyk*, 2005 ND 76, ¶ 19, 695 N.W.2d 196, 201 ("Discovery decisions are addressed to the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.").

[¶28] Appellants have not cited any authority holding that an agency abuses its discretion by denying discovery when that agency has determined that it lacks subject matter jurisdiction. Appellants cite *Shark v. Northern States Power Co.*, 477 N.W.2d 251 (N.D. 1991) to show that they are entitled to discovery; however, in *Shark* the North Dakota Supreme Court did not hold that the plaintiff was entitled to discovery. Instead, the Court held that the plaintiff should have been granted his requested continuance because he became an intervenor one week before a scheduled hearing on a matter that was properly before the PSC. *Id.* at 254-55 (holding that the "PSC's denial of Shark's request for a continuance was a clear abuse of discretion"). Contrary to Appellants' assertion, *Shark* is not a "similar situation" to the one here, where the PSC, considering all the evidence before it, satisfied itself that it did not have subject matter jurisdiction and therefore lacked the authority to permit discovery. (PSC's Order on Recommended Decision Granting Motion to Dismiss) (Doc. ID 109, at p. 10) ("Unless the legislature expands PSC authority or Meridian goes forward with an addition to that 49,500 bpd capacity, discovery as to its previously stated plans or possible future plans for expansion cannot be permitted by this agency.")

B. The ALJ and PSC's Decision Not To Permit Discovery Was Appropriate.

[¶29] Appellants originally sought discovery under N.D. R. Civ. P. 56(f). (*See* Pet'rs' Resp. to Mot. to Dismiss) (Doc. ID 59, at p. 10-11.) The ALJ and PSC appropriately denied Appellants' request for three reasons. First, discovery under Rule 56(f) is discretionary, not mandatory. N.D. R. Civ. P. 56(f) ("If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken") (emphasis added). Second, a party seeking discovery under Rule 56(f) must "identify with specificity what information is sought." *Poppe v. Stockert*, 2015 ND 252, ¶ 18, 870 N.W.2d 187,194. Appellants failed to meet this specificity requirement when they requested "internal communications, private communications with investors, engineering plans and blueprints, etc." (Aff. of Rachel Granneman in Support of Pet'rs' Resp. to Mot. to Dismiss) (Doc. ID 60, at ¶ 7.) Third, a request under Rule 56(f) "may not be premised solely on speculation as to evidence which might be discovered" and discovery under 56(f) "does not permit a plaintiff to engage in a 'fishing expedition.'" *Wright v. Eastman Kodak Co.*, 550 F. Supp. 2d 371, 382 (W.D.N.Y. 2008), *aff'd*, 328 F. App'x 738 (2d Cir. 2009). Appellants' request was clearly a fishing expedition, as evidenced by the series of broad questions, unrelated to the PSC's jurisdiction, that they thought discovery could "shed light" on. (*See, e.g.*, Pet'rs' Resp. to Mot. to Dismiss) (Doc. ID 59, at p. 10-11.) ("What financial and/or technical considerations led to repeated public statements that Meridian intends to build a 55,000 bpd refinery?) Thus, the ALJ and PSC's appropriately found that Appellants' requested discovery was improper.

IV. Even On the Face of Appellants' Complaint, the PSC Still Lacks Subject Matter Jurisdiction.

[¶30] The thrust of Appellants' Complaint is that Meridian is constructing an oil refinery in two possible phases that could have a potential total capacity of 55,000 bpd. (*See* Pet'rs' Compl.) (Doc. ID 29, at ¶¶ 2, 46.) Even if the PSC had accepted all of Appellants' assertions as being true, the PSC would still have been compelled to dismiss the Complaint for lack of subject matter jurisdiction because Meridian's first phase of construction would be under the statutory threshold for jurisdiction. (*See id.*, at ¶ 2) ("Meridian has 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 requirements of a certificate of site compatibility.") (emphasis added). The PSC's Order made clear that jurisdiction would only attach "when and if" Meridian sought to expand the refinery beyond the 50,000 bpd threshold. (PSC's Order on Recommended Decision Granting Mot. to Dismiss) (Doc. ID 109, at p. 8) ("Meridian has now stated it has no current plans for an addition to or expansion of the refinery beyond the capacity of 49,500 bpd. When and if it does, the PSC would then acquire the siting jurisdiction which it currently lacks.")

V. The Court May Disregard Any Alleged Procedural Error as Harmless Error.

[¶31] Even if Appellants are correct and they were entitled to a hearing and discovery, any procedural errors by the PSC have not affected Appellants' rights. "[O]nly errors or defects which affect the substantial rights of the parties warrant a new trial." *Gowin v. Trangsrud*, 1997 ND 226, ¶ 9, 571 N.W.2d 824, 826; *see also* N.D.R.Civ.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Here, Appellants' primary objective is ensuring that Meridian complies with the PSC's siting requirements. In its Order, the PSC explicitly stated that prior to

Appellants' Complaint, the PSC had been monitoring Meridian's compliance with siting requirements. Further, the PSC noted its authority to continue monitoring the project in the future:

The Commission clarifies that consistent with the policy of ensuring 'minimal adverse effects on the environment and the welfare of the citizens,' the Commission may, of its own volition, investigate and inquire into the actions of persons in pursuance of compliance. N.D.C.C. § 49-22.1-20(1), (5). The matter upon which the Complaint is filed has been the subject of Commission monitoring. If Meridian operates a facility above the statutory threshold without a siting permit, or if Meridian files for a site certificate and does not have an appropriate showing of a previous design limitation, the project and company may be subject to criminal or civil action.

(PSC's Order on Recommended Decision Granting Mot. to Dismiss) (Doc. ID 109) (emphasis added). Thus, Appellants' concerns regarding whether the Davis Refinery is subject to the Siting Act are assuaged, any alleged procedural error was harmless, and further litigation on this matter is unnecessary.

CONCLUSION

[¶32] For the reasons stated above, the PSC's decision to dismiss the complaint should be confirmed and Appellants' requested relief should be denied.

DATED this 8th day of March, 2019.

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