20190095
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 3, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

National Parks Conservation Association, Appellant, and Environmental Law & Policy Center, and Dakota Resource Council, v. North Dakota Department of Environmental Quality, and Meridian Energy Group, Inc., Appellees.	Supreme Court No. 20190095 Stark County District Court Case No.: 45-2018-CV-00680

Appeal from Judgment Entered on January 24, 2019
Case No. 45-2018-CV-0060
County of Stark, Southwest Judicial District
The Honorable Dann E. Greenwood, Presiding

BRIEF OF APPELLEE MERIDIAN ENERGY GROUP, INC.

(ORAL ARGUMENT REQUESTED IF APPELLANT'S REQUEST IS GRANTED)

FREDRIKSON & BYRON, P.A.

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

Attorneys for Appellee
Meridian Energy Group, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph(s)

CASES

Statutes

Regulations

STATEMENT ON ORAL ARGUMENT

[¶1] Appellee Meridian Energy Group, Inc. ("Meridian") does not believe oral argument is necessary because the issues are straightforward and adequately explained in the parties' briefs. But should this Court grant any other party's request for oral argument, Meridian respectfully requests oral argument.

STATEMENT OF THE ISSUES PRESENTED

[¶2] Appellants' Statement of the Issues focuses on alleged errors committed by the district court, but the arguments in its brief focus on the decision of the North Dakota Department of Health to issue the Permit to Construct to Appellee Meridian Energy Group, Inc. Although the standard of review for an appeal from an agency's permitting decision requires some consideration of the district court's decision, the primary focus of the appeal is whether the agency's decision to issue the permit is adequately supported in the record and is not arbitrary, capricious, or contrary to law. *See infra* at 18-20.

[¶3] Based on the arguments advanced by Appellants in their brief, the issues on appeal are:

a. Whether the agency reasonably determined that emissions of hazardous air pollutants from the Davis Refinery would be minimal and well under applicable regulatory thresholds, thereby rendering unnecessary explicit emissions limits in the Permit;

b. Whether the Permit's requirements for monitoring of emissions of volatile organic chemicals from equipment leaks are reasonable; and

c. Whether the agency responded to comments from Appellants' consultant concerning monitoring of emissions of volatile organic chemicals from equipment leaks.

STATUTORY AND REGULATORY BACKGROUND

[¶4] The federal Clean Air Act Amendments of 1970, 42 U.S.C. § 7401 *et seq*., created a comprehensive legislative and regulatory scheme designed to protect and improve the nation's air quality. The Clean Air Act places the primary responsibility for administration and enforcement on state and local governments. *N.Y. Public Interest Research Group v. Whitman*, 321 F.3d 316, 320 (2d Cir. 2003). States, including North Dakota, have adopted State Implementation Plans ("SIPs") to implement the Clean Air Act. The United States Environmental Protection Agency ("the EPA") approves all SIPs. North Dakota's SIP has been approved by the EPA. 40 C.F.R. §§ 52.1820 to 52.1837; N.D. Admin. Code §§ 33-15-01-01 *et seq*.

[¶5] At the times relevant to this appeal, North Dakota's SIP was administered by the North Dakota Department of Health. Under the approved SIP, certain stationary facilities are "major" sources if they have the potential to emit more than specified thresholds of designated pollutants.[1] Sources that emit less than those thresholds are designated as minor sources. Under both federal and North Dakota law, sources that cap their pollution output may apply for minor source permits: "Sources which are subject to the title V permitting requirements in section 33-15-14-06 *based solely on their potential*

[1] A major stationary source is one that emits or has the potential to emit in the aggregate more than 10 tons per year of any single hazardous air pollutant or more than 25 tons per year of any combination of hazardous air pollutants. N.D. Admin. Code § 33-15-14-06 1(q)(1)(a). A major source is also a source that has the potential to emit more than 100 tons per year of any regulated (referred to as "criteria") air pollutant. N.D. Admin. Code § 33-15-14-06 1(q)(2).

to emit may apply for a federally enforceable minor source permit to operate which would limit their potential to emit to a level below the title V permit to operate applicability threshold." N.D. Admin. Code § 33-15-14-03 1(e) (emphasis added).[2] In the parlance of the Clean Air Act, a permit that places enforceable limits or emissions controls on the permitted facility that reduce the facility's potential to emit to below Title V thresholds is referred to as a "synthetic" minor air permit. The agency uses that term in its guidance materials and in connection with its review of the Davis Refinery Permit to Construct.

[¶6] A facility's classification as a major, minor, or synthetic minor source for permitting purposes is determined based on the facility's "potential to emit" air contaminants. "Potential to emit" is a defined term requiring consideration of a facility's use of pollution control devices or operational practices. It is permissible in making the potential to emit determination for a source to avoid having to obtain a major source permit by committing to operational limits or the use of add-on pollution control equipment that will keep emissions below the major source threshold. *Voigt v. Coyote Creek Mining Co., LLC,* 2016 WL 3920045, at *33, 83 ERC 1027 (D. N.D. July 15, 2016). North Dakota law defines the term "potential to emit" as:

> [T]he maximum capacity of a stationary source to emit any air contaminant under its physical and operational design. *Any physical or operational limitation on the capacity of a source to emit an air contaminant*, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, *shall be treated as part of its design* if the limitation is

[2] A major source, under North Dakota law, would otherwise be required to apply for a Title V operating permit. N.D. Admin. Code § 33-15-14-06 2. Operating permits are required following completion of construction pursuant to the Permit to Construct.

> enforceable by the administrator of the United States environmental protection agency and the department.

N.D. Admin. Code § 33-15-14-06 1(u) (emphasis added). North Dakota's definition of "potential to emit" has been approved by the EPA as part of the State's SIP. North Dakota's definition is similar to the definition found in the Clean Air Act. *See* 40 C.F.R. § 52.21(b)(4); 40 C.F.R. § 51.165(a)(1)(iii).

[¶7] In disputes regarding a facility's potential to emit, courts have rejected efforts to ignore emissions-reducing equipment such as scrubbers, filters, and other technologies. *See Nat'l Mining Ass'n. v. U.S. EPA*, 59 F.3d 1351, 1362 (D.C. Cir. 1995) (citing *Alabama Power Co. v. Costle,* 636 F.2d 323, 353-55 (D.C. Cir. 1979)). Thus, "potential to emit" is *not* the expected emissions that would exist in the absence of control devices, operational practices, or permit limitations, as Appellants erroneously assert in their brief. *See* Appellants' Opening Brief at 19 ("without a legally and practically enforceable limit on HAPs, Meridian would have the Potential to Emit 81.78 tons/year of HAPs").

[¶8] Under this statutory and regulatory framework, Meridian was legally entitled to seek a synthetic minor source permit for the Davis Refinery if it employed physical or operational limitations on the refinery's capacity to emit air pollutants. As discussed below, Meridian's design for the facility includes both; it includes state-of-the-art air pollution control equipment and operational limitations that reduce potential emissions below the thresholds for a major source permit.

[¶9] In the district court, Appellants' primary argument was that NDDH should not have issued a synthetic minor source permit for the Davis Refinery, but instead should have required Meridian to obtain a major source permit. On further appeal to this

Court, Appellants have abandoned the main argument they raised in the district court. Nevertheless, it bears repeating that there is nothing inherently wrong with a synthetic minor source permit; it protects the environment by limiting a facility's potential to emit air pollutants. Meridian was not required to seek a major source permit for the Davis Refinery, and the North Dakota Department of Health was legally authorized to determine if the requirements for Meridian's synthetic minor source Permit to Construct application were met and to issue the final permit.

FACTUAL BACKGROUND

I. THE PARTIES

[¶10] Appellants National Parks Conservation Association, Environmental Law & Policy Center, and Dakota Resource Council (collectively, "Appellants") are environmental organizations.

[¶11] At the time the Permit to Construct was issued on June 12, 2018 (App. 4-49)[3] the North Dakota Department of Health (NDDH) was the agency responsible for reviewing and issuing air permits necessary to construct a crude oil refinery. Effective in 2019, the North Dakota Department of Environmental Quality (DEQ) assumed authority for certain permitting and other programs previously handled by NDDH. *See* 2017 N.D. Sess. Laws ch. 199. Although NDDH issued the permit involved in this case, DEQ is the proper party on this appeal to defend the issuance of the Permit. Because the Permit was issued by NDDH, however, references in this brief to the issuing agency will be to NDDH.

[3] Citations to "App. __" are to page numbers in Appellants' Appendix. Citations to "A.R. __" are to pages in the Administrative Record.

[¶12] Appellee Meridian Energy Group, Inc. ("Meridian") is a closely-held South Dakota corporation formed to build and operate the Davis Refinery, a high conversion crude oil refinery in Billings County, North Dakota.

II. THE PROJECT

[¶13] Historically, the vast majority of oil produced in the Bakken Formation is transported to distant refineries, and refined products consumed in the North Dakota markets are transported back for distribution. By building the Davis Refinery near the source of crude oil, Meridian plans to take advantage of low-cost sources of crude oil as feedstock and natural gas as refinery fuel. (A.R. 4939.) The Davis Refinery will also benefit from a transportation cost advantage for its refined products. The site for the Davis Refinery is located near the major oil and gas-producing operations of the Bakken, and in close proximity to major highways, oil and gas pipeline systems and the Burlington Northern Santa Fe primary rail line (which runs through the property), and is near a pipeline that transports crude oil to Marathon's crude oil rail terminal. (A.R. 4941.)

[¶14] The permit application states that the project will be constructed in two phases. Upon completion of the entire project, the Davis Refinery will have a rated capacity of up to 49,500 bpd, and will produce a complete product slate including gasoline, diesel, jet fuel, fuel oil, and liquefied petroleum gas. Although the facility was planned for construction in two phases, for air quality permitting purposes the NDDH analyzed the impact of the entire planned project. (A.R. 6553.)

III. THE PERMIT PROCESS

A. Pre-Application Information

[¶15] Meridian and its environmental consultant, Zia Engineering & Environmental Consultants, LLC, began sharing information concerning the refinery project with NDDH well before a permit application was submitted. On August 8, 2016, Meridian's consultant submitted an "Air Dispersion Modeling Protocols" document as a required initial step in the permitting process. It described the proposed project, provided general estimates of emissions, and described the options for conducting air emissions modeling to evaluate the potential impact of the project. (*See* A.R. 1-22.) The proposed modeling protocols were provided to NDDH pre-application in order to obtain NDDH's comments prior to Meridian performing the air emissions modeling and applying for a permit.

[¶16] On September 16, 2016, NDDH provided comments on the draft modeling protocol. (A.R. 28.) NDDH recognized that Meridian would be submitting a permit for a synthetic minor source, not a major source, and noted that "total emissions must be carefully considered and PSD applicability must be determined prior to application submittal." (A.R. 29.) NDDH "recognize[d] that the emissions shown [in the draft protocol] are preliminary estimates and more detailed emissions estimates (along with the emissions calculations) [would] be provided with the application for a Permit to Construct." (*Id.*) The Department then provided comments for preparation of the emissions calculations. On September 22, 2016, Meridian's consultant responded to NDDH's comments. (A.R. 37.) The consultant wrote that it appreciated the assistance and input from NDDH in its review of the modeling protocol document and hoped that the responses provided appropriate clarification and addressed NDDH's questions. (*Id.*)

The consultant further noted it would proceed with the modeling effort based on the input of NDDH in order to prepare an initial permit application. (*Id.*)

B. <u>The Initial Permit Application</u>

[¶17] On October 6, 2016, Meridian submitted its initial Permit to Construct and Permit Application for Air Contaminant Sources for the Davis Refinery project. (A.R. 43.) The application described state-of-the-art pollution control equipment that would be used at the refinery to substantially reduce air emissions and enable it, based upon the calculated air emissions, to seek a synthetic minor Permit to Construct. The application noted that "[d]esign optimization conducted during the early phases of engineering has been aimed at the reduction of air emissions through process technology choices and definitions of operating conditions, in conjunction with the selection of the proper emission controls after a pollutant-by-pollutant analysis of available control technologies." (A.R. 51.) The application described in detail the emissions controls that would be used at the Davis Refinery.

[¶18] As directed by NDDH, the application was prepared in accordance with North Dakota's permit requirements in N.D. Admin. Code § 33-15-14-02 and NDDH's criteria pollutant modeling requirements for a Permit to Construct. *See* NDDH, Environmental Health Section, *Criteria Pollutant Modeling Requirements for a Permit to Construct* (Oct. 6, 2014). Meridian presented a complete Air Pollution Permit Application for both criteria pollutants and hazardous air pollutants for the proposed Davis Refinery, and offered to submit any additional information needed by NDDH to evaluate potential risks to human health or the environment. The applications and supporting documentation, including a detailed emissions inventory, controls technology and review, and air dispersion modeling, exceeded 1,300 pages. (A.R. 43-1361.)

C. The Permit Review Process

[¶19] On October 24, 2016, NDDH acknowledged receipt of the application and advised Meridian that "an extensive review process is required for the proposed facility based on a number of factors, including the complexity of the regulations applicable to the facility and the location of the facility very near Theodore Roosevelt National Park." (A.R. 1362.) NDDH advised that its initial review process to determine if the application is accurate and complete would require three to six months, and that once its initial review was completed, additional information could be required. Once the application was determined to be complete, NDDH advised that an additional three-month to six-month review process would occur, at which point, if the Davis Refinery was expected to comply with applicable regulatory requirements, a draft permit to construct would be prepared, which would then be subject to a 30-day public review period, including a public meeting and hearing. Therefore, NDDH advised Meridian to expect at least a nine-month to twelve-month review process before a final determination could be made on the permit application. (*Id*.)

[¶20] In the ensuing months, NDDH requested additional information, including backup documentation and manufacturer and supplier commitments. (A.R. 1364.) Meridian produced, among other documents and information, thousands of pages of technical information it relied on in formulating its design and control technologies for the Davis Refinery, including information from the manufacturers of air pollution control equipment that would be used at the Davis Refinery and research literature supporting the efficacy of the treatment methodology. It further provided EPA guidance documents on controlling certain types of emissions and additional technical information. (A.R. 1367-4131.)

[¶21] In December 2016, Meridian and its consultant met with NDDH to discuss certain planned design changes to the proposed facility and the process for reviewing and modifying the application to address those changes. (A.R. 4132.) Meridian's consultant also provided information from the suppliers of the heater and boilers supporting the emissions levels provided in the estimated emissions inventory. (A.R. 4133-4200.) Another teleconference with NDDH took place on December 19, 2016 to discuss process changes and the preparation of an amendment to the permit applications, which were summarized in an e-mail to the participants. (A.R. 4201-4202.)

D. The Amended Application

[¶22] On April 5, 2017, Meridian submitted a revised permit application and supporting documentation that incorporated the design changes previously discussed with the NDDH in December. (A.R. 4215-5596.) NDDH informed Meridian that its review of the amended permit application would take nine to twelve months. (A.R. 5598.)

[¶23] On May 15, 2017, NDDH sent a letter to Meridian providing comments to the amended permit application and requesting certain clarifications and additional information. The letter noted that the type of permit requested—a synthetic minor source permit—required the facility's emissions or potential emissions to be limited to 100 tons per year of any criteria pollutant. (A.R. 5615.) The letter identified other information required to assure that emissions would be consistent with the estimated emissions contained in the amended permit application.

[¶24] On June 14, 2017, Meridian responded to NDDH's request for additional information. (A.R. 5636-5833.) Meridian's letter included a point-by-point response to NDDH's comment letter. For example, the letter explained that federal PSD rules do not classify petroleum refineries as major stationary sources per se, but instead provide that

any facility is a major stationary source if its potential to emit criteria pollutants exceeds 100 tons per year. (A.R. 5637-5638.) NDDH noted that PSD rules are not applicable where, as is the case with the Davis Refinery, emissions controls and enforceable physical or operational limits reduce the potential to emit to below 100 tons per year for each applicable criteria pollutant. (*Id.*)

[¶25] Meridian's response further explained how significant advances in burner technology over the past 20 years (advancements that have been incorporated into the Davis Refinery plans) have rendered inapt any comparisons between expected emissions at the Davis Refinery and emissions from older facilities that do not use such technologies. (A.R. 5639-5643.) Meridian's response explained how neither EPA guidance nor models for emissions inventory development, both of which were based on data from older facilities, is required to be used for emissions inventory calculations at the Davis Refinery. Accordingly, the expected emissions values on new state-of-the-art control technologies would naturally be lower than outdated EPA guidance. (A.R. 5639-5640.) Meridian provided additional responses to each of NDDH's other comments, and concluded its letter with the statement that the emissions estimates submitted in the April 2017 amended application were fully supported and justified by data and other information in the record.

[¶26] On July 25, 2017, NDDH noted it was reviewing the additional information and was working with EPA Region 8 and the U.S. National Park Service. Additional meetings to discuss Meridian's permit applications occurred on July 19, 2017, August 24, 2017, September 1, 2017, and October 19, 2017 among NDDH,

EPA Region 8, the National Park Service, and the U.S. Fish and Wildlife Service. (A.R. 5735-5738.)

[¶27] On October 18, 2017, NDDH completed a pre-draft permit for the Davis Refinery. NDDH requested comments on the pre-draft permit prior to its publication as the official draft for public review and comment. (A.R. 5742.) Meridian provided comments on October 19, 2017. (A.R. 5740-5741.)

[¶28] In November 2017, Meridian submitted a revised summary report of air dispersion modeling results that addressed NDDH's comments to the April 2017 permit submittal. (A.R. 5751.) On November 16, 2017, NDDH had further discussions concerning the application with EPA Region 8 and the National Park Service. (A.R. 5750.)

[¶29] Also in November 2017, NDDH conducted its own independent Air Quality Impacts Analysis ("AQIA") as part of its review of Meridian's permit application. (A.R. 23155-23214.) The AQIA was first completed by an NDDH Environmental Scientist on November 30, 2017, and was updated on June 7, 2018. The purpose of the Department's AQIA was to verify that emissions from the proposed Davis Refinery would comply with state and federal Ambient Air Quality Standards and PSD increments. The Department concluded that "it is expected that the proposed Davis Refinery will be in compliance with applicable AAQS and PSD increments." (A.R. 23157.)

[¶30] The AQIA noted that Meridian applied for a synthetic minor Permit to Construct. The AQIA cited the NDDH's October 6, 2014 memorandum, *Criteria Pollutant Modeling Requirements for a Permit to Construct,* which provides:

> For non-PSD sources [such as the Meridian-Davis Refinery], any source that exceeds the SERs [Significant Emission Rates] limits listed in the *Criteria Pollutant Modeling Requirements for a Permit to Construct* memo and that is located within 50 km of a Class I area shall be modeled. The proposed Meridian-Davis Refinery is within 50 km of Theodore Roosevelt National Park's [] South Unit and Elkhorn Ranch Unit. Emissions are below levels that require modeling for all pollutants except VOCs and $PM_{2.5}$; *however, given the extremely close proximity to the South Unit of Theodore Roosevelt National Park (<3 miles) and the public interest in this facility, modeling for Class I and Class II PSD increments was conducted.*

(A.R. 23164) (emphasis added). The AQIA explains that it used the EPA's preferred methods for evaluating the model and its results. *See* 40 C.F.R. Part 51, Appendix W. (A.R. 23167.) The methods and results of the NDDH's modeling are presented in detail in the AQIA. Tables 1 and 2 summarize the results and show that the Davis Refinery's emissions passed the analysis of Ambient Air Quality Standards and PSD increments. (A.R. 23155-23157.)

[¶31] The AQIA also evaluated HAPs as required under NDDH's *Policy for the Control of Hazardous Air Pollutant Emissions in North Dakota* (Air Toxics Policy)[4]. The AQIA stated that "[t]he air toxics analysis conducted by Meridian-Davis Refinery follows the procedure put forth in the Department's *Air Toxics Policy*." (A.R. 23187.) It further concluded that "[t]he results of the air toxics analysis show that emissions from the proposed project are not expected to exceed the acceptable levels established in the *Air Toxics Policy*." *Id*. The agency's First Air Quality Effects Analysis concludes that "The facility's potential HAP emissions are less than 10 tons/year of any single HAP and are less than 25 tons/year of any combination of HAPs, so the facility is an area (minor) source of HAPs." (A.R. 6482.)

[4] https://deq.nd.gov/publications/AQ/policy/modeling/Air_Toxics_Policy.pdf.

[¶32] On December 5, 2017, NDDH provided public notice of the draft Permit to Construct and extended the period for receiving public comments until January 26, 2018. NDDH also scheduled a public informational meeting and public hearing for January 17, 2018, in Dickinson, North Dakota. (A.R. 6028-6033.) The draft Permit to Construct is in the record at A.R. 6045-6067.

E. Public and Agency Comments on the Draft Permit

[¶33] Even before the formal public comment period began, NDDH began receiving comments on the construction permit for the Davis Refinery. (A.R. 6086-6089.) Over the course of the formal public comment period, NDDH received more than 10,000 comments from the public, both in support of and in opposition to the permit. (A.R. 6111-6244, 11050-22117.) Meridian provided an extensive, detailed response to the public comments. (A.R. 22830-23154.) NDDH also meticulously reviewed each comment from the public and prepared a 91-page written response. (A.R. 6323-6413.) Both Meridian's and NDDH's responses address the substance of each category of comments received.

[¶34] In response to comments from several individuals that the NDDH's review was not thorough, and that NDDH was merely "rubberstamping" the project, NDDH noted that it had provided an enhanced review of the project, using review criteria that was equal to the criteria used for major source permits. It stated "due to the public interest in this project and its proximity to [Theodore Roosevelt National Park], the Department reviewed the project utilizing criteria similar to the criteria used for Prevention of Significant Deterioration (PSD) major sources." (A.R. 6329.) It attached a chart summarizing the additional levels of scrutiny it applied to the permit application, which went well beyond what is required for a synthetic minor source permit.

(A.R. 6329.) NDDH noted it had spent over two years and over 1,000 staff hours working to verify that the emissions rates and limits could be achieved, analyzing the impacts of the facility's emissions on nearby areas including the national park, and determining that the permit would set enforceable emissions conditions. (A.R. 6330.) NDDH also noted it exceeded public participation requirements, granting an extended public comment period and holding a public hearing. (*Id.*) It noted that, based on comments received, it had made a number of revisions to the final permit.

[¶35] Both NDDH and Meridian provided detailed responses to the comments submitted by Appellants and by their retained consultant, Dr. Phyllis Fox. *See* A.R. 6336-6351 and App. 63-79 (NDDH's responses); A.R. 23133-23154 (Meridian's responses). Both included specific responses to Dr. Fox's comments regarding HAPs and VOC monitoring, the same issues that Appellants raise in this appeal. (A.R. 6348-6349; A.R. 23134-23135.)

[¶36] Other governmental agencies provided further comments on the draft permit, including the United States Department of the Interior and the National Park Service. (A.R. 6245.) The EPA provided comments on the draft permit in a letter dated January 25, 2018. (A.R. 10291-10297.) Its comments requested that a number of additional conditions be added to the permit, including the addition of New Source Performance Standards ("NSPS") requirements. (A.R. 10294-10296.) The EPA noted that its comments were to "help ensure that the proposed permit is consistent with the North Dakota State Implementation Plan (SIP) and federal Clean Air Act (CAA) requirements." (A.R. 10291.) NDDH addressed each of the EPA's comments

(A.R. 6368-6377) and also the comments from the U.S. National Park Service. (A.R. 6378-6379.)

IV. THE FINAL PERMIT

[¶37] In response to the comments it received, NDDH made numerous changes to the draft permit and included the NSPS requirements and other changes suggested by the EPA to ensure that the final permit is consistent with the North Dakota SIP and the requirements of the Clean Air Act. The revisions NDDH made to the draft permit are summarized in the record at A.R. 6330-6331.

[¶38] On June 12, 2018, NDDH notified Meridian that it had completed its review of the application for the Permit to Construct and the initial operation of the Davis Refinery, and that following extensive review, it approved the Permit after making additional permit revisions in response to comments. (A.R. 6415.)

[¶39] The Permit sets specific emissions limits for each "emission unit" at the facility. (App. 10-17, 30-35.) The Permit contains other requirements including the use of specific equipment and emissions control technology and operational requirements. (App. 6-9.) It requires continuous emissions monitoring systems to monitor emissions and sets specific performance standards. (App. 35-45.) The Permit requires emissions testing to assure compliance with the emissions limitations and prescribes the method and timing of testing. (App. 27-30.) It sets specific recordkeeping and reporting requirements to assure compliance with all emissions limits and other requirements in the Permit (App. 45-47) and provides for enforcement (App. 49). The NDDH's "Air Quality Effects Analysis For Permit To Construct" that accompanied the Permit concludes that "[a] complete review of the proposed project indicates that the facility is expected to comply with the applicable federal and state air pollution rules and regulations."

(A.R. 6485.) The assessment concludes that Meridian "has met all the requirements for obtaining a Permit to Construct." (*Id*.)

STANDARD OF REVIEW

[¶40] This Court recently set forth the standards governing judicial review of agency permitting decisions in *Coon v. North Dakota Department of Health*, 2017 ND 215, 901 N.W.2d 718. The district court's decision on its own review of the agency's decision is reviewed in the Supreme Court "under the standards set out in N.D.C.C. § 28-32-46." *Id*. at ¶ 7. The Court reviews the agency's decision, and record compiled before the agency, giving respect to the district court's sound reasoning. *Id*. The Supreme Court gives an agency's permitting decision "even greater deference than a decision after an adjudicative proceeding," reviewing whether its decision is "is arbitrary, capricious or unreasonable." *Id*.

[¶41] Under this standard, the agency decision must be upheld if there is any rational basis for it: "A decision is arbitrary, capricious, or unreasonable if it is not the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." *Id*. (citation omitted); *see also People to Save the Sheyenne River, Inc. v. N. Dakota Dep't of Health*, 2005 ND 104, ¶ 24, 697 N.W.2d 319, 329 (noting parenthetically that "under arbitrary and capricious standard court must uphold agency if there is any rational basis for decision" (citation omitted)).

[¶42] Appellant incorrectly argues that the district court applied the wrong standard of review because the "arbitrary and capricious" standard allegedly was supplanted by the 2007 enactment of N.D.C.C. § 23-01-36. However, this Court's decision in *Coons* was issued after that legislation went into effect, and affirmed that the

arbitrary and capricious standard, and deference to agency expertise, is still very much part of the process of judicial review of an agency's permitting decision. It was undisputed in *Coons* that N.D.C.C. § 28–32–46 applied. The question was instead how much deference should be given "where there has been no adjudicative proceeding and preparation of findings of fact." *Id.* In applying the deferential arbitrary-or-capricious standard, this Court invoked earlier cases applying that standard in non-adjudicative agency proceedings. *See id.* at ¶¶ 22–23 (citing *Little v. Traynor*, 1997 ND 128, ¶ 17, 565 N.W.2d 766; *Koch Hydrocarbon Co. v. State,* 454 N.W.2d 508, 510–511 (N.D. 1990)). Adhering to those decisions, the Court held that the same standard should apply to permitting decisions, which likewise are non-adjudicative proceedings.[5] *See id.* at ¶ 24. Here, Appellants seek review of a non-adjudicative permitting decision. Accordingly, N.D.C.C. § 23–01–36 does not change the applicable standard of review.

[¶43] Further, in arguing for a non-deferential standard of review, Appellants overlook the arbitrary-or-capricious standard's constitutional underpinnings. *See Little,* 1997 ND at ¶ 17 (noting that separation of powers limits judicial review of non-judicial decision-making as to whether the decision is arbitrary, capricious, or unreasonable). As this Court observed four decades ago, despite the existence of a statutory amendment governing review of agency decisions, courts "must exercise restraint" because the constitutional separation of powers prohibits delegating "nonjudicial functions to the

[5] EPA's Environmental Appeals Board has similarly noted: "When a petitioner seeks review of a permit based on issues that are fundamentally technical in nature, the Board assigns a particularly heavy burden to the petitioner. This demanding standard . . . ensures that the locus of responsibility for important technical decision making rests primarily with the permitting authority . . . ." *In Re Peabody W. Coal Co*., 2005 WL 428833, at *8 (E.P.A. Feb. 18, 2005).

judiciary." *Allstate Ins. Co. v. Knutson*, 278 N.W.2d 383, 388 (N.D. 1979). Those separation-of-powers concerns informed this Court's application of the arbitrary-or-capricious standard in *People to Save the Sheyenne River, Inc*. *See* 2005 ND at ¶ 24. Those same concerns apply equally to the permitting decision here.

[¶44] Finally, as the Court observed in *People to Save the Sheyenne River, Inc*., the arbitrary-or-capricious standard "is particularly applicable" where "the subject matter is complex or technical and involves agency expertise." 2005 ND at ¶ 24. That observation applies here. As Appellants conceded in the district court, "No one questions whether there are parts of this record that are technical." (Appellants Dist. Ct. Reply Br. at 4 ¶ 7). Indeed, the record consists of more than 24,000 pages of material, much of it highly technical in nature. And there can be no serious contention that the legal subject matter here is also complex. *See, e.g., Util. Air Regulatory Grp. v. E.P.A*., 573 U.S. 302, 323 (2014) ("EPA acknowledges that PSD review is a 'complicated, resource-intensive, time-consuming, and sometimes contentious process'" (citation omitted)).

ARGUMENT

[¶45] Appellants do not dispute that NDDH devoted more than 1,000 hours to its review of the permit application over a period of two years, or that thousands of public comments were received and carefully addressed by NDDH, or that NDDH conducted its own confirmatory air dispersion modeling, or that NDDH solicited comments from other regulatory agencies including the EPA, Department of the Interior and the National Parks Service, and incorporated their comments into the Permit, or that NDDH's extensive review of the permit application and issuance of the Permit generated a 24,000-page administrative record**.**

[¶46] Instead, Appellants state that they are focusing on three narrow issues: (1) whether the Permit should have included express limitations for HAPs; (2) whether the Permit's requirements for VOC monitoring are adequate; and (3) and whether NDDH "sufficiently address[ed] NPCA's comments that the permit lacks adequate monitoring for VOCs." (Appellants' Opening Brief at 21.) NDDH carefully considered and addressed these issues in the administrative record. Its decision is well supported and is not arbitrary, capricious, or unsupported by evidence in the record, as the district court correctly concluded after its own extensive review of the administrative record.

I. NDDH Properly Determined that Separate HAP Emissions Limits, in Addition to the Permit's Existing VOC Emissions Limits, Were Unnecessary.

[¶47] While citing no regulatory requirements or other authority requiring it, Appellants argue that that it was improper for NDDH to issue the Permit without including express numeric emissions limits for hazardous air pollutants (HAPs).[6] NDDH thoroughly explained the reasons for not including express limits for HAP emissions in the Permit, and its reasoning is fully supported.

[¶48] As an initial matter, Appellants' argument is misleading. It suggests that HAP emissions are uncontrolled and that no enforceable emissions limit exists. What Appellants fail to acknowledge is that HAPs, such as benzene and toluene, comprise a subset of the category of VOCs that are subject to specific limits and controls under the Permit, including monitoring and recordkeeping. *See* Permit Conditions Section II. A.,

[6] This argument is an afterthought. Appellants did not raise the issue in their brief to the district court, and only raised it for the first time in their reply brief after NDDH and Meridian had already responded to their other arguments. Although raising an issue for the first time in a reply brief amounts to a waiver, *see Akeyo v. O'Hanlon,* 75 F.3d 370, 374 n. 2 (8th Cir.1996), the district court nevertheless addressed (and rejected) Appellants' untimely argument.

Emissions Limits (App. 17) (establishing Total Emissions Limit for VOCs from all emission units within the facility); Permit Conditions II. A. 10 – 16 (App. 21-26) (establishing VOC controls); Permit Conditions II. D. 1 and F. 4. C. (App. 30-32, 47) (VOC emissions calculation, recordkeeping, and reporting requirements); Permit Conditions II. E. 1 (App. 35-41) (VOC monitoring); Permit Conditions II. E. 12 (App. 43-44) (monitoring); Permit Conditions II. E. 18 (App. 45) (fence-line benzene monitoring). The controls, monitoring, recordkeeping, and reporting requirements in the Permit related to VOCs also pertain to HAPs, a subset of VOCs. Appellants have not challenged the Permit's explicit VOC limits, controls, monitoring, and reporting requirements. Their complaints concerning a HAPs emissions limit, a subset of the enforceable VOC limits, are illogical and unsupported.

[¶49] Second, NDDH's decision to not include express limits for HAP emissions in addition to the overall VOC emissions limits is well supported. NDDH determined that HAP emissions would be minimal. All other agencies that reviewed the draft Permit agreed, including the EPA. If the Davis Refinery had, in fact, the potential to emit HAPs in excess of the applicable minor source regulatory thresholds of 10 tons annually for any single HAP or 25 tons for all HAPs, then the regulators simply would never have approved a synthetic minor source permit for the facility.

[¶50] The record support is extensive for NDDH's determination that HAP emissions would be minimal. It includes Meridian's dispersion modeling for all emissions from the Davis Refinery, HAPs included. (A.R. 5749-5833.) The modeling demonstrated that HAP emissions would be well below regulatory thresholds. (*Id*.)

[¶51] The record support for NDDH's determination also includes NDDH's independent confirmation that HAP emissions would be minimal. In November 2017, NDDH conducted an independent Air Quality Impacts Analysis (AQIA) as part of its review of Meridian's permit application. (A.R. 23155-23214.) The AQIA concluded that expected HAP emissions were well within regulatory limits. *See* A.R. 23187 ("The results of the air toxics analysis show that emissions from the proposed project are not expected to exceed the acceptable levels established in the *Air Toxics Policy*"). The agency's Final Air Quality Effects Analysis (AQEA) that accompanied the Permit confirms that HAP emissions will be minimal and well under the regulatory threshold. *See* A.R. 6482 (concluding that "total potential HAPs from the facility are approximately 6.2 tons/year, and the greatest single potential HAP is Hexane at 2.4 tons/year.").

[¶52] The record further demonstrates that NDDH separately evaluated potential HAP emissions from various sources within the Refinery (combustion sources, tanks, and fugitive emissions) and concluded that HAP emissions would be minimal for each because of the controls and operational requirements specified in the Permit. NDDH concluded "HAPs from combustion sources" would be "well below any regulatory threshold requirements" because of "established emission factors and the good combustion practices that will be required for the heaters/boilers to meet the low carbon monoxide emission rates" specified in the Permit. (App. 129.) NDDH determined that "HAPs from tanks are also expected to be low (based on control of volatile liquid storage tanks by installation and proper operation of internal floating roofs)." (App. 129.) Regarding fugitive emissions, NDDH concluded that such emissions are "expected to be

low, based on the operation of a stringent leak detection and repair program where VOC emissions from leaks are monitored/repaired." (App. 129.)

[¶53] In the face of this extensive record, Appellants offered no contrary evidence that HAP emissions would exceed the regulatory thresholds of a minor source. Appellants completely failed to rebut NDDH's determination that HAP emissions from the Davis Refinery, *as designed*, would be minimal. Instead, Appellants point to a single page within the 24,000 page administrative record (A.R. 4256) that estimates what HAP emissions might be if the Refinery were designed *without* pollution controls. However, that is a theoretical refinery – one that is never going to be built. The Davis Refinery, as actually designed, *does* include robust pollution controls. Appellants offer *no evidence* (because none exists) that the Davis Refinery, as actually designed, has the potential to emit HAPs in excess of the regulatory thresholds for synthetic minor source status.

[¶54] Appellants' erroneous approach of focusing on a theoretical refinery's potential to emit, instead of the actual Davis Refinery's potential to emit, is a misapplication of the definition of "potential to emit." Under N. Dak. Admin. Code § 33-15-14-06:

> "Potential to emit" means the maximum capacity of a stationary source to emit any air contaminant *under its physical and operational design*. Any physical or operational limitation on the capacity of a source to emit an air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the administrator of the United States environmental protection agency and the department.

(Emphasis added.) Here, NDDH correctly determined that "under its physical and operational design," the Davis Refinery did not have the potential to emit HAPs at levels above the regulatory thresholds for a synthetic minor source.

[¶55] Because HAP emissions are well under any applicable regulatory threshold, NDDH also appropriately determined that the Permit did not require inclusion of express numeric limits for HAP emissions. *See* App. 129 ("Given the low expected HAP emissions, the Department determined that establishment of emission limits for the individual HAPs and emissions testing for the individual HAPs is not warranted."). As NDDH explained in the record, that determination was consistent with NDDH's long-standing practice of not including "facility-wide emissions caps for pollutants that have no reasonable possibility of exceeding a regulatory threshold[.]" (App. 84.) Consistent with analogous federal environmental regulations, NDDH interprets the "reasonable possibility" standard to mean that "emissions are projected to be less than 50 percent of the regulatory threshold." (*Id*., citing 40 C.F.R. § 52.21(r)(6)(vi).) Projected HAP emissions for the Davis Refinery are well under 50 percent of the regulatory threshold. (A.R. 6482.)

[¶56] NDDH explained that the lack of specific emissions limits for HAPs in the Permit does not mean that emissions would be ignored. Rather, even without express emissions limits in the Permit, the Permit nevertheless requires HAP emissions to be monitored and reported:

> Emissions of PM10, PM2.5, VOCs, and HAPs from gas combustion at the Davis Refinery do not have any regulatory emissions limits; however, these pollutants were accounted for during the permitting process and will be reported on in the annual emission inventory report (*See* Permit to Construct Condition II.F.4.c). Testing to confirm calculated emissions is required under Permit to Construct Condition II.B.

(App. 75.) Permit Condition II. E. 18 requires fenceline monitoring for benzene (a HAP pollutant emitted by the facility) (App. 45) and Permit Condition II. F. 2 and II. F. 3 establish recordkeeping requirements for HAP emissions. (App. 46.) Finally, under the

Permit, NDDH "may require the permittee to have tests conducted to determine the emission of air contaminants from any source, whenever the Department has reason to believe that an emission of a contaminant not addressed by the permit applicant is occurring, or the emission of a contaminant in excess of that allowed by this permit is occurring." (App. 29.) NDDH also has the right under the Permit to "conduct tests of emissions of air contaminants from any source." (*Id*.)

[¶57] In sum, the record fully supports NDDH's conclusion that HAP emissions are minimal and fully supports NDDH's decision to not require separate HAP limits in addition to the Permit's overall VOC limits, monitoring, and recordkeeping requirements. Appellants fail to demonstrate that these decisions were arbitrary or capricious, or contrary to law. Appellants' improper approach of simply ignoring evidence in the record that rebuts their arguments is an utter failure to meet their burden of proof.

II. The Permit Contains Robust Requirements for VOC Monitoring.

[¶58] Appellants next make a wholly unsupported argument that the Permit's requirements for VOC monitoring are inadequate, and that "significant VOC emissions [could be] undetected from leaking equipment." (Appellants' Opening Brief at 23.) Appellants' argument focuses on fugitive VOC emissions, *i.e*., emissions from leaking equipment components. The Permit, in fact, contains extensive, enforceable monitoring requirements to assure that VOC emissions will not exceed the emissions limit of 58 tons/year stated in the Permit. (App. 17, 32.)

[¶59] Methods for monitoring and controlling fugitive emissions include using improved equipment components (*e.g.*, pumps that have double mechanical seals) and implementing programs for detecting and repairing leaking equipment ("leak detection and repair" or "LDAR" programs). Such methods are customary within the industry.

[¶60] In its amended permit application, Meridian described the controls it would employ to reduce fugitive VOC emissions, including using enhanced seals on certain equipment and installing a robust LDAR program. (A.R. 5006.) Meridian elected to go beyond the requirements imposed by existing state and federal laws for monitoring equipment for leaks by implementing a monitoring and repair program equivalent to the "28 LAER" LDAR program[7] promulgated by the Texas Commission on Environmental Quality ("TCEQ"), one of the most stringent LDAR programs in the United States. (A.R. 23153.) The TCEQ LDAR program is based on EPA guidance documents and methodologies specified in EPA's publication, A BEST PRACTICE GUIDE – LEAK DETECTION AND REPAIR (LDAR). The proposed LDAR program uses a more stringent definition of "leak" than do the applicable federal and state regulations. (*Id*.) The proposed LDAR program also requires more frequent monitoring, with audible, visual, and olfactory ("AVO") inspections conducted weekly on all connectors. (*Id*.) The LDAR program also includes details on how certain components are to be installed (*e.g.*, piping connections must be welded or flanged, and pumps and compressors must be equipped with a shaft sealing system that prevents or detects VOC emissions). (*Id*.) The LDAR program's implementation and requirements are based on regulatory requirements specified by EPA's New Source Performance Standards ("NSPS") and by National Emission Standards for Hazardous Air Pollutants ("NESHAP") programs. These methodologies are well established; they are used by the EPA and by multiple states programs, and are proven to be effective and capable achieving emissions goals.

[7] "LAER" is the acronym for Lowest Achievable Emission Rate.

[¶61] Meridian's proposed LDAR program, which is equivalent to the 28 LAER LDAR program, requires quarterly monitoring of all accessible components using an approved gas analyzer, such as a photo ionization detector (PID), that meets the requirements of Method 21 under 40 C.F.R. 60 Appendix A. PIDs typically are handheld instruments that can be positioned near a component to determine if it is leaking. PIDs can measure concentrations of VOCs in parts per million/volume to effectively identify leaks. However, because such handheld instruments typically must be placed near the component being monitored, monitoring of certain components can be difficult or unsafe. Therefore, Meridian's permit application also specified an alternative monitoring procedure to monitor all components every two months utilizing an Optical Gas Imaging ("OGI") camera that can detect VOC leaks. Because OGI cameras can be used from a much greater distances to identify leaking components, they make monitoring possible for components that are otherwise difficult or unsafe to access directly, and which as a result typically are monitored only annually at other facilities. In addition, when using OGI cameras, any and all observed VOC emissions are considered leaks regardless of their concentration and are subject to repair requirements. (A.R. 23154.)

[¶62] In addition to the enhanced ability to identify leaks, Meridian's proposed LDAR program further requires expedited repairs. A first attempt at repair is required within 5 days of any detected leak, and the leak is required to be fully repaired no later than 15 days after being detected. (*Id*.) The LDAR program also requires that components be re-monitored after the repair has been completed to confirm that the repair was successful at stopping the leak.

[¶63] NDDH's Air Quality Effects Analysis details the performance standards for equipment leaks required by EPA's New Source Performance Standards, including 40 C.F.R. 60, Subpart GGGa (adopted by reference in N.D. Admin. Code § 33-15-12-02) and 40 C.F.R. Part 60, Subpart VVa. (A.R. 6477-79.) The NSPS requirements mandate implementation of the LDAR program irrespective of the NDDH Permit. The NSPS standards specify monitoring and repair requirements that must be met.

[¶64] NDDH carefully analyzed the requirements of Meridian's proposed LDAR program, received comments on the program from other agencies, and ultimately included those requirements, along with recordkeeping requirements, as conditions in the Permit. (App. 21-22.) NDDH also required equipping compressors with "a shaft sealing system that prevents or detects emission of VOC from the seal." (*Id*.) It required enhanced monitoring for leaks using "optical gas imaging (OGI) in conjunction with approved Method 21 analyzers [i.e., PIDs] . . . to improve the efficiency of the ELDAR program," and required monitoring at more frequent intervals than even the 28 LAER LDAR program specifies. (*Id.*) It required a fenceline monitoring program for benzene to further verify that fugitive emissions were being controlled as required. (App. 45.) It further required that leaked VOC emissions must be recorded and reported (App. 30, 45, 47), requirements also specified by NSPS GGGa, 40 C.F.R Part 60. Since these are all specific requirements included in the Permit, they are fully enforceable.

[¶65] Despite these very specific requirements, Appellants nevertheless assert that the Permit's VOC limits are "ambiguous" and "unenforceable." (Appellants' Opening Brief at 22.) However, they provide nothing to support those bare assertions. In fact, these requirements are explicit, and Meridian would be in violation of the Permit if

it did not follow the Permit's conditions for using improved components and following the enhanced monitoring and repair requirements and fence line monitoring requirements specified in the Permit. The Permit is neither ambiguous nor unenforceable.

[¶66] Similarly, Appellants assert that "significant VOC emissions [could be] undetected from leaking equipment," but never explain how. In fact, the Permit's requirement for frequent monitoring for leaks and prompt repairs of leaks assures there will not be significant, undetected VOC emissions. Appellants' argument amounts to unsupported speculation and provides no grounds on which to reverse NDDH's decision to issue the Permit.

[¶67] Finally, Appellants make a misguided argument that fugitive VOC emissions are unknown because the OGI cameras detect emissions in parts per million, while the VOC emissions limits in the Permit are stated in tons/year. (Appellants' Opening Brief at 23.) This argument is nonsensical because the OGI cameras are intended to identify the *existence* of leaks, not to *quantify* the amount of VOC emissions. The point of using these devices is to quickly and effectively locate leaks so they can be repaired, thereby ceasing fugitive VOC emissions.[8]

[¶68] Appellants' argument ignores the fact that fugitive VOC emissions from leaking components are fundamentally different than other emissions sources at a facility, and therefore necessarily are monitored differently. Emissions from combustion sources

[8] The method for calculating fugitive VOC emissions is by using the actual monitored leak concentration determined from use of an approved Method 21 PID analyzer paired with EPA correlation equations to quantify individual component emissions rates. This is a long established practice used throughout the industry. *See* RTI, EMISSIONS ESTIMATION PROTOCOL FOR PETROLEUM REFINERIES, VERSION 3, at 2-3 through 2-4 (April 2015).

are centralized and therefore are capable of being monitored and quantified through continuous emissions monitoring ("CEM") devices. By contrast, fugitive emissions from leaking equipment are highly de-centralized and cannot be monitored and quantified by a CEM device. Emissions limits for fugitive emissions in the Permit are determined based on the number and type of equipment components at the facility that are susceptible to leaking (*e.g.*, valves, pumps, pressure relief devices) and on the established emission rate factor for each component type. *See* AIR PERMIT TECHNICAL GUIDANCE FOR CHEMICAL SOURCES, FUGITIVE GUIDANCE, Air Permits Division, Texas Commission on Environmental Quality (June 2018).[9] Permit limits for fugitive emissions are set based on the expected reduction in emissions that can be achieved by an LDAR program and by the other conditions stated in a permit. Thus, compliance with the limits stated in a permit for fugitive emissions is assured by compliance with the LDAR program and other permit conditions. Here, the VOC limits set by NDDH in the Permit to Construct will not be exceeded if the LDAR requirements in the Permit (which were the bases for establishing the emissions limits) are met. There is nothing "ambiguous" about ensuring compliance with VOC emissions limits in the Permit by ensuring compliance with the Permit's LDAR requirements and other conditions.

[¶69] In sum, Appellants have failed to establish that the VOC monitoring requirements in the Permit are inadequate. They offer no reason for the Court to overturn NDDH's decision to issue the Permit.

---

[9] https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/fugitive-guidance.pdf

III. Appellants' Comments on VOC Monitoring Were Addressed in the Record.

[¶70] Appellants' final argument – that NDDH did not address its comments about the adequacy of VOC monitoring – provides no basis on which to reverse NDDH's decision to issue the Permit.

[¶71] First, NDDH's argument is a complaint about the *process*, not about the substance or merits of the Permit. Where, as here, the Permit, in fact, contains adequate substantive requirements for VOC monitoring, complaints about the process that lead to the adoption of those requirements are irrelevant. Appellants cite no authority to support their argument that the Court can invalidate a permit that contains adequate substantive requirements because of an alleged failure to respond to one of the thousands of comments received from the public.

[¶72] Second, the record demonstrates that NDDH *did* respond to comments from Appellants' consultant concerning the adequacy of VOC monitoring. The district court meticulously reviewed the extensive administrative record and outlined in its Order how NDDH had addressed those comments:

> NDDOH also points out that in its responses to public comments, 19.d in particular, it addresses the enforceability of VOC emissions through the eLDAR program which includes reporting and record keeping. NDDOH contests the need for monitoring of VOCs to be practically enforceable because such is impractical due to the fact that such are typically fugitive. NDDOH also points out that it addressed Dr. Fox's assertions concerning VOCs in its responses to her comments on that subject, explaining that the TANKS model, an EPA approved method, was used to estimate VOC emissions and further explained that EPA protocols were used to quantify emissions, and that compliance with the eLDAR program would ensure emissions would remain low.
>
> The Court also notes that, in its response to Dr. Fox's January 26, 2018, letter addressing enforceability of VOC and HAP emissions limits, response to comment 20.d in particular, NDDOH addressed the practical enforceability thereof. It noted that permit conditions require reporting of such emissions and testing to confirm emission calculations. *See, also*,

> NDDOH response to comment 22.d. which asserts that HAPs exceed those allowed for a synthetic minor source. NDDOH responds that the permit accounts for all emissions which are required and includes restrictions which are tracked and reported to ensure compliance. *See, further*, NDDOH's response to comment 22.e addressing necessary emission control. In its response, NDDOH addresses HAPs and VOCs, asserting that "leakless" fugitive emission control components do not currently exist. It asserts that reduction of those emissions are dealt with through strict eLDAR programs (which are conditions of the permit issued) which require design standards, monitoring, low detection levels, reporting and record keeping. It should also be noted that, in response to comment 32.h, NDDOH challenges the need for monitoring of HAPs, stating that "[g]iven the low expected HAP emissions, the Department determined that establishment of emission limits for the individual HAPs and emissions testing for the individual HAPs is not warranted."

Order at 22, ¶¶ 50-51 (App. 184-85). Appellants simply ignore the district court's conclusions on this issue, as well as the many places in the record addressing VOCs and VOC monitoring. *See, e.g,.* App. 69-71 (responding to Dr. Fox's August 22, 2017 comments regarding VOC emissions); A.R. 23122 (Response 32); A.R. 23152-154 (Responses 88 and 89). This is not a situation, as Appellants contend, where VOC emissions and controls were overlooked by the agency, or where public comments were not addressed.

CONCLUSION

[¶73] NDDH's decision to issue the Permit to Construct is supported in the record and is not arbitrary, capricious or contrary to law. The district court's decision, which rejected Appellants' challenge to the Permit, should be affirmed.

DATED this 3rd day of October, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

Attorneys for Appellee
Meridian Energy Group, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Meridian Energy Group, Inc. in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure, the Brief of Appellee contains 37 total pages.

DATED this 3rd day of October, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

Attorneys for Appellee
Meridian Energy Group, Inc.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

National Parks Conservation Association, Appellant, and Environmental Law & Policy Center, and Dakota Resource Council, v. North Dakota Department of Environmental Quality, and Meridian Energy Group, Inc., Appellees.	Supreme Court No. 20190095 Stark County District Court Case No.: 45-2018-CV-00680

Appeal from Judgment Entered on January 24, 2019
Case No. 45-2018-CV-0060
County of Stark, Southwest Judicial District
The Honorable Dann E. Greenwood, Presiding

CERTIFICATE OF SERVICE

I hereby certify that on October 3rd, 2019, I electronically filed the Brief of Appellee Meridian Energy Group, Inc. with the Clerk of the North Dakota Supreme Court and served by electronic mail on the following:

Derrick Braaten
derrick@braatenlawfirm.com

JJ England
jj@braatenlawfirm.com

Scott Strand
SStrand@elpc.org

Rachel Granneman
RGranneman@elpc.org

Margaret I. Olson
maiolson@nd.gov

DATED this 3rd day of October, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Lawrence Bender*

LAWRENCE BENDER, ND Bar #03908
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com

Attorneys for Appellee
Meridian Energy Group, Inc.

67750319 v2