

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Environmental Driven Solutions, LLC, Plaintiff and Appellee, v. Dunn County, a North Dakota Municipality, Defendant and Appellant, v. North Dakota Industrial Commission, Intervenor and Appellee.	Supreme Court No. 20160100 Dunn County No. 13-2013-CV-100
---	---

**AMICUS CURIAE BRIEF OF THE NORTH DAKOTA PETROLEUM COUNCIL
IN SUPPORT OF PLAINTIFF AND APPELLEE AND INTERVENOR AND
APPELLEE**

On Appeal from Judgment Dated March 3, 2016,
District Court, Southwest Judicial District, Dunn County, North Dakota
The Honorable Judge Dann Edward Greenwood, Presiding

John W. Morrison (#03502)
jmorrison@crowleyfleck.com
CROWLEY FLECK PLLP
100 West Broadway, Suite 250
PO Box 2798
Bismarck, ND 58502
701.223.6585

Attorney for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION ¶ 1

 A. Preliminary Statement..... ¶ 1

 B. Identity of *Amicus Curiae* and its interest..... ¶ 2

II. ARGUMENT ¶ 5

 A. Dunn County has no zoning jurisdiction in matters which the legislature has authorized the NDIC to regulate ¶ 5

 B. The North Dakota Industrial Commission has exclusive jurisdiction over the location, construction, and operation of oil waste treating facilities ¶ 6

 C. The exclusive jurisdiction of the NDIC provides reliable, consistent regulation promulgated by experts who are best positioned to regular highly technical fields ¶ 10

 D. The proper resolution of this case does not require the Court to defer to the Commission’s determinations as to its own jurisdiction ¶ 12

III. CONCLUSION..... ¶ 16

CERTIFICATE OF SERVICE ¶ 18

TABLE OF AUTHORITIES

CASES

<u>Burford v. Sun Oil Co.</u> , 319 U.S. 315, 319-20, (1943).....	¶ 16
<u>Church v. Jamison</u> , 143 Cal. App. 4th 1568, 1580 (2006)	¶ 13
<u>Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Pub. Regulation Comm'n</u> , 139 P.3d 166, 169 (N.M. 2006).....	¶ 13
<u>Doyle ex rel. Doyle v. Sprynczynatyk</u> , 2001 ND 8, ¶ 10, 621 N.W.2d 353.....	¶ 8
<u>First Bank of Buffalo v. Conrad</u> , 350 N.W.2d 580, 584–85 (N.D.1984)	¶ 15
<u>Gofor Oil, Inc. v. State</u> , 427 N.W.2d 104, 107 (N.D. 1988).....	¶ 10
<u>Heier v. North Dakota Dept. of Transp.</u> , 2012 ND 171, ¶5, 820 N.W.2d 394	¶ 15
<u>HIT, Inc. v. N. Dakota Dep't of Human Servs.</u> , 2013 ND 51, ¶ 7, 828 N.W.2d 792.....	¶ 14
<u>Mountrail Cty. v. Hoffman</u> , 2000 ND 49, ¶ 7, 607 N.W.2d 901	¶ 5
<u>Noey v. Dep't of Envtl. Conservation</u> , 737 P.2d 796, 800 (Alaska 1987)	¶ 13
<u>Sloan v. N. Dakota Workforce Safety & Ins.</u> , 2011 ND 194, ¶ 10, 804 N.W.2d 184	¶ 9
<u>State ex rel. Clayburgh v. American West Cmty. Promotions, Inc.</u> , 2002 ND 98, ¶ 7, 645 N.W.2d 196.....	¶ 13

STATUTES

N.D. Admin. Code § 43-02-03-01(49).....	¶ 7, 8
N.D. Admin. Code § 43-02-03-15(6).....	¶ 7
N.D. Admin. Code § 43-02-03-34.1	¶ 7
N.D. Admin. Code § 43-02-03-55	¶ 7
N.D. Admin. Code §§ 43-02-03-51 to 43-02-03-51.4	¶ 7
N.D.C.C. § 1–02–03	¶ 8

N.D.C.C. § 1-02-05.....	¶ 14
N.D.C.C. § 28-32-06	¶ 9
N.D.C.C. § 38-08-04.....	¶ 14
N.D.C.C. § 38-08-04(2)(a).....	¶ 6
N.D.C.C. § 38-08-04(2)(e).....	¶ 6
N.D.C.C. § 38-08-04(2)(e)(2)	¶ 6, 8
N.D.C.C. § 38-08-04(5)	¶ 7
N.D.C.C. Ch. 11-33	¶ 5
N.D.C.C. Ch. 28-32	¶ 3
N.D.C.C. Ch. 38-08	¶ 7, 8, 12

OTHER AUTHORITIES

2B Norman J. Singer, <i>Statutes and Statutory Construction</i> § 49:04, 24 (6th ed. 2000 Rev.).....	¶ 13
---	------

I. INTRODUCTION

A. Preliminary Statement

[¶1] The North Dakota Petroleum Council (NDPC) respectfully submits this brief as *amicus curiae* in support of Environmental Driven Solutions, LLC, Plaintiff and Appellee and the North Dakota Industrial Commission, Intervenor and Appellee.

B. Identity of *Amicus Curiae* and its interest

[¶2] As set forth in the Motion for Leave to File Amicus Curiae Brief filed with this brief, the NDPC is a trade association representing more than 590 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, and storage, as well as mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region. North Dakota is ranked second in the nation in the production of oil and gas, and NDPC members produce 98 percent of the oil and gas in North Dakota. Established in 1952, NDPC's mission is to promote and enhance the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in North Dakota, South Dakota, and the Rocky Mountain region; to promote opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; to monitor and influence legislative and regulatory activities on the state and national level; and to accumulate and disseminate information concerning the petroleum industry to foster the best interests of the public and industry.

[¶3] The activities of many NDPC members are primarily regulated by the North Dakota Industrial Commission and the NDPC believes the perspective of regulated industry is necessary to assist the Court in reaching its decision. The NDPC members have

a strong interest in avoiding an inconsistent patchwork of regulation through local zoning in matters where the Legislature has authorized the North Dakota Industrial Commission (“NDIC”) to act and where the NDIC has taken action to uniformly regulate the industry through rules promulgated in accordance with Chapter 28-32 of the North Dakota Century Code. For these reasons, the NDPC files this brief in support of Environmental Driven Solutions, LLC, Plaintiff and Appellee, and the North Dakota Industrial Commission, Intervenor and Appellee.

[¶4] This brief has not been authored in whole or part by counsel for any party in this proceeding, no party or party’s counsel has contributed money intended to fund the preparation and submission of this brief, and no person other than the NDPC, its members and counsel has contributed money intended to fund preparation and submission of this brief.

II. ARGUMENT

A. Dunn County has no zoning jurisdiction in matters which the legislature has authorized the NDIC to regulate.

[¶5] It is well established that while Dunn County has the general authority to enact zoning ordinances pursuant to N.D.C.C. ch. 11-33, it cannot validly enact a zoning ordinance to regulate waste treatment facilities that contravenes state law. *See Mountrail Cty. v. Hoffman*, 2000 ND 49, ¶ 7, 607 N.W.2d 901.

B. The North Dakota Industrial Commission has exclusive jurisdiction over the location, construction, and operation of oil waste treating facilities.

[¶6] The legislature has expressly granted the NDIC the jurisdiction to regulate the “drilling, producing and plugging of wells, the restoration or drilling and production

sites, and all other operations for the production of oil and gas” including the jurisdiction “[t]o regulate disposal of saltwater and oilfield wastes.” N.D.C.C. §§ 38-08-04(2)(a), 38-08-04(2)(e). Since 2013, the statute has expressly recognized the NDIC’s jurisdiction over “treating plants:” “The commission may consider in addition to other authority granted under this section, safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities.” N.D.C.C. § 38-08-04(2)(e)(2).

[¶7] As is typical of administrative agencies, the NDIC has the express jurisdiction “[t]o adopt and to enforce rules and orders *to effectuate the purposes and intent of [chapter 38-08].*” *Id.* at 38-08-04(5) (emphasis added). Pursuant thereto, the NDIC has adopted an extensive set of regulatory rules to govern these facilities. A treating plant is defined as,

[A]ny plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production.

N.D. Admin. Code § 43-02-03-01(49). The NDIC’s regulatory oversight of treatment plants includes permitting, bonding, siting, operation, abandonment and reclamation of such facilities. *See* N.D. Admin. Code §§ 43-02-03-15(6), 43-02-03-34.1, 43-02-03-51 to 43-02-03-51.4, 43-02-03-55. The District Court properly found that this extensive regulatory framework, adopted under express authority granted by the legislature, evidenced an intent that the NDIC would “occupy the field” of the regulation of oil and gas waste treating plants and preempt local attempts to regulate the location of oil and gas waste treating plants through zoning ordinances. App. 36.

[¶8] Appellant asserts that, despite the express authority to regulate the “disposal of saltwater and oilfield wastes” and consider the “safety of the location and road access to . . . treating plants,” the NDIC does not have jurisdiction to regulate treatment plants because N.D.C.C. ch. 38-08 does not explicitly confer jurisdiction over these facilities. *See* Brief of Appellant ¶22-23. Appellant further asserts the reference to “treating plants” in N.D.C.C. § 38-08-04(2)(e)(2), merely implies the NDIC is encouraged to “consider whether treating plants are convenient to the disposal operation over which it does have jurisdiction”. *See* Brief of Appellant ¶24. In other words, while the NDIC has the express authority to regulate the “disposal of saltwater and oilfield wastes,” it has no authority over “treating plants,” which by definition reclaim, treat, process or recycle waste from drilling operations (see § 43-02-03-01(49), N.D. Admin. Code, *supra*) other than to consider whether those apparently unregulated facilities are convenient to the operation of a saltwater disposal well. This ad hoc statutory interpretation is unsupported by a plain reading of the statute and fails to follow well established principles of statutory construction. Statutes must be construed in their plain, ordinary, and commonly understood meaning. *Doyle ex rel. Doyle v. Sprynczynatyk*, 2001 ND 8, ¶ 10, 621 N.W.2d 353 (citation omitted). They must be read in context to give meaning and effect to every word, phrase, and sentence in a statute. *Id.*; *see also* N.D.C.C. § 1-02-03 (providing words and phrases of a statute must be construed according to the context).

[¶9] Dunn County attributes little, if any, significance to NDIC’s rules regulating treatment plants. *See* Brief of Appellant ¶ 22 (“If the Industrial Commission has jurisdiction over EDS’s proposed facility, it must be found in this statute—not in the administrative code”) (emphasis included in original citation). However, properly

promulgated administrative rules have the “force and effect of law” and cannot simply be ignored. N.D.C.C. § 28–32–06; *Sloan v. N. Dakota Workforce Safety & Ins.*, 2011 ND 194, ¶ 10, 804 N.W.2d 184. Dunn County does not attack the validity or enforceability of the treating plant regulations. Instead, it simply ignores the regulations as not helpful to its argument.

C. The exclusive jurisdiction of the NDIC provides reliable, consistent regulation promulgated by experts who are best positioned to regulate highly technical fields.

[¶10] The NDIC’s exclusive jurisdiction and regulation of treatment plants provides a uniform and consistent set of regulations regardless of in which county a facility may be physically located. It is in the public’s best interest and safety that industry has a uniform set of rules and regulations issued by competent experts governing oil and gas related activities including treatment plants. “In certain subjects of governmental regulation public interest is better served by delegating a part of detailed lawmaking to expert administrators who are especially familiar with the subject the legislature has directed them to regulate.” *Gofor Oil, Inc. v. State*, 427 N.W.2d 104, 107 (N.D. 1988).

[¶11] As the legislature determined when it granted authority to the NDIC to regulate the disposal of saltwater and oilfield wastes, both the industry and the people of North Dakota will benefit from a consistent pattern of regulation rather than in a piecemeal fashion through the myriad of political subdivisions with zoning authority in the Bakken oil field. The siting and regulation of oilfield waste disposal plants is a complex, technical question that is squarely within the NDIC’s area of expertise, and the public interest will be served by allowing the Commission to exercise its authority without interference from Dunn County and other municipal entities.

D. The proper resolution of this case does not require the Court to defer to the Commission's determinations as to its own jurisdiction.

[¶12] In its brief to the District Court, the Commission argued that its interpretation of the extent of its jurisdiction was entitled to deference and that it is allowed a “range of reasonableness” in determining the limits of its jurisdiction under Chapter 38-08. *See* Doc ID# 115 at 7-8. The District Court did not rely on deference to the agency as a basis for its decision determining that the NDIC has exclusive jurisdiction over the location of oil and gas waste treating plants.

[¶13] North Dakota law has long recognized that a state agency's interpretation of a statute it is charged to enforce is entitled to a certain level of deference when the agency is addressing questions that are “complex and technical in nature.” *State ex rel. Clayburgh v. American West Cmty. Promotions, Inc.*, 2002 ND 98, ¶ 7, 645 N.W.2d 196. However, as this Court has previously observed, “an administrative agency's construction of a statute is accorded much less weight when the only issue to be resolved by a court is a nontechnical question of law.” *Id.* (citing 2B Norman J. Singer, *Statutes and Statutory Construction* § 49:04, 24 (6th ed. 2000 Rev.) and case law from Kansas and New York). The approach to deference questions taken by this Court in *American West* is sound, and courts in many states follow a similar approach. *See, e.g., Noey v. Dep't of Env'tl. Conservation*, 737 P.2d 796, 800 (Alaska 1987) (“this issue involves basic principles of statutory interpretation and thus presents a question of law. Accordingly, no particular deference is owed to the agency's interpretation of the applicable statutes”); *Church v. Jamison*, 143 Cal. App. 4th 1568, 1580 (2006) (declining to defer to agency because it “was not operating in its area of expertise,” among other reasons); *Dona Ana Mut. Domestic Water Consumers Ass'n v.*

New Mexico Pub. Regulation Comm'n, 139 P.3d 166, 169 (N.M. 2006) (“We therefore accord little deference to an agency interpreting its own jurisdiction”).

[¶14] As noted earlier, N.D.C.C. § 38-08-04 unambiguously gives the NDIC authority to regulate treating plants. The regulations properly promulgated as administrative rules by the NDIC address explicitly the permitting, bonding, siting, operation, abandonment and reclamation of such facilities. Read together, the statute and the regulations “occupy the field” and preclude any attempt by a local governing body to regulate the same issue. There is simply no need for the Court to examine deference issues in case where the plain language of the statute controls. *See HIT, Inc. v. N. Dakota Dep't of Human Servs.*, 2013 ND 51, ¶ 7, 828 N.W.2d 792; *see also* N.D.C.C. § 1-02-05.

[¶15] As an administrative agency, the NDIC has only those powers granted to it by the legislature. *Heier v. North Dakota Dept. of Transp.*, 2012 ND 171, ¶5, 820 N.W.2d 394 (citing *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584–85 (N.D.1984)). It cannot expand its own jurisdiction beyond that legislatively delegated authority by claiming it is entitled to deference in deciding questions of law relating to its jurisdiction. And, since the NDIC’s authority over treating plants is expressly stated, the argument is unnecessary in this case.

III. CONCLUSION

[¶16] “[T]here is no question of the constitutional power of the State to take appropriate action to protect the [oil and gas] industry and protect the public interest.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 319-20, (1943) (citations omitted). Consistent and uniform regulation promulgated by a central and experienced regulatory body is vital to industry operations; vital to promote the development, production, and utilization of oil

and gas resources in North Dakota; and is vital to protect the public's interest and safety. The NDIC has explicit and exclusive jurisdiction over the location, construction, and operation of oil waste treating facilities. For these reasons, the NDPC respectfully requests this Court affirm the District Court's ruling.

[¶17] Dated this 28th day of July, 2016.

/s/ John W. Morrison

John W. Morrison (#03502)
jmorrison@crowleyfleck.com
CROWLEY FLECK PLLP
100 West Broadway Avenue, Suite 250
PO Box 2798
Bismarck, ND 58502
701.223.6585

CERTIFICATE OF SERVICE

¶18] I hereby certify that on July 28, 2016, a true and correct copy of the foregoing document was electronically filed with the North Dakota Supreme Court and served electronically upon the following:

Zachary E. Pelham
Pearce Durick PLLC
Attorney for Plaintiff/Appellee
zep@pearce-durick.com

Hope L. Hogan
Office of the Attorney General
Attorney for Intervenor/Appellee
hhogan@nd.gov

Ariston E. Johnson
Johnson & Sundeen
Attorney for Defendant/Appellant
ari@dakotalawdogs.com

Aaron G. Birst
NDACo
Attorney for Amicus Curiae
aaron.birst@ndaco.org

Karen Sue Prout
Assistant Williams County State's Attorney
Attorney for Amicus Curiae
prout@nemont.net

Stephanie Dassinger
North Dakota League of Cities
Attorney for Amicus Curiae
stephanie@ndlc.org

/s/ John W. Morrison
John W. Morrison