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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Environmental Law & Policy Center, and Dakota Resource Council, Appellants, v. North Dakota Public Service Commission, and Meridian Energy Group, Inc., Appellees.	Supreme Court No. 20190220 Burleigh County District Court Case No.: 08-2018-CV-02937

Appeal from Judgment Entered on May 15, 2019
Case No. 08-2018-CV-02937
County of Burleigh, South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

BRIEF OF APPELLEE
MERIDIAN ENERGY GROUP, INC.

(ORAL ARGUMENT REQUESTED IF APPELLANTS' REQUEST IS GRANTED)

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I. 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.

II. STATEMENT OF THE ISSUES PRESENTED

[¶2] The issues on appeal, as stated in Appellants' specifications of error to the District Court for the County of Burleigh, South Central Judicial District (the "District Court"), are whether the North Dakota Public Service Commission ("PSC") failed to provide a fair hearing and follow the requirements of the Administrative Agencies Practice Act ("AAPA"), N.D.C.C. § 28-32-46, by declining Appellants' request for discovery and dismissing their Complaint without an evidentiary hearing for lack of subject matter jurisdiction under N.D.C.C. § 49-22.1-01, *et seq.* (the "Siting Act").

III. STATEMENT OF THE CASE

[¶3] This case centers on Meridian's construction of a crude oil refinery in Billings County, North Dakota, known as the Davis Refinery. Appellants filed a Complaint with the PSC alleging that Meridian is required to undergo siting review and obtain a certificate of site review for the Davis Refinery pursuant to the Siting Act. Meridian moved to dismiss Appellants' Complaint for lack of subject matter jurisdiction. Under N.D.C.C. §§ 49-22.1-01 and 49-22.1-04, the PSC only has subject matter jurisdiction over oil refineries that have a capacity of 50,000 barrels per day (bpd) or more. Because the Davis Refinery has a planned capacity below 50,000 bpd, the PSC determined that it lacked the necessary subject matter jurisdiction over Appellants' complaint and so dismissed. Appellants appealed the PSC's decision to the District

Court, arguing that the lack of discovery and an evidentiary hearing deprived them of a “fair hearing” and did not comply with the requirements of the AAPA. N.D.C.C. §§ 28-32-46(3), (4). The District Court affirmed the PSC. Appellants now appeal to this Court.

IV. STATEMENT OF THE FACTS

A. The Davis Refinery.

[¶4] Meridian is in the process of constructing the Davis Refinery in Billings County, North Dakota. (APP 007, ¶ 12; APP 010, ¶ 20.) The Davis Refinery is located near the Bakken Formation and is being constructed to a rated capacity of 49,500 bpd. (APP 071, Affidavit of William Prentice (“Prentice Aff.”), ¶ 2.)

[¶5] Early designs for the Davis Refinery had a rated capacity of 27,500 bpd, sometimes referred to as “Davis-Light.” (APP 010, ¶ 21.) Meridian contemplated that, at some point in the future, the Davis Refinery might be expanded to increase the capacity by another 27,500 bpd with a second phase of construction, sometimes referred to as “Davis-Full,” for a potential future capacity of 55,000 bpd. (*See generally* Compl. Ex. A, Doc. ID 30, Compl. Ex. C, Doc. ID 43–48.) Construction of a second phase would be dependent on financing and other considerations. (*See* Doc. ID 31 at p. 12.) Meridian explained this proposal for the Davis Refinery in statements to regulators, the public, and investors.

[¶6] During development, Meridian revised its plans for the Davis Refinery. Rather than constructing a 27,500 bpd first phase with a potential second phase expansion, Meridian decided to construct a single-phase refinery at a capacity of 49,500 bpd. (*See* APP 071, Prentice Aff., ¶ 2.) 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. (*Id.*, at ¶ 3.) Meridian explained its revised plan to its shareholders and others. This plan was the final plan and Meridian proceeded with construction of the Davis Refinery pursuant to this plan.

[¶7] Meridian obtained all the permits it required to construct the Davis Refinery, broke ground on construction in July 2018, and anticipates that construction will be completed in the coming years.

B. Appellants' Repeated Attempts to Halt the Davis Refinery.

[¶8] Appellants have made repeated, unsuccessful attempts to halt the construction of the Davis Refinery. First, Appellant Dakota Resource Council initiated an action against Meridian in the South Central District Court, Burleigh County, North Dakota (Civil No. 08-2018-CV-01518), alleging that the conditional use permit issued to Meridian by the Billings County Commission was invalid. Meridian answered the Complaint, successfully moved for summary judgment, and Dakota Resource Council's lawsuit was dismissed.

[¶9] 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), alleging that the air permit issued to Meridian by the North Dakota Department of Health failed to meet certain legal requirements. That appeal was dismissed with prejudice.

[¶10] Third, Appellants initiated this matter before the PSC. As detailed below, at the recommendation of Administrative Law Judge Patrick Ward, the PSC dismissed this case for lack of subject matter jurisdiction. (APP 101, Order on Recommended Decision Granting Mot. to Dismiss Complainants/Petitioners' Compl.) Appellants then appealed to the District Court (Civil No. 08-2018-CV-02937), which affirmed the PSC's decision. Appellants now appeal the District Court's opinion to this Court.

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

[¶11] On June 29, 2018, Appellants filed a Complaint with the PSC alleging that Meridian's proposal to construct a first phase of the 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"). (APP 001; APP 016, ¶¶ 45-48.) 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. (APP 002-003.) As support, Appellants referenced outdated statements regarding Meridian's initial proposal to construct the Davis Refinery in two possible phases. (APP 010–013.)

[¶12] In response to the Complaint, on August 8, 2018, Meridian filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Dakota Rules of Civil Procedure and N.D.C.C § 28-32-22. (APP 058-59.) There, Meridian explained that the Davis Refinery would be built in a single phase with a capacity of 49,500 bpd, which falls outside of the PSC's statutory jurisdictional threshold of 50,000 bpd set by the Siting Act. (APP 065-66.) In support of its Motion to Dismiss, Meridian cited 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. (APP 060–62.) In response, Appellants opposed Meridian's Motion to Dismiss and argued that it should be entitled to conduct discovery pursuant to Rule 56(f). (Response to Motion to Dismiss, Doc. ID 59.) Contrary to the requirements of Rule 56(f), however, Appellants failed to make the requisite showing to obtain such discovery and made it clear that they intended to conduct overly broad and invasive discovery on issues not necessarily relevant to jurisdiction. (*See* APP 082–83.)

[¶13] On September 10, 2018, Administrative Law Judge Patrick Ward issued a Recommended Decision Granting Meridian Energy Group, Inc.'s Motion to Dismiss Complainants/Petitioners' Complaint. (APP 076, ALJ's Order on Recommended Decision Granting Mot. to Dismiss.) The ALJ's recommended decision held that "[t]he PSC lacks statutory subject matter jurisdiction over [Meridian's] proposed 49,500 bpd facility." (APP 086.) 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.

(APP 081–82).

[¶14] 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.

[¶15] (APP 084.) 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. (APP 082–84, 086.)

D. Appellants' Motion to Reopen the Record is Denied.

[¶16] On September 14, 2018, following the ALJ's recommended decision, Appellants filed a Motion to Reopen and Supplement the Record and to Permit Jurisdictional Discovery ("Motion to Reopen"). (Mot. 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 an evidentiary 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 unsupported. (Br. in Opp. to Petitioners' Mot., Doc. ID 104.)

[¶17] On October 3, 2018, the ALJ issued its recommended decision on Appellants' motion. (APP 092.) The ALJ's recommended decision on the motion to reopen considered whether Appellants' proffered evidence 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. (APP 094.) 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. (APP 095.)

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

[¶18] 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, the PSC specifically clarified 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." (APP 102.) 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.*)

F. The District Court Denies Appellants' Appeal of the PSC's Order.

[¶19] On November 8, 2018, Appellants filed a Notice of Appeal to the District Court. (Doc. ID 1.) In their Notice of Appeal, Appellants challenged the PSC's adoption of the ALJ's recommended decisions, arguing that they were denied a fair hearing because they were not afforded discovery and an evidentiary hearing. (*Id.* at ¶ 19.) In their specifications of error to the District Court, Appellants did not challenge the standard of review applied by the PSC in its decision to grant Meridian's Motion to Dismiss. (*See generally* Doc. ID 1.) Appellants also did not raise a due process challenge in their specifications of error. (*Id*.) Both are raised for the first time in this appeal.

[¶20] The District Court found that the PSC's findings of facts were "accurate and thorough" and adopted those findings for its own decision. (APP 119 at ¶ 4.) The District Court held that the PSC's dismissal of Appellants' Complaint was "appropriate and warranted" reasoning that while "Meridian may very well have originally planned to construct a refinery capable of the manufacture or refinement of more than 50,000 bpd," the "current stated intention is to only construct a refinery capable of 49,500 bpd" which was "under the jurisdictional threshold . . . ." (APP 121 at ¶ 10.) Because the PSC was without jurisdiction, it could not conduct a hearing. (*Id.* at ¶ 11.) Additionally, the District Court held that the PSC was within its discretion to deny discovery, as Appellants did not specifically identify what evidence sought would defeat a motion to dismiss for lack of subject matter jurisdiction. (APP 121-22 at ¶ 13.) Thus, the District Court affirmed the PSC's decision and denied Appellants' appeal.

G. Appellants Appeal to this Supreme Court.

[¶21] On July 15, 2019, Appellants filed its Notice of Appeal to this Court. Appellants raise new arguments in addition to some raised previously, as further discussed below. Appellants also raise new facts that were unavailable to the PSC at the time of its decision, referencing a newer YouTube video. (App. Br. at ¶ 25, n.5.) Meridian shares the PSC's concerns in their Motion Requesting Judicial Notice, Or Alternatively, Motion to Strike and would ask that the Court either strike footnote 5 from Appellants' Principal Brief or take judicial notice of the entirety of the video, which is consistent with the statements made by Meridian throughout these proceedings that it is constructing the Davis Refinery to a 49,500 bpd capacity.

[¶22] Appellants' arguments, both old and new, lack merit and the PSC's decision should be affirmed.

V. STANDARD OF REVIEW

[¶23] The North Dakota Supreme Court "reviews a district court's decision reviewing an administrative agency's decision under the standards set out in N.D.C.C. § 28-32-46." *Coon v. N. Dakota Dep't of Health*, 2017 ND 215, ¶ 7, 901 N.W.2d 718, 720–21, *reh'g denied* (Sept. 29, 2017); *see also Matter of Boschee*, 347 N.W.2d 331, 334 (N.D. 1984) ("[W]e do not, in the usual sense, review the district court's decision, but, rather, we review the agency's decision on the record developed in its proceedings and under the same standard of review used by the district court."). The Court is to "review the agency's decision and record compiled before the agency while giving respect to the district court's sound reasoning." *Coon*, 2017 ND 215, ¶ 7. Administrative rulings are entitled to deference, and the Court should not substitute its judgment for that of the agency. *Christofferson v. N. Dakota Dep't of Health*, 2007 ND 199, ¶ 7, 742 N.W.2d 799, 802 (citing *Wetzel v. N. Dakota Dep't of Transp.*, 2001 ND 35, ¶ 9, 622 N.W.2d 180); *Filkowski v. Dir., N. Dakota Dep't of Transp*, 2015 ND 104, ¶ 6, 862 N.W.2d 785.

[¶24] Under N.D.C.C. § 28-32-46, review of adjudicative decisions is limited to certain criteria. A court may reverse an agency's decision when:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Id.

[¶25] 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. Dakota Dep't of Health*, 2005 ND 104, ¶ 24, 697 N.W.2d 319, 329. "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.*

[¶26] Disputes about underlying jurisdictional facts present a mixed question of law and fact, and this Court "review[s] the question of law de novo and the district court's findings of fact under the clearly erroneous standard of review." *Gustafson v. Poitra*, 2018 ND 202, ¶ 6, 916 N.W.2d 804, 806 (citing *Fredericks v. Fredericks*, 2016 ND 234, ¶ 6, 888 N.W.2d 177, 181). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire record, this Court believes a mistake has been made." *Id.*

VI. ARGUMENT

A. Appellants' Argument that the PSC Applied the Wrong Standard in Granting Meridian's Motion to Dismiss Lacks Merit.

[¶27] Appellants argue that "the PSC failed to view the facts in the light most favorable to DRC and ELPC" when it considered Meridian's Motion to Dismiss. (Appellants' Br. at ¶ 21.) Specifically, Appellants state that, instead of taking the Complaint's allegations as true for purposes of the Motion to Dismiss, the PSC improperly relied on evidence submitted by Meridian demonstrating the Davis Refinery had a planned capacity of 49,500 bpd—below the jurisdictional threshold for the Siting Act. Appellants contend that doing so "was clear legal error, and it must be reversed." (*Id.* ¶ 24.) Appellants' argument, raised for the first time in its brief to this Court, lacks merit.

1. Appellants' challenge to the PSC's standard of review is not properly before this Court.

[¶28] In appeals from administrative agency decisions, courts may only consider those grounds identified in specifications of error under N.D.C.C. § 28-32-42, and the grounds specified must come within the provisions of N.D.C.C. § 28-32-46. *Matter of*

Boschee, 347 N.W.2d at 335. If an issue is not raised in the specifications of error, it may not be considered on appeal. *See id.*

[¶29] Such was the situation in *Aalund v. N. Dakota Workers Comp. Bureau*, 2001 ND 32, 622 N.W.2d 210. There, a claimant appealed a judgment that affirmed a Workers Compensation Bureau order adopting an administrative law judge's recommendation. *Id.* at ¶ 1. In his specification of error to the district court, the claimant did not contest the burden of proof applied in the agency proceedings. *Id.* at ¶ 9. Nevertheless, in his appeal to this Court, the claimant argued that "the Bureau erred in using the preponderance of evidence standard[,]" rather than a clear and convincing evidence standard, when it found he had violated a statute. *Id.* Because that issue had not been included in the claimant's specifications of error, the Court found the issue had not been properly preserved for review and declined to consider it. *Id.* at ¶¶ 11–12.

[¶30] Here, as in *Aalund*, Appellants did not identify the standard of review applied by the PSC in granting Meridian's Motion to Dismiss as an issue for appeal in their specifications of error to the District Court. (*See* Doc. ID 1 at ¶¶ 18-20 (identifying issues for appeal).)[1] Appellants' specifications of error relate to the lack of hearing or discovery afforded by the PSC. Specifically, Appellants alleged that because they were not permitted to conduct discovery and did not receive an evidentiary hearing, "the proceeding at the PSC and the Commission's order did not 'afford[] the appellant[s] a fair

[1] In discussing the case background, Appellants' specifications of error make vague reference to them having opposed Meridian's Motion to Dismiss as "procedurally improper" and "raised a fact dispute that must be resolved through . . . formal hearing and discovery process." (Doc. ID 1 at ¶ 12.) Appellants' did not, however, challenge the standard or review applied by the District Court and instead identified the lack of discovery and an opportunity for their hearing as their ultimate specifications of error. (Doc. ID 1 at ¶¶ 18-20.)

hearing' as required by N.D.C.C. §§ 28-32-46(3)" and the provisions of the AAPA were not complied with as required by N.D.C.C. § 28-32-46(4). (Doc. ID 1 at ¶¶ 19–20.) Because Appellants failed to identify the standard of review applied by the PSC as an issue for appeal in their specifications of error, they are precluded from raising it for the first time before this Court.[2] Accordingly, this Court should decline to consider Appellants' argument that the PSC failed to apply the correct standard in granting Meridian's Motion to Dismiss.

2. The PSC applied the correct standard to Meridian's Motion to Dismiss for lack of subject matter jurisdiction.

[¶31] Appellants argue that the PSC was required to accept the allegations in its Complaint as true when ruling on Meridian's Motion to Dismiss. (Appellants' Br. at ¶ 22.) According to Appellants, "[i]f a plaintiff presents a prima facie case on the merits of a claim, that is enough to defeat a motion for failure to state a claim upon which relief may be granted." (*Id*. at ¶ 26.) Appellants may be correct if Meridian had moved to dismiss for failure to state a claim under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure. But Meridian moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).

[¶32] When a party seeks dismissal of a Complaint for failure to state a claim under Rule 12(b)(6), courts (and the PSC) are required to accept the factual allegations in the Complaint as true. *Vandall v. Trinity Hosps.*, 2004 ND 47, ¶ 5, 676 N.W.2d 88 (stating that on a motion under Rule 12(b)(6) "we construe the complaint in the light

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[2] Further, Appellants have not indicated which provision of N.D.C.C. § 28-32-46 is allegedly implicated by the PSC's application of the allegedly wrong standard of review. *See Matter of Boschee*, 347 N.W.2d at 335 (requiring the grounds specified to come within the provisions of N.D.C.C. § 28-32-46).

most favorable to plaintiff and accept as true the well-pleaded allegations in the complaint"). Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), however, apply a different standard:

> In . . . a factual 12(b)(1) motion, the trial court's jurisdiction—its very power to hear the case—is at issue, and the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. As a result, no presumptive truthfulness attaches to the plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

N. Dakota ex rel. Stenehjem v. United States, 257 F. Supp. 3d 1039, 1049–50 (D.N.D. 2017) (internal citations omitted); *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914–15 (8th Cir. 2015) (noting that in a "factual attack" "the existence of subject matter jurisdiction [is challenged] in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered").

[¶33] Here, Meridian moved to dismiss the Complaint for lack of subject matter jurisdiction and, in doing so, presented facts outside the Complaint. As such, Meridian's motion was a "factual attack" on the PSC's subject matter jurisdiction. Consistent with the foregoing authorities, the PSC was free to consider that evidence when deciding subject matter jurisdiction. By considering the evidence before it and determining that it lacked subject matter jurisdiction under the Siting Act, the PSC did not commit legal error. As a result, its decision should be affirmed.

3. Even if the allegations in Appellants' Complaint are accepted as true, the PSC still lacks subject matter jurisdiction.

[¶34] Taken together, N.D.C.C. §§ 49-22.1-01(6) and 49-22.1-04 address when the expansion of a plant to an operating capacity of 50,000 bpd or more can bring it within the PSC's siting jurisdiction. Section 49-22.1-01(6) defines "gas or liquid energy conversion facility" as "any plant, addition, or combination of plant and addition, designed for or capable of . . . "[m]anufacture or refinement of fifty thousand barrels . . . or more of liquid hydrocarbon products per day . . . ." *Id.* Section 49-22.1-04, in turn, provides that "[a] utility may not begin construction of a gas or liquid energy conversion facility or gas or liquid transmission facility in the state without first having obtained a certificate of site compatibility or a route permit from the commission pursuant to this chapter." *Id.*

[¶35] The meaning of these two provisions is clear. If a plant has a capacity less than 50,000 bpd, it is not a "gas or liquid energy conversion facility" for purposes of the Siting Act and there is no need for a certificate of site compatibility prior to its construction. If, after the plant's construction, there is a planned "addition" to (i.e., "expansion" of) the plant that would bring its operating capacity over the 50,000 bpd threshold, the plant and addition become a "gas or liquid energy conversion facility" requiring a certificate of site compatibility prior to the construction of the addition. Only then does the PSC's jurisdiction attach.

[¶36] Here, Appellants' Complaint did not allege that Meridian was constructing a single-phase oil refinery with a capacity over 50,000 bpd. Rather, Appellants alleged that the "first phase would have a capacity of fewer than 50,000 bpd," but would be subsequently expanded beyond the 50,000 bpd threshold through a second phase. (APP 016 at ¶ 46.) As indicated in the allegations and attachments to the Complaint, the first phase would involve the construction of a standalone, operational facility capable of refining 27,500 bpd. (*See, e.g.*, Compl., Ex. A at 1 ("The Refinery will be constructed in two phases, with the initial design capacity of the Refinery being 27,500."), Doc. ID 30.) The second phase, in turn, would involve a 27,500 bpd addition to the first phase. As the attachments to the Complaint made clear, the second phase would have been initiated at some indeterminate time after completing the construction of the operational first phase. (*See* Compl., Ex. B at 12 (explaining the second phase would be dependent on "allowing reinvestment of initial operational profits [from the first phase] into the construction"), Doc. ID 31.)

[¶37] Even if the PSC took Appellants' Complaint as true, it still lacked jurisdiction to require a certificate of siting compatibility under the Siting Act because Meridian's first phase of construction would be <u>under the statutory threshold for jurisdiction</u>. (*See* APP 002 at ¶ 2) ("Meridian has taken the position that it can avoid siting review by the PSC by developing the refinery in two stages, <u>the first of which would be under the 50,000 bpd threshold that triggers the requirements of a certificate of site compatibility</u>.") (emphasis added). Rather, pursuant to Sections 49-22.1-01(6) and 49-22.1-04, it is only when Meridian seeks to expand the Davis Refinery's capacity above the 50,000 bpd through the addition of a second phase that the PSC's jurisdiction attaches. Accordingly, based solely on the allegations in and attachments to Appellants' Complaint, the PSC still lacked subject matter jurisdiction.

[¶38] For its part, the PSC agreed with this analysis in its decision. "[T]he legislature clearly articulated that a refinery capable of refining less than 50,000 bpd is not subject to the PSC's citing jurisdiction under the statute . . . <u>If</u> the person wishes to construct a subsequent 'addition' to such a facility that would increase the production capacity of the facility beyond the 50,000 bpd, the statute specifically contemplates that the 'addition' would cause the <u>total</u> facility to come within the jurisdiction of the PSC . . . ." (APP 111) (emphasis in original). Simply put, the allegations and attachments to the Complaint were not sufficient to create subject matter jurisdiction in the PSC.

[¶39] Finally, Appellants argue that because they presented a prima facie case as to jurisdiction, that that should end the inquiry and Appellants' suit should have proceeded. (Appellants' Br. at ¶ 26.) But the cases cited by Appellants are all cases regarding *personal* jurisdiction and do not provide the correct standard for subject matter jurisdiction, which as provided above, was utilized here.

B. The PSC's Dismissal of the Complaint Without Allowing Discovery was not an Abuse of Discretion.

[¶40] Appellants argue that the PSC deprived them of a fair hearing and violated the AAPA by denying their request to conduct discovery pursuant to Rule 56(f) of the North Dakota Rules of Civil Procedure. This argument fails for several reasons.

[¶41] First, Appellants present the PSC's decision not to permit discovery as a legal error subject to de novo review. Appellants are incorrect; decisions on whether to permit discovery are reviewed for abuse of discretion. "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 <u>have discretion to control procedural matters such as discovery and admission of evidence</u>." *Id.* (emphasis added); *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.").

[¶42] Second, the PSC did not abuse its discretion in denying Appellants' request for discovery under Rule 56(f). To the extent it applies, discovery under

Rule 56(f) is permissive, 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 <u>may</u> . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken . . . ." (emphasis added)). 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. Further, a request under Rule 56(f) "may not be premised solely on speculation as to evidence which might be discovered" and discovery under Rule 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).

[¶43] Appellants failed to meet these requirements. Indeed, Appellants identified only a vague, non-exhaustive set of document categories that it may want to obtain through discovery, which included "internal communications, private communications with investors, engineering plans and blueprints, <u>etc.</u>" (Aff. of Rachel Granneman in Support of Pet'rs' Resp. to Mot. to Dismiss) (Doc. ID 60, at ¶ 7 (emphasis added).) This was far from the specificity required under Rule 56(f). Further, in their briefing, Appellants made it patently clear that they intended to use the requested discovery as a quintessential fishing expedition. This was evidenced by the series of broad questions, unrelated to the PSC's jurisdiction, that Appellants desired discovery to "shed light" on. (*See*, *e.g.*, Pet'rs' Resp. to Mot. to Dismiss) (Doc. ID 59, at pp. 10–11.) ("What financial and/or technical considerations led to repeated public statements that Meridian intends to build a 55,000 bpd refinery?"). For its part, the District Court found Appellants' showing did not meet the requirements for discovery under Rule 56(f). As a result, the PSC's decision denying Appellants' request for discovery was not an abuse of discretion.

[¶44] Finally, the caselaw Appellants rely on—specifically *Shark v. N. States Power Co.*, 477 N.W.2d 251 (N.D. 1991)—does not support their argument that the PSC abused its discretion. In *Shark*, the Court did not hold that the plaintiff was entitled to discovery. Instead, it 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"). Accordingly, 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.

C. The PSC's Dismissal of the Complaint Without An Evidentiary Hearing Was Not Legal Error.

[¶45] Appellants argue that they were deprived of a "fair hearing" under the AAPA because the PSC dismissed their Complaint without an evidentiary hearing. (Appellants' Br. at ¶ 32.) Appellants' argument is unsupported by the text of the AAPA or caselaw.

1. Subject matter jurisdiction is a necessary prerequisite to a hearing.

[¶46] 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, 580 N.W.2d 583 ("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 PSC holds a hearing. *See, e.g.*, 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 <u>for hearing with the consent of the agency having jurisdiction</u>." (emphasis added)); 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 <u>with the agency having subject matter jurisdiction of the proceeding</u>." (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 <u>any continuing jurisdiction</u> which is granted to the agency by statute." (emphasis added)).

[¶47] 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. Nor can they. 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, then, 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).

[¶48] 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* APP 110-11.) 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."

(APP 111.)

[¶49] 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. As a result, Appellants were not deprived of a "fair hearing" in violation of the AAPA and the PSC's decision should be affirmed.

2. The PSC's decision on jurisdiction was not an adjudicative proceeding.

[¶50] Appellants contend that they were entitled to a hearing because the right to present evidence and cross-examine witnesses is part of the required procedures for an "adjudicative proceeding." (Appellants' Br. at ¶ 30.) But the PSC's decision was not part of an adjudicative proceeding. 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).

[¶51] As discussed above, 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.

3. Appellants' position would entitle any plaintiff to a hearing on any complaint.

[¶52] Under Appellants' theory, they only needed to allege that the Davis Refinery could be expanded in the future to obtain discovery and an evidentiary hearing on the refinery's location. If Appellants were correct, any litigant could obtain a hearing before the PSC for any plant based on an allegation that the plant could potentially exceed the Siting Act's jurisdiction at some point in the future. This could potentially inundate the PSC with hearings on speculative matters—any person that wanted to slow or halt the progress of 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. In doing so, it would thwart the purpose behind the Siting Act's jurisdictional threshold. Such a result is contrary to the procedures under the AAPA, the siting jurisdiction granted to the PSC, and notions of judicial economy.

D. Appellants' Due Process Argument Is Not Properly Before This Court And Lacks Merit.

[¶53] Appellants argue that the PSC's dismissal of their Complaint for lack of subject matter jurisdiction violated the "rationale behind judicial estoppel" and procedural due process. This is another argument that Appellant has raised for the first time in its appeal to this Court. Because this argument was not identified in Appellants' specifications of error to the District Court, it is not properly before this Court and should be disregarded. *See Aalund*, 2001 ND 32 at ¶¶ 11-12, 622 N.W.2d at 215. Even if considered, the argument does not have merit.

1. Judicial estoppel is inapplicable.

[¶54] In support of their due process argument, Appellants rely on the doctrine of judicial estoppel. While Appellants state that they are "not asking the Court to adopt and then apply the judicial estoppel doctrine to these facts" (Appellants' Br. at ¶ 38), they confusingly claim that the "rationale behind judicial estoppel" should mean that they prevail. (*Id.*) Needless to say, this argument—made without legal support—does not withstand scrutiny.

[¶55] Judicial estoppel is intended to prohibit a litigant from taking fundamentally inconsistent positions during the course of litigation that could impair the integrity of the judicial process. *See Meide v. Stenehjem ex rel. State of N.D.*, 649 N.W.2d 532, 2002 ND 128, ¶ 15 ("The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.") "The doctrine applies only where a party's subsequent position is <u>totally inconsistent</u> with its original position, and <u>does not apply</u> where distinct or different issues or facts are involved." *Id*. (emphasis added).

[¶56] Here, Meridian has not taken inconsistent positions <u>in the litigation</u>. Indeed, it was not even in litigation when it initially contemplated, and made statements about, developing the Davis Refinery in two phases. Further, the decision to redesign the Davis Refinery to be constructed in a single phase at a lower capacity is not fundamentally inconsistent with the prior plan. It is, quite simply, what companies all over the world do on a daily basis—make decisions that are different from earlier decisions. Judicial estoppel is not intended to stop parties from changing their mind, making different decisions, or altering their plans. *See Ingebretson v. Ingebretson*, 2005 ND 41, ¶ 18, 693 N.W.2d 1, 7 (explaining that in a divorce proceeding, the doctrine of judicial estoppel would not prohibit a party from requesting permanent spousal support even though she earlier requested support for only 10 years).

2. Appellants' due process argument is unsupported.

[¶57] Appellants also make a passing argument that the "PSC's interpretation of the law also conflicts with basic notions of procedural due process." (Appellants' Br. at ¶ 39.) This argument is empty rhetoric, made without elaboration or legal support. Indeed, the extent of Appellants' argument is that the PSC interpreted the Siting Act in a way that created an "irrebuttable presumption that a defendant's statements have to be accepted as true." (*Id.*) That is not what happened in this case. The PSC reviewed the Siting Act's requirements and concluded it did not have jurisdiction over the Davis Refinery. Because jurisdiction was a necessary predicate to a hearing under the Siting Act, it granted Meridian's motion and dismissed the matter without a hearing.

[¶58] Furthermore, Appellants have not demonstrated that their due process rights have been violated. "The inquiry in resolving due process claims is twofold: whether a constitutionally protected property or liberty interest is at stake and, if so, whether minimum procedural due process requirements were met." *Ennis v. Williams Cty. Bd. of Commr's*, 493 N.W.2d 675, 678 (N.D. 1992). "The hallmark of a property right is an individual entitlement, grounded in state law, which cannot be removed except for cause." *Id*. "If no constitutionally protected interest is involved, the due process requirements do not apply." *Id*.

[¶59] Appellants claim, in a footnote, that they have a property interest in the siting of the Davis Refinery because they have "members that live, work, and recreate near the proposed refinery site." (Appellants' Br. at ¶ 39, n.9.) While this interest may be enough to confer standing on Appellants, it is not a constitutionally protected property interest for purposes of procedural due process. *See Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 243 F. Supp. 3d 141, 153 (D.D.C. 2017), *aff'd*, 895 F.3d 102 (D.C. Cir. 2018) (denying plaintiffs' due process claim because the alleged right to "clean air, pure water, and preservation of the environment" was not "a federal protected property interest for purposes of the Fifth or Fourteenth Amendment" and noting that "aesthetic interests or enjoyment of wildlife" were not liberty interests protected by the Fifth Amendment); *In re Conservation Law Found.*, 188 A.3d 667, 677 (Vt. 2018) ("Because [plaintiff] frames its property interest as a generalized concern for environmental protection . . . it has no cognizable procedural due process right in this case."); *Coastal Habitat All. v. Pub. Util. Comm'n of Texas*, 294 S.W.3d 276, 286–87 (Tex. App. 2009) (denying environmental group's due process claim because the environmental group did not have a vested property interest in "wildlife, or in the viewing, enjoyment, or hunting thereof"); *Delaware Cty. Safe Drinking Water Coal., Inc. v. McGinty*, No. CIV. A. 07-1782, 2008 WL 2229269, at *1 n.1 (E.D. Pa. May 27, 2008) (holding that plaintiffs had no property interest in water flowing in a public river). Because Appellants have not identified any constitutionally protected property or liberty interest, they have failed to show a deprivation of their due process rights. The PSC's actions did not violate any due process rights and Appellants have not cited authority demonstrating the contrary.

VII. CONCLUSION

[¶60] For the reasons stated above, Meridian respectfully requests that this Court affirm the order of the PSC dismissing Appellants' Complaint.

DATED this 25th day of September, 2019.

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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 30 total pages.

DATED this 25th day of September, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Environmental Law & Policy Center, and Dakota Resource Council, Appellants, v. North Dakota Public Service Commission, and Meridian Energy Group, Inc., Appellees.	Supreme Court No. 20190220 Burleigh County District Court Case No.: 08-2018-CV-02937

Appeal from Judgment Entered on May 15, 2019
Case No. 08-2018-CV-02937
County of Burleigh, South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 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:

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