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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 145

National Parks Conservation Association — Appellant

and

Environmental Law & Policy Center, and

Dakota Resource Council, — Respondents

v.

North Dakota Department of Environmental

Quality and Meridian Energy Group, Inc., — Appellees

No. 20190095

Appeal from the District Court of Stark County, Southwest Judicial District, the Honorable Dann E. Greenwood, Judge.

AFFIRMED.

Opinion of the Court by Jensen, Chief Justice.

JJ W. England (argued) and Derrick L. Braaten (on brief), Bismarck, ND, for appellant.

Margaret I. Olson, Assistant Attorney General, Bismarck, ND, for appellee North Dakota Department of Environmental Quality.

Lawrence Bender, Bismarck, ND, for appellee Meridian Energy Group, Inc.

Nat'l Parks Conservation Ass'n v. N.D. Dep't of Envtl. Quality
No. 20190095

Jensen, Chief Justice.

[¶1] National Parks Conservation Association ("NPCA") appeals from a judgment affirming a final permit decision by the North Dakota Department of Environmental Quality, formerly the Department of Health Environmental Health Section[1], to issue Meridian Energy Group, Inc. an air quality permit to construct a refinery. We conclude the Department did not act arbitrarily, capriciously, or unreasonably in issuing the permit. We affirm.

I

[¶2] In October 2016, Meridian submitted its initial application and supporting documentation to the Department for a permit to construct the Davis Refinery, as required under North Dakota's air pollution control rules implementing the federal Clean Air Act. In April 2017, Meridian submitted a revised application with supporting documentation, replacing the original application and incorporating design changes.

[¶3] In May 2017, after completing its initial review, the Department sent Meridian a letter identifying concerns with certain emissions information and requiring Meridian to submit additional information before the Department would proceed with its review. Meridian provided additional information, and the Department resumed its review of the revised permit application.

[¶4] On November 30, 2017, the Department issued a draft permit, finding a complete review of the proposed project indicated the facility is expected to comply with the applicable federal and state air pollution rules. The

[1] At the time the final permit to construct was issued on June 12, 2018, the North Dakota Department of Health was responsible for reviewing and issuing air permits necessary to construct a refinery. Effective April 29, 2019, the Department of Environmental Quality assumed authority for certain permitting and other programs previously under the authority of the former Department of Health Environmental Health Section. *See* 2017 N.D. Sess. Laws ch. 199. Although citations for the relevant statutes and administrative rules have also changed, this opinion predominantly cites to statutes and administrative rules in place at the time the permit was issued.

Department explained the basis for its decision to issue the draft permit in its draft Air Quality Effects Analysis. As explained in the Air Quality Impacts Analysis that accompanied its Air Quality Effects Analysis, the Department determined the Davis Refinery would comply with the state and federal ambient air quality standards based on its model emissions. The Department held a comment period on the draft permit from December 8, 2017, to January 26, 2018, which included a public meeting and hearing on January 17, 2018.

[¶5] The Department received over 10,000 comments, with most of the substantive comments coming from NPCA, the National Park Service, and the Environmental Protection Agency. NPCA filed comments with the Department supported by its two experts' opinions, asserting that Meridian's oil refinery would be a "major source," rather than a "minor source," of air pollution and that the permit does not contain "practically enforceable" emissions limits under the federal Clean Air Act and North Dakota's air pollution control rules implementing the Clean Air Act.

[¶6] After considering public comments and Meridian's responses, the Department's Air Quality Division recommended to the State Health Officer that the Department issue a final permit because the Davis Refinery's emissions are expected to comply with the applicable North Dakota air pollution control rules. The recommendation was primarily based on the Department's responses to comments and its final Air Quality Effects Analysis, which was substantially similar to the draft Air Quality Effects Analysis. The Division also recommended changes to the permit based on the comments. On June 12, 2018, the State Health Officer issued a final permit to Meridian.

[¶7] In July 2018, NPCA appealed to the district court, arguing that the Department had unlawfully issued Meridian a "minor source" air pollution permit, that the permit did not establish practically enforceable limits for air pollutants, and that the Department did not sufficiently respond to its comments. In January 2019, the district court affirmed the Department's decision to issue the final permit. The court concluded the Department had adequately addressed NPCA's concerns, including those specifically relating to the Davis Refinery's emissions of hazardous air pollutants (HAPs) and volatile

organic compounds (VOCs). The court held the Department correctly applied the law in issuing the final permit.

II

[¶8] At the outset, NPCA contends the district court erred by applying the "arbitrary and capricious" standard of review to the Department's decision to issue the final permit.

A

[¶9] NPCA's appeal from the Department's final permit decision is governed by N.D.C.C. § 23-01-36, which was enacted in 2007 and is now codified at N.D.C.C. § 23.1-01-11. 2007 N.D. Sess. Laws ch. 280, § 2; *see also* 2015 N.D. Sess. Laws ch. 192, § 1; 2017 N.D. Sess. Laws ch. 199, § 16; 2019 N.D. Sess. Laws ch. 216, § 1. At the time the Department issued the permit, N.D.C.C. § 23-01-36 stated in part:

> An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter 23-20.1, 23-20.3, 23-25, 23-29, or 61-28 may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. . . . *Except as provided in this section, an appeal of the final permit determination is governed by sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law.* Except for a violation of chapter 23-20.1, 23-20.3, 23-25, 23-29, or 61-28 which occurs after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters which occurs after the permit is issued, any challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

(Emphasis added.) With regard to this appeal, N.D.C.C. §§ 28-32-46 defining the scope of and procedure on appeal from the determination of an agency and 28-32-49 providing the procedure for review in this Court, govern our review of NPCA's appeal of the Department's permit decision. Section 23-01-36 also provides that the final permit conditions and written responses to public comments constitute the Department's findings of fact and conclusions of law.

[¶10] Under N.D.C.C. § 28-32-49, this Court reviews a district court's decision reviewing an administrative agency's decision in the same manner as provided in N.D.C.C. § 28-32-46. *Coon v. N.D. Dep't of Health*, 2017 ND 215, ¶ 7, 901 N.W.2d 718; *Voigt v. N.D. Pub. Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. Under N.D.C.C. § 28-32-46, we must affirm the agency's decision unless:

> 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.

While we give due respect to the district court's sound reasoning, this Court reviews the agency's decision and the record compiled before the agency. N.D.C.C. § 28-32-49; *Voigt*, at ¶ 8; *Coon*, at ¶ 7.

[¶11] In reviewing an agency's findings of fact, we do not make independent findings or substitute our judgment for the agency's judgment. *Voigt*, 2017 ND 76, ¶ 9, 892 N.W.2d 149; *see also Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214,

220 (N.D. 1979) ("In construing the 'preponderance of the evidence' standard to permit us to apply the weight-of-the-evidence test to the factual findings of an administrative agency, we do not make independent findings of fact or substitute our judgment for that of the agency."). This Court "determine[s] only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Power Fuels*, at 220. "This standard defers to the [fact-finder's] opportunity to hear the witnesses' testimony and to judge their credibility[,] and [this Court] will not disturb the agency's findings unless they are against the greater weight of the evidence." *Voigt*, at ¶ 9 (quoting *Johnson v. N.D. Dep't of Transp.*, 530 N.W.2d 359, 361 (N.D. 1995)).

[¶12] Questions of law are fully reviewable on appeal from an agency's decision. *Voigt*, 2017 ND 76, ¶ 9, 892 N.W.2d 149. This Court has long held, however, that an agency's reasonable interpretation of a regulation is entitled to deference, and an agency's decision in "complex or technical matters" involving agency expertise is entitled to "appreciable deference." *Ennis v. N.D. Dep't of Human Servs.*, 2012 ND 185, ¶ 7, 820 N.W.2d 714; *see also Voigt*, at ¶ 9; *Capital Elec. Coop., Inc. v. N.D. Pub. Serv. Comm'n*, 2016 ND 73, ¶ 6, 877 N.W.2d 304; *Indus. Contractors, Inc. v. Workforce Safety & Ins.*, 2009 ND 157, ¶ 6, 772 N.W.2d 582; *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2008 ND 34, ¶ 15, 744 N.W.2d 748; *N.D. State Bd. of Med. Exam'rs v. Hsu*, 2007 ND 9, ¶ 42, 726 N.W.2d 216; *St. Benedict's Health Ctr. v. N.D. Dep't of Human Servs.*, 2004 ND 63, ¶ 9, 677 N.W.2d 202; *Cass Cty. Elec. Coop., Inc. v. N. States Power Co.*, 518 N.W.2d 216, 220 (N.D. 1994). Our role in an administrative appeal is not to act as a "super board" in reviewing the agency's decision. *Skjefte v. Job Serv. N.D.*, 392 N.W.2d 815, 817 (N.D. 1986).

B

[¶13] NPCA argues the district court erred in applying the "arbitrary and capricious" standard of review to the Department's permit decision. NPCA contends that when the legislature enacted N.D.C.C. § 23-01-36 in 2007, it overruled the standard we articulated in *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2005 ND 104, ¶ 24, 697 N.W.2d 319.

[¶14] In *Coon v. North Dakota Department of Health*, 2017 ND 215, ¶ 7, 901 N.W.2d 718, however, this Court relied on both N.D.C.C. § 28-32-46 and *People to Save the Sheyenne River* to reiterate that our standard of review provides "even greater deference" for a Department permitting decision, as opposed to an adjudicative decision. We explained that "[a]n agency has a reasonable range of discretion to interpret and apply its own regulations, and the agency's expertise is entitled to deference when the subject matter is complex." *Coon*, at ¶ 12 (quoting *Voigt*, 2017 ND 76, ¶ 28, 892 N.W.2d 149). "However, an agency's rules and regulations, if within the agency's authority, generally are binding upon the agency as if they were enacted by the legislature." *Coon*, at ¶ 12 (citing *Fercho v. Montpelier Pub. Sch. Dist. No. 14*, 312 N.W.2d 337, 341 (N.D. 1981)). Under N.D.C.C. § 23-01-23, now N.D.C.C. § 23.1-01-07, a permit hearing conducted to receive public comment under N.D.C.C. ch. 23-25, now N.D.C.C. ch. 23.1-06, is not an adjudicative proceeding under N.D.C.C. ch. 28-32.

[¶15] We have consistently held our review of an agency's decision involving the exercise of its discretion is limited under the separation of powers doctrine. NPCA's argument that the district court erred in applying the standard of review is unavailing because we have consistently held the Department exercises significant discretion in issuing a final permit. We therefore reiterate that the Department's permitting decision is entitled to greater deference than a decision after an adjudicative proceeding and we review the final permitting decision to determine whether it is arbitrary, capricious or unreasonable. *Coon*, 2017 ND 215, ¶ 7, 901 N.W.2d 718. "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.*

III

[¶16] On appeal, NPCA argues the Department did not sufficiently address the evidence NPCA and its experts presented to the agency that the Davis Refinery's potential emission of air pollutants exceed the federal Clean Air Act's major source permitting thresholds. NPCA further contends the air

quality permit to construct the Davis Refinery does not contain practically enforceable limits on the emission of pollutants and hazardous air pollutants to comply with the federal Clean Air Act.

[¶17] The Department implements the State's air pollution control program including various permitting programs. *See* N.D.C.C. ch. 23-25. As "a new stationary source within a source category designated in [N.D. Admin. Code] section 33-15-14-01," the Davis Refinery must have a "permit to construct." N.D. Admin. Code § 33-15-14-02(1)(a); *see also* N.D. Admin. Code § 33-15-14-01(5)(g) (designating "[p]etroleum refining and petrochemical operations" as "air contaminant sources capable of causing or contributing to air pollution, either directly or indirectly."). Under N.D. Admin. Code § 33-15-14-02, the Department shall issue a permit "[i]f, after review of all information received, including public comment with respect to any proposed project," it determines the proposed project "will be in accord with [N.D. Admin. Code art. 33-15]" or "will provide all necessary and reasonable methods of emission control." *See* N.D. Admin. Code § 33-15-14-02(5), (8).

[¶18] The Department maintains that a "permit to construct" is required for both major and minor sources of air pollution, but a "major source" is subject to additional requirements under North Dakota's air pollution control rules and the federal Clean Air Act. The Department asserts that "[a] source may be considered major due either to emissions of HAPs or criteria pollutants (sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone/VOCs, and lead)" and "VOCs are regulated as ozone precursors." *See* 42 U.S.C. § 7412(a)(1) (defining "major source" for hazardous air pollutants); 42 U.S.C. § 7479(1) (defining "major emitting facility" for prevention of significant deterioration program).

[¶19] Under 42 U.S.C. § 7412(a)(1), a "major source" is defined as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." If the Davis Refinery is a "major source" of HAPs,

Meridian must show that it can meet the applicable maximum achievable control technology emission limitations. *See* 42 U.S.C. § 7412(a)(1); 40 C.F.R. Part 63, Subparts CC & UUU (addressing HAPs emission standards for petroleum refineries). Likewise, if the Davis Refinery "emits, or has the potential to emit," 100 tons per year or more of any criteria pollutant, it will be a "major" source under the Prevention of Significant Deterioration (PSD) program and be required to go through the PSD permitting. *See* N.D. Admin. Code § 33-15-15-01.2 (adopting 40 C.F.R. § 52.21(b)(1)(i)(a) and 40 C.F.R. § 52.21(b)(1)(iii)(j)).

[¶20] The Department asserts that more than 1,000 staff hours over a two-year period were spent reviewing the project, "working to verify: the emission rates and limits can be achieved, the impacts of the facility's emissions on the nearby area (including TRNP [Theodore Roosevelt National Park]) will not cause or contribute to a violation of any applicable ambient air quality standard, and a draft permit to construct sets enforceable emission conditions." The Department asserts much of the time included verifying the Davis Refinery's "potential to emit" would qualify it as a "synthetic minor source." *See, e.g., Voigt v. Coyote Creek Mining Co., LLC*, No. 1:15-CV-00109, 2016 WL 3920045, at *33 (D.N.D. July 16, 2016) (discussing "synthetic minor source" as essentially a source that commits to restrictions in a minor source construction permit to keep its emissions below major source thresholds).

[¶21] On appeal NPCA provides three reasons the district court erred in affirming the Department's permit decision: 1) the Department's omission of an enforceable permit limit for HAPs in Meridian's permit makes the decision unlawful under the federal Clean Air Act; 2) the Department did not address NPCA's comment regarding inadequate monitoring of VOCs from leaks, which NPCA's expert opined could allow significant VOC emissions to be undetected; and 3) the Department's issuance of a "minor source" permit is illegal under the Clean Air Act because of inadequate monitoring for VOC leaks.

A

[¶22] NPCA argues that the permit lacks a mandatory enforceable emission limit for HAPs.

[¶23] NPCA argues the Department erred by not including any permit condition to limit the Davis Refinery's HAPs emissions. NPCA asserts that despite commenting that a HAPs limit was missing from the permit, the Department's responses to comments on this issue were "contradictory and confusing" and the Department's failure to include an "enforceable limit" violates the Clean Air Act. NPCA argues the Department's action means Meridian lacks an enforceable limit on its HAP "potential to emit" and the permit should have treated the entire refinery as a "major source" under the Clean Air Act's hazardous air pollution rules. *See* 42 U.S.C. § 7412(a)(1). NPCA contends the Department's issuance of the permit is, therefore, "not in accordance with the law" under N.D.C.C. § 28-32-46(1).

[¶24] The Department responds that it reasonably determined that a numeric cap for HAPs is unnecessary because the refinery's potential to emit HAPs is significantly below "major source" thresholds. The Department asserts it carefully considered the Davis Refinery's HAPs emissions. In its Air Quality Impacts Analysis, the Department reviewed Meridian's modeling to ensure the Davis Refinery's emissions would not exceed the acceptable limits in the Department's Policy for the Control of Hazardous Air Pollutant Emissions in ND. The Department reviewed Meridian's potential to emit calculations that were developed by analyzing the facility's design, emissions controls, regulatory requirements, and proposed permit emissions limits.

[¶25] In its Air Quality Effects Analysis, the Department determined the total potential HAPs emissions would be 6.2 tons per year, below the 25 tons per year "major source" threshold, and the largest single potential hazardous pollutant's emissions would be 2.4 tons per year, below the 10 tons per year "major source" threshold. The Department's Air Quality Effects Analysis further explains that several federal standards applicable to non-major or "area" sources would limit the facility's HAPs emissions and that the facility would also meet most of the standards applicable to "major sources" through compliance with strict emissions limits and environmental programs, *i.e.*, the ELDAR (enhanced leak detection and repair) program. While the permit does not impose a facility-wide numeric cap on HAPs, the Department included a

specific permit condition requiring these emissions to be tracked and reported to ensure and verify the facility stays below major source thresholds.

[¶26] The Department rejects NPCA's argument that it erred by not including an enforceable permit condition, "presumably in the form of a numeric cap," limiting the Davis Refinery's HAPs emissions. The Department contends NPCA ignores its relevant responses to comments on the issue and its responses show its decision not to include a numeric cap for HAPs is reasonable and consistent with applicable law and policy. The Department states that "permit conditions addressing other pollutants inherently limit HAPs to less than fifty percent of major source thresholds, and the permit's reporting requirements ensure these low emissions are maintained." The Department identifies on appeal several places in its responses to comments where it specifically addressed HAPs and asserts nothing in its statements contradicts the Department's "clearly articulated position" that HAPs do not require a numeric cap because other permit conditions inherently limit HAPs to levels significantly below major source thresholds.

[¶27] The Department also argues that this Court should decline to address NPCA's argument that the permit was required to include a numeric cap for HAPs because NPCA did not even acknowledge the Department's most relevant responses on this issue. *See, e.g., Native Village of Kivalina IRA Council v. U.S. E.P.A.*, 687 F.3d 1216, 1221 (9th Cir. 2012) (By failing to "engage the EPA's responses to public comments, it [the petitioner] did not meet its burden of showing that EAB review of the alleged reduction in monitoring requirements was warranted."). The Department argues, alternatively, that NPCA's HAPs argument should be rejected because the record supports its determination that HAPs do not require a numeric cap since these emissions are "inherently limited" to low levels, *i.e.*, less than fifty percent of major source thresholds, by other permit conditions and because its determination is consistent with North Dakota's air pollution control rules, the Clean Air Act, and EPA guidance. The Department's explanation on appeal of the relevant legal basis for its determination is instructive:

In determining whether a facility qualifies as a major source of HAPs, [the Department] must determine whether it "emits or has the potential to emit considering controls" above the major source threshold. 42 U.S.C. § 7412(a)(1); *see* 40 C.F.R. Part 63, Subparts CC & UUU (refinery sector rules); N.D. Admin. Code § 33-15-22-01 (adopting by reference 40 C.F.R. Part 63). Under 40 C.F.R. § 63.2, "potential to emit" is defined as follows:

> Potential to emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, 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 or the effect it would have on emissions is federally enforceable.

The "federally enforceable" portion of the rule was remanded to EPA in 1995. *Nat'l Min. Ass'n v. E.P.A.*, 59 F.3d 1351, 1365 (D.C. Cir. 1995). As a result, EPA generally interprets the term "federal enforceability" to require "practical enforceability." *See In re Piedmont Green Power, LLC*, Pet. No. IV-2015-2, 2016 WL 7489674, n. 4 (E.P.A. Dec. 13, 2016).

Nothing in applicable state or federal law requires [the Department] to specify a numeric cap for a limit on a source's potential to emit to be practically enforceable. *See Voigt v. Coyote Creek Mining Co., LLC*, No. 1:15-CV-00109, 2016 WL 3920045, at *34 (D.N.D. July 15, 2016) (rejecting argument that a numeric cap was required when determining a source's potential to emit in the PSD context). To the contrary, EPA guidance shows a numeric cap is not required in situations such as this (*See* AR16728-16738 (EPA, Interim Policy on Federal Enforceability of Limitation on Potential to Emit (Jan. 22, 1996) (1996 Interim Policy) (attachment to NPCA comments))). *See also* Leslie Sue Ritts & Ben Snowden, *The Regulation of Hazardous Air Pollutants, Clean Air Act Handbook*, at 259-261 (Julie R. Domike & Alec C. Zacaroli, eds., 4th ed. 2016) (discussing history and explaining that the 1996 Interim Policy "remains EPA's applicable policy with regard to

defining a source's potential to emit HAP (and other regulated air pollutants) under the Clean Air Act"). EPA's 1996 Interim Policy clarifies that EPA's January 25, 1995 Transition Policy remains in effect, which states:

> Another federally-enforceable way criteria pollutant limitations affect HAP can be described as a "nested" HAP limit within a permit containing conditions limiting criteria pollutants. For example, the particular VOC's within a given operation may include toluene and xylene, which are also HAP. If the VOC-limiting permit has established limitations on the amount of toluene and xylene used as the means to reduce VOC, those limitations would have an obvious "effect" on HAP as well.

EPA, Options for Limiting the Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act, at 7 (Jan. 25, 1995) (1995 Transition Policy).

(Footnotes omitted.) The Department maintains this is precisely the situation in this case.

[¶28] The Department explained that the Davis Refinery's HAPs emissions will be limited by the permit's conditions restricting other pollutants and that a "primary example" is the permit's ELDAR conditions that limit VOCs and serve as a means to limit HAPs, many of which are also VOCs. Among its relevant responses, the Department stated in part: "HAP emissions from a facility are largely dependent on the leak and repair ([E]LDAR) standards for a facility. The Davis Refinery will be subject to very stringent [E]LDAR requirements which are expected to result in low levels of HAP emissions (including benzene) from the facility . . . ." In another response, the Department stated:

> Based on established emission factors and the good combustion practices that will be required for heaters /boilers to meet the low carbon monoxide emission rates, HAPs from the point sources at the facility are expected to be well below any regulatory thresholds. 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). HAPs from fugitive 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. 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.

The Department asserts its "long-standing practice to exclude such pollutants from numeric caps is consistent with EPA's guidance." As discussed above, the Department explains that the EPA's 1996 Interim Policy affirms the 1995 Transition Policy guidance advising that sources that "maintain their emissions at levels that do not exceed 50 percent of any applicable major source threshold . . . do not need a permit to limit [potential to emit]." The Department asserts that, based on the Department's and EPA's policy, no numeric cap is required because both individual and total HAPs emissions are below fifty percent of the threshold.

[¶29] Meridian also responds that the Department properly decided that separate HAP emissions limits, in addition to the permit's VOC emissions limits, were unnecessary. Meridian contends there is no regulatory requirement or other authority that requires the limit and NPCA's argument is misleading. Meridian relies on the "extensive record" for support and contends NPCA offered no contrary evidence that HAP emissions would exceed the regulatory thresholds of a "minor source."

[¶30] Here, the Department reasonably considered the impact of the permit conditions restricting other pollutants in calculating the Davis Refinery's potential to emit HAPs and determined the facility will not be a major source of HAPs. Under our standard of review, we conclude the Department's reasonable interpretation of its policies and regulations is entitled to deference, and we give appreciable deference to its expertise in "complex or technical matters," such as whether the VOC limits would also include HAPs. We conclude NPCA has not established the Department acted arbitrarily,

capriciously, or unreasonably in issuing the permit with regard to its consideration of HAP emissions.

B

[¶31] NPCA argues that the Department did not sufficiently address its comments that the permit lacks adequate monitoring for volatile organic compounds (VOCs).

[¶32] Courts have explained that "[t]he requirement that agency action not be arbitrary or capricious includes a requirement that the agency . . . respond to 'relevant' and 'significant' public comments." *City of Portland, Or. v. Envtl. Prot. Agency*, 507 F.3d 706, 713 (D.C. Cir. 2007) (quoting *Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 197 (D.C. Cir. 1993)). Generally, an agency must address significant comments "in a reasoned manner" in adequately responding to comments. *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997); *see also FBME Bank Ltd. v. Mnuchin*, 249 F.Supp.3d 215, 222 (D.D.C. 2017) ("There is no requirement, however, that an agency respond to significant comments in a manner that satisfies the commenter.").

[¶33] Courts have also said that "[c]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." *Nat. Res. Def. Council v. Pollution Control Bd.*, 37 N.E.3d 407, 415 (Ill. App. Ct. 2015) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Defense Council, Inc.*, 435 U.S. 519, 553 (1978)). "The selection of which comments are significant necessarily involves a matter of discretion[, and a] cognizable challenge to an agency's selection decision is not stated unless the challenging party alleges the agency acted in an arbitrary and capricious manner." *Nat. Res. Def. Council*, at 415 (citing *Citizens for Clean Air v. U.S. Envtl. Prot. Agency*, 959 F.2d 839, 845-46 (9th Cir. 1992)). This comports with our standard for reviewing whether the Department's decision to issue the permit was arbitrary, capricious or unreasonable.

[¶34] NPCA argues the Department failed to provide any response to its comment that the permit lacks a meaningful method to measure leaks of VOCs when Meridian's permit application indicated VOC leaks would be the single largest source of controlled VOC emissions. NPCA asserts this is significant because it affects the entirety of the permit as a "minor source" permit and involves a substantial quantity of VOC pollution.

[¶35] NPCA relies on N.D.C.C. § 28-32-46(7) ("The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant."), and *Swenson v. Workforce Safety & Ins. Fund*, 2007 ND 149, ¶ 26, 738 N.W.2d 892 ("Adequate reasons for rejecting appellant's evidence set forth in the agency's findings and supported by the record are necessary for us to determine whether or not the decision of the agency is to be affirmed under N.D.C.C. § 28-32-46(5), (6) and (7)."). NPCA contends the Department's permitting decision is unlawful because it did not "sufficiently address the evidence presented to the agency" when the Department failed to comment on this "significant issue" submitted by its expert to an expert agency.

[¶36] The Department responds, however, that it adequately responded to NPCA's comments and its decision is supported by the record and consistent with applicable law. Citing specific comments, the Department contends that it adequately responded to NPCA's comments regarding VOC leaks and the ELDAR program but that NPCA again ignores its responses. The Department specifically points to one comment which further directs the commenter to Meridian's response for additional information on the ELDAR program. The Department argues that NPCA has not sufficiently challenged the Department's responses to explain why they are wrong and that this Court should decline to address their argument the permit lacks adequate monitoring for the VOC leaks.

[¶37] On the basis of our review of the record, including the Department's relevant responses to comments, we conclude the Department has considered and addressed the significant comments, including VOC monitoring, and that NPCA has not established the Department acted in an arbitrary, capricious, or unreasonable manner in responding to the relevant comments.

C

[¶38] NPCA argues the permit's VOCs limit lacks adequate monitoring and is unenforceable. NPCA contends that although the permit limits Meridian to 58.0 tons per year of emissions of VOCs, calculated on a monthly rolling average, and also includes recordkeeping requirements, the permit's VOC conditions regarding monitoring are inadequate. NPCA argues the permit's requirement that Meridian attempt to monitor "[t]otal VOC emissions" from equipment leaks "via ELDAR program monitoring" is ambiguous and that it "could allow significant VOCs emissions."

[¶39] The Department responds that it reasonably imposed VOC leak monitoring requirements that are "even more stringent" than applicable federal standards. The Department asserts the record shows the permit adequately addresses VOC leaks through imposition of the ELDAR program, which is consistent with the applicable NSPS [New Source Performance Standards] and imposes more stringent requirements, with a lower leak threshold to trigger repair action. The Department argues NPCA's contention that the VOC leak emissions limit is not "practically enforceable" is baseless. The Department again relies on EPA guidance, stating:

> Under relevant EPA guidance applicable to calculating the potential to emit four criteria pollutants under the PSD [Prevention of Significant Deterioration] program, an NSPS is de facto practically enforceable. EPA, Guidance of Limiting Potential to Emit in New Source Permitting, at 2 (June 13, 1989) ("Non-permit limitations can also legally restrict potential to emit," including "New Source Performance Standards codified at 40 C.F.R. Part 60.").

[¶40] The Department asserts the permit's ELDAR program requirements are "practically enforceable" because its requirements are consistent with and even more stringent than the applicable New Source Performance Standards. Meridian also contends that the permit contains "robust requirements" for VOC monitoring, that NPCA failed to establish the VOC monitoring requirements are inadequate, and that NPCA's comments on VOC were addressed in the record.

[¶41] On the basis of our review, the Department's permit decision considered and addressed VOC leaks in requiring compliance with the permit's ELDAR program, and we therefore conclude NPCA has not established that the Department's decision is arbitrary, capricious, or unreasonable.

IV

[¶42] We have considered NPCA's remaining arguments and deem them to be without merit or unnecessary to our opinion. We affirm the district court judgment affirming the Department's decision to issue Meridian the air quality permit to construct.

[¶43] Jon J. Jensen, C.J.
Lisa Fair McEvers
Daniel J. Crothers
Gerald W. VandeWalle
Bruce B. Haskell, S.J.

[¶44] The Honorable Bruce B. Haskell, Surrogate Judge, sitting in place of Tufte, J., disqualified.