STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF STARK SOUTHWEST JUDICIAL DISTRICT

National Parks Conservation Association, Environmental Law & Policy Center and Dakota Resource Council, Appellants, v. North Dakota Department of Health and Meridian Energy Group, Inc., Appellees.	Civil No. 45-2018-CV-680 Permit No. PTC17020 MEMORANDUM OPINION

[1] This is an administrative appeal pursuant to N.D.C.C. § 23-01-36 from the decision of the North Dakota Department of Health (hereinafter "NDDOH") dated June 12, 2018, to issue a permit to construct a refinery to Meridian Energy Group, Inc. (hereinafter "Meridian"). National Parks Conservation Association, Environmental Law & Policy Center and Dakota Resource Council (hereinafter collectively "Appellants") filed their Notice of Appeal on July 12, 2018.

[2] Appellants filed their opening brief, NDDOH and Meridian filed their respective Appellees' briefs; and Appellants filed a reply brief. On December 12, 2018, the parties presented oral argument on the matter. The Court has read the briefing and considered the arguments presented. The Court has also reviewed the record, which

consists of more than 23,000 pages of materials, in relevant and significant part including, but not limited to:

1. The NDDOH's responses to comments.

2. The permit issued.

3. Most, if not all, of those portions of the record to which the parties cited the Court in a specific, as opposed to general, sense.

[3] For the reasons set forth below, it is the decision of the Court to AFFIRM the issuance by the NDDOH of the permit to construct.

[4] Section 23-01-36, N.D.C.C., upon which this appeal is based, provides:

> 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. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. 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.

[5] An appeal from an administrative agency's decision is governed by the standards set out in N.D.C.C. § 28-32-46. See Coon v. N.D. Dep't of Health, 2017 ND 215, ¶ 7, 901 N.W.2d 718; People to Save the Sheyenne River v. N.D. Department of Health, 2005 ND 104, ¶ 15, 697 N.W.2d 319. Section 28-32-46, N.D.C.C., provides:

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 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.
>
> If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[6] In the process of reviewing the factual findings of an administrative agency in the issuance of a permit, the District Court does not make independent findings of fact or substitute its judgment for that of the agency. It only "determines whether a reasoning mind could have reasonably determined the agency's factual conclusions were supported by the weight of the evidence from the entire record." See People to Save the Sheyenne River, 2005 ND 104, ¶ 15, 697 N.W.2d 319 (citing Gross v. North Dakota Dep't of Human Servs., 2004 ND 24, ¶ 6, 673 N.W.2d 910).

DISCUSSION

[7] Appellants present several arguments supporting their request that the decision of the NDDOH be reversed and remanded to NDDOH:

1. Appellants argue, generally, that the project was not exempt from requirements for a major source permit; and that the NDDOH should have considered the proposed refinery as a major source and reviewed the application for permit against the

standards for Prevention of Significant Deterioration (PSD).

2. Appellants argued more specifically that the NDDOH failed to explain the rationale for what Appellants characterize as a reversal of a prior position. Appellants assert that early in the permitting process, the NDDOH expressed concerns that Meridian would be able to satisfy the requirements for a minor source permit to construct but thereafter decided to issue the permit.

3. Appellants also argue that NDDOH's decision was not supported by findings or substantial evidence in the record.

4. Appellants argue that NDDHO's decision was based upon an incorrect interpretation of law such that the decision was not entitled to any deference by this Court.

[8] NDDOH responds that:

1. The Appellants' arguments are premised upon the wrong standard of review. It argues that its decision is entitled to deference, that the correct standard is whether the decision is arbitrary, capricious or unreasonable and that Appellants have failed to meet their burden of showing that its decision was arbitrary, capricious or unreasonable.

2. That the NDDOH did not reverse its position as argued by Appellants and adequately addressed the suggestions that it did in its response to comments.

3. That the NDDOH did not rely upon erroneous legal conclusions.

[9] Meridian responds to Appellants' arguments as follows:

1. That Appellants misstate the issue before the Court. It argues that the issue is not whether the project is exempt from the requirements applicable to a major source.

2. That the applicable standard is whether NDDOH's decision was arbitrary, capricious or unreasonable.

3. That, in the context of the arbitrary, capricious or unreasonable standard:

   a. The NDDOH did not reverse its position;

   b. The NDDOH decision was supported by the record; and

   c. The Appellants' other arguments are rebutted by the record.

[10] In their reply brief, Appellants argue:

1. The NDDOH decision is not entitled to deference because it was based upon an erroneous legal determination entitled to denovo review.

2. That Appellees misunderstand Appellants' use of the term exempt.

3. That permit conditions must be legally and practically enforceable.

4. NDDOH's explanation of its change in position was conclusory and its response to that subject and other comments in general

was inadequate.

[11] At oral argument, NDDOH argues that the Court should not consider issues raised for the first time in its reply brief.

[12] Appellants assert that the refinery for which the NDDOH issued the permit to construct would be the first refinery to be built in the United States in over 40 years. They assert that even before making application for the permit, Meridian provided information to NDDOH, including a report entitled "Air Dispersion Modeling Protocols." Appellants assert that a NDDOH representative responded by letter dated September 16, 2016, wherein significant concern was expressed as to Meridian's emissions estimates, indicating that the estimates were "very low and may not be achievable."

[13] Appellants note that Meridian responded on September 22, 2016, defending its estimates; and Appellants state that on October 6, 2016, Meridian submitted its formal air quality permit application, along with a new emissions dispersion and air quality impact analysis. Appellants further note that on October 26, 2016, NDDOH acknowledged receipt and requested more information; and Meridian submitted substantial additional materials. Appellants assert that interactions between Meridian and NDDOH resulted in an understanding that Meridian would submit a revised Permit to Construct Application.

[14] Appellants assert that Meridian submitted such a revised application on April 5, 2017, and that on May 1, 2017, NDDOH sent a letter to Meridian, again expressing serious concerns about the revised application which needed to be resolved prior to continued review of the application. Appellants assert that Meridian and NDDOH exchanged further correspondence about those concerns.

[15] Appellants assert that on October 22, 2017, Appellants submitted a report from Dr. Phyllis Fox, whom they claim is one of the most experienced air quality experts in the United States, which supported NDDOH's initial concerns and concluded that Meridian had failed to adequately address those concerns.

[16] Appellants claim that, notwithstanding NDDOH's initial concerns, Meridian's failure to satisfy those concerns, and Dr. Fox's report addressing the concerns and failure to satisfy such, the NDDOH "reversed" its position, decided Meridian's emission estimates were acceptable, and on October 18, 2017, sent Meridian its Draft Notice of Intent to issue a Minor Source Permit to Construct.

[17] The NDDOH asserts that, regardless of prior submittals by Meridian and/or NDDOH responses, the NDDOH permitting decision was based upon its review of the Meridian's April 5, 2017, revised application. NDDOH claims that, after completing its initial review of that application, it outlined its concerns and required

Meridian to submit additional information in a May 15, 2017, letter. NDDOH asserts that in a series of three letters, Meridian provided information and gave a detailed response to each of NDDOH's concerns, including a June 13, 2017, letter providing the basis for its calculations for its Potential to Emit (PTE) estimates set forth in its revised permit application.

[18] NDDOH maintains that it throughly reviewed the revised application, actually giving it a review more like that required for major sources which are subject to the PSD permitting standards because of its proximity to the Theodore Roosevelt National Park.

[19] On November 30, 2017, NDDOH issued a draft permit, indicating that "[a] complete review of the proposed project indicates that the facility is expected to comply with the applicable federal and state air pollution rules." The NDDOH asserts that it explained its bases for its decision in its draft Air Quality Effects Analysis including:

1. That it determined that the refinery's PTE would be below the major sources emission threshold for all criteria pollutants and hazardous air pollutants so that it was not subject to PDS review together with its explanation that its determination was based upon calculations in Meridian's revised permit application;
2. That it determined that the refinery would comply with all

potentially applicable rules in N.D.A.C. Article 33-15; and

3. That it determined that the refinery would comply with all state and federal ambient air quality standards based upon its modeled emissions.

[20] NDDOH asserts that it held a comment period from December 8, 2017, to January 26, 2018, which included a public meeting and hearing on January 26, 2018. NDDOH asserts that during the comment period, the draft permit was available to the public via website.

[21] Appellants, along with Dr. Fox and Dr. H. Andrew Gray, submitted detailed comments on January 26, 2018, asserting that the draft permit seriously underestimated the refinery's potential to emit criteria and hazardous pollutants and that it did not include the monitoring, record keeping and reporting requirements to assure emissions would be limited to minor source levels. In addition, over 10,000 comments were submitted by the public.

[22] The record reflects that NDDOH provided roughly 91 pages of written response to the comments which were submitted. Many responses were to specific comments, while other responses appeared to be made to groups of many similar comments. NDDOH argues that comments made by the National Park Service and the EPA did not question NDDOH's determination that the refinery qualified as a synthetic minor source based upon its PTE, but merely sought clarification on certain items in the permit. NDDOH claims that it

is not aware of any objection to the permit by EPA.

[23] NDDOH asserts that on June 11, 2018, the Department's Air Quality Division recommended that the Department issue a final permit because the refinery's "emissions are expected to comply with the applicable North Dakota Air Pollution Control Rules." Based upon comments, the Air Quality Division also recommended changes to clarify conditions already included in the permit. Following those recommendations, the State Health Officer issued the final permit on June 12, 2018. This appeal ensued by notice of appeal filed July 12, 2018.

ANALYSIS

[24] The Court first wishes to address the issue of the standard of review.

[25] Appellants initially cite N.D.C.C. § 28-32-46 as providing the standard of review, asserting on the basis of Cudmore v. N.D. Department of Transportation, 2016 ND 64, ¶ 6, 877 N.W.2d 52 that an agency's factual findings are reviewed to determine "whether a reasoning mind reasonably could have determined the factual conclusions reached were proved by the weight of the evidence from the entire record."

[26] NDDOH and Meridian argue based upon Coon v. N.D. Department of Health, 2017 ND 215, ¶ 7, 901 N.W.2d 718, that this Court must affirm the decision of the NDDOH to issue the permit to construct

unless that decision was arbitrary, capricious or unreasonable, meaning it was 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. Furthermore, they argue that the decision of the NDDOH is entitled to deference.

[27] Appellants respond that NDDOH is not entitled to deference as concerns errors in interpreting or applying law.

[28] It appears that Coon is the seminal case on the issue of what is the standard of review in an appeal from the non-adjudicative decision of an administrative agency. It seems to the Court that the parties are arguing past each other on the issue of the standard of review without trying to reconcile those parts of Coon upon which they rely. On page 7 of that case, the Court addresses both standards. First, it holds that "we review the Department's permitting decision to determine whether the decision is arbitrary, capricious or unreasonable" which is "entitled to even greater deference than a decision after an adjudicative proceeding." Coon, 2017 ND 215, ¶7, 901 N.W.2d 718. Second, it holds that the Court "reviews ... an administrative agency's decision under the standards set out in N.D.C.C. § 28-32-46," which require findings of fact supported by a preponderance of the evidence and conclusions of law supported by its findings of fact. Id.

[29] From that, this Court concludes that its role is not simply one of deciding whether NDDOH's decision to issue the permit, in a complete sense, was arbitrary, capricious or unreasonable. The Court notes the North Dakota Supreme Court's reference in People to Save the Sheyenne River to the incompatibility of the general standard of review of agency's "findings" in an adjudicative proceedings to a non-adjudicative proceeding. 2005 ND 104, ¶ 24, 697 N.W.2d 319. Based upon that analysis, this Court concludes that the "arbitrary, capricious or unreasonable" standard of review applies only to the issue of whether NDDOH's findings of fact are supported by a preponderance of the evidence.

[30] The Court next wishes to address the issue of what is the "deference" to which the NDDOH's decision is entitled. Coon discusses two types of deference.

> This Court has said the Department's permitting decision is entitled to even greater deference than a decision after an adjudicative proceeding, and we review the Department's permitting decision to determine whether the decision is arbitrary, capricious or unreasonable.

2017 ND 215, ¶ 7, 901 N.W.2d 718.

[31] As stated above, this Court concludes that such has to do only with the NDDOH's findings of fact.

[32] It is the second type of deference which is more instructive to this case. As asserted by Appellants, Coon does hold that "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." Id. at ¶ 12. However, citing Voigt v. N.D. Public Service Commission, 2017 ND 76, ¶ 28, 892 N.W.2d 149, Coon also states at ¶ 12 that: "An 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." Id. at ¶ 12. In addition, Coon states:

> An 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. Voigt, 2017 ND 76, ¶ 28, 892 N.W.2d 149. The Department's calculation of the number of animal units is entitled to deference.

Id. at ¶ 31.

[33] From the first of the two excerpts immediately above, the Court concludes that while the NDDOH must adhere to the law, it is entitled to deference in its interpretation and application of its own regulations. From the second of those excerpts, the Court concludes that the NDDOH is entitled to deference in its determination of whether its decision to issue a permit to construct the refinery based upon its findings of fact and conclusions of law as set forth in its response to comments satisfy those regulations.

[34] The Court's task then is to review the record to determine whether the decision of the NDDOH to issue the permit to Meridian

to construct the refinery must be modified or reversed and remanded to the agency for further action because of the presence of one or more of the disqualifying conditions set forth in N.D.C.C. § 28-32-46. If not, and regardless of what this Court might have decided were it entitled to make independent findings of fact or substitute its judgment for that of the agency, this Court must affirm the decision of the NDDOH.

NDDOH's Alleged Reversal of Position.

[35] The Appellant's first argument is that the NDDOH failed to explain the rationale for what Appellants characterize as a reversal of a prior position. NDDOH effectively denies that it reversed it position and argues that its responses to comments on that subject adequately explained the rationale for its decision to grant the permit.

[36] The Court can appreciate that NDDOH's earlier expressions of concern or doubt that Meridian could meet the emissions limits for a synthetic minor source permit might serve as "grist for the mill" in the context of making written comments or presenting testimony or evidence at a public hearing following the issuance of the draft permit. However, Appellants fail to persuade the Court that NDDOH's decision to grant a synthetic minor source permit presents one or more of the disqualifying conditions set forth in N.D.C.C. § 28-32-46 simply because there has been an evolution of its

conclusion from one of concern and/or doubt to one of satisfaction that the permit application complies with controlling regulations. In that context, the Court agrees with NDDOH that the case cited by Appellants, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2123, 195 L. Ed. 2d 382 (2016), is inapposite or distinguishable. Rather, Appellants must demonstrate that the decision ultimately reached presents of one or more of the disqualifying conditions. See Audubon Soc'y of Greater Denver v. United States Army Corps of Engineers, 908 F.3d 593, 606 (10th Cir. 2018) (citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 659, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007)).

Appellant's Claim that NDDOH's Decision was not Supported by Findings or Substantial Evidence in the Record.

[37] Appellant's next argument is that NDDOH's decision was not supported by findings or substantial evidence in the record. If correct, such could constitute the presence of the disqualifying conditions of subparagraphs 5 and/or 6 of N.D.C.C. § 28-32-46.

[38] While the NDDOH decision to issue the permit appealed from does not provide formal findings of fact or conclusions of law, N.D.C.C. § 23-01-36 provides that "[t]he department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law." NDDOH did provide roughly 91 pages of its responses to public comments and the permit

issued did include numerous conditions. Therefore, the Court is required to review those comments and conditions against the requirement that findings of fact are supported by a preponderance of the evidence and that the conclusions of law and order of the agency are supported by its findings of fact. It would seem that, in conducting that review, the Court is also required to consider whether those comments and conditions made by NDDOH sufficiently address the evidence presented to the agency by the appellant as required by subparagraph 7 of N.D.C.C. § 28-32-46.

[39] As stated herein above, this Court has concluded that it must apply the arbitrary, capricious or unreasonable standard of review when reviewing NDDOH's finding of fact (as set forth in the comments and conditions). Likewise, the Court has concluded that NDDOH's expertise is entitled to deference when, as here, the subject matter is complex. See Coon, 2017 ND 215, ¶¶ 7, 31, 901 N.W.2d 718.

[40] The Court has reviewed all of the NDDOH responses to comments including those comments by the public, by Appellants and by Appellant's proffered experts; and the Court has reviewed all of the conditions incorporated into the permit issued. This Court recognizes that the subjects addressed in many of those comments and NDDOH's responses thereto are very complex and call for expertise which the Court does not possess. The Court is not

capable of articulating why certain parts of the record either support or detract from one side of the issue or other in this case; and will not attempt to do so.

[41] Nevertheless, it appears to the Court that the "permit conditions and written responses to public comments" provide a reasoned explanation of the basis for its conclusions that "the facility is expected to comply with the applicable federal and state air pollution rules," that the refinery would comply with all potentially applicable rules in N.D.A.C. Article 33-15, and that the refinery would comply with all state and federal ambient air quality standards based upon its modeled emissions. Giving deference to the NDDOH's expertise concerning the subject area, it also appears to the Court that the "permit conditions and written responses to public comments" made by NDDOH sufficiently address the evidence presented to the agency by the Appellants inasmuch as those conditions and/or comments provide what seems to the Court to be a reasoned explanation for its conclusions and/or for why the Appellant's evidence does not support a different conclusion.

[42] Neither is the Court persuaded that the permit conditions or NDDOH's comments are "conclusory." While the Court's lack of expertise prevents it from suggesting that NDDOH provides substantive bases for its conclusions in every instance, it is the Court's impression that it does so in more substantial part.

Notwithstanding Appellant's numerous suggestions to the contrary, a great number of the responses refer to such things as estimates that staff expended over 1,000 hours to verify that emission rates and limits can be achieved, reliance upon the Department's experience, independent verification that proposed emissions were achievable, use of test results from existing refineries, use of representative Bakken crude data from a nearby source and NDDOH independent TANK calculations, and use of EPA emissions estimate protocol to quantify emissions.

[43] Based upon the foregoing, the Court cannot conclude that NDDOH's findings of fact, as set forth in its permit conditions and/or responses to comments, "are 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." Therefore, the Court concludes that NDDOH's findings of fact, as set forth in its permit conditions and/or responses to comments, are not arbitrary, capricious or unreasonable.

The Appellant's Claim that the Decision of NDDOH was Based upon an Incorrect Interpretation of Law.

[44] Appellants argue that the decision of NDDOH was based upon an incorrect interpretation of law such that the decision was not entitled to any deference by this Court. Appellants spend a great

deal of time in their opening brief explaining when "new sources" such as the subject refinery, must satisfy the PSD requirements associated with a "major source." However, based upon the Court's review of both Appellant's opening and reply briefs, it appears that the focus of Appellant's argument in this respect is that NDDOH misunderstands the law which requires that the permit conditions for a synthetic "minor source" permit to construct must be practically and legally enforceable; and Appellant argues that the limits contained in the permit are not practically and legally enforceable.

[45] Appellants assert in its reply brief that the NDDOH's determination that Meridian was not required to obtain a new source review air quality permit as a "major stationary source" was a legal determination which is not entitled to deference. It is unclear to the Court what is Appellant's specific basis for that contention. It appears that it is similar to what the Court referred to above in ¶ 7, subpart 1, as a general argument that the project was not exempt from requirements for a major source permit. However, the Court is of the impression that such argument is merely an overarching statement addressing the process as a whole based upon what they perceive as the weight of the contested evidence. Appellants assert that the weight of the evidence supports a conclusion that Meridian should have been required to

apply for, and satisfy the requirements for, a major source permit.

[46] Appellants more specifically claim, especially in their reply brief, that NDDOH misunderstands the law which requires that the permit conditions for a synthetic "minor source" permit to construct must be practically and legally enforceable. In furtherance of that position, they assert that the conditions of the synthetic minor source permit which was issued are not practically and legally enforceable.

[47] One of Appellants' arguments in that respect is that it is legally insufficient to rely upon blanket restrictions on emissions as a means of enforcement, citing United States v. Louisiana-Pac. Corp., 682 F. Supp. 1122, 1133 (D. Coll. 1987). Another argument Appellants make is that to be practically enforceable, the permit must include a method to determine compliance including appropriate monitoring, record keeping, and reporting. Appellant argues that the permit fatally does not provide for monitoring of VOCs (volitile organic compounds) and HAPs (hazardous air pollutants).

[48] Conversely, NDDOH points out that it acknowledged in its response to public comments that the law requires that the permit conditions for a synthetic "minor source" permit to construct must be practically and legally enforceable.

[49] NDDOH further asserts that through its response to public comments, specifically to those of Dr. Fox, it explained how the

emissions limits in the conditions of the synthetic minor source permit which was issued are practically enforceable. NDDOH points out further that, in those responses to public comments, it debunks Dr. Fox's comments suggesting that the Department was relying solely upon vendor guarantees to legally enforce emissions limits. NDDOH notes that, in addition to review of the vendor guarantees, it independently reviewed the vendor information though review of such things as stack testing data for similar units.

[50] NDDOH also points out that in its responses to public comments, 19.d in particular, it addresses the enforceability of VOC emissions through the eLDAR program which includes reporting and record keeping. NDDOH contests the need for monitoring of VOCs to be practically enforceable because such is impractical due to the fact that such are typically fugitive. NDDOH also points out that it addressed Dr. Fox's assertions concerning VOCs in its responses to her comments on that subject, explaining that the TANKS model, an EPA approved method, was used to estimate VOC emissions and further explained that EPA protocols were used to quantify emissions, and that compliance with the eLDAR program would ensure emissions would remain low.

[51] The Court also notes that, in its response to Dr. Fox's January 26, 2018, letter addressing enforceability of VOC and HAP emissions limits, response to comments 20.d in particular, NDDOH

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

[52] In the context of Appellant's assertions that NDDOH is relying upon "blanket" restrictions on emissions, the Court's review of the NDDOH comments demonstrate that it is not relying on "blanket" restrictions as a means to demonstrate legal or practical

enforceability. Appellant asserts that practical enforcebility requires: 1) technically accurate limitations; 2) the time period for the limitation; and 3) the method to determine compliance, including appropriate monitoring, record keeping and reporting. Although, clearly, this Court has no expertise in the assessment thereof, it nevertheless appears to the Court from its review that NDDOH's comments address, and assert that its permit conditions provide compliance with, all of those issues.

[53] NDDOH asserts that its responses to comments demonstrate that the alleged erroneous "legal conclusions" were part of the permitting decision entitled to heightened deference. From that, the Court understands NDDOH to be saying both that it correctly interpreted its own regulations and that the permit and the conditions set forth therein satisfied those regulations.

[54] At oral argument, Appellant's counsel was asked whether they were contending that NDDOH was in error about what was law or whether NDDOH was in error in determining whether its permitting process satisfied the requirements of the law. Counsel answered that it was both.

[55] It appears that the controlling provisions of N.D.A.C. Chapter 33-15 dealing with air pollution were promulgated by the NDDOH pursuant to the authority grated by N.D.C.C. § 23-25-02. As such, for purposes of the Court's analysis, the Court will view

provisions as NDDOH's "own regulations" as used in Coon. As stated above, that recent case recent provides both at ¶ 12: "An 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," and at ¶ 31:

> An 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. Voigt, 2017 ND 76, ¶ 28, 892 N.W.2d 149. The Department's calculation of the number of animal units is entitled to deference.

Coon, 2017 ND 215, ¶¶ 12, 31, 901 N.W.2d 718.

[56] Based upon that law, as applied to the Court's review of the relevant portions of the record and the parties' respective briefs and oral argument, this Court is not persuaded that the decision of NDDOH to issue the synthetic minor source permit was based upon an incorrect interpretation of law. That view is based upon the following conclusions:

1. The Court's previously stated conclusion that the NDDOH is entitled to deference in its determination of whether its decision to issue a permit to construct the refinery based upon its findings of fact and conclusions of law as set forth in its response to comments satisfy those regulations.
2. That NDDOH has not abused its discretion to interpret and apply its own regulations concerning the complex subject

matter involved in this instance.

3. That NDDOH has not abused its discretion in determining that the permit and the conditions set forth therein satisfied those regulations concerning the complex subject matter involved in this instance.

4. From a review of NDDOH's responses to comments and its brief, that it appears that NDDOH has both acknowledged an appreciation of the requirements of the law and demonstrated that the permit and the conditions set forth therein satisfy applicable regulations.

[57] Therefore, for the reasons discussed above, it is the ORDER of this Court that the decision of NDDOH to issue a permit to construct is hereby AFFIRMED. NDDOH's counsel shall prepare a proposed order consistent with this Memorandum Opinion.

Dated: January 23, 2019.

BY THE COURT:

Dann Greenwood
District Judge