Continental
RESOURCES

June 12, 2019

VIA Certified Mail, Return Receipt Requested,
And Electronic Mail (DGlatt@ND.gov; Maiolson@nd.gov)

Mr. L. David Glatt, Director
Department of Environmental Quality
Gold Seal Center
918 E. Divide Avenue
Bismarck, ND 58501-1947

Ms. Margaret Olson
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

Re: CLR v. ND DEQ, Supreme Court No. 20190087 (Case No. 08-2018-CV-02160)
Enrolled House Bill 1024 - Anticipated Rulemaking by DEQ
Petition for Rulemaking (under N.D.C.C. §§ 23-01-04.1(3) and 28-32-16

Dear Director Glatt:

I write on behalf of Continental Resources, Inc. ("Continental") to address several related matters.

First and foremost, please know Continental continues to seek a strong, cooperative relationship with you and your Department. Although we have ongoing litigation between us, we believe our respective positions in that litigation arise from a simple disagreement over how to best achieve a common goal: clear, objective and enforceable environmental regulations that support the principles of cooperative federalism and state primacy. The recent enactment of House Bill 1024, the appropriations bill for the Department of Environmental Quality ("DEQ"), presents an opportunity for us to put aside our temporary disagreement and achieve this common goal. We would like to work with you to take advantage of this opportunity.

The opportunity starts with the need for rulemaking as a result of House Bill 1024. HB 1024 expressly contemplates DEQ will assume primacy over the Quad O and Quad Oa federal air pollution programs. We understand you have acknowledged DEQ's obligation to engage in a rulemaking to implement this statutory change. However, we also heard from several of our industry peers that you commented publicly your Department intends to defer its rulemaking while litigation with Continental remains pending. There is no legal reason the litigation pending between us should justify the deferral of this necessary rulemaking. To the contrary, DEQ must adopt and implement the statutory change within nine months of the effective date of the statutory change. *See* N.D.C.C. § 28-32-07. Accordingly, time is of the essence. Continental supports the anticipated rulemaking to adopt Quad O and Quad Oa to fulfill the legislature's directive and

encourages the Department to begin the rulemaking process to timely effectuate the statutory change. We also encourage the Department to use the rulemaking as an opportunity to reconsider and amend the language of § 33-15-07-02(1).

Respectfully, we believe the Department's 2016 re-interpretation of N.D. Admin. Code § 33-15-07-02(1) and its decision to use another "global consent decree" as a means of regulating emissions control efforts hurt the long-term interests of the State of North Dakota. That is why we filed our lawsuit. We also believe the State's interests are harmed by the Department's position in the pending litigation – that a state court cannot review a state agency's interpretation of a state regulation authorized by state statute because the federal Environmental Protection Agency is indispensable to such an action. The long-term interests of the State are served by maintaining primacy over environmental regulation, not ceding it to the federal government. On this point, the Governor, the Legislature, and even EPA clearly agree. EPA's General Counsel cautioned in a recent letter to Continental that "Requiring EPA to be joined in this action, and every action involving the legal interpretation of a state regulation, would not only be unnecessary, but would threaten to undermine the balance of power inherent in the cooperative federalism regime."

EPA's position is consistent with our understanding of the Governor's and Legislature's position that DEQ ought to accept and maintain primacy over environmental regulations. Arguing the EPA must be joined as an indispensable party for the judicial interpretation of a state environmental regulation stands in stark contrast to this directive. We are attaching the letter EPA General Counsel Matt Leopold. The letter describes in further detail EPA's principled disagreement with the position your Department has taken in seeking to claim EPA is an indispensable party and that our pending litigation is a challenge to North Dakota's SIP.

Further, Continental believes the Department's position will negatively impact its future ability to enforce § 33-15-07-02(1) and other SIP-approved regulations, because it would need to join EPA as an "indispensable party" in order to overcome any operator's defense based on the agency's misinterpretation of its regulations. Continental appealed the district court's decision because we strongly believe the state's environmental regulations should be clear, objective and enforceable. The Department's positions fail to achieve these criteria.

In 2016, the Department departed from its historical interpretation of § 33-15-07-02(1) and began to require that 100% of all organic compounds must be directed to, and reach, operating flares or combustors. This created an impossible leakless technology requirement. The Department confirmed in its briefing and during oral argument that it now interprets the rule to require zero fugitive emissions from compounds being transported to an operating flare or combustor. But compliance with a rule requiring zero leaks from fugitive emissions components before combustion through the flare is impossible to achieve with current technology – a fact already recognized by the Department.[1]

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[1] *See* North Dakota Department of Health Response to Public Comments Regarding Issuance of an Air Pollution Control Permit To Construct for the Meridian Energy Group, Inc. – Davis Refinery at pp. 37-38 ("We also

Not only does the Department's current rule, as interpreted, set an impossible standard to meet, it is also far more stringent than corresponding federal regulations addressing emissions control. Federal counterparts focus on the operation of a routine maintenance, leak detection, and repair program, with objective repair timelines. The mere existence of a fugitive emission does not automatically mean that emissions control equipment is not functioning properly and does not constitute a violation unless the operator is not complying with maintenance, leak detection and repair rules, or the leak is so significant as to violate NAAQS. As such, the Department's zero-emission rule (as now interpreted) violates N.D.C.C. § 23.1-01-04, which prohibits the Department from adopting any rule that is more stringent than corresponding federal regulations promulgated under the Federal Clean Air Act. But with global consent decrees expiring and the rulemaking necessitated by HB 1024, the time is ripe for the Department to seize an opportunity.

By engaging in a rulemaking to amend § 33-15-07-02(1), the Department has an opportunity to realign the rule with Quad O and Quad Oa (and the remainder of the state's regulatory framework), and re-establish clear, transparent, and enforceable restrictions on organic compounds emissions. For these reasons, ***we are petitioning your Department***, pursuant to N.D.C.C. § 23-01-04.1(3) and § 28-32-16, to reconsider and amend § 33-15-07-02(1). In conjunction with the necessary rulemaking to assume primacy over Quad O and Quad Oa, we propose the following reasonable re-formulation of the rule:

> No person may cause or permit the emission of organic compounds gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are "fugitive emissions" as defined in section 1(14), and emissions control equipment ~~burned by flares, or an equally effective control device as~~ approved by the department is installed and operated in accordance with sections [the Department's implementing regulations for Quad O and Quad Oa]. Provided the requirements of these sections are met, then fugitive emissions from such equipment shall be exclusively regulated under section 17 ("Restriction of Fugitive Emissions"). Minor sources, as determined by the department and not subject to New Source Performance Standards (NSPS), may be granted exemptions to this subsection.

This amendment would re-establish clear, transparent, and enforceable restrictions on organic compounds emissions. This amendment would also significantly reduce the basis of the dispute between DEQ and Continental, and help lead us to an effective and mutually agreeable resolution of the pending litigation.

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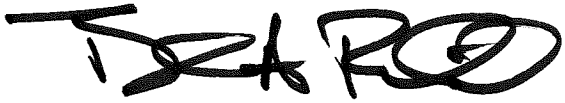
considered an equipment standard requiring installation of 'leakless' equipment. 'Leakless' equipment…is less likely to leak than standard equipment, but leaks may still develop….We could not identify any new 'leakless' technologies that could be applied in all applications. Therefore, requiring "leakless" equipment is not technically feasible, and this option was not considered to be [suitable].").

We note it was the Department that first suggested Continental petition for a rulemaking. In the Department's Motion to Dismiss, it argued Continental "could petition the Department for reconsideration or amendment of N.D. Admin. Code § 33-15-07-02(1). . . ." *See Brief in Support of Motion to Dismiss* at p. 18. Having suggested this would provide an adequate remedy for Continental's grievance arising from the Department's zero-emissions interpretation of the regulation, we believe it incumbent on the Department to now give good faith consideration to the request and commit to a rulemaking that brings the regulation back in line with North Dakota's regulatory framework and corresponding federal regulations.

Finally, we have confirmed with EPA that a minor rule change such as the one we have proposed will not require an official revision to the SIP through the Federal Register, just as adoption of the NSPS rules under Quad O and Quad Oa also do not require changes in the SIP.

To comply with the nine-month time frame in both N.D.C.C. § 28-32-07 and §23.1-01-04.1(3), we encourage the Department to move quickly toward a rulemaking. If there is any reason the Department is not able to commence and complete its rulemaking obligations in a timely manner, please let us know how we might be able to assist. We are committed to supporting your efforts in any way we can.

Respectfully,



Brooks A. Richardson
Vice President and Deputy General Counsel
Continental Resources, Inc.

Attachment

cc: Eric S. Eissenstat, SVP and General Counsel
Blu Hulsey, SVP – Government Affairs
Brad Aman, VP – Production and Completions
Chris Nichols, VP – Northern Region Production

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

June 4, 2019

JUN 0 4 2019

Jason B. Hutt
Bracewell
2001 M Street NW, Suite 900
Washington, DC 20036-3310

Re: *Continental Resources, Inc. v. North Dakota Department of Environmental Quality*, Docket No.20190087 (appeal from Case No. 2018-CV-02160)

Dear Mr. Hutt:

This responds to your inquiry regarding the issues raised in the above-referenced appeal that is currently pending before the Supreme Court of North Dakota. We have reviewed the key pleadings in this case, including the South Central Judicial District Court's order dismissing Continental Resources, Inc.'s ("CLR") declaratory judgment action. Generally, it appears that the district court's reasons for dismissing CLR's declaratory judgment action may stem from a misunderstanding of the cooperative partnership that exists between the EPA and the States relative to the CAA.

Background

The CAA creates a partnership between the federal government and the states to combat air pollution.[1] This partnership is a uniquely important system of cooperative federalism in the quest for clean air.[2] EPA embraces and is strongly committed to restoring power to the states through cooperative federalism.[3]

Under the CAA, EPA must prescribe national ambient air quality standards ("NAAQS") for certain air pollutants, and each state is responsible for implementing those standards within its borders.[4] As designed by Congress, states play a central role in the CAA regulatory structure.[5]

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[1] *Natural Res. Def. Council, Inc. v. U.S. Dep't of Transp.*, 770 F. 3d 1260, 1264 (9th Cir. 2014). The purpose of the CAA is to create a cooperative partnership between the states and the federal government to enforce air quality standards on a nationwide and local basis. *Kentucky Resources Council, Inc. v. EPA*, 304 F. Supp. 2d 920 (S.D. Ohio 2004).

[2] *Montana Environmental Information Center v. Thomas*, 902 F.3d 971, 974 (9th Cir. 2018).

[3] *See* Working Together: FY 2018-2022 U.S. EPA Strategic Plan February 2018, at https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf.

[4] *See* 42 U.S.C. §§ 7409-10.

[5] *Texas v. EPA*, 690 F.3d 670, 674 (5th Cir. 2012).

Specifically, each state must adopt, and submit for EPA's approval, a state implementation plan ("SIP") that provides for the implementation, maintenance, and enforcement of the NAAQS.[6] The federal government through EPA determines the ends – the standards of air quality – but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through SIPs and timetables for compliance.[7] In other words, the CAA and EPA supply the goals and basic requirements of SIPs, but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.[8] It is to the states that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.[9] Once approved by EPA, the state retains the primary responsibility to administer and enforce a SIP.[10]

EPA's Role in the Federal-State Partnership

In the inquiry you made, you noted that the state district court dismissed CLR's underlying Complaint in part because it concluded that EPA was a "required party" under Rule 19 such that the joinder of EPA was necessary to accord complete relief among the parties. Because EPA had not been (and could not be) joined, the district court ruled that the North Dakota Department of Health ("the Department") was entitled to dismissal of the Complaint. The conclusion that EPA was a required party appears to have been based on the assumption that "EPA oversees the execution of N.D. Admin. Code §33-15-07-02(1)"; EPA had an interest that would be affected by the declaration; and the declaration may prejudice the rights of EPA.[11]

N.D. Admin. Code §33-15-07-02(1) is contained in North Dakota's SIP.[12] EPA, along with the State and citizens via citizen suits, has the authority to enforce the SIP. However, to suggest that somehow this matter cannot proceed with joining EPA as a party reflects a misunderstanding of EPA's role relative to the state under the CAA. North Dakota's SIP is administered and enforced by the Department consistent with the Congressional design of cooperative federalism. Requiring EPA to be joined in this action, and every action involving the legal interpretation of a state regulation, would not only be unnecessary, but would threaten to undermine the balance of power inherent in the cooperative federalism regime. Through cooperative federalism, SIPs are enforced by the states and EPA retains its authority to independently enforce federally-approved SIPs.[13]

You noted in your inquiry that the state court also concluded that the Department was entitled to dismissal of the underlying Complaint because the state court did not have subject matter jurisdiction of the matter. Specifically, the state court indicated that under Section 307(b)(1) of the CAA, invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision under Section 7606(b)(1). The district court also stated that because SIP approval is final EPA action, claims that have the practical effect of

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[6] *Id.*
[7] *Id.* at 675, *quoting Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).
[8] *Id.* at 674.
[9] *Montana*, 902 F.3d at 974.
[10] *California Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 503 (9th Cir. 2015).
[11] *See* Order Granting Defendant's Motion to Dismiss, Case No. 2018-CV-02160, Index #55, ¶11-12 (Jan. 08, 2019).
[12] The district court indicated that North Dakota has had an EPA-approved SIP since 1972.
[13] *See* 42 U.S.C. §7413.

challenging EPA's approval of a state's SIP are subject to the jurisdictional limit within Section 307(b)(1). In reaching this conclusion, the district court relied on *California Dump Truck Owners Ass'n v. Nichols,* 784 F.3d 500 (9th Cir. 2015), a case where the Ninth Circuit Court of Appeals concluded that Section 307(b)(1) was applicable to a preemption suit, the practical objective of which was to nullify California's SIP and challenge the EPA's legal determination regarding the validity of the SIP.[14] *California Dump Truck,* and the cases relied on by the Ninth Circuit in that decision, are inapposite because these cases involved challenges that would invalidate EPA action.[15] At this time, we have seen nothing to suggest that CLR is seeking to invalidate EPA's approval of the regulation.

In sum, there are multiple tools that EPA can use in appropriate instances to rectify problems with state implementation of its SIP, including issuance of a SIP call (a mechanism by which EPA can identify a legal deficiency in a state's SIP and call on the state to make a new submission to redress that deficiency), making a finding of failure on the state's part to implement its SIP, and taking measures to address specific permits pursuant to EPA's case-by-case permitting oversight.[16] Thus, it is unnecessary and potentially harmful to the established statutory scheme for EPA to be involved in every state court proceeding involving an interpretation of a state regulation. We do not believe that was Congress's intended result in establishing cooperative federalism.

Thank you again for bringing this matter to my attention. If you have further questions, please contact Justin Schwab, Deputy General Counsel, at 202-564-3135.

Sincerely,

Matthew Z. Leopold
General Counsel

[14] *California Dump Truck*, 784 F.3d at 510.

[15] In *California Dump Truck,* the California Dump Truck Owners Association ("Truck Association") sought to invalidate a state regulation which had been approved by EPA as part of California's SIP, arguing that the regulation violated the Supremacy Clause because it was preempted by federal law. The Court noted that the Truck Association had effectively challenged the validity of EPA's determination that federal law did not prohibit the regulation. The Court found that as the practical objective of the Truck Association's preemption suit was to nullify the SIP and challenge the EPA's legal determination regarding its validity, it was the type of action to which Section 307(b)(1) applied.

[16] *Montana Environmental Information Center v. Thomas*, 902 F.3d at 979.