UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWEST DIVISION

DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant.	)	CIVIL ACTION NO. 1:12-CV-064

DEFENDANT NORTH DAKOTA'S MOTION FOR SUMMARY JUDGMENT

Defendant North Dakota Public Service Commission ("**NDPSC**"), by and through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 56 and D.N.D. Civ. L.R. 7.1, submits its Memorandum of Law in Support of Its Motion for Summary Judgment and In Opposition to Plaintiff's Motion for Summary Judgment. The grounds for this Motion are set forth in the accompanying Memorandum of Law.

Dated: December 21, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, the foregoing Defendant North Dakota Public Service Motion for Summary Judgment was served electronically to all counsel of record through the Court's ECF System.

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DEFENDANT NORTH DAKOTA PUBLIC SERVICE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq.* ("**SMCRA**"), authorizes States to obtain "primacy" over the regulation of coal exploration and surface coal mining operations. States may be granted "primacy" by the United States Secretary of the Interior ("**Secretary**") once a State has undergone an extensive application and review process. Specifically, SMCRA requires States to submit all of their "laws and regulations directly affecting the regulation of coal exploration and surface coal mining and reclamation operations" to the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("**OSM**") for review and approval. 30 C.F.R. § 731.14(b).

On February 29, 1980, North Dakota submitted to the Secretary its formal application and request that it be granted primacy to enforce SMCRA on North Dakota's non-federal and non-tribal lands. On December 15, 1980[1], the Secretary approved North Dakota's request. ("**ND Program**"). *See* 45 Fed. Reg. 82,214 (Dec. 15, 1980); *see also* 30 C.F.R. § 934.10. Since its Program was approved, the Secretary has reviewed and approved, either wholly or in-part, all NDPSC proposed amendments to the ND Program. *See* 30 C.F.R. §§ 934.12-934.15. Since being granted primacy to enforce SMCRA in North Dakota, the ND Program has been reviewed annually by OSM. At no time in the last thirty-one years has OSM ever threatened to remove the NDPSC's authority to implement the ND Program. *See* Attachment A, Affidavit of James R. Deutsch in Support of Defendant North Dakota Public Service Commission's Motion for Summary Judgment ("**Affidavit**"), ¶5.

[1] Plaintiff incorrectly states that, "**Since 1979**, NDPSC has engaged in a pattern and practice of amending its federally approved state surface mining program by Means of Memoranda..." Motion at p. 7. (emphasis added). Plaintiff's erroneous assertions with respect to the NDPSC's alleged amendments to the North Dakota Program are addressed below. Of note here is that Plaintiff's assertion that 'amendments' to the North Dakota Program have been underway since 1979 could not be possible since there was no OSM approved North Dakota Program in 1979.

Since 1977, the NDPSC has issued guidance documents that provide guidance on how to comply with the laws and legislative rules that make-up the ND Program. Specifically, the NDPSC has issued twenty-three guidance documents[2], two of which were subsequently withdrawn leaving in effect twenty-one policy memoranda. (collectively "**Policy Memoranda**"). At no time have any of the Policy Memoranda ever been used as or considered by the NDPSC as legislative rules or law. *See* Affidavit at ¶ 13.

Plaintiff's Complaint and Brief in Support of its Motion for Summary Judgment ("**Motion**") allege that the Policy Memoranda are amendments to the ND Program that have not been submitted to or approved by the Director of OSM. *See* Complaint at ¶ 17, and Motion at pp. 7-8. Plaintiff asks the Court to find that NDPSC has and continues to violate SMCRA and to compel NDPSC to refrain from giving further effect to the Policy Memoranda. *See* Complaint at p. 7.

Plaintiff's Motion relies only on bald assertions (and no material supporting facts) to claim that the Policy Memoranda are amendments to the ND Program requiring OSM's review and approval. *See* Motion at p. 5. Plaintiff's claims are based upon a fundamental misunderstanding of SMCRA and the ND Program, and the Policy Memoranda themselves. The Policy Memoranda are simply guidance documents issued to assist mine operators. As guidance documents, the Policy Memoranda do not change or result in an alteration of the statutory and regulatory content of the OSM approved ND Program, and therefore are not required to be submitted to OSM for review and approval. *See* 30 C.F.R. § 732.17(a). Plaintiff fails to demonstrate any genuine, material fact that would demonstrate the Policy Memoranda are or have been used as anything other than guidance. Plaintiff's request that this Court compel

[2] *See* Affidavit at Exhibits 1 -18, 22-25 for copies of all existing twenty-one Policy Memoranda.

NDPSC to refrain from giving effect to the Policy Memoranda until NDPSC submits the Policy Memoranda for review by the OSM is devoid of merit and must be denied.

Further, Plaintiff's Motion must also be denied as Plaintiff fails to demonstrate that it or its members have Article III standing to bring its case. Plaintiff has neither identified the requisite actual or threatened harm to any of its identified members in relation to the Policy Memoranda. Nor are Plaintiff's claims ripe for review. Plaintiff's allegations rest only on mere supposition that the Policy Memoranda may be used in the future as something other than guidance. Accordingly, Plaintiff's Motion for Summary Judgment must be denied and NDPSC's Motion granted.

STATUTORY AND REGULATORY BACKGROUND

I. SMCRA

Congress enacted SMCRA to provide for comprehensive regulation of surface coal mining and the attendant reclamation of mined lands on all non-federal and non-tribal lands. *See* 30 U.S.C. §§ 1202, 1300. Specifically, SMCRA created "a program of cooperative federalism that allows States, within limits established by federal minimum standards, to enact and administer their own regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-69, (1981). In 1979, the OSM promulgated regulations to "establish the procedures through which the Secretary of the Interior will implement the Surface Mining Control and Reclamation Act of 1977." ("**SMCRA Regulations**"). 30 C.F.R. § 700.1. The SMCRA regulatory regime is based on State primacy, reflecting Congress's recognition that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations...**should rest with the States.**" 30 U.S.C. § 1201(f). (emphasis added).

Through SMCRA's cooperative federalism approach, a "State regulatory authority," under 30 U.S.C. § 1291(26), assumes the exclusive enforcement authority under SMCRA, or "primacy," over the surface coal mining operations on its non-federal and non-tribal lands by submitting a permanent regulatory program for review and approval by the Secretary. *See generally* 30 U.S.C. § 1253; *see also Hodel,* 452 U.S. at 271. The program-approval process requires an extensive review by OSM and the solicitation and consideration of comments on the proposed program from other agencies and the public. *See* 30 U.S.C.§ 1201(a)-(c). SMCRA requires any State program to meet two principal criteria: (1) the minimum SMCRA federal standards must be implemented as State law; and (2) the State has the capability to enforce the law. *See* 30 U.S.C. § 1253.

Once a State achieves "primacy" under SMCRA, a State regulatory authority "exercises front-line supervision, and the Secretary [of the Interior] will not intervene unless its discretion is abused." *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981) (*en banc*). The State, not OSM, has the primary responsibility for all aspects of enforcing the regulatory program. SMCRA "does not provide for concurrent jurisdiction in the States and federal government" once a State's program is approved by the Secretary. *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987); *see also Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288-89 (4th Cir. 2000); *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1469 (8th Cir. 1995).[3] When a State has primacy, OSM's role is limited to monitoring, which involves occasional on-site inspections "to evaluate the administration of approved State programs." 30

[3] In developing SMCRA, "Congress did not pursue, although it could have, the direct regulation of surface coal mining as its preferred course . . . . Nor did Congress invite the States to enforce federal law directly. By giving States exclusive regulatory control through enforcement of their own approved laws, Congress intended that federal law establishing minimum national standards would "drop out" as operative law and that the State laws would become the sole operative law."
Bragg, 248 F.3d at 295.

U.S.C. § 1267(a). Based on those inspections, OSM may alert the State to possible violations of SMCRA, which triggers a regulatory enforcement review process. *See id.* § at 1271(a)(1); 30 C.F.R. § 842.11(b)(1).

Recognizing that a State's program may need to adapt as certain changes at either the federal or State levels occur, the SMCRA Regulations require an amendment to a State's program when "changes to laws or regulations that make up the approved State program" occur. 30 C.F.R. § 732.17(g). The SMCRA Regulations also identify specific "significant changes" to a State's program that require submission to OSM for review and the possible amendment of a State's program. *See* 30 C.F.R. § 732.17(b). These "significant changes" do not include guidance documents a State agency issues in furtherance of the implementation of its existing OSM approved State program, rather they include:

(1) Changes to the "provisions, scope or objectives" of the State program;

(2) Changes in the State's regulatory authority "to implement, administer or enforce" the program;

(4) Significant changes to the "staffing and resources" of the State regulatory authority;

(5) A change in an agreement between the State regulatory authority and another State agency authorized to implement portions of the State program;

(6) "Significant changes in funding" of the State program; and

(7) "Significant changes" in the amount of coal exploration and/or mining and reclamation activities in the State.

See id.

II. NORTH DAKOTA'S EXTENSIVE REGULATION OF SURFACE COAL MINING AND RECLAMATION ACTIVITIES

North Dakota began regulating surface coal mining and reclamation in 1970, well before the enactment of SMCRA in 1977. Beginning in 1977, the NDPSC issued Policy Memorandum as guidance to operators who were conducting surface mining operations in the State.[4] As guidance, the Policy Memoranda are not rules and are therefore not subject to the rulemaking requirements set forth in North Dakota's Administrative Agencies Practice Act ("**AAPA**"), N.D. Cent. Code ch. 28-32. Nor has NDPSC utilized or relied upon the Policy Memoranda in a manner that gives the Policy Memoranda the force and effect of law or regulation. Affidavit, ¶¶13-17.

In 1979, the North Dakota legislature repealed its former reclamation statute and enacted new coal mining and reclamation statutes to incorporate SMCRA's minimum federal standards into State law, which pursuant to 30 U.S.C. § 1253(a)(1), is the requisite first step to obtaining exclusive enforcement responsibility under SMCRA. *See generally* N.D. Cent. Code ch. 38-14.1-01. On February 29, 1980, North Dakota submitted its plan for implementing SMCRA to the Secretary for approval. On December 15, 1980, the ND Program was approved by the Secretary. *See* 45 Fed. Reg. 82,214; *see also* 30 C.F.R. § 934.10. NDPSC's regulation of surface coal mining activities is a comprehensive program, requiring those engaged in surface coal mining operations to comply with extensive permitting requirements and environmental protection performance standards. *See generally* 30 U.S.C. §§ 1256-1266; N.D. Cent. Code ch. 38-14.1-01; and N.D. Admin. Code art. 69-05.2

Since the Secretary's approval of the ND Program in 1980, the NDPSC has continuously maintained exclusive authority over surface coal mining and reclamation on its non-federal and

[4] Plaintiff incorrectly states that NDPSC issued, "its first surface mining memoranda in **1979**." Motion at p. 8. (emphasis added). The first Policy Memoranda was issued on September 6, 1977. *See* Affidavit ¶7.

non-tribal lands. *See* N.D. Cent. Code § 38-14.1-02(4); 30 C.F.R. pt. 934. In implementing the ND Program, the Reclamation Division evaluates surface mining permit applications, permit revision and renewal applications, makes recommendations to the NDPSC Commissioners regarding permit issuance, bond releases, and carries out inspections of coal mines to ensure compliance with SMCRA and the ND Program. *See* Affidavit ¶3. Since obtaining approval of its ND Program, NDPSC has submitted all changes in North Dakota's laws or regulations or changes that would affect the implementation, administration or enforcement of the ND Program to OSM for its review as program amendments. *See* Affidavit ¶6. The Secretary has reviewed and approved, either wholly or in-part, these amendments and OSM's final action on each amendment is detailed in 30 C.F.R. §§ 934.12-934.15.

OSM has never threatened to remove the NDPSC's authority to implement the ND Program. *See* Affidavit ¶5. OSM has also recently recognized NDPSC's continued successful implementation of the ND Program. Specifically, OSM's 2012 annual report states that NDPSC "continues to administer an efficient and successful coal regulatory program," and has "no major issues that need corrective action." Attachment B, Office of Surface Mining Reclamation and Enforcement, Annual Evaluation Report for the Regulatory Program Administered by the Public Service Commission of North Dakota for Evaluation Year 2012, pp. 3, 14 (Sept. 2012).

PROCEDURAL BACKGROUND

On March 26, 2012, Plaintiffs notified the Secretary and NDPSC of their intent to file a federal civil lawsuit pursuant to SMCRA's citizen suit provision, 30 U.S.C. § 1270(a)(2). Plaintiff filed its Complaint on May 30, 2012, alleging that NDPSC's Policy Memoranda are amendments to North Dakota's OSM approved surface mining and reclamation program, which have not been submitted to or approved by the Director of OSM. Plaintiff asks the Court to find

that 1) NDPSC has and continues to violate SMCRA and the SMCRA program regulations; 2) compel NDPSC to refrain from giving further effect to the Policy Memoranda; 3) award Plaintiff its cost and expenses; and 4) to grant all other relief as necessary. *See* Complaint p. 7. Plaintiff failed to attach any of the challenged Policy Memoranda to its Complaint. Plaintiff filed its Motion on November 12, 2012. Plaintiff attaches only five of the twenty-one Policy Memoranda to its Motion. NDPSC is providing true and correct copies of all of the Policy Memoranda identified in the Complaint and Motion for the Court's review and consideration. In response to Plaintiff's Motion and pursuant to the Court's Order entered December 5, 2012, NDPSC files its Memorandum of Law in Support of Its Motion for Summary Judgment and In Opposition to Plaintiff's Motion.

RECITATION OF UNCONTESTED MATERIAL FACTS

1. On March 8, 1995, NDPSC issued a revised Policy Memorandum No. 2, which provides guidance to mine operators regarding mine personnel accompanying NDPSC representatives during inspections. NDPSC originally issued Policy Memorandum No. 2 on April 27, 1978, and NDPSC reissued the Memorandum on August 10, 1984. A true and correct copy is attached as Exhibit 1 to the Affidavit.

2. NDPSC issued a revised Policy Memorandum No. 3 on March 8, 1995, to provide guidance to mine operators regarding covering toxic or combustible materials. On April 27, 1978, NDPSC originally issued Policy Memorandum No. 3 and NDPSC issued revised versions of the Memorandum on August 10, 1984, August 7, 1986, and February 25, 1988. A true and correct copy is attached as Exhibit 2 to the Affidavit.

3. A revised Policy Memorandum No. 4 was issued on March 8, 1995, by NDPSC, which provides guidance regarding payment of charges for analytical samples taken by NDPSC

representatives. The Memorandum was originally issued on October 13, 1978, and NDPSC issued a revised version on August 10, 1984. A true and correct copy is attached as Exhibit 3 to the Affidavit.

4. NDPSC issued a revised Policy Memorandum No. 5 on March 8, 1995, which provides guidance to mine operators regarding removal of suitable plant growth material. Policy Memorandum No. 5 was originally issued on March 7, 1979, and revised on August 10, 1984. A true and correct copy is attached as Exhibit 4 to the Affidavit.

5. On March 8, 1995, NDPSC issued a revised Policy Memorandum No. 6 to provide guidance to mine operators regarding activities covered by surface coal mining permits. NDPSC originally issued the Memorandum on May 4, 1979, and issued a revised version on August 10, 1984. A true and correct copy is attached as Exhibit 5 to the Affidavit.

6. NDPSC issued a revised Policy Memorandum No. 7 to mine operators on March 8, 1995, which provides guidance regarding coordinating communications between the North Dakota agencies involved in regulating surface coal mining operations. Policy Memorandum No. 7 was originally issued by NDPSC on August 2, 1979, and a revised version was issued on August 10, 1984. A true and correct copy is attached as Exhibit 6 to the Affidavit.

7. On March 8, 1995, NDPSC issued a revised Policy Memorandum No. 8, which provides guidance to mine operators regarding applicability of the statutory ten-year revegetation liability period. NDPSC originally issued Policy Memorandum No. 8 on October 15, 1980 and reissued the Memorandum on August 10, 1984. A true and correct copy is attached as Exhibit 7 to the Affidavit.

8. On July 12, 2006, NDPSC issued an updated Policy Memorandum No. 9 which provides guidance to mine operators regarding bond release notice requirements. NDPSC

originally issued Policy Memorandum No. 9 on November 10, 1982, and reissued the Memorandum on August 10, 1984, March 8, 1995, and December 19, 2001. A true and correct copy is attached as Exhibit 8 to the Affidavit.

9. On February 17, 1994, NDPSC issued a revised Policy Memorandum No. 10, which provides guidance to mine operators regarding standards and methods for proving reclamation success on cropland areas, management practices on reclaimed cropland, and breaking pre-cropland grass-legume stands prior to final bond release. NDPSC originally issued the Policy Memorandum on April 29, 1983 and it was reissued on August 10, 1984, and September 24, 1991. A true and correct copy is attached as Exhibit 9 to the Affidavit.

10. A revised Policy Memorandum No. 11 was issued by NDPSC on March 8, 1995, which provides guidance to mine operators regarding sedimentation pond design, construction, operation and maintenance. NDPSC originally issued Policy Memorandum No. 11 on July 25, 1983, and issued a revised version on August 10, 1984. A true and correct copy is attached as Exhibit 10 to the Affidavit.

11. On July 12, 2006, NDPSC issued an updated Policy Memorandum No. 12, which provides guidance to mine operators regarding a professional engineer's impoundment certifications and inspection reports. NDPSC originally issued Policy Memorandum No. 12 on February 12, 1985 and issued updated versions on March 8, 1995, and December 19, 2001. A true and correct copy is attached as Exhibit 11 to the Affidavit.

12. NDPSC issued a revised Policy Memorandum No. 14 on March 8, 1995, which provides guidance to mine operators regarding clarification of the annual map requirements that are contained in North Dakota's administrative code. Policy Memorandum No. 14 was originally

issued by NDPSC on June 21, 1985. A true and correct copy is attached as Exhibit 12 to the Affidavit.

13. On January 13, 1999, NDPSC issued a revised Policy Memorandum No. 15, which provides guidance to mine operators regarding performance bond release for waste disposal operations located on mined lands. NDPSC originally issued Policy Memorandum No. 15 on November 5, 1985. A true and correct copy is attached as Exhibit 13 to the Affidavit.

14. NDPSC issued an updated Policy Memorandum No. 16 in July of 2009, which provides guidance to mine operators regarding estimating reclamation costs. Policy Memorandum No. 16 was originally issued on December 31, 1985 and updated in June of 1986, April of 1990, March of 1995, October 28, 1998 and July 18, 2006. A true and correct copy is attached as Exhibit 14 to the Affidavit.

15. On September 4, 2012, NDPSC issued the annual update of the variable costs in Policy Memorandum No. 16 which provides guidance to mine operators regarding the 2012 update for the variable costs contained in the Policy Memorandum. A true and correct copy is attached as Exhibit 15 to the Affidavit.

16. On March 8, 1995, NDPSC issued a revised Policy Memorandum No. 17, which provides guidance to mine operators regarding suitable plant growth material removal and redistribution. Policy Memorandum No. 17 was originally issued on January 20, 1987. A true and correct copy is attached as Exhibit 16 to the Affidavit.

17. Policy Memorandum No. 18 was issued by NDPSC on February 3, 1987, which provides guidance to mine operators concerning performance bonds covering more than one permit area. A true and correct copy is attached as Exhibit 17 to the Affidavit.

18. On July 12, 2006, NDPSC issued a revised Policy Memorandum No. 19, which provides guidance to mine operators for sedimentation pond removal and pond site reclamation. Policy Memorandum No. 19 was originally issued on July 15, 1987, and revised versions were issued on May 18, 1988, March 8, 1995, and July 30, 1997. A true and correct copy is attached as Exhibit 18 to the Affidavit.

19. On November 8, 1988, NDPSC submitted proposed regulatory language regarding the 10-year revegetation bond liability period for areas disturbed by sedimentation ponds and associated activities to OSM for review as a ND Program amendment. A true and correct copy of the transmittal is attached as Exhibit 19 to the Affidavit.

20. On July 31, 1989, NDPSC withdrew the proposed amendment regarding the revegetation bond liability period language from OSM because NDPSC had sufficient discretion to implement the proposed actions under existing legal authority. A true and correct copy of the withdrawal letter is attached as Exhibit 20 to the Affidavit.

21. Also on July 31, 1989, OSM, in response to NDPSC's withdrawal of the proposed bond release amendment, concurred with the NDPSC that the "amendment was unnecessary since [NDPSC has] adequate discretion within" the existing ND Program to act in accordance with the planned amendment. A true and correct copy of the OSM letter is attached as Exhibit 21 to the Affidavit.

22. On September 6, 1989, after receiving OSM's determination that amending the ND Program to include the previously approved bond release language "was unnecessary," NDPSC originally issued Policy Memorandum No. 20, which provides guidance to mine operators concerning the revegetation responsibility period for areas disturbed by sedimentation ponds and associated activities. Revised versions of Policy Memorandum No. 20 were issued by

NDPSC on July 21, 1992, July 30, 1997, June 9, 2004, and January 29, 2009. A true and correct copy is attached as Exhibit 22 to the Affidavit.

23. NDPSC issued Policy Memorandum No. 21 on August 1, 1995, which provides guidance to mine operators concerning mine waste disposal under applicable regulations. A true and correct copy is attached as Exhibit 23 to the Affidavit.

24. On June 9, 2004, Policy Memorandum No. 22 was issued by NDPSC providing guidance to mine operators regarding future permitting for bond-released tracts of land. A true and correct copy is attached as Exhibit 24 to the Affidavit.

25. On July 12, 2006, NDPSC issued Policy Memorandum No. 23, which provides guidance to mine operators regarding mine-related roads subject to design and performance standards and road certification requirements. A true and correct copy is attached as Exhibit 25 to the Affidavit.

26. NDPSC and its staff have not, and do not, apply the text of the Policy Memoranda as mandatory or otherwise binding upon NDPSC's decision-making regarding permitting or enforcement of mine operators under the ND Program. *See* Affidavit ¶15.

27. NDPSC and its staff consider the Policy Memoranda as guidance, issued the Policy Memoranda as guidance and continue to utilize the Policy Memoranda only as guidance. *See* Affidavit ¶16.

28. NDPSC and its staff have not, and do not, independently utilize the Policy Memoranda when issuing individual surface mining and reclamation permits pursuant to the ND Program or in enforcing the ND Program laws and regulations relating to SMCRA. Affidavit¶17.

29. None of the Policy Memoranda have been promulgated as rules or codified by North Dakota's legislature. *See* Affidavit ¶11. None of the Policy Memoranda have undergone

the public notice procedures required for a formal rulemaking as would be required by North Dakota's AAPA were the Policy Memoranda regulations. Affidavit ¶9.

30. The Policy Memoranda have not been published in North Dakota's Administrative Code, the Federal Register, or the Code of Federal Regulations. Affidavit ¶12.

STANDARD OF REVIEW

Summary judgment is proper where there are no disputed issues of genuine material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Once the moving party has filed a properly-supported motion for summary judgment, the plaintiff cannot merely rest upon the allegations or arguments in the complaint and must come forward with evidence that sets forth the specific facts showing that there is a genuine issue for trial. *FDIC v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997). Indeed, conclusory statements are wholly insufficient as the non-moving party must come forward with more than a scintilla of evidence to avoid entry of summary judgment. *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). A plaintiff also has the burden to properly invoke the limited subject matter jurisdiction of a federal court, which includes essential elements of standing under Article III of the federal Constitution. *Lujan v. Defenders of Wildlife et al.*, 504 U.S. 555, 561 (1992). Standing is "an indispensable part of the plaintiff's case, [and] each element must be supported." *Id.*

Plaintiff's Motion incorrectly asserts that this Court's review of the Policy Memoranda as alleged "final agency decisions" is further governed by the federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("**APA**"). Motion at 6. Any review of an NDPSC administrative action is appropriate under only the AAPA, (N.D. Cent. Code ch. 28-32), and not the federal APA because NDPSC is not a federal agency. *See Del. County Safe Drinking Water Coalition, Inc. v. Hanger*, 304 Fed. Appx. 961, 963 (3d Cir. Pa. 2008) (unpublished opinion).

ARGUMENT

Plaintiff's Motion must be denied, and NDPSC's Motion granted because, as a matter of law, SMCRA neither prohibits the issuance of the Policy Memoranda as guidance nor requires the Policy Memoranda be submitted to OSM for review and approval as amendments to the ND Program. The Policy Memoranda are only guidance documents and do not formally (or as applied) represent changes to ND's Program. Plaintiff's Motion fails to assert, let alone establish any instance where the Policy Memoranda have 1) been used or relied upon by the NDPSC in the course of implementing the ND Program; or 2) been used in a manner other than what they are designed to be: guidance documents issued to mine operators. Plaintiff's Motion must also be denied because Plaintiff has not demonstrated the requisite actual or threatened harm to any of its members as a result of any of the challenged Policy Memoranda. Accordingly, summary judgment should be entered in favor of NDPSC and Plaintiff's Motion denied.

I. THE POLICY MEMORANDA DO NOT CONSTITUTE AMENDMENTS TO NORTH DAKOTA'S PROGRAM

Plaintiff asserts that the Policy Memoranda have "become part of the North Dakota state surface mining program" without public or OSM review and therefore violate SMCRA. Motion at p. 13. Plaintiff's assertion is erroneous for two reasons. First, the Policy Memoranda are guidance documents and not legislative rules. As guidance documents, neither SMCRA, the North Dakota AAPA (nor even the federal APA), require that the Policy Memoranda be promulgated as legislative rules. Second, because the Policy Memoranda are guidance documents and not legislative rules, they do not (and cannot) amend the ND Program because the Policy Memoranda do not substantively affect the rights of the public, mine operators or otherwise limit the authority or discretion of the NDPSC. *See Rennich v. N.D. Dep't of Human Svcs.*, 756 N.W.2d 182, 188 (N.D. 2008).

With respect to the standard of review to be applied when considering the Policy Memoranda, it is the North Dakota AAPA and not the federal APA that is to be applied. No NDPSC decision or rulemaking is reviewable under the federal APA as the APA applies only to an agency that is an "authority of the Government of the United States." 5 U.S.C. § 701(b)(1). The NDPSC is not an agency that is an "authority of the Government of the United States." *See Del. County Safe Drinking Water Coalition* 304 Fed. Appx. 963 (unpublished opinion) (Finding that a State department of environmental quality is not an "agency" for purposes of the federal APA.) Plaintiff's Complaint and Motion allege no federal agency rulemaking or action that would be reviewable under the federal APA. Nor did Plaintiff name as a party any federal agency in its Complaint. Accordingly, as a matter of law the federal APA is not an applicable standard of review. Rather, any review of an NDPSC administrative action is appropriate under only the AAPA, N.D. Cent. Code ch. 28-32. However, while the APA is not the applicable standard of review to be applied, because of the common characteristics between the federal APA and the AAPA on what constitutes a legislative rule versus agency guidance is instructive. This Court may therefore look to the federal courts' interpretation under the APA of what constitutes agency guidance in considering that the Policy Memoranda are guidance and not legislative rules.

A. Guidance Documents Are Substantively Not Rules.

As guidance documents, the Policy Memoranda do not have the legal force and effect of legislative rules adopted by an administrative agency. *See General Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (a guidance document is not a legislative rule unless it has the force of law.) Under the AAPA, North Dakota defines a rule as,

> the whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency.

> [a rule] does not include:
>
> k. Any material, including a **guideline, interpretive statement, statement of general policy**, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

N.D. Cent. Code ch. 28-32-01(11)(k). (emphasis added).

In North Dakota, an agency is expressly exempt from undertaking a rulemaking proceeding to promulgate guidelines as rules, unless the agency guidelines substantively affect the rights of the public or otherwise limit the discretion of the agency. *Rennich*, 756 N.W.2d at 188. As with North Dakota's AAPA, the federal APA also exempts general statements of policy from rulemaking procedures. 5 U.S.C. § 553(b)(3)(A); *see generally Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987). Under the APA, guidance documents are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citation omitted). Guidance "appris[es] the regulated community of the agency's intentions as well as inform[s] the exercise of discretion by agents and officers in the field." *Cmty. Nutrition Inst.*, 818 F.2d 949.

Further, in interpreting the APA, the federal courts recognize that federal agencies may issue guidance documents that do not have the force and effect of law and therefore are not "legislative rules." *see also Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 226-28 (D.C. Cir. 2007); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-22 (D.C. Cir. 2000). However, were an agency's guidance document to be employed with the force and effect of law, that guidance must be proposed and promulgated in accordance with the federal APA. *See id.* In considering whether a federal agency's guidance document should be characterized as a legislative rule having the force and effect of law, the federal courts apply a standard similar to

that set forth in *Rennich*. Courts consider (1) the agency's characterization of the action; (2) whether the statement was published; and (3) whether the action has binding effects on the agency or private parties. *Cement Kiln Recycling Coalition*, 493 F.3d at 227. Courts also consider whether in the guidance the agency has imposed any rights and obligations, or if it has left itself genuinely free to exercise discretion. *Id.* The ultimate inquiry is to determine whether the challenged agency action "binds private parties or the agency itself with the 'force of law.'" *General Elec. Co.* 290 F.3d 382.

B. The Policy Memoranda Are Guidance Documents.

When applying the criteria test set forth in *Rennich* and *Cement Kiln Recycling* to the NDPSC's Policy Memoranda, cannot materially be disputed that the challenged Policy Memoranda are only agency guidance documents and not rules. Applying the first prong of the *Cement Kiln* test, how has NDPSC characterized the Policy Memoranda, NDPSC has always characterized and treated the Policy Memoranda as guidance – not legislative rules or law (*See* Affidavit ¶¶13, 16). *See id.* at 227*; see also U.S. v. Vertac Chemical Corp.*, 453 F.3d 1031, 1046 (8th Cir. 2006) (How an agency characterizes and treats its guidance is important when looking at whether the guidance is a rule.) Moreover, Plaintiff neither alleges nor establishes any material fact demonstrating that the NDPSC has characterized or treated the Policy Memoranda as anything other than guidance. As to the second prong, were the Policy Memoranda published as legislative rules, NDPSC has never published the Memoranda in North Dakota's Administrative Code, nor have the Memoranda been published in the Federal Register or the Code of Federal Regulations, and Plaintiff provides no evidence to the contrary. Affidavit ¶12.

Under the third prong of the *Cement Kiln* test, agency guidance is not a legislative rule when the agency retains its discretion and does not impose binding requirements upon the agency or affected parties. *Cement Kiln Recycling Coalition* at 227. Here again, Plaintiff has

neither alleged nor provided any evidence demonstrating that NDPSC has ever utilized or applied the Policy Memoranda as legislative rules. Nor can Plaintiff do so. The Policy Memoranda have been utilized in North Dakota as only guidance, and do not impose binding requirements upon regulated parties or the agency (Affidavit ¶¶ 15, 16). *Id.* at 228. Plaintiff has failed to carry its legal burden to demonstrate that the Policy Memoranda are legislative rules and therefore unapproved amendments to the ND Program, a violation of 30 C.F.R. § 732.17(a). As a matter of law, NDPSC is therefore entitled to summary judgment in its favor that the Policy Memoranda are guidance documents and are not "laws or regulations" that are required to be submitted to OSM.

C. The Policy Memoranda Do Not Constitute Amendments to ND's Program

Plaintiff claims to randomly pick five Policy Memoranda as examples of how the five and "at **least some** [other] Memoranda"[5] have allegedly amended the ND Program without receiving OSM review and approval. Motion at p.13. Plaintiff's argument is factually and legally flawed and must be rejected for two reasons. First, as set forth *supra*, the Policy Memoranda are guidance documents and not legislative rules and therefor do not and could not amend the ND Program. And as guidance documents, none of the Policy Memoranda require OSM review and approval. Second, while Plaintiff provides a cursory analysis of five Policy Memoranda, Plaintiff provides absolutely no facts to demonstrate how these five Memoranda have been applied by the NDPSC. Plaintiff merely provides a summary of what it thinks the five Policy Memoranda provide and then only vaguely speculates how the Memoranda **may** be applied in the future. If any of the Policy Memoranda were amendments to the ND Program, which they are not, Plaintiff

[5] Other than a vague reference to Memorandum Number 3, see Motion at p. 12, Plaintiff fails to identify whether any other Policy Memoranda constitute amendments to the North Dakota Program.

has wholly failed to demonstrate any facts showing that the NDPSC has used any of the Policy Memoranda as a legislative rule and not as guidance. *Id.*

Further, no North Dakota law or regulation has been changed by the Policy Memoranda. Under the SMCRA Regulations, a State "shall immediately submit" to OSM as an amendment to its State program "**changes to laws or regulations** that make up the approved State program." 30 C.F.R. § 732.17(g), *see also* 30 C.F.R. § 731.14(a) and (b) (affirming that only a State's laws, regulations, or "significant changes" to a State's program – not guidance documents implementing its existing OSM approved program – must be submitted to OSM for review and approval.). (emphasis added). Plaintiff consistently misconstrues the plain meaning of 30 C.F.R. § 732.17(g), incorrectly asserting that it requires the Policy Memoranda, which are guidance and not law or legislative rules, be submitted to OSM for review and approval.[6] Motion at pp. 5, 9.

NDPSC has not failed to comply with 30 C.F.R. § 732.17(g). The NDPSC is not required to submit the Policy Memoranda to the Director of OSM for approval pursuant to 30 C.F.R. § 732.17(g) because the Policy Memoranda, as guidance documents, are not changes to the laws or regulations that make up the ND Program. And contrary to Plaintiff's assertion, NDPSC does not take its responsibilities under SMCRA and specifically 30 C.F.R. § 732.17(g) 'casually'. Motion at p. 22. Rather, NDPSC has submitted changes in its laws and regulations that affect the ND Program to OSM for review and approval during the entire thirty-plus years that North Dakota

[6] Plaintiff cites to a program amendment submitted by Kentucky to OSM as an example that something "as small as a single word, ... changing the term 'performance bond' to 'reclamation bond,'" requires OSM approval. Motion at p. 11. Plaintiff mischaracterizes the scope and extent of the Kentucky plan amendments. Kentucky submitted to OSM amendments to its SMCRA program that resulted from the Kentucky General Assembly's adoption of six bills, each of which made significant changes to the Kentucky program. *See* 55 Fed. Reg. 32,618 (August 10, 1990). These statutory changes resulted in significant changes to Kentucky's program, including: bond release procedures, bond liability, and changing the criteria for admittance to the bond pool program. *See id.* Further, and importantly, the Kentucky amendments approved by OSM were a result of changes in law - **not** guidance documents.

has had a SMCRA-approved program. Affidavit ¶6. Each amendment submitted by North Dakota and OSM's decision on the amendment is documented by submission date and citation to the specific North Dakota statutory or regulatory provision in 30 C.F.R. §§ 934.12, 934.13, & 934.15. Plaintiff provides no facts or admissible evidence that any of the Policy Memoranda are changes to North Dakota's laws or regulations. Without such a showing, Plaintiff's argument fails and NDPSC is therefore entitled to judgment as a matter of law.

D. The Policy Memoranda Are Not Inconsistent With The SMCRA Regulations.

While Plaintiff's Complaint alleged that all Policy Memoranda are required to be submitted in writing "to OSM for its evaluation and approval," Plaintiff's Motion contains absolutely no discussion of the other sixteen challenged Policy Memoranda. Rather, Plaintiff asserts it randomly picked five Policy Memoranda, which Plaintiff claims, "with at least [these] five Memoranda, NDPSC is effectively implementing substantive changes in the [ND Program], inconsistent with SMCRA." Motion at p. 12. Plaintiff's Complaint and Motion lack any facts that substantiate how these five Policy Memoranda, or any of the Memoranda, result in changes or amendments to the ND Program. As demonstrated below, not one of these five Policy Memoranda is or has ever been used as anything other than guidance. The practical effect of these five Policy Memoranda, and all the Policy Memoranda, is that they are essentially "cliff notes" for the regulations and statutes that comprise the ND Program. As such, the Policy Memoranda are not amendments to the ND Program and are not inconsistent with SMCRA or the SMCRA Regulations. Accordingly, NDPSC is entitled to summary judgment as a matter of law.

1. Policy Memorandum No. 5 is consistent with the SMCRA Regulations and as a guidance document, requires no review and approval by OSM.

Plaintiff's assertion that Policy Memorandum No. 5 is inconsistent with the SMCRA Regulations is wholly without merit. Plaintiff asserts that Policy Memorandum No. 5 "is substantively less stringent" than SMCRA or ND's Program because the Memorandum "allow[s] case by case exceptions to standards created by statute and regulation for topsoil removal and separation from subsoil." Motion at pp. 13-14. Policy Memorandum No. 5 does not create an exception to the ND Program or to the SMCRA Regulations with respect to the removal and segregation of topsoil in the course of mine operations. *See* 30 C.F.R. § 816.22; *see also* N.D. Admin. Code § 69-05.2-15-02. Rather, Policy Memorandum No. 5, 1) provides guidance to mine operators as to "what the Public Service Commission (PSC) inspectors are looking for when approving topsoil and subsoil removal segregation"; 2) notes the procedures operators are expected to follow when removing topsoil; and 3) notes efforts operators should take to prevent reducing the productivity of the topsoil and to prevent degradation of the topsoil.

Because not all topsoil is the same, nor is the scope of all mining operations the same, Policy Memorandum No. 5 provides that exceptions to the guidance detailed in Policy Memorandum No. 5 may be granted on a "case-by-case" basis "depending upon the site conditions involved." Exhibit 4 to Affidavit. As guidance, Policy Memorandum No. 5 is not a rule that requires compliance. It is a general statement of policy, that "appris[es] the regulated community of the agency's intentions as well as inform[s] the exercise of discretion by agents and officers in the field." *Cmty. Nutrition Inst.*, 818 F.2d 949. Accordingly, neither the issuance of Policy Memorandum No. 5, nor its provision that the NDPSC may consider exceptions to the guidance on a case-by-case basis, amends, supplants or violates SMCRA or the ND Program.

Further, allowing for the NDPSC to consider exceptions to its own guidance is not, as Plaintiff erroneously asserts, a "waiver" of the SMCRA Regulations or ND Program's requirements for topsoil. Motion at p. 14. The SMCRA Regulations and the ND Program anticipate and provide that the State regulatory authority may exercise discretion in the course of approving an operator's topsoil removal plan. For instance, 30 C.F.R. § 816.22(a)(3) allows that the "regulatory authority **may** choose not to require the removal of topsoil for minor disturbances" when certain conditions exist. Under the OSM approved ND Program, the NDPSC has the authority to approve the use of "other suitable strata [to] be used as a supplement to topsoil." N.D. Admin. Code § 69-05.2-15-02(5)(b). Further, N.D. Cent. Code ch. 38-14.1-24(5) provides that operators shall "[r]emove, segregate, and respread suitable plant growth material **as required by the Commission**." (emphasis added).

Finally, the ND Program is in fact more stringent than the SMCRA Regulations with respect to topsoil and subsoil removal and separation. The ND Program requires mine operators to save suitable topsoil and subsoil from all lands that are mined, N.D. Admin. Code § 69-05.2-15-02(2), which is more stringent than the counterpart federal provisions under 30 C.F.R. § 816.22. When conducting surface mining operations on prime farm land, the SMCRA Regulations require the saving of both topsoil and subsoil, and when conducting operations on non-prime farm lands only the topsoil is required to be saved. *See* 30 C.F.R. § 816.22(c). Accordingly, Plaintiff's unfounded allegations that Policy Memorandum No. 5 is inconsistent with SMCRA must be rejected.

2. Policy Memorandum No. 6 is consistent with the SMCRA Regulations and as a guidance document, requires no review and approval by OSM.

Plaintiff's assertion that Policy Memorandum No. 6 is inconsistent with the SMCRA Regulations is without merit. Plaintiff's claim that Policy Memorandum No. 6 creates "less

stringent permit requirements than those defined at 30 C.F.R. § 701.5." Motion at p. 14. Specifically, Plaintiff's allegations concern the definition of a "public road" and when a public road is or is not included in an "affected area" as these terms are defined in the SMCRA Regulations and the OSM approved ND Program.

Under the SMCRA Regulations, "affected areas" are those areas that are impacted as a result of mining operations. In defining what is an "affected area," the SMCRA Regulations also set forth what an affected area is not. Under 30 C.F.R. § 701.5, an "affected area" specifically excludes roads that were "designated as a **public road** pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use." (emphasis added). Accordingly, under the SMCRA Regulations public roads **are not** considered part of the mining permit area so long as they are not "used to facilitate, or [ ] physically altered by, surface coal mining and reclamation operations." *Id.*

Just as under the SMCRA Regulations, the ND Program excludes public roads from the mining permit area if they are not part of the surface mining operations. In the OSM approved ND Program, a public road is defined as

> a public way for purposes of vehicular travel, including the entire area within the right of way, all public ways acquired by prescription as provided by statute, and all land located within two rods [10.06 meters] on each side of all section lines. This definition does not include those public ways or section lines which have been vacated as permitted by statute or abandoned as provided by statute.

N.D. Admin. Code § 69-05.2-01-02(82).

The ND Program prohibits "surface coal mining activities being within one hundred feet 30.48 meters, measured horizontally, of the outside right-of-way line of any **public road**." N.D. Admin. Code § 69-05.2-04-01.1(3). (emphasis added). This prohibition, however,

> does not apply: a. Where a mine access or haul road joins a public road; or b. When, as provided by section 69-05.2-04-01.3, the commission or the appropriate public road authority with jurisdiction over the road allows the road to be relocated or closed, or the area within the protected zone to be affected by the surface coal mining operation. *Id.*

In Policy Memorandum No. 6, NDPSC affirms what is set forth in the OSM approved ND Program and under the SMCRA Regulations: "Roads maintained by public funds are excluded" from surface coal mining operations. Exhibit 5 to Affidavit. Plaintiff's argument that Policy Memorandum No. 6 carves "out at least one new exception inconsistent with state law and SMCRA" is clearly incorrect. Motion at p. 15. In providing guidance to mine operators, Policy Memorandum No. 6 merely affirms what N.D. Admin. Code § 69-05.2-04-01.1(3), and 30 C.F.R. § 701.5 provide: that generally, public roads are not to be considered part of a surface mining operation.

Plaintiff also incorrectly asserts that North Dakota's Policy Memorandum 6 is similar to the situation that arose in the State of Virginia where OSM "disapproved a definition of 'affected area' in the proposed Virginia state program 'to the extent that it could be interpreted as excluding all public roads with more than incidental public use.' 30 C.F.R. § 946.12." Motion at pp. 15-16. First, at issue in Virginia was a proposed **statutory** change to the Virginia SMCRA program. As established *supra*, Policy Memorandum No. 6 is guidance and unlike the case in Virginia, does not result in any statutory or regulatory change to the ND Program.

Second, OSM's disapproval of the Virginia amendment came as a result of a decision issued by the U.S. District Court for the District of Columbia *In re: Permanent Surface Mining*

Regulation Litigation II, 620 F. Supp. 1519 (D.D.C. July 15, 1985). *In re: Permanent Surface Mining Regulation Litigation II*, the Court "remanded the Federal definition of 'affected area' at 30 C.F.R. § 701.5 because it excluded all public roads **with more than incidental public use**, an exclusion which the court found to be inconsistent with the definition of 'surface coal mining and reclamation operations' at section 701(28) of SMCRA." 51 Fed. Reg. 42,458 (III.4), November 25, 1986. (emphasis added). As a result of the decision in *In re: Permanent Surface Mining Regulation Litigation II*, the Director of OSM found "that the Virginia definition of 'affected area' **is less stringent than SMCRA**, and [did] not approv[e] it to the extent that it excludes public roads without regard to the effect of mining use upon the road." *Id.*

Nothing in Policy Memorandum No. 6, N.D. Admin. Code § 69-05.2-04-01.1(3) or § 69-05.2-01-02(82) defines public roads to be only those roads "with more than incidental public use" as did Virginia. Accordingly, Plaintiff's unfounded allegations that Policy Memorandum No. 6 is inconsistent with SMCRA must be rejected.

3. Policy Memorandum No. 15 is consistent with the SMCRA Regulations and as a guidance document, requires no review and approval by OSM.

a. Policy Memorandum No. 15 does not divest the NDPSC of its authority to implement the ND Program.

The SMCRA Regulations anticipate that more than one State agency may have or share duties in connection with the implementation of an OSM approved SMCRA State program. *See* 30 C.F.R. § 731.14(f) (stating that copies of "supporting agreements between agencies which will have duties in the State program" are to be provided to OSM.) In the OSM approved ND Program, disposal of waste materials from coal utilization processes and coal conversion facilities are activities that must obtain special waste disposal permits from the North Dakota Department of Health ("**NDDH**").

> waste materials from coal utilization processes and coal conversion facilities to be permanently disposed of within a permit area and that **are required to be permitted under the solid waste management rules of the [NDDH]** must be disposed of according to those rules and this chapter. (emphasis added).

N.D. Admin. Code § 69-05.2-19-02(1)

Plaintiff erroneously asserts that Policy Memorandum No. 15 "may have the effect of diminishing NDPSC jurisdiction over certain mined lands, in violation of SMCRA." Motion at p. 17. There is no merit to Plaintiff's assertion. First, the SMCRA Regulations acknowledge that multiple State agencies may share duties related to the implementation of a State's SMCRA program. *See* 30 C.F.R. § 731.14(f). Second, Policy Memorandum No. 15 does nothing more than affirm what the OSM approved ND Program already provides – that any waste materials (coal ash) from coal utilization processes and coal conversion facilities proposed to be disposed of in a coal mine must be disposed of in accordance with the NDDH's solid waste rules. *See* N.D. Admin. Code § 69-05.2-19-02(1). Policy Memorandum No. 15 does not diminish, threaten or divest NDPSC of its authority to implement the OSM approved ND Program.

b. Policy Memorandum No. 15 does not amend the ND Program with respect to reclamation of mining lands.

Plaintiff also erroneously asserts that while Policy Memorandum No. 15 "incorporates the performance bond requirements at N.D. Admin. Code § 69-05.2-12, [it] is inconsistent with SMCRA's previous or better land use standard," since "most land mined in North Dakota was previously used for agricultural purposes." *Id.* Plaintiff's assertions are without merit.

SMCRA requires that when reclaiming land that has been used in a SMCRA approved surface mining operation, the land must be restored "to a condition capable of supporting the uses which it was capable of supporting prior to any mining, **or higher or better uses of which there is a reasonable likelihood.**" 30 U.S.C. § 1265(b)(2). Consistent with SMCRA, the OSM approved ND Program provides that land reclamation for surface mining operations

> must be judged on the basis of the land use that existed prior to any mining. However, if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, **the postmining land use must be judged on the basis of the highest and best use** that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.

N.D. Admin. Code § 69-05.2-23-01(2).

To ensure that monies are available to complete the restoration of mined lands to the highest and best use once the surface mining operations are completed, SMCRA requires that operators post performance bonds with the State regulatory authority implementing SMCRA. Policy Memorandum No. 15 provides guidance to mine operators concerning the process established under the OSM approved ND Program for early release of performance bond amounts for "waste materials from coal utilization processes and coal conversion facilities," N.D. Admin. Code § 69-05.2-19-02(1); and as to what the NDPSC believes the appropriate amount of topsoil and subsoil is necessary "to ensure a good vegetative cover," after the long term disposal of coal ash on mined lands is completed in accordance with the NDDH's requirements. Exhibit 13 Affidavit.

Policy Memorandum No. 15 sets no edicts as to how lands with waste disposal operations are to be used in the future; it does not reverse or amend N.D. Admin. Code § 69-05.2-23-01(2); nor is it inconsistent with 30 U.S.C. § 1265(b)(2). The only discussion in the Memorandum of the use of these lands is "that future use of these sites following waste disposal and closure **will probably be limited** due to final topography and the desire to maintain a permanent vegetation cover on the areas." *Id.* While the future use of the land may be limited due to NDDH requirements, Policy Memorandum No. 15 takes no position on what that use of the land will be or should be, nor does it prohibit the land from being returned to agricultural use. Further,

Plaintiff's erroneous assertions ignore the land use criteria set forth under N.D. Admin Code § 69-05.2-23-03. Specifically, N.D. Admin Code § 69-05.2-23-03 establishes that the NDPSC, in consultation with the landowner, may approve an alternative post mining use for mined land. Nothing in Policy Memorandum No. 15 amends or repeals N.D. Admin Code § 69-05.2-23-03.

c. Policy Memorandum No. 15 is consistent with the SMCRA Regulations authorization to dispose of coal ash in surface mines.

Policy Memorandum No. 15 acknowledges that under the OSM approved ND Program, mined acreage may be used "for the disposal of large quantities of ash from coal ash." Exhibit 13 to Affidavit. Plaintiff erroneously asserts that the SMCRA Regulations do not allow for the disposal of coal ash "in surface mines," only in "underground mines," and therefore Policy Memorandum No. 15 violates the SMCRA Regulations because it "contemplates" disposal of coal ash at a surface mine. Motion at p. 17.

In its application to the Secretary, requesting that it be granted "primacy", OSM reviewed and approved the provisions of N.D. Admin. Code § 69-05.2-19-02, which allows for waste materials from coal utilization processes and coal conversion facilities (coal ash) to be permanently disposed of within a permit area. In accordance with the OSM approved ND Program, mine operators in North Dakota may dispose of coal ash in surface mines, *i.e.* above ground. *See* N.D. Admin Code § 69-05.2-19-02. Accordingly, Plaintiff's unfounded allegations that Policy Memorandum No. 15 is inconsistent with SMCRA must be rejected.

4. Policy Memorandum No. 18 is consistent with the SMCRA Regulations and as a guidance document, requires no review and approval by OSM.

Plaintiff erroneously asserts that Policy Memorandum No. 18 is inconsistent with SMCRA because it allows for "a single performance bond to cover more than one **permit area**

at a mine." Motion at p. 18. (emphasis added). Plaintiff's assertions are incorrect. Nothing within Policy Memorandum No. 18 is contrary to SMCRA or the authority SMCRA grants to the States to implement alternative bonding schemes.

In permitting a surface mine operation under SMCRA, multiple permits will be issued by the regulatory authority for one mine operation. SMCRA provides that performance bonds must be in place to cover reclamation activities for all surface mine operations. *See* 30 U.S.C. § 1259(a). Under SMCRA, a performance bond must be posted by the mine operator in an amount that "shall cover that area of land within the **permit area** upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit." 30 U.S.C. § 1259(a). (emphasis added). The SMCRA Regulations define a "permit area" as that

> area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator's performance bond ... **and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas**; provided that areas adequately bonded under another valid permit may be excluded from the permit area.

30 C.F.R. § 701.15 (emphasis added)

Consistent with SMCRA, under the OSM approved ND Program, a mine operator applicant "shall submit an estimate of bond for the **entire permit area**," to the NDPSC for approval as part of the surface mine permit application process. N.D. Admin. Code § 69-05.2-12-01(1). (emphasis added). Like the SMCRA Regulations, the OSM approved ND Program defines "Permit area" as "the area of land approved by the commission for surface coal mining operations...," that is the entire mine operation. N.D. Cent. Code § 38-14.1-02(15).

Policy Memorandum No. 18 provides guidance to mine operators that "a single performance bond to cover more than one permit area at a mine" may be posted with the NDPSC, rather than requiring an individual bond for each individual permit. Policy Memorandum No. 18, Exhibit 17 to Affidavit. Posting one performance bond does not diminish in any way the mine operator's reclamation responsibilities. In implementing its OSM approved ND Program, the NDPSC has found that the posting of one performance bond for the entire mine operation is more efficient and provides the same performance bond protections as set forth in the ND Program or under SMCRA.

Policy Memorandum No. 18 is merely guidance to mine operators as to how the NDPSC implements the performance bond program, and the Memorandum makes no changes to the OSM approved ND Program. Accordingly, Plaintiff's unfounded allegations that Policy Memorandum No. 18 is inconsistent with SMCRA must be rejected.

5. Policy Memorandum No. 20 is consistent with SMCRA and as a guidance document, requires no review and approval by OSM.

Policy Memorandum No. 20 explains that the NDPSC *may* approve variances to the 10-year revegetation bond liability period for certain water management structures and other reclaimed areas. *See* Exhibit 21 to Affidavit. Meaning that the NDPSC *may* approve bond releases for tracts containing some areas that have been revegetated for less than 10 years when certain circumstances are met by the operator. As noted in Policy Memorandum No. 20, in 1988, before the NDPSC issued the Memorandum it presented to the OSM as a proposed amendment to the ND Program that would have provided the NDPSC the exact same discretion with respect to bond releases as the Memorandum currently provides. *See id.* After review of the NDPSC's proposed amendment to its Program, the then Director of the OSM determined that no amendment to the ND Program was required since the NDPSC has "adequate discretion within

[its] program as currently approved to conduct bond releases consistent with the amendment." Exhibit 25 to Affidavit. NDPSC's proposed amendment to the ND Program was withdrawn. *See id., see also* 54 Fed. Reg. 37,128/3, September 7, 1989, Exhibit 24 to Affidavit.

Notably, Plaintiff does not assert that Policy Memorandum No. 20 is actually inconsistent with SMCRA, only that "the language of Memo 20 with regard to variances to the reclamation timeline is too vague to determine whether or not it is consistent" with SMCRA. Motion at p. 22. Plaintiff provides no facts that would suggest Policy Memorandum No. 20 is inconsistent with SMCRA or the ND Program. Further, Plaintiff's assertions that the NDPSC and OSM have engaged in a "casual" manner regarding consultation of when amendments to the ND Program are required is baseless and not supported by the facts. As affirmed by the Director of the OSM, it is within the NDPSC's authority to conduct bond releases as provided in Policy Memorandum No. 20 and therefore Plaintiff's spurious allegations must be denied.

Plaintiff further asserts that a public records request was made to the NDPSC pursuant to the North Dakota open records law[7], and to OSM pursuant to the federal Freedom of Information Act[8], seeking the production of "written records" confirming the OSM's determination that NDPSC has adequate discretion to conduct bond releases consistent with Policy Memorandum No. 20. Motion at p. 22. Plaintiff asserts that neither NDPSC nor OSM was "able to produce written records of such a consultation." *Id.* Plaintiff fails to identify the entity or person who made the alleged public records request to NDPSC, nor does it provide a copy of any such request. As set forth in the Affidavit, no request for the production of public records related to Policy Memorandum No. 20 was ever received by the NDPSC from Plaintiff. *See* Affidavit ¶22.

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[7] *see generally* N.D. Cent. Code ch. 44-04-18
[8] *see generally* 5 U.S.C. § 552.

II. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S CHALLENGE

A. Plaintiff Does Not Have Standing

Federal courts are courts of limited jurisdiction and Plaintiff bears the burden of establishing that this Court has jurisdiction to hear its claims, including demonstrating the standing required by Article III of the U.S. Constitution. Article III requires a party to demonstrate that it suffers an injury-in-fact to a protected legal interest that is concrete, particularized, and not hypothetical, the injury is fairly traceable to the challenged action, and the Court has the ability to redress the injury. *Lujan* 504 U.S. 560-61; *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278-79 (D.C. Cir. 2012). Further, an organization, like the Plaintiff, that is suing on behalf of its members must also show that the organization's members have the right to proceed in their own right, but do not need to participate, and that the lawsuit is germane to the organization's purpose. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Bare allegations are insufficient to establish standing on a motion for summary judgment and a plaintiff must set forth specific facts by Affidavit or other evidence. *Id.*

Further, "when the plaintiff is not [it]self the object of the government action or inaction [it] challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). Plaintiff "can demonstrate standing only if application of the [Policy Memoranda] by the [NDPSC] will affect" Plaintiff in a way that threatens to impose an "'injury in fact' that is concrete and particularized." *Summers v. Earth Island Institute,* 555 U.S. 488, 493-494 (2009). "[T]he threat," moreover, "must be actual and imminent, not conjectural or hypothetical." *Id.* at 493. Indeed, an injury must be "'certainly impending' to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). That requirement "ensure[s] that the alleged injury is not too speculative for Article III

purposes," *Lujan* 504 U.S. at 565 n.2, and "that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party,'" *Summers*, 555 U.S. at 493 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

Plaintiff fails to set forth specific facts that would demonstrate its standing to bring this lawsuit. Instead, Plaintiff makes non-specific statements regarding standing. In its Complaint Plaintiff asserts that, "the interests of Plaintiff's members are or may be adversely affected by [NDPSC's] unlawful implementation of changes to the North Dakota [SMCRA] regulatory program." Complaint, ¶ 2. The Complaint further asserts that,

> [c]ertain of Plaintiff's members who work, reside and recreate near regulated strip mines are aggrieved by these violations because the North Dakota state regulatory program as implemented is now inconsistent with certain federal permanent performance standards for state programs as a result of these violations, including weaker standards for reclamation and waste disposal practices than required under the federal program, which have resulted and will continue to result over time in diminished land values and quality of life.

Id. at ¶ 18.

These two, limited statements wholly fail to demonstrate the Plaintiff's standing because they do not establish an injury-in-fact that is causally linked to NDPSC's actions or inactions.

Plaintiff's Motion does nothing more to establish any facts to demonstrate standing. Plaintiff merely continues to make the same generalized statement regarding standing. Plaintiff asserts that it has standing because Plaintiff's members include

> individuals who reside, recreate, and/or work on or near, or own, land that is being actively strip mined or is proposed for strip mining and therefore falls under the jurisdiction of the federal [SMCRA], as implemented by the State of North Dakota. These members' peaceful enjoyment of their homes, the viability of their farming, ranching, and outfitting livelihoods, and their personal safety on local roads are or imminently would be

> threatened by surface coal mining operations, including but not limited to blasting, digging, and hauling.

Motion at p. 3.

There is no affidavit from any member of Plaintiff to support these vague assertions. There are no references to specific mining activities to which a member of Plaintiff has suffered or may suffer alleged harm. There is no demonstration of how any member of Plaintiff has had their peaceful enjoyment, safety, or livelihoods impaired or threatened as a result of active or proposed mining activity. There is not even a vague reference to an area of the State where these alleged activities are underway or proposed. Further, Plaintiff has failed to allege, with any specificity, how the Policy Memoranda likely will be implemented by NDPSC to cause future harm to Plaintiff's members' interest, which is a requirement for the Plaintiff's to obtain the prospective relief of enjoining NDPSC's use of the Policy Memoranda. *Coalition for Mercury-Free Drugs*, 671 F.3d at 1280 (affirming standing lacking where prospective relief sought, but no future injury alleged).

An environmental organization's failure to specifically demonstrate a probability of injury to a single member from the complained-of action is legally insufficient to demonstrate standing. *Sierra Club*, 292 F.3d at 902. The generic nature of the Plaintiff's allegations—which are not tied to any specific or identified implementation of a Policy Memorandum by NDPSC in a manner inconsistent with SMCRA—makes it virtually impossible to understand how Plaintiff's members' legally protected interests are affected by NDPSC's mere issuance of the Policy Memoranda. Such allegations are wholly insufficient to establish the injury-in-fact necessary to support the Plaintiff's standing. *Id.* at 901 (failing to properly support standing allegations leaves the defendant to "flail at the unknown in an attempt to prove the negative"); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (holding that the specificity requirement of standing "is

assuredly not satisfied by averments" that an individual "uses unspecified portions of an immense tract of territory"); *see also Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1160-61 (8th Cir. 2008).

Nor is Plaintiff's requirement to demonstrate that it has or will imminently suffer an injury so as to establish Article III standing waived or lessened because Plaintiff's claim is brought under SMCRA's citizen suit provision. In *Lujan v. Defenders*, the Supreme Court expressly rejected "that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573. (emphasis in the original). Rather, "it is clear that in suits against Government, at least, the concrete injury requirement must remain." *Id.* at 578.

B. Plaintiff's Claims Are Not Ripe.

In assessing whether a claim is ripe for judicial review, this Court examines both the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).* In particular, the Court determines: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998).* "The primary consideration for a court assessing the fitness of the issue for judicial review is whether the agency action is final." *National Mining Ass'n v. Jackson*, 2012 WL 3090245 at 42 (D.D.C. 2012).

The Policy Memoranda themselves do not regulate the conduct of Plaintiff or its members, nor of operators who must comply with the ND Program . *Cf. Abbott Labs,* 387 U.S. at 153. The Policy Memoranda "do not command anyone to do anything or to refrain from doing

anything." *Ohio Forestry,* 523 U.S. at 733. They similarly do not "grant, withhold, or modify any formal legal license, criminal liability"; or "create [any] legal rights or obligations." *Ibid.* Nor do the Policy Memoranda authorize any action to be taken within lands regulated by the ND Program or "abolish anyone's legal authority to object" to any such action in the future. *Ibid.* North Dakota's Surface Mining and Reclamation Operations law permits citizen suits against the State. *See* N.D. Cent. Code ch. 38-14.1-40. If the Policy Memoranda were ever to be implemented in a manner inconsistent with their sole purpose to be guidance causing harm to Plaintiff's members, Plaintiff may challenge the application of the Policy Memoranda at that time. *Ohio Forestry at* 734.

Fundamentally, Plaintiff's cause of action is unripe as Plaintiff has failed to demonstrate that there exists a controversy where the Policy Memoranda have been applied such that Plaintiff or its members are harmed. At best, all Plaintiff can assert is that language contained in a Policy Memorandum "**could be used**" – not in North Dakota but in Appalachia - in a manner that allegedly would be inconsistent with SMCRA. Motion at p. 16. Vague, potential threats of harm are insufficient to support Plaintiff's allegations, especially when the harm alleged is not even relevant to the State of North Dakota but to some hypothetical situation in Appalachia.

Accordingly, Plaintiff fails to demonstrate any hardship that would result to it or its members by delaying review of a challenge to the Policy Memoranda until there is an actual substantiated controversy regarding the application of any of the Policy Memoranda. And in fact, it is the NDPSC that is harmed by judicial review at this time. Judicial intervention at this time would only cause significant disruption to the balance of authority delegated to the States and OSM under SMCRA. North Dakota has been granted primacy by OSM to implement SMCRA in the State, and with that designation OSM exercises a limited amount of federal supervision.

"Thus, SMCRA provides for either State regulation of surface coal mining within its borders or federal regulation, **but not both**." *Bragg*, 248 F.3d 275, 289. (emphasis supplied). It is NDPSC that implements the ND Program, a Program which OSM has approved, therefore it is NDPSC alone that prepares and issuance guidance concerning the implementation of the ND Program. To require States with primacy to provide its guidance documents to OSM for review and approval defeats the very purpose of achieving and maintaining primacy under SMCRA.

Further, Plaintiff has waited decades to bring its unsubstantiated claims, despite its knowledge of the existence of the Policy Memoranda. Since at least 1991, Plaintiff has actively participated before the NDPSC in challenging permit applications and commenting on policy memorandum. For instance, in 1991 the Reclamation Division proposed the Draft Water Replacement Policy Memorandum which would have provided guidance on the replacement of water supplies affected by surface mining operations. *See* Affidavit ¶31. While at least one version of this proposed policy was distributed to Plaintiff, mining companies and OSM for review and comment, the proposed policy was not adopted as a policy memorandum by the NDPSC, but instead proposed and promulgated as a change to Article 69-05.2 of the North Dakota Administrative Code. *See* Affidavit ¶28. Additionally, since 1994 Plaintiff's members have been on a NDPSC mailing list to receive proposed and final policy documents prepared by the NDPSC. *See* Affidavit ¶24 and Exhibit 28 to Affidavit. As such, not only did Plaintiff have constructive notice of the Policy Memoranda but they have had actual notice since at least 1991. *See id.* Accordingly, any action against the NDPSC must have been brought by Plaintiff within "three years after the claim for relief has accrued." N.D. Cent. Code ch. 28-01-22.1. Plaintiff has been aware of the Policy Memoranda for more than three years and as such its claims are barred.

Finally, as NDPSC has demonstrated throughout this Motion, Plaintiff provides no factual basis by which this – or any court – could evaluate the claims presented in the Complaint. Accordingly, Plaintiff's case is not ripe for review.

III. PLAINTIFF'S REMAINING CLAIMS ARE UNSUPPORTED AND MUST BE DENIED

A. This Court Lacks Subject Matter Jurisdiction To Hear Plaintiff's Claim Concerning The OSM's Annual Program Evaluation Process.

Plaintiff makes the oblique argument that OSM's annual evaluation of the ND Program has failed to include and consider the Policy Memoranda. Motion at p. 23. Neither the Secretary nor OSM were included by Plaintiff in its Complaint. Accordingly, any allegation or claim Plaintiff may wish to assert here against OSM is improper and cannot be properly considered by this Court.

B. Plaintiff Is Not Entitled To Summary Judgment Under State Law.

Plaintiff erroneously asserts that, "NDPSC's failure to comply with SMCRA provisions requiring written submission to OSM of any changes to the state program is also a violation of state law." Motion at p. 24. Plaintiff's Complaint asserts no violation of N.D. Cent. Code ch. 38-14.1-03(12). Even if this Court were to consider Plaintiff's claim that NDPSC's issuance of the Policy Memoranda violates N.D. Cent. Code ch. 38-14.1-03(12), for the reasons set forth above, summary judgment must be denied as the Policy Memoranda are guidance documents that the NDPSC has the authority to prepare and issue and which do not violate SMCRA.

C. Plaintiff's Due Process Rights Are Not Being Denied By The NDPSC

Plaintiff erroneously asserts that "North Dakota's state surface mining program does not authorize citizen suits against the state, [and] the Memoranda create a serious gap in the due process rights of North Dakotans." Motion at 12. "To rectify this problem" Plaintiff's "first step" is the filing of its Complaint. *Id.* With all due respect, Plaintiff's allegations are wholly without

merit. Under N.D. Cent. Code, ch. 38-14.1-40, entitled "Citizen Suits", "any person having an interest which is or may be adversely affected may commence a civil action on the person's own behalf to compel compliance with [North Dakota's Surface Mining and Reclamation law], or any regulation, order or permit issued pursuant to this chapter." The "problem" claimed by Plaintiff does not exist. Plaintiff or its members may proceed with the filing of a citizen suit against the State should they believe they have been adversely affected by an action of the NDPSC.

CONCLUSION

For the reasons stated herein, North Dakota Public Service Commission respectfully requests the Court grant NDPSC's Motion for Summary Judgment because as a matter of law, the (1) NDPSC's Policy Memoranda are not changes to North Dakota's laws or regulations implementing its SMCRA Program, and (2) the Plaintiff has no standing to bring this suit and its claims are not ripe for judicial review. The North Dakota Public Service Commission also respectfully requests the Court award to the NDPSC the cost of its attorneys fees and expenses pursuant to 30 U.S.C. § 1270(d).

DATED: December 21, 2012.

Respectfully submitted,

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Attorneys for the Defendant North Dakota Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, the foregoing Defendant North Dakota Public Service Commission's Memorandum of Law in Support of Its Motion for Summary Judgment was served electronically to all counsel of record through the Court's ECF System.

s/ Paul M. Seby
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWEST DIVISION

DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant.	CIVIL ACTION NO. 1:12-CV-064

AFFIDAVIT AND DECLARATION IN SUPPORT OF DEFENDANT NORTH DAKOTA PUBLIC SERVICE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of North Dakota }
} ss.
County of Burleigh }

I, JAMES R. DEUTSCH, declare as follows

1. My name is James R. Deutsch. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on personal knowledge and are true and correct.

2. I am employed by the North Dakota Public Service Commission ("**NDPSC**") as the Director of the Reclamation Division. I have been employed by the NDPSC since 1974, and have continuously served as the Director of the Reclamation Division since January 1997.

3. The Reclamation Division administers North Dakota's surface coal mining and reclamation program, (the "**ND Program**"), approved by the U.S. Department of the Interior pursuant to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, *et seq*. ("**SMCRA**"). The Reclamation Division evaluates surface mining permit applications, permit revision and renewal applications, makes recommendations to the NDPSC Commissioners regarding permit issuance, and carries out inspections of surface coal mines to ensure compliance with the ND Program's requirements.

4. Since 1980, North Dakota's regulatory program has been a partnership effort between the State and the United States Office of Surface Mining Reclamation and Enforcement ("**OSM**"). On December 15, 1980, the Secretary of the Interior approved North Dakota's Program, granting North Dakota primacy to enforce SMCRA on North Dakota's non-federal and non-tribal lands. *See* 45 Fed. Reg. 82,214 (Dec. 15, 1980); *see also* 30 C.F.R. § 934.10. The ND Program is set forth in statute at N.D. Cent. Code ch. 38-14.1-01. As authorized in N.D. Cent.

Code § 38-14.1-03(11), the NDPSC may promulgate regulations as necessary to carry out the provisions of the ND Program and SMCRA. Those regulations promulgated by the NDPSC pursuant to N.D. Cent. Code § 38-14.1-03(11) are set forth at N.D. Admin. Code art. 69-05.2.

5. Since being granted primacy to enforce SMCRA in North Dakota, the ND Program has been reviewed annually by OSM. At no time in the last thirty-one years has OSM ever threatened to remove or limit the NDPSC's authority or primacy to implement the ND Program.

6. Since obtaining approval of its ND Program, NDPSC has routinely and timely submitted all changes in North Dakota's laws or regulations or changes that would affect the implementation, administration or enforcement of the ND Program to OSM for its review as program amendments.

7. The NDPSC currently has in effect twenty-one policy memoranda (collectively "**Policy Memoranda**") issued by the NDPSC for consultation by mine operators. The first Policy Memorandum was issued September 6, 1977. Over the course of my thirty-eight year career with the Reclamation Division, I have been involved in, or aware of the development of the twenty-three policy memoranda. The Policy Memoranda are issued to provide guidance on some of the provisions in North Dakota's reclamation law and rules. The Policy Memoranda do not replace or supersede any of the statutory or regulatory provisions of the ND Program or of SMCRA, nor are they imposed as conditions to surface coal mining permits issued by the NDPSC.

8. I have reviewed the Policy Memoranda attached hereto as Exhibits 1- 18 and 22-25, and affirm each is a true and correct copy of such Policy Memorandum.

9. The NDPSC has not promulgated Policy Memoranda attached hereto as Exhibits 1-18 and 22-25 as rules under North Dakota's Administrative Agencies Practice Act ("**AAPA**"), N.D. Cent. Code ch. 28-32.

10. Since I have been employed by the NDPSC, none of the Policy Memoranda have undergone the public notice procedures required for a formal rulemaking.

11. Since I have been employed by the NDPSC, none of the Policy Memoranda have been promulgated as rules or codified by North Dakota's legislature.

12. Since I have been employed by the NDPSC, the Policy Memoranda have not been published in North Dakota's Administrative Code, the Federal Register, or the Code of Federal Regulations.

13. Since I have been employed by the NDPSC, none of the Policy Memoranda have ever been used as or considered by the NDPSC or Reclamation Division staff as legislative rules or law.

14. Since I have been employed by the NDPSC, none of the Policy Memorandum have ever been used as the basis for any Notice of Violation ("**NOV**") issued to mining companies by the Reclamation Division. NOVs issued by the Reclamation Division clearly cite the specific provisions of North Dakota's reclamation law and rules that have not been complied with and that served as the basis for issuing the NOV. In addition to citing the specific section(s) of law or rule violated, NOV's may refer to a Policy Memorandum to provide for further clarification of the cited provision(s). However, in no instance was a Policy Memorandum the sole basis for issuing an NOV.

15. Since I have been employed by the NDPSC, the NDPSC and its staff have not, and do not, apply the text of the Policy Memoranda as mandatory or otherwise binding upon

NDPSC's decision-making regarding permitting or enforcement of mine operators under the ND Program.

16. Since I have been employed by the NDPSC, NDPSC and its staff consider the Policy Memoranda as guidance, issued the Policy Memoranda as guidance and continue to utilize the Policy Memoranda only as guidance.

17. Since I have been employed by the NDPSC, NDPSC and its staff have not, and do not, independently utilize the Policy Memoranda when issuing individual surface mining and reclamation permits pursuant to the ND Program or in enforcing the ND Program laws and regulations relating to SMCRA.

18. On November 8, 1988, NDPSC submitted to OSM proposed regulatory language regarding the 10-year revegetation bond liability period for areas disturbed by sedimentation ponds and associated activities to OSM for review as an amendment to the ND Program. A true and correct copy of NDPSC's transmittal to OSM is attached as Exhibit 23.

19. On July 31, 1989, NDPSC withdrew the proposed amendment regarding the revegetation bond liability period language from OSM because NDPSC had sufficient discretion to implement the proposed actions under existing legal authority. A true and correct copy of the Federal Register Notice confirming the NDPSC's withdrawal of the proposed amendment is attached as Exhibit 24.

20. On July 31, 1989, OSM, in response to NDPSC's withdrawal of the proposed bond release amendment, concurred with the NDPSC that the "amendment was unnecessary since [NDPSC has] adequate discretion within" the existing ND Program to act in accordance with the planned amendment. A true and correct copy of the OSM letter is attached as Exhibit 25.

21. On September 6, 1989, after receiving OSM's determination that amending the ND Program to include the previously approved bond release language "was unnecessary," NDPSC issued Policy Memorandum No. 20, which provides guidance to mine operators concerning the revegetation responsibility period for areas disturbed by sedimentation ponds and associated activities. A true and correct copy of the current version of Policy Memorandum No. 20 is attached as Exhibit 21.

22. By letter dated August 5, 2011, Plains Justice submitted a request for records to the NDPSC requesting with respect to the Policy Memoranda, "all records concerning the development of Policy Memo 18," and "all records concerning the development of Policy Memo 16 in its current form, including documentation of development of previous versions of Policy Memo 16 if relevant to the current version." No request for records related to Policy Memorandum No. 20 has been received by Plaintiff or Plains Justice. A true and correct copy of the Plains Justice request for records is attached as Exhibit 26.

23. By letter dated August 23, 2011, the Reclamation Division responded to Plains Justice's August 5, 2011 request for records, providing thirteen compact disks (CD's and DVD's) containing information related to the development and implementation of Policy Memoranda Nos. 16 and 18. A true and correct copy of the Reclamation Division's August 23, 2011 response letter is attached as Exhibit 27.

24. NDPSC maintains a mailing list of interested persons who have requested that they be notified of proposed and final policy memorandum proposed by the Reclamation Division. Plaintiff has requested it be included on the Reclamation Division mailing list so that it may receive copies of proposed and final policy documents issued by the NDPSC. Plaintiff has

been included on the Reclamation Division's mailing list since at least 1994. A true and correct copy of the mailing list maintained by Reclamation Division is attached as Exhibit 28.

25. On March 6, 1991 the Reclamation Division announced to interested parties, which included Plaintiff, the NDPSC's proposed Draft Water Replacement Policy Memorandum. A true and correct copy of the Reclamation Division's announcement to interested parties of the NDPSC's proposed Draft Water Replacement Policy Memorandum is attached as Exhibit 29.

26. The NDPSC proposed Draft Water Replacement Policy Memorandum was developed to provide guidance to mine operators concerning the implementation of the water supply replacement requirement set forth in SMCRA and the ND Program. The NDPSC's proposed Draft Water Replacement Policy Memorandum was modeled on the OSM Water Replacement Directive issued by OSM on October 19, 1988. A true and correct copy of the OSM Water Replacement Directive issued October 19, 1988 is attached as Exhibit 30.

27. On July 1, 1991, Plaintiff submitted comments to the NDPSC's proposed Draft Water Replacement Policy Memorandum. A true and correct copy of Plaintiff's July 1, 1991 comments to the proposed Draft Water Replacement Policy Memorandum is attached as Exhibit 31.

28. The NDPSC subsequently withdrew the proposed Draft Water Replacement Policy Memorandum from consideration and instead proposed to the public the substance of the water replacement policy as a rule to be promulgated and included in the ND Program. On November 6, 1996, the NDPSC announced to the public a proposed change to Article 69-05.2 of the North Dakota Administrative Code to include a definition of the term 'replacement of water supply.' A true and correct copy of the NDPSC's Notice of Proposed Rules and Public Hearing

announcing the proposed change to Article 69-05.2 to include a definition of the term 'replacement of water supply' is attached as Exhibit 32.

29. On February 4, 1997, the NDPSC held a public Reclamation Rulemaking hearing at which it considered the proposed change to Article 69-05.2 of the North Dakota Administrative Code to include a definition of the term 'replacement of water supply. Present at the February 4, 1997 Reclamation Rulemaking were three members of the Plaintiff. A true and correct copy of the February 4, 1997 NDPSC Attendance Sheet is attached as Exhibit 33.

30. At the February 4, 1997 public Reclamation Rulemaking hearing Plaintiff submitted written comments to the NDPSC's proposed change to Article 69-05.2 of the North Dakota Administrative Code to include a definition of the term 'replacement of water supply. A true and correct copy of Plaintiff's February 4, 1997 written comments are attached as Exhibit 34.

31. Since at least 1991, Plaintiff and its members have actively participated before the NDPSC by commenting on applications submitted by mine operators pursuant to the ND Program.

32. I have reviewed the Policy Memoranda and all other documents attached to this Affidavit and in light of my review of these documents, I affirm that:

a. Each of the documents were maintained in the normal course of the Division of Reclamation's business by persons with a business duty to maintain such records;

b. Each document was extracted from the Division of Reclamation's public records; and

c. Each document is an accurate and true copy of its original maintained by the Division of Reclamation.

FURTHER AFFIANT SAYETH NOT.

Dated this 21st day of December, 2012

James R. Deutsch

ACKNOWLEDGMENT

State of North Dakota }
} ss.
County of Burleigh }

Before me, the undersigned, a Notary Public, in and for said County and State, on this 21st day of December, 2012, personally appeared **James R. Deutsch**, to me known to be the person in and who executed the within and foregoing instrument of writing and acknowledged that he executed the same as his free act and deed.

My commission expires: 12-21-2018

Notary Public

ESTHER JANGULA
Notary Public
State of North Dakota
My Commission Expires Dec. 21, 2018

(Seal)

Bismarck, ND
Address