IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant, SECRETARY OF THE INTERIOR KEN SALAZAR, in his official capacity, Intervenor-Defendant.	)	Case No. 1:12-cv-64 INTERVENOR-DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Ken Salazar, Secretary of the United States Department of the Interior ("Intervenor-Defendant" or "Secretary"), hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56 on all issues raised in Plaintiff Dakota Resource Council's ("Plaintiff") complaint. This motion is supported by the Secretary's contemporaneously-filed memorandum of law.

The Secretary is entitled to summary judgment because Plaintiff does not have standing to assert its claims and Plaintiff has failed to assert a ripe challenge to any of the identified policy memoranda. Plaintiff's claims are also barred by the statute of limitations because the majority of the memoranda were issued well over thirty years ago, and all of the memoranda were issued more than three years prior to Plaintiff's lawsuit.

Respectfully submitted this 21st day of December, 2012.

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DAKOTA RESOURCE COUNCIL, Plaintiff, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, Defendant, SECRETARY OF THE INTERIOR KEN SALAZAR, in his official capacity, Intervenor-Defendant.	)	Case No. 1:12-cv-64 INTERVENOR-DEFENDANT'S MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Intervenor-Defendant Ken Salazar, Secretary of the United States Department of the Interior ("Intervenor-Defendant" or "Secretary"), submits the following memorandum of law in support of his cross-motion for summary judgment and in response to the Plaintiff Dakota Resource Council's ("Plaintiff") motion for summary judgment. As a threshold jurisdictional matter, the Secretary is entitled to summary judgment because Plaintiff does not have standing to assert its speculative claims in the absence of any site-specific action which threatens a concrete harm. In addition, Plaintiff's challenge is not ripe for judicial review because further factual development is required and because judicial review at this stage will unduly interfere with the administrative process by which the Secretary, through the Office of Surface Mining, Reclamation and Enforcement ("OSM"), and the North Dakota Public Service Commission ("NDPSC"), have already committed to review all of the pertinent policy memoranda during the upcoming 2013 state program evaluation. Plaintiff's claims are also barred by the statute of limitations because the majority of the identified memoranda were issued well over thirty years ago, and all of the memoranda were issued more than three years prior to Plaintiff's lawsuit. For these reasons, and for the reasons discussed further below, this Court should deny Plaintiff's motion for summary judgment and grant Intervenor-Defendant's cross motion for summary judgment.

STATEMENT OF UNDISPUTED FACTS

Pursuant to D.N.D. Civ. L.R. 7.1(A)(2), Intervenor-Defendant submits this Statement of Undisputed Facts consisting of the specific facts relied upon in this Response and Cross-Motion for Summary Judgment:

1. Policy Memoranda No. 2 was issued on April 27, 1978, reissued on August 10, 1984, and revised on March 8, 1995. Exhibit A at 1, Policy Memoranda.[1]
2. Policy Memoranda No. 3 was issued on April 27, 1978, and revised on August 10, 1984; August 7, 1986; February 25, 1988; and March 8, 1995. Exhibit A at 2-4.
3. Policy Memoranda No. 4 was issued on October 13, 1978, and revised on August 10, 1984 and March 8, 1995. Exhibit A at 5.
4. Policy Memoranda No. 5 was issued on March 7, 1979, and revised on August 10, 1984 and March 8, 1995. Exhibit A at 6-7.
5. Policy Memoranda No. 6 was issued on May 4, 1979, and revised on August 10, 1984 and March 8, 1995. Exhibit A at 8-9.
6. Policy Memoranda No. 7 was issued on August 2, 1979, and revised on August 10, 1984 and March 8, 1995. Exhibit A at 10-12.
7. Policy Memoranda No. 8 was issued on October 15, 1980, reissued on August 10, 1984, and revised on March 8, 1995. Exhibit A at 13-14.

[1] All of the policy memoranda are publicly available at http://www.psc.nd.gov /public/laws/othercoalmining.php (last visited Dec. 21, 2012).

8. Policy Memoranda No. 9 was issued on November 10, 1982, reissued on August 10, 1984; March 8, 1995, and December 19, 2001; and updated on July 12, 2006. Exhibit A at 15-19.
9. Policy Memoranda No. 10 was issued on April 29, 1983, reissued on August 10, 1984 and September 24, 1991, and revised on February 17, 1994. Exhibit A at 20-22.
10. Policy Memoranda No. 11 was issued on July 25, 1983, and revised on August 10, 1984 and March 8, 1995. Exhibit A at 23-25.
11. Policy Memoranda No. 12 was issued on February 12, 1985, and updated on March 8, 1995; December 19, 2001; and July 12, 2006. Exhibit A at 26-27.
12. Policy Memoranda No. 14 was issued on June 21, 1985, and revised on March 8, 1995. Exhibit A at 28-31.
13. Policy Memoranda No. 15 was issued on November 5, 1985, and revised on January 13, 1999. Exhibit A at 32-33.
14. Policy Memoranda No. 16 was issued in 1985, Exhibit B at 19, 1998 Annual Evaluation for North Dakota, *available at* http://odocs.osmre.gov/ (last visited Dec. 21, 2012); Policy Memoranda 16a was updated in July of 2006, Exhibit A at 34-54; and Policy Memoranda 16b was updated on September 4, 2012. Exhibit A at 55-61.
15. Policy Memoranda No. 17 was issued on January 20, 1987, and revised on March 8, 1995. Exhibit A at 62-67.
16. Policy Memoranda No. 18 was issued on February 3, 1987. Exhibit A at 68.

17. Policy Memoranda No. 19 was issued on July 15, 1987, and revised on May 18, 1988; March 8, 1995; July 30, 1997, and July 12, 2006. Exhibit A at 69-72.

18. Policy Memoranda No. 20 was issued on September 6, 1989, and revised on July 21, 1992; July 30, 1997; June 9, 2004; and January 29, 2009. Exhibit A at 73-75.

19. Policy Memoranda No. 21 was issued on August 1, 1995. Exhibit A at 76-77.

20. Policy Memoranda No. 22 was issued on June 9, 2004. Exhibit A at 78-79.

21. Policy Memoranda No. 23 was issued on July 12, 2006. Exhibit A at 80-82.

22. During evaluation year 2013, OSM's Casper Field Office will conduct a review of policy memoranda developed by the North Dakota Regulatory Program. Exhibit C at 3, Regulatory Performance Agreement for 2013, *available at* http://www.wrcc.osmre.gov/programs/oversight/NorthDakota /performance.shtm (last visited Dec. 21, 2012).

LEGAL BACKGROUND

I. Relevant Provisions of the Surface Mining Control and Reclamation Act ("SMCRA") and the Federal Regulations

In 1977, Congress enacted SMCRA to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). OSM administers and enforces SMCRA. 30 U.S.C. § 1211(c).

SMCRA establishes a program of cooperative federalism that allows the states to enact and administer their own regulatory programs within limits established by federal minimum standards and with limited backup enforcement authority by the Department of the Interior. *See* H.R. Rep. 218, 95th Cong., 1st Sess. at 57 (1977), *reprinted in* 1977

U.S. Code Cong. & Admin. News 593, 595; *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981). Under Section 503 of SMCRA, 30 U.S.C. § 1253, a State may assume primary jurisdiction over the regulation of surface coal mining within that State's borders by submitting a program proposal to the Secretary of the Interior. Section 503(a) provides:

> Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, . . . shall submit to the Secretary . . . a State program which demonstrates that such State has the capability of carrying out the provisions of this Chapter and meeting its purposes through -
>
> (1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Chapter; . . . .
> (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Chapter.

30 U.S.C. § 1253(a) (emphasis added). The State of North Dakota has an approved program, which is implemented by NDPSC.

The Secretary promulgated regulations implementing Section 503, which are found at 30 C.F.R. Parts 730-733. Part 732 addresses the procedures and criteria for approval or disapproval of submissions of state programs. While SMCRA itself does not address changes to state programs after their initial approval by OSM, the regulations at 30 C.F.R. § 732. 17 govern alterations or amendments to the elements of state programs that affect the "implementation, administration or enforcement of the approved State program."

In sum, when a proposed program amendment is submitted, OSM is required to publish in the Federal Register a notice of receipt of the amendment, with a summary of the amendment, an invitation for public comment, and a notice of any public hearings or meetings to be held. 30 C.F.R. § 732.17(h)(2). At the close of the public comment period, the written record is to be transmitted to the Director of OSM for decision. 30 C.F.R. § 732.17(h)(6).

According to the regulations, the applicable criteria for approval or disapproval of an amendment are the same as those for approval or disapproval of the original State program. 30 C.F.R. § 732.17(h)(10). Those criteria are that the OSM Director shall not approve an amendment unless, on the basis of the record, he finds that the amendment:

> provides for the State to carry out the provisions and meet the purposes of the Act and this Chapter within the State and that the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter.

30 C.F.R. § 732.15(a) (emphasis added). This regulation re-states the standards set in Section 503(a) of the Act, 30 U.S.C. § 1253, but the relevant terms have been more fully defined as follows:

> Consistent with and in accordance with mean:
>
> (a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act.
>
> (b) With regard to the Secretary's regulations, the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of the Act.

30 C.F.R. § 730.5 (emphasis added). State programs, then, must consist of elements that are no less stringent than SMCRA and no less effective than its implementing regulations. At the states' discretion, the state programs may be more stringent with regard to land use, environmental controls, and regulation of surface mining, *see* 30 U.S.C. § 1255(b) & 30 C.F.R. § 730.11, but in no case may state programs be "less stringent than" the federal statute.

SMCRA provides for either state or federal regulation to be exclusive within a state, but not both. *See* 30 U.S.C. §§ 1253(a), 1254(a); *see also* 30 U.S.C. § 1276(e) ("[a]ction of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law"). Therefore, once a state program has been approved, the state law and regulations become operative for the regulation of surface coal mining in the state, and the state officials administer the program. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001); *see also In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 518 (D.C. Cir. 1981) ("Under a state program, the state makes decisions applying the national requirements of [SMCRA] to the particular local conditions of the state.").

OSM's role under SMCRA, however, does not end once it has approved a state's program. SMCRA gives OSM ongoing authority to oversee the effectiveness of the state's implementation of its program. OSM's responsibilities in this area include inspection and enforcement duties in "primacy states," such as North Dakota. *See, e.g.,* 30 U.S.C. §§ 1267(a), 1271, 1254(b). For instance, Section 517(a) requires OSM to conduct "such inspections . . . as are necessary to evaluate the administration of approved

state programs . . . ." 30 U.S.C. § 1267(a). Section 521(a)(1) also provides for federal inspections where a state, after notification from OSM of "any information" providing reason to believe that a violation exists, fails to respond appropriately within ten days. 30 U.S.C. § 1271(a)(1). Section 521(a)(2) provides authority for immediate inspection, without state notification, where adequate proof of an imminent harm is presented. In addition to inspection authority, SMCRA provides the Secretary with authority to pursue direct federal enforcement in primacy states when necessary to ensure the SMCRA and federal standards are being met. *See, e.g.,* 30 U.S.C. § 1271.

II. Standards of Review

A. Administrative Procedure Act

Plaintiff asserts that it seeks judicial review of "final agency decisions by NDPSC pursuant to . . . the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the citizen suit provision of SMCRA, 30 U.S.C. § 1270." Pl.'s Mot. at 6. However, a state agency's actions, such as NDPSC in this case, are not reviewable under the federal APA. *See* 5 U.S.C. § 701(b)(1) (defining the term "agency" as used in the APA as "each authority of the Government of the United States"); *Hunter v. Underwood*, 362 F.3d 468, 477 (8th Cir. 2004) ("The APA does not grant federal courts jurisdiction to review actions of state or municipal agencies."). Rather, the APA may be used to guide a court where another federal statute, such as SMCRA, authorizes judicial review but does not provide standards for that review. *See Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998); *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995).

The APA specifies that agency action, including an alleged failure to act, may be overturned only where it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Gatewood v. Outlaw*, 560 F.3d 843, 846 (8th Cir. 2009). The standard of review of agency action under Section 702 of the APA is "highly deferential." *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 566 F. Supp. 2d 995, 997 (D.S.D. 2008). This standard of review is also a narrow one, which forbids a court from substituting its own judgment for that of the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *accord Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*); *Ranchers Cattlemen Action Legal Fund*, 566 F. Supp. 2d at 997. The court presumes the agency action to be valid, with the court's role merely to ensure that the agency considered all of the relevant factors and that its decision contained no "clear error of judgment." *Citizens to Pres. Overton Park*, 401 U.S. at 415-16. In making this determination, a court reviews whether the agency action was arbitrary and capricious based on the record that was before the decisionmaker at the time the decision was made. *Id.* at 420.

The APA provides for judicial review in cases were an agency has allegedly failed to act, such as pursuant to a mandatory, non-discretionary duty. *See* 5 U.S.C. § 706(1). However, a claim under this provision can only proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. S.*

Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original) ("*SUWA*"); *accord Saini v. Heinauer*, 552 F. Supp. 2d 974, 977 (D. Neb. 2008).

B. Summary Judgment

Summary judgment is appropriate where there is no genuine dispute of material fact, and judgment should be granted as a matter of law. Fed. R. Civ. P. 56(c). Because claims for review of agency actions are appropriately decided on the basis articulated by the agency (typically through review of the agency's administrative record, and without trial or discovery), such claims are properly decided through the mechanism of summary judgment. *See* 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2733 (3d ed. 2012); *Ill. Commercial Fishing Ass'n v. Salazar*, 867 F. Supp. 2d 108, 113 (D.D.C. 2012).

ARGUMENT

I. Plaintiff Does Not Have Standing Because It Has Not Identified A Justiciable Injury-In-Fact

"[T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' . . . . Second, there must be a casual connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant'. . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Sierra Club v. Robertson*, 28 F.3d 753, 757-58 (8th Cir. 1994) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

Plaintiff's standing fails at the first hurdle. To show an injury-in-fact, a plaintiff must show "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." *Id.* at 758 (citing *Lujan*, 504 U.S. at 560). Merely alleging an injury to some cognizable interest "is not enough"; rather, a plaintiff "must make an adequate showing that the injury is actual or certain to ensue." *Id.* In the present case, Plaintiff has not identified in either its complaint or summary judgment motion a single permit request, application, amendment, or termination decision as the basis for any alleged injury. Rather, Plaintiff relies exclusively on speculative, hypothetical future harms that are untethered to any site-specific action concerning any of the challenged policy memoranda. Accordingly, Plaintiff has not asserted a concrete injury-in-fact sufficient to invoke this Court's Article III jurisdiction.

In *Sierra Club v. Robertson*, the plaintiff environmental groups had initially challenged the issuance of a land and resource management plan for the Ouchita National Forest and two proposed timber sales approved pursuant to that plan. *Id.* at 754-57. Plaintiffs unsuccessfully sought two preliminary injunctions in the district court to halt the proposed timber sales and the district court subsequently granted summary judgment in favor of the federal defendants. *Id.* at 756. Then, at the time of appeal, plaintiffs abandoned their timber sale-specific claims and instead argued simply that the management plan itself violated the law apart from any site-specific management decisions. *Id.* The Eighth Circuit Court of Appeals found that the plaintiffs failed to assert an imminent injury in fact to support their standing on appeal because plaintiffs

had challenged the management plan itself but had not challenged any on-the-ground or site-specific actions flowing from that plan. *Id.* at 758. The Circuit Court reasoned that the plaintiffs' arguments were "devoid of reference to the particularities of any proposed site-specific action that might give rise to an injury in fact." *Id.* at 758-59 (also stating "the mere existence of the Ouchita Forest Plan does not produce an imminent injury in fact" and that "[f]inding an environmental injury based on the [p]lan alone, without reference to a particular site-specific action, would 'take[ ] us into the area of speculation and conjecture.'") (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

In reaching its conclusion that plaintiffs lacked standing, the *Robertson* court relied heavily on the Supreme Court's reasoning in *Lujan v. National Wildlife Foundation*, 497 U.S. 871 (1990). In *Lujan*, the Court struck down an attempt to seek judicial review of an entire Bureau of Land Management "land withdrawal review program" by which the agency classified and administered public lands, holding that the plaintiffs did not have standing to challenge the program wholesale. *Id.* at 890-94. In reaching that conclusion, the Court stated that the agency had not engaged in reviewable "final agency action" under the APA, and that program-wide flaws cannot simply be placed before the courts for "wholesale improvement." *Id.* at 891; *see also id.* at 894 ("The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher

level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.")

The same sound reasoning of the *Robertson* and *Lujan* cases also applies here. Plaintiff has not alleged a single concrete, and not merely conjectural, injury-in-fact as to the application of any of the five specifically identified policy memoranda. For example, Plaintiff has not identified any specific application of Memo No. 5's described policies, but instead challenges the hypothetical potential future application of such exception. *See* Pl.'s Mot. for Summ. J., ECF 13-1 at 13 ("Pl.'s Mot.") ("Memo 5 includes a provision that *appears to allow* case by case exceptions....") (emphasis added). Similar hypothetical harms are alleged regarding Memo No. 6. *Id.* at 16 (referring to "potential harm" and stating that "this sort of language *could be used* to keep small mines out of SMCRA permit areas" and "*if* such a precedent were established, it *could* ultimately lead to non-SMCRA jurisdictional surface mining") (emphasis added). For Memo No. 15, Plaintiff again engages in speculation, and fails to identify any circumstance in which the memo was applied for the allegedly impermissible purpose of allowing land formerly used for agricultural purposes to be reclaimed for industrial waste use.[2] *Id.* at 16-17. In

[2] To the extent Plaintiff implies that SMCRA prohibits land that was used for agriculture before mining from being used as a land fill, for coal ash or other waste, Plaintiff is mistaken. *See* Pl.'s Mot. at 16-17. SMCRA requires that the mine site be reclaimed "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). The regulations at 30 C.F.R. § 701.5 define "higher or better uses" as "postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses." This definition sweeps very

the absence of any such site-specific application, there is no way to judge whether the reclamation of a surface coal mining operation violates the state and federal standards for post-mining land uses. 30 U.S.C. §§ 1265(b)(2) & (c)(3). Plaintiff also challenges Memo No. 18 itself rather than any application in a specific permitting decision. For Memo No. 20, Plaintiff's own allegations make clear that it cannot allege a concrete injury-in-fact. As Plaintiff admits, "[t]he language of Memo 20 with regard to variances to the reclamation timeline *is too vague to determine whether or not it is consistent* with the federal Permanent Performance Standards." Pl.'s Mot. at 22 (emphasis added).[3] The allegations are based, once again, on hypothetical circumstances, as demonstrated by the heading: "Memo 20 . . . *potentially* allow[s] a shorter – and therefore less stringent – reclamation responsibility time period." *Id.* at 21 (emphasis added). Plaintiff has not, and cannot, allege a concrete injury-in-fact for any of the challenged policy memoranda.

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broadly. Thus with the exception of prime farmland, *see* 30 C.F.R. § 785.17(e)(1) (requiring the postmining land use for prime farmland be cropland), land that was used for agriculture prior to mining could properly be reclaimed in such a manner that it could be used for an airport, a factory, a subdivision, a landfill or numerous non-agricultural uses after mining. 30 U.S.C. § 1265(c). It is not uncommon for industrial waste disposal sites and landfills to be considered the "highest and best use" of property.

[3] Concerning Plaintiff's allegations about a "consultation" and "records request" regarding Memo No. 20, Pl.'s Mot. at 22, Plaintiff did submit a Freedom of Information Act request on March 2, 2012, for documents demonstrating an alleged "consultation" between OSM and North Dakota concerning that memorandum. However, since OSM has no duty to formally review or evaluate policy memoranda, OSM rightfully determined that no such consultation was required. *See* Pl.'s Mot. Ex. G (stating that "[t]he Director of OSM decided the Amendment was unnecessary and informed the Commission that adequate discretion existed within the State's regulatory program to do what the Amendment proposed"). Accordingly, OSM possessed no responsive records related to a consultation that never occurred.

Indeed, Plaintiff has failed even to identify the particular policy memoranda that give rise to its claims. Far from challenging a concrete, site-specific decision, Plaintiff has instead made clear that they are generally challenging a "pattern and practice" of behavior by NDPSC and OSM allegedly spanning more than three decades. *See* Pl.'s Mot. at 12 (generally referencing that "over more than thirty years, NDPSC has issued at least twenty-three (23) Memoranda").[4] Plaintiff hedges its bets by arguing that "at least five Memoranda" allegedly implement substantive changes to the state program, while still obliquely referring to "other memoranda" which are apparently "outside the scope of this litigation" – but Plaintiff never provides a concrete picture of which memoranda allegedly trigger a duty to process as state program amendments.[5] For all these reasons,

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[4] Plaintiff's motion for summary judgment also never really identifies with any certainty which (and how many) specific memoranda it is challenging. *Compare* Pl.'s Mot. at 5 (identifying twenty-three policy memoranda which allegedly lack a documentary record of evaluation and approval and stating that "[a]s a matter of law, NDPSC lacks authority to decide unilaterally and without documentation or due process that the memoranda do not constitute program amendments requiring OSM's formal review") and Pl.'s Mot. Ex. A (identifying twenty-three memoranda) *with* Pl.'s Mot. at 12 ("Other memoranda – Memo 3 for example – appear to require expert analysis beyond the scope of this litigation" and alleging that "[w]ith at least five Memoranda, NDPSC is effectively implementing substantive changes in the state program"). Since Plaintiff has only argued the merits of five policy memoranda, this Court's consideration of matters beyond the threshold jurisdictional issues should rightly be limited only to those five memoranda specifically identified and discussed by Plaintiff.

[5] To the extent the Court may look to the APA for guidance on reviewing Plaintiff's claims, the APA prohibits (in cases where the defendant is a federal agency) the type of overly broad, non-specific attack put forth by Plaintiff. Plaintiff attempts to challenge an alleged "pattern and practice" of NDPSC not submitting policy memoranda for OSM's approval as state program amendments. But programmatic challenges such as this are not cognizable under the APA. *See SUWA*, 542 U.S. at 63-64 (APA Section 706(1) claims alleging a "failure to act" are limited to a failure to take "a discrete action" that the agency is "required to take," which necessarily precludes "broad programmatic attack[s]"

Plaintiff cannot assert a justiciable injury-in-fact in support of its amorphous, non-specific challenges to the policy memoranda.

II. Plaintiff's Claims Are Not Ripe

Related to the flaws in its standing, Plaintiff has also failed to assert a ripe challenge to the referenced policy memoranda. The policies described in the memoranda cannot be clearly presented for judicial review until the relevant facts are more fully developed during OSM's upcoming 2013 annual performance review for North Dakota's state program, as well as in the context of some site specific action. Moreover, judicial intervention at this stage could unduly short-circuit the further administrative action being taken by OSM and NDPSC.[6]

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seeking wholesale review of an agency program; such review is only properly sought "in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made.") (quoting *Lujan*, 497 U.S. at 891). The Supreme Court has explained that this limitation in the APA is intended both to protect agencies from undue judicial interference, and to prevent courts from entering "general orders compelling compliance with broad statutory mandates" that would "inject[] the judge into day-to-day agency management." *SUWA*, 542 U.S. at 66-67. Plaintiff argues precisely this type of sweeping programmatic challenge, attacking over 20 different policy memoranda issued over a span of more than 30 years without alleging even one instance where application of any of these policy memoranda led to an action that was contrary to the approved state program, SMCRA, or the federal regulations. *See, e.g.,* Pl.'s Mot. at 7-8 ("[s]ince 1979, NDPSC has engaged in a pattern and practice of amending its [program] by ...Memoranda . . . without written submission to or approval by OSM"); *id.* at 8 ("[s]ince issuing its first surface mining policy memoranda in 1979, through more than 50 publications of and changes to NDPSC's twenty-three Memoranda to Mine Operators over the last three decades, NDPSC has consistently failed to comply with SMCRA....").

[6] Courts have recognized OSM's unique expertise in this field and have granted OSM substantial deference when it interprets SMCRA and the regulations due to the complex nature of SMCRA's regulatory scheme. *See, e.g., W. Va. Mining & Reclamation Ass'n v. Babbitt*, 970 F. Supp. 506, 518 (S.D. W. Va. 1997).

In determining whether an agency's decision is ripe for judicial review, a court must examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (internal citations and quotations omitted). In doing so, a court must consider: "(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." *Id.* In finding the plaintiffs' claims unripe for review, the *Ohio Forestry* Court recognized that "before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court . . . The [plaintiff] thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.* at 734 (internal citations omitted). As in *Ohio Forestry*, NDPSC must focus on a site-specific action and apply the policies described in the memoranda to that site-specific action before making a final decision, such as issuing a permit, recalculating a performance bond, or any number of other actions. Once the policy is applied to the facts of a particular circumstance, Plaintiff has ample opportunity to comment on those site-specific actions, and may bring a challenge to any allegedly improper policies at that time. In addition, all of the relevant factors dictate that Plaintiff's claims are not ripe for judicial review.

A. The Court Would Benefit From Further Factual Development of the Issues Presented Because Policy Memoranda Generally Do Not Require Review as State Program Amendments

The Court would certainly benefit from further factual development resulting from the planned administrative review of the policy memoranda. *See* Exhibit C at 3. Further factual development of this nature is important because, contrary to Plaintiff's beliefs, policy memoranda and other state program guidance documents do not *per se* warrant submittal to OSM as state program amendments. *Compare* 30 C.F.R. § 732.17(e) ("State program amendments *may* be required . . . .") (emphasis added) *with* 30 C.F.R. § 732.17(g) ("Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State *shall* immediately submit the proposed changes . . . as an amendment. . . .") (emphasis added).

OSM has adopted regulations at 30 C.F.R. § 732.17 to govern the state program amendment process. Paragraph (b) of 30 C.F.R. § 732.17 identifies when a state must notify OSM of conditions or events that may require a state program amendment. Paragraphs (b)(1) through (b)(7) of 30 C.F.R. § 732.17 further identify minimum conditions or events for which notification is mandatory. However, none of those paragraphs explicitly mentions state policy memoranda. Therefore, state policy memoranda do not *per se* warrant submittal to OSM for a determination as to whether they must be processed as state program amendments.

Plaintiff alleges that NDPSC failed to follow the notification procedures in 30 C.F.R. § 732.17(b)(1). But policy memoranda, which only provide further explanation or clarification concerning the approved State program and that do not substantively change

the operation of that program, do not require notification under the federal regulations.[7] Furthermore, even if the notification provisions were triggered, it does not follow that a program amendment would be required. As described in 30 C.F.R. § 732.17(c), the Director of OSM will determine whether or not a program amendment is actually required in a specific circumstance. "State program amendments *may* be required" when any one of three criteria are met. 30 C.F.R. § 732.17(e) (emphasis added). But the word "may" affords OSM with the discretion to determine whether or not a state program amendment is required in every case in which one or more of these criteria are met.

While it is true that the program amendment process has been, and under 30 C.F.R. § 732.17(g), must be initiated for changes to the laws or regulations of approved state programs involving only a single word (even for matters as small as correcting grammatical or spelling errors), the same is not true for revisions to policy memoranda.[8]

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[7] The use of such policy memoranda and guidance documents is commonplace in the regulatory scheme. *See, e.g.*, 71 Fed. Reg. 51684, 51690 (Aug. 30, 2006) ("States do not have to include in their approved programs all of the specific techniques and standards they use to assess whether other SMCRA requirements have been met. . . . Instead, the regulatory authorities, both States and OSM, have effectively addressed the standards to be used in these determinations or submissions by developing guidance documents that are not required to be in the approved regulatory programs."). OSM itself expands on issues needing clarification through issuance of Directives, which can be found online at http://www.osmre.gov/guidance/directives/directives.shtm.

[8] For example, if a state made changes, even minor grammatical changes, to the statutes or regulations that are part of the approved state program, a program amendment would be required. 30 C.F.R. § 732.17(g) ("Whenever changes to laws or regulations that make up the approved State program are proposed by a State, the State shall immediately submit the proposed changes to the Director [of OSM] as an amendment." (emphasis added)). This was the situation that Plaintiff refers to where Kentucky submitted a state program amendment after the Kentucky General Assembly changed the language of that state's surface mining law by deleting the word "primary" from a statute. 55 Fed. Reg.

Policy memoranda do not alter a single word of the existing state laws or regulations that make up the approved program. Policy memoranda merely expand on aspects of existing state programs that require further clarification, but do not themselves alter the language or overarching principles of the state laws and regulations. As such, they do not automatically require formal OSM review and approval as state program amendments. *Compare* 30 C.F.R. § 732.17(e) *with* 30 C.F.R. § 732.17(g).

OSM's Casper Field Office nevertheless does review North Dakota's policy documents on an informal basis prior to their issuance. This informal review is in addition to the review conducted for whatever policies have been submitted through the formal 30 C.F.R. § 732.17(b) notification process. Moreover, OSM reviews all pertinent policy memoranda in the course of its oversight responsibilities to ensure the approved state program complies with SMCRA and the applicable federal regulations. OSM's oversight responsibility of state regulatory programs takes several forms, including (1) an annual evaluation of state program administration as specified in 30 C.F.R. § 733.12(a)(1), and (2) federal inspections of surface coal mining and reclamation operations as provided for in 30 C.F.R. § 842.11(a)(2). *See also* OSM Directive, Oversight of State and Tribal Regulatory Programs (REG-8) p. 4 (Jan. 31, 2011), *available at* http://www.osmre.gov/guidance/directives/directive967nc.pdf (last visited Dec. 21, 2012). It is primarily through these established oversight vehicles that NDPSC's

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32618, 32619 (Aug. 10, 1990) (stating that "the amendment contained in SB-377 deletes the word 'primary' and adds new language to [Ky. Rev. Stat. § 350.020]"). Policy memoranda and other types of guidance documents, and changes to those documents, do not *per se* require a state program amendment under OSM's regulations.

actions, including their application of internal policies and guidance documents, are evaluated for compliance with the approved state program, SMCRA, and federal regulations.[9]

In addition, whenever OSM receives a request to evaluate a state program, OSM will conduct a review to evaluate that request. 30 C.F.R. § 733.12(a)(2). But Plaintiff elected not to follow this administrative process, which could have also triggered an evaluation of these policy memoranda by OSM.[10] Nonetheless, now that the issue has been brought to its attention (albeit through an unnecessary lawsuit), OSM's regional office will review NDPSC's policies as part of its annual program review in 2013. *See* Exhibit C at 3. Once OSM completes this annual review, it will determine whether the policy memoranda are in compliance with the approved state program, SMCRA, and the federal regulations, or require corrective action, if necessary. OSM's corrective action could include, but is not limited to, requesting the state rescind any offending policy or submit the policy as a state program amendment. The Court would benefit from the

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[9] In addition to these oversight methods, OSM contends that it was not necessary for any party to file a lawsuit in federal court in order to request that OSM review the policy memoranda. The best process for applying OSM's expertise in evaluating the compliance of the policy memoranda is to make a request according to the process laid out in the regulations. *See* 30 C.F.R. § 733.12(a)(2).

[10] In addition, OSM solicits input from identified stakeholders, including Plaintiff, for topics that may warrant oversight evaluations on an annual basis. Not only did Plaintiff fail to submit a request for oversight with OSM, Plaintiff also did not raise the matter of improper policy memoranda during these stakeholder input solicitations. Instead, Plaintiff merely filed a Freedom of Information Act request with OSM for records relating to the formal review of policy memoranda as program amendments, and, after receiving a response that OSM's search found no responsive records, Plaintiff sent a Notice of Intent to file a civil lawsuit rather than submitting a request pursuant to 30 C.F.R. § 733.12.

factual development resulting from this review; accordingly, judicial review at this point is premature and unnecessary.

The Court would also benefit from further factual development in the context of a challenge to a site-specific action applying the policies described in the memoranda. This would allow the Court to assess the actual application of the described policies rather than to issue an advisory opinion addressing the hypothetical scenarios repeatedly relied upon in Plaintiff's motion. *See, e.g.,* Pl.'s Mot. at 13 (arguing that "Memo 5 includes a provision that *appears to allow* case by case exceptions to [certain] standards" but not identifying any circumstance in which a case-specific exception has actually been made) (emphasis added); *see also id.* at 16 (speaking in hypothetical terms that memoranda language "*could* be used" to manipulate mine sites and "creates a *potentially* problematic precedent") (emphasis added).

B. Judicial Intervention Will Inappropriately Interfere With Administrative Action, and Delayed Review Will Not Cause Hardship

For many of the same reasons as above, judicial intervention at this stage would also unduly interfere with the administrative process. OSM and NDPSC have already committed to review the various policy memoranda as part of the annual performance review for 2013. *See* Exhibit C at 3 ("OSM will conduct a review of Policy Memoranda developed by the North Dakota Regulatory Program. The primary focus of this evaluation is to review all current Policy Memoranda to determine if any of the policies are inconsistent with the approved state regulatory program or contradict federal regulations as defined in [SMCRA]."). Judicial review at this point will unduly interfere

with the well-established regulatory process for oversight in the spirit of cooperative federalism. 30 C.F.R. § 733.12(a)(1). In addition, delayed review will not cause harm because Plaintiff has not identified any imminent risk of the challenged policies being applied in a site-specific mining decision. Plaintiff will have ample opportunity to comment on those site-specific decisions, and may bring a challenge to any allegedly improper policies at that time.

Because the Court's jurisdictional limitations prohibit the sort of premature adjudication requested by Plaintiff, these unripe claims must be dismissed. *Cf. Lujan*, 497 U.S. at 891 ("a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him").

III. Plaintiff's Challenges to the Policy Memoranda are Barred by the Statute of Limitations

To the extent Plaintiff has identified specific memoranda which it complains are the source of the alleged SMCRA violations, any challenge to the issuance of those memoranda are barred by the three-year statute of limitations applicable to claims brought against the State. The issuance dates, which range from 1977 to early 2009, readily make clear that any challenge to the memoranda themselves—in the absence of any identified site-specific application of the policies described in the memoranda—is time barred.

Since North Dakota has an approved state program in place, and Plaintiff has brought its claim directly against a state agency, the applicable statute of limitations derives from state law.[11] North Dakota provides for a three year statute of limitations in actions brought against the state or its employees and officials acting within the scope of their employment or office. N.D. CENT. CODE § 28-01-22.1. The relevant statutory language reads in its entirety:

> Actions against state—Limitation. When not otherwise specifically provided by law, an action against the state or its employees and officials acting within the scope of their employment or office must be commenced within three years after the claim for relief has accrued. For purposes of this section, the claim for relief is deemed to have accrued at the time it is discovered or might have been discovered in the exercise of reasonable diligence. This may not be construed as a waiver of immunity.

N.D. CENT. CODE § 28-01-22.1.

The five specific memoranda identified by Plaintiff were issued in 1979, 1985, 1987, and 1989. The exercise of reasonable diligence at the time of issuance would have led Plaintiff to discover any claim arising from the contents of these policy memoranda, as these documents are publicly available. Nor could Plaintiff argue that the statutory period should be reopened by virtue of any revisions to these policy memoranda. Of the

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[11] In the alternative, even if the general six-year federal statute of limitations at 28 U.S.C. § 2401(a) were to apply, Plaintiff's claims would still be time-barred. None of the five specifically identified memoranda were issued in the six years preceding the date of Plaintiff's complaint. *See supra* at 2-4, Statement of Undisputed Facts. Nor has Plaintiff distinguished between the policies as originally enacted and any subsequent revisions so as to justify any reopening of the statutory period. *See Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1350-51 (D.C. Cir. 1995); *see also Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 759-62 (8th Cir. 2009) (declining to adopt "continuing violation" theory to six-year statute of limitation found at 28 U.S.C. § 2401(a)).

five specifically discussed memoranda, none were revised within the three years preceding the filing of Plaintiff's complaint on May 30, 2012. Even including all twenty-three of the policy memoranda listed in Plaintiff's Exhibit A, only two were revised or updated within the three year limitation period (Memo Nos. 16a and 16b). However, Plaintiff makes no attempt to identify any specific harm or violation flowing from those two policy memoranda, or to demonstrate how the more recent updates may have created a meaningful change from the policy described at the time of the memo's initial issuance so as to justify reopening the statute of limitations. The mere act of revising, reissuing or updating a policy, without more, is not sufficient to reopen the statutory period. *See National Mining Ass'n*, 70 F.3d at 1350-51 (finding that arguments available at the time of a rule's initial adoption were barred by statute of limitations, and finding that "reopener doctrine" concerning statute of limitations may allow judicial review where an agency has undertaken to "reexamine its former choice"). Accordingly, Plaintiff's challenges to any policy memoranda are barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant's cross-motion for summary judgment should be granted in its entirety, and Plaintiff's motion for summary judgment should be denied.

Respectfully submitted this 21st day of December, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum of Law in Support of Intervenor-Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment contains 25 pages, exclusive of caption, tables of contents and authorities, certifications and exhibits, and complies with the page limitations set forth in the Court's Order dated October 12, 2012, and D.N.D. Civ. L. R. 5.1.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, the above-captioned document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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