

## Jeffcoat-Sacco, Illona

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**From:** Paul Seby <paul.seby@sebylarsen.com>  
**Sent:** Wednesday, April 03, 2013 4:51 PM  
**To:** Kalk, Brian P.; Deutsch, James R.; Jeffcoat-Sacco, Illona  
**Cc:** mimi.larsen@sebylarsen.com  
**Subject:** DRC v ND PSC- Policy Memo case  
**Attachments:** Exhibit A to Reply Brief (02009467).pdf; Exhibit B to Reply Brief (02009468).pdf; Reply Brief March 29 2013 (02009471).pdf; OSM Reply Brief (02009475).pdf; Ex. 1 to OSM's Reply Brief (02009474).pdf

Attached are as filed copies of the Reply Briefs of the ND PSC and the US Department of Interior in the policy memorandum case , filed last Friday.

The United States brief tracks the NDPSC's arguments concerning DRC's lack of legal standing , but also claims the case is not ripe for review because the challenged policy memorandum are undergoing "comprehensive review by OSM". We can discuss this issue together soon.

Thanks

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

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

**NORTH DAKOTA PUBLIC SERVICE COMMISSION'S  
REPLY IN OPPOSITION TO PLAINTIFF'S  
MEMORANDUM OF LAW IN REPLY AND OPPOSITION TO  
DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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## INTRODUCTION

As a matter of law, Plaintiff Dakota Resource Council's ("**Plaintiff**") Motion for Summary Judgment must be denied because the North Dakota Public Service Commission ("**NDPSC**") does not have a duty under 30 C.F.R. § 732.17(b) to provide to the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("**OSM**") for review and approval certain guidance documents issued in furtherance of North Dakota's federally approved Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, et seq. ("**SMCRA**") program ("**ND Program**"). Plaintiff's Motion is based on the strained and unsupported argument that the guidance documents provided by the NDPSC ("**Policy Memoranda**") constitute "**any action**" which "**alter[s] the interpretation** of North Dakota's surface mining reclamation laws" and thus must be submitted to the OSM for review and approval. Response at 2 (emphasis added). Plaintiff's vision of SMCRA is a 'mother-may-I' system where a primacy State first seeks OSM review and approval for every action it takes. Such a view, however, is wholly inconsistent with the extraordinary deference SMCRA grants to the States.

Plaintiff's Motion for Summary Judgment also must fail because Plaintiff cannot demonstrate that it has standing to bring its claims. Plaintiff has not suffered any real or threatened harm as a result of the existence and use of the Policy Memoranda. Plaintiff's Response is merely a re-hash of unsupported claims that Plaintiff and its members are suffering "adverse impacts" as a result of the NDPSC's Policy Memoranda. Response at 16. Plaintiff does not (and cannot) identify any "adverse impacts" or how any of the Policy Memoranda have resulted in an adverse impact. Rather, Plaintiff complains only of speculative events that "may" occur in the future based solely upon its erroneous and undocumented belief that NDPSC's

guidance documents result in regulatory measures that are less stringent than SMCRA requirements.

Lastly, this Court must dismiss Plaintiff's claims to the extent that Plaintiff is now asking this Court to rule on whether the Policy Memoranda are consistent with North Dakota law. The Eleventh Amendment to the United States Constitution establishes State sovereign immunity and prohibits suits against States in federal courts. The SMCRA citizen suit provision recognizes the Eleventh Amendment prohibition on suits against States in federal court. *See* 30 U.S.C. § 1270(a)(2).

For these reasons and for the reasons set forth below, Plaintiff's Motion for Summary Judgment must fail and the NDPSC's Motion for Summary Judgment be granted.

#### **ARGUMENT**

##### **I. SMCRA DOES NOT IMPOSE A NON DISCRETIONARY DUTY UPON THE NDPSC TO SUBMIT GUIDANCE DOCUMENTS TO OSM FOR REVIEW AND APPROVAL.**

###### **A. As A Primacy State, North Dakota Has Exclusive Jurisdiction To Provide Guidance Concerning Its OSM Approved SMCRA Program.**

Plaintiff's argument that the NDPSC has "violated a mandatory, non-discretionary duty under SMCRA to submit its Policy Memoranda in writing to OSM as program amendments," is unsupported by the plain meaning of 30 C.F.R. § 732.17 and ignores that SMCRA grants to States with primacy the exclusive jurisdiction to design, enforce and interpret their SMCRA programs. Response at 5. When, as with North Dakota, a State achieves primacy under SMCRA, it "assume[s] **exclusive jurisdiction** over the regulation of surface coal mining and reclamation operations" on non-Federal and non-Indian lands within its borders. 30 U.S.C. § 1253(a) (emphasis added). Exclusive jurisdiction to regulate surface coal mining and reclamation does

not mean that the State and the federal government have “concurrent jurisdiction.” *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987). In allowing States to achieve and retain exclusive jurisdiction under SMCRA, 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 v. W. Va. Coal Ass’n*, 248 F.3d 275, 295 (4th Cir. 2000). A State’s enacted laws and regulations must, “at minimum, meet the minimum federal standards, with the federal standards serving only as the floor and not the ceiling for the state programs.” *Pennsylvania Federation of Sportsmen’s Clubs, Inc. v. Hess*, 297 F.3d 310, 316 (3rd Cir. 2002).

Accordingly, once a primacy State has in place an OSM approved SMCRA program, it is the State and not OSM that enforces that State’s program and interprets how the program is to be implemented. Plaintiff’s Response ignores this legal construct and instead argues that “the decision whether a given program change constitutes a program amendment **can only be made by OSM**, acting in its proper SMCRA state program review capacity.” Response at 5 (emphasis added). Plaintiff’s argument is not correct. A State with primacy designs its own SMCRA program, enacts laws and promulgates rules that implement its program and, accordingly, interprets and provides guidance to operators as to how that program is implemented. Therefore, it is the State that makes the decision whether a program amendment is warranted by the State’s action. Because it is the State and not OSM that makes this decision, SMCRA provides that, “the **State regulatory authority**” notifies OSM “of any **significant events or proposed changes** which affect the implementation, administration or enforcement of the approved State program.” 30 C.F.R. § 732.17(b) (emphasis added). However, OSM can require a State to modify its program if SMCRA and/or the OSM’s rules are amended. 30 C.F.R. § 732.17(d).

Further, Plaintiff grossly overstates the scope of 30 C.F.R. § 732.17 in claiming that the OSM regulation “uses broad and sweeping language that applies to **any agency action**, including the Policy Memos that **alter the interpretation** of North Dakota’s surface mining reclamation laws.” Response at 2 (emphasis added). Plaintiff’s contention that “any agency action” that “alter[s] the interpretation” of the ND Program must be first presented to OSM for review and approval is contrary to the plain meaning of 30 C.F.R. § 732.17.<sup>1</sup> Section 732.17(a) provides that “any alteration of an approved State program whether accomplished on the initiative of the State regulatory authority or the Director” are considered as “amendments” to the State’s SMCRA program and must be approved by OSM. What constitutes an “alteration” to a State program is clearly established under SMCRA. For instance, a State “shall immediately submit” to OSM as an amendment to its State program when “**changes to laws or regulations** that make up the approved State program” occur. 30 C.F.R. § 732.17(g), *see also* 30 C.F.R. § 731.17 (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.). Nowhere within 30 C.F.R. § 732.17 does it require actions that may “alter the interpretation” of a State’s program to be reviewed and approved by OSM as Plaintiff erroneously asserts. An “alteration” of a State program is a modification or a change of that program. *See* 30 C.F.R. § 732.17(b). The issuance of a document that provides a general guidance memorandum for mine operators explaining how the ND Program is implemented is

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<sup>1</sup> It is clear from Plaintiff’s erroneous assertion that “Policy Memo 18 allows the improper extension of reclamation deadlines without providing any opportunity for public comment **or formal review by OSM**,” that Plaintiff believes in fact every administrative action taken by the NDPSC to implement the ND Program should be reviewed by OSM. Response at 6 (emphasis added).

not an alteration of that Program, it's a further explanation of how the Program operates - nothing more.

Further, requiring that “any agency action” must be first presented to OSM for review and approval is contrary to the “extraordinary deference” that SMCRA affords to States. *Bragg*, 248 F.3d at 293-94. A primacy State - and not OSM – has “exclusive” authority in implementing its program. *Id.* at 294. Primacy States do not seek OSM’s approval before the State takes ‘any action’ associated with the implementation of the State’s SMCRA program. Were that the case there would be no need to grant States primacy since the States would effectively have no real authority in the implementation of SMCRA. *See Pennsylvania Coal Association v. Babbitt*, 63 F.3d 231, 238 (3d Cir.1995) (Explaining that if the States were required to adopt the same SMCRA regulations that OSM has in place, “[t]here would be no reason to allow the states to impose their own regulations.”).

**B. The NDPSC’s Policy Memoranda Are Not Significant Events Or Changes To The ND Program.**

Plaintiff alleges that “NDPSC has failed to perform its mandatory, non-discretionary duty to submit to OSM for review all alterations and changes to the approved state surface mining program – namely, the Policy Memos.” Response at 4-5. Plaintiff’s claims that 1) that SMCRA places a “non-discretionary duty” on the NDPSC to submit the Policy Memoranda to OSM for review and approval; and 2) that the Policy Memoranda “alter[ ] and change[ ]” the ND Program are not supported by either evidence or law.

First, SMCRA places no “non-discretionary duty” on primacy States to submit guidance documents to OSM for review and approval. Only “significant events or proposed changes which affect the implementation, administration or enforcement of the approved State program,” must

be submitted to OSM for review and approval. 30 C.F.R. § 732.17(b). Second, a State's guidance documents, like the NDPSC's Policy Memoranda, which provide only general guidance on how a State's existing regulatory program may be implemented, is not a "significant event or proposed change" that requires OSM review and approval. As detailed extensively in North Dakota's Motion for Summary Judgment, guidance documents are not legislative rules that require promulgation as a legislative rule under the federal Administrative Procedure Act or the North Dakota's Administrative Agencies Practice Act, N.D.C.C. § 28-32. *See* North Dakota Motion at 15-19. Rather, guidance documents are merely "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." *Community Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987). In North Dakota, a State administrative agency is also expressly exempt under State law 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 v. N.D. Dep't of Human Svcs.*, 756 N.W.2d 182, 188 (N.D. 2008).

Plaintiff contests NDPSC's demonstration that the Policy Memoranda are guidance documents stating that, "DRC...contest[s] the characterization of each Policy Memo as a document "which provides guidance." Response at 3. Plaintiff however, provides no facts to support its assertion that the Policy Memoranda are not guidance documents and instead asks this Court to determine "whether SMCRA... require[s] (1) NDPSC to submit to OSM each Policy Memo currently in effect or formulated in the future and (2) OSM to provide public notice of the

receipt of each memo and of the agency's determination whether the memo requires evaluation as a proposed state program amendment before NDPSC actually implements it." *Id.* Notably, for the Court to consider if there was a duty for the NDPSC to submit its Policy Memoranda to the OSM for review and approval there must be a showing by Plaintiff that the Policy Memoranda are not merely guidance, but rather that they constitute a "significant event or proposed change" to the ND Program. Noticeably absent from Plaintiff's Complaint, Motion for Summary Judgment and Response is any showing that the Policy Memoranda are "significant event[s] or proposed change[s]" that "affect the implementation, administration or enforcement" of the ND Program. 30 C.F.R. § 732.17(b).

Plaintiff avoids its burden of proof by claiming instead that the Policy Memoranda "are technical in nature...[and] [i]t would take an expert, like an OSM official, reviewing the Policy Memos in detail, taking public comment, and consulting other agencies as SMCRA requires, to determine whether or not the Policy Memos are consistent with the letter and spirit of SMCRA as implemented."<sup>2</sup> Response at 6. Plaintiff also "contests NDPSC's assertion, unsupported by any administrative record to the contrary, that NDPSC and its staff have not, and do not, independently utilize the Policy Memoranda when issuing individual surface mining and reclamation permits." Response at ¶ 28. First, the statements and facts that Plaintiff takes issue with are set forth in the sworn affidavit of Mr. James Deutsch, Director of the Reclamation Division at the NDPSC. Second, Plaintiff provides no evidence to contradict Mr. Deutsch's truthful statements, offering only general and unfounded protestations. Third, there is no administrative record before this Court because Plaintiff has not identified any NDPSC final

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<sup>2</sup> Plaintiff cites to no provision of SMCRA that supports its theory of how OSM should conduct a review of the Policy Memoranda, and in fact no such review process exists.

agency action. Plaintiff fails to demonstrate any facts to support its allegations that the Policy Memoranda must first be presented to OSM for review.

Plaintiff's response also presents a new argument, namely, that OSM has a legal responsibility to conduct a review of the Policy Memoranda to determine whether they "are consistent with the letter and spirit of SMCRA as implemented."<sup>3</sup> Response at 6. First, under SMCRA, North Dakota - not OSM - makes the determination of whether any Policy Memoranda are "significant event[s] or proposed change[s]" to the ND Program that require OSM review and approval. 30 C.F.R. § 732.17(b). A State with primacy has the "exclusive authority" to implement its SMCRA program within the State. 30 U.S.C. § 1253(a). That exclusive authority includes providing operators with guidance on how that program is implemented. Second, the standard of review is not whether the Policy Memoranda are consistent with "letter and spirit of SMCRA." Response at 6. The Policy Memoranda interpret the ND Program - State law - and as such any review of the Policy Memoranda would have to be to determine whether they are consistent with the ND Program.<sup>4</sup> Since achieving primacy to enforce SMCRA in North Dakota, the ND Program has also 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 to North Dakota's Motion for Summary Judgment, Affidavit of James R. Deutsch

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<sup>3</sup> Plaintiff also remarks at some length that the "NDPSC and the Secretary's offer to evaluate the Policy Memos does not address the underlying SMCRA violations." Response at 17. First, as set forth within North Dakota's Motion for Summary Judgment and here, NDPSC has not violated SMCRA. Second, NDPSC has never, as Plaintiff erroneously asserts, "acknowledge[ed] at this late stage that the Policy Memos require review." Response at 21. NDPSC has never stated in its pleadings to this Court that the Policy Memoranda require OSM's review. The OSM's current review of the Policy Memoranda is being conducted in the course of the OSM's annual evaluation of the ND Program and has no bearing on Plaintiff's claims.

<sup>4</sup> As detailed in Section III *infra*, a review of whether the Policy Memoranda comply with State law is prohibited under the Eleventh Amendment and cannot be brought before this Court.

in Support of Defendant North Dakota Public Service Commission's Motion for Summary Judgment ("Affidavit"), ¶5.

**C. Plaintiff's Reliance On *Ohio River Valley Environmental Coalition, Inc. et al. v. Michael Callaghan* Is Misplaced.**

Plaintiff cites to the Order of the U.S. District Court for the Southern District of West Virginia in *Ohio River Valley Environmental Coalition, Inc. et al. v. Michael Callaghan, et al.*, Civil Action No. 3:00-0058 (September 2, 2001), as precedent that other "district courts<sup>5</sup> have upheld challenges to unapproved state surface mining 'guidance documents' similar to DRC's challenge in this action." Response at 11. Plaintiff's argument is based upon a mischaracterization of the District Court's holding in *Ohio River Valley*. The Court in *Ohio River Valley* did not "[uphold a] challenge[ ] to unapproved state surface mining 'guidance documents.'" Rather, on a motion to supplement Defendant Callaghan's Motion for Summary Judgment in light of the Fourth Circuit's ruling in *Bragg*, the Court reaffirmed that Ohio River Valley's claims concerning a guidance document issued by the West Virginia Department of Environmental Protection's Division of Mining & Reclamation could proceed before the Court.

Moreover, at this point, the Court finds it is premature to decide the merits of Plaintiffs' claims, which includes any showing of actual harm. As the Court stated in its Memorandum Opinion and Order entered on June 15, 2000, '[w]hether that document constitutes a change in the state program covered by these regulations **is an issue to be resolved**, but Plaintiffs have stated a valid claim.' *Memorandum Opinion and Order* at 7.

Exhibit C p. 8 to Plaintiff's Response (emphasis supplied).

The Court never resolved Ohio River Valley's claims because the parties entered into a Consent Decree that settled all outstanding claims. See Exhibit D to Response. Under the terms of the

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<sup>5</sup> While Plaintiff indicates more than one district court has spoken to the same issues that are before this Court, it provides no case references other than to *Ohio River Valley*.

Consent Decree a quality review panel was established to review the hydrologic impacts at issue in the guidance document and prepare a written opinion on the issue. *See id* at 7. The Consent Decree contains no findings or agreement on whether the guidance document in question constituted an amendment to the State of West Virginia's SMCRA program. As such, Plaintiff's characterization that "other federal district courts have upheld challenges to unapproved state surface mining 'guidance documents'" issued in furtherance of an OSM approved SMCRA program is both misleading and not correct. Response at 11.

## **II. THE COURT LACKS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFF'S CLAIMS.**

### **A. SMCRA Citizen Suit Claims Must Still Meet Article III Standing Requirements.**

When a Plaintiff lacks Article III standing to bring its claims, a Court has no subject matter jurisdiction over the suit. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). "To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." *Young Am. Corp. v. Affiliated Computer Servs., Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Further, because Plaintiff is an organization, it must prove that it has associational standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Establishing that one member of Plaintiff has standing to

bring the claims alleged here, is sufficient to meet the associational standing requirement. *See Ward v. Seldin*, 422 U.S. 490, 511 (1975). Whether Plaintiff has standing is “determined as of commencement of the suit,” and it is Plaintiff’s burden to demonstrate that it has standing. *Lujan*, 504 U.S. at 560, 570 n.5.

Bringing a SMCRA citizen suit does not, as Plaintiff claims, alleviate Plaintiff’s burden to demonstrate to this Court that it has jurisdiction to hear Plaintiff’s claims. “Defendants’ arguments regarding ripeness, final agency action, exhaustion of administrative remedies and statute of limitations ignore the breadth of SMCRA’s citizen suit authorization, which places no such restrictions on a citizen suit.” Response at 16. Plaintiff’s assertion that parties who file SMCRA citizen suits are exempt from having to affirmatively demonstrate that a federal court has subject matter jurisdiction to hear their claims is wrong. As NDPSC explained in its Motion for Summary Judgment, the Supreme Court has spoken to the issue of whether plaintiffs are required to demonstrate an injury-in-fact when suing the government to take an action purportedly required by law. 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 Has Not Demonstrated That It Has Standing To Pursue Its Claims.**

**1. Plaintiff’s Affiants do not cure Plaintiff’s failure to establish standing.**

Plaintiff’s Complaint lacked the requisite demonstration of standing to invoke this Court’s subject matter jurisdiction under Article III of the U.S. Constitution. In an apparent attempt to cure its failure to demonstrate standing at “commencement of the suit”, Plaintiff

submitted the affidavits of Mr. Gene Wirtz, a member of Plaintiff, and Mark Trechock, a former Staff Director of Plaintiff with its Response. *See Lujan*, 504 U.S. at 560, 570 n.5. *See* Exhibits B and E to Plaintiff's Response. However, neither Mr. Wirtz's or Mr. Trechock's affidavits demonstrate that either Plaintiff or any of its members have suffered or will suffer any harm as a result of the challenged Policy Memoranda.

Plaintiff's Mr. Wirtz merely states that he is a member of Plaintiff and has resided and farmed for 34-years on land that is "in close proximity" to the Falkirk Mine. Exhibit B ¶ 4 to Plaintiff's Response. The Falkirk Mine is a surface coal mine located in Underwood, North Dakota that has been in operation since 1978 and produces "approximately 7 million tons of coal per year."<sup>6</sup> The Falkirk Mine "reclaims about 400 acres of land annually."<sup>6</sup> As a surface mine operating in North Dakota, the Falkirk Mine is subject to regulation by the NDPSC under the ND Program.

Plaintiff claims that Mr. Wirtz's affidavit shows that he has "suffered and will continue to suffer demonstrable harms directly attributable to the Policy Memos." Response at 13. However, Mr. Wirtz's affidavit does not demonstrate that he has suffered any harm as a result of any of the Policy Memoranda, nor does it suggest any future harm is imminent or threatened. Nowhere within Mr. Wirtz's affidavit does he allege that he has ever personally suffered any direct harm as a result of the NDPSC's application of any of the Policy Memoranda to any permitting or other regulatory action concerning the Falkirk Mine. Instead, Affiant Wirtz states:

"The health of my family depends on good air and water quality in rural McLean County, **which may be negatively affected** by mining and reclamation activity that does not meet federal standards." Exhibit B ¶ 6 to Plaintiff's Response.

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<sup>6</sup> <http://www.nacoal.com/operations/falkirk.html>

“I believe that the quality and quantity of water in our well and our water aquifers **may be negatively affected** by mining and reclamation activity that does not meet federal standards.” *Id.* ¶ 7.

“I believe that bond release provisions for coal ash disposal sites weaker than federal standards **may create groundwater hazards** ...” *Id.* ¶ 8.

“I believe that any relaxation of federal standards for handling of topsoil **may reduce** the productivity of farmland in this area and affect my property value and the viability of my agricultural livelihood.” *Id.* ¶ 9.

“Our safety on roads... **may be affected** by any change to the North Dakota surface mining program that allows permit exemptions for public roads.” *Id.* ¶ 10.

Affiant Wirtz’s declarations contain no reference to any actual harm that he, his family or even his community has suffered as a result of the Falkirk Mine, let alone the application of any Policy Memoranda to a permitting or bonding decision related to the Falkirk Mine. All of Affiant Wirtz’s claims of ‘harm’ are to future, speculative and unknown events.

Like Mr. Wirtz’s affidavit, Mr. Trechock’s affidavit contains no demonstration of any harm that has been or will be suffered as a result of the existence of any of the Policy Memoranda. Affiant Trechock asserts that as the former State Director for Plaintiff the Dakota Resource Council (“**DRC**”), beginning approximately eighteen years ago, he participated in rulemakings before the NDPSC concerning “the replacement of water wells that had been destroyed in the process of mining.” *See* Exhibit E ¶4 to Plaintiff’s Response. Affiant Trechock also asserts that beginning on August 3, 1998 he engaged with “OSM and the NDPSC over the low rate of final bond release and the ineffectiveness of ‘rolling bonds’ created by Policy Memo 18.” *Id.* at ¶ 5. From 1998 through January 23 2012, Affiant Trechock describes several instances of where he, on behalf of the DRC, apparently “engaged” State and federal policy and lawmakers on issues concerning and related to Policy Memorandum No. 18. *See id.* at ¶¶ 6-12.

While Affiant Trechock demonstrates that he and the DRC have been aware of Policy Memorandum No. 18 for at least fourteen years before this Complaint was filed, he does not identify any real or threatened harm from the NDPSC's application of the Policy Memorandum.<sup>7</sup> Mr. Trechock's expression of his opinion that bond releases occurred too slowly in North Dakota is not evidence of any harm that has been suffered by himself or Plaintiff.

**2. Plaintiff cannot establish harm attributable to the NDPSC's issuance of Policy Memoranda No. 18.**

Plaintiff claims that Policy Memorandum No. 18 "does away with – the ordinary financial incentive for release of performance bonds" and "allows coal mine operators to delay the completion of reclamation activities through decades-long reclamation timelines that are inconsistent with and less stringent than SMCRA itself allows." Response at 5-6. However, Policy Memorandum No. 18 does none of the things that Plaintiff alleges, nor has the NDPSC ever used the Memorandum as a legislative rule or a law. (*See* Deutsch Affidavit ¶¶13, 16).

As detailed in NDPSC's Motion for Summary Judgment at pp. 29-31, 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. Policy Memorandum No. 18 does not affect any of the contemporaneous reclamation requirements under the ND Program or similar provisions in the OSM regulations. For instance, both the NDPSC and OSM rules have specific performance standards on

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<sup>7</sup> Affiant Trechock also confirms the NDPSC's understanding that the DRC has had constructive notice of the Policy Memoranda for more than a decade. *See* North Dakota's Motion for Summary Judgment at 38-39. Accordingly, Plaintiff's action is time barred under N.D.C.C. § 28-01-22.1 as any action against the NDPSC must have been brought by Plaintiff within "three years after the claim for relief has accrued."

contemporaneous backfilling and grading. *See* N.D. Admin. Code § 69-05.2-21-01 and 30 C.F.R. § 816.101. North Dakota's reclamation law also contains a specific performance standard with a contemporaneous reclamation requirement that is not in SMCRA or OSM's regulations and is therefore **more stringent** than SMCRA. N.D.C.C. § 38-14.1-24(14), requires mine operators to complete all reclamation work through the initial seeding within three years of completion of surface coal mining operations unless otherwise prescribed by the NDPSC. Any variance from this three-year contemporaneous reclamation that is proposed by a mine operator must be explained and justified in the reclamation plan required under N.D. Admin. Code § 69-05.2-09-11 and approved as part of the permit or revision approval process. Policy Memorandum No. 18 in no way changes or affects these reclamation requirements contained in the ND Program or under SMCRA.

There has never been a judicial determination of an insufficient bond approved by the NDPSC nor has Plaintiff shown that the NDPSC has failed to ensure that the bond amount established for a mine operation is sufficient to cover the worst-case condition in the consolidated bond area. The ND Program clearly vests the NDPSC with the authority to "set the bond amount sufficient to complete the reclamation plan in the event of forfeiture" and that the "bond must cover that area of land within the permit area upon which the permittee will initiate and conduct surface coal mining and reclamation operations". N.D.C.C. §§ 38-14.1-16-02, 38-14.1-16-03. In addition, "permit area" is defined under N.D.C.C. § 38-14.1-02-15 as "the area of land approved by the commission for surface coal mining operations which shall be readily identifiable by appropriate markers on the site." With Policy Memorandum No. 18, the NDPSC does not limit this definition to be the boundary of each individual permit area if a mine has

multiple permits. The permit area for a particular mine is the outside boundary of all permits at that mine. *See* N.D.C.C. § 38-14.1-02-15.

Nowhere within Plaintiff's discussion of the NDPSC's use of Policy Memoranda No. 18 (or in any of Plaintiff's vague references to the Policy Memoranda) can it or does it show that any of the Policy Memoranda regulate the conduct of Plaintiff or its members, or of operators who must comply with the ND Program. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967). The Policy Memoranda "do not command anyone to do anything or to refrain from doing anything." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). 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.* Plaintiff's cause of action remains unripe as Plaintiff has failed to demonstrate any instance where the Policy Memoranda have been applied such that Plaintiff or its members are harmed.

**3. Plaintiff has not established any harm has or will result from the NDPSC's approval of the increase in the amount of the bond for the Falkirk Mine.**

Plaintiff relies on the February 12, 2012 Memorandum Re: Increase to self-bond SB-9503-1 covering permits NAFK-9503, NAFK-8705, and NAFK-8405 held by Falkirk, Case No. RC-12-67 (the "Falkirk Memo") (Exhibit A to Plaintiff's Response) as the basis for its claim that the NDPSC utilizes "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." Response at ¶ 26. Plaintiff mischaracterizes the Falkirk Memo, because nowhere within the Memo does it state that the NDPSC is using any Policy Memoranda as the

basis for its decision to approve Falkirk's request to increase the self-bond. *See* Falkirk Memo at 1.

To begin with, the NDPSC rules, as well as OSM regulations, allow self-bonds as one of the performance bonding options available to operators. *See* N.D. Admin. Code § 69-05.2-12-02 and 30 C.F.R. § 800.12. In 1986, the NDPSC amended its regulations to allow for self-bonding by an operator and adopt rules similar to what OSM's regulations provide for self-bonding. *See* N.D. Admin. Code § 69-05.2-12-05.1 and 30 C.F.R. § 800.23. The NDPSC submitted its proposed amendment to the ND Program to OSM on February 10, 1987 and the OSM approved the NDPSC's proposed amendment on February 2, 1988. *See* 30 C.F.R. § 934.15. Since the self-bonding rules became effective, all self-bonds and adjustments are approved by the NDPSC Commissioners. Collateral bonds are also approved by the NDPSC, but surety bonds are approved by staff. 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 Deutsch Affidavit.

The Falkirk Mining Company filed Revision No. 29 to Permit No. NAFK-8405 in 2011 and it included with its Revision an update to the reclamation cost estimate for its consolidated bond area that covers Permits NAFK-8405, NAFK-8705, and NAFK-9503. *See* Exhibit A at 1 to Response. In addition to updating the worst case reclamation cost estimate to reflect the increased variable costs, pursuant to the ND Program, Revision 29 also included a new mining and reclamation scenario for the cost estimate. *See* N.D. Admin. Code § 69-05.2-09-11-02, N.D. Admin. Code § 69-05.2-12-08 and Policy Memo 16. After review of the Falkirk permit Revision No. 29, the NDPSC determined that bond had to be no less than \$74,407,608 as required by N.D.

Admin. Code § 69-05.2-12-07. See the attached January 18, 2012 bond determination letter at Exhibit A. Falkirk then filed bond documents that increased the total bond amount covering the consolidated bond area to \$74,450,000, **an increase of \$14,235,000**. See the attached February 6, 2012 letter from Falkirk at Exhibit B. Plaintiff makes no showing that any Policy Memoranda were improperly used as a legislative rule in connection with the increase in the Falkirk bond or that any harm has or will result from increasing the bond amount. In approving Revision 29 and Falkirk's bond increase in 2012, the NDPSC did what is required by the ND Program to ensure the Falkirk's bond amount is adequate to cover the estimated reclamation costs.

Further, Policy Memorandum No. 16 does not affect the final bond release on a permit. Policy Memorandum No. 16 permits the calculation of the bond amount based on the worst-case reclamation condition. The procedures for calculating worst-case reclamation cost under Policy Memorandum No. 16 are similar to those in the OSM Bonding Handbook, OSM's guidance document for determining the bond amount.<sup>8</sup> The NDPSC's calculation of the bond amounts as discussed in Policy Memorandum No. 16 have been reviewed several times by OSM as part of their annual oversight process, mostly recently in 2010. At no time has the OSM found that manner in which the NDPSC calculates bond amounts to be inconsistent with the ND Program or less stringent than what is required under SMCRA.

Neither Mr. Wirtz's or Mr. Trechock's affidavits, or Plaintiff's erroneous assertions concerning the meaning and application of and of the Policy Memoranda, or Plaintiff's baseless allegations regarding the NDPSC's approval of an increase in the Falkirk Mine bond demonstrate that either Plaintiff or its members have or will suffer an injury-in-fact to a protected legal interest that is concrete, particularized, and not hypothetical. *Lujan*, 504 U.S. 560-61; see also *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Further any "threat" that Plaintiff

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<sup>8</sup> See <http://www.techtransfer.osmre.gov/NTTMainSite/Library/hbmanual/bondcal.shtm>

believes it or its members face “must be actual and imminent, not conjectural or hypothetical.” *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). 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 has accordingly not met its burden to demonstrate that it or its members have suffered an injury that is fairly traceable to any of the Policy Memoranda, and that the Court has the ability to redress such an injury. *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278-79 (D.C. Cir. 2012). The bare allegations in Plaintiff’s two affiants’ declarations are wholly insufficient to establish Article III standing and this Court therefore lacks subject matter jurisdiction. *Sierra Club v. EPA*, 292 F.3d 898.

**III. TO THE EXTENT PLAINTIFF SEEKS TO HAVE THIS COURT RENDER A DECISION ON WHETHER ANY OF THE POLICY MEMORANDA VIOLATE THE ND PROGRAM, SUCH REVIEW IS IMPROPER BY THIS COURT SINCE IT INVOLVES A QUESTION OF STATE NOT FEDERAL LAW.**

Plaintiff’s suit is brought pursuant to Section 1270(a)(2) of Title 30 of the U.S. Code, which allows citizens to bring suit in federal court against a regulator for failure to perform a non-discretionary duty. *See* 30 U.S.C. § 1270(a)(2). In Plaintiff’s Complaint and Motion for Summary Judgment, its claims, while vague, focused on whether the Policy Memorandum were required to be submitted to OSM for review and approval pursuant to 30 C.F.R. § 732.17 – that is did North Dakota fail to perform a non-discretionary duty. Now in its Response, Plaintiff makes allegations regarding the NDPSC application of Policy Memorandum No. 18 in

connection with the Falkirk Mine bond increase approval. Response at ¶ 26, pp. 5-6, 9 and 13-14. To the extent that Plaintiff's allegations with respect to Policy Memorandum No. 18 requires a determination of whether the NDPSC has applied Policy Memorandum No. 18 in a manner that is inconsistent with the ND Program, i.e. does it violate North Dakota law, such a question is prohibited by the Eleventh Amendment to be brought before this Court.

By its plain terms the citizen suit provision of SMCRA does not trump the Eleventh Amendment prohibition against suits by citizens against States in federal court. 30 U.S.C. § 1270(a)(2) provides for suit by citizens

against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

*Id.*

The Supreme Court has construed the Eleventh Amendment to bar not only suits by citizens of another state or citizens of a foreign state, but also suits by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S. Ct. 504, 33 L. Ed. 842 (1890). "Eleventh Amendment immunity is, however, subject to three primary exceptions: (1) congressional abrogation, (2) waiver by the state, and (3) suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law<sup>9</sup>." *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 323. None of these exceptions apply in this case. Therefore, this Court cannot consider whether

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<sup>9</sup> Plaintiff has not brought suit against any individual officer of the State of North Dakota only the NDPSC.

Policy Memorandum No. 18, or any of the Policy Memoranda are inconsistent with the ND Program.

### 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. Due to the complexities of the issues before this Court, the NDPSC respectfully requests this Court schedule oral argument in this case.

Finally, 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: March 29, 2013.

Respectfully submitted,

**STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL**

/s/Paul M. Seby

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*Attorneys for the Defendant North Dakota Public  
Service Commission*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2013, the foregoing Defendant North Dakota Public Service Commission's Reply In Opposition To Plaintiff's Memorandum of Law In Reply and Opposition to Defendants' Cross-Motions For Summary Judgment was served electronically to all counsel of record through the Court's ECF System.

s/ Paul M. Seby

Paul M. Seby  
Special Assistant Attorney General

*Attorneys for the Defendant North Dakota  
Public Service Commission*



Public Service Commission  
State of North Dakota

EXHIBIT A

COMMISSIONERS

Tony Clark  
Brian P. Kalk  
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Executive Secretary  
Darrell Nitschke

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January 18, 2012

Mr. D. Randall Crooke  
Environmental Manager  
Falkirk Mining Company  
P.O. Box 1087  
Underwood, ND 58576-1087

Dear Mr. Crooke:

The Reclamation Division has reviewed the worst case reclamation cost estimate that is part of Revision No. 29 to Permit NAFK-8405 at the Falkirk Mine. The worst case reclamation cost estimate was revised to reflect the July 2011 Variable Cost Update and a slightly modified worst case scenario. We have determined that the minimum bond amount for the consolidated bond area must be increased to \$74,407,608 as described in the permit revision application dated December 21, 2011.

The necessary bonding instruments to increase the current bond to no less than \$74,407,608 will need to be submitted, and the remaining technical deficiencies will need to be adequately addressed, before Revision 29 can be approved.

If you have any questions, please contact this office.

Sincerely,

James R. Deutsch  
Director  
Reclamation Division

cc: Nancy Jensen

# THE FALKIRK MINING COMPANY

A SUBSIDIARY OF THE NORTH AMERICAN COAL CORPORATION



February 6, 2012

HAND DELIVERY

Darrell Nitschke  
Executive Secretary  
North Dakota Public Service Commission  
State Capitol Building  
600 East Boulevard Avenue – Department 408  
Bismarck, North Dakota 58505-0480

Dear Mr. Nitschke:

Revision No. 29 to The Falkirk Mining Company's Permit No. NACT-9503 is scheduled to be approved by the North Dakota Public Service Commission at its February 15, 2012, meeting. The minimum bond amount associated with the revised worst case reclamation cost estimate, which reflects the July 2011 variable cost update, as approved by the Commission is \$74,407,608.

Falkirk currently maintains Self-Bond No. SB-9503-1 guaranteed by Great River Energy and Collateral Bond No. CB-9503-4, which cover the entire consolidated area within Permit Nos. NAFK-8405, NAFK-8705, and NAFK-9503. Falkirk plans to provide for this \$14,235,000 increase, which includes a \$42,329 contingency amount, as follows:

BOND	CURRENT AMOUNT	INCREASE	NEW AMOUNT
SB-9503-1	\$54,193,500	\$12,811,500	\$67,005,000
CB-9503-4	6,021,500	0	6,021,500
105624532	0	1,423,500	1,423,500
<b>TOTAL</b>	<b>\$60,215,000</b>	<b>\$14,235,000</b>	<b>\$74,450,000</b>

Accordingly, enclosed are the following documents:

1. One original and three copies of Self-Bond Rider to Increase Bond Amount for Bond No. SB-9503-1, which has been executed by Falkirk and Great River Energy as third-party guarantor, and
2. One original and three copies of Surface Coal Mining and Reclamation Operations Surety Bond, which has been executed by Falkirk and Travelers Casualty and Surety Company of America.

Commission acceptance of the foregoing is respectfully requested.

Sincerely,

THE FALKIRK MINING COMPANY

Nancy L. Jensen  
Land Specialist

Enc.

cc: (via email)  
R. Crooke  
J. Eckroth  
T. Faulkner  
W. Thompson