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 REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Federal courts do not have jurisdiction to entertain cases that allege nothing more than speculative and abstract harms, and that interfere with ongoing administrative processes. The existence of a citizen suit provision in the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") does not change the limited jurisdiction of this Court. Plaintiff's claims in this case should be dismissed for three independent reasons. First, Plaintiff does not have Article III standing to maintain its claims or requests for relief because none of its allegations of harm rise to the level of establishing a concrete and particularized injury-in-fact that can be traced to any of the identified policy memoranda, and because no cognizable injury-in-fact could possibly flow from non-existent "future" policy memoranda. Second, Plaintiff's claims are unripe because the challenged policy memoranda are already undergoing a comprehensive administrative review by the Office of Surface Mining Reclamation and Enforcement ("OSM") concerning the very matter at dispute in this lawsuit, and Plaintiff has provided no convincing arguments to the contrary. Finally, all challenges to the existing policy memoranda are barred by the statute of limitations, which rightfully prevents Plaintiff from mounting facial attacks to policies that have been in place for decades.

ARGUMENT

I. This Court Does Not Have Jurisdiction Over Plaintiff's Claims[1]

A. Plaintiff Does Not Have Article III Standing Because It Has Not Established a Concrete Injury-in-Fact

In order to invoke Article III jurisdiction in federal court, all plaintiffs must establish the irreducible constitutional minimum elements of standing. These elements include a concrete and particularized injury-in-fact that is actual or imminent and not merely hypothetical or conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Contrary to Plaintiff's strained arguments, this requirement for a concrete injury-in-fact is not somehow reduced by SMCRA's citizen suit provision—30 U.S.C. § 1270. *See, e.g., Katz v. Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012) ("Although the prudential requirements may be relaxed in some contexts, the constitutional requirements [of standing] apply with equal force in every case.") (internal quotations omitted). Plaintiff's other attempts to manufacture an injury-in-fact through speculative affidavits and other unsupported allegations also fall far short of the mark.

Plaintiff initially argues, without support, that the irreducible constitutional minimum elements of standing are somehow negated by SMCRA's citizen suit provision. *See* ECF No. 35 at 14. The fact that Plaintiff has invoked SMCRA's citizen suit provision as the basis for its claim does not eliminate the need to establish constitutional standing according to the standards articulated by the United States Supreme Court, which includes the existence of a concrete injury in fact. *Lujan*, 504 U.S. at 572-78 (rejecting proposition that Endangered Species Act's citizen

[1] Contrary to Plaintiff's response, Intervenor-Defendant did not argue in its opening brief that Plaintiff failed to exhaust administrative remedies or failed to challenge final agency action as jurisdictional matters. Rather, the argument is a practical and equitable one that Plaintiff has not engaged in the most appropriate process for addressing its concerns, and has instead brought an overly broad challenge that asks this Court to invalidate every policy memorandum regardless of (and without even considering) their substantive meaning or effect.

suit provision, which permitted suit by "any person," could eliminate need to establish a concrete injury); *see also Consol. Cos., Inc. v. Union Pac. R.R. Co.*, 499 F.3d 382, 385 (5th Cir. 2007) ("[a]s Union Pacific correctly notes, the citizen suit provisions of the [Resource Conservation Recovery Act (RCRA)] and the [Louisiana Environmental Quality Act] do not, in and of themselves, satisfy the case-in-controversy requirement of Article III"); *Natural Res. Def. Council v. U.S. E.P.A.*, 542 F.3d 1235, 1245 (9th Cir. 2008) (clarifying that citizen suit provisions can eliminate concerns over prudential standing, but constitutional standing elements must still be met); *cf. Port Wash. Teacher's Ass'n v. Bd. of Educ. of Port Wash. Union*, 478 F.3d 494, 498-99 (2d Cir. 2007) (stating that every plaintiff seeking to establish standing must prove the three irreducible constitutional minimum elements of injury in fact, causal connection, and likelihood of redress, even where asserting third-party standing).

The *Port Washington* case involved a similar jurisdictionally-flawed challenge to a "policy memorandum." 478 F.3d at 497. In that case, the policy had been issued by a board of education and required the plaintiffs (consisting of teachers and other education professionals) to report student pregnancies to parents. *Id.* Plaintiffs claimed that the policy would force them to break laws protecting privileged communications and violate students' constitutional rights. *Id.* The Second Circuit held that the plaintiffs did not have standing to assert their claims because they had failed to assert an injury-in-fact based on the concrete application of the policy outlined in the memorandum. *Id.* at 499. Instead, Plaintiffs had alleged hypothetical harms based on their perception of future application of the policy. *Id.* at 499-500, 501 ("A hypothetical or abstract dispute does not present a case or controversy").

In this case, as in *Port Washington*, Plaintiff has offered no support beyond speculation and mere conjecture in an attempt to establish its constitutionally required injury-in-fact.

Although Plaintiff provides several new arguments and documents in an attempt to prove Article III standing, these do nothing to change the speculative nature of these alleged harms. For example, Plaintiff again only mentions a few of the numerous policies that it purports to challenge—memoranda 6, 15 and 18—and, even then, offers nothing more in than a restatement of its previously deficient allegations. *See* ECF No. 35-2 ¶¶ 6-11 (providing various general and speculative statements of personal opinion, such as "I believe that any relaxation of federal standards for handling of topsoil may reduce the productivity of farmland in this area"). Such allegations fall far short of meeting even the broadest interpretation of standing supported by Supreme Court precedent. Plaintiff's remaining arguments and supporting documents fare no better.

1. Plaintiff's Newly Submitted Declaration Does Not Establish a Concrete Injury-in-Fact

Plaintiff attached a new declaration from one of its members to its reply memorandum in an apparent attempt to provide some form of factual support for its standing. *See* ECF No. 35-2 (Wirtz Declaration). However, the declaration fails to rectify the hopelessly speculative nature of Plaintiff's allegations of harm.

Based on the Wirtz declaration, Plaintiff now maintains that a "rural neighborhood" was turned into a "mining zone" for longer than originally anticipated. *See id.* But the declaration does not provide any facts to support what the original timeframe was intended to be, does not identify any specific action which extended that timeframe, does not allege that any extension was unlawful under the approved North Dakota program or SMCRA, and does not attempt to explain how such an extension caused specific harm to its interests beyond the unsupported and general averment that the authorized mining activities reduce property values and quality of life. *See id.; see also* ECF No. 35 at 14. As for the claimed risk of coal ash disposal in an abandoned

mine pit, the declaration neither provides any factual support beyond speculative personal opinion nor connects the coal ash disposal to any activity regulated by NDPSC under SMCRA.[2] ECF No. 35-2 ¶ 8 ("I believe that bond release provisions for coal ash disposal sites weaker than federal standards may create groundwater hazards, prevent agricultural land from being restored to a higher or better use than it had prior to mining, and thereby reduce property values and create health risks in the area."). These allegations fail to identify any concrete injury-in-fact because they consist entirely of personal conjecture and do not identify a single example of a challenged policy applied in a specific circumstance.

2. Plaintiff's Documents Concerning Policy Memo 18 Provide No Basis for Standing

Plaintiff relies on three documents, two of which are new exhibits attached to Plaintiff's reply memorandum, in an attempt to show standing in support of its arguments apparently directed at Policy Memo 18. That policy memorandum sets forth NDPSC's decision to allow a single performance bond to cover more than one permit area at a mine (and, if a permittee decides to seek a single performance bond, requires a worst-case reclamation cost determination and that liability under the bond date back to the approval date of the first-issued permit). Plaintiff refers to an annual report document, and now provides a memorandum (the "Falkirk

[2] It is unclear from the declaration provided that the "coal ash disposal site" referred to in the declaration is under the jurisdiction of the NDPSC. SMCRA does not regulate coal ash disposal sites—only surface coal mining and reclamation operations. *See* 30 U.S.C. § 1291(28) (definition of surface coal mining operations). Unless the coal ash disposal is occurring at an active or abandoned mine site, NDPSC has no jurisdiction under its SMCRA approved program to regulate "coal ash disposal site." Instead that responsibility falls to the North Dakota Department of Health under the North Dakota Solid Waste Management Rules, Chapter 33-20 of the North Dakota Administrative Code as authorized by NorthDakota Century Code Chapter 23-29. *See* Steven J. Tillotson, Asst. Director, Division of Waste Management, North Dakota Department of Health, "Coal Combustion Waste North Dakota Regulatory Perspective" (April 2002), *available at* http://www.ndhealth.gov/WM/Publications/CoalCombustionWasteRegulatoryPerspective.pdf.

Memo," as Plaintiff refers to it) and an affidavit from its former Staff Director (the "Trechock Affidavit"). None of these documents demonstrate an actual injury-in-fact.

Turning first to the annual report, this document does not show any concrete harm to Plaintiff as a group or any of its members because it merely states the total acreage in the entire state of North Dakota that was either released from bonding, newly bonded, or disturbed by mining activities. ECF No. 15-6. The report itself operates in statewide generalities and fails to identify any specific injury or harm to Plaintiff or any of its members allegedly caused by Policy Memo 18 or any of the other memoranda. The report does not provide any insight whatsoever into whether Policy Memo 18 has ever been applied in a manner inconsistent with the approved State program or SMCRA in such a way as might possibly harm any concrete interest, and therefore provides no support for Plaintiff's standing.

Next, the Falkirk Memo, which concerns permits held by the Falkirk Mining Company, also fails to establish any concrete injury attributable to Policy Memo 18 or any other policy memorandum.[3] The Falkirk Memo involves an increase to the bond *amount* through an increased self-bond and new surety bond. *See* ECF No. 35-1. As an initial matter, Plaintiff has not demonstrated how this increase in the bond amount relates to its allegations that the *timeline* for reclamation of active mines in North Dakota is being improperly extended as a result of Policy Memo 18. Moreover, Plaintiff has provided no explanation as to how an increase to a

[3] Plaintiff did not include any reference to the Falkirk Memo in its complaint or statement of uncontested facts. *See* ECF No. 1; ECF No. 13-1 at 7. Notwithstanding the Falkirk Memo's belated appearance in this case, it remains unclear whether the Falkirk Memo even relates to a mining site located in an area that could impact Plaintiff or its members. Moreover, it is unclear how this February 9, 2012 memorandum relates to Plaintiff's claims. While the Wirtz Declaration refers to the "Falkirk Mine," Plaintiff provides no link between the specific permits listed in the Falkirk Memo and the location of that mine. In any event, Plaintiff has not specifically challenged any such permits or included factual allegations illustrating how this, or any other, memorandum has been applied to the detriment of its interests.

self-bond described in the Falkirk Memo is inconsistent with the approved state program or SMCRA, much less how such an increase in the amount of the bond actually harms Plaintiff's interests. Indeed, SMCRA *requires* performance bond amounts to be increased prior to disturbing new acreage and whenever the cost of future reclamation increases. 30 U.S.C. § 1259(e) ("The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes."); *see also* 30 C.F.R. § 800.15(a); N.D. CENT. CODE § 38-14.1-16.9.

Similarly, the allegations contained in the Trechock Affidavit (ECF No. 35-5) fail to demonstrate any actual harm to Plaintiff's interests caused by Policy Memo 18. Based on this affidavit, Plaintiff apparently tries to show an injury-in-fact based on its belief that Policy Memo 18 might authorize bonding procedures that contravene SMCRA. *See* ECF No. 15-5 ¶ 5. Despite the conjecture as to the effect of Policy Memo 18 in this affidavit, the affidavit nonetheless fails to identify any specific application of this policy where the allegedly improper bonding procedures may have occurred or imminently might occur, let alone how any such application might impact its concrete interests. Thus, Plaintiff's abstract speculation as to the effect or application of this memorandum cannot give rise to an injury-in-fact.

3. Plaintiff's Allegations of Harm Concerning Its Ability to Advocate for Its Members are Inaccurate

In a final attempt to establish some sort of injury-in-fact, Plaintiff submits that the policy memoranda, in general, affect its ability to "advocate for its members in the OSM review process, and cut off the availability of judicial review of the final agency action that OSM has never taken" on the memoranda. ECF No. 35 at 15. Plaintiff appears to argue that it has been

harmed because it is prevented from participating in a public commenting process concerning the policy memoranda.

To the extent Plaintiff makes such an allegation, it is inaccurate. The program amendment process is not the only process by which the public may comment on state program activities. Indeed, Plaintiff has various avenues through which to voice its concerns to both NDPSC and OSM regarding the policy memoranda or their application to specific sites.[4] *See, e.g.,* 30 U.S.C. § 1263 (describing public notice availability and process for objecting to proposed initial or revised permit applications); 30 C.F.R. § 842.12 (explaining process for requesting federal inspection of a suspected violation).

One such avenue for Plaintiff to voice their concerns over the application of specific policy memos was recently used in West Virginia by a citizen acting on behalf of an environmental group. In that instance, the citizen filed a complaint with the state regulatory

[4] SMCRA is designed, in part, to "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter." 30 U.S.C. § 1202(i). And both NDPSC and OSM have developed such procedures to invite public input and participation in the regulatory oversight of the state's coal mining operations. *See, e.g.,* N.D. ADMIN. CODE 69-05.2-01-03 ("Any person or governmental agency may petition the commission to adopt, amend, or repeal any rule under this article."); 30 C.F.R. § 733.12(a)(2) (stating any interested person may make a request for the Director of OSM to evaluate a state program). OSM guidance document Directive REG-8 also outlines the public outreach and participation efforts to be undertaken by OSM Field Offices. These actions include development of an outreach program in conjunction with individual states and tribes to solicit comments from the public and interested groups regarding the oversight process, views on additional review topics for the evaluation year and suggestions for improvements of future annual evaluation reports. This outreach program includes an open invitation for public participation, as found on the OSM website at http://www.osmre.gov/topic/Oversight/SCM/SCM.shtm. OSM Directive INE-24 further describes the process for the public to voice potential concerns through the citizen's complaint process. Any citizen concerned about potential SMCRA violations, its implementing regulations, or the approved state program, may file a complaint with either OSM or the State Regulatory Authority. Copies of OSM directives are available at: http://www.osmre.gov/guidance/directives/directives.shtm. For program amendments, there are procedures allowing for public participation. *See* 30 C.F.R. § 732.17(h).

authority, the West Virginia Department of Environmental Protection (WVDEP), regarding a particular mining operation that the citizen believed was violating a provision of the approved state program. *See* Ex. 1 at 2 (Letter of Determination). WVDEP, in turn, allowed the operation to correct the violation based on an internal policy document. *Id.* The citizen then sent OSM a citizen's complaint reiterating their belief that the operation was violating a provision of the approved state program regardless of the corrective action taken by WVDEP in accordance with their internal policy. *Id.* at 3. The citizen's complaint gave OSM reason to believe that a violation of West Virginia's approved regulatory program had occurred, and pursuant to 30 U.S.C. § 1271(a)(1) and the applicable federal regulations, OSM issued a Ten Day Notice to WVDEP. *Id.* Under this process, WVDEP had ten days to take appropriate action to correct the violation or show good cause for failing to do so. *Id.*; *see also* 30 U.S.C. § 1271(a)(1). WVDEP responded that it had shown good cause, and, after clarification, explained that it had followed an internal policy and the violation was corrected to its satisfaction. Ex. 1 at 4.

After reviewing WVDEP's response, OSM determined that the state had failed to take appropriate action or show good cause for not doing so because, in effect, the internal policy it relied on for the corrective action was inconsistent with its approved regulatory program, and thus its action in reliance on that policy was arbitrary, capricious and an abuse of discretion. *Id.* at 5-6. Subject to the option for informal review, OSM ordered a federal inspection.[5] *Id.* at 7.

[5] If OSM had come to the opposite conclusion, i.e., that the state had shown good cause, the citizen could then have requested informal review of that decision. *See* 30 C.F.R. § 842.15. In turn, the decision could then be administratively appealed to the Department's Office of Hearings and Appeals ("OHA"). 30 C.F.R. § 842.15(d); *see, e.g., Robert Gadinski,* 177 IBLA 373 (2009). OHA decisions, including decisions from the Interior Board of Land Appeals ("IBLA"), are an exercise of the final decisionmaking power of the Secretary and can be subject to judicial review. 43 C.F.R. §§ 4.1, 4.21(c), and 4.1101(a).

This example demonstrates a clear process for lodging and investigating an actual, and not hypothetical, situation where an internal policy memorandum may be inconsistent with an approved state program. It allows the relevant agencies opportunities to correct any violations that are discovered without first resorting to the judicial process. But, even if judicial review would be warranted further down the road, the court would then be aided by a fully developed record concerning the allegedly inconsistent policy. This process contrasts sharply with the one Plaintiff attempts to use in the instant case, where Plaintiff has failed to identify any situations where the actual implementation of any NDPSC policies have been inconsistent with SMCRA.

Moreover, if Plaintiff believes that an NDPSC policy is inconsistent with the approved state program or SMCRA, even if they do not have "reason to believe" that policy is violating state or federal law, there are other avenues available for seeking OSM to review the allegations and create a record of agency review. *See, e.g.*, 30 C.F.R. § 733.12(a)(2) (allowing any interested party to request OSM evaluate a state program). In addition, Plaintiff may submit concerns as part of OSM's annual oversight process, during which OSM specifically solicits public concerns for consideration during that process.[6] Plaintiff could have, but did not, avail itself of any number of these avenues for relief, which would have created a record for judicial review of a particularized situation.[7]

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[6] Although Plaintiff was invited to submit topics for OSM review, for whatever reason, Plaintiff did not voice any concerns over the policy memos during the 2012 stakeholder meeting to discuss the upcoming annual review for North Dakota's program. Instead, Plaintiff's declaration states that they provided informal comments at a separate meeting that was completely unrelated to the annual oversight process. *See* ECF No. 35-5 ¶ 11 (referring to stakeholder meeting for purpose of discussing merger of OSM and BLM areas of responsibility).

[7] It should be noted that a statutorily-required sixty day notice of intent to sue, such as the one submitted by Plaintiff in this case, is not the same as, and does not substitute for, these other primary avenues for public participation and agency oversight. *Compare, e.g.*, 30 U.S.C. § 1270(b) *with* 30 U.S.C. § 1271(a) *and* 30 C.F.R. § 842.12. Plaintiff cannot simply send a sixty day notice of intent to sue in federal court and then rely on that notice to have the same effect as

4. The Cases Cited by Plaintiff Provide No Legal Basis for Standing

In addition to failing to provide factual support for its allegations of standing, the cases cited by Plaintiff offer no legal basis either. [8] Plaintiff cites *Simon v. Eastern Kentucky Welfare Rights Organization*, where the Supreme Court held that the plaintiff advocacy organization did not have standing to assert claims on behalf of its indigent clients. 426 U.S. 26 (1976). Far from supporting Plaintiff's position, however, this case further illustrates how Plaintiff has failed to establish its standing. In *Simon*, a citizen organization had sued various federal agencies and officers on the basis that its clients had suffered harm at various hospitals because the hospitals had been "encouraged" to deny services by operation of an IRS ruling, and argued that by invalidating that ruling the Court would then "discourage" hospitals from denying services. *Id.* at 42-43. The Court, however, recognized that "the case or controversy limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42. Because it was unknown how third parties would react

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if Plaintiff had submitted a specific written request for a federal inspection of a suspected violation, condition or practice. *See* 30 C.F.R § 842.12 (requiring signed, written statement from person requesting federal inspection). Nor should such a notice be automatically presumed sufficient to give the Secretary adequate reason to believe that a violation has actually occurred.

[8] Plaintiff's statement that other federal district courts have upheld challenges to "guidance documents" is misleading. ECF No. 35 at 11. The *Ohio River Valley Environmental Coalition v. Callaghan* case does not address the merits of the challenged guidance manual itself, but rather stands for the proposition that, once an approved state program is in place, SMCRA's structural provisions remain operative. *See* ECF No. 35-3 at 5-6. The court in that case expressly reserved its ruling on whether the guidance documents were permissible, and the subsequent consent decree provides no further support for Plaintiff's position. It is also unclear from Plaintiff's exhibit whether the guidance document at issue in that case was being challenged on its face within the statute of limitations or as applied to a specific circumstance that created an injury-in-fact.

to an invalidated IRS ruling, the Court reasoned that "[s]peculative inferences [were] necessary to connect [plaintiff's] injury to the challenged actions," and held that "[a] federal court, properly cognizant [of] the Art. III limitations upon its jurisdiction, must require more than respondents have shown before proceeding to the merits." *Id.* at 45.[9]

Here, Plaintiff's arguments require similar speculation as to the results of any OSM review of the challenged policy memoranda, and how NDPSC or SMCRA permittees (who are not before this Court) might react to the results of that review. Even if Plaintiff succeeded and the Court ordered NDPSC to submit its policy memoranda for review and approval as state program amendments, there is no guarantee that OSM would determine that the policy memoranda satisfy the criteria for going through the program amendment process, or that OSM would find the policies to be inconsistent with the existing approved state program. Moreover, even if OSM did find the policies inconsistent with the approved state program, there is no guarantee that OSM would not lawfully approve the policy memoranda as program amendments that are consistent with SMCRA and the operative federal regulations. If OSM were to do so, the policies themselves would ultimately remain in effect as a practical matter. In such a circumstance, Plaintiff's alleged harms flowing from the policies themselves would not necessarily be redressed by the requested relief.

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[9] Plaintiff's reference to *Warth v. Seldin* fares no better. *See* 422 U.S. 490, 508 (1975) ("We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention . . . Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of a real need to exercise the power of judicial review or that relief can be framed no [more broadly] than required by the precise facts to which the court's ruling would be applied." (internal quotation marks omitted); *id.* at n.18 ("A particularized personal interest may be shown in various ways, which we need not undertake to identify in the abstract. But usually the initial focus should be on a particular project.").

Every plaintiff in federal court must meet its obligation of establishing Article III standing, including the irreducible element of a concrete and particularized injury-in-fact that is actual or imminent. Plaintiff has not met its burden in this case, and its claims must be dismissed for lack of jurisdiction.

B. Plaintiff Does Not Have Standing to Challenge, or Seek Relief Regarding, Any Future Policy Memoranda

Even if Plaintiff could assert standing to challenge any of the existing policy memoranda, that standing would not extend to any challenge to, or request for relief concerning, non-existent "future" policy memoranda. "Standing is not dispensed in gross . . . . Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 734 (2008) (internal quotations and citations omitted).

Plaintiff does not have standing to challenge or seek relief concerning "future" policy memoranda which do not yet exist because no colorable argument can be made that a concrete and particularized injury-in-fact that is actual or imminent can flow from a non-existent policy or document. *See* ECF No. 35 at 5 (seeking order that NDPSC submit "current *and future* Policy Memos and revisions" to OSM for review) (emphasis added). Plaintiff cannot establish standing to seek relief for policy memoranda that do not yet exist, nor could any such challenges possibly be ripe.[10]

[10] Plaintiff's argument that there is a "realistic prospect" of NDPSC failing to submit existing or future policy memoranda to OSM for program amendment review is irrelevant. *See* ECF No. 35 at 20. The "realistic prospect" argument relates to the doctrine of mootness, yet neither NDPSC nor the Secretary has raised mootness as a defense. Nonetheless, the point concerning mootness is noteworthy because, to the extent Plaintiff sought relief in the form of OSM reviewing the existing policy memoranda for consistency with the approved state program, that request for relief is now certainly moot as OSM is reviewing these memoranda as part of its annual oversight of the North Dakota program.

C. Plaintiff's Claims Are Not Ripe for Review

Plaintiff argues, again without any relevant support, that a fundamental jurisdictional requirement—ripeness—has somehow been eliminated by SMCRA's citizen suit provision. As explained below, this simply is not the case. Plaintiff also fails to demonstrate that its claims are prudentially ripe. Consequently, Plaintiff fails to establish that this Court has jurisdiction.

1. Congress Did Not Waive Consideration of Prudential Ripeness in SMCRA's Citizen Suit Provision

The ripeness doctrine, like the standing doctrine, involves both constitutional and prudential considerations. *See Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction"). Congress may choose to waive prudential limitations in certain statutory judicial review provisions. *See, e.g., Nat'l Treasury Employees Union v. United States*, 101 F.3d 1432, 1427 (D.C. Cir. 1996) (justiciability doctrines, such as standing, ripeness, and mootness, "are composed both of prudential elements which Congress is free to override, . . . and core components which are essential and unchanging parts of the case-or-controversy requirement of Article III") (internal citations and quotations omitted). However, there is no language in SMCRA's citizen suit provision to support the conclusion that Congress intended to waive any prudential limitations on ripeness.

SMCRA's citizen's suit provision does permit suit by "any person," thereby arguably eliminating a plaintiff's burden of establishing prudential standing (although, as explained above, the Article III standing requirements still apply). SMCRA does not contain similar language allowing suit to be brought at "any time." *See Coal. for Sustainable Res., Inc. v. U.S. Forest Service*, 259 F.3d 1244, 1249 n.10 (10th Cir. 2001) ("The Coalition does not appear to argue that the citizen-suit provision of the Endangered Species Act abrogates the prudential (non-

constitutional) component of the ripeness inquiry. . . .The citizen-suit provision abrogates the prudential component of the *standing* inquiry by allowing suits by 'any person.' . . . There is no comparable language authorizing a suit at 'any time,' for example. We therefore examine both constitutional and prudential limits to ripeness in this case.") (internal citations and quotations omitted, emphasis in original); *Citizens for a Better Env't v. Costle*, 617 F.2d 851 (D.C. Cir. 1980) (finding claims pursuant to RCRA citizen suit provision for alleged failure to perform mandatory, nondiscretionary duty unripe).[11] Because SMCRA's citizen suit provision does not waive the prudential requirement for ripeness, Plaintiff must demonstrate that that its claims are both constitutionally and prudentially ripe for review.

2. Plaintiff Fails to Satisfy Either Factor in Support of Prudential Ripeness

As discussed in our opening brief, *see* ECF No. 27 at 17 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726), and as recently stated by the Eight Circuit, prudential ripeness requires that "[a] party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Iowa League of Cities v. EPA*, ___ F.3d ___, No. 11-3412, 2013 WL 1188039, at *11 (8th Cir. Mar. 25, 2013)

[11] The cases cited by Plaintiff for the proposition that citizen suits can be used as a vehicle for addressing an agency's failure to perform a mandatory duty miss the point. *See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980) (discussing applicability of administrative exhaustion doctrine to subject matter jurisdiction and little else); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (addressing claim for relief pursuant to federal Administrative Procedure Act seeking to compel agency action unlawfully withheld). Plaintiff argues that either NDPSC or OSM has still failed to act despite the present plan to review the policy memoranda as part of OSM's annual oversight. It is true that, at this stage, OSM will not review the policies as proposed program amendments. However, it will be reviewing these policy memoranda for consistency with the approved state program—which is the prerequisite step to requiring a program amendment. In that instance, if OSM finds a policy memorandum is inconsistent with the state program or changes how that program is implemented, then a program amendment may potentially be necessary. 30 C.F.R. § 732.17(e). Plaintiff is simply putting the cart before the horse by arguing that a full program amendment is already warranted with regard to all internal policy memoranda issued by NDPSC.

("[b]oth of these factors are weighed on a sliding scale, but each must be satisfied 'to at least a minimal degree'").

With regard to the first factor, "[f]itness rests primarily on whether a case would benefit from further factual development[.]" *Id.* at *42. Simply because a case raises primarily legal questions does not make the claims ripe when "further factual development regarding the agency's application of the document would aid [the court's] decision." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003). Thus, this prong ensures that courts do not "entangle[e] themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Given the abstract nature of Plaintiff's claims in this case, it is difficult to imagine that the Court would not benefit from more analysis and factual development by the agency charged with overseeing this area of the law. *See Coal. for Sustainable Res., Inc.*, 259 F.3d at 1253 (Federal agencies, "with their specialized expertise, should be allowed a first chance to balance the competing interests at stake and choose a course of action."). As Plaintiff admits, "[i]t would take an expert, like an OSM official, reviewing the Policy Memos in detail . . . to determine whether or not the Policy Memos are consistent with the letter and spirit of SMCRA as implemented." ECF No. 35 at 6. This review of the policy memoranda is essentially what OSM is presently undertaking as part of its annual program review for 2013. [12] *See*

[12] Contrary to Plaintiff's representations, *see* ECF No. 35 at 21, OSM's plan to review the policy memos during the 2013 annual program evaluation was a publicly available fact long before Plaintiff ever filed its opening motion for summary judgment. *See* ECF No. 27-3 at 7, signed July 6, 2012, *available at* http://www.wrcc.osmre.gov/programs/oversight/NorthDakota /performance.shtm. Neither OSM nor NDPSC had an obligation to submit a settlement offer to Plaintiff based on this fact, and certainly had no duty to engage in settlement of claims that both agencies maintain are unfit for judicial review in the first instance.

http://www.osmre.gov/topic/Oversight/SCM/SCM.shtm;http://www.wrcc.osmre.gov/programs/oversight/Northdakota.shtm.

Likewise, Plaintiff has not met the second factor because it cannot allege any hardship for withholding consideration of this case. Plaintiff's attempts at showing harm highlight the speculative, abstract nature of its claims.

First, contrary to Plaintiff's representations, *see* ECF No. 35 at 17, the policy memoranda are not "in force" in any meaningful sense. NDPSC has already stated in this litigation that its policy memoranda are not treated as having the force or effect of legislative rules or law, but rather are merely used as guidance. ECF No. 23-1 at 18. In light of this fact, there is no way for the policy memoranda themselves to have any force or effect outside of a site-specific permitting decision which applies the actual policies. Notably, Plaintiff has not challenged any such site-specific application of these memoranda in the nearly 30 years since most were issued. Plaintiff has not identified any concrete hardship it may suffer in the absence of judicial review.

Second, Plaintiff's concern about the unavailability of public participation in the 2013 annual program review process is factually incorrect. *See* ECF No. 35 at 18. Although nothing in SMCRA or the federal regulations requires it to do so, OSM has voluntarily solicited input from various public stakeholders in accordance with its own internal guidance, including Plaintiff, about the issues to be addressed as part of the 2013 annual program review.[13] During the process of developing OSM's 2013 annual program review, Plaintiff had the ability to inform OSM of its concerns regarding the policy memoranda, but it did not do so. Because Plaintiff was

[13] OSM is required as part of its monitoring duties under SMCRA to "evaluate the administration of each state program at least annually." 30 C.F.R. § 733.12(a)(1). As part of this duty, OSM's Directive—REG-8—provides OSM with internal guidance for outreach, public participation, information accessibility, etc., associated with these regularly scheduled annual reviews. *See* Appx. 1, at A-4 of REG 8, *available at* http://www.osmre.gov/guidance/docs/directive967nc.pdf.

afforded the opportunity to participate even though no law or regulation required public participation, Plaintiff will not suffer while OSM continues its independent and objective assessment of the policy memoranda through the annual oversight report. [14]

Third, Plaintiff takes the untenable position that they somehow suffer harm because all of the policy memoranda – regardless of their actual content or application – were not submitted as "program amendments" that trigger SCMRA's mandatory review process. *See* ECF No. 35 at 17, 19 (citing 30 C.F.R. § 732.17(h)). There is no support in fact or law for the remarkable proposition that all policy guidance documents, regardless of their substance or practical effect, make the kind of alterations to an approved State program that would automatically trigger the need for a state program amendment. *See* 30 C.F.R. § 732.17(a). It is certain that SMCRA does not require, as a *per se* rule, that state programs must submit all policy memoranda for formal approval as program amendments. The pertinent question here is whether any of North Dakota's policy memoranda have caused a *de facto* "alteration" to its approved state program such that they must be submitted as full program amendments in accordance with 30 C.F.R. § 732.17.[15] However, in order even to begin assessing whether such *de facto* changes have occurred, the agencies must be able to meaningfully review the policies described in the memoranda so that informed determinations can be made, and those determinations should not be made in the kind of factual vacuum presented by this case.

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[14] In addition to this annual review process, as described earlier, Plaintiff can always avail itself of the process in 30 C.F.R. § 733.12(a)(2) to evaluate a program outside of the annual review process.

[15] Plaintiff effectively admits that this threshold determination is required prior to processing the policy as a program amendment. *See* ECF No. 35 at 6 ("[i]t would take an expert, like an OSM official, reviewing the Policy Memos in detail… to determine whether or not the Policy Memos are consistent with the letter and spirit of SMCRA as implemented").

Finally, Plaintiff also cites *Natural Resources Defense Council v. Train* for the proposition that "relief pendente lite" is occasionally appropriate to protect against "irreparable injury during the pendency of administrative review." 510 F.2d 692 (D.C. Cir. 1974); *see* ECF No. 35 at 19. This argument is not relevant because such a request for temporary relief would first require Plaintiff to establish a risk of irreparable injury during the annual review process. Because Plaintiff has not even attempted to establish any such risk during the course of the 2013 annual program review, no temporary relief is warranted.

Accordingly, the Court would benefit from the outcome of the 2013 annual program review. In any event, judicial review at this time would unduly interfere with an ongoing agency action and create unnecessary inefficiencies for all parties and the Court. Thus, Plaintiff's claims challenging the policy memos are not ripe.

II. Plaintiff's Claims are Barred by the Statute of Limitations

Plaintiff did not meaningfully respond to the argument that the statute of limitations has expired for all of its claims, and thus has essentially conceded the matter. At only one point does Plaintiff even address this issue. Without citation to any supporting law, Plaintiff appears to take the misguided stance that no statute of limitations applies. *See* ECF No. 35 at 16 ("Defendants' arguments regarding . . . statute of limitations ignore the breadth of SMCRA's citizen suit authorization, which places no such restrictions on a citizen suit.").

When a law does not include a specific statute of limitations, courts typically borrow a period from either state or federal law to limit the cause of action. *See, e.g., N. Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1013-14 (8th Cir. 2010) (applying general federal statute of limitations to Clean Air Act citizen suit lawsuit, where the Clean Air Act does not establish a specific limitation period for commencing

citizen suits); *Conservation Force v. Salazar*, 811 F. Supp. 2d 18, 27 (D.D.C. 2011) (applying general six-year statute of limitations to similar citizen suit action brought pursuant to Endangered Species Act, where Act did not provide for more specific limitations period to citizen suit); *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006) (refusing to apply continuing violation theory to time barred claim alleging failure of agency official to perform nondiscretionary duty); *Cmty. Ass'n for Restoration of Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 983 (E.D. Wash. 1999) (applying general federal five-year statute of limitations period to citizen suit action brought pursuant to Clean Water Act).

Since SMCRA is a statute designed to allow for states to assume primary jurisdiction over their local surface mining programs, the courts should look to state law when applying statutes of limitations to lawsuits brought against states pursuant to SMCRA's citizen suit provisions. *See* 30 U.S.C. § 1276 ("Action 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 . . . ."); *see also Cope v. Anderson*, 331 U.S. 461, 463 (1947) (stating that where "[t]here is no federal statute of limitations fixing the period within which suits must be brought to enforce the [statutory liability] . . . we look to [state] law to determine the period in which these suits may be brought"). The availability of judicial review in accordance with state law does not "limit the operation of the rights established" by SMCRA's citizen suit provision. *See* 30 U.S.C. § 1276(e). The citizen suit provision remains fully operational and provides citizens with an avenue of judicial review from the time that Plaintiff's causes of action accrued until the expiration of the limitations period. Plaintiff could still challenge the policies set forth in the memoranda at any point in the future in the context of challenging the application of those policies through some site-specific actions (i.e., a decision by NDPSC resulting in an extension

of the reclamation period for a given mine site). Therefore, application of the statute of limitations does not foreclose a plaintiff from exercising any of the rights granted pursuant to SMCRA's citizen suit provisions.[16] But application of a statute of limitations would bring certainty to SMCRA's operation by preventing plaintiffs from belatedly attacking policies enacted decades before, and therefore upsetting the settled expectations of parties that have justifiably relied on those long-established policies.

CONCLUSION

Intervenor-Defendant respectfully requests the court to grant his cross-motion for summary judgment in its entirety, and to deny Plaintiff's motion for summary judgment.

Respectfully submitted this 29th day of March, 2013.

IGNACIA S. MORENO
Assistant Attorney General

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[16] Far from refuting the argument that the statute of limitations has expired, Plaintiff's response actually provides further factual support for dismissal of its claims. According to Plaintiff's own affidavit, it has known about and voiced its concerns with Policy Memo 18 since 1998, over 14 years prior to filings this lawsuit. *See* ECF No. 35-5 ¶ 5. Plaintiff also argues that its member has "relied" upon Policy Memo 18's application "for years" and has lived adjacent to a reclamation site "for decades" without assurance that reclamation is complete. ECF No. 35 at 9. Plaintiff provides no explanation for why its concerns over Policy Memo 18, which it admits was first issued in 1987, are suddenly the basis for a federal lawsuit. *See* ECF No. 27 at 3 ¶ 16; ECF No. 35 at 4 ("DRC does not contest the dates of issuance and revision of the Policy Memos referenced.").

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Memorandum in Support of Intervenor-Defendant's Cross-Motion for Summary Judgment contains 21 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 March 29, 2013, 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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/s/ Joanna K. Brinkman
Joanna K. Brinkman

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
1027 Virginia Street, East
Charleston, West Virginia 25301

JUN 08 2012

Certified Mail – Return Receipt Requested

Thomas Clarke, Director
Division of Mining and Reclamation
Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304

Dear Mr. Clarke:

This is in response to your letter of April 18, 2012, in which you provided the Office of Surface Mining Reclamation and Enforcement (OSM) supplemental information in response to our Ten Day Notice (TDN) No. X12-111-391-002 regarding a citizen complaint alleging Marfork Coal Company's failure to initiate mining operations within three (3) years of permit issuance at its Eagle No. 2 Surface Mine (Permit No. S-3028-05) in Raleigh County, West Virginia. We have reviewed your agency's initial response dated February 27, 2012, and your supplemental information to our TDN regarding Marfork Coal Company's alleged violation and as outlined below must inform you that OSM has determined that, pursuant to 30 CFR 842.11(b)(1)(ii)(B), the West Virginia Department of Environmental Protection (WVDEP) has failed to take appropriate action to cause this violation to be corrected and we find your responses to be arbitrary, capricious, and an abuse of discretion under West Virginia's approved permanent regulatory program.

Overview of the TDN Process

A TDN is used to notify a State regulatory authority when OSM has reason to believe that there is a violation of the State's approved regulatory program. Upon receipt of the TDN, the regulatory authority has 10 days to take "appropriate action" to assure that the violation is corrected or to show "good cause" for failing to do so. *See* 30 CFR §§842.11(b)(1) and 843.12(a)(2). "Appropriate action" includes enforcement or other action to correct the violation. *See* 30 CFR §842.11(b)(1)(ii)(B)(3). Circumstances constituting "good cause" for not taking appropriate action are set forth in 30 CFR §842.11(b)(1)(ii)(B)(4). OSM will accept a regulatory authority's response to a TDN as constituting "appropriate action" or "good cause" unless the regulatory authority's response is arbitrary, capricious, or an abuse of discretion. *See* 30 CFR §842.11(b)(1)(ii)(B)(2). If the regulatory authority disagrees with OSM's determination, the

regulatory authority may request, in writing, an informal review of the decision. *See* 30 CFR §842.11(b)(1)(iii). If OSM's final determination is that the regulatory authority has failed to take appropriate action or demonstrate good cause, OSM will conduct a Federal inspection. *See* 30 CFR §842.11(b)(1). If the Federal inspection reveals that a violation exists, OSM must take enforcement action, including issuance of a notice of violation or cessation order, as appropriate. *See* CFR §843.12(a)(2).

Applicable State Program Requirements

West Virginia Code §22-3-8(a)(3) provides that "a permit terminates if the permittee has not commenced the surface mining operations covered by such permit within three years of the date the permit was issued: Provided, that the Director may grant reasonable extensions of time upon a timely showing that such extensions are necessary by reason of litigation precluding such commencement, or threatening substantial economic loss to the permittee, or by reason of conditions beyond the control and without the fault or negligence of the permittee: . . ."

Code of State Regulations (CSR) 38-2-3.27.e. provides that extensions of time for a permit as provided in subsection 3, section 8 of the Act shall be specifically set forth in a written approval and made part of the permit. Such extensions shall be made public by the Secretary.

Chronological History of Citizen Complaint and Corresponding State Actions

On January 9, 2012, WVDEP received a citizen complaint from Rob Goodwin, Coal River Mountain Watch, alleging that Marfork Coal Company's Eagle No. 2 Surface Mine Permit No. S-3028-05 had not started within three years of permit issuance and by law had terminated. State records indicate that the original permit was approved by WVDEP on June 6, 2008. The company was required by law to submit a request for a permit extension prior to June 6, 2011.

On January 10, 2012, Grant Connard, WVDEP Inspector, acknowledged receipt of the complaint and notified Mr. Goodwin that WVDEP would consider the information and decide how to proceed.

On January 17, 2012, Grant Connard notified Rob Goodwin that after reviewing the situation, it was determined that WVDEP had not notified Marfork Coal Company in accordance with Section 4.A of the State policy dated January 1993, regarding the termination of not-started permits that are three years old. The policy provides that the State inspector or clerk must notify the permittee that the permit will expire on the three-year anniversary date. The notification should be sent at least 90 days before the three-year anniversary date, but no more than 180 days before the mid-term date. Since the WVDEP had not properly notified the company, Mr. Connard acknowledged that WVDEP would follow Section 4.E of the policy and notify Marfork Coal Company. Section 4.E provides that there should not be any not-started permits which have exceeded more than three years since issuance or the most recent renewal date. However, if any of these are discovered that have not been notified in accordance with the procedure given above, you should proceed in accordance with the guidelines listed above.

Keith Porterfield, WVDEP, notified the company on January 12, 2012, that it had to submit a request for a permit extension; submit a statement if operations are expected to commence before the three-year anniversary date of permit issuance; or submit a statement acknowledging receipt of the letter and advising that the company wished to terminate the permit and obtain bond release.

On January 31, 2012, Marfork Coal Company submitted a request for an extension to WVDEP pursuant to WV Code §§22-3-8(a)(1) and 8(a)(3). The company stated that litigation involving its Clean Water Act (CWA) 404 permit has complicated and delayed mining for the past several years. In addition, due to the purchase of Massey Energy by Alpha Natural Resources, several permit transfer applications are still pending with the State. The company acknowledged that there had been changes in the regulations since permit issuance, and it would address any deficiencies prior to beginning operations on this permit or with the next required permit renewal.

On February 9, 2012, Keith Porterfield notified Marfork Coal Company that Permit No. S-3028-05 has been extended to June 6, 2013. The Company was advised to update the permit to current regulatory requirements prior to activation or the next renewal. In addition, Mr. Porterfield notified the Company that further extensions will be considered and granted only if a timely and adequate request is submitted. He cautioned that WVDEP bears no responsibility for providing the company any additional notice.

On February 13, 2012, OSM received a citizen complaint alleging that Marfork Coal Company's Eagle No. 2 Surface Mine, Permit No. S-3028-05, had terminated due to the company's failure to initiate surface mining operations within three years of permit issuance.

On February 15, 2012, OSM issued TDN X12-111-391-002 to WVDEP transmitting the citizen complaint.

On February 27, 2012, WVDEP responded to the TDN and provided OSM correspondence concerning actions it had taken earlier regarding the TDN. WVDEP acknowledged that the permit had been extended to June 6, 2013.

On April 3, 2012, OSM sought addition clarification from WVDEP regarding WVDEP's policy for the granting of permit extensions to not-started permits within three years of issuance; potential changes to Marfork Coal Company's permit if submitted as a new application; and Marfork Coal Company's eligibility to receive a permit, given that the company appeared to be linked to 20 violations that are part of settlement agreements in Kentucky and West Virginia.

On April 18, 2012, WVDEP acknowledged that, by law, WVDEP had authority to grant reasonable extensions, and WVDEP developed a policy clarifying the requirements and establishing procedures for the extension or termination of not-started permits. According to WVDEP, Section 4.E of its 1993 Policy allows a "retroactive" granting of an extension, if, and only if, WVDEP fails to follow its own policy of notifying a permittee of the upcoming three-

year anniversary. According to WVDEP, the State must abide by the notions of fair play and due process when WVDEP has made it known to permittees that it will notify them of the three-year anniversary for not-started permits. WVDEP acknowledged that it foresees no significant change if the permit were submitted as a new application. However, when the NPDES permit is up for renewal in 2013, required changes to the NPDES permit will generate a revision to the permit. WVDEP acknowledged that the transfer of this permit from Massey Energy to Alpha Natural Resources was still pending, and the permit was not initially conditioned at the time of issuance because Marfork Coal Company was not associated with the Pittston entities involved in the settlement agreements. In addition, WVDEP stated that, given that these violations have been or are in the process of being corrected to the satisfaction of the regulatory authorities, Marfork Coal Company is eligible to receive a surface mining permit.

Analysis of WVDEP's Response to the TDN

- All parties agree that Marfork Coal Company's Permit No. S-3028-05 had not started mining operations within three years of permit issuance, and the company had failed to submit a timely application for a permit extension to the WVDEP within the required time period. WVDEP acknowledged that the burden is still upon the permittee to provide a timely showing that an extension is necessary.

- State law, like §506(c) of the Surface Mining Control and Reclamation Act (SMCRA), provides that a permit terminates if the permittee has not commenced the surface mining operations covered by such permit within three years of the date the permit was issued. Documents provided by WVDEP in response to the TDN show that Marfork Coal Company's Permit No. S-3028-05 had expired on June 6, 2011, when the company failed to commence mining by that date.

- State law, like §506(c) of SMCRA, also provides that the WVDEP may grant reasonable extensions of time upon a timely showing that such extensions are necessary (1) by reason of litigation precluding such commencement or threatening substantial economic loss to the permittee, or (2) by reason of conditions beyond the control and without the fault or negligence of the permittee. In its letter dated January 12, 2012, notifying Marfork Coal Company of its need to submit a request for a permit extension, WVDEP advised the company that its request must state the reasons for requesting an extension pursuant to West Virginia Code §22-3-8(a)(3). However, in its approval letter dated February 9, 2012, WVDEP does not acknowledge the reasons for granting Marfork Coal Company's permit extension or how Marfork Coal Company's request dated January 31, 2012, satisfies the requirements for extending the permit pursuant to West Virginia Code §22-3-8(a)(3). Further, WVDEP's determination that it lawfully granted an extension of Marfork Coal Company's permit on February 9, 2012, is not supported by the facts or West Virginia law and is, accordingly, arbitrary, capricious, and an abuse of discretion.

- In its January 31, 2012, letter, Marfork Coal Company stated that litigation involving its CWA 404 Permit had complicated and delayed mining and the purchase of Massey

Energy by Alpha Natural Resources has resulted in several pending transfer applications with the State. According to the company, a five-year extension of the permit is requested and valid pursuant to the following: §22-3-8(a)(3) – conditions beyond the control and without the fault or negligence of the permittee existed with regard to the CWA 404 process; and §22-3-8(a)(1)(c) Alpha is a successor in interest and has provided the necessary documentation required by this section of the Code. Marfork Coal Company states that CWA 404 litigation has delayed mining at its Eagle No. 2 Surface Mine. A discussion with U.S. Army Corps of Engineers (USACE) personnel confirmed on May 1 and again on May 30, 2012, that Marfork Coal Company had not submitted a CWA 404 permit application for its Eagle No. 2 Surface Mine or any mining operation with the name or permit number in Raleigh County. Also, Marfork Coal Company's Permit No. S-3028-05 was not on the USACE's Enhanced Coordination Procedures (ECP) list dated June 2009 pending a CWA 404 permit or part of the ECP discussions that resulted thereafter with State, Federal, and industry officials. Although Marfork indicated to WVDEP that it had finalized its jurisdictional determination (JD) request that reflects the changes that have taken place since its initial stream delineation in 2008 and it was to be submitted in February 2012, the USACE has no record that a JD request for this permit has ever been submitted by Marfork Coal Company. Several permit transfer applications were pending with WVDEP for Marfork Coal Company at the time the not-started permit expired, but this did not relieve the company of its obligation to submit a timely request for a permit extension with the WVDEP. Furthermore, any permit transfers issued by the WVDEP to Alpha Natural Resources for Marfork Coal Company should be conditioned upon compliance with the settlement agreements involving 20 violations that are still being corrected in West Virginia and Kentucky. Given this information, Marfork Coal Company has not satisfied the State's statutory provisional requirements for obtaining a permit extension. Even if Marfork Coal Company had applied in a timely manner, its application fails to meet any of the statutory or regulatory criteria for obtaining a permit extension.

- WVDEP relied on a policy dated January 1993 in approving Marfork Coal Company's permit extension. Section 4.E of that policy provides that there should not be any not-started permits which have exceeded more than three years since issuance (or the most recent renewal date). However, if any of these are discovered, that have not been notified in accordance with the procedures given above, the WVDEP should proceed in accordance with the guidelines listed above. This policy is part of the State's Inspection and Enforcement Handbook that is posted on the WVDEP webpage under Section 3, Permit Application Requirements. The State's inspection staff, not the permitting staff, is responsible for processing applications for permit extensions. However, this policy has not been submitted to OSM and approved as part of the approved State program. In addition, there is nothing in the approved program that allows for the retroactive approval of permit extensions. The retroactive approval of a permit extension is inconsistent with both State law and regulations at West Virginia Code §22-3-8(a)(3) and CSR 38-2-3.27.e., respectively.

- Although WVDEP's policy provides that the permittee is to be notified within 90 days of the three-year anniversary of the permit issuance date, nothing in the approved State program requires the WVDEP to provide such notification. When approving Marfork Coal Company's permit extension, WVDEP acknowledged that further extensions will be considered and granted only if a timely and adequate request is submitted, and the WVDEP bears no responsibility for providing the company any additional notice. Under the approved State program, responsibility for submitting a timely application for a permit extension rests solely with the permittee. Further, granting untimely requests for permit extensions solely because WVDEP failed to provide a pre-expiration notice is inconsistent with the approved State program.

- CSR 38-2-3.27.e. provides that permit extensions must be made public by the WVDEP. Nothing in the permit file indicates that the public was ever given any notice of this permit extension. Only Marfork Coal Company and personnel with WVDEP were notified of the permit extension when it was granted by WVDEP on February 9, 2012. WVDEP's failure to provide the public notice of Marfork Coal Company's permit extension dated February 9, 2012, is not in accordance with the approved State program.

Conclusion

For the reasons set forth above, we must find that WVDEP's initial and supplemental responses to TDN X-12-111-391-002 involving Marfork Coal Company Permit No. S-3028-05 are arbitrary, capricious, and an abuse of discretion pursuant to 30 CFR §842.11(b)(1)(ii)(B)(2).

While the phrase "arbitrary, capricious, and an abuse of discretion" is used in 30 CFR Part §842, it is not defined in 30 CFR Part §700 to End. We must look elsewhere for a definition. Under the arbitrary and capricious standard, an agency's determination cannot be reversed unless it has no reasonable basis or it exceeds an agency's lawful authority. When an agency makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and the decision can be invalidated on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; and action not based upon consideration of relevant factors is arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law if it was taken without observance of procedure as required by law (Natural Resources Defense Council, Inc. v. U.S. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992). However, there is no singular standard for what constitutes an arbitrary and capricious decision.

Our review shows that WVDEP did not have good cause for failing to take corrective action because the violation cited in the TDN exists under the approved State program and no other circumstances demonstrating good cause have been asserted or exist under the good cause criteria at 30 CFR 30 CFR §842.11(b)(1)(ii)(B)(4). Furthermore, because WVDEP's decision in this case clearly exceeds its legal authority under the State's approved permanent regulatory program, we must find your actions with regard to the extension of Marfork Coal Company Permit No. S-3028-05 to be arbitrary, capricious, and an abuse of discretion.

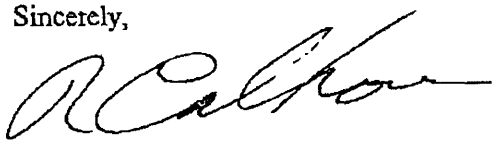
In accordance with 30 CFR §842.11(b)(1)(iii)(A), you may file a request for informal review of this determination. Authority to conduct these reviews and render a final decision has been delegated by OSM's Deputy Director to the appropriate Regional Director. Therefore, your request for informal review must be submitted to:

Thomas Shope, Regional Director
U.S. Department of the Interior
Office of Surface Mining
Reclamation and Enforcement
Appalachian Region
Three Parkway Center
Pittsburgh, Pennsylvania 15220

Your request for informal review must be received by Mr. Shope within five days from your receipt of this determination. If you do not request informal review within five days from receipt of this decision, or if the Regional Director affirms this determination upon informal review, OSM will conduct a Federal inspection and take any enforcement action it deems appropriate. We encourage you to take immediate action to cause this terminated permit to be corrected, which would avoid the need for a Federal enforcement action.

Please contact me if you have any questions regarding this determination or OSM's informal review procedures.

Sincerely,



Roger W. Calhoun, Director
Charleston Field Office

cc: Rob Goodwin, Coal River Mountain Watch
Stephanie Morgan, Permit Manager,
Marfork Coal Company