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

Dakota Resource Council, Plaintiff, vs. North Dakota Public Service Commission, Defendant and Secretary of the Interior Ken Salazar, in his official capacity, Intervenor-Defendant.	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Case No. 1:12-cv-064

I. FACTS

Congress enacted the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1323 ("SMCRA") to provide for comprehensive regulation of surface coal mining and the reclamation of mined lands on all non-federal and non-tribal lands. See 30 U.S.C. §§ 1202, 1300. SMCRA created "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs." Hodel v. Va.Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981). In 1979, the United States Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") promulgated regulations to "establish the procedures through which the Secretary of the Interior will implement the Surface Mining Control and Reclamation Act of 1977" (hereinafter"SMCRA Regulations"). 30 C.F.R. § 700.1. The SMCRA regulatory scheme is based on state primacy, reflecting Congress's recognition that "because of the diversity in terrain, climate, biologic,

chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States." 30 U.S.C. § 1201(f).

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

Once a state achieves "primacy" under SMCRA, a state regulatory authority "exercises front-line supervision, and the Secretary [of the Interior] will not intervene unless its discretion is abused." In re Permanent Surface Mining Regulation Litig., 653 F.2d 514, 523 (D.C. Cir. 1981) (*en banc*). The state, not OSM, has the primary responsibility for all aspects of enforcing the regulatory program. SMCRA "does not provide for concurrent jurisdiction in the states and federal government" once a state's program is approved by the Secretary of the Interior. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 497 (3d Cir. 1987); see also Bragg v. W. Va. Coal Ass'n., 248 F.3d 275, 288-89 (4th Cir. 2001); Coteau Props. Co. v. Dep't. of Interior, 53 F.3d 1466, 1469 (8th Cir. 1995). When a state has primacy, OSM's role is limited to monitoring, which involves occasional on-site inspections "to evaluate the administration of approved State programs." 30

U.S.C. § 1267(a). Based on those inspections, OSM may alert the state to possible violations of SMCRA, which triggers a regulatory enforcement review process.

Recognizing that a state's program may need to adapt as certain changes at either the federal or state levels occur, SMCRA Regulations require an amendment to a state's program when "changes to laws or regulations that make up the approved State program" occur. 30 C.F.R. § 732.17(g). SMCRA Regulations also identify specific "significant changes" to a state's program that require submission to OSM for review and the possible amendment of a state's program. See 30 C.F.R. § 732.17(b). These "significant changes" do not appear to include guidance documents a state agency issues in furtherance of the implementation of its existing OSM-approved state program. Rather, "significant changes" include: (1) changes to the "provisions, scope or objectives" of the state program; (2) changes in the state's regulatory authority "to implement, administer or enforce" the program; (3) significant changes to the "staffing and resources" of the state regulatory authority; (4) a change in an agreement between the state regulatory authority and another state agency authorized to implement portions of the state program; (5) "significant changes in funding" of the state program; and (6) "significant changes" in the amount of coal exploration and/or mining and reclamation activities in the state. Id.

North Dakota began regulating surface coal mining and reclamation in 1970, before the enactment of SMCRA in 1977. Beginning in 1977, the North Dakota Public Service Commission ("PSC") issued Policy Memorandum as guidance documents to operators who were conducting surface mining operations in the state. The Policy Memoranda are not rules and are not subject to the rulemaking requirements set forth in North Dakota's Administrative Agencies Practice Act ("AAPA"), N.D.C.C. ch. 28-32.

In 1979, the North Dakota legislature repealed its former reclamation statute and enacted new coal mining and reclamation statutes to incorporate SMCRA's minimum federal standards into state law. Pursuant to 30 U.S.C. § 1253(a)(1), this is the requisite first step to obtaining exclusive enforcement responsibility under SMCRA. See generally N.D.C.C. ch. 38-14.1-01. On February 29, 1980, North Dakota submitted its plan for implementing SMCRA to the Secretary of the Interior for approval. On December 15, 1980, the plan was approved. See 45 Fed. Reg. 82, 214 (Dec. 15, 1980) (codified at 30 C.F.R. pt. 934); see also 30 C.F.R. § 934.10. The PSC's regulation of surface coal mining activities is a comprehensive program, requiring those engaged in surface coal mining operations to comply with extensive permitting requirements and environmental protection performance standards. See 30 U.S.C. §§ 1256-1266; N.D.C.C. ch. 38-14.1-01; and N.D. Admin. Code art. 69-05.2. Since the Secretary's approval of the ND Program in 1980, the PSC has maintained exclusive authority over surface coal mining and reclamation on its non-federal and non-tribal lands. See N.D.C.C. § 38-14.1-02(4); 30 C.F.R. pt. 934. In implementing the ND Program, the Reclamation Division evaluates surface mining permit applications, permit revisions and renewal applications, makes recommendations to the PSC Commissioners regarding permit issuance and bond releases, and carries out inspections of coal mines to ensure compliance with SMCRA and the ND Program. See Docket No. 23-2, p.2. Since obtaining approval of the ND Program, the PSC has submitted all changes in North Dakota's laws or regulations, or changes that would affect the implementation, administration or enforcement of the ND Program, to OSM for review as program amendments. See Docket No. 23-2, p.3. The Secretary of the Interior has reviewed and approved, either wholly or in-part, these amendments with OSM's final action on each amendment is detailed in 30 C.F.R. §§ 934.12-934.15. OSM has never threatened to remove the

PSC's authority to implement the ND Program. See Docket No. 23-2, p.3. OSM's 2012 annual report states that the PSC "continues to administer an efficient and successful coal regulatory program," and has "no major issues that need corrective action." See Docket No. 23-37, pp. 9, 20.

On March 26, 2012, the Plaintiff notified the Secretary of the Interior and the PSC of their intent to file a federal civil lawsuit pursuant to SMCRA's citizen suit provision, 30 U.S.C. § 1270(a)(2). The Plaintiff filed its complaint on May 30, 2012, alleging that the PSC's Policy Memoranda are amendments to North Dakota's surface mining and reclamation program which have not been submitted to or approved by the Director of the OSM. The Plaintiff asks the Court to: 1) find that the PSC has violated and continues to violate SMCRA and SMCRA program regulations; 2) compel the PSC to refrain from giving further effect to the Policy Memoranda; 3) award Plaintiff its cost and expenses; and 4) to grant all other relief as necessary. See Docket No. 1, pp. 6-7. The Plaintiff failed to attach any of the challenged Policy Memoranda to its complaint. The Plaintiff filed its motion for summary judgment on November 12, 2012, and attached five of the 21 Policy Memoranda to its motion. See Docket Nos. 14, 15, 15-11. The PSC provided true and correct copies of all of the Policy Memoranda identified in the complaint and the Plaintiff's motion for the Court's review.

II. UNCONTESTED MATERIAL FACTS

1. On March 8, 1995, the PSC issued a revised Policy Memorandum No. 2, which provides guidance to mine operators regarding mine personnel accompanying PSC representatives during inspections. The PSC originally issued Policy Memorandum No. 2 on April 27, 1978, and reissued the Memorandum on August 10, 1984.

2. The PSC issued a revised Policy Memorandum No. 3 on March 8, 1995, to provide guidance to mine operators regarding covering toxic or combustible materials. On April 27, 1978, the PSC originally issued Policy Memorandum No. 3 and issued revised versions of the Memorandum on August 10, 1984, August 7, 1986, and February 25, 1988.

3. A revised Policy Memorandum No. 4 was issued on March 8, 1995, by the PSC, which provides guidance regarding payment of charges for analytical samples taken by PSC representatives. The Memorandum was originally issued on October 13, 1978, and the NDPSC issued a revised version on August 10, 1984.

4. The PSC issued a revised Policy Memorandum No. 5 on March 8, 1995, which provides guidance to mine operators regarding removal of suitable plant growth material. Policy Memorandum No. 5 was originally issued on March 7, 1979, and revised on August 10, 1984.

5. On March 8, 1995, the PSC issued revised Policy Memorandum No. 6 to provide guidance to mine operators regarding activities covered by surface coal mining permits. The PSC originally issued the Memorandum on May 4, 1979, and issued a revised version on August 10, 1984.

6. The PSC issued a revised Policy Memorandum No. 7 to mine operators on March 8, 1995, which provides guidance regarding coordinating communications between the North Dakota agencies involved in regulating surface coal mining operations. Policy Memorandum No. 7 was originally issued by the PSC on August 2, 1979, and a revised version was issued on August 10, 1984.

7. On March 8, 1995, the PSC issued a revised Policy Memorandum No. 8, which provides guidance to mine operators regarding the applicability of the statutory 10-year revegetation

liability period. The PSC originally issued Policy Memorandum No. 8 on October 15, 1980, and reissued the Memorandum on August 10, 1984.

8. On July 12, 2006, the PSC issued an updated Policy Memorandum No. 9 which provides guidance to mine operators regarding bond release notice requirements. The PSC originally issued Policy Memorandum No. 9 on November 10, 1982, and reissued the Memorandum on August 10, 1984, March 8, 1995, and December 19, 2001.

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

10. A revised Policy Memorandum No. 11 was issued by the PSC on March 8, 1995, which provides guidance to mine operators regarding sedimentation pond design, construction, operation and maintenance. The PSC originally issued Policy Memorandum No. 11 on July 25, 1983, and issued a revised version on August 10, 1984.

11. On July 12, 2006, the PSC issued an updated Policy Memorandum No. 12, which provides guidance to mine operators regarding a professional engineer's impoundment certifications and inspection reports. The PSC originally issued Policy Memorandum No. 12 on February 12, 1985, and issued updated versions on March 8, 1995, and December 19, 2001.

12. The PSC issued a revised Policy Memorandum No. 14 on March 8, 1995, which provides guidance to mine operators regarding clarification of the annual map requirements that are

contained in North Dakota's administrative code. Policy Memorandum No. 14 was originally issued by the PSC on June 21, 1985.

13. On January 13, 1999, the PSC issued revised Policy Memorandum No. 15, which provides guidance to mine operators regarding performance bond release for waste disposal operations located on mined lands. The PSC originally issued Policy Memorandum No. 15 on November 5, 1985.

14. The PSC issued an updated Policy Memorandum No. 16 in July of 2009, which provides guidance to mine operators regarding estimating reclamation costs. Policy Memorandum No. 16 was originally issued on December 31, 1985, and updated in June of 1986, April of 1990, March of 1995, October 28, 1998, and July 18, 2006.

15. On September 4, 2012, the PSC issued the annual update of the variable costs in Policy Memorandum No. 16 which provides guidance to mine operators regarding the 2012 update for the variable costs contained in the Policy Memorandum.

16. On March 8, 1995, the PSC issued a revised Policy Memorandum No. 17, which provides guidance to mine operators regarding suitable plant growth material removal and redistribution. Policy Memorandum No. 17 was originally issued on January 20, 1987.

17. Policy Memorandum No. 18 was issued by the PSC on February 3, 1987, which provides guidance to mine operators concerning performance bonds covering more than one permit area.

18. On July 12, 2006, the PSC issued a revised Policy Memorandum No. 19, which provides guidance to mine operators for sedimentation pond removal and pond site reclamation.

Policy Memorandum No. 19 was originally issued on July 15, 1987, and revised versions were issued on May 18, 1988, March 8, 1995, and July 30, 1997.

19. On November 8, 1988, the PSC submitted proposed regulatory language regarding the 10-year revegetation bond liability period for areas disturbed by sedimentation ponds and associated activities to OSM for review as a ND Program amendment.

20. On July 31, 1989, the PSC withdrew the proposed amendment regarding the revegetation bond liability period language from OSM because the PSC had sufficient discretion to implement the proposed actions under existing legal authority.

21. On July 31, 1989, OSM, in response to the PSC's withdrawal of the proposed bond release amendment, concurred with the PSC that the "amendment was unnecessary since [the PSC has] adequate discretion within" the existing ND Program to act in accordance with the planned amendment.

22. On September 6, 1989, after receiving OSM's determination that amending the ND Program to include the previously approved bond release language "was unnecessary," the PSC issued Policy Memorandum No. 20, which provides guidance to mine operators concerning the revegetation responsibility period for areas disturbed by sedimentation ponds and associated activities. Revised versions of Policy Memorandum No. 20 were issued by the PSC on July 21, 1992, July 30, 1997, June 9, 2004, and January 29, 2009.

23. The PSC issued Policy Memorandum No. 21 on August 1, 1995, which provides guidance to mine operators concerning mine waste disposal under applicable regulations.

24. On June 9, 2004, Policy Memorandum No. 22 was issued by the PSC providing guidance to mine operators regarding future permitting for bond-released tracts of land.

25. On July 12, 2006, the PSC issued Policy Memorandum No. 23, which provides guidance to mine operators regarding mine-related roads subject to design and performance standards and road certification requirements.

26. The PSC and its staff have not, and do not, apply the text of the Policy Memoranda as mandatory or otherwise binding upon the PSC's decision-making regarding permitting or enforcement of mine operators under the ND Program. See Docket No. 23-2, pp. 4-5.

27. The PSC and its staff consider the Policy Memoranda as guidance and continue to utilize the Policy Memoranda only as guidance. See Affidavit of Deutsch ¶16.

28. The PSC and its staff have not utilized the Policy Memoranda when issuing individual surface mining and reclamation permits pursuant to the ND Program or in enforcing the ND Program laws and regulations relating to SMCRA. See Docket No. 23-2, p. 5.

29. None of the Policy Memoranda have been promulgated as rules or codified by North Dakota's legislature. See Docket No. 23-2, p.4. None of the Policy Memoranda have undergone the public notice procedures required for formal rule making as would be required by North Dakota's AAPA were the Policy Memoranda regulations. See Docket No. 23-2, p. 4.

30. The Policy Memoranda have not been published in North Dakota's Administrative Code, the Federal Register, or the Code of Federal Regulations. See Docket No. 23-2, p. 4.

III. STANDARD OF REVIEW

The Plaintiff seeks judicial review of final agency decisions by the PSC pursuant to . . . "the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the citizen suit provision of SMCRA, 30 U.S.C. § 1270." However, a state agency's actions are not reviewable under the federal

APA. See 5 U.S.C. § 701(b)(1) (defining the term "agency" as used in the APA as "each authority of the Government of the United States"); Hunter v. Underwood, 362 F.3d 468, 477 (8th Cir. 2004) ("The APA does not grant federal courts jurisdiction to review actions of state or municipal agencies."). Rather, the APA may be used to guide a court where another federal statute, such as SMCRA, authorizes judicial review but does not provide standards for review. See Newton Cnty. Wildlife Ass'n v. Rogers, 141 F.3d 803, 808 (8th Cir. 1998); Sierra Club v. Glickman, 67 F.3d 90, 96 (5th Cir. 1995).

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

The APA provides for judicial review in cases where an agency has allegedly failed to act, such as pursuant to a mandatory, non-discretionary duty. See 5 U.S.C. § 706(1). A claim under this provision can only proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original); accord Saini v. Heinauer, 552 F. Supp. 2d 974, 977 (D. Neb. 2008).

IV. LEGAL ARGUMENT.

A. STANDING.

The doctrine of standing involves both constitutional and practical limitations.

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" . . . . Second, there must be a casual connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant" . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Sierra Club v. Robertson, 28 F.3d 753, 757-58 (8th Cir. 1994) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

To show an injury-in-fact, a plaintiff must show "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." Id. at 758 (quoting Lujan, 504 U.S. at 560). Merely alleging an injury related to some cognizable interest is not enough; rather, a plaintiff "must make an adequate showing that the injury is actual or certain to ensue." Id. In this case, the Dakota Resource Council has not identified, in either the complaint or the summary judgment motion, a specific permit request, application, amendment, or termination decision as the basis for any alleged injury. Instead, the Plaintiff relies exclusively on hypothetical future harms that are untethered to any site-specific

action concerning any of the challenged Policy Memoranda issued by the PSC since 1977. The Court finds the Plaintiff has not asserted a concrete injury-in-fact sufficient to invoke this Court's Article III jurisdiction.

In Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994), the plaintiff environmental groups had initially challenged the issuance of a land and resource management plan for the Ouchita National Forest and two proposed timber sales approved pursuant to that plan. Id. at 754-57. The plaintiffs unsuccessfully sought two preliminary injunctions in the district court to halt the proposed timber sales. The district court subsequently granted summary judgment in favor of the federal defendants. Id. at 756. At the time of appeal, the plaintiffs abandoned their timber sale claims and argued simply that the management plan violated the law apart from any site-specific management decisions. The Eighth Circuit Court of Appeals found that the plaintiffs failed to assert an imminent injury in fact to support their standing on appeal because the plaintiffs had challenged the management plan itself but had not challenged any on-the-ground or site-specific actions flowing from that plan. Id. at 758. The Eighth Circuit reasoned the plaintiffs' arguments were "devoid of reference to the particularities of any proposed site-specific action that might give rise to an injury in fact." Id. at 758-59 (also stating "[t]he mere existence of the Ouchita Forest Plan does not produce an imminent injury in fact" and that "[f]inding an environmental injury based on the [p]lan alone, without reference to a particular site-specific action, would 'take[ ] us into the area of speculation and conjecture.'" (quoting O'Shea v. Littleton, 414 U.S. 488, 497 (1974))).

In reaching its conclusion that the plaintiffs lacked standing, the Eighth Circuit in *Robertson* relied on the United States Supreme Court's reasoning in Lujan v. National Wildlife Foundation, 497 U.S. 871 (1990). In *Lujan*, the Supreme Court struck down an attempt to seek judicial review

of an entire Bureau of Land Management "land withdrawal review program" in which the agency classified and administered public lands, holding that the plaintiffs did not have standing to challenge the program wholesale. 497 U.S. at 890-94. In reaching that conclusion, the Supreme Court said that the agency had not engaged in reviewable "final agency action" under the APA, and that program-wide flaws cannot be placed before the courts for "wholesale improvement." Id. at 891; see also id. at 894 ("The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.")

The same reasoning of the appellate courts in *Robertson* and *Lujan* applies here. The Plaintiff has not alleged a single concrete, injury-in-fact as to the application of any of the five identified Policy Memoranda. For example, the Plaintiff has not identified any specific application of Memo No. 5's described policies, but instead challenges the hypothetical potential future application of such exception. See Docket No. 15, p. 13 ("Memo 5 includes a provision that appears to allow case by case exceptions. . . ."). Similar hypothetical harms are alleged concerning Memo No. 6 (referring to "potential harm" and stating that "this sort of language could be used to keep small mines out of SMCRA permit areas" and "[i]f such a precedent were established, it could ultimately lead to non-SMCRA–jurisdictional surface mining"). See Docket No. 15, p. 16. With respect to Memo No. 15, the Plaintiff fails to identify any circumstance in which the memo was

applied for the purpose of allowing land formerly used for agricultural purposes to be reclaimed for industrial waste use. In the absence of any site-specific application, there is no way to judge whether the reclamation of a surface coal mining operation violates the state and federal standards for post-mining land uses. 30 U.S.C. §§ 1265(b)(2) & (c)(3). The Plaintiff also challenges Memo No. 18 rather than any application in a specific permitting decision with respect to Memo No. 20. The Plaintiff's allegations clearly reveal that it does not allege a concrete injury-in-fact. The allegations are essentially based on hypotheticals as demonstrated by the heading: "Memo 20 . . . potentially allow[s] a shorter – and therefore less stringent – reclamation responsibility time period." Id. at 21. Simply stated, the Plaintiff a concrete injury-in-fact with respect to any of the challenged Policy Memoranda.

Further, the Plaintiff has failed to identify the particular Policy Memoranda that give rise to its claims. The Plaintiff merely notes it is challenging a "pattern and practice" of behavior by the PSC and the OSM spanning more than three decades. See Docket No. 15. The Plaintiff contends that "at least five Memoranda" implement substantive changes to the state program, while still making vague references to "other memoranda" which are apparently "outside the scope of this litigation." The Court finds that the Plaintiff never provides a concrete picture of which specific memoranda trigger a duty to process as state program amendments. In summary, the Plaintiff has failed to assert a justiciable injury-in-fact as the allegations are in essence vague, non-specific challenges to the Policy Memoranda issued by the PSC.

B. RIPENESS

The Court finds that the Plaintiff has also failed to assert a ripe challenge to the referenced Policy Memoranda. The policies described in the memoranda are not ripe for judicial review until the relevant facts are more fully developed during the OSM's upcoming 2013 annual performance review for North Dakota's state program, as well as in the context of some site specific action. Judicial intervention at this stage could short-circuit further administrative action being taken by the OSM and the PSC. Courts have recognized the OSM's unique expertise in this field and have granted the OSM substantial deference when it interprets SMCRA and the regulations due to the complex nature of SMCRA's regulatory scheme. See W. Va. Mining & Reclamation Ass'n v. Babbitt, 970 F.Supp. 506, 518 (S.D. W. Va. 1997).

In determining whether an agency's decision is ripe for judicial review, a court must examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998) (internal citations and quotations omitted). A court must consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Id. In finding the Plaintiffs' claims unripe for review, the Supreme Court in *Ohio Forestry* recognized that "before the Forest Service can permit logging, it must focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court. . . . The [plaintiff] thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." Id. at 734 (internal citations omitted).

As in *Ohio Forestry*, the PSC must focus on site-specific action and apply the policies described in the memoranda to that site-specific action before making a final decision, such as issuing a permit, recalculating a performance bond, or any number of other actions. Once the policy is applied to the facts of a particular circumstance, the Plaintiff has ample opportunity to comment on those site-specific actions, and may bring a challenge to any allegedly improper policies at that time. All of the relevant factors reveal that the Plaintiff's claims are not ripe for judicial review.

In addition, the Court would certainly benefit from further factual development resulting from the planned administrative review of the Policy Memoranda. This is important because Policy Memoranda and other state program guidance documents do not per se warrant submittal to the OSM as state program amendments. Compare 30 C.F.R. § 732.17(e) ("State program amendments may be required . . . .") with 30 C.F.R. § 732.17(g) ("Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes . . . as an amendment . . . .").

The OSM has adopted regulations at 30 C.F.R. § 732.17 to govern the state program amendment process. 30 C.F.R. § 732.17(b) identifies when a state must notify the OSM of conditions or events that may require a state program amendment. 30 C.F.R. § 732.17(b)(1) - (b)(7) identify minimum conditions or events for which notification is mandatory. None of those paragraphs explicitly mentions state Policy Memoranda.

The Plaintiff alleges the PSC failed to follow the notification procedures in 30 C.F.R. § 732.17(b)(1). However, the Policy Memoranda issued by the PSC simply provide further explanation or clarification concerning the approved state program, and do not substantively change the operation of that program, and do not necessarily require notification under the federal

regulations. Even if the notification provisions were triggered, it does not follow that a program amendment would be required. As described in 30 C.F.R. § 732.17(c), the Director of the OSM will determine whether a program amendment is actually required in a specific circumstance. "State program amendments may be required" when any one of three criteria are met. 30 C.F.R. § 732.17(e). This language affords the OSM the discretion to determine whether a state program amendment is required in every case in which one or more of the criteria are met. Arguably, the PSC's Policy Memoranda merely expand on aspects of the existing state program that require further clarification, but do not alter the language or overarching principles of the state laws and regulations. As such, they do not automatically require formal OSM review and approval as state program amendments. Compare 30 C.F.R. § 732.17(e) with 30 C.F.R. § 732.17(g).

The record reveals that OSM's Casper Regional Office reviews North Dakota's policy documents on an informal basis prior to their issuance. This informal review is in addition to the review conducted for policies submitted through the formal 30 C.F.R. § 732.17(b) notification process. OSM reviews all pertinent Policy Memoranda in the course of its oversight responsibilities to ensure the approved state program complies with SMCRA and the applicable federal regulations. OSM's oversight of state regulatory programs takes several forms, including (1) an annual evaluation of state program administration as specified in 30 C.F.R. § 733.12(a)(1), and (2) federal inspections of surface coal mining and reclamation operations as provided for in 30 C.F.R. § 842.11(a)(2). See Docket No. 25, p. 25. It is primarily through these established procedures that the PSC's actions, including their application of internal policies and guidance documents, are evaluated for compliance with the approved state program, SMCRA, and federal regulations.

In addition, when OSM receives a request to evaluate a state program, they will conduct a review to evaluate that request. 30 C.F.R. § 733.12(a)(2). The Plaintiff elected not to follow this administrative process which arguably may have triggered an evaluation of the Policy Memoranda by OSM. It is the Court's understanding that because the issue has now been brought to OSM's attention, OSM's Regional Office will review the PSC's policies as part of its annual program review in 2013. Once the OSM completes the annual review, it will determine whether the Policy Memoranda are in compliance with the approved state program, SMCRA, and the federal regulations, or require corrective action. OSM's corrective action could include, but is not limited to, requesting the state rescind any offending policy or submit the policy as a state program amendment. The Court would benefit from the factual development resulting from this review.

The Court would also benefit from further factual development in the context of a challenge to site-specific action applying the policies described in the memoranda. This would allow the Court to assess the actual application of the described policies rather than to issue an advisory opinion addressing the hypothetical scenarios relied upon in the Plaintiff's motion.

Judicial intervention at this stage would also interfere with the administrative process. OSM and the PSC have already committed to review the various Policy Memoranda as part of the annual performance review for 2013. See Docket No. 27-3, p. 5 (the "OSM will conduct a review of Policy Memoranda developed by the North Dakota Regulatory Program. The primary focus of this evaluation is to review all current Policy Memoranda to determine if any of the policies are inconsistent with the approved state regulatory program or contradict federal regulations as defined in [SMCRA]."). Judicial review at this stage will interfere with the regulatory process for oversight in the spirit of cooperative federalism. 30 C.F.R. § 733.12(a)(1). In addition, delayed review will

not cause harm because the Plaintiff has not identified any imminent risk of the challenged policies being applied in a site-specific mining decision. The Plaintiff will have ample opportunity to comment on those site-specific decisions. The Court's jurisdictional limitations prohibit the premature adjudication requested by the Plaintiff and, as a result, these unripe claims must be dismissed.

V. STATUTE OF LIMITATIONS

Finally, to the extent the Plaintiff has identified specific Policy Memoranda which are the source of the alleged SMCRA violations, the Court finds that any challenge to the issuance of those memoranda are clearly barred by the three-year statute of limitations applicable to claims brought against the state. The issuance dates of the Policy Memoranda, which range from 1977 to early 2009, make clear that any challenge to the memoranda themselves – in the absence of any identified site-specific application of the policies described in the memoranda – is time barred.

Since North Dakota has an approved state program in place, and the Plaintiff brought its claim directly against a state agency (the PSC), the applicable statute of limitations derives from state law.[1] North Dakota provides for a three year statute of limitations in actions brought against the state or its employees and officials acting within the scope of their employment or office. N.D.C.C. § 28-01-22.1. The relevant statutory language reads in its entirety:

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

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

N.D.C.C. § 28-01-22.1.

The five Policy Memoranda identified by the Plaintiff were issued in 1979, 1985, 1987, and 1989. The exercise of reasonable diligence at the time of the issuance of the policies would have led the Plaintiff to discover any claim arising from the contents of the Policy Memoranda because the documents are a matter of public record. The Plaintiff cannot argue that the statutory period should be reopened by virtue of any revisions to the Policy Memoranda. Of the five identified Policy Memoranda, none were revised within the three years preceding the filing of the complaint on May 30, 2012. Even including all twenty-three of the Policy Memoranda, only two were revised or updated within the three year limitation period (Memo Nos. 16a and 16b). The Plaintiff has made no attempt to identify any specific harm or violation flowing from those two Policy Memoranda, nor has the Plaintiff shown how the more recent updates may have created a meaningful change from the policy described at the time of the memo's initial issuance so as to justify reopening the statute of limitations. The mere act of revising, reissuing or updating a policy, without more, is not sufficient to reopen the statutory period. See Nat'l Mining Ass'n, 70 F.3d at 1350-51 (finding that arguments available at the time of a rule's initial adoption were barred by statute of limitations, and finding that "reopener doctrine" concerning statute of limitations may allow judicial review where an agency has undertaken to "reexamine its former choice"). The Court finds, as a matter of law,

that the Plaintiff's challenges to any of the Policy Memoranda issued by the PSC are barred by the applicable statute of limitations.

VI. CONCLUSION

For the reasons outlined above, the Defendant's Motion for Summary Judgment (Docket No. 23) is **GRANTED**, the Intervenor Defendant's Motion for Summary Judgment (Docket No. 26) is **GRANTED**, and the Plaintiff's Motion for Summary Judgment (Docket No. 14) is **DENIED.**

IT IS SO ORDERED.

Dated this 3rd day of September, 2013.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court