

United States
Department of
Agriculture

Forest Service Washington Office

SENGAD 800-631-688

14th & Independence SW P.O. Box 96090 Washington, DC 20090-6090

File Code: 2580

Date: JAN 2 3 2004

Mr. Jim Sims
Executive Director
Western Business Roundtable
320 Indiana Street, Suite 230
Golden, CO 80401

Dear Mr. Sims:

Thank you for your letter dated July 25, 2003, to Secretary Veneman regarding the guidelines as presented in the Federal Land Manager's Air Quality Related Values Workgroup Phase 1 Report (FLAG). In summary, your concerns are that the information in the FLAG Report pre-empts State authority and slows much needed energy development in the West because it:

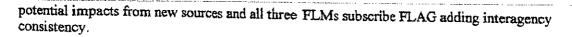
- gives Federal land managers the power to veto or indefinitely delay proposed energy projects across the West,
- sets standards so narrow that it impacts the ability to meet energy demand,
- is not consistent with the Federal Clean Air Act,
- was issued as guidelines instead of Federal regulations to avoid the rigors of Federal rulemaking, and
- flies in the face of the President's National Energy Policy and associated Executive Orders

Finally, you urged the Administration to suspend applying the FLAG Report, conduct a review of their national security and energy implications, and seek approval of such energy regulatory barriers through an open, deliberative rulemaking process. I will address each of these points, but first, let me review the law and regulations under which the USDA Forest Service (FS) manages "mandatory" class I areas since the FLAG Report only addresses the class I areas.

In the Clean Air Act, Congress gives the FS (a Federal land manager) the affirmative responsibility to protect air quality related values (AQRV) in 88 wildernesses from the adverse effects of air pollution. Since this is not a discretionary requirement, the FS takes an active role in recommending to the State, in a process clearly defined in the law and regulation, whether or not a large new or modified stationary source will adversely affect one or more of these 88 class I areas. Yet, the FS is not a regulatory agency. The States choose whether or not to issue permits based on many considerations including our recommendation with regard to class I areas.

In this redard, the FLAG Report is simply guidance that helps a permit applicant, a FS permit reviewer, and others to estimate AQRV impacts from proposed and permitted sources on class I areas. It is not a decision document and adds no new requirements for permit applicants, regulators, or the FLMs. The key advantage of the FLAG document to potential permit applicants is that it reduces uncertainty because applicants know how the FLMs are evaluating





As to your specific concerns, FLAG gives no more and no less power to delay or affect proposed energy projects. The timelines are set by State rules and regulations, so the FLAG guidance helps the agency keep to these timelines. No one is required to follow the FLAG recommendations.

The FLAG documented processes and levels that result in adverse impact on visibility or air quality related values (AQRVs) are those that were in common use by all FLMs prior to the Report.

The FLAG is consistent with the Clean Air Act. It adds no new hurdles; it only consolidates agency procedures and explains permit review processes that have been in place for sometime. The advantage of FLAG is the potential permit review delays can be avoided if FLAG is used by all parties. The familiarity and consistency of approach makes permit preparation and review easier.

If FLAG guidelines are used by applicants and consultants before consultation with States or FLMs, we are unable to assess any scale back or cancellation of projects and are also unable to use its flexibility to work toward appropriate solutions.

The FLAG was issued as a guideline not "to avoid the rigors of the Federal rulemaking process" But rather to give maximum flexibility in their application; applicants and regulations may chose to follow or not to follow the document. In fact, issuing FLAG as a Federal rule likely would have required compliance instead of leaving it as an option.

The FLAG is consistent with the President's National Energy Policy which calls for increases in energy supplies while protecting and improving the environment. The Executive Orders you refer to address rulemaking actions. The FLAG is not a rule or a regulation. The FLAG establishes a level playing field for both permit applicant applicants and permitting authorities by informing all parties of the FLMs' role and suggesting a permit review process for AQRVs in class I areas.

Even without the FLAG Report, FLMs would still review applications and make recommendations to the States and they probably would still use many of the techniques and procedures found in the FLAG Report, as they did prior to its issuance. The FLAG Report offers optional procedures which if followed can provide a fair, open, and well defined assessment of the effects of proposed sources on class I areas. Therefore, we do not intend on withdrawing the FLAG Report.

We have added your organization's information to our list of parties interested in providing comments at a time when the agency chooses to update the Phase 1 Report or begin Phase 2.



I hope this clarification of the FLAG Phase 1 Report eases your concerns. Should you have any further questions about FLAG, please contact Rich Fisher at (970) 295-5981.

Sincerely,

JAMES T. GEADEN

Director, Watershed, Fish, Wildlife, Air, and Rare Plants





The Honorable Gail Norton Secretary, Interior Department 1849 C Street, N.W. Washington, D.C. 20240

The Honorable Spencer Abraham Secretary, Energy Department 1000 Independence Ave., S.W. Washington, D.C. 20585 The Honorable Ann Veneman Secretary, Agriculture Department Washington, D.C. 20250

Acting Administrator Marianne Horinko Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. Mail Code 3213A Washington, DC 20460

Re: A Federal Policy That Is Pre-Empting State Authority And Slowing Much-Needed Energy Development In A Time Of Crisis In The West

Dear Secretaries Norton, Veneman and Abraham and Acting Administrator Horinko:

As you know, our nation is in the grips of a looming energy crisis, one that could devastate our recovering economy and hit millions of American families with disastrously higher energy bills this winter. It is imperative that government leaders do everything possible to encourage production of adequate supplies of energy for all Americans, especially in terms of reducing burdensome government regulation. Identifying and lessening such regulation was in fact a principal directive to your agencies from President Bush as part of his National Energy Policy and associated Executive Orders.

We are writing to bring to your attention one such government policy that is contributing directly to our nation's growing energy crisis. This policy has the effect of a government regulation but was instead approved by government managers entirely outside of the regulatory process and largely hidden from public scrutiny. It is precisely the type of barrier to increased domestic energy development that the President has asked your department to address.

### The "FLAG" Guidelines

This policy is known as Federal Land Manager's Air Quality Related Values Workgroup "FLAG" Policy Directive. In short, FLAG provides unelected federal land managers (FLMs) with a virtual veto over the decisions of state regulators in the air quality permitting process, something neither this Administration nor the Congress has contemplated nor would approve.

As the attached letter from North Dakota Governor John Hoeven states, "while it serves the purpose of standardizing the FLMs review procedures, FLAG set standards so narrow that it may adversely impact the nation's ability to meet its growing energy demand and discourage economic development activities across the U.S."

FLAG imposes additional air permitting requirements on new energy projects beyond those in the Clean Air Act, all without Congressional authorization or formal regulatory sanction. As a

Secretary Norton
Secretary Veneman
Secretary Abraham
Interim EPA Administrator

result, it forces additional costs and delays on energy projects and has contributed to the delay, scaling back or cancellation of several needed energy projects in the West, including both natural gas and coal-fired projects. For example, projects in states such as Montana, New Mexico, Wyoming, and North and South Dakota have been adversely affected by this 'non-regulatory regulation.'

FLAG did not go through rulemaking required by the federal Administrative Procedure Act and is therefore the type of government action (a substantive legal rule in the guise of a "guidance document") that the D.C. Circuit Court of Appeals, the court of principal national responsibility for judicial oversight of federal agencies like EPA and the FLMs, has repeatedly overturned because of due process circumvention. These problems were aggravated when EPA recently approved an air quality technical model where EPA's regulatory preamble acknowledged the FLAG directive, but did so in a manner that is inconsistent with the federal Clean Air Act.

FLAG has far-reaching impacts because it established new "acceptability" values and metrics for determining "adverse impacts" and "limits of acceptable change" for air quality related values (AQRVs). Under the guise of a "guidance document," FLAG is instead a binding policy that substantively functions as a set of definitive regulatory requirements that mandate and compel additional analyses. This governance by guidance is surreptitious and particularly outrageous when our nation faces a growing energy crisis.

## Solution: Submit This Guideline To The Regulatory Process

The Roundtable supports the desire of the U.S. Forest Service, National Park Service and U.S. Fish and Wildlife Service to develop consistent policies and processes both for identifying AQRVs and for evaluating the effects of air pollution on AQRVs in national parks and wilderness areas (Federal Class I air quality areas). However, the FLAG Policy Directive is flawed in both process and substance. The Roundtable believes that, if the Administration wants FLMs to have consistent policies in this area, it should propose them in a formal rulemaking. This would provide [state] and other interested parties with an appropriate opportunity to review and help shape an eventual regulation.

The following provides a constructive and balanced approach for the Administration to follow in addressing this problem. We encourage you to contact the Departments of Interior, Agriculture and Energy and the Environmental Protection Agency and urge that they work together in implementing these recommendations.

- Ensure that the FLAG Policy Directive is adopted in accordance with due process of law and the Administrative Procedures Act. Although the FLAG Policy Directive is purportedly guidance and was not properly promulgated as a regulation, the FLMs and EPA treat the Directive as having the force of law. [See 68 Fed. Reg. 18442 (April, 15, 2003)]. The FLAG Directive should either be treated as unenforceable guidance or undergo appropriate notice and comment rulemaking.
- 2. Clarify that, in most circumstances, the FLMs cannot veto a state decision to issue a permit. While Congress gave the FLMs the "affirmative responsibility" to

Secretary Norton
Secretary Veneman
Secretary Abraham
Interim EPA Administrator

protect AQRVs, it also gave the states authority, in most circumstances, to decide when an AQRV in a Class I area will be adversely impacted by emissions from a new or modified major source. [See CAA, Section 165(d)(2)(C)(ii)]. The FLAG Policy Directive should clarify that, consistent with the Clean Air Act, unless a PSD-increment or ambient air quality standard is violated, the permitting state makes the ultimate policy decision whether AQRV impacts should prevent issuance of a permit.

- 3. Recognize site specific data and processes for developing better scientific data in determining "Natural Conditions." While FLAG allows for some minor adjustment for relative humidity differences, FLAG purports to establish only one default value for establishing "natural visibility conditions" in all Western Class I areas. Instead of this "one-size-fits-all" approach, FLAG should be revised to require the use of actual FLM visibility measurement data and account for actual background visibility impacts in Class I areas.
- 4. Clarify that the focus of AQRV Impact Assessments in the PSD permitting process is solely on whether the proposed source will interfere with visitor enjoyment of the Class I area. FLAG should be revised to recognize that the Clean Air Act expressly sets out that the AQRV determination is for an individual source's impacts on any AQRV or increment and that EPA's regulations base the State's decision on case-specific factors affecting the visitors' enjoyment of the Class I area.
- 5. Recognize and hold accountable AQRV Impairing Emissions from Federal Lands. Forest fires, either intentionally set or accidental, release large quantities of fine particles that cause several impacts on air quality. In the Western states, where federal ownership often exceeds 85 percent of total land mass within a state, FLMs have announced long-term plans to dramatically increase the use of prescribed fire as a land management tool, yet emissions from fire are not included in the FLAG determination of "natural conditions" for Class I areas. FLAG should be revised to account realistically for growth in emissions from fire.
- 6. Clarify that Class I Areas are the focus of the AQRV protection program. In the FLAG Policy Directive, the FLMs attempt to take a significantly expanded role in the air quality permitting process by applying their review authority to Class II areas. The Clean Air Act does not support the expansion of the FLM role to include Class II areas. FLAG should be revised to clearly recognize that the Clean Air Act visibility program protects mandatory Class I areas.

#### Provide The FLMs With Interim Procedures

We have urged the Administration to ensure that the FLAG Policy Directive better utilize scientific data and is aligned with applicable legal requirements. In the meantime, we suggest that the FLMs employ some reasonable interim procedures for evaluation of permits while the FLAG guidelines are suspended and revised. Those proposed interim procedures are enclosed with this letter.

July 25, 2003

Secretary Norton
Secretary Veneman
Secretary Abraham
Interim EPA Administrator

It is important to recognize that, pursuant to the Clean Air Act, there is already a well-established process underway -- independent of FLAG -- to address visibility in Class I Areas. Under the Act's Regional Haze Rule, states are in the process of preparing plans to address visibility in Class I areas, including the impact of new sources. Properly designed and implemented state visibility plans would improve Western visibility in a cost-effective, scientifically sound manner. Unlike FLAG, these programs benefit from the input from all stakeholders and should achieve genuine environmental progress without impeding the construction of new facilities or imposing such a significant burden on Western economic development.

#### About Us

The Western Business Roundtable is a broad-based coalition of companies doing business in the Western United States. Our members are engaged in a wide array of enterprises, including engineering, construction, communications, manufacturing, retail sales, refining, iron and steel, mining, electric power generation, and oil and gas exploration, development, and distribution. We work for a common sense, balanced approach to economic development and environmental protection. We support public policies that encourage economic growth, opportunity and freedom of enterprise. We are proud defenders of the Western way of life.

We appreciate your consideration of the Roundtable's concerns on this issue and we look forward to continue working with you to pursue a reasonable approach to ensure protection of air quality related values in national parks and wilderness areas throughout our Western region. If you have any questions or comments, please contact me.

Sincerely,

Jim Sims Executive Director

Enc.

cc:

Governor [lastname]
Western Governors Association
Steven Griles (DOI)
Lynn Scarlet (DOI)
Kit Kimball (DOI)
Mark Rey (USDA)

Kyle McSlarrow (DOE)
Bob Card (DOE)
Jim Connaughton (CEQ)
Jimmy Glotfelty (DOE)
Cesar Conda (White House)
Chris Shaver (NPS)

# **Proposed Interim Application Review Procedures**

These procedures should be used on an interim basis while the FLAG guidelines are in suspension and until they are promulgated through a formal rulemaking process:

- 1. Consistent with the proposed Clear Skies Act, a source located more than 50 km from any Class I area should be presumed not to have any adverse impact on visibility or other AQRVs in the Class I area. This presumption should apply unless the FLM finds (1) that the increment in the Class I area would be violated by emissions from the source; or (2) clear and convincing evidence (consistent with the rest of this document) that emissions from the source will impair visibility or other air quality related values in the Class I area by a perceptible amount when compared against current visual air quality conditions taking into account the effects of weather.
- 2. The screening models used to assess visibility impairment should trigger additional review only if they demonstrate adverse visibility impacts in the Class I Area. They should not trigger additional review if they identify visibility impacts outside of the Class I Area.
- 3. The analysis of a new source should consider only the impact of the source's emissions on visibility and other AQRVs. Cumulative impacts analysis should not be required, and cumulative impacts should be addressed through other programs (i.e. Regional Haze).
- 4. The FLMs should account for background conditions for each Class I area, including humidity and precipitation, when modeling source impacts. No permit should be denied when background or natural conditions obscure the predicted effects of the proposed new source.
- 5. The thresholds for assessing the impact of a proposed source's emissions of visibility in FLAG are far too low. (FLAG sets the level at 5% change in light extinction, which would not be perceptible in most Western Class I areas.) Only humanly perceptible change in visibility (based on empirical data published in recent research) should trigger FLM concern.
- 6. The FLMs should assess the deposition impacts of a proposed source's emissions based on site-specific data demonstrating an actual adverse impact on a Class I area.

