

STATE OF NORTH CAROLINA
 COUNTY OF HYDE

IN THE OFFICE OF
 ADMINISTRATIVE HEARINGS
 08 EHR 1067

U.S. DEPARTMENT OF INTERIOR
 FISH & WILDLIFE SERVICE,

Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENT
 AND NATURAL RESOURCES, DIVISION OF
 AIR QUALITY,

Respondent,

and

PCS PHOSPHATE COMPANY, INC

Respondent-Intervenor.

**RESPONDENT'S
 WRITTEN EXCEPTIONS
 AND ARGUMENT**

NOW COMES RESPONDENT, by and through counsel James Holloway, and requests that the Final Agency Decision Maker reverse the Decision of the Administrative Law Judge finding that the North Carolina Division of Air Quality ("NCDAQ") erred as a matter of law by failing to follow federal policy and failing to properly notify the federal government. In support of this request, the Respondent makes the following written exceptions and argument.

INTRODUCTION

As a general exception this Decision fails to set forth or even discuss the legal standard of review under which this Decision was made. There were no findings that North Carolina's interpretations of the relevant provisions were contrary to law or arbitrary and/or capricious. The Petitions stated that the law and regulations do not address the issues raised in this matter. Therefore the Petitioner is required by law to demonstrate that NCDAQ's interpretation of the relevant statutory and regulatory provisions were arbitrary and/or capricious. The Petitioner's failure to carry this burden is evidenced in the Decision's failure to even mention the standard of review. The arbitrary and capricious standard is a difficult one to meet. Agency actions have been found to be arbitrary and capricious when such actions are whimsical because they indicate a lack of fair and careful consideration [or] when they fail to indicate any course of reasoning and the exercise of judgment. White v. North Carolina Dep't of Env't, Health & Natural

Resources, 117 N.C. App. 545, 547-48, 451 S.E.2d 376, 378 (1995) (citations and quotation marks omitted).

Instead of applying the standard of review, the OAH decision appears to express a simple policy preference in favor of guidance document developed by the Petitioners themselves. Perhaps more importantly, this Decision prospectively binds all sources in North Carolina to any guidance the FLM writes – no need for federal rulemaking and certainly no need for the EMC and its rulemaking process.

The Petition filed this action because

“The visibility analysis conducted for this permit did not follow FLAG guidance.”

(Pet’s Prehearing Statement, Attachment A, p.2)

However, the FLM admitted over and over in binding Rule 30(b)(6) deposition statements that nobody, including North Carolina, is required to follow FLAG guidance.

“The FLAG is something that is binding on the federal land managers. *It’s not something that is binding on the State agency.*”

(emphasis added) (Rule 30(b)(6) Dep. at V2 p. 248)

“We [Petitioner] can’t -- we can’t bind the States or the applicants to do anything.”

(Rule 30(b)(6) Dep. at V2 p. 230)

“FLAG in itself as guidance to the public is not a requirement.”

(Rule 30(b)(6) Dep. at V2 p. 122)

“Applicants and regulat[ors] may choose to follow or not to follow the document.”

(Rule 30(b)(6) Dep. at V2 p. 213)

“*North Carolina doesn’t have to follow FLAG...*”

(Rule 30(b)(6) Dep. at V2 p. 125)

In what can only be described as a paradox, the Decision finds that, although the Petitioner admitted North Carolina is not bound by FLAG, North Carolina violated the law because it did not require an analysis consistent with FLAG.¹ To support this Decision the EMC must reject

¹ The Decision can be added to the Greek philosopher Zeno’s list of paradoxes. Zeno’s paradoxes are a set of problems generally thought to have been devised to prove that, contrary to our senses, motion is nothing but an illusion. Similarly, the Decision is replete with record contradictions ending in an unsupportable conclusion that the Petitioner’s desires override the law.

the consistent and record-based conclusions of the NCDAQ, the federal Environmental Protection Agency (EPA), and their administrative appeals board, and the EPA's Office of General Counsel and instead follow a letter addressed "To Whom it May Concern." Rule 30(b)(6) Dep. T V2, at 186.

Equally contradictory is Conclusion of Law No. 15 (discussed *infra*) in which the Decision states the law "requires" the use of natural conditions in PSD visibility analysis. The Conclusion of Law stands in direct conflict with the Petitioner's binding admission, "There are no regulations which detail how a required analysis or demonstration must be performed or what assumptions or baselines are to be used." Pet.'s Response to the Respondent's Memorandum in Support of its Motion For Summary Judgment and to the Respondent Intervenor's Brief in Support of its Motion for Summary Judgment, p. 13.

Even if the Petitioner is correct that there is no law controlling these issues, fundamental principles of administrative law require the Petitioner to demonstrate that the NCDAQ interpretations and policies are arbitrary and capricious.

WRITTEN EXCEPTIONS

The Respondent excepts to Findings of Fact and Conclusions of Law as detailed below. The Respondent has provided an alternative Proposed Final Agency Decision document that incorporates record-based Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The FWS was not notified of the pre-application meeting and contacts between PCS Phosphate and the NCDENR.

Exception.

The Respondent excepts to this Finding of Fact because it implies that FWS was legally entitled to notification. As a matter of law, NCDENR had no obligation to provide notification to the FWS because the Class I increment was not exceeded.

NOTE: On November 18, 2010 the EMC approved a revision to NCDAQ PSD regulations at 15A NCAC 02D .0530(t) requiring NCDAQ to notify the FLM for all projects regardless of impact. See <http://daq.state.nc.us/rules/hearing/>

2. Typically, air quality modeling is discussed at the pre-application meeting.

No Exception.

3. A modeling protocol is usually agreed upon at the pre-application meeting, in which the types of air quality models and the settings to be used are agreed upon.

No Exception.

4. The NCDENR interprets the term “may affect” found in its regulation at 15A NCAC 2D .0530(t) to be synonymous with “has the potential to exceed a Class 1 increment.”

No Exception.

5. During the pre-application meeting, it is not possible for the NCDENR to make a determination of whether a Class I increment will be exceeded.

Exception

This Finding of Fact is expressly contrary to undisputed testimony at hearing. NCDAQ witness Fern Paterson in response to a question asking whether it was possible for the NCDAQ to make a determination of whether a Class I increment would be exceeded at the pre-application meeting, Ms. Paterson stated, “**There is the possibility that at that time they could tell us that they have a Class I increment exceedance.**” Hearing Transcript, Volume I, page 107, lines 4-6.

6. When the PCS Phosphate permit was issued, the NCDENR did not notify the FWS “[b]ecause it wasn’t required in the PSD regulations”.

No Exception.

7. PCS Phosphate did not submit revised modeling to satisfy the FWS’ concern that “natural conditions” was not used as the background visual range in its model because the NCDENR made it known to PCS Phosphate’s consultants that the NCDENR’s policy was to use “current conditions” instead.

No Exception.

8. The NCDENR’s position is that it has no duty to notify a Federal Land Manager of either a pre-application meeting or the filing of a PSD permit application, or to send a Federal Land Manager a draft permit and preliminary determination, unless a Class 1 increment will be exceeded.

No Exception

9. The NCDENR has never had a PSD permit issued with a Class 1 increment being exceeded, and in only “a handful of time” has a permit application initially shown the potential for a Class 1 increment being exceeded.

No Exception.

10. The NCDENR Division of Air Quality has taken the position that the test of whether or not visibility in a Class 1 area is going to be affected is the same as the test of whether or not a Class 1 increment is going to be exceeded.

No Exception

11. In order to avoid being put into a “difficult position”, the NCDENR has a policy of advising PSD permit applicants to use “current conditions” as the background for the modeling done to determine whether a new source or major modification will have an adverse impact on visibility at a Class 1 area, rather than “natural conditions” as requested by the Federal Land Managers.

Exception.

As a threshold matter, “natural conditions” is not the same thing as “natural background.” See exception to Conclusion of Law No. 15.

Both the NCDAQ and the federal EPA require current conditions to be used in assessing Class I visibility impacts in a PSD review. In fact, EPA stated that the use of current background in the PSD context – as opposed to natural background – was “not debatable.” See 50 FR 28544. The clever contextual extraction of the term “difficult position” merely expresses the odd result the FLM advocates. The FLM is asking the NCDAQ to use its authority to require applicants to use natural background visual range despite the fact that the NCDAQ and the EPA require the adverse impact analysis to be based on current background visual range conditions. There is little question that NCDAQ would be in a “difficult position” if they asked the applicant to perform an impact analysis using a background visual range that is both legally and factually incorrect. This was explained by the Chief for the NCDAQ Permits Section at hearing. See Hearing Transcript, Volume II, page 338.

12. The NCDENR, citing to CFR 51.166(p)(3) for its authority, takes the position that the NCDENR decides what the adverse impact determination should look like, rather than the Federal Land Manager.

Exception.

The Finding of Fact is not based on the record testimony of any witness. Instead this Finding of Fact is the question Petitioner’s counsel posed at the hearing and attempted to get the NCDAQ witness to agree with. The NCDAQ witness unequivocally rejected this Finding of Fact. The NCDAQ witness confirmed what the plain language of the law makes clear. When the applicant is required to perform the analysis the NCDAQ defines how that analysis is to be performed. When the FLM is required to demonstrate the impact the FLM “can submit anything they want.” See Hearing Transcript, Volume II, page 338.

The “Finding of Fact” that the FLM “decides what the adverse impact determination should look like” is contradicted by the Petitioner’s position taken in 1999. In 1999 the FLM and the NCDAQ entered into a Memorandum of Understanding (“MOU”) with North Carolina. van der Vaart Aff. ¶ 8. The MOU was intended to enhance communications between North Carolina and the FLMs. See MOU at p 1. The MOU expressly provided that it was not intended to modify existing laws or regulations. In that MOU the FLM agreed that the law and regulations provide that North Carolina, “shall have the authority to define the assumptions, including parameter values, needed to complete the analysis.” MOU ¶ C. One of those parameters is the background range to be used in a visibility analysis. None of the laws or regulations affecting this issue have changed since 1999.

It is interesting to note that at the time the MOU was signed the FLM agreed with NCDAQ that the proper background visual range to be used in PSD analyses was the “current background.” The FLM’s guidance at the time the MOU was signed was contained in a document entitled “Interagency Workgroup on Air Quality Models (IWAQM) Phase 2 Summary Report and Recommendations For Modeling Long Range Transport Impacts” (“IWAQM”) IWAQM at 27. van der Vaart Aff. ¶ 15.

As noted previously, visibility analyses are compared against a background condition. The estimates of background visibility conditions at Class I areas are derived from the IMPROVE network.

* * * * *

The background conditions provided for a Class I visibility analysis will be representative of clean conditions. Changes in visibility are most sensitive under clean conditions. By using clean conditions for all comparisons in a Class I analysis, it ensures that already clean conditions will not be impaired. Additionally, the Clean Air Act states as a national goal that the visibility in Class I areas is to be unimpaired by man-made air pollutants and that any such impairment is to be remedied. To represent clean conditions, the average of the cleanest 20% of the data from IMPROVE, at that site, is generally used. Even the data from the cleanest days usually exhibit some man-made influence. This average of 24-hour values for the 20% cleanest conditions is used as representative of a clean background condition.

IWAQM at 27.

Apparently, since 1999, despite no change in the law or regulations, the FLM has changed its position as to who decides how the analyses should be performed and what the proper background visual range should be. The Decision fails to address this fact.

Finally, at hearing the Chief of the NCDAQ permits section explained how, at the time of the 1999 MOU, the FLM solicited EPA Office of General Counsel (OGC) for its opinion as to who is required to perform the analysis.

Q. What was your understanding about EPA's belief?

A. Well, I mean just to put it in their words, if you look on Exhibit 43 at the very last - I don't know what you call it - bullet number 4, it says, "The next day she called. Vickie does not read the law." Vickie is of the EPA OGC's office. "Vickie does not read the law to require the applicant to do the modeling. She did not think EPA OGC could provide us [FLMs] any written support." And then she's talking about some policy and practice she referred to Dan Deroke. So the indication there as we had thought - when we read this, I relied on this to confirm what we had gleaned from the legislative history which is, after the Class I increment test is done and if the Class I increment is not exceeded, there is no further obligation on the part of the applicant.

Q. Has the EPA ever told you that you're required to do the modeling even where the Class I increment is not exceeded?

A. No.

Hearing Transcript, Volume II, page 279.

Not surprisingly, the EPA Environmental Appeals Board similarly found that the applicants are not required to follow FLM guidance like FLAG. In a 2006 air quality PSD permit decision in Illinois, error was alleged with the state's issuance of a PSD permit claiming the analysis relied on by the agency was not performed consistent with the FLAG guidance. See Prairie State Generating Company, PSD Appeal No. 05-05 (Decided August 24, 2006). The EPA Environmental Appeals Board (the body equivalent to the NC OAH for PSD Permits issued by the State of Illinois) properly found,

We specifically reject Petitioners' contention that IEPA was required to adhere to the FLAG Guidance in all respects and was not allowed to make adjustments based on IEPA's case-specific determinations in this matter. With respect to other guidance documents, we have frequently held that "an agency cannot, consistent with the Administrative Procedure Act,

utilize * * * [a] policy statement as if the policy were a ‘rule’ issued in accordance with APA ‘rulemaking procedures’” and that “[t]he agency must, in some meaningful way, keep an ‘open mind’ about the issues addressed in the policy document, and cannot act as if those issues are no longer subject to debate.” *Employers Ins. of Wausau*, 6 E.A.D. 735, 761 (EAB 1997).

Prairie State at 156.

There is no support for this Finding of Fact that the FLM decides how PSD analyses are to be performed.

13. The FWS has only appealed five PSD permits in the past 30 years, and two of them were issued by North Carolina.

No Exception

14. The document known as FLAG was developed because of “request[s] from permitting authorities as well as permit applicants for the Federal Land Managers (FLMs) to have a more consistent and transparent process in evaluating air quality-related values.”

No Exception.

NOTE: There is general agreement that FLAG only instructs the FLM how they may evaluate air quality related values. Even the FLMs themselves are not bound by FLAG. As established above FLAG is in no way binding on states and applicants.

15. FLAG is a guidance document and an agreement between the National Park Service, the Fish and Wildlife Service, and the Forest Service as Federal Land Managers, on how the FLMs will review permit applications and assess air quality impacts on air quality-related values (AQRVs) of the lands they administer.

Exception

The record contradicts the finding that FLAG is an “agreement” between the NPS, FWS and Forest Service (USDA). The Petitioner cites to nothing in the record that supports the finding that the Forest Service (USDA) is in agreement with the Petitioner. When asked about the Forest Service (USDA) the Petitioner repeatedly stated in a binding Rule 30(b)(6) deposition that they cannot speak for, or answer for, the Forest Service

(USDA).² In an attempt to find safety in numbers the Decision finds that the Petitioner can now bind the Forest Service. The reality is that the Decision contradicts the Petitioner's binding statements.

The record does however support the conclusion that FLAG is "guidance." As such it is not binding on anyone including the FLM. FLAG is an extremely controversial document that from its inception elicited concerns from state agencies and the regulated community that the FLMs would attempt to use FLAG as a binding authority upon which to challenge agency actions. When developing FLAG the public commented on this issue. The Petitioner, as part of the FLAG workgroup, attempted to assuage these concerns stating,

The FLAG report is a guidance document that explains factors and information the FLMs expect to use when carrying out their consultative role. Therefore, it is not a legislative rule subject to informal rulemaking procedures under the Administrative Procedures Act (APA), or any other statutory requirements. Guidance documents themselves do not create rights and responsibilities under the law, and guidance documents are not legally binding on outside parties or on the agencies.

Although FLAG, as a guidance document *cannot legally bind the participating FLMs*, each FLM recognizes the value of guidance documents in providing consistency and predictability.

Again, the FLAG is not a rule. Rules are generally defined as agency statements of general applicability and future effect that the agency intends to have the force and effect of law. As discussed above, the FLAG report does not purport to do so.

(emphasis added) FLAG Response to Public Comments on Draft Phase I Report, p. 6.

In the final FLAG document the Petitioner restated this assurance providing, "It is important to emphasize that the FLAG report is only a guidance document...." FLAG p.5.

In 2003, three years after FLAG was made available, the regulated community continued to voice its concerns that the FLMs, contrary to their express assurances, were treating FLAG like a binding requirement. In response to a letter from the Executive Director of the Western Business Roundtable, the FLM for the USDA (Forest Service) stated,

"Flag is simply guidance"

² The Petitioner, FWS, was asked if the Forest Service (USDA) was bound by FLAG and they responded "I think -- I'm not sure. I'm not sure how they sign -- I don't know their policy procedures." Rule 30(b)(6) Dep. T Vol. 1 p. 80, line 17-19. MR. HOLLOWAY: Is the only difference between the USDA and you guys is that -- is this December 27th, 2000, letter that we just spoke of? MS. SILVA: The only difference between the two agencies is that letter? You mean in regards to FLAG? MR. HOLLOWAY: In terms of it being binding. MS. SILVA: I can tell you what makes it binding for us. I can't tell you what makes it binding for them. Rule 30(b)(6) Dep. T Vol. 1 p. 81, line 5-14.

“It is not a decision document and adds no new requirement for permit applicants, regulators, or the FLM.”

“No one is required to follow FLAG recommendations.”

“applicants and [regulators] may choose to follow or not follow the document.”

“FLAG is not a rule or regulation.”

(emphasis added) Letter from James T. Gladen, Director, Watershed, Fish, Wildlife, Air and Rare Plants, to Jim Sims, Executive Director, Western Business Roundtable (January 23, 2004). As the FLM for the Department of Agriculture correctly states, nobody, including the FLMs, are bound by FLAG.

By Petitioner’s own admission, the ONLY reason the Petitioner follows FLAG is a letter addressed to “To Whom it May Concern.” Rule 30(b)(6) Dep. T V2, at 186. The “To Whom it May Concern” letter was signed by Mr. Stephen C. Sanders, the Deputy Assistant Secretary for the Fish and Wildlife and Parks, announcing the availability of the final FLAG report and “encourage[ing] all FLMs, permitting authorities, permit applicants, and other interested parties to take advantage of the helpful guidance contained in the FLAG report when they prepare and review new source permit applications.” At no point does the letter expressly indicate that FLAG is a “policy” of Fish and Wildlife Service, nor does it suggest that FLAG is binding on the agency or that it is required.

Moreover, the record shows that the ignored its own procedures to make FLAG the Petitioner’s guidance and or policy. The issuance of a letter “To Whom it May Concern” did not follow any of the legally required procedures contained in the Fish and Wildlife Service Manual for establishing service directives. 011 FW 3.3, (Feb. 22, 2010) .

The Petitioner could have established FLAG as its guidance following the Service Directives System provisions as a “Memoranda Signed by the Director, a Deputy Director, or Acting Director.” 010 FW 1.4.E, (Mar. 11, 2010). However, these memoranda are “limited to operational, incident-specific, project related, or one-time (non-continuing) matters.” FLAG does not qualify FLAG under this provision because the Fish and Wildlife Service Manual expressly prohibits the use of Memoranda “to convey instructions that have general and continuing applicability to Service activities.” Id. The Petitioner admits that FLAG has, in fact, “general and continuing applicability” to the agency (Rule 30(b)(60) T V2 p. 267) and therefore the Petitioner cannot be bound to the use of FLAG through the use of memoranda. The letter “To Whom it May Concern” is insufficient to establish FLAG as a binding directive with general and continuing applicability.

The Petitioner could have established FLAG as a “Specialized Directive.” 010 FW 1.4.F, (Mar. 11, 2010). Special directives are “for narrow administrative or technical matters and are subordinate to the Fish and Wildlife Service Manual.” The Petitioner admitted that FLAG was not made policy through a Special Directive. (T V2 p.269 lines 9-17).

Another possible method to have allowed the Petitioner to establish FLAG as its policy would be to include the document as a “Handbook[.]” Handbooks are directives, but “rather are used to explain how to comply with directives.” 10 FW 1.4.G, (Mar. 11, 2010) (Exhibit 1). The Petitioner admits that FLAG does not appear in a Handbook. (T V2 p. 273).

In summary, the Petitioner has several legal methods to make FLAG its official policy and did not follow a single proper method. Instead, the Petitioner believes that a letter “To Whom it May Concern” encouraging the FLM to take notice of a document makes that document “binding” on both the FLM and by extension, North Carolina.

16. In the context of the PSD permitting process, FLAG is the guidance that the FLMs provide explaining how PSD permit applicants should perform the analysis required by the Clean Air Act in order to provide the FLMs with the information they need to make an informed decision on whether impacts expected to occur from the permitted source would cause an adverse impact on AQRVs at a Class 1 area.

Exception.

This Finding of Fact inaccurately reflects the record in a crucial way. The hearing transcript provides the following exchange between the Petitioner’s counsel and the FLM witness.

Q. What is FLAG? I mean, what is it? What its function?

A. Well, it's a guidance document, and it's an agreement between the three participating agencies on how the Federal Land Managers will review permit applications and to assess air quality impacts on air quality-related values of the lands that we administer.

Q. How is FLAG used in the PSD context?

A. Well, one of the primary roles or one of the tests of the PSD Program is to ensure that air quality-related values - that Class I areas would not be adversely impacted. That's - the basis for that is the Clean Air Act and other statutes, and so in the context of PSD, FLAG is the guidance that we provide and how we would like applicants to perform that analysis so that we can have the information we need to make an informed decision on whether those impacts would be adverse or not.

Hearing Transcript V1 at p.84-85. This testimony provides only that the FLM will use FLAG when they perform the analysis. With respect to permit applicants and states however, the Petitioner’s witness states they “would like” applicants to use FLAG. This Finding of Fact changes a desire (i.e. “would like”) to a requirement (i.e. “should”).

The Finding of Fact inaccurately provides that the Clean Air Act requires PSD applicants to perform a case-by-case AQRV (visibility) analysis and provide it to the FLM for their review. Pursuant to Section 165(d)(1)(2)(c)(ii) of the Act, where there is no exceedance of the Class I increment, it is the responsibility of the FLM to “demonstrate[] to the State that the emissions from [the proposed project] will have an adverse impact on the air quality-related values (including visibility)...” In other words, where there is no Class I increment exceedance, it is the FLM’s responsibility to perform a case-by-case AQRV (visibility) analysis and submit it to the state for consideration if the FLM seeks to rebut the presumption provided by the Class I increment test that the project will not adversely impact a Class I area. The permit applicant (or permitting authority) is *only* required to submit a case-by-case AQRV (visibility) analysis to the FLM for consideration if there is Class I increment exceedance and they desire to rebut the presumption provided by the Class I increment test that the project will adversely impact a Class I areas.. These procedures are provided for in Section 165(d)(1)(2)(C) of the CAA.

17. The FLMs would perform the same function of reviewing PSD permit applications and making adverse impact determinations and would use the same standards for review if FLAG did not exist.

No Exception.

18. As expressed in FLAG, the FLMs have decided that “natural conditions” is the appropriate background visual range for visibility modeling used to determine whether emissions from a proposed source will have an adverse impact on visibility at a Class 1 area.

Exception

As a threshold matter, “natural conditions” is not the same thing as “natural background.” See exception to Conclusion of Law No. 15.

The Petitioner admitted in a binding deposition that it cannot speak for FLMs generally – they cannot speak for the Forest Service (USDA). To the extent that the Petitioner has “decided” that they believe natural background visual range is appropriate for their analyses the Respondent does not object.

Notwithstanding when a visibility analysis is performed under 15A NCAC 2D .0530(t), this regulation requires all analyses performed under this rule to be based on existing – background visual range. (Exhibit 13) North Carolina adopted specific requirements related to visibility impairment under 15A NCAC 2D .0530(t). The provisions were adopted by North Carolina in direct response to §169A of the Clean Air Act Amendment of 1977. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95 (current version at 42 U.S.C. §7491). As required, North Carolina developed this regulation and submitted it to the EPA for approval. On January 21, 1986 the federal EPA approved North

Carolina’s visibility impairment provisions (currently 15A NCAC 2D .0530(t)) into the State Implementation Plan (SIP). 51 Fed. Reg. 2695 (January 21, 1986). One of the minimum elements that North Carolina’s regulation had to satisfy was 40 CFR 51.305. Id. That provision required each state regulation to:

(a) . . . include in the plan a strategy for evaluating visibility in any mandatory Class I Federal area by visual observation or other appropriate monitoring techniques. Such strategy must take into account current and anticipated visibility monitoring research, the availability of appropriate monitoring techniques, and such guidance as is provided by the Agency.

(b) The plan must provide for the consideration of available visibility data and must provide a mechanism for its use in decisions required by this subpart. 40 CFR 51.305 (1985).

In approving North Carolina’s visibility impairment provisions, EPA stated over and over that the current monitoring data was to be collected and used for the specific purpose of making decisions under 15A NCAC 2D .0530(t).

The visibility monitoring program [proposed by North Carolina] meets the criteria for an approvable plan, as it will provide the State with reliable background visibility data for making permit decisions and for assessing visibility trends. It has been reviewed and been found to meet the provisions contained in 40 CFR 51.305.

* * * * *

[the monitoring stations] will provide the State with reliable background visibility data for making permit decisions. . . .

* * * * *

“The Weather Service provides visibility measurements in units of distance, or visual range, which are recorded three times a day for every day of the year. This data is appropriate for use in modeling potential visibility impacts of new sources (see Workbook for Estimating Visibility Impairment, November 1980, EPA-450/4-8-031)

* * * * *

[P]rovid[ing] acceptable regional background data to use in making visibility related permit decisions.

* * * * *

The State [North Carolina] will use this visibility data . . . in making their permit decisions.

(emphasis added) 51 Fed. Reg. 2695

Not only did EPA approve North Carolina’s provisions as satisfying the minimum elements of the federal visibility impairment requirements at 40 CFR §§ 51.300-307, in doing so the EPA expressly stated that any decisions made under this program were to be based on actual monitoring data. As required by law the visibility analysis that the

NCDAQ relied on in approving PCS's permit application was based on current background.

In a final visibility rule for new sources, EPA stated, "In assessing a proposed source's impact on visibility, the reviewing authority must necessarily review that impact in the context of existing background visibility. This point does not seem debatable." 50 Fed. Reg. 28,544 (Jul. 12, 1985)

19. For the Swanquarter Wilderness Area, "natural conditions" for the background visual range is 182 kilometers.

Exception.

As a threshold matter, "natural conditions" is not the same thing as "natural background." See exception to Conclusion of Law No. 15. While 182 kilometers is the natural background visual range currently included in FLAG, the FLM has provided that this value is estimated using the "best science" currently available to it, and that the FLM could calculate a different background visual range is more appropriate in the future as the science improves. By the FLM's own admission, the "recommended" background visual ranges are a moving target that could change at any time based on the most recent science. To the extent that it is based on science, the Petitioner does not object. However, it is precisely the fact this value can change at any time coupled with the Petitioner's belief that as a matter of law applicants are required to adhere to this value that requires one of two conclusions: 1) the value is guidance only and North Carolina is not bound, or 2) the Petitioner or the EPA must follow established rulemaking procedures to make it binding.³ The fact that the Petitioner erroneously believes it is bound as a result of a letter addressed "To Whom it May be Concerned" encouraging people to take notice of a document is insufficient to bind North Carolina.

20. The distances in kilometers used by the FLMs as "natural conditions" for the background visual range for visibility models is the best science currently available and was developed in the NAPAP report, which is a report provided to Congress by a number of research scientists.

Exception.

See Exception to Finding of Fact 19 above.

21. The Class 1 increment only addresses three pollutants: SO₂, NO₂ and PM-10 particulate matter.

No Exception.

³ This is no different than the National Ambient Air Quality Standards (NAAQS) which EPA revises periodically based on the best currently available science. Before a revised NAAQS can be enforceable in North Carolina the EPA must follow well established rulemaking procedures followed by a similar rulemaking procedure by the Environmental Management Commission.

22. The pollutants that effect visibility are usually different from those covered by the Class 1 increment and include SO₄ and NO₃.

Exception

The Petitioner's own "expert" – contradicts this Finding of Fact. The following exchange took place at hearing regarding the relationship between the Class I increment pollutants and protection of Class I areas.

Q. Do you know why--- Yeah. Do you know why Congress used the increment--- Do you know why Congress used the increment - the Class I increment with the AQRV analysis then?

A. Again, from a scientific point of view, I think they're linked in the sense that they are two ways to protect the properties or the beneficial properties at a Class I area. You know, so from a regulatory standpoint, I'll let our briefs handle that question, but from a scientific point, I think that protecting the Class I increment as it was described with those chemicals is very complimentary to the AQRV pollutants that we've identified for visibility protection. And I think, in many places, it says AQRVs including visibility, and increment is also something that indicates pollution that happens at a facility - I mean - sorry - at a Class I area.

Hearing T V2 at p. 385. Their own expert concludes that the Class I increment pollutants are scientifically linked to protection of Class I areas and that they are "complimentary" to each other. It is inconceivable how this exchange could be manipulated to support a Finding of Fact that the Class I increment pollutants of sulfur dioxide, particulate matter, and nitrogen oxides are "different from those" pollutants that affect visibility.

23. Visibility at a Class 1 area can be adversely affected despite the emissions from a source not exceeding the Class 1 increment.

No Exception.

24. An inverse relationship can exist between the Class 1 increment and the effect that emissions from a source have on visibility at a Class 1 area where as the increment pollutants are decreased the pollutants that have an adverse affect on visibility increase.

Exception

See Exception to Finding of Fact No. 22 above.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this matter. The case should not be dismissed for mootness. “The general rule that an appeal presenting a moot question will be dismissed is subject to some exceptions, one of which is that where the question involved is a matter of public interest the court has the duty to make a determination.” 25 NC App 394, 397. Keeping our air as clean as possible is certainly a matter of public interest. Also, the issues in this case are “capable of repetition.” Furthermore, upon failing to adopt my former decision granting summary judgment to Petitioner, the agency only had a statutory authority to remand for a hearing which I have conducted. To the extent that my Findings of Fact contain Conclusions of Law, or that my Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

Exception

“Whenever, during the course of litigation it develops . . . that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979) (citations omitted).

It is presumed that if subsequent events, such as the modeling performed in this case and the conclusion that the proposed project will not adversely impact the Class I area, make the case moot the matter is to be dismissed. There are however exceptions to the mootness doctrine. North Carolina Courts “have long recognized an exception to dismissals for mootness and have held it is proper for the appellate courts to hear appeals where the issues are “capable of repetition, yet evading review.” Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (citing Crumpler v. Thornburg, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, disc. rev. denied, 324 N.C. 543, 380 S.E.2d 770 (1989)), disc. rev. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

While it is admitted that the issues in this case, while rarely present due to the unique facts necessary to give rise to these issues, are capable of repetition, there is no chance for them to escape review. All PSD permits are subject to public comment. Moreover in November 2010 the EMC approved a change to the NCDAQ PSD regulations that require notification of the FLM for all PSD projects regardless of environmental impact. While there may be an academic interest in these issues, the case at hand is legally moot.

As to the Decision, as a matter of law this Decision cannot be upheld. If the ALJ is correct in finding that the sovereign state of North Carolina is bound by federal policy statements, then by operation of law the Office of Administrative Hearings and the Environmental Management Commission would **NOT** have jurisdiction to hear appeals of PSD permits.

In implementing the Prevention of Significant Deterioration permitting program state agencies have three choices:

- 1) EPA Program - Allow the federal EPA to administer the program in their state,
- 2) Delegated Program - Request delegation of the program thus allowing the State to stand in the shoes of the federal government and administer the federal program, or
- 3) Approved Program - Adopt regulations implementing a PSD program and following EPA approval, implements the PSD permit program.

If the PSD program is an “EPA program” or a “delegated program” it could be argued that EPA’s policy guidance should be followed. However the law is clear that approved states are NOT required to adhere to federal policy statements when implementing the PSD program. North Carolina’s PSD program has been fully approved by the federal EPA. 47 Fed. Reg. 7836 (February 23, 1982). The purpose of having an approved PSD program is to allow North Carolina to customize its program and develop and apply its own regulations and policy necessary to prevent the significant deterioration of air quality. The OAH Decision concluded that the NCDAQ/EMC is prohibited by law from following its own guidance and must adhere to informal policy developed by any federal government entity.⁴ In short, the Decision is an anathema to the entire purpose of adopting state specific PSD regulations.

If the ALJ is correct in finding that as a matter of law that North Carolina is required to adhere to federal policy then the Decision constructively changes the fundamental implementation of North Carolina’s PSD program from a fully approved PSD program to an EPA program or an EPA delegated program. As a matter of law, appeals of PSD permits issued the EPA or by EPA delegated programs shall be heard by the EPA Environmental Appeals Board (EAB).

Appeal of RCRA, UIC, NPDES, and PSD Permits ((a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision . . . has been issued under § 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.)

40 C.F.R. § 124.19 (2008). As an EPA delegate, not only would the NCDAQ be bound to federal policy, the EMC would be stripped of its power to make final permit decisions. See Greater Detroit Resource Recovery Auth. v. EPA, 916 F.2d 317, 320-21 (6th Cir. 1990).

⁴ The Decision not only found that as a matter of law that the NCDAQ is bound by EPA policy memoranda (See Conclusion of Law No. 10), the Decision also held that the NCDAQ is bound by policy developed by ad hoc groups of federal agencies (See Conclusion of Law No. 12) (The use of “natural background” is the policy statement contained in the “FLAG Report.” FLAG members include representatives from the three FLMs that administer the nation's Federal Class I areas: the U.S. Department of Agriculture Forest Service (USDA/FS), the National Park Service (NPS), and the U.S. Fish and Wildlife Service (FWS)).

2. The U.S. Environmental Protection Agency (EPA) has the authority under the CAA to publish governing regulations and to approve and oversee state regulatory PSD programs.

Exception

The Respondent excepts to this Conclusion of Law to the extent that it is unclear what “oversee” means in this context. It is admitted that EPA, not the Petitioner, has powers granted through the CAA to oversee PSD permit decisions they believe do not comply with the Clean Air Act.

Regarding EPA oversight, the Act includes a general instruction and one geared specifically to the PSD program. The general prescription, §113(a)(5) of the Act, authorizes EPA, when it finds that a State is not complying with a CAA requirement governing construction of a pollutant source, to issue an order prohibiting construction, to prescribe an administrative penalty, or to commence a civil action for injunctive relief. 42 U.S.C. § 7413(a). Directed specifically to the PSD program, CAA §167 instructs EPA to “take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction” of a major pollutant emitting facility that does not conform to the PSD requirements of the Act. 42 U.S.C. § 7477.

Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004). EPA did review the permit issued by the Respondent in this matter and did not exercise either of the specific powers referenced above.

What is germane to this matter is that the EPA – not the FLM – has this limited oversight authority. The FLM has a well-defined and prescribed role in the PSD permitting process. Specifically, where there is no exceedance of the Class I increment the FLM bears the burden of demonstrating “to the satisfaction of the State” that a project will adversely impact a Class I area. 42 U.S.C. § 7475(d)(C)(ii); CAA § 165(d)(2)(C)(ii); 40 CFR 51.166(p)(1). The increment was not exceeded in this case and therefore it was the FLM’s option to provide an analysis of the impact on the Class I area. It is an undisputed fact that the FLM did not provide any analysis of the impact of the proposed facility on the Swanquarter Class I area. Had the FLM submitted any such analysis the PSD regulations require the agency to consider any “analysis performed by the Federal land manager. . . .” 15A NCAC 2D .0530(t).

3. The North Carolina PSD permitting program is implemented by regulations at 15A NCAC 2D.0530 and is modeled after and incorporates by reference EPA regulations, including regulations at 40 CFR 51.300 *et seq.* and 40 CFR 51.166.

Exception

This Conclusion of Law is simply WRONG. North Carolina does not incorporate by reference 40 CFR 51.300 et. seq. In fact the only part of 51.300 that North Carolina has adopted is the definitions at 40 CFR 51.301.⁵ This is not a trivial matter because much of the Petitioner’s argument, adopted in large part in this Decision, is based on the erroneous legal conclusion that North Carolina has adopted 40 CFR 51.300 et. seq.⁶

4. The “purpose” of North Carolina’s rule, 15A NCAC 2D.0530, as stated in subsection (a), “is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166.”

No Exception

5. North Carolina’s regulations at 15A NCAC 2D.530(t) require the NCDENR to “provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application” when a proposed source or major modification “may affect” a Class 1 area.

Exception

The Respondent excepts to this Conclusion of Law for the reasons cited in Exception to Conclusion of Law No. 6 below.

6. The term “may affect” in 15A NCAC 2D0530(t) is not otherwise defined in North Carolina’s regulations, therefore, the interpretation given that term by the EPA for its counterpart regulation governs. EPA’s position is that:

If a proposed major source or major modification may affect a Class 1 area, the Federal PSD regulations require the reviewing authority to provide written notification of any such proposed source to the FLM (and the USDI and USDA officials delegated permit review responsibility). The meaning of the term “may affect” is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class 1 area. Also, if a major source proposing to locate at a distance greater than 100 km is of such size that the reviewing agency or FLM is concerned about potential emission impacts on a Class 1 area, the reviewing agency can ask the applicant to perform an analysis of the source’s potential emissions impacts on the Class 1 area. This is because certain meteorological conditions, or the quantity or type of air emissions from large sources locating further than 100 km, may cause adverse impacts on a Class 1 area. A reviewing agency should exclude no major new source or

⁵ 15A NCAC 2D .0530(b) states “For the purposes of this Rule the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 apply except the definition of “baseline actual emissions.” North Carolina expressly adopted by reference ONLY the definitions from the federal rule – not the entire rule as stated in this so-called “Conclusion of Law.”

⁶ The Petitioner’s arguments and this Decision continue to ignore the sovereignty of North Carolina and the rulemaking function of this body. The Petitioner’s case and this Decision are based on federal regulations not applicable in North Carolina and guidance documents developed outside any formal rulemaking process.

major modification from performing an analysis of the proposed source's impact if there is some potential for the source to affect a Class 1 area. EPA's New Source Review Manual at #.16, page 254. See also Prairie State p. 148; In re Knauf p. 155(lexis p. 78).

Exception

The Respondent takes exception to this Conclusion of Law because the conclusion that “the interpretation given that term [may affect] by the EPA for its counterpart regulation governs” is erroneous. More specifically, the conclusion of law is erroneous for three important reasons:

- 1) The only alleged authority citing the 100 km threshold is a 1979 policy statement from EPA,
- 2) The citations supporting this conclusion are from adjudicated permit decisions in delegated – not approved – state agencies, and
- 3) The Petitioner has failed to demonstrate that the NCDAQ's interpretation of “may affect” is contrary to law or otherwise arbitrary or capricious.

First, the supposed binding authority interpreting “may affect” is a 1979 EPA policy statement.⁷ EPA policy statements are not binding on state agencies with approved PSD permit programs. To find otherwise would, by operation of law, deprive the EMC of jurisdiction to decide this matter. See Exception to Conclusion of Law No. 1, above.

Second, in an attempt to further support the 1979 EPA memorandum, the Decision cites to two EPA Administrative Appeals Board (EAB) decisions (Prairie State and In re Knauf). As would be expected, the Administrative Appeals Board – which is an EPA body – agrees with its own interpretive 1979 memo. The “cases” add absolutely nothing and provide no further support for any finding that NCDAQ's interpretation is “arbitrary or capricious.” What is legally significant however is that these “cases” do nothing to inform or bind the NCDAQ or the EMC. The non-binding nature of these decisions is best expressed in a decision in where petitioner's attempted, like Petitioners in this case, to impose EAB decisions as binding authority on a State with an approved PSD permit program.

[T]he EAB has no authority to review any decision of the [State of Missouri] . . . applying Missouri statutes or regulations under Missouri's approved PSD program under its SIP. . . . [T]he decisions of the EAB in applying and interpreting federal environmental statutes and regulations . . . are not binding or controlling upon the [State of Missouri] . . . or the courts of this State.

⁷ In 1996 EPA proposed rulemaking that would have adopted the 100 km policy as part of the federal PSD rule. 61 Fed. Reg. 38249 (“The 100-kilometer cutoff being used in this proposal for mandatory notification requirements involving FLM's is consistent with the current EPA policy concerning modeling of Class I impacts”). This proposal was never finalized. Thus, this Decision makes an end-run around the federal rule making process and ignores entirely the rulemaking function of the EMC to establish that as a *matter of law* the definition of “may affect” is tied to non-regulatory federal policy.

Chipperfield v. Mo. Air Conservation Comm'n, 229 S.W.3d 226, 242 (Mo. Ct. App. 2007).

Finally, and most importantly, the Decision makes neither of the necessary findings to support the legal conclusion that the NCDAQ is bound to EPA's 1979 policy interpretation of "may affect." In order for the Petitioner to prevail, the NCDAQ's interpretation of "may affect" would have to be either 1) contrary to law, or 2) arbitrary or capricious.

The Petitioner does not allege, nor does the Decision find that NCDAQ's interpretation of "may affect" (that being an exceedance of the Class I increment) is contrary to law. In fact, the Decision firmly establishes that there is no definition and therefore, ipso facto, the NCDAQ position cannot be contrary to what does not exist.

The only remaining legal ground upon which to base this Conclusion of Law is that NCDAQ's interpretation of "may affect" was arbitrary and/or capricious.

The arbitrary and capricious standard is a difficult one to meet. Agency actions have been found to be arbitrary and capricious when such actions are whimsical because they indicate a lack of fair and careful consideration [or] when they fail to indicate any course of reasoning and the exercise of judgment.

White v. North Carolina Dep't of Env't, Health & Natural Resources, 117 N.C. App. 545, 547-48, 451 S.E.2d 376, 378 (1995) (citations and quotation marks omitted). There is nothing in the record, either the Petitioner's briefs or the Decision that demonstrates that NCDAQ's interpretation of "may affect" was whimsical or lacked fair and careful consideration.

While all PSD applications require an air quality impact analysis of areas outside Class I areas, called Class II areas, no analysis for Class I impacts is initially required. In the 1977 Clean Air Act Amendments, Congress defined exactly when a Class I analysis⁸ is required. In these amendments, Congress added visibility protections in two different sections of the CAA. First, under the Prevention of Significant Deterioration (PSD) section of the CAA, § 165, Congress added provisions dealing with new sources. Second, Congress added provisions under the Regional Haze section of the CAA, § 169A, to deal with existing sources.

With respect to the visibility provisions under the PSD section of the CAA, Congress defined the process to be used as follows,

Most sources will only have to model for the Class II numbers [increments] and provide data to demonstrate that it will not exceed the

⁸ A Class I increment analysis is not the same as a visibility analysis. These are two distinct modeling demonstrations.

increment governing the Class II area. The exception occurs when there is reason to believe a source may damage the air quality associated values of a Class I area. The State, on receipt of any application for a permit, is required to publish a notice of the application and to inform the EPA. EPA would then give notice to the Federal Land Manager . . . in the area that might be affected.

The Federal Land Manager . . . is authorized to notify the State that the proposed source poses a potential adverse impact on the quality of the air within the Class I area. A statement identifying the potential impacts . . . would be filed.

* * * * *

When no such notice is forthcoming from a Federal lands official, the applicant would adhere to the regular requirements for the Class II areas When notice is filed, the applicant must demonstrate whether or not the Class I increments would be exceeded in the Class I areas.

Vol. 6 of the Legislative History of the Clean Air Act Amendments of 1977, August 1978, p. 4727; (Senate Report 94-717, p. 26). Congress intended that States require new sources to perform the Class I increment analysis “when there is reason to believe a source may damage the air quality associated values of a Class I area.” To make that determination, Congress established a three step process. First, the State is required to send all permit applications to the EPA. Second, the EPA must decide whether a PSD affected project may affect a Class I area. If the EPA so decides, it must send the application to the FLM. Third, after the FLM receives the application, it must decide whether to notify the State “that the proposed source poses a potential adverse impact.” Only if the FLM notifies the State of a potential adverse impact is the Class I increment analysis required. This procedure is prescribed in detail at CAA §165(d)(2)(A).⁹

However, while the CAA is clear, the EPA’s regulations implementing these requirements failed to include the second and third EPA (notification by the EPA of the FLM, and the FLM notification to the State). Only the first step in these requirements were implemented by the EPA under 40 CFR 51.166(p)(1),

“Sources impacting Federal Class I areas – additional requirements – (1) Notice to EPA. The plan [SIP] shall provide that the reviewing authority [i.e., the State] shall transmit to the Administrator a copy of each permit application...”

North Carolina implemented the notification requirements in its EPA approved PSD program under 15A N.C.A.C. 2D .0530(q):

(q) If a source to which this Rule applies impacts an area designated Class I by requirements of 40 CFR 51.166(e), notice to EPA will be provided as set forth in 40 CFR 51.166(p)(1)....

⁹ §165(d)(1) requires the State to transmit every PSD application to the EPA while §165(d)(2)(A) requires the EPA to notify the FLM of each application which may affect the Class I increment.

Similar to the federal rule, 15A N.C.A.C. 2D .0530(q) is silent with respect to notification of the FLM by the EPA and of the State by the FLM. This is understandable since the State has no authority to require action of the EPA or of the FLM in this regard. Despite this silence, however, the NCDAQ recognizes that the FLM has an affirmative responsibility under the CAA to protect Class I areas and that the ultimate outcome of the notification process, as Congress provided in CAA § 165(d)(2)(C)(i), is that the State may be asked to require the applicant to perform the Class I increment analysis. Regardless of notification, in this case the NCDAQ did require the applicant to prepare the Class I increment analysis. That analysis demonstrated that the Class I increment would not be exceeded.

The Class I increments are very protective of air quality in Class I areas and allow increases in ambient concentrations of air pollutants that are only a fraction of the health and welfare based National Ambient Air Quality Standards (“NAAQS”). For example, the NAAQS for annual concentrations of sulfur dioxide is 1300 ug/m³. The Class I increment is 25 ug/m³ and is less than 2 percent of the NAAQS – the standard already determined by the EPA to be protective of human health and welfare.

While the Class I increment is significantly more stringent than the Class II increment, it is not the final determinant of whether a PSD permit is sufficiently protective of Class I areas to issue. Rather, the Class I increment analysis determines whether the State or the FLM has the burden of proof for further analyses of air quality values, including visibility. As Congress stated,

[T]he class I increments are an index of the change in air quality. They do not, in any way, establish a final basis for approval or disapproval of a permit application.

If the Federal land manager certifies that the air quality values of the class I areas in question will not be adversely affected... [by] the new [source], the source can be given approval to build even if the class I increments would be exceeded. Conversely, if the Federal land manager convinces the State that the air quality-related values would adversely affected, the States must deny approval even if the class I increments would not be exceeded.

Vol. 6 of the Legislative History of the Clean Air Act Amendments of 1977, August 1978, p. 4982-83. These procedures were written into the CAA at §165(d)(2)(C)(ii) – (iii) and were codified by the EPA under 40 CFR 51.166(p)(3) and adopted by the NCDAQ at 15A NCAC 2D .0530(t). The Class I increment analysis serves to identify who is the arbiter in the permit decision for new or modified sources while the other party must make the demonstration. In other words, when the Class I increment is exceeded the presumption is that the proposed source will affect the Class I area. The State must then overcome that presumption by convincing the FLM to allow issuance of the permit. Conversely, if the Class I increment is not exceeded, the FLM must overcome the

presumption that the source will not affect the Class I area by convincing the State to not issue the permit.

To address visibility impact from existing sources, the 1977 amendments that dealt with the protection of visibility from existing sources less than 15 years old in 1977 was under the Regional Haze provisions. CAA §169A. This part of the CAA is distinct from the PSD provisions and its purpose is to “establish[ed] a national goal of remedying existing impairments of visibility in [Class I areas] and of preventing future visibility problems from arising.” Vol. 3 of the Legislative History of the Clean Air Act Amendments of 1977, August 1978, p. 533-34; (Joint Explanatory Statement of the Committee of Conference). Later in the *Conference Agreement*, Congress noted, “Issues with respect to visibility as an air quality value in application to new sources are to be resolved within the provisions for prevention of significant deterioration.”

The EPA developed regulations implementing the Regional Haze provisions at 40 CFR 51.307. In developing these rules EPA stated that the PSD rules were to be followed for new sources but that clarification of the “procedural relationships” with the FLM was needed.

As the first step in the review process, the State notifies the FLM of any potential new source that *may impact* visibility in a Federal Class I area. The State and FLM then initiate consultation, which will continue throughout the permitting process. Early consultation in the permitting process will be valuable and the State should notify the FLM of the source that *may potentially affect* the Federal Class I area. This notification should take place at the time the State reasonably believes that a source intends to make an application for a permit that *would affect* the area. [*emphasis added*]

45 FR 80084 at 80088 (December 2, 1980). The Regional Haze provisions provide that States notify the FLM when the State “...*reasonably believes...a source...would affect the [Class I] area.*” It is reasonable and fully consistent with the PSD provisions of the CAA and Congressional intent that the Class I increment provides this reasonable presumption. In other words, if the Class I increment is exceeded, the State reasonably believes the source would affect the Class I area, and must therefore notify the FLM if the State continues to seek the issuance of the permit.

The NCDAQ implemented the Regional Haze requirements through subparagraph (t) to 15A NCAC 2D .0530. In developing this rule, the NCDAQ included the notification scheme discussed above.

(t) When a source or modification subject to this Rule *may affect* the visibility of a Class I area named in Paragraph (c) of this Rule, the following procedures shall apply:

(1) The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or

within 30 days of receiving advance notification of an application. The notification shall be at least 30 days prior to the publication of notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility.

(2) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice as to where the explanation can be obtained. [*emphasis added*] (2D .0530(t))

Again, nothing is said of the requirements that the EPA notify the FLM (if the EPA believes the source may affect the Class I area), or the requirement of the FLM to notify the State (if the FLM believes the source will potentially affect the Class I area adversely). The State lacks authority to do so. Instead, subparagraphs (1) and (2) provide the procedure the State must follow in the eventuality that those actions were followed, and the Class I increment analysis was ultimately performed. Under subparagraph (1), the case when the increment is exceeded, the State is required to provide the FLM with “an analysis provided by the source of the potential impact of the proposed source on visibility.” In this case the FLM is the arbiter of the decision whether the proposed source will cause an adverse impact. If the Class I increment is not exceeded, subparagraph (2) requires the Director to consider “any analysis concerning visibility impairment performed by the FLM...” if the FLM seeks to prevent the issuance of the permit despite the fact that the Class I increment was not exceeded.

In this case, regardless of the timeliness of notification, the results would have been the same. NCDAQ required the applicant to perform the Class I increment analysis. The result of the analysis was that the Class I increment was not exceeded. Under the existing NCDAQ rule at 15A NCAC 2D .0530(t)(2), the FLM has the burden of proving to the satisfaction of the Director that the permit should not be issued by performing whatever analysis the FLM believes will convince the NCDAQ that the permit should not be issued.

7. The notification required by 15A NCAC 2D.0530(t) and the visibility determination made by the FLM under the authority of 15A NCAC 2D.0530(t)(2) are not related to or contingent upon the analysis performed to determine whether the proposed source will consume a Class 1 increment.

Exception

The respondent excepts to this Conclusion of Law for the reasons established and set forth above in Exception to Conclusion of Law No. 6 above.

8. The NCDENR failed to notify the FWS as required by 15A NCAC 2D.0530(t) of the pre-application meeting and of the filing of the permit application.

Exception

The Respondent excepts to this Conclusion of Law because it is based on the false premise that notification was required. It is undisputed fact that the Class I increment was not exceeded in this case and therefore the notification requirement under 2D .0530(t) was not triggered.

9. The NCDENR failed to comply with 15A NCAC 2D.0530(t) by failing to timely furnish the FWS a copy of all information relevant to the permit application, including an appropriate analysis provided by the source of the potential impact of the proposed source on visibility at Swanquarter.

Exception

The Respondent excepts to this Conclusion of Law because this conclusion is based on the false premise that the NCDAQ was required by 15A NCAC 2D .05030(t) to provide the FWS with relevant information. As stated in Exception to Conclusion of Law No. 8 above, it is an undisputed fact that in this case the Class I increment was not exceeded and therefore the notification and analysis requirements under 15A NCAC 2D .0530(t) were not triggered.

10. North Carolina's PSD regulations at 15A NCAC 2D.0530(g), incorporating by reference 40 CFR 51.166(n), require "the owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make a determination required under procedures established in accordance with this section."

Exception

To the extent that this Conclusion of Law implies that a Class I visibility analysis is required at all times the Respondent excepts to this Conclusion of Law because it is unsupported by the law. The requirement under 40 CFR 51.166(n) applies to all analysis required of the applicant. The decision to rebut the presumption from the Class I increment in this case is the FLM's. Their decision to rebut requires the FLM to provide the Director with the demonstration (CAA §165(d)(2)(C)(ii)).

11. The visibility analysis required by 15A NCAC 2D.0530(t) is for the FLM to use in making a determination of whether or not emissions from the proposed source will have an adverse impact on visibility at the Class 1 area.

Exception

This Conclusion of Law contradicts the plain language of the EMC's regulation where it is made clear that the visibility analysis is for the NCDAQ Director – NOT the FLM.

The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice as to where the explanation can be obtained.

15A NCAC 2D .0530(t). The plain language states exactly what the purpose of the analysis is – and it is not “for the FLM.”

12. The FLMs have been given an obligation to protect the air quality at Class 1 areas by reviewing PSD permit applications submitted by sources which may affect the Air Quality Related Values at a Class 1 area, and are required by both Federal and State regulations to use natural conditions as the background for comparison when making adverse impact determinations for visibility.

Exception

The Respondent excepts to this Conclusion of Law because it is unsupported by the law. In fact, the EPA, who the FLM has agreed is the agency responsible for interpreting the CAA has stated on numerous occasions that actual, current visibility must be used in PSD permitting decisions. (See 50 FR 28544 (“not debatable”) and 51 FR 2695 in approval of NC State Implementation Plan.)

13. North Carolina's PSD regulations do not address what background visual range to use for the visibility analysis required by 15A NCAC 2D.0530(t). The NCDENR has decided to implement a policy of using “current conditions” as the background visual range instead of “natural conditions” which the FLMs have agreed to use in the Federal Land Managers' Air Quality Related Values Workgroup report (FLAG).

Exception

The Respondent excepts to the Conclusion of Law because it is an incorrect conclusion of law and the Petitioner failed to demonstrate that NCDAQ's use of current conditions was either contrary to law or otherwise arbitrary and/or capricious. The NCDAQ PSD regulations provide that the PSD plan is designed to evaluate “increased air quality

deterioration over any baseline concentration.” 40 CFR 51.166(a)(2). Baseline concentration is defined in pertinent part as “that ambient concentration level that exists in the baseline area at the time of the applicable minor source baseline date.” 40 CFR 51.166(b)(13). In other words, impact analyses required under the PSD program are to be assessed against an existing level of air pollution (e.g. current conditions). In contrast, the Decision’s requirement to use natural conditions (visibility that would exist in the absence of manmade pollution) is inconsistent with the entire premise of the PSD program.

Interestingly, prior to the issuance of the FLAG Report in 2000, the FLM’s recommendation was to use current conditions to assess visibility impacts at Class I areas. See Memorandum in Support of Respondent’s Motion in Support of Motion for Summary Judgment, pp. 17-18. Following the availability of the FLAG Report in 2000 and its revised recommendation from current to natural conditions the NCDAQ re-evaluated the use of current background. North Carolina’s decision to continue to use current background was formalized in 2002 in a memorandum entitled “Background Visual Range; Visibility AQRV Analysis under the PSD Program” (“BVR Memo”). The BVR Memo described in detail the agency’s rationale for using “current background” under the PSD program. See Memorandum in Support of Respondent’s Motion for Summary Judgment, pp. 15-20. The Decision is devoid of any factual or legal demonstration that the NCDAQ policy memorandum was in any way contrary to the law or arbitrary and/or capricious.

Finally, with respect to the specific provision at issue in this case – 15A NCAC 2D .0530(t) – the rule was adopted in 1986 by the EMC and approved by the EPA. The record supporting this rule makes it clear that analyses performed under this provision were to use “current conditions.” In approving 15A NCAC 2D .0530(t) the EPA stated over and over that current monitoring data was to be collected and used for the specific purpose of making decisions under 15A NCAC 2D .0530(t).

The visibility monitoring program [proposed by North Carolina] meets the criteria for an approvable plan, as it will provide the State with reliable background visibility data for making permit decisions and for assessing visibility trends. It has been reviewed and been found to meet the provisions contained in 40 CFR 51.305.

* * * * *

[the monitoring stations] will provide the State with reliable background visibility data for making permit decisions. . . .

* * * * *

The Weather Service provides visibility measurements in units of distance, or visual range, which are recorded three times a day for every day of the year. This

data is appropriate for use in modeling potential visibility impacts of new sources (see Workbook for Estimating Visibility Impairment, November 1980, EPA-450/4-8-031)

* * * * *

[P]rovid[ing] acceptable regional background data to use in making visibility related permit decisions.

* * * * *

The State [North Carolina] will use this visibility data . . . in making their permit decisions.

51 Fed. Reg. 2695 (January 21, 1986)(emphasis added).

In sum, law requires the use of current background and the Petitioner failed to demonstrate that the NCDAQ use of the same was contrary to the law or otherwise arbitrary and/or capricious.

14. Using a background visual range of “natural conditions” is consistent with the “national [visibility] goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class 1 Federal areas which impairment results from manmade air pollution” 40 CFR 51.300(a).

Exception

The Respondent excepts to this Conclusion of Law because it is based on a specious presumption and is contrary to existing law. The goals of the two programs (PSD and Visibility Protection) are “complementary” (See Amer. Corn Growers, 291 F.3d 1 (2002)) in that increases from PSD projects are allowed provided reasonable progress towards the goal of natural conditions. It is specious to imply that the goal of the Regional Haze program, a goal with a 2064 deadline, has anything at all to do with the question of what background visibility should be used in PSD permitting decisions. The PSD program is predicated on the allowing reasonable emission increases. Far from having to discern the underlying goals of these two programs, however, the EPA has been explicit in noting that current background visibility must be used for PSD permitting decisions (See Exception to Conclusion of Law 12).

15. Using a background visual range of “natural conditions” is required by both Federal and State regulations when the FLMs are fulfilling their duty to determine whether the proposed source or modification would have an adverse impact on visibility at a Class 1 area. 40 CFR 51.166(p)(2) and 51.307(a)(3). See also 40 CFR 51.301.

Exception

First, as discussed in Exception to Conclusion of Law No. 3, 40 CFR 51.307 is not applicable in North Carolina. Second, the Petitioner has already admitted that 40 CFR 51.166 does not address this issue of visual range. As to 40 CFR 51.301, as noted in Exception to Conclusion of Law No. 3, North Carolina did adopt the definitions in 40 CFR 51.301. However, the citation to the definition in this instance should be considered at best entirely inappropriate and at worst an affront on this Commission. The term “natural conditions” as used in 40 CFR 51.301 has nothing at all to do with the case-by-case AQRV (visibility) analysis. In fact, the term “natural conditions” as used in 51.300 refers to the recognition that natural phenomena also reduce visibility and that any analysis of an anthropogenic source’s impact must exclude those natural phenomena. These include rain, fog, darkness, etc. To be clear, the rule’s recognition of these events serve to reduce the predicted impact of a source (in the visibility protection context). Of course, as Congress made clear when discussing the affect of the visibility protection rule provision on new sources, none of this has anything at all to do with the case-by-case AQRV (visibility) modeling considered under PSD rules.

16. Because the visibility analysis required by 15A NCAC 2D0530(t) is for the use of the FLMs, and the FLMs are required to use “natural conditions” as a background visual range for visibility determinations, the decision by the NCDENR to implement a policy that “current conditions” should be used as the background visual range in the visibility analysis required by 15A NCAC 2D.0530(t) is erroneous. Also, since the NCDENR policy has not been promulgated as a rule, it is invalid.

Exception

There are two grave errors associated with this Conclusion of Law.

First, the Petitioner has already conceded that nothing in the law addresses what background visual range should be used in assessing visibility impacts.

There are no regulations which detail how a required analysis or demonstration must be performed or what assumptions or baselines are to be used.

Pet.’s Response to the Respondent’s Memorandum in Support of its Motion For Summary Judgment and to the Respondent Intervenor’s Brief in Support of its Motion for Summary Judgment, p. 13. It is important to note that as established above, North Carolina and the federal EPA agree that under the PSD regulations “it is not debatable” that current background visual range and not natural background visual range is to be used in assessing visibility in the PSD context.

Second, the basis for this conclusion is that NCDAQ’s policy has not been promulgated as a rule and therefore is invalid. As a threshold matter if the failure to take “policy”

through rulemaking makes that “policy” invalid then it is unclear how the Petitioner and OAH Decision can rely on FLAG as it has never been through rulemaking.

If the Petitioner or the Office of Administrative Hearings wants to reject the long-standing and well-reasoned written NCDAQ policy to use current conditions they would have to have demonstrated that policy was arbitrary and capricious. “Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment....” *Act-Up Triangle v. Commission for Health Services*, 354 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal quotation marks and cites omitted). There is nothing in the record to support such a finding.

The NCDAQ’s use of “current background” is supported by:

- 1) The history and statements made contemporaneously with the passage of 2D .0530 that unequivocally state that current background is the proper background (See Exceptions to Conclusion of Law Nos. 11 and 12),
- 2) The plain language of the regulations that provide that the analysis performed in a PSD review is a change from existing conditions (See Exceptions to Conclusions of Law Nos. 11 and 12), and
- 3) The long-standing written and reasonable memorandum clearly stating how and why the agency uses current background.

In order to adopt this Conclusion of Law one must ignore entirely all of the above sources directing the use of “current background” without having demonstrated that any of these sources are contrary to law and/or arbitrary or capricious; and instead bind the NCDAQ and the EMC to informal whimsical guidance developed at various federal agencies.

Additionally, the use of natural background visibility in PSD permitting is inconsistent with Federal rules and guidance. Use of natural background for permitting decisions would require rule-making. The use of current background visibility is consistent with federal law and therefore no rule making is required.

17. By furnishing the FWS with a visibility analysis that does not contain the data that the FWS needs to make its visibility determination, the NCDENR has failed to fulfill its obligation under 15A NCAC 2D.0530(t).

Exception

The Respondent excepts to this Conclusion of Law because it is unsupported by the law. The EPA has made it explicitly clear that current visibility background should be used in PSD permitting decisions. This Conclusion of Law evidences what is essentially a euphemism for making FLAG “binding” on North Carolina and its applicants. From one side of the mouth Petitioner declares the state agency and the applicants are not required

to follow FLAG – but from the other side of the mouth they declare that a meaningful analysis is limited to one that adheres to FLAG. Again, demonstrating its commitment to require adherence with FLAG:

MR. ALLEN: We feel that providing information to us so that we can conduct our affirmative responsibility is a requirement. It's specified in both federal and your own State regulations. So it may just be splitting hairs as to whether you decide to follow FLAG. But, again, internally, we've decided that that's the procedure that we recommend and intend to follow. And in order for us to fulfill the time [sic] requirements that was in that paragraph, we need you to provide us with sufficient information to accomplish that goal.

Rule 30(b)(6) Deposition T. V1 at p. 121.

18. The NCDENR failed to furnish or to require PCS Phosphate to furnish the FWS with a visibility analysis that contained an appropriate and meaningful analysis of the potential impact of the proposed source on visibility at Swanquarter as required by 15A NCAC 2D.0530(t), thus preventing the FWS from having an opportunity to make its determination of whether the emissions from the proposed source would have an adverse impact on visibility at Swanquarter.

Exception

The Respondent excepts to this Conclusion of Law because it is unsupported by the law. Because the proposed project was predicted to protect the Class I increment, no further analysis was required. Under federal law and consistent with 2D .0530(t) the FLM is authorized to perform and submit case-by-case AQRV (visibility) modeling to the DAQ for consideration to rebut the presumption that the project would not adversely impact any Class I areas afforded by the Class I increment analysis.

19. Because of its actions, the NCDENR violated the terms of 15A NCAC 2D.0530(t) and issued the subject PSD permit to PCS Phosphate without reviewing a determination by the FWS of whether the emissions from the proposed source would have an adverse impact on visibility at Swanquarter.

Exception

The record is clear that the Petitioner did not submit any visibility analysis to the NCDAQ and as such 2D .0530(t) is not operative. The NCDAQ did review a Class I impact analysis provided by PCS and included the results of that analysis in the record. The Petitioner filed this case because the analysis did not follow FLAG.

20. Subsequent to the subject permit being issued and to the FWS being furnished by PCS Phosphate with the visibility modeling using natural conditions as the background, the FWS

exercised its authority under 15A NCAC 2D.0530(t) and determined that the emissions from the proposed source would not have an adverse impact on visibility at Swanquarter, which determination validated the issuance of the permit.

Exception

The Respondent excepts to this Conclusion of Law because it is unsupported by the law. Because the proposed project was predicted to protect the Class I increment, no further analysis was required of the company. Under federal law and consistent with 2D .0530(t) the FLM is authorized to perform and submit case-by-case AQRV (visibility) modeling to the DAQ for consideration to rebut the presumption that the project would not adversely impact any Class I areas afforded by the Class I increment analysis.

STATE OF NORTH CAROLINA
 COUNTY OF HYDE

IN THE OFFICE OF
 ADMINISTRATIVE HEARINGS
 08 EHR 1067

<p>U.S. DEPARTMENT OF INTERIOR FISH & WILDLIFE SERVICE,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY,</p> <p style="text-align: center;">Respondent,</p> <p style="text-align: center;">and</p> <p>PCS PHOSPHATE COMPANY, INC</p> <p style="text-align: center;">Respondent-Intervenor.</p>	<p>FINAL AGENCY DECISION</p>
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THIS MATTER came before the Environmental Management Commission (hereinafter the Commission) for final agency decision pursuant to N.C.G.S. §150B-36 at its regularly scheduled meeting in Raleigh, North Carolina on March 10, 2011.

The above matter was heard before Fred Morrison, Senior Administrative Law Judge (hereinafter “ALJ”) and a Decision was issued November 12, 2010. (This Decision will be referred to as Decision II because the prior Decision issued March 5, 2009 in this case was remanded to the ALJ on July 17, 2009.) The contested case was filed by Petitioner, U.S. Department of the Interior (DOI) Fish and Wildlife Service (hereinafter “FWS” or alternatively Federal Land Manager (hereinafter “FLM”)). The Respondent is North Carolina Division of Air Quality (hereinafter “NCDAQ”) and the Respondent-Intervenor, PCS Phosphate Company, Inc. (hereinafter “PCS”). This case is an appeal of

a permit issued to PCS by the NCDAQ. One of the regulations applicable to the proposed modification is 15A NCAC 2D .0530 “Prevention of Significant Deterioration” (hereinafter “PSD”).

APPEARANCES

For Petitioner:	Charles P. Gault Attorney at Law 800 S. Gay Street Suite 800 Knoxville, TN 37929
For Respondent:	James C. Holloway Assistant Attorney General N.C. Department of Justice 9001 Mail Service Center Raleigh, NC 27699-9001
For Respondent-Intervenor:	George W. House Brooks Pierce McLendon Humphrey & Leonard LLP PO Box 26000 Greensboro, NC 27420-6000

ISSUES

The parties are agreed that the issues presented below are questions of law:

- 1) Was the NCDAQ required to notify the FLM, pursuant to 15A NCAC 2D .0530(t), about the application submitted by PCS for modification to its facility located in Aurora, North Carolina?
- 2) Was the NCDAQ or PCS required to perform a case-by-case air quality related values (hereinafter “AQRV”) (visibility) analysis when then Class I increment was not exceeded?

- 3) Was the NCDAQ's use of current visibility range to evaluate visibility impacts at the Swanquarter Class I area contrary to law or otherwise arbitrary and/or capricious?

FINDINGS OF FACT

1. The PCS Phosphate manufacturing facility at issue is located 32 km west of the Swanquarter Wilderness Area, a federal Class I air quality area.
2. The DOI's agency, the FWS, manages Swanquarter, and the Assistant Secretary for Fish and Wildlife and Parks is the Federal Land Manager (FLM).
3. At its manufacturing facility near Aurora, North Carolina, PCS Phosphate conducts a phosphate ore mining operation, refines the ore and mixes it with sulfuric acid to produce phosphoric acid.
4. The phosphoric acid is used to produce phosphate fertilizer, fertilizer grade phosphoric acid, technical and food grade phosphoric acid and other products.
5. The Aurora plant produces over 1.3 million tons of phosphoric acid a year.
6. The sulfuric acid used in the manufacturing process is produced on-site by a process that involves burning sulfur.

7. The subject permit will allow PCS Phosphate to construct a new sulfuric acid plant to replace two existing on-site plants.
8. The new plant will produce over 4,500 tons of sulfuric acid a day, an increase of over 1,000 tons a day over the present output of the existing plants.
9. On August 25, 2005, a pre-application meeting was held between PCS Phosphate and the NCDENR, regarding PSD permitting methodology and requirements.
10. At the pre-application meeting an air quality modeling protocol, dated August 25, 2005, was submitted to the NCDENR.
11. Typically, air quality modeling is discussed at the pre-application meeting.
12. A modeling protocol is usually agreed upon at the pre-application meeting, in which the types of air quality models and the settings to be used are agreed upon.
13. The Modeling Protocol was approved by the NCDENR by letter dated September 15, 2005.
14. The NCDENR interprets the term “may affect” found in its regulation at 15A NCAC 2D .0530(t) to be synonymous with “has the potential to exceed a Class 1 increment.”

15. The NCDENR Division of Air Quality has taken the position that the test of whether or not visibility in a Class 1 area is going to be affected is the same as the test of whether or not a Class 1 increment is going to be exceeded.

16. The NCDENR has never had a PSD permit issued with a Class 1 increment being exceeded, and in only “a handful of time” has a permit application initially shown the potential for a Class 1 increment being exceeded.

17. The Class I increment was not exceeded and therefore the notification provisions of 15A NCAC 2D .0530(t) were not triggered.

18. The NCDENR’s position is that it has no duty to notify a Federal Land Manager of either a pre-application meeting or the filing of a PSD permit application, or to send a Federal Land Manager a draft permit and preliminary determination, unless a Class 1 increment will be exceeded.

19. On October 31, 2005, PCS Phosphate submitted the subject permit application to the NCDENR.

20. On August 23, 2006, and June 28, 2007, the URS Corporation (URS), an environmental consulting firm representing PCS Phosphate, submitted additional information for the subject permit application to the NCDENR.

21. On November 5, 2007, when NCDENR gave public notice of the PCS Phosphate permit action and issued its preliminary determination and draft permit, it did send FWS copies of the preliminary determination and permit.
22. The PCS Phosphate permit was issued on January 4, 2008.
23. The Class 1 increment only addresses three pollutants: SO₂, NO₂ and PM-10 particulate matter.
24. Visibility at a Class 1 area can be adversely affected despite the emissions from a source not exceeding the Class 1 increment.
25. The modeling protocol submitted at the pre-application meeting addressed visibility modeling for impacts at Class I areas and used a baseline of current visibility range, rather than natural visibility range.
26. The application was reviewed by the NCDAQ consistent with the requirements of 15A NCAC 2D .0530 and the NCDAQ determined that the facility would comply with those requirements.
27. The FWS has only appealed five PSD permits in the past 30 years, and two of them were issued by North Carolina.

28. The FWS first became aware that current visibility range had been used as the baseline for visibility modeling in the PCS Phosphate permit application, when it was sent a copy of the permit application and associated materials on November 26, 2007.

29. The FWS submitted comments on December 5, 2007, the comment period deadline.

30. One of the FWS comments was that natural visibility range should have been used as the baseline for visibility modeling.

31. PCS Phosphate did not submit revised modeling to satisfy the FWS' concern that "natural conditions" was not used as the background visual range in its model because the NCDENR made it known to PCS Phosphate's consultants that the NCDENR's policy was to use "current conditions" instead.

32. On February 27, 2008, the FWS asked the NCDENR about the status of the PCS permit and was told that it had been issued.

33. When the PCS Phosphate permit was issued, the NCDENR did not notify the FWS "[b]ecause it wasn't required in the PSD regulations".

34. The document known as FLAG was developed because of “request[s] from permitting authorities as well as permit applicants for the Federal Land Managers (FLMs) to have a more consistent and transparent process in evaluating air quality-related values.”

35. The FLMs would perform the same function of reviewing PSD permit applications and making adverse impact determinations and would use the same standards for review if FLAG did not exist.

36. Subsequent to the permit being issued and the filing of the subject appeal by the FWS, PCS submitted to the FWS visibility modeling using natural visibility range as a baseline.

37. After reviewing the visibility analysis which used natural visibility range, the FWS determined that the emissions expected to be produced as a result of the subject permit would not cause an adverse impact on visibility at Swanquarter.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this matter to the extent that the Conclusion of Law provides that the EMC is not required by law to comply with EPA policy statements. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. When the Class I increment is not exceeded, the Clean Air Act (CAA) and the North Carolina PSD regulations allow the FLM to submit any analysis they perform to the NCDAQ for consideration. 42 U.S.C. § 7475(d)(C)(ii); CAA § 165(d)(2)(C)(ii); 40 CFR 51.166(p)(1); 15A NCAC 2D .0530(t). The Class I increment was not exceeded in this matter. Moreover, despite the option allowed under the CAA, the FLM did not submit any impact analysis to the NCDAQ.
3. The North Carolina PSD permitting program is implemented by regulations at 15A NCAC 2D .0530 and has been fully approved by the federal EPA. 47 Fed. Reg. 7836 (February 23, 1982).
4. The “purpose” of North Carolina’s rule at 15A NCAC 2D .0530, “is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166.”
5. The term “may affect” in 15A NCAC 2D .0530(t) is not otherwise defined in North Carolina’s regulations. The NCDAQ interprets “may affect” to mean that a proposed PSD project will exceed a Class I increment analysis.
6. The notification provisions contained in 15A NCAC 2D .0530(t) require the NCDAQ to notify the FLM when the impacts from a proposed source or modification exceed the Class I Increment.

NOTE: On November 18, 2010 the EMC approved a revision to NCDAQ PSD regulations at 15A NCAC 2D .0530(t) requiring NCDAQ to notify the FLM for all projects regardless of impact. See <http://daq.state.nc.us/rules/hearing/>

7. The FLAG Report is guidance and the NCDAQ is not bound by the Report.
8. North Carolina's PSD regulations provide that PSD impact analyses, including case-by-case AQRV (visibility) analyses, are to be performed using current visibility range.
9. The impacts from the proposed modification were below the Class I increment and the FLM elected to not submit a case-by-case AQRV (visibility) analysis pursuant to 15A NCAC 2D .0530(t)(2). As a result the Director's decision that an adverse impact would not result at the Swanquarter Class I area was not required.

DECISION

1. Because the Class I increment was not exceeded the notification requirements under the version of 15A NCAC 2D .0530(t) in effect at that time were not triggered and the NCDAQ was not required as a matter of law to notify the FLM of the proposed project.
2. Because the Class I increment was not exceeded, neither the NCDAQ nor PCS were required to submit a case-by-case AQRV (visibility) analysis.

3. The NCDAQ is not bound by the FLAG Report. Moreover, the NCDAQ's use of current visibility range for the PSD impact analysis was consistent with the law and the Petitioner failed to demonstrate that the current visibility range was in any way arbitrary and/or capricious.

THEREFORE, pursuant to N.C.G.S. §150B-36(d), the Commission ORDERS this matter to be remanded to the Office of Administrative Hearings for a decision consistent with this Final Agency Decision.

A copy of the foregoing was mailed to:

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