

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF HYDE

08 EHR 1067

U.S. Department of the Interior (DOI),)
Fish and Wildlife Service (FWS))
Petitioner,)
)
)
v.)
)
)
N.C. Department of Environment and)
Natural Resources, Division of Air Quality)
(NCDENR))
Respondent.)
)
and)
)
PCS Phosphate Company, Inc.)
Respondent Intervenor)

**PETITIONER’S REQUEST TO PRESENT ORAL ARGUMENT AND PETITIONER’S
WRITTEN ARGUMENT IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE’S
DECISION**

The Petitioner, the United States Department of the Interior, Fish and Wildlife Service, requests an opportunity to present oral argument at the meeting of the Environmental Management Commission (Commission). Additionally, the Petitioner files a brief written argument in support of the administrative law judge’s decision.¹

INTRODUCTION

This contested case has been before this Commission previously. On that occasion, the

¹This summary argument is presented to refresh the memory of Commission members who heard this matter when the administrative law judge made his initial summary judgment decision and to inform any Commission members who did not attend the first presentation.

administrative law judge had granted summary judgment in favor of the DOI. After reviewing the administrative record and hearing oral argument, the Commission remanded the matter to the administrative law judge.² To resolve the matter, the case was then set for an administrative trial. The trial was held on July 13 – 14, 2010. Eight witnesses were heard. On November 12, 2010, the administrative law judge issued a decision granting judgment to the Petitioner and making findings of fact and conclusions of law. On January 4, 2011, the DOI received a letter, dated December 28, 2010, from the North Carolina Department of Justice, setting this case for presentation before the Commission on March 10, 2011, and requiring that any requests for oral presentation and written argument be filed by February 1, 2011.

In this contested case, the DOI has appealed the decision by the NCDENR to issue PSD Air Permit, No.04176T37 to the PCS Phosphate Company, Inc. (PCS Phosphate) on January 4, 2008. The permit was issued under North Carolina's Prevention of Significant Deterioration (PSD) regulatory program, and authorized PCS Phosphate to make major modifications to its phosphate fertilizer manufacturing facility located near Aurora, North Carolina.

Because the manufacturing facility is located 32 km west of the Swanquarter Wilderness Area (Swanquarter), a federal Class I air quality area under the protection of the Clean Air Act (CAA), 42 U.S.C. § 7401, et seq., and the emissions of pollutants expected to be produced by the modifications to the facility may affect visibility at Swanquarter, the DOI became involved in the permit review. The DOI's agency, the Fish and Wildlife Service manages Swanquarter, and the Assistant Secretary for Fish and Wildlife and Parks is the Federal Land Manager (FLM). Under the Clean Air Act the Federal Land Manager is charged with an "affirmative responsibility to

² The Commission issued an Order, dated July 17, 2009, remanding the case to the administrative law judge with instructions that it be dismissed as moot. Upon remand, the administrative law judge pointed out that he had held that the case was not moot in his summary judgment decision and that the Commission could only remand a summary judgment decision for a hearing to be conducted.

protect” the air quality related values (AQRV’s) at Class I areas, 42 U.S.C. § 7475(d)(2)(B).

The DOI, through the FWS, contested this permit because the FWS was not properly notified during the review process, preventing its effective review of the proposed project prior to permit issuance, and the permit was issued without an appropriate analysis of the potential effects that the emissions of pollutants caused by the modification to the facility would have on Swanquarter.³ Because of the inadequate visibility analysis provided by the permit applicant (sanctioned by the NCDENR), the FWS was not provided with complete and accurate data from which it could determine whether the emissions produced from the modifications would have an adverse impact on visibility at Swanquarter.

The administrative law judge’s decision contains twenty stipulated facts, twenty-four findings of fact and twenty conclusions of law.⁴ Based on the findings of fact and conclusions of law, the administrative law judge ruled “that judgment be entered for the Petitioner and that this appeal be sustained.” The administrative law judge also decided that the subject permit should not be suspended because, due to visibility modeling and analysis submitted by the proposed source to the FWS during the course of the litigation, the FWS had determined that emissions from the proposed source would not have an adverse impact on the Class I area, Swanquarter. The DOI agrees with all aspects of the administrative law judge’s decision.

ARGUMENT

The DOI and the FWS engaged in this permitting action and filed this contested case appealing the permitting decision because they are charged by several federal statutes, by federal regulations and by their internal policies and mission statements “to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national

³ The FWS has appealed only five PSD permits in the past 30 years. Two of those appeals have been for PSD permits issued by North Carolina. ALJ Decision, Findings of Fact 13.

⁴ The transcript of the administrative trial consists of 444 pages of testimony and 37 exhibits.

seashores, and other areas of special national or regional natural, recreational, scenic, or historic value.” 42 U.S.C. 7470(2). Swanquarter Wilderness Area is such a place, and is recognized as such by North Carolina’s PSD regulatory program. 15A N.C.A.C. 2D.0530(c). Although the DOI and FWS have the duty to “preserve, protect, and enhance the air quality” of Class I areas, they cannot carry out this mission without the cooperation of counterpart State agencies.

Since the last time that this matter was before the Commission, the North Carolina PSD rules have been amended regarding notification of Federal land Managers when applications for PSD permits are received.⁵ [CHECK THIS OUT!] The Petitioner has not been informed of any changes in the position of the NCDENR on the other issues in this case.

The DOI noted in its first presentation to the Commission that there is no doubt that the government of the State of North Carolina feels strongly that cleaning up, and preventing the further deterioration, of the State’s, and Nation’s, air is of primary importance. As the NCDENR stated in one of its briefs “North Carolina has been, and continues to be proactive in protecting the health and welfare of the citizens of North Carolina and its natural resources.” The NCDENR also noted that, in 2002, the Clean Smokestacks Act was enacted, requiring significant emissions reductions from large coal-fired electric utility plants. In addition, North Carolina’s Attorney General has also taken aggressive action, filing lawsuits in federal court seeking compliance with the federal Clean Air Act (CAA). These efforts are commendable. The decision of the administrative law judge in this case is in step with the State’s stance regarding cleaning up the air and protecting special places such as Swanquarter. A reversal of this decision would be a step backward.

⁵ For the reasons stated in the Petitioner’s briefs previously filed in this case, and as stated in the administrative law judge’s Decision, the Federal Land Manager was not properly or timely notified under the rule in effect when the subject permit application was filed. The Petitioner has filed its comments and position concerning the rule change regarding notice to the FLMs; however, the notice provisions of North Carolina’s PSD program were violated in this instance.

This case turns on questions of law rather than questions of fact; however, an administrative trial has been held and witnesses have testified. The record now includes testimony from the recently retired and present Directors of the NCDENR; the head of the FWS Division of Air Quality office; the head of the NCDENR PSD permitting division; an expert on air quality models; the Chief of the NPS Policy Planning and Permit Review Branch of the Air Resources Division; and both Federal and State PSD permit reviewers. The administrative law judge's decision is based on the applicable Federal and State statutes and regulations as well as the testimony of these witnesses.

The seminal statute in this case is the federal Clean Air Act. Beginning in 1977, the Clean Air Act (CAA), and its subsequent amendments, initiated a national program to clean up our nation's air. One of the national goals of the CAA is the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution." 42 USC 7491(a)(1).

The Environmental Protection Agency (EPA) is the federal agency designated by the Clean Air Act to promulgate regulations implementing the statute. The EPA has promulgated regulations at 40 CFR 51.300 – 40 CFR 51.309 and at 40 CFR 51.166. 40 CFR 51.300 states that:

The primary purposes of this subpart are to require States to develop programs to assure reasonable progress toward meeting the **national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I Federal areas** which impairment results from manmade air pollution; **and to establish necessary additional procedures for new source permit applicants, States and Federal Land Managers to use in conducting the visibility impact analysis required for new sources under § 51.166.** This subpart sets forth requirements addressing visibility impairment in its two principal forms: "reasonably attributable" impairment (i.e., impairment attributable to a single source/small group of sources) and regional haze (i.e., widespread haze from a multitude of sources which impairs visibility in every direction over a large area). (Emphasis added.)

Although the NCDENR has taken the position that the PSD and Regional Haze programs are not related and have different goals, the above-quoted regulation makes it clear that both programs have a common goal of “preventing any future, and remedying any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution”.

At 40 CFR 51.301, definitions applicable to the entire subpart are set out.⁶ The term “**adverse impact on visibility**” is defined as meaning:

“**visibility impairment** which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of visibility impairments, and how these factors correlate with (1) times of visitor use of the Federal Class I area, and (2) the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas.” (Emphasis added.)

The term “visibility impairment” is then defined to mean “any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under **natural conditions**.” (Emphasis added.) Finally, “natural conditions” is defined as including “**naturally occurring phenomena** that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration.” (Emphasis added.)

At subsection 51.166(p), the regulations specify that:

(p) Sources impacting Federal Class I areas -- additional requirements -- (1) Notice to EPA. The plan shall provide that the reviewing authority shall transmit to the Administrator a copy of each permit application relating to a major stationary source or major modification and provide notice to the Administrator of every action related to the consideration of such permit.

⁶ At 15A NCAC 2D.0530(b) North Carolina’s PSD program incorporates by reference “the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 ... except the definition of “baseline actual emissions.”

(2) Federal Land Manager. The Federal Land Manager and the Federal official charged with direct responsibility for management of Class I lands have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands and to consider, in consultation with the Administrator, whether a proposed source or modification would have an **adverse impact** on such values.⁷ (Emphasis added.)

(3) Denial -- impact on air quality related values. The plan shall provide a mechanism whereby a Federal Land Manager of any such lands may present to the State, after the reviewing authority's preliminary determination required under procedures developed in accordance with paragraph (r) of this section, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit.⁸

The federal regulations at 40 CFR 51.166 detail the “nuts and bolts” of the PSD program.

This regulation contains many specific provisions which have been incorporated by reference into North Carolina’s PSD program. At 40 CFR 51.166(l), requirements are set out for the use of air quality models:

(l) Air quality models. The plan shall provide for procedures which specify that --

(1) **All applications of air quality modeling** involved in this

⁷ The NCDENR reads into this, and the preceding subsection, a requirement that the EPA has the duty to notify the FLM that a PSD permit application has been filed which may affect a Class I area. There is no language in the text of this, or any other regulation, which puts the duty of initial notification on the EPA rather than the NCDENR. (As a footnote to this footnote: In the early days of implementing the CAA, the EPA did initially notify the FLMs, but this was before the States had approved programs. Since there were no State regulatory authorities at that time, the EPA had to perform the notification. After a State’s program has been approved, the State has that responsibility, under its own regulations.) North Carolina’s PSD regulation at 15A NCAC 2D.0530(t), placed the duty to initially notify the FLM of a PSD permit application, or pre-application contacts concerning a PSD permit application, which “may affect” a Class I area on the Director of the NCDENR. Subsection 51.166(p)(2) comes into effect **after** both EPA and the FLM have been notified by the NCDENR that a PSD permit application has been filed. The duty and authority to make a determination of **adverse impact** is placed with the FLM and the EPA Administrator.

⁸ Subsection (3) allows the State to either accept or reject an adverse impact determination made by the FLM; however, if the adverse impact determination is rejected, the State must publish an explanation of its decision. 15A N.C.A.C. 2D.0530(t)

subpart **shall be based on the applicable models**, data bases, and **other requirements specified in appendix W** of this part (Guideline on Air Quality Models).⁹

When the FLMs review PSD permit applications (or pre-application information) they use “natural conditions” as the background visual range for comparison.¹⁰ There are three compelling reasons why “natural conditions”, as that term is used by the FLMs in their PSD permit application reviews, is the appropriate standard.

First, the federal regulations, incorporated into North Carolina’s PSD program, require the use of “natural conditions”. The FLMs have a duty to determine whether emissions expected from either a new PSD source or major modifications made to an existing source will have an “adverse impact” on the air quality related values (AQRVs) at Class I areas. 40 CFR 51.166(p)(2) and 307(a)(3); 15A NCAC 2D.0530(t)(2). At 40 CFR 51.301, “adverse impact” is defined to mean “visibility impairment”. In that same section, “visibility impairment” is defined to mean “any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions.” The federal (and State) regulations, therefore, require that natural conditions be used as the standard to measure against when determining whether an adverse impact is expected.

By choosing to use natural conditions, the FWS is also exercising its judgment about what is the best way for it to carry out its duty under the Clean Air Act to protect visibility at a Class I area by the “prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air

⁹ 40 CFR 51.166(l) is incorporated by reference into North Carolina’s PSD program at 15A NCAC 2D.0530(g). Thus, through the incorporation of 40 CFR 51.166(l), North Carolina’s PSD program requires that air quality models be used as prescribed in Appendix W, and that the “**other requirements specified in appendix W**” be adhered to. One of the “other requirements” specified in appendix W is the requirement to consult with the FLM before a model is chosen and to use the inputs recommended by the FLM in the model.

¹⁰ That the FLMs use natural conditions as the background visual range for their adverse impact determinations was a position known by NCDENR well in advance of this permit application. The FWS and other FLMs announced this position in the FLAG document published in 2000.

pollution.” 42 U.S.C. 7491(a)(1). In choosing natural conditions as the background visual range for comparison, the FWS is also being consistent with one of the primary goals of the PSD program “to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value”. 42 USC 7470(2). (Emphasis added.) This duty of protecting the Class I areas and the adverse impact determination is placed with the FLMs by the Clean Air Act. Thus the FLMs must be allowed to use their best judgment of how to fulfill this obligation. The role of a state regulatory authority is to consult and coordinate with the FLMs, and to assist them. After the FLM has made an adverse impact determination, the State may either accept or reject it. The State, however, does not have the duty or authority to make the adverse impact determination.¹¹

The third reason for using natural conditions, as that term is used by the FLMs, is that it is the “best science” currently available. At the administrative trial, Tim Allen, the FWS expert witness, gave a comprehensive explanation of why “natural conditions” is used as the standard and how the FLMs determine the range to be used at the Class I areas.

An additional issue should be addressed in this summary. The NCDENR has taken the position that, under the PSD rules in effect when this permit application was submitted, it was not obligated to notify the FLM of either pre-application meetings or the filing of the application, or to require the applicant to prepare a visibility analysis, unless a Class I increment was exceeded. *See* Decision, Stipulated Facts 12; Findings of Fact 8, 10. The DOI’s position is that the FLM should be notified and the visibility analysis done whenever the projected emissions from the proposed project “may effect” the visibility at a Class I area. *See* the Petitioner’s Brief

¹¹ It follows that the State also does not have the authority to tell the FLMs how to make the determination and what air quality models and criteria the FLMs must use to make their determinations.

filed October 15, 2010 at pages 16-23.

ADMINISTRATIVE LAW JUDGE'S DECISION

In the Decision, there are twenty stipulated facts. They include:

9. The NCDENR did not send the EPA a copy of the application when it was filed.

10. The EPA did not notify the FWS of the application when it was filed.

11. The FWS did not receive a copy of the application when it was filed.

12. The NCDENR does not require the applicant to prepare the AQRV (visibility) modeling, if the applicant does not exceed the Class I increment.

13. The AQRV (visibility) modeling protocol submitted by the applicant to the NCDENR addressed AQRV (visibility) modeling for Class I areas and used a background of current conditions.

17. The NCDENR did not require the permit applicant to use natural conditions as the background for the AQRV (visibility) modeling that it performed for this permit application.

18. The NCDENR does not require PSD permit applicants to use natural conditions as the AQRV (visibility) modeling background.

After the trial and review of the transcript and exhibits, the administrative law judge made a finding of twenty-four additional facts. They include:

1. The FWS was not notified of the pre-application meeting and contacts between PCS Phosphate and the NCDENR. The citation to the hearing transcript which supports this Finding of Fact is found at page 19.

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. The citation to the hearing transcript which supports this Finding of Fact is found at pages 101, 102, 145.

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. The citation to the hearing transcript which supports this Finding of Fact is found at page 120.

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. The citation to the hearing transcript which supports this Finding of Fact is found at page 179.

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. The citation to the hearing transcript which supports this Finding of Fact is found at page 184-185, 338-339.

12. The NCDENR, citing to 40 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. The citation to the hearing transcript which supports this Finding of Fact is found at page 342-343.

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. The citation to the hearing transcript which supports this Finding of Fact is found at page 55.

After consideration of the briefs of the parties, the administrative law judge made twenty conclusions of law. They include:

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 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.

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.”

5. North Carolina’s regulations at 15A NCAC 2D.0530(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.

6. The term “may affect” in 15A NCAC 2D.0530(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 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 E.16, page 254. See also Prairie State p. 148; In re Knauf p. 155(lexis p. 78).

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.

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.

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 any determination required under procedures established in accordance with this section.”

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.

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.

13. North Carolina’s PSD regulations do not address what background visual range to use for the visibility analysis required by 15A N.C.A.C. 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).

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.

16. Because the visibility analysis required by 15A NCAC 2D.0530(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.

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).

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.

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.

CONCLUSION

The DOI and FWS are not attempting to tell the NCDENR how to run its regulatory program. On the other hand, however, the FWS must be allowed to fulfill its duty under the Clean Air Act and make the decisions and conduct the analysis that it is charged by law to accomplish. To fulfill its duty, the FWS must be notified as early as possible that a new source or major modification to an existing source that may affect the air quality at one of its Class I areas is being planned. The “notification” must 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” at the subject Class I area. (Emphasis added.) This analysis includes air quality modeling. In order for this analysis to be useful to the FWS and to furnish the FWS with information from which it can determine whether the projected emissions will have an adverse impact on the Class I area, the modeling must be done so that it produces the data in the form that the FWS needs. This is not too much to ask and does not infringe upon the ability of the NCDENR to run its regulatory program as it wants.

As required by N.C. Gen. Stat. § 150B-36(b), the Commission makes a final decision after its review of the official record. The Commission must adopt each finding of fact made by the administrative law judge unless it determines that the finding is clearly contrary to the preponderance of the admissible evidence. The findings of fact in the Petitioner’s proposed decision were substantially adopted by the administrative law judge in his decision and are fully supported by citations to the record. The administrative law judge’s conclusions of law are also supported by briefing in the record and are valid interpretations of the requirements of the many statutes and regulations which apply to this situation.

For the reasons stated above, the DOI urges the Commission to adopt and sustain the decision of the administrative law judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, to the following on this 1st day of February, 2011:

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