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Mr. John Bunyak
Air Resources Division
National Park Service
P.O. Box 25287
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**Comments on the Federal Land Manager's
Air Quality Related Values Workgroup (FLAG)
Draft FLAG Phase I Report - Revised**

Dear Mr. Bunyak:

On July 8, 2008, the National Park Service, in cooperation with the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture Forest Service, announced the availability of, and the opportunity to comment on, the Federal Land Managers ("FLMs") Air Quality Related Values Workgroup's ("FLAG") draft *FLAG Phase I Report—REVISED*. 73 Fed. Reg. 39039 (2008) ("Report").

The following comments are provided on behalf of Peabody Energy Corporation. Peabody is the world's largest private-sector coal company. Its coal products fuel approximately 10 percent of all U.S. electricity generation and 2 percent of world-wide electricity. Peabody appreciates the opportunity to comment on the Draft FLAG Phase I Report – Revised. We support the Federal Land Managers (FLMs) efforts to establish a consistent and objective approach for evaluating impacts on air quality-related values (AQRVs). We do, however, have some concerns with the approach outlined in the Report as discussed below.

Use of $Q/D \leq 10$ as Screening Tool

The revised Report recommends the use of $Q/D \leq 10$ to screen out sources from AQRV review, but includes no cap on the distance between the source and a Class I area. Current practice in new source permitting is to evaluate impacts on Class I areas located within 300 kilometers of the source. While somewhat onerous, this is a workable distance with respect to the resources necessary to perform the modeling. It also is consistent with EPA's position regarding the use of CALPUFF to assess impacts. See Peter Tsigotis, Director, EPA Emissions, Monitoring and Analysis Director, "Application of CALPUFF for Long-Range Transport," (May 10, 2004).

As drafted, the revised Report would require large sources to assess impacts on Class I areas beyond the recognized capability of the models. For example, two 300 megawatt coal-fired circulating fluidized bed units employing state of the art controls

would be required to evaluate impacts on Class I areas within 435 kilometers of the site. Two 750 megawatt coal-fired pulverized coal units also with state of the art controls would have to evaluate impacts on Class I areas as far away as 779 kilometers. We understand that with refinements, i.e., puff splitting and modern mesoscale meteorological modeling, the model may be used to assess impacts at distances greater than 300 kilometers. Even with these refinements, however, EPA recommends caution in using CALPUFF beyond 300 kilometers. *Id.* It also is not clear that puff splitting and modern mesoscale meteorological modeling are acceptable refinements to the model in a "first level" analysis. Even if they are acceptable refinements, assessing impacts of a new source past 300 kilometers has not been shown to be warranted given the resources necessary to perform the modeling with puff splitting.

We also question whether 10 is the appropriate value for comparison. The only justification provided for its use is reference to EPA's work in the context of BART. No technical analysis is provided for the use proposed in the FLAG Report.

For the above reasons, we recommend that the practice of evaluating impacts on Class I areas located within 300 kilometers of a new source be continued.

Limitations on Refinements to the Model

The revised Report describes "first-level analysis procedures" for modeling and indicates that any deviation from those procedures may warrant an hourly analysis using a different metric. Report at 33. Very little guidance is provided as to how such an hourly analysis would be conducted or as to what refinements to the first-level analysis would trigger it. Indeed, the Report suggests that any refinement would lead to an hourly analysis : "We wish to emphasize that the first-level procedures defined herein are to be taken as a whole; any deviations from these procedures or ostensible refinements compromise the integrity of the analysis, and may warrant an hourly analysis for all hours in the analysis." *Id.*

There are several refinements to CALPUFF that improve the representativeness of the results without compromising the integrity of the analysis that should be allowed without triggering an hourly analysis. The revised Report would preclude those refinements without establishing a technical basis for such exclusion. This is contrary to the FLMs stated position that they "rely on the best scientific information available in the published literature and best available data to make informed decisions regarding levels of pollution likely to cause adverse impacts." Report at 7. Additionally, the revised Report would stifle progress in improving the representativeness and predictive capability of the models. Without such progress over the past 8 years, it is questionable whether we would have a FLAG 2008 Report to review. Indeed, numerous refinements to the methodology described in FLAG 2000 and incorporated in the revised Report are the result of refinements made and knowledge gained in individual cases.

One such refinement is the use of the ammonia limiting method ("ALM"). As we understand it, MNITRATE=1 has been approved by FLMs in the past, which would allow adjustments to the source's ammonia concentration but would prohibit any adjustment

to background ammonia concentrations (included in full ALM methodology). No scientific justification was provided for precluding ALM as an acceptable refinement to the first-level analysis. Ammonia concentrations are an important variable in assessing impacts and are known to vary both spatially and temporally. Precluding adjustments for actual ammonia concentrations is unreasonable and not grounded in sound science.

Finally, the revised Report is ambiguous as to whether any modifications would be considered permissible deviations that would not trigger an hourly analysis. As mentioned above, puff splitting and modern mesoscale meteorological modeling are needed in some instances and it is not clear whether they are acceptable refinements. If the analysis is limited to 300 kilometers or less as recommended above, these refinements may not be necessary but should nevertheless be available for use.

Limitations on Consideration of Regulatory Factors

The revised Report indicates that consideration of the regulatory factors in determining an adverse impact on visibility (40 C.F.R. § 51.301) are inherent in the first-level analysis. Report at 106. While the factors may be addressed to some extent, it is not clear that they are fully addressed by the first-level analysis. For example, the Report indicates that use of the 98th percentile and monthly relative humidity values provides a reasonable approach to addressing weather impacts. *Id.* at 107. That may be true for some cases, but not for all. A source should not be precluded from fully evaluating the regulatory factors in providing its analysis of potential impacts on Class I areas with a first-level analysis. Indeed, the FLMs do not have the authority to restrict the use of the regulatory factors in such a manner. As they point out in the revised Report, “they have no authority under the Clean Air Act to establish air quality-related rules or standards.” *Id.* at 5-6. By attempting to limit the use of the regulatory factors established by EPA, they are in effect attempting to modify impermissibly air quality-related rules.

Impermissible Expansion of Role of FLMs in NSR Permitting

The FLMs acknowledge the permitting agency’s role under the Clean Air Act but nonetheless seek to insert themselves into the process beyond their authority under the Act. *See, e.g.*, Report at 5 (“FLMs have no permitting authority under the Clean Air Act”). Some of the more troublesome examples are discussed below.

It is the permitting agency that makes the determination that an application for a new or modified source is complete in accordance with its rules and regulations. In the revised Report, however, the FLMs seek to insert themselves into that process. *See, e.g.*, Report at 13 (encouraging “the permitting authority to use comments provided by the FLM concerning the completeness of the application, and to not deem the application complete until the applicant performs all necessary air quality impact analyses, including all relevant AQRV impact information”). The “completeness” of an application with respect to the best available control technology (“BACT”) analysis or the Class II ambient air quality impact analysis is not relevant to the FLMs ability to assess the impact of the source on the AQRVs. While the FLMs may want lower emission

limits as BACT, that has no bearing on the impact the BACT emissions limits proposed by the applicant will have on AQRVs, which is on what the FLMs should be focusing their attention. As noted in the revised Report: "The FLM role within the regulatory context consists of considering whether emissions from a new source, or emission increases from a modified source, may have an adverse impact on AQRVs and providing comments to permitting authorities." *Id.* at 6. Indeed, it the permitting agency's responsibility to determine BACT and the adequacy of the NAAQS and increment analyses, not the FLMs. While the FLMs may comment on those determinations and analyses, they are doing so as members of the public, not as a government agency tasked with those responsibilities. If the FLMs provide comments as a government agency, such comments should be consistent with federal policy and interpretation of the regulations.

The revised Report establishes a separate 30-day FLM comment period if there is a Class I increment violated or a preliminary adverse impact determination. Report at 16-17. It is unclear how this comment period fits within the NSR permitting procedures. It is possible that such a period could occur after the final permit has been issued by the permitting agency and lead to separate federal litigation with respect to the FLM finding. This is not what is contemplated by the Clean Air Act or EPA's implementing regulations for new source permitting. The regulations set up a detailed process for the FLMs to submit their determinations as to impacts on Class I areas to the permitting agency within certain time frames and for the permitting agency to address those determinations as part of the public notice. Again, the revised Report attempts to modify that regulatory process.

The Report states that an "applicant must perform an air quality impact analysis for each pollutant subject to PSD review" and cites 40 C.F.R. § 51.166. *Id.* at 14. This misstates the requirement and expands the scope of the ambient air impact analysis required by the Clean Air Act. Air quality analyses are performed for those pollutants for which there is a national ambient air quality standard ("NAAQS") or increment and for which there is a model appropriate for single source analysis. There are other pollutants that are subject to PSD review but for which no air quality analysis is performed (e.g., sulfuric acid mist, fluorides, volatile organic compounds).

Specific Authority to Regulate AQRVs in Class II Areas is Lacking

The revised Report states that it provides "consistent policies and processes both for identifying air quality related values (AQRVs) and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I air quality areas, but in some instances, in Class II areas (all other federal, state and tribal lands)." Report at vi. The legal authority for FLMs to regulate AQRVs in Class II areas is, at best, highly questionable.

In early 2001, National Mining Association provided an analysis of this authority which was also purported in the original FLAG report (enclosed). The following is quoted directly from the NMA report, which is attached:

The Clean Air Act specifically limits regulation of visibility and AQRVs to Class I areas. With respect to regulation of existing sources, this is stated clearly in Sections 169A and 169B of the Act. The legislative history of the Act repeatedly confirms that visibility and other AQRVs are to be regulated only in Class I areas. In fact, the 1977 Amendments, which adopted the current Prevention of Significant Deterioration (PSD) and visibility provisions, expressly changed the prior EPA regulations to eliminate the authority of Federal Land Managers to control the designation of federal lands where visibility and other AQRVs can be regulated. Under the Act as amended, that authority is reserved exclusively for the states (§ 164).

The NMA further stated: "It is also well established law that where a specific statutory provision of law addresses the same endpoint as that sought by the agency, the specific provision of law governs, and broadly construed statutory interpretations are inappropriate." Therefore, the specific provisions dealing with Class I areas in the Clean Air Act preclude extending AQRV protection to Class II areas, particularly in light of the 1977 amendments and legislative history. Peabody questions the legal basis for the intent to extend protection of AQRVs to Class II areas as expressed in FLAG 2008 and requests that this language be completely removed from the document.

In conclusion, we support the FLMs efforts to protect our Class I areas for the enjoyment of all. That protection, however, should be based on sound scientific principles and comport with the programs established by the Clean Air Act and its implementing regulations. Should you have any questions about our comments, please do not hesitate to contact Wanda Burget at 307.687.3920 if you have Class II questions or me, at 314.342.7613 for Class I questions.

Sincerely

A handwritten signature in cursive script, appearing to read "Dianna Tickner".

Dianna Tickner
Vice President

Enclosure

To: Wanda Burget, Greg Schaefer, Bob Green

From: John Shanahan

Date: January 30, 2001

Re: Forest Service Authority to Regulate AQRVs in Class II Areas

In looking into the question of the Forest Services' authority to regulate AQRVs in Class II, it appears there is little to substantiate their direct authority to regulate. That analysis follows. It is also well established law that where a specific statutory provision addresses the same endpoint as that sought by the agency, the specific provision of law governs, and broadly construed statutory interpretations are inappropriate. I will provide that analysis to you tomorrow, but wish to look further into the question of the extent to which other statutory provisions address the agency's objectives. That analysis, if appropriate to this situation, will be a bit more extensive.

Specific Authority to Regulate AQRVs in Class II Areas is Lacking

The Forest Service has asserted its authority to regulate visibility and other "air quality related values" (AQRVs) in Class II areas in the Thunder Basin National Grasslands Draft Management Plan and EIS. Our initial research indicates that the legal authority for such an approach is, at best, highly questionable.

The Clean Air Act specifically limits regulation of visibility and AQRVs to Class I areas. With respect to regulation of existing sources, this is stated clearly in Sections 169A and 169B of the Act. With respect to permits for new or modified sources, it is stated clearly in Section 165(d) of the Act. The legislative history of the Act repeatedly confirms that visibility and other AQRVs are to be regulated only in Class I areas.¹ In fact, the 1977 Amendments, which adopted the current PSD and visibility provisions, expressly changed the prior EPA regulations to eliminate the authority of Federal Land Managers (such as the Forest Service) to control the designation of federal lands where visibility and other AQRVs can be regulated.² Under the Act as amended, that authority is reserved exclusively for the states (§ 164).

The Forest Service Memorandum of October 17, 2000 attempts to argue that despite these provisions of the Clean Air Act, the Service somehow has authority under other statutes to regulate visibility and AQRVs in Class II areas. No precedent for such action is cited in the Memorandum, and our initial research found none. We did find cases holding that the authority

provided in those statutes should, as a general matter, be construed broadly.³ However, the statutes cited in the Memorandum provide extremely general grants of authority that should not be construed to override Congress' more specific direction in the Clean Air Act.⁴ This area of law is well settled, as discussed below.

¹ See, e.g., H.R. Rep. No. 564, 99th Cong., 1st Sess. 151-55 (1977)(Conference Report); H.R. Rep. No. 294, 95th Cong., 1st Sess. 7-10, 13, 171-72 (1977)(House Report). The 1990 Amendments changed this scheme only to clarify that Class I areas include any changes to the boundaries made after the 1977 Amendments were adopted. See §§ 162(a) & 164(a); H.R. Rep. No. 490, 101st Cong., 2nd Sess. 273 (1990)(House Report).

² See 1977 House Report, *supra*, at 8.

³ See, e.g., *United States v. Raffield*, 82 F.3d 611, 612 (4th Cir. 1996)(and cases cited therein).

⁴ See, e.g., *Busic v. United States*, 446 U.S. 398 (1980).

To: Wanda Burget, Bob Green, Greg Schaefer

From: John Shanahan

Date: February 2, 2001

Re: Particular Versus Generalized Provisions

There appear to be no good candidates for specific statutory remedies dealing with visibility in Class II areas. We have strongly opposed secondary NAAQS as inappropriate to deal with visibility. At the risk of criticism from devotees of Winston Churchill, who said that consistency is the hobgoblin of little minds, it appears less than an ideal provision to use as evidence of a more specific statutory provision. Likewise, the PSD program does not appear directly on point.

Thus, the argument here is not that a different provision deals with visibility (or AQRVs) in Class II areas per se, but that specific visibility provisions dealing with Class I preclude extending visibility protection to Class II, particularly in light of the 1977 amendments and legislative history, as discussed in the previous memo.¹ In essence, by limiting the provisions to Class I, Congress precluded Class II.

Where Congress Has Specified a Particular Statutory Remedy, EPA May Not Avail Itself of the Act's More General Remedial Provisions

Where Congress has designated a statutory remedy that is tailored specifically to addressing a particular issue of concern, that remedy – and that remedy alone – is the embodiment of the legislature's grant of authority for agency action in that area. Consequently, agencies may regulate air pollution under the general remedial authority cited by the Forest Service only to the extent that the endpoint of that regulatory concern is not addressed by a more specific statutory provision.

The specific remedial provisions of the CAA addressing visibility suggest deference by the Forest Service because they reflect the results of Congress's balancing of competing societal interests – an undertaking that is uniquely within the purview of the legislature.²

Accordingly, the broad remedial purpose entailed by the Acts cited by the Forest Service gives way to Congress's particularized prescriptions in specifying a protections within Class I areas, as enumerated in the Act. As the Supreme Court explained:

Application of 'broad purposes' of legislation at the expense of specific provisions

ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. *Board of Governors, Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986).

These considerations have given rise to the well-settled doctrine of statutory interpretation that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 120 S.Ct. 1655, 1660 (2000) (quotations omitted). Congress spoke to visibility protection in sections 169A and 169B of the Act. The Supreme Court has concluded that both agency and reviewing court "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 232, 114 S.Ct. 2223-2232 (1994).

As the Supreme Court has held repeatedly, "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.... Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Company v. Transmirra Products Corp.*, 353 U.S. 222, 228-9, 77 S.Ct. 787, 791-2 (1957) (quotations omitted); *Clifford F. MacEvoy Co. v. U.S.*, 322 U.S. 102, 106, 64 S.Ct. 890, 893-4 (1944) (concluding same with regard to act that is "highly remedial in nature"); see also *Maiatico v. U.S.*, 302 F.2d 880, 886 (D.C. Cir. 1962) (stating same); *American Trucking Associations v. EPA*, 175 F.3d 1027, 1042 (D.C. Cir. 1999) (citing "the well-established principle that a general statutory rule usually does not govern unless there is no more specific rule") (quotations omitted).

Such a construction is especially appropriate with respect to the Clean Air Act. The balancing of the costs and benefits of air quality programs is inherently a legislative function, entailing the allocation of scarce societal resources to competing but legitimate priorities. See *Office of Consumer's Counsel v. Federal Energy Regulator Commission* 655 F.2d 1132.

The Supreme Court has held that the valid exercise of congressionally delegated power depends upon the prior "adoption of [a] declared policy by Congress and its definition of the circumstances in which its command is to be effective." *Opp Cotton Mills, Inc. v. Administrator* 312 U.S. 126, 144; 61 S.Ct. 524, 532. The Forest Service's interpretation would grant it broad regulatory authority without circumscribing the bounds and conditions for its use. Appellate courts have held that such statutory authority lacking a guiding principle entails a standardless delegation. See *American Trucking Associations v. EPA* 175 F.3d 1027, 1034 (even where EPA applied "reasonable factors" to determine the degree of public health concern associated with ozone and PM, the lack of an "intelligible principle" in the CAA to channel the Agency's application of these factors rendered its development of NAAQS invalid as an unconstitutional delegation of legislative power).

The mere fact that such a broad interpretation implicates nondelegation problems militates against it, because courts construe statutes to avoid constitutional questions. *United States v. X-Citement Video* 115 S.Ct. 464, 467 (1994) (“[A] statute is to be construed where fairly possible so as to avoid substantial constitutional questions.”); *Ashwander v. TVA* 297 U.S. 288, 347 (1936) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”); see also Tribe, *American Constitutional Law* (1988) at 366 (“Typically, the Court ‘narrowly construes’ federal statutes to avoid broad delegations, thus finding administrative action unauthorized as a statutory matter instead of holding congressional action constitutionally unjustified.”). Congress in the CAA has specified with particularity the regulatory mechanisms for dealing with visibility and AQRVs.

The Forest Service’s argument appears contrary to well-established canons of statutory interpretation, which divest agencies of the ability to stretch their general remedial powers to exceed the authority Congress has granted the Agency with targeted specificity. Where Congress has designated a statutory remedy that is tailored specifically to addressing a particular issue of concern, that remedy – and that remedy alone – is the embodiment of the legislature’s grant of authority for agency action in that area.

¹ An interesting observation about the Organic Administration Act cited by the Forest Service: that Act directs the Secretary of Agriculture to “...make provisions for the protection against destruction by fire and other depredations upon the public forests and national forests.” The Forest Service states that the “potential magnitude of air pollution impacts to National Forest System Lands can be classified as a depredation.” It ignores that this language, on its face, limits the authority to protection against “destruction.” So it may be that, whether it qualifies as a depredation, air pollution does not cause destruction. This observation, however, may split hairs. Research into that Act may find the term has been construed broadly. Moreover, even if not previously addressed, degradation of air quality arguably could be termed destruction.

² See *Office of Consumer's Counsel v. Federal Energy Regulator Commission* 655 F.2d 1132, 1152 (D.C. Cir. 1980) (“It is not for an administrative agency, however, to preempt Congressional action or to ‘fill in’ where it believes some federal action is needed. It goes without saying that appropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.”).