



September 8, 2008

***Via Electronic Mail to: [john\\_bunyak@nps.gov](mailto:john_bunyak@nps.gov)***

Mr. John Bunyak  
Air Resources Division  
National Park Service  
P.O. Box 25287  
Denver, Colorado 80225

### **Comments on the Draft FLAG Phase I Report - Revised**

Dear Mr. Bunyak:

The National Mining Association (NMA) appreciates this opportunity to comment on the Federal Land Managers' (FLM) draft revisions to the FLM Air Quality Related Values Work Group (FLAG) Phase 1 Report (hereinafter "Draft Report" or "Report"), published at 73 Fed. Reg. 39,039 (July 8, 2008).

NMA is a national trade association whose members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members have a great interest in Clean Air Act (CAA) matters, including the Prevention of Significant Deterioration (PSD) program. The proposed revisions to the Draft Report will have direct and indirect impacts on a significant number of NMA members, many of whom conduct operations in locations that may affect Class I areas. NMA members wish to conduct operations in a manner that will not cause adverse impacts on those areas. Therefore, NMA and its members have a strong interest in assisting the FLMs in improving the approach of evaluating impacts on air quality related values (AQRV) in Class I areas.

#### **I. Introduction**

NMA believes that protecting Class I areas against adverse impacts is important. Class I areas are important resources for the entire nation and must be preserved for future generations. Adverse impacts to AQRVs in Class I areas from new or modified sources subject to the PSD program should be mitigated.

NMA largely supports the FLM's efforts towards establishing a consistent and objective approach to evaluating impacts on AQRVs. In particular, NMA supports the efforts of the FLMs, as stated in the preface to the Draft Report, to develop a consistent and objective approach to evaluating air pollution effects on AQRVs in Class I areas, and in providing State permitting authorities and permit applicants consistency in evaluating the impacts of new sources on those Class I areas.

While NMA supports these stated objectives of the Draft Report, NMA is concerned about certain aspects of the draft. NMA's particular concerns are addressed by the comments herein.

## **II. FLM's Role In NSR Permitting**

The CAA clearly grants States with authority to issue PSD permits broad discretion in reviewing PSD permit applications and in issuing permits. The role of the FLM is to demonstrate, by providing comments to the State permitting authority, that a proposed facility will have an adverse impact on AQRVs in a Class I area. CAA § 165(d)(2)(C)(ii). The permitting authority is directed to consider the comments of the FLM in the overall permitting process.

Generally speaking the Draft Report accurately describes the relationship FLMs are to maintain with State permitting authorities with respect to the PSD permitting process. Under the CAA, FLMs do not have permitting authority, nor do they have authority to establish air quality-related rules or standards. FLMs are to maintain a purely consultative role. Revised Executive Summary of the FLAG 2008 Report (at p. vi).

Portions of the Draft Report, however, are inconsistent with the CAA with regard to the role of the FLM in the NSR permitting process. In particular, the Draft Report encourages permitting authorities to require permit applicants to perform necessary air quality impact analyses and relevant AQRV impact information before deeming an application complete. Draft FLAG 2008 Report (at p. 13). NMA feels that an FLM's ability to assess the impact of a source on AQRVs is not incumbent upon certain analyses, such as best available control technologies (BACT) and Class II ambient air quality impacts. Applications, therefore, can be deemed complete by a permitting authority absent such analyses without disrupting the FLM's process of determining the impacts of the BACT emissions limits proposed by an applicant on AQRVs.

NMA requests that the final FLAG 2008 Report consistently establish that permitting authorities have the ultimate responsibility of establishing AQRVs, making final determinations of whether a proposed new source will have an adverse impact on AQRVs, and for deciding whether or not to issue a PSD permit.

### **III. Concerns About the Use of $Q/D \leq 10$ as a Screening Tool**

NMA agrees that it is reasonable to set screening criteria in order to avoid subjecting all proposed new and modified sources to BART review. NMA is concerned, however, with the use in the Draft Report of a single initial screening criterion:  $Q/D$ . The Draft Report recommends the use of  $Q/D \leq 10$  to screen out sources from AQRV review, but does not set a 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 required for appropriate 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).

The Draft Report currently sets no limit on how far away a Class I area could be in applying the  $Q/D$  rule to permit applications of large sources. 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.

NMA feels that the proposed use of the  $Q/D \leq 10$  criterion as an absolute threshold value requires further technical justification. Permitting authorities and applicants can rely on alternative screening tools to evaluate whether proposed sources are having meaningful impacts on Class I areas. Additionally, NMA feels that evaluating impacts of new sources beyond 300 kilometers is not warranted due to the resources required to perform the modeling. For these reasons, NMA recommends that FLMs continue to evaluate impacts on Class I areas located within 300 kilometers of a proposed source.

### **IV. Limitations on Refinements to the Model**

The Draft Report indicates in several places that if a permit applicant makes any deviations from the first-level modeling analysis described in the Report, it could trigger an hourly analysis using a different metric. NMA is concerned that inflexible enforcement of this policy could prevent improvements from being made to the overall source impact assessment process. Additionally, 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.

Several potential refinements to the modeling procedures exist which would improve the representativeness of the results without compromising the integrity of the overall analysis. NMA feels that these refinements should be allowed without triggering an hourly analysis. One such refinement is the ammonia limiting method (ALM), which involves the varying of ammonia in both time and space. NMA

understands that the ALM has been used in a separate model study conducted in Wyoming, and that the use of ALM resulted in much closer agreement with observed ammonia nitrate levels than did the use of a constant ammonia value, which resulted in over-predictions.

NMA feels that enhancements in first-level modeling approaches should be encouraged. Therefore, NMA recommends that the final FLAG 2008 Report should clearly state that permitting authorities have the discretion to allow the development and use of improved modeling approaches, including ALM, without risk of triggering an hourly analysis.

#### **V. Concerns About Limiting Consideration of Regulatory Factors**

The Draft Report suggests that the regulatory factors used by EPA to determine adverse impacts on visibility (40 C.F.R. § 51.301) are merely considered in the first-level analysis. Draft FLAG 2008 Report (at 106). NMA feels that FLMs should not restrict the use of the regulatory factors in a first-level analysis and a proposed source should not be precluded from fully evaluating the regulatory factors in providing its analysis of potential impacts on Class I areas. FLMs do not have the authority to restrict the use of the regulatory factors, and by attempting to do so, FLMs are overreaching.

#### **VI. Concerns Regarding FLM Authority to evaluate impacts on AQRVs in Class II Areas**

Although the stated purpose of the Draft Report is to evaluate the impacts of proposed new sources on Class I areas and to report those findings to the permitting authority for consideration in reviewing new source permit applications near Class I areas, the Report refers in several places (often in footnotes) to extending the FLM's responsibilities to Class II areas as well. NMA feels that the legal authority to extend the FLM's purview to Class II areas is lacking, and requests that all references to evaluating Class II areas be removed from the Report.

In 2001, NMA provided a legal analysis of the authority of a FLM (the U.S. Forest Service, in that instance) to regulate AQRVs in Class II areas. That analysis was ultimately incorporated into comments submitted regarding the FLAG 2001 Report. Although NMA believes that resources in Class II parks and wilderness areas are important and warrant some oversight, NMA believes that the FLAG Report is not the appropriate mechanism to provide that oversight, does not provide FLMs with the legal authority to review the impacts of proposed new sources on Class II areas and should not be relied upon as guidance authorizing such review.

The CAA specifically limits regulation of visibility and AQRVs to Class I areas. With respect to regulating existing sources, this is clearly stated in Sections 169A and 169B of the Act. With respect to permits for new or modified sources, it is stated in Section 165(d) of the Act.

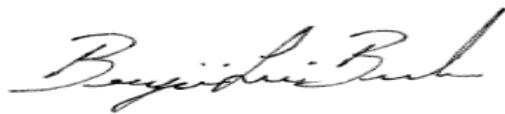
It is a well recognized tenet of statutory interpretation that where Congress has designated a statutory remedy that is tailored specifically to address a particular issue of concern, that remedy – and that remedy alone – is the embodiment of the legislature’s grant of authority for agency action in that area. Because Congress has specifically enumerated visibility provisions pertaining to Class 1 areas, they have affirmatively precluded extending those provisions to Class II areas.

Similarly, the preface to the Draft Report accurately indicates that the CAA assigns to FLMs the specific responsibility of evaluating the impacts of proposed new sources on AQRVs in Class 1 areas, and reporting those findings to the permitting authority for consideration in granting permits. Draft FLAG 2008 Report (p. i). The Draft Report, however, then inappropriately refers, in a footnote, to extending that responsibility to Class II areas. *Id.* (Footnote 1). The purpose of the FLAG Report is to offer guidance to FLMs in carrying out their responsibility to protect AQRVs in Class I areas. Reference to similar protection of resources in Class II areas is intentionally absent in the CAA, and any reference to extending the responsibilities of FLMs to cover Class II areas in the final FLAG 2008 Report is overreaching. Such references will only lead to confusion among FLMs, permitting authorities, permit applicants and states in carrying out effective federal land planning.

For these reasons, and for the reasons contained in NMA’s legal evaluation of the issue in early 2001 (attached), NMA requests that all references to evaluating proposed new source impacts on AQRVs in Class II areas be removed from the final FLAG 2008 Report.

NMA appreciates the opportunity to comment on the Draft FLAG 2008 Report and looks forward to participating in other proceedings related to implementation of the Clean Air Act’s visibility improvement provisions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Benjamin L. Brandes".

Benjamin L. Brandes

Director, Air Quality