

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> This area of law is well settled, as discussed below.

<sup>1</sup> See, e.g., H.R. Rep. No. 564, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 151-55 (1977)(Conference Report); H.R. Rep. No. 294, 95<sup>th</sup> Cong., 1<sup>st</sup> 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, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 273 (1990)(House Report).

<sup>2</sup> See 1977 House Report, *supra*, at 8.

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

<sup>4</sup> 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.<sup>1</sup> 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.<sup>2</sup>

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.

<sup>1</sup> 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.

<sup>2</sup> 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.”).