



North Carolina Department of Environment and Natural Resources
Division of Air Quality

Beverly Eaves Perdue
Governor

Sheila C. Holman
Director

Dee Freeman
Secretary

July 20, 2011

To: Donald van der Vaart
Chief, NCDAQ Permits Section

From: John C. Evans
Supervisor, NSR Branch

Re: PCS Phosphate Litigation
USFWS v. DENR, DAQ

This memorandum is intended to clarify the impact of the decision in the 2008 PCS Phosphate permit contested case litigation. A summary of the important dates is provided below:

Date	Summary of Activity
January 4, 2008	Air quality permit issued to PCS Phosphate
April 28, 2008	US Dept of Interior, Fish and Wildlife (USFWS) petitioned for review at the Office of Administrative Hearings (OAH)
March 5, 2009	OAH granted the USFWS's motion for Summary Judgment
July 9, 2009	NC Environmental Management Commission (EMC) remanded the case back to the OAH with instructions to find the case moot
July 13-14, 2010	OAH held an administrative hearing
November 12, 2010	OAH issues Decision finding the case was not moot and found in favor of USFWS
March 10, 2011	EMC votes to reject the ALJ decision and modify the ALJ decision
May 16, 2011	EMC Issues Written Decision that reflects the vote from March 10, 2011 (attached)
July 15, 2011 [SIC]	USFWS sent an undated letter to EMC Chairman Smith claiming that May 16, 2011 EMC decision was void because the EMC failed to issue the written decision within the time prescribed by law. Moreover, as a result of this failure the November 12, 2010 ALJ decision is the decision of the EMC by operation of law. (attached)

As a result of the lengthy and somewhat convoluted case history there is some confusion about how the NCDAQ should implement the PSD regulations that were at issue in this case. Based on discussions with the Attorney General's office the EMC decision (adopting by operation of law the ALJ's November 12, 2010 decision) is binding only for the specific PCS case. The EMC's adoption of the November 12, 2010 ALJ decision by operation of law is not binding on the EMC in the future. According to the AG's office, the decision is not binding on future actions because,

although the ALJ and the EMC did not technically find the case moot, the permit was not in jeopardy. Moreover, the ALJ decision became the EMC final decision due to a technicality and not a vote of the EMC. In fact, the EMC did vote to reject the November 12, 2010 ALJ decision on the substantive merits (background visual range and Class I increment).

Because the EMC decision is not binding outside the specific PCS case, the NCDAQ continues to apply the PSD regulations consistent with the regulation's plain language and interpretations expressed by the NCDAQ throughout the litigation. Specifically, when the FLM requests an analysis of impacts of a proposed project on a Class I area, the applicant is required to provide a Class I increment analysis. If the Class I increment is not exceeded neither the applicant nor the NCDAQ is required to provide any further Class I impact analysis. If the increment is exceeded and the applicant or the NCDAQ wishes to make the demonstration that there will be no adverse impact at the Class I area, the background visual range to be used in that analysis should be based on the existing/current background visual range. Finally, in the case that the Class I increment is not exceeded, the FLM can demonstrate to the NCDAQ that the proposed project would nevertheless adversely impact the Air Quality Related Values at the Class I area. However, that demonstration should rely on the existing/current background visual range. In any AQRV visibility analysis, whether it is performed by the applicant or the FLM, an adverse impact is calculated taking into account (1) the times of visitor use of the Class I area, and (2) frequency and timing of natural conditions that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration. Natural conditions that reduce visibility include rain, darkness, snow, *etc.*

cc: DENR-NCDAQ-Permits Staff
Sheila Holman
Mike Abraczinskas

Attachment

May16, 2011 EMC Decision

motion for summary judgment filed by the U. S. Department of the Interior, Fish and Wildlife Service's (hereinafter "Department of the Interior") and deny DENR's and PCS Phosphate's motions for summary judgment. All parties concurred that, during the course of proceedings before the ALJ, PCS Phosphate had performed a modeling analysis using "natural conditions" for the background visual range parameter which analysis was submitted to DENR and the Department of the Interior. After its review of this analysis, the Department of the Interior determined that the emissions expected to result from the proposed facility would not cause an adverse impact on visibility at the Swanquarter Class I area and that the permit should issue. In its July 17, 2009 written Order of Remand, the Commission held that the issues being litigated had become moot and, in deference to N.C.G.S. § 150B-36(d), remanded the contested case to the ALJ with instructions to enter a decision recommending dismissal of the case consistent with the findings of mootness made by the Commission. Instead, upon remand, Fred G. Morrison, Jr., Senior Administrative Law Judge, conducted an administrative evidentiary hearing on July 13 and 14, 2010, in Raleigh, N.C. At this hearing the Department of the Interior and the DENR agreed to a Stipulation of Facts and presented witness testimony and introduced exhibits during the hearing; however, since the Commission's July 2009 decision that the issues in the contested case had become moot, there has been no change in the FLM's determination that the projected emissions from the proposed facility would not cause any adverse impact to visibility at the Swanquarter Class I area and in the FLM's agreement that the PSD permit should issue to PCS Phosphate.

On November 12, 2010, ALJ Morrison issued his decision, which recommended entry of judgment for the U.S. Department of the Interior but did not revoke or suspend the PSD Permit issued to PCS Phosphate. The official administrative record of proceedings after remand was

transmitted to the Commission in December 2010. DENR filed exceptions to the ALJ's decision and supporting written arguments and the Department of the Interior filed written arguments in support of the ALJ's decision. No party suggested in its submissions that the permit issued to PCS should be revoked or suspended. The Chairman entered an Order on February 18, 2011, extending the time for making the final agency decision.

At the March 10, 2011, meeting of the Commission, the Department of the Interior was represented by Charles P. Gault, Esquire, of the Office of the Field Solicitor, U. S. Department of the Interior, Knoxville, Tenn. DENR was represented by Assistant Attorney General James C. Holloway. The Respondent-Intervenor, PCS Phosphate Company, Inc., elected not to participate in the oral presentations.

ISSUES

1. Whether DENR acted erroneously under North Carolina law and regulations by failing to notify the FLM of the PCS Phosphate pre-application meeting and of the filing of PCS Phosphate's permit application?
2. Whether DENR acted erroneously under North Carolina law and regulations by failing timely to furnish the FLM with 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 Swanquarter Wilderness Area?
3. Whether DENR acted erroneously under North Carolina law and regulations by issuing the PSD Permit without considering any determination by the FLM of whether the emissions from the proposed source would have an adverse effect on the Swanquarter Class I Area?

Based upon careful consideration of the whole record, the arguments and exceptions by the parties and the preponderance of the admissible evidence, the Environmental Management

Commission rejects the ALJ's decision issued on remand and modifies the ALJ's decision for the reasons set forth in this document.

STIPULATED FACTS

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 Department of Interior's agency, the Fish and Wildlife Service ("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 sulfuric acid used in the manufacturing process is produced on-site by a process that involves burning sulfur.
5. On October 31, 2005, PCS Phosphate submitted the subject permit application to DENR.
6. The subject permit will allow PCS Phosphate to construct a new sulfuric acid plant to replace two existing on-site plants.
7. 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.
8. The resulting net air pollution emissions increases from the modified plant are 49.5 tons per year ("tpy") nitrogen oxides, and 44.3 tpy of sulfuric acid mist.
9. The DENR 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 DENR 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 DENR addressed AQRV (visibility) modeling for Class I areas and used a background of current conditions.
14. The FWS first became aware that current conditions had been used as the background for AQRV (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.
15. The FWS submitted comments on December 5, 2007, two days before the comment period deadline.
16. One of the FWS comments was that "the incorrect background visual range" was used in the AQRV (visibility) modeling.
17. The DENR 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 DENR does not require PSD permit applicants to use natural conditions as the AQRV (visibility) modeling background.
19. The FLM has an affirmative responsibility to protect AQRVs (including visibility) in Class I areas under the Clean Air Act.
20. When the FLM makes an impact determination it uses natural conditions as background for comparison.

FINDINGS OF FACT

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

2. Typically, air quality modeling is discussed at the pre-application meeting.
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.
4. Since the inception of the PSD permit program, The DENR interprets DENR's interpretation of the term "may affect" found in its regulation at 15 NCAC 2D.0530(t) to be has been that it is synonymous with the phrase "has the potential to exceed a Class I increment."

Reason ALJ Finding Modified: The testimony of witnesses Holman, Overcash and van der Vaart and exhibits establish that, since the inception of the PSD permit program, the State has interpreted both the federal regulations and the State regulation to allow the Class I increment to indicate when notice to the FLM is required and where the burden of going forward with proof of an adverse impact to visibility lies in the PSD permit program. T pp 178, 200, 290-93, 303-045, 319, 326-27; Resp. Ex. 46, 51.

5. During the pre-application meeting, it is ~~not~~ possible for the DENR to make a determination of whether a Class I increment will be exceeded if the applicant is able to provide the information.

Reason ALJ Finding Not Adopted: Testimony of witness Patterson is not disputed that it is possible that the applicant will inform the Division of Air Quality at the pre-application meeting that the projected emission will exceed the Class I increment. T p 107.

6. When the PCS Phosphate permit was issued, the DENR did not notify the FWS "[b]ecause it wasn't required in the PSD regulations".
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 DENR made it known to PCS Phosphate's consultants that the DENR's policy was to use "current conditions" instead.
8. The DENR's ~~position~~ interpretation of its PSD rule 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 FLM a draft permit and preliminary determination, unless the applicant has the potential to exceed a Class I increment will be exceeded.

Reason ALJ Finding Modified: The finding is modified to conform with Finding of Fact 4 and also to conform with the undisputed evidence in the testimony of witnesses Holman, Overcash and van der Vaart as previously set forth in the reason underlying Finding of Fact 4.

9. The DENR has never had a PSD permit issued with a Class I increment being exceeded, and in only "a handful of times" has a permit application initially shown the potential for a Class I increment being exceeded.

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

11. ~~In order to avoid being put into a "difficult position",~~ The DENR has a longstanding practice 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 I area, rather than "natural conditions" as requested by the FLMs.

Reason ALJ Finding Modified: The State's PSD permit program for individual new or modified sources, 15A NCAC 2D .0530, addresses significant air quality deterioration at Class I areas through the maximum allowable Class I increment which is measured using monitoring data for the existing level of air pollution, the current conditions, as the baseline in the case-by-case AQRV analysis modeling. Under the PSD program, a limited increase in pollution that will not cause or contribute to a violation of the applicable increment at Class I areas is allowable for a new source or major modification. 40 CFR 51.166(a)(2). The State's PSD permit rule, 15A NCAC 2D .0530, incorporates the federal definition of "natural conditions" which "includes naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration." 40 CFR 51.301. For the PSD permit program, adverse impact on visibility means visibility impairment in a Class I area that is determined on a case-by-case basis and takes into account the "frequency and timing of natural conditions that reduce visibility." Id. Under PSD, natural conditions refers to natural phenomena such

as rain, fog and darkness which are not considered when determining the predicted impact upon visibility by a source of pollution.

The EPA describes the PSD and regional haze programs as complementary with regard to the States making reasonable progress toward the national visibility goal. The PSD program controls any additional deterioration of air quality from sources or modifications by establishing maximum allowable increases of certain pollutants in specified areas that sometimes may allow for limited air quality deterioration. See 42 U.S.C. § 7473(b). Applying the plain meaning of increase or increment, the growth is measured from the existing or current level of pollution. The Regional Haze program, on the other hand, requires overall reasonable progress toward the year 2064 national goal of “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 U.S.C. § 7491(a)(1), that is, visibility that would exist in the absence of manmade pollution. Thus, the regional haze program is concerned with progress toward long-term emission decreases from the entire regional emission inventory. Because only a small increment of air quality deterioration is permissible in Class I areas, allowing localized emission increases in the short-term from sources or modifications subject to PSD is not inconsistent with the regional haze program. *Am. Corn Growers Ass’n v. EPA*, 291 F3d 1 (DC Cir 2002). While the PSD program generally allows for a small increment of air quality deterioration in Class I areas, “section 165 of the CAA also provides for the additional protection of air quality-related values, ‘including visibility,’ in Class I Federal areas beyond that provided by the increments. That is, where the FLM [Federal Land Manager] demonstrates that emissions from a new or modified source will have an adverse impact on air quality-related values (AQRVs), notwithstanding the fact that the emissions from the source do not cause or contribute to concentrations in excess of the increment for a Class I area, ‘a permit shall not be issued.’ Section 165(d). Thus, under PSD there can be no increase in emissions from the construction or modification of a major stationary source where that increase would result in adverse impacts on AQRVs in a Class I Federal area.” *Id.* Thus the baseline for measuring the level of air pollution is different for the two programs. T pp 100-02, 156, 165, 178, 200-02, 210, 217-21, 224-26, 240-49, 290-93, 303-04, 319, 326-27.

~~12. The DENR, citing to 40 CFR 51.166(p)(3) for its authority, takes the position that the DENR decides what the adverse impact determination should look like, rather than the Federal Land Manager.~~

12. Where the source’s AQRV modeling analysis predicts that the Class I increment will not be exceeded, federal regulation 40 CFR 51.166(p)(3) and State regulation 15A NCAC 2D .0530(t) shift the burden of showing an adverse impact to visibility to the FLM with the State

holding the ultimate authority to make a determination based upon any analysis concerning visibility impairment that the FLM submits.

Reason ALJ Finding Not Adopted: The Finding of Fact is not based on the record testimony of any witness. Rather, its source is a question posed by Petitioner's counsel at the hearing which the DENR witness unequivocally rejected. The DENR witness confirmed what the plain language of the law makes clear: When an applicant is required to perform the Class I increment analysis, the DENR defines how that analysis is to be performed. When the analysis predicts that the increment will not be exceeded, the FLM is required to demonstrate the impact to visibility. The FLM "can submit anything they want" to the Division of Air Quality. T pp 290, 335, 340-444.

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

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."

15. FLAG is a guidance document and an agreement ~~between~~ among 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 that they administer. As a guidance document, FLAG is an agreement among the signatory agencies but is not a rule and is not binding upon the PSD permit applicants or the permitting authority (State).

Reason ALJ Finding Modified: The finding of fact is clarified to reflect the undisputed evidence from Petitioner's staff that FLAG has not been codified as a rule; is only guidance to permit applicants and permitting authorities; and is binding only among its signatories, not the permitting authority or permit applicants. T pp 35-36, 73, 84, 87-88, 361-65, 371; Resp. Ex. 1 & 2.

16. In the context of the PSD permitting process, FLAG is the guidance that the FLMs provide explaining how the FLMs would prefer that the PSD permit applicants should perform the AQRV analysis required by the Clean Air Act in order to provide the FLMs with the

information they believe 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 I area.

Reason ALJ Finding Clarified and Modified: The ALJ's 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 Clean Air Act (42 USC § 7475(d)), 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 such facility [the proposed project] will have an adverse impact on the air quality-related values (including visibility) of such lands, . . ." Thus, 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 a predicted Class I increment exceedance and the applicant desires to rebut the presumption provided by the Class I increment test that the project will adversely impact a Class I area. These procedures also are provided for in 15A NCAC 2D .0530(t) and 40 CFR 51.166(n) and (p). The Department of the Interior seeks to shift the burden of performing the AQRV analysis in the first instance to the permit applicant, because the Department lacks the resources to do the analysis which it believes that it needs in order to do its job. T pp 84-85, 378, 412, 418-19; Resp. Ex 1, pp. 3-4.

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.

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

Reason ALJ Finding Clarified and Modified: The FLAG guidance document speaks for itself and indicates the intention of the signatories. Resp. Ex. 1 and 2. Because the background visual range identified in FLAG is only guidance for permit applicants and the permitting authority and not a federal or State regulation, the ALJ finding is erroneous as a matter of law. The finding as originally written characterizes the background visual range in FLAG as a rule; therefore, the ALJ's finding, if adopted by

the Commission, would be ad hoc rulemaking of the type that is disapproved by *Comm. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980).

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

19. The estimated background visual range under "natural conditions" for the Swanquarter Wildlife area identified in FLAG is 182 kilometers.

Reason ALJ Finding Clarified and Modified: According to the federal definition incorporated into 15A NCAC 2D .0530, "natural conditions includes naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration." FLAG uses estimates of natural conditions as reference background levels for Class I visibility analyses. While 182 kilometers is the natural condition visual range currently included in FLAG, the record evidence shows this is an estimated value "that is the best recommendation that we have that's consistent throughout the country," and that the value could change in the future as the science improves. Thus, according to the FLMs, the "recommended" background visual ranges could change at any time based on the most recent science. However, the fact that this value can change at any time, coupled with the Petitioner's position that, as a matter of law, FLAG is a guidance document, requires two conclusions: 1) the value is guidance only and North Carolina is not bound, and 2) the EPA and the DENR must follow established rulemaking procedures to make it binding. The measure of background visual range found in FLAG comes within the APA definition of a rule, N.C.G.S. § 150B-2(8a), an agency standard or statement of general applicability that describes a practice requirement of the agency. To require permit applicants to apply the background visual range in FLAG before it is adopted through APA rulemaking would amount to ad hoc rulemaking of a type disapproved by *Comm. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980). Before a revised standard or practice requirement can be enforceable in North Carolina, the EPA must follow well established rulemaking procedures and the Environmental Management Commission must follow and conduct rulemaking pursuant to the APA's statutory rulemaking procedure. T pp 58-59, 371, 400; Resp. Ex. 2, pp. 25, 29.

20. The distances in kilometers used by the FLMs as "natural conditions" for the background visual range for visibility models ~~is~~ are, according to the FLMs, the best science currently available and ~~was~~ were recommendations developed in the NAPAP report, which is a report provided to Congress by a number of research scientists. Using mass concentrations of very common air pollutants that are present in the atmosphere, the scientists estimated visibility for

classified areas in the United States in terms of range or distance in the absence of manmade pollution and natural conditions that limit visibility.

Reason ALJ Finding Clarified and Modified: The clarification and modification are supported by a preponderance of the uncontradicted evidence presented in the testimony of Tim Allen, Air Quality Branch, US Fish and Wildlife Service. T pp 58-59.

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

22. The pollutants that ~~effect~~ affect visibility are usually different ~~from~~ forms of those compounds covered by the Class I increment and, from the original IMPROVE equation, include sulfates in the form of SO₄ and NO₃. The emissions of SO₂ and NO₂ go through a chemical transformation in the atmosphere to SO₄ and NO₃ and can transform back. The VISCREEN model for the Class I increment and AQRV models for near-field and far-field simulate those atmospheric conversions.

Reason ALJ Finding Clarified and Modified: The preponderance of the evidence shows that the Class I increment pollutants are scientifically linked to protection of Class I areas and that they are complementary to the AQRV pollutants that affect visibility. According to the uncontradicted testimony of Tim Allen, "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." The model used for determining the Class I increment and those for the AQRV visibility impact all account for the atmospheric chemical transformation of the emissions from the facility as they travel toward the Class I area. T pp 421-27.

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

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

increase, both the Class I increment analysis and the AQRV analysis protect the beneficial properties (AQRVs) at a Class I area. The modeling used for the Class I increment and that for the AQRV visibility impacts account for the atmospheric conversion of the emissions during transport from the facility to the Class I area. The pollutants emitted from the facility and those present in the Class I area being complementary, the Class I increment modeling does predict the impacts, including visibility, of the project's emissions that could occur at the Class I area.

Reason ALJ Finding Clarified and Modified: The preponderance of the evidence shows that the Class I increment pollutants are scientifically linked to protection of Class I areas and that they are complementary to the AQRV pollutants that affect visibility. According to the uncontradicted testimony of Tim Allen, "from a scientific point, I think that protecting the Class I increment as it was described with those chemicals is very complimentary [sic] 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." The modes used for determining the Class I increment and those for the AQRV visibility impact both account for the atmospheric chemical transformation of the emissions from the facility as they travel toward the Class I area. T pp 421-27.

25. Subsequent to the PSD permit being issued and the filing of this appeal by the FWS, PCS Phosphate procured visibility modeling using visibility under natural conditions as a baseline which was submitted to the FWS.

26. After reviewing that visibility analysis, the FWS was satisfied that there in fact would be no adverse impact to visibility in the Swanquarter Class I area from the emissions expected to be produced as a result of the subject permit.

Reason for Additional Findings of Fact 25 & 26: The Commission takes judicial notice of petitioner's admissions in the record before it on the motions for summary judgment found at Record I, pp. A- 51, 290-91, and 531, which are part of the whole record in this contested case. These findings of fact are necessary to support the ALJ's conclusion of law 17, which is adopted in this decision. N.C.G.S. § 8C-1, Rule 201(b) (1992); *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998); *In Re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).

Based upon the foregoing Stipulated Facts and Findings of Fact, the Environmental Management Commission makes the following:

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 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.~~

1. The Environmental Management Commission has jurisdiction over the parties and the subject matter of this contested case. N.C.G.S. §§ 150B-36; 143-215.108.

Reason ALJ Conclusion of Law not Adopted: Only the Commission has jurisdiction to make the final decision in a contested case based upon the record transferred to the agency. The Administrative Procedure Act, Chapter 150B, requires the agency's final decision to have specific findings of fact and conclusions of law which can be reviewed on judicial review.

2. The Petitioner bears the burden of proof on the issues. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 635 S.E.2d 442 (2006). To meet this burden, the Petitioner must show by a preponderance of the evidence that the agency substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure,

acted arbitrarily or capriciously, or failed to act as required by law or rule in processing the application and issuing the PSD Permit to PCS Phosphate.

Reason Additional Conclusion of Law Adopted: In appeals under § 150B-23(a), the statute requires a petitioner, other than an agency, to allege facts establishing that the agency acted improperly in order to state a proper basis for obtaining relief from the agency decision. Because the petitioner is seeking to show a basis for reversing the agency decision, the burden of proof is properly allocated to the petitioner -- even if that burden requires proving a negative. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 635 S.E.2d 442 (2006); N.C.G.S. § 150B-23(a).

3. 2. The U.S. Environmental Protection Agency (EPA) has the authority under the Clean Air Act to publish governing regulations and to approve and, to the extent provided by law, oversee State regulatory PSD programs.

Reason Conclusion of Law Clarified: The federal Clean Air Act authorizes the EPA to provide oversight of the State air pollution program and specifically the State's PSD program. Under §113(a)(5) of the Clean Air Act, when the EPA finds that a State is not complying with a CAA requirement governing construction of a pollutant source, it can issue an order prohibiting construction, prescribe an administrative penalty, or commence a civil action for injunctive relief. 42 U.S.C. § 7413(a). Under §167 of the Clean Air Act regarding the PSD program, EPA can "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. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004). The FLMs' well-defined and prescribed role in the PSD permitting process involves consulting with the EPA and, where there is no exceedance of the Class I increment, 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). North Carolina's approved PSD rule, 15A NCAC 2D .0530(t), includes an identical role for the FLM in the PSD permitting process. The increment was not exceeded in this case and therefore it was the FLM's option to provide the Division of Air Quality an analysis of the impact on the Swanquarter Class I area. 15A NCAC 2D .0530(t).

4. 3. The North Carolina PSD permitting program is implemented by regulations at regulation 15A NCAC 2D .0530 and is modeled after and incorporates by reference particular EPA regulations, including the definitions in regulations at ~~40 CFR 51.300 et seq.~~ 40 CFR 51.301 and 40 CFR 51.166.

Reason ALJ Conclusion of Law Modified: The ALJ's conclusion is erroneous as a matter of law because North Carolina does not incorporate by reference 40 CFR 51.300 *et seq.* 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 at 40 CFR 51.301.

5. 4. The "purpose" of North Carolina's rule, 1 5A 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."

6. 5. North Carolina's regulation at 15A NCAC 2D .0530(t) requires the DENR 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 the visibility of a Class I area." This section of the rule was amended effective January 2, 2011, to require, regardless of impact by a source or modification subject to this rule, that the Federal Land Manager with the U.S. Department of Interior and U.S. Department of Agriculture receive notification of an application from a source or modification subject to this rule.

Reason ALJ Conclusion of Law Clarified: Acting in its quasi-judicial authority, the Commission may take judicial notice of changes in the law or regulations and matters of common knowledge relevant to the issue in a contested case. N.C.G.S. § 8C-1, Rule 201(b) (1992); *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998); *In Re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).

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 USD1 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).~~

Reason ALJ Conclusion of Law Not Adopted: Rule 15A NCAC 2D .0530(t) was amended effective January 2, 2011, to require, regardless of impact by a source or modification subject to this rule, that the Federal Land Manager with the U.S. Department of Interior and U.S. Department of Agriculture receive notification of an application from a source or modification subject to this rule. Acting in its quasi-judicial authority, the Commission may take judicial notice of changes in the law or regulations and matters of common knowledge relevant to the issue in a contested case. N.C.G.S. § 8C-1, Rule 201(b) (1992); *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998); *In Re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).

~~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 and contingent upon the analysis performed to determine whether the proposed source will consume a Class I increment.~~

Reason ALJ Conclusion of Law Not Adopted: Rule 15A NCAC 2D .0530(t) was amended effective January 2, 2011, to require, regardless of impact by a source or modification subject to this rule, that the Federal Land Manager with the U.S. Department of Interior and U.S. Department of Agriculture receive notification of an application from a source or modification subject to this rule. Acting in its quasi-judicial authority, the Commission may take judicial notice of changes in the law or regulations and matters of common knowledge relevant to the issue in a contested case. N.C.G.S. § 8C-1, Rule 201(b) (1992); *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998); *In Re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997).

~~7.8. The DENR 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.~~

8. 9. The DENR 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.

9. 10. North Carolina's PSD regulations at 15A NCAC 2D .0530(g), incorporating by reference 40 CFR 51.166(n), require that "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."

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

Reason ALJ Conclusion of Law Clarified: Section (1) of the rule requires the Director's notification to the FLM to include "an analysis provided by the source to the potential impact of the proposed source on visibility." The applicant provides the analysis to the DENR as part of the information relevant to the permit application.

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

Reason ALJ Conclusion of Law Clarified and Modified: The ALJ's conclusion of law is not supported by the Findings of Fact and is contrary to law and rule. North Carolina has not adopted a rule that requires a single source/small group of sources to use natural conditions as background when performing PSD program modeling for adverse impacts to visibility from projected emissions. Additionally, the EPA, the agency responsible for implementing and interpreting the CAA, has stated on various occasions in formal settings that actual current visibility must be used in PSD permitting decisions. (See Resp. Ex. 32 (50 FR 28544 "not debatable") and Resp. Ex. 35 (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 DENR 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).~~

12. Because North Carolina has not adopted, as part of its PSD rule, a requirement that a particular background visual range is to be used for the visibility analysis required by 15A NCAC 2D.0530(t), the DENR's interpretation of 15A NCAC 2D .0530(t) to allow that the existing level of air pollution at the Class I area, the "current conditions," be used as the baseline in modeling for visibility impacts in PSD permitting decisions, is consistent with the language of the rule and the requirements for PSD programs set forth in 40 CFR 51.166. In using the existing level of air pollution in the analyses for impacts to visibility in this case, the DENR did not exceed its authority or jurisdiction, did not act erroneously or fail to use proper procedure, and did not act arbitrarily or capriciously.

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is not a conclusion of law but is a repetition of Undisputed Facts 17, 18 and 19, and Findings of Fact 7, 11, and 18. Moreover, the interpretation of a regulation administered by an agency is enforceable unless it is clearly erroneous or inconsistent with the regulation's plain language. *Hensley v. N.C. Dep't of Env't & Natural Res.*, 364 N.C. 285, 698 S.E.2d 41 (2010); *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994); *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14, 17-18 (2005). PSD regulation 15A NCAC 2D .0530 provides that the PSD plan is designed to "implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166." 40 CFR 51.166(a)(2) requires approved PSD programs to evaluate "increased air quality deterioration over any baseline concentration." 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)

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 I Federal areas which impairment results from manmade air pollution". 40~~

~~CFR 51.300(a).~~

13. The estimate of background visual range of "natural conditions" is used in the long term Regional Haze program to determine the total amount of improvement in visibility at Class I areas that is necessary in order to achieve the year 2064 national visibility 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." 40 CFR 51.300(a); 40 CFR

51.308.

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is erroneous as a matter of law and attempts to apply a measure used in the Regional Haze program, 40 CFR 51.308, to the separate and distinct PSD permit program, 40 CFR 51.166. 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 the State makes reasonable progress towards the year 2064 national goal of natural conditions at Class I areas. It is erroneous to imply that the goal of the Regional Haze program, a goal with a 2064 deadline, is determinative of what background visibility should be used in PSD permitting decisions. The PSD program is predicated on allowing reasonable emission increases above the baseline that do not adversely impact air quality values, including visibility. In contrast, the ALJ 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 permit program approved by the EPA. The estimate of natural background at a Class I area is used in the Regional Haze program which is a long term effort designed to improve regional visibility in Class I areas. Regional haze rule 40 CFR 51.308(f) requires States, at the time a SIP for regional haze is revised, to calculate the visibility difference between current conditions (i.e. conditions for the most recent 5 year period) and natural conditions to determine the amount of improvement that States will need to address in their long term strategies toward meeting the "national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I areas which impairment results from manmade air pollution." 40 CFR 51.300(a). Consistent with the differences between the two programs, the EPA has been explicit in noting that actual current background visibility must be used for PSD permitting decisions. (See Resp. Ex. 32 (50 FR 28544 "not debatable")) and Resp. Ex. 35 (51 FR 2695 in approval of NC State Implementation Plan)).

~~14. 15. Using a Use of the background visual range of "natural conditions" is not required by either both Federal or and State PSD program regulations when the FLMS are fulfilling their duty to determine whether the emissions from a proposed source or modification would have an adverse impact on visibility at a Class I area. 40 CFR 51.166(p)(2) and 15A NCAC 2D .0530. 51.307(a)(3). See also 40 CFR 51.301.~~

Reason ALJ Conclusion of Law Clarified and Modified: The ALJ's conclusion of law is erroneous a matter of law. North Carolina has not adopted a rule that requires "natural conditions" at a Class I area to be used as a background measurement in the case-by-case AQRV (visibility) modeling considered under the PSD program rules. 15A NCAC 2D .0530. As discussed above in Conclusion of Law 4, 40 CFR 51.307 has not been incorporated into the North Carolina PSD rule. 40 CFR 51.166 does not address the issue of visual range. Though North Carolina did adopt the federal definition of the term "natural conditions" in 40 CFR 51.301 (naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration), such natural phenomena are not considered in the case-by-case AQRV (visibility) analysis of the source's emissions.

~~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 DENR 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 DENR policy has not been promulgated as a rule, it is invalid.~~

15. By interpreting 15A NCAC 2D .0530 and the Clean Air Act and implementing regulations to permit the use of "current conditions" for background visual range in AQRV (visibility) modeling for assessing visibility impacts to Class I areas from projected emissions from sources or modifications subject to the PSD program rules, the DENR did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is contrary to law and rule, and is not supported by the Findings of Fact or the evidence. No federal or State rule has adopted "natural conditions" as a background visual range for visibility impact analyses and determinations under the PSD permit program. Absent such a rule, the interpretation of the statute or regulation by the State agency charged with implementation is enforceable and given great weight unless it is plainly erroneous or inconsistent with the regulations plain language. *Hensley v. N.C. Dep't of Env't & Natural Res.*, 364 N.C. 285, 698 S.E.2d 41 (2010); *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994); *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14, 17-18 (2005). If adopted, the ALJ's conclusion of law would impose a standard or rule (FLAG) upon the State that has not been adopted under the rulemaking procedures of the either the federal or State Administrative Procedure Acts, and would amount to ad hoc rulemaking of a type disapproved by *Comm. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980).

As with our rejection of ALJ's Finding of Fact 11, we adopt the same reasoning in rejecting the ALJ's Conclusion of Law 16. The EPA describes the PSD and regional haze programs as complementary with regard to the State making reasonable progress toward the national visibility goal. The PSD program controls any additional deterioration of air quality from sources or modifications by establishing maximum allowable increases of certain pollutants in specified areas that sometimes may allow for limited air quality deterioration. See 42 U.S.C. § 7473(b). Applying the plain meaning of increase or increment, the growth is measured from the existing or current level of pollution. The Regional Haze program, on the other hand, requires overall reasonable progress toward the year 2064 national goal of "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 U.S.C. § 7491(a)(1), that is, visibility that would exist in the absence of manmade pollution. Thus, the regional haze program is concerned with progress toward long-term emission decreases from the entire regional emission inventory. Because only a small increment of air quality deterioration is permissible in Class I areas, allowing localized emission increases in the short-term from sources or modifications subject to PSD is not inconsistent with the long term regional haze program. *Am. Corn Growers Ass'n v. EPA*, 291 F3d 1 (DC Cir 2002). While the PSD program generally allows for a small increment of air quality deterioration in Class I areas, "section 165 of the CAA also provides for the additional protection of air quality-related values, 'including visibility,' in Class I Federal areas beyond that provided by the increments. That is, where the FLM [Federal Land Manager] demonstrates that emissions from a new or modified source will have an adverse impact on air quality-related values (AQRVs), notwithstanding the fact that the emissions from the source do not cause or contribute to concentrations in excess of the increment for a Class I area, 'a permit shall not be issued.' Section 165(d). Thus, under PSD there can be no increase in emissions from the construction or modification of a major stationary source where that increase would result in adverse impacts on AQRVs in a Class I Federal area." *Id.* Thus the baseline for measuring the level of air pollution is different for the two programs.

~~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 DENR has failed to fulfill its obligation under 15A NCAC 2D.0530(t).~~

16. By providing to the FLM the PSD permit application and visibility analysis supplied by PCS Phosphate of the potential impact of projected emissions on visibility to a Class I area using current conditions, the DENR acted as required by 15A NCAC 2D .0530 and did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is contrary to law and rule, and is not supported by the Findings of Fact. Stipulated Facts 14 and 15 confirm that the FLM received the permit application and associated materials and in fact submitted comments to the permitting agency. Because the source's analysis of projected emissions predicted that the Class I increment would not be exceeded and visibility would not be impacted, the PSD rule, 15A NCAC 2D .0530, and 42 USC § 7475(d) shift the burden to the FLM to present to the Director any analysis it performs concerning visibility impairment at the Class I area. Thus, 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. Although it received the information relevant to the projected emissions for the modification at the PCS Phosphate facility, the FLM did not perform any visibility impact analysis using the natural conditions set forth in FLAG because, according to witness Silva, it does not have the staff or resources to perform such an analysis. T pp 412, 418-19.

~~18. The DENR 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.~~

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is contrary to law and rule, and is not supported by the Findings of Fact. Stipulated Facts 14 and 15 confirm that the FLM received the permit application and associated materials and in fact

submitted comments to the permitting agency. Because the source's analysis of projected emissions predicted that the Class I increment would not be exceeded and visibility would not be impacted, the PSD rule, 15A NCAC 2D .0530 ,and 42 USC § 7475(d) shift the burden to the FLM to present to the Director any analysis it performs concerning visibility impairment at the Class I area. Thus, 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 FLM did not do so, apparently because it does not have the staff or resources to perform such an analysis. T pp 412, 418-19.

~~17. Because of its actions, the DENR 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.~~

Reason ALJ Conclusion of Law Not Adopted: The ALJ's conclusion of law is contrary to law and rule and is not supported by the Findings of Fact. The record is clear that the FLM did not submit any visibility analysis to the Director and as such 15A NCAC 2D .0530(t) is not operative. The DENR did review a Class I impact analysis provided by PCS Phosphate and included the results of that analysis in the record.

~~17. 20. Subsequent to the subject permit being issued and to the FWS (FLM) being furnished by PCS Phosphate with visibility modeling using natural conditions as the background by PCS Phosphate, the FWS (FLM) exercised its authority under federal law consistent with 15A NCAC 2D.0530(t) and determined that the emissions from the proposed source would not in fact have an adverse impact on visibility at Swanquarter, which determination was consistent with the conclusion of the original visibility analysis validated and supported the issuance of the permit.~~

Reason ALJ Conclusion of Law Clarified and Modified: As written the ALJ's conclusion of law is in conflict with the law and rules and is not supported by the Findings of Fact and evidence. Because the proposed project was predicted to protect the Class I increment, no further analysis was required of the company. 42 U.S.C. § 7475; 40 CFR 51.166(n) and (p). Under federal law and consistent with 15A NCAC 2D .0530(t), the FLM is authorized to perform and submit case-by-case AQRV (visibility) modeling to the Director for consideration to rebut the presumption that the project would not adversely impact any Class I areas afforded by the Class I increment analysis. The decision to issue the PSD permit, regardless of the visibility impact analysis performed

by the FLM, rests with the Director and the FLM's determination does not validate the permit decision. 15A NCAC 2D .0530(t).

18. The FLM has not carried its burden of proof to establish by a preponderance of the evidence that the DENR exceeded its authority or jurisdiction, acted erroneously, arbitrarily or capriciously or failed to act as required by law or rule in issuing the PSD permit to PCS Phosphate where the preponderance of the evidence and Findings of Fact establish that the FLM concurred with the DENR's analysis and conclusion that the projected emissions would not adversely impact visibility at the Swanquarter Class I area.

Reason Conclusion of Law Added: The additional conclusion of law is supported by the Findings of Fact and applies the standards for contested cases set forth in N.C.G.S. § 150B-23(a).

Based on the foregoing Stipulated Facts, Findings of Fact and Conclusions of Law, the Environmental Management Commission makes the following:

FINAL AGENCY DECISION

Having considered the whole record, arguments, and submissions of the parties, the Environmental Management Commission, upon duly made motion and majority vote, does not adopt the decision by the Administrative Law Judge. The Environmental Management Commission adopts this final agency decision which determines that:

- (1) DENR did not act in accordance with 15A NCAC 2D .0530 when it failed to notify the FLM regarding the pre-application meeting with and submission of the PSD permit application by PCS Phosphate, but this will not occur in the future due to a recently adopted change in the rule requiring such notification by DENR to the FLM;
- (2) DENR's use of "current conditions" as the visual background range in the analysis of potential impacts to air quality related values ("AQRV") in Class I areas as part of its process for issuing PSD permits is accorded great deference and is not arbitrary or capricious; and

- (3) The PSD permit issued to PCS Phosphate should be upheld because it was demonstrated and stipulated by the Petitioner that the emissions from the proposed source will not have an adverse impact on visibility in the Swanquarter Class I Area.

IT IS THEREFORE ORDERED AND ADJUDGED that PSD Air Permit No. 04176T37 issued to PCS Phosphate Company, Inc. on January 4, 2008 is UPHELD.

This the 16th day of May, 2011.

ENVIRONMENTAL MANAGEMENT COMMISSION


Stephen T. Smith, Chairman

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Final Agency Decision upon counsel of record for the parties, each having agreed to accept service for his respective client, by depositing a copy in the United States Mail, Certified Mail or First-Class Mail, addressed to counsel for the Petitioner and Respondent-Intervenor, and by Hand Delivery to the Department's counsel as follows:

Charles P. Gault, Esq.
530 S Gay Street, Room 308
Knoxville, TN 37902

CERTIFIED MAIL
RETURN RECEIPT

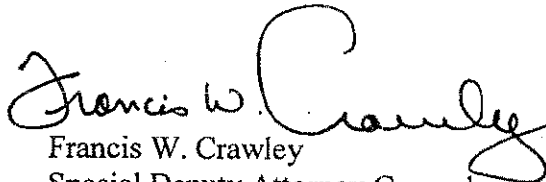
James C. Holloway, Esq.
Assistant Attorney General
P. O. Box 629
Raleigh, N. C. 27602-0629

HAND DELIVERY

George W. House, Esq.
P. O. Box 26000
Greensboro, N. C. 27420-6000

CERTIFIED MAIL
RETURN RECEIPT

This the 17th day of May, 2011.



Francis W. Crawley
Special Deputy Attorney General
Post Office Box 629
Raleigh, N. C. 27602-0629
Commission Counsel
(919)-716-6600

Attachment

Undated USFWS Letter to EMC Chairman



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



Stephen T. Smith, Chairman
Environmental Management Commission
North Carolina Department of
Environment and Natural Resources
1641 Mail Service Center
Raleigh, North Carolina 27699-1641

Dear Chairman Smith:

The U.S. Fish and Wildlife Service considered an appeal of the recent decision by the Environmental Management Commission (EMC), issued May 16, 2011, in the matter of U.S. Department of the Interior, Fish and Wildlife Service v. DENR, DAQ and PCS Phosphate Company, Inc., 08 EHR 1067. During our research of North Carolina law, however, we have concluded that an appeal is not necessary. We have been advised by our attorneys that the Administrative Law Judge's decision is the Final Agency Decision.

North Carolina's Administrative Procedures Act proscribes time limits for final agency decisions. At N.C.G.S. §150B-44, the following time limits are set out:

An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision.

The EMC is a Commission subject to this statute. The record was received by the EMC on November 29, 2010¹. Sixty days from that date expired on January 28, 2011, and the additional 60-day period expired on March 31, 2011. Sixty days after the EMC's next regularly scheduled

¹ The EMC Final Agency Decision, at pages 2-3, states: "The official administrative record of proceedings after remand was transmitted to the Commission in December 2010." This statement is inaccurate. The EMC's records verify that the administrative record was filed with the Commission on November 29, 2010. See Order Extending Time To Make Final Decision, dated February 18, 2011, and letter from Francis Crawley to counsel, dated December 28, 2011.

meeting that was held after the record was filed, the January 13, 2011, meeting, expired on March 14, 2011, with the additional 60-day period expiring on May 13, 2011. There is a question concerning whether the February 18, 2011, Order validly extended the time an additional 60-days, but even if it did, the EMC's May 16, 2011, decision was issued beyond the statutory time period.²

After midnight May 13, 2011, the EMC had no authority to issue a decision in this case. When a decision is not issued within the statutory time period, the statute states that "the agency is considered to have adopted the administrative law judge's decision as the agency's final decision."

The following cases support the Department of the Interior's position: *Occaneechi Band of the Saponi Nation, Petitioner, v. North Carolina Commission of Indian Affairs, Respondent*, 551 S.E.2d 535 (2001 N.C. App.); *Gwendolyn L. Gordon, Petitioner, v. North Carolina Department of Correction, Respondent*, 618 S.E.2d 280 (2005 N.C. App.); and *Walton v. N. C. State Treasurer*, 625 S. E. 2nd 883 (2006 N.C. App.)

In *Occaneechi Band of the Saponi Nation, Petitioner, v. North Carolina Commission of Indian Affairs, Respondent*, 551 S.E.2d 535 (2001 N.C. App.), a final agency decision was issued beyond the time limit prescribed by N.C.G.S. §150B-44. The trial court affirmed the decision of the Commission, stating that the statutory time limit in N.C.G.S. §150B-44 was intended to be presumptive and not absolute. The trial court held, therefore, that if an agency can demonstrate reasonableness in issuing a final decision beyond the statutory limit, the agency is not considered to have adopted the recommended decision of the ALJ.

The Court of Appeals reversed the decision of the trial court and held:

Petitioner maintains that the pertinent portion of *G.S. § 150B-44* is self-executing. Accordingly, when Respondent failed to issue a final decision on or before 11 June 1999, the Recommended Decision of the ALJ became the Final Agency Decision. We agree.

Occaneechi Band of the Saponi Nation at p. 537. (Emphasis added.) The Court of Appeals additionally held that:

To interpret the statutory time limit as presumptive rather than absolute would undermine the stated purpose of the Act. Accordingly, we find that the trial court incorrectly interpreted *G.S. § 150B-44* in concluding that the statutory time limits were merely presumptive.

Occaneechi Band of the Saponi Nation at p. 538 - 539.

² There is a question of whether the reason stated in the Order is an appropriate basis for extending the time. The "good cause" stated in the Order was that the Commission considers cases in the order in which the official records are received, and this case could not be scheduled until the March 10 meeting. Whether that qualifies as "good cause" is debatable.

The Court in *Gwendolyn L. Gordon, Petitioner, v. North Carolina Department of Correction, Respondent*, 618 S.E.2d 280 (2005 N.C. App.) also held that the time limits in N.C.G.S. §150B-44 are absolute and that an agency loses its ability to issue a decision after the time has expired.

In *Walton v. N. C. State Treasurer*, 625 S. E. 2nd 883 (Jan. 23, 2006) the application of N.C.G.S. §150B-44 was also at issue. In that case, a North Carolina Retirement Board had issued an untimely decision on August 13, 2004, but attempted to remedy the problem by having the decision state that it was "*nunc pro tunc* to 4 June 2004." The trial court held that the Board had failed to render the final decision within the time limit set by N.C.G.S. §150B-44 and that the ALJ's decision became the final agency decision. The State appealed.

The Appellate Court framed the issues as follows:

There was no extension of the sixty-day time period. Since the Board's written decision clearly fell outside of the sixty-day time period, the questions presented are: (1) whether the oral announcement on 22 April 2004 constituted a "final decision;" and, if not, (2) whether an administrative agency can make a decision "*nunc pro tunc*."

Walton v. N. C. State Treasurer, p. 885.

The Court of Appeals affirmed the trial court's decision. Concerning the first issue, the Court held:

Following the closed session of the Board's 22 April 2004 meeting, the Board merely informed the parties of its vote. It did not recite any findings of fact or conclusions of law. This oral announcement did not constitute a final decision as required by *N.C. Gen. Stat. § 150B-36 and 150B-44*.

Id.

Addressing the second issue, the Court stated:

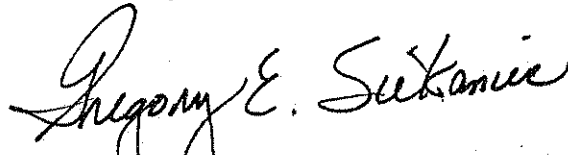
We hold that an administrative agency cannot enter a decision under Chapter 150B "*nunc pro tunc*." *N.C. Gen. Stat. § 150B-44* is "'intended to guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay.'" *Gordon v. N.C. Dep't of Corr.*, 173 N.C. App. 22, 27, 173 N.C. App. 22, 618 S.E.2d 280, 285 (2005)(citations omitted). Based on this principle, this Court has held an agency subject to Article 3 is "without authority to unilaterally extend the deadline for issuing its final decision." *Occaneechi*, 145 N.C. App. at 656, 551 S.E.2d at 540. Under this rationale, the Board cannot circumvent the time requirements of the statute by filing a final decision "*nunc pro tunc*" that was clearly filed outside of the prescribed time for making a final decision. To allow the Board to do so would render the time requirements enacted by the legislature in *N.C. Gen. Stat. § 150B-44* meaningless.

Walton v. N. C. State Treasurer, p. 886.

The holding of the cases referenced above is controlling, therefore the May 16, 2011, EMC decision is void, and the decision by the ALJ is the final agency decision. Since the statute is self executing, an appeal is not necessary.

The litigation chapter of this controversy is closed. The Service understands that the Environmental Protection Agency has sent a letter to the DENR, expressing its position on the programmatic issues. We will be happy to discuss these matters with the DENR and look forward to developing a better working relationship between the Service and the DENR Division of Air Quality.

Sincerely,



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