

TO: Chair, Council on Environmental Quality
Attn: Energy Task Force

FAX: 202-456-6546

FROM: Center for Energy and Economic Development

DATE: Novcmber 1, 2001

27 Pages including this cover sheet

CEED

THE CENTER FOR ENERGY
AND ECONOMIC DEVELOPMENT

November 1, 2001

Via E-Mail, Facsimile And Overnight Courier

Chair
Council on Environmental Quality
Executive Office of the President
722 Jackson Place, NW
Washington, DC 20503

Attn: V. A. Stephens
Energy Project Streamlining Task Force

The Center for Energy and Economic Development (CEED) submits these comments to the Energy Task Force in response to the Council on Environmental Quality's Federal Register notice (66 FR 43586, August 20, 2001) requesting information on federal administrative regulatory programs that are believed to be "impediments to federal agencies' completion of decisions about energy-related projects" and "examples of permitting or other decision-making processes which should be improved or streamlined."

CEED is a non-profit organization formed by the nation's coal producing companies, railroads, a number of electric utilities, equipment manufacturers, and related organizations for the purpose of educating the public, including public-sector decision-makers, about the benefits of affordable, reliable and environmentally compatible coal-based electricity.

CEED respectfully calls the Task Force's attention to provisions contained in the Regional Haze Rules (RHR) promulgated by the U.S. Environmental Protection Agency (EPA) and the Federal Land Managers' (FLMs) Air Quality Related Values Workgroup (FLAG Report) being implemented by the National Park Service, U.S. Forest Service and U.S. Fish and Wildlife Service. CEED believes that both the RHR and FLAG stand to significantly and adversely impact the country's ability to achieve the President's National Energy Policy goals of increased production, transmission and conservation of energy. For these reasons and those set forth below, CEED believes both the RHR and FLAG are technically indefensible, impractical and unworkable. CEED respectfully requests that the Task Force urge EPA and the FLMs to either withdraw these programs or revise them in a way that is consistent with these comments.

A. FLAG

President Bush's May 16, 2001 National Energy Policy requires detailed policy coordination and review by federal agencies with respect to actions involving energy development. Further, the President's May 18, 2001 Executive Order entitled "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use" requires that federal agency actions must include an analysis and "Statement of Energy Effects" in their respective actions.

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The FLAG process was adopted by the National Park Service, U.S. Forest Service and U.S. Fish and Wildlife Service in early January 2001, prior to the development of the National Energy Policy and Executive Order. According to FLAG documents, it became "effective" on April 1, 2001. FLAG claims to establish "consistent policies and processes both for identifying 'air quality related values' (AQRVs) and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I areas, (certain national parks and wilderness areas) and in Class II areas (all other federal, state and tribal lands)." AQRVs include such things as visibility, flora, fauna, soil and water quality. CEED believes that the FLAG process is neither consistent with the Federal Clean Air Act nor based on sound scientific principles. (See Attachment A.)

FLAG imposes additional air permitting requirements on new energy projects. As a result, it will add additional costs, project delays and result in potential permit denials. FLAG will do this because it establishes new "acceptability" values and metrics for determining "adverse impacts" and "limits of acceptable change" for AQRVs in the specified geographic areas. Substantial questions remain as to the scientific validity of these "acceptability" values.

Under the guise of a "guidance document," FLAG is instead a binding policy developed by the three FLM agencies to substantively function as a set of definitive regulatory requirements that mandate and compel additional analyses. Up until April 1, 2001, the legal standard which new projects had to meet was to model against the federal health standards and Class I increments -- using methods proscribed by EPA at 40 CFR Part 51, Appendix W. (See Attachment A.) Now, under FLAG, additional modeling hurdles and thresholds have been erected by the three FLM agencies, without the benefit of rulemaking. Any new energy project will have to do air quality modeling to prove it will have "acceptable" impacts. As demonstrated by the attached map of the western United States, very little land mass (public or private) is not covered by FLAG's dramatic extension of federal jurisdiction (See Attachment B.) FLAG indicates that any failure to follow its prescribed process may result in "substantial delay" to a project.

This governance by guidance is very surreptitious -- but when the country is in the throws of a growing energy crisis it is even more worrisome when the "guidance" has such far-reaching impacts. FLAG did not go through rulemaking required by the federal Administrative Procedure Act and is therefore the type of government action (a substantive legal rule in the guise of a "guidance document") that the D.C. Circuit Court of Appeals, the court with principal national responsibility for judicial oversight of federal agencies like EPA and the FLMs, has repeatedly overturned because of due process circumvention. FLAG should, therefore, be withdrawn pursuant to the President's Executive Orders. In its place, an enhanced AQRV protection process should be developed notice and comment rulemaking under the federal Administrative Procedure Act, utilizing validated scientific principles and incorporated into EPA PSD regulations at 40 CFR Part 51, Appendix W.

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B. REGIONAL HAZE RULES

The RHR was published in the Federal Register on July 1, 1999 (64 Fed. Reg. 35714) and took effect on August 30, 1999. The RHR contains provisions of general national applicability for all states (§ 308) and alternative provisions (§309) by which states within the Grand Canyon Visibility Transport Commission ("GCVTC") region can opt to be governed.

Under the RHR, all states must calculate the uniform rate of progress in visibility (measured in deciviews) needed for each Class I area within the state to attain "natural visibility conditions" by the year 2064, as compared with a baseline period. Notably, the baseline period is defined as visibility impairment only on the 20% most and 20% least impaired days expressed as an annual average for the years 2000-2004.

The "60 year glidepath to natural conditions" and the measures needed to achieve it become the state's reasonable progress goal under CAA § 169A.

Each SIP under § 308 must include a ten-year, long-term strategy ("LTS") to achieve the reasonable progress goals. "The long-term strategy *must* include *enforceable* emissions limitations, compliance schedules, and other measures *as necessary to achieve* the reasonable progress goals established by states having mandatory Class I federal areas." SIP due dates under § 308 are timed in accordance with EPA's interpretation of the TEA-21 legislation. Under EPA's view there will be three years of air quality monitoring data development before states are required to submit attainment/nonattainment designations under the new PM_{2.5} standard (unless a state follows the earlier Annex time frame under § 309 discussed below). EPA will have one year to act on area designations. Regional haze SIPs for areas designated as "attainment or unclassifiable" for PM_{2.5} will be due one year after designation. Regional haze SIPs for areas designated as nonattainment for PM_{2.5} will be due three years after designation.

A principal component of the RHR is provisions respecting the Best Available Retrofit Technology requirement (BART) concerning SO₂, PM₁₀, and NO_x emissions for certain stationary sources placed in operation between 1962 - 1977. BART requires the analysis of several cost-benefit factors. EPA's "new" BART for regional haze provisions applies only to the first ten-year implementation period. States are given two options regarding "regional haze BART" for stationary sources:

RHR § 308(c)(4) allows as an "alternative" to mandating BART controls on BART-eligible sources, a state may substitute its participation in a regional emission trading program that at least includes all sources subject to BART. If selected, EPA requires a state to demonstrate that greater progress towards the reasonable progress goal will be made using a trading program "or other alternative measures" than through the alternative of requiring BART retrofits at BART-eligible

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plants, that the emissions reductions will be achieved during the first ten-year LTS period, and that the program is administratively feasible.

Western States have been given the limited option to be governed by requirements found in RHR § 309. Under the § 309 approach, the Western Regional Air Partnership (WRAP) submitted an "Annex" to EPA at the end of September, 2000. The Annex contains an SO₂ trading program for all SO₂ sources above 100 tpy in the western states. If approved, the Annex SO₂ trading program will serve as the model for visibility-related trading programs under the RHR throughout the country.

Because it stands to serve as a precedential visibility-related trading program, CEED wishes to bring to the Task Force's attention that following the development and submittal of the WRAP Annex to EPA, a growing state and federal dialogue emphasizing the need for a comprehensive energy policy capable of meeting present and future energy needs emerged and raised serious and substantial questions concerning the regional SO₂ emissions cap contained in the Annex. States like Colorado and stakeholders like CEED and others called for immediate action to be taken by the WRAP and EPA to better determine whether the Annex unrealistically and unnecessarily conflicts with any present or future demands for electrical power development. (See Attachments C and D, respectively.)

Like the State of Colorado, many western governors know that the answers to these questions will have far-reaching implications for their citizens in terms of lifestyle impacts, energy, economic and environmental considerations. Answering these important questions in a timely fashion would seem to be made all the more important since WRAP modeling has shown that the Annex SO₂ strategy will not achieve a humanly perceptible improvement in visual air quality in western Class I areas. In order to facilitate broad consideration of this important issue, CEED is providing the Task Force with a copy of an independent analysis that concisely summarizes one point of view. Attachment E was prepared by Energy Ventures Analysis who tracks new power plant construction for the National Electric Reliability Council. A similar point of view and concern has recently been expressed by the State of Colorado:

We have spent additional time reviewing the Annex since it was adopted by the WRAP last September. We have a better understanding of the Annex and remain concerned about the policy implications of adopting a backstop program to improve visibility in Class I areas that cannot demonstrate a perceptible improvement in visibility.

We are concerned that a state such as Colorado with high projected growth rates, could experience substantial difficulty in meeting the new source set aside over the long term. Colorado may eventually be subject to reliance on other states for power generation and be required to pay a premium for electric utility costs. We are concerned that new sources that

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may be considering Colorado as a future location may be persuaded to locate elsewhere based on the need to purchase allocations in order to be permitted.

We are also concerned about the analysis to determine new source growth in the region for electric power generation and "other sources" given the pending discussions related to the development of a new energy policy for our country under the Bush Administration that would substantially increase the likelihood of new source growth in Colorado.

(See Attachment C.)

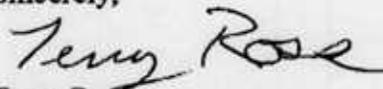
Given these concerns, CEED believes the Energy Task Force should investigate these issues and EPA should not approve a program that lacks any perceptible visibility benefit while potentially standing to significantly impair the ability of the western states to develop additional energy resources.

C. CONCLUSION

Processes such as FLAG and emissions cap and trade visibility programs that may create delay and confusion in the issuance of PSD permits and the development of new and cleaner energy sources and also has the potential to replace state discretion with federal authority as part of the permitting process is not appropriate. In order to achieve the goals and objectives outlined in the President's National Energy Policy Report, the Task Force should work with EPA and the FLMs to modify the RHR and FLAG, as suggested herein, so that these regulatory programs are sound from both a legal and policy standpoint and respect and follow the language of the federal Clean Air Act and congressional intent.

If you have any questions or would like to meet to discuss CEED's comments further, please contact the undersigned.

Sincerely,



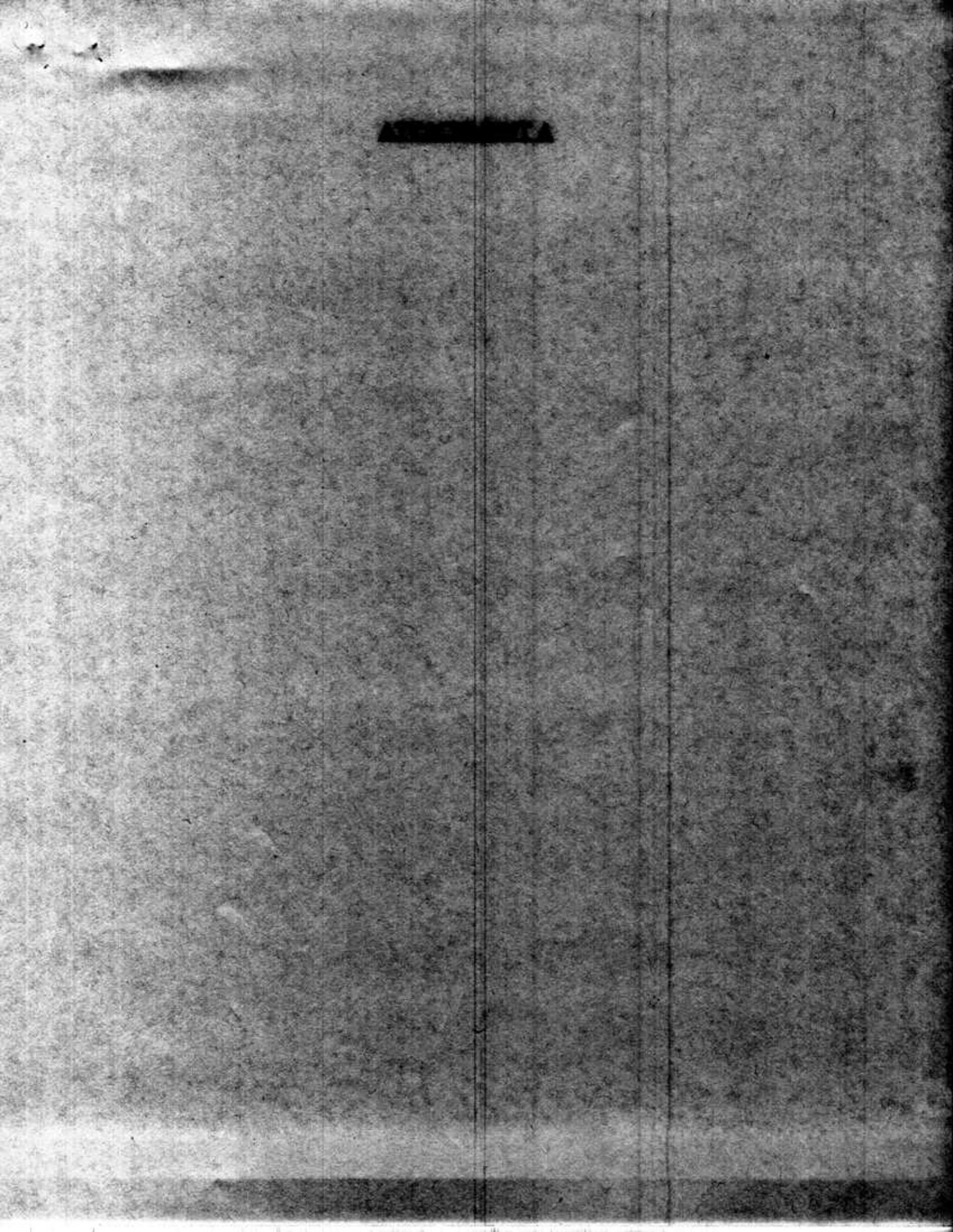
Terry Ross

Western Regional Vice-President

**CENTER FOR ENERGY AND ECONOMIC
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**ATTACHMENT A
FEDERAL LAND MANAGERS' AIR QUALITY RELATED VALUES
WORKGROUP**

I. Overview of the Regulatory Framework

New Source Review (NSR) is the federal CAA permitting program that regulates the construction of major new stationary sources and major modifications. NSR regulations require new major stationary sources and major modifications at existing major stationary sources to obtain permits, perform health and visibility/air quality impact analyses, and install stringent air pollution control equipment for new construction at the plants. NSR consists of more than one distinct sub-program: PSD for areas in attainment with health-based National Ambient Air Quality Standards (NAAQS), and Non-attainment NSR (NNSR) for those that are not in attainment with NAAQS. The NSR program involves a complex set of regulations (40 CFR Parts 51, 52, and 60) and EPA guidance documents that began with, and have evolved since, the 1970 Clean Air Act Amendments.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR 52.21 which is part of the federal PSD program that applies as part of a federal implementation plan (FIP) for states that have not submitted a PSD program meeting the regulatory requirements of 40 CFR 51.166 - the other set of regulations which contains standards for PSD provisions in state implementation plans (SIPs). Many states have an EPA-approved PSD program, pursuant to an EPA-approved SIP.

In §§ 161 and 165 of the federal CAA, Congress specifically delineated the roles of EPA, the Federal Land Manager (FLM) and the states in issuing PSD permits for sources located near Class I areas. Under this program, a complete permit application must include, among other things, an air quality analysis showing compliance or noncompliance with the Class I increments. A permitting authority must act on a complete application within one year of filing. See, CAA § 165(c).

Upon the filing of a permit application for a source that may affect a Class I area, the permitting authority must provide notice of the application to the FLM. The FLM may then consider, whether a proposed major emitting facility will have an adverse impact on the AQRVs of such areas. CAA § 165(d)(2)(A) and (B). Where the emissions from the proposed source are not projected to cause or contribute to an increment exceedance, nothing more is required of the permit applicant unless the FLM demonstrates "to the satisfaction of the State" that the source "will have" an adverse impact on an AQRV, and the Governor of the state (or, on appeal, the President) does not overrule the FLM. See, CAA § 165(d)(2)(C)(ii).

By contrast, where the applicant's emissions would cause or contribute to an increment exceedance, the FLM must "certify" that no adverse impact on an AQRV in the Class I area would result before "the State may issue a permit." See, CAA § 165(d)(2)(C)(iii). In this latter case, if the FLM denies a certification, that decision may be reversed by the President if the applicant shows "to the satisfaction of" the Governor of the state that the proposed facility will not have an adverse effect on AQRVs and the President determines that issuance of a permit is in the national interest.

Under the CAA, the AQRV demonstration – whether undertaken by the FLM or the

applicant – is to take place in accordance with rules issued by EPA. Under CAA § 161, EPA is obligated to adopt rules addressing such "measures as may be necessary" to guide states in implementing the PSD program. Under CAA § 165(e), EPA must issue regulations addressing the nature of ambient air quality analyses to be performed in support of a permit, and must identify by rule scientifically credible modeling techniques that can evaluate the effect of emissions from new sources on visibility and any other AQRV. For the PSD program to work as envisioned by Congress,¹ any AQRV protection efforts should be in the context of how the statute and EPA regulations call for those demonstrations.

II. THE RECENT FLAG PROCESS

A. What is FLAG?

As indicated, the FLAG process was adopted by the National Park Service, U.S. Forest Service, and U.S. Fish and Wildlife Service in early January 2001 and became "effective" on April 1, 2001. FLAG claims to establish "consistent policies and processes both for identifying [AQRVs] and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I areas, (certain national parks and wilderness areas) and in Class II areas (all other federal, state and tribal lands)." AQRVs include such things as visibility, flora, fauna, soil and water quality.

The FLAG process requires a project applicant to submit an analysis for FLM review containing a defined set of assessments that are stated to be the only way in which an FLM will potentially comment on a proposed project. FLAG establishes several prescriptive definitions and standards that are to be applied by the FLMs. Some of these prescriptive FLAG requirements are:

- Extends impact assessments beyond Class I Wilderness Areas to Class II areas (all other federal lands).
- Requires the use of a yet-to-be-approved model (CALPUFF) in the context of FLAG visibility impact determination criteria for determining whether a project represents an "unacceptable adverse impact."
- Establishes a defined threshold for requiring an applicant to conduct a regional or multi-source cumulative air quality impact study before determining the "acceptability" of that individual source.
- Establishes a procedure on how an applicant must calculate "deposition" effects and leaves "acceptability" judgments up to a particular FLM. The FLAG process requires an applicant to obtain and use model input values from the FLMs, such as ozone and ammonia, that are necessary in order to run the FLAG-required model.

¹ As Congress observed, "[t]he States and Federal agencies must do "all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. Nothing could be more detrimental to the intent of this section and the integrity of this act than to have the process encumbered by bureaucratic delay." S. Rep. No. 127, 95th Cong., 1st Sess. 32 (1977).

- Establishes "natural conditions" values for each Class I area in the U.S. Establishes "acceptability" values ("critical loadings" and "limits of acceptable change") for specific AQRV's and areas. In determining "acceptability" FLAG requires the use of a screening model that ignores circumstances such as wind direction and differences in topography (elevation) when assessing the potential (and "acceptable") impacts of a source on a Class I area.

B. FLAG Imposes New and More Stringent Requirements for Permit Applications Than Those Contained in the CAA

Under the guise of a "guidance document," FLAG is instead a binding policy developed by the three FLM agencies to substantively function as a set of definitive regulatory requirements that mandate and compel additional analyses. Up until April 1, 2001, the legal standard which new projects had to meet was to model against Class I increments. Now, under FLAG, additional modeling hurdles and thresholds have been erected by the three FLM agencies, without the benefit of rulemaking. Any new project will have to do air quality modeling to prove it will have "acceptable" impacts, and FLAG indicates that any failure to follow its prescribed process may result in "substantial delay" to a project.

Given the prescriptive nature of the FLAG process and how it is being implemented, FLAG is not simply the FLMs' efforts to generally inform states and permit applicants of a tentative position the FLMs intend to take in future proceedings. Instead, FLAG establishes legal standards that affect future permit applicants rights and responsibilities through the FLMs' articulation of what is required to satisfy their view of required elements of NEPA planning or a PSD permit – *i.e.*, the legal norm necessary to avoid an adverse FLM recommendation and/or suggested veto of a proposed permit.² Further, the FLMs have stated their intent that FLAG work as a component part of an integrated regulatory process that includes other federal rules such as EPA's existing Regional Haze Rule and forthcoming New Source Review Reform rule.

Moreover, FLAG reserves to the FLM the authority to determine the completeness of an application while the studies on AQRVs that the FLM has prescribed are undertaken by the permit applicant. As a result, the FLM can, through information requests to the applicant, circumvent the requirement that applications be acted on within one year.

The expansion of an FLM role to include Class II areas does not find support in the Clean Air Act. The CAA visibility program protects mandatory Class I areas, which are the federal Class I areas specified in CAA §162(a). Soon after the adoption of the 1977 CAA Amendments, the Secretary of the Interior identified, in consultation with other FLMs, those mandatory Class I areas where visibility is an important value. See 43 Fed. Reg. 7721 (1978). EPA reviewed that list and

² See, e.g., "Only the threat of remand of a permit or revocation of [permitting] authority will get the attention of some state and local programs." Memorandum from Don Sheperd (NPS) to John Bunyak (NSP), Dennis Crumpler (EPA), and Lew Nagler, dated December 4, 1998. (emphasis added)

concluded that visibility is an important value for 156 of the eligible 158 mandatory Class I areas. See 44 Fed. Reg. 69,122 (1979). Two wildernesses, Rainbow Lake (Wisconsin) and Bradwell Bay (Florida), were excluded. The list of the 156 mandatory Class I areas is codified at 40 CFR Part 81, Subpart D. Each mandatory Class I area is the responsibility of the FLM with authority over such lands (e.g., the Secretary of Agriculture for U.S. Forest Service lands and the Secretary of the Interior for National Park Service and U.S. Fish and Wildlife Service lands). See CAA § 302(i).

If one were to compare a map of Class II areas with a map of Class I areas, one would see that FLAG creates a mechanism for significant program expansion. Such an expansion goes beyond what Congress authorized. In fact, Congress has made clear that EPA or the FLMs are prohibited from requiring "the use of any automatic or uniform buffer zone or zones" around mandatory federal Class I areas. See, CAA §169A(e). Further, specific congressional action is required before non-federal property can be regulated in accordance with the Property Clause of the federal Constitution (Article V, § 3, Clause 2). While it has not done so, Congress may always specifically designate newly created parks and wilderness areas or other federal lands as mandatory Class I federal areas.

C. FLAG Shifts the Burden of the AQRV Analysis

While Congress gave the FLMs the "affirmative responsibility" to protect AQRVs – those attributes in a mandatory federal Class I area that could be affected by a degradation of the ambient air quality, Congress gave to the states the authority to decide when an AQRV in a Class I area will be adversely impacted by emissions from a new or modified major source. Although the FLMs have an affirmative duty to review applications for such proposed facilities and may attempt to demonstrate to the state that an adverse effect to an AQRV in a Class I area will occur, the demonstration must prove the adverse effect "to the satisfaction of the State." See CAA § 165(d)(2)(C)(ii). The FLAG report, however, defines "adverse impact" on an AQRV as "an unacceptable effect, as identified by an FLM, that results from current, or would result from predicted, deterioration of air quality in a Federal Class I or Class II area." (Emphasis added.) FLAG Phase I report (December 2000) p. 15.

The express state – FLM relationship set out by Congress in CAA § 165 has long been recognized in EPA regulations (40 CFR 52.66(p)(3) and (4)) and enforced by EPA administrative law judges. See In Re: Hudson Power, 4 E.A.D. 258 (E.A.B. 1992), See also In Re: Old Dominion Electric, 3 E.A.D. 779 (E.A.B. 1992) (State must give reasonable consideration to FLMs' adverse impact assertions, but the [state] permitting authority has final determination, and the permitting authority's discretion takes precedence if it was not exercised in an arbitrary or capricious manner).

Under the CAA, if there is compliance with the NAAQS and PSD increments, the FLM must demonstrate that the proposed facility will have an adverse impact on an AQRV. That demonstration must provide proof not merely of a risk of harm, but of demonstrable harm to an AQRV caused by the pollution from a new source. Despite the CAA's detailed statutory scheme, FLAG establishes a different process with requirements that obviate the role of the existing (or future) Class I increment standards. In doing so, FLAG always imposes on the permit applicant the burden of demonstrating "no adverse impacts" of AQRV's – even if there is no exceedance of the applicable increment. If the FLMs are concerned that the Class I increments for Class I Areas are not adequately protecting AQRVs, the federal CAA already provides EPA with the authority to

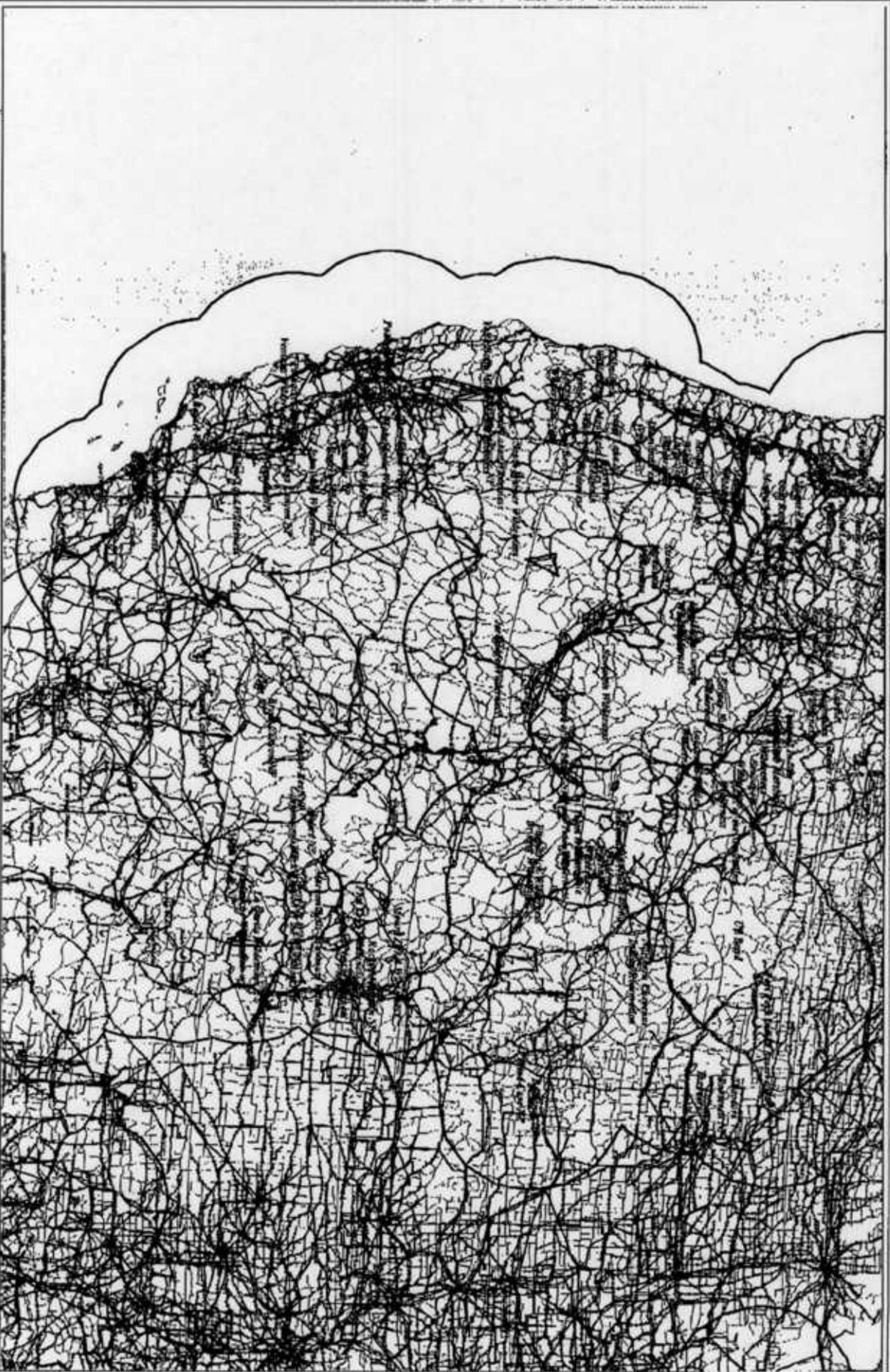
develop additional welfare-based standards as only the Administrator of the EPA can promulgate regulations under the federal CAA. In the absence of utilizing that lawful and available approach, the FLMs cannot unduly assert themselves when no potential increment violation is shown. Nevertheless, FLAG requires, under certain defined circumstances, that an individual source conduct a cumulative modeling assessment. However, CAA §165(d) expressly sets out that the AQRV determination is for an individual source's impacts on any AQRV or increment – not a group of sources in a region beyond the realm of an individual project.

If left unchecked, the FLAG approach to PSD permitting has three practical implications for permit applicants and state permitting authorities. First, permit proceedings will take far longer than the one-year period anticipated by Congress, because state permitting authorities and applicants will have to attempt to divine what analyses are needed in response to the FLM's "speculative" notice of potential adverse effects, and the applicant must then conduct those analyses – even in the absence of adequate data and analytical techniques. In addition, these concerns may be amplified when one adds in the Class II issues that presumably come into play with an FLM certification.

Second, whereas the FLMs are assigned the burden of demonstrating "to the satisfaction of the State" that a proposed source "will have" an adverse effect on an AQRV (where there are no PSD increment exceedances), FLAG would place the burden of performing this analysis in the first instance on the applicant. This burden is likely to be difficult to meet given that the FLM's adverse impact allegations may be "speculative," and that the applicant's response must be "comprehensive" even in the face of inadequate data and analytical techniques.

Third, the FLM is given a decision-making role that preempts the authority of the state permitting agency. That is, because the FLM must identify AQRVs and define whether there are "adverse impacts" on those AQRVs, the FLM dictates not only what analyses must be performed, but ultimately whether a proposed source can be constructed without undertaking mitigation measures that may also be dictated by the FLM. Such a subjective standard is inconsistent with what Congress authorized where a permitting authority (state or EPA) was given the task of balancing the various issues – it did not give the FLMs a veto (either expressly or indirectly by allowing them to develop a process like FLAG).

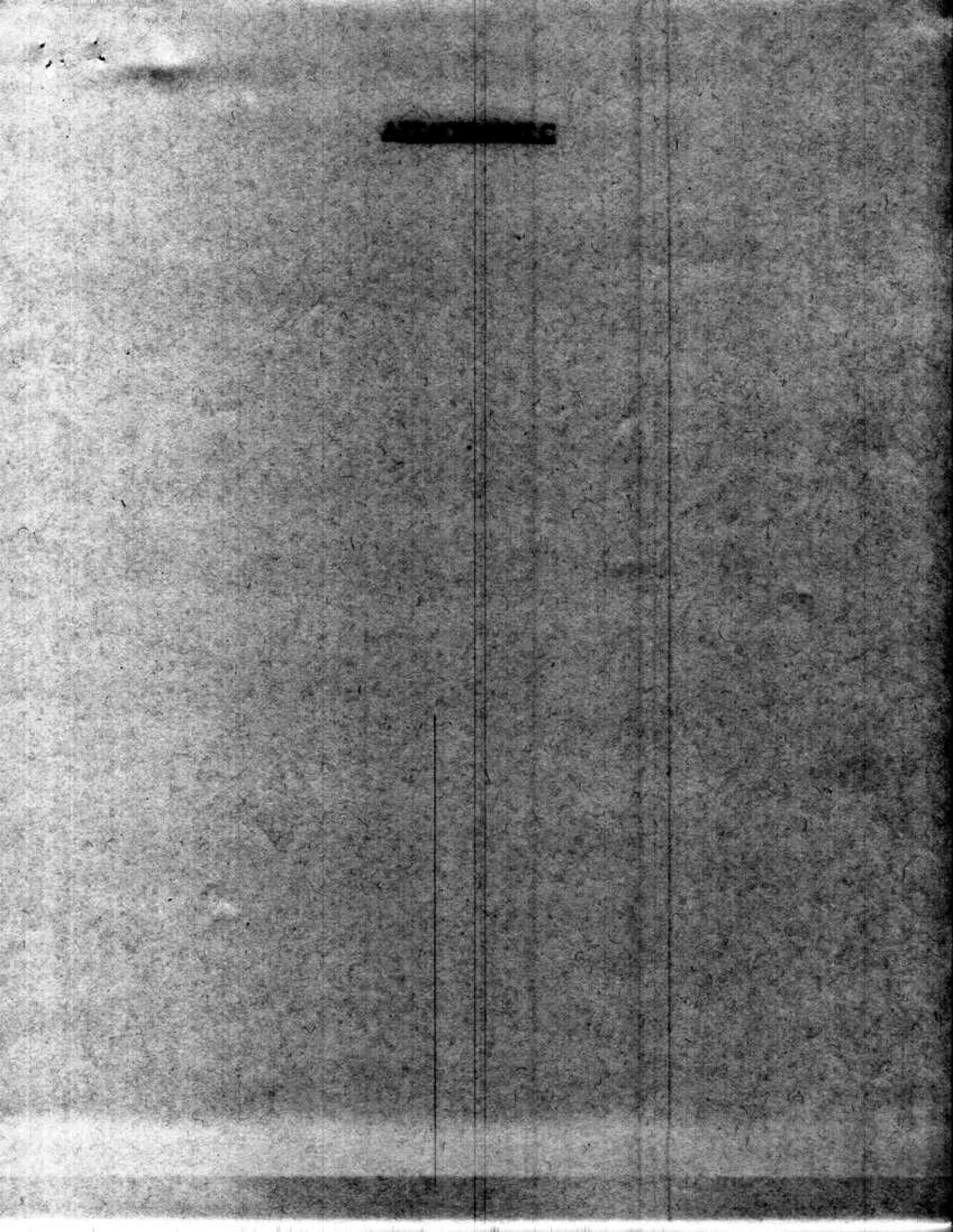
1972-73



- Class I FLAG Area
- 200 km Buffer Zone
- Unincorporated Area
- Powerline
- Railroad
- Road
- River / Stream
- State of Interest
- Water Body

Class I Areas with 200km Buffers
Western United States View





STATE OF COLORADO

Bill Owens, Governor
Jane E. Norton, Executive Director

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Colorado Department
of Public Health
and Environment

May 22, 2001

The Western Regional Air Partnership
Ms. Dianne Nielson, State of Utah
Governor Lloyd Tortalita, Pueblo of Acoma

Dear Governor Tortalita & Ms. Nielson:

Colorado understands the WRAP is a regional organization with voluntary participation by western states. We also recognize members of the market-trading forum have invested considerable time and energy in the development of the Annex and the information to be considered by the WRAP Board today. We have spent additional time reviewing the Annex since it was adopted by the WRAP last September. We have a better understanding of the Annex and remain concerned about the policy implications of adopting a backstop program to improve visibility in Class I areas that cannot demonstrate a perceptible improvement in visibility.

The WRAP is due to consider supplemental information to be submitted to EPA in support of the Annex approved by the WRAP Board in September 2000. The milestone adjustments for opting in or out of the program seem to be a basic component of the program and not supplemental information or even technical supporting information. A state's decision to opt in or out of the program will be based, at least in part, on the allocations in the opt in/opt out provisions for each state and on the new source set aside for each state. We understand the milestone adjustments and the new source set aside are not necessarily binding on each state, but remain concerned about the implications for Colorado regarding how these provisions may be viewed in the future. The calculation of allocations is now proposed to be based on emission projections with BART emission control levels applied to BART eligible sources. The calculation of the new source set aside seems to be based on a comparative analysis of the current level of emissions in each state and appears to make no consideration for projected growth in individual states that may choose to participate in the program.

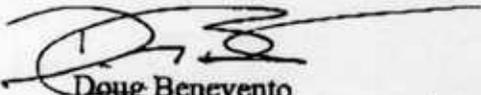
We are concerned that a state such as Colorado with high projected growth rates, could experience substantial difficulty in meeting the new source set aside over the long term. Colorado may eventually be subject to reliance on other states for power generation and be required to pay a premium for electric utility costs. We are concerned that new sources that may be considering Colorado as a future location may be persuaded to locate elsewhere based on the need to purchase allocations in order to be permitted.

We are also concerned about the analysis to determine new source growth in the region for electric power generation and "other sources" given the pending discussions related to the development of a new energy policy for our country under the Bush Administration that would substantially increase the likelihood of new source growth in Colorado.

Colorado is committed to protecting visibility in Class I areas and remains interested in the activities of the WRAP through our participation in many of the forums and workgroups. Colorado will abstain from voting on the supplementary information to be submitted to EPA in support of the Annex. On its face, we do not support the methodology to develop the new source set aside allocations and the possible implications they could have for Colorado, however, we do not want impede the process from moving forward if the majority of western states find value in it.

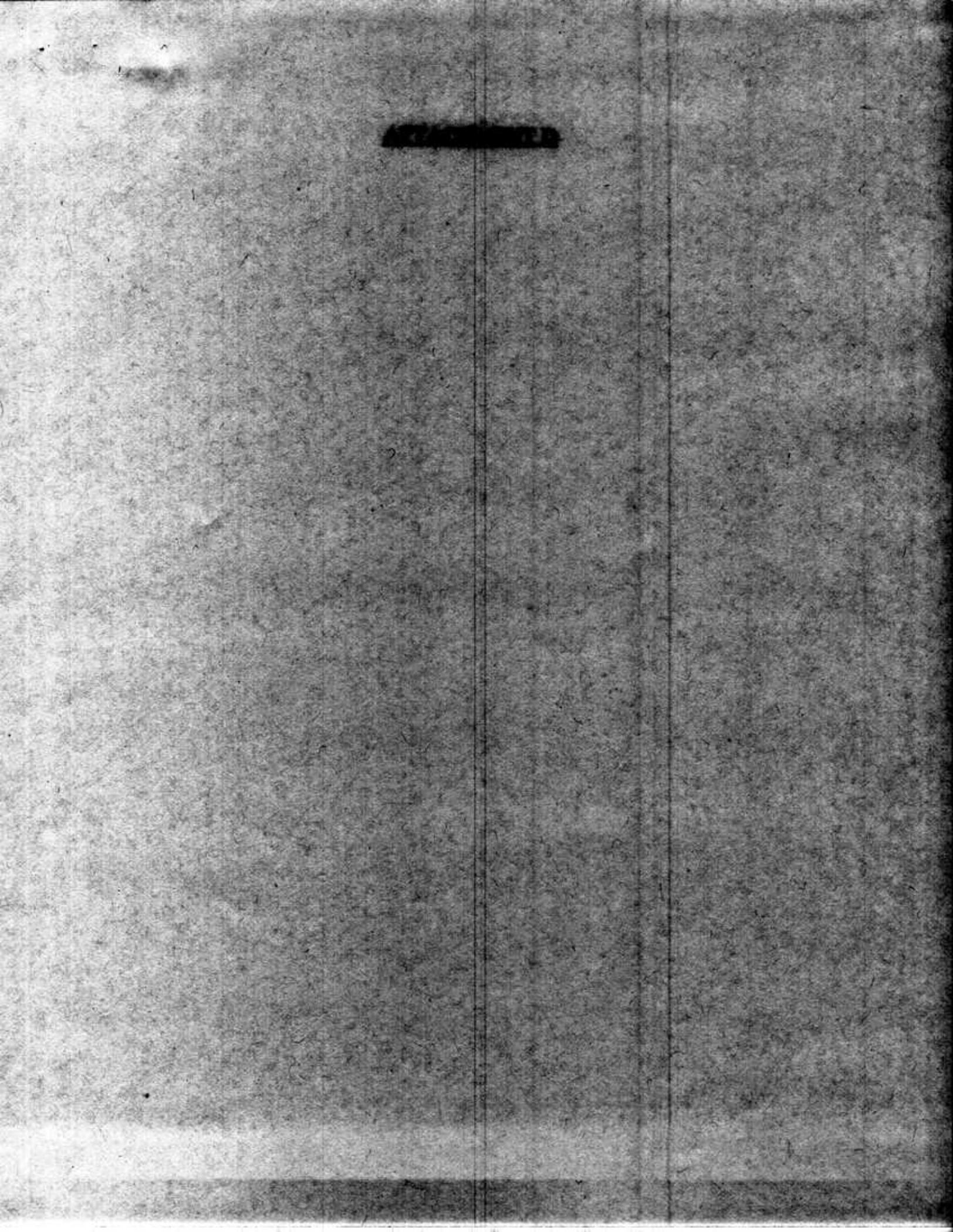
We appreciate the effort put forth regarding regional haze and look forward to working with you in the future.

Sincerely,



Doug Benevento
Director of Environmental Programs
Colorado Department of Public
Health & Environment

CC: Jane Norton
Margie Perkins
Doug Lempke



CEED

THE CENTER FOR ENERGY
AND ECONOMIC DEVELOPMENT

June 21, 2001

Via Hand Delivery

Robert E. Brady
Chairman
Colorado Air Quality Control Commission
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Denver, CO 80246-1530

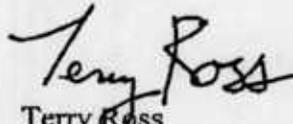
Chairman Brady and Commissioners:

I regret that I am not able to participate in the Commission's informational hearing today on regional haze, given that I have a pre-existing commitment. The visibility issues you are considering are very important to the Center for Energy and Economic Development ("CEED"), and we have a longstanding involvement in them. As such, I wanted to bring an issue to the Commission's attention, as I attended the Western Regional Air Partnership's May 23, 2001 meeting in New Mexico.

Prior to the WRAP meeting, CEED requested that the WRAP assess whether the proposed emission trading program adversely impacts the future development of new electricity generating facilities in western states, including Colorado. CEED pointed out the need for such a study, based upon initial concerns and questions raised by the North American Electric Reliability Council (attached).

Unfortunately, CEED has not received a response to its request or the attached assessment. In any event, CEED believes this information is useful to the Commission as it assesses which regional haze program to develop and implement in Colorado. Thank you for this opportunity to comment.

Sincerely,



Terry Ross
Regional Vice-President

Enclosure

CEED

THE CENTER FOR ENERGY
AND ECONOMIC DEVELOPMENT

May 21, 2001

James M. Souby
Executive Director
Western Governors Association
1515 Cleveland Place Suite 200
Denver, CO 80202-5114

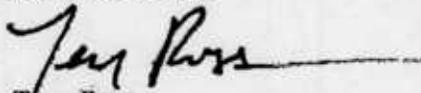
Dear Mr. Souby:

We understand that the Western Regional Air Partnership's upcoming May 23, 2001 meeting in Pueblo of Acoma, New Mexico includes an agenda item entitled "Update on Energy and Air Quality Issues." It appears there will also be much discussion focused on the Annex the WRAP previously submitted to EPA. As you know, the growing state and federal dialogue emphasizing the need for a comprehensive energy policy capable of meeting present and future energy needs has raised questions concerning the regional SO₂ cap in the Annex and exactly what steps must now be taken to better determine whether the Annex unrealistically and unnecessarily conflicts with any future demands for electrical power development.

Many western governors know that the answers to these questions will have far-reaching implications for their citizens in terms of lifestyle impacts, energy, economic and environmental considerations. Further, answering this important question in a timely fashion would seem to be made all the more important since WRAP modeling has shown that the Annex SO₂ strategy will not achieve a humanly perceptible improvement in visual air quality in western class I areas. In order to facilitate broad consideration of this important issue prior to the WRAP meeting, I wanted to provide you with a copy of a recently prepared independent analysis that concisely summarizes one point of view. The attached was prepared by Energy Ventures Analysis who tracks new power plant construction for the National Electric Reliability Council.

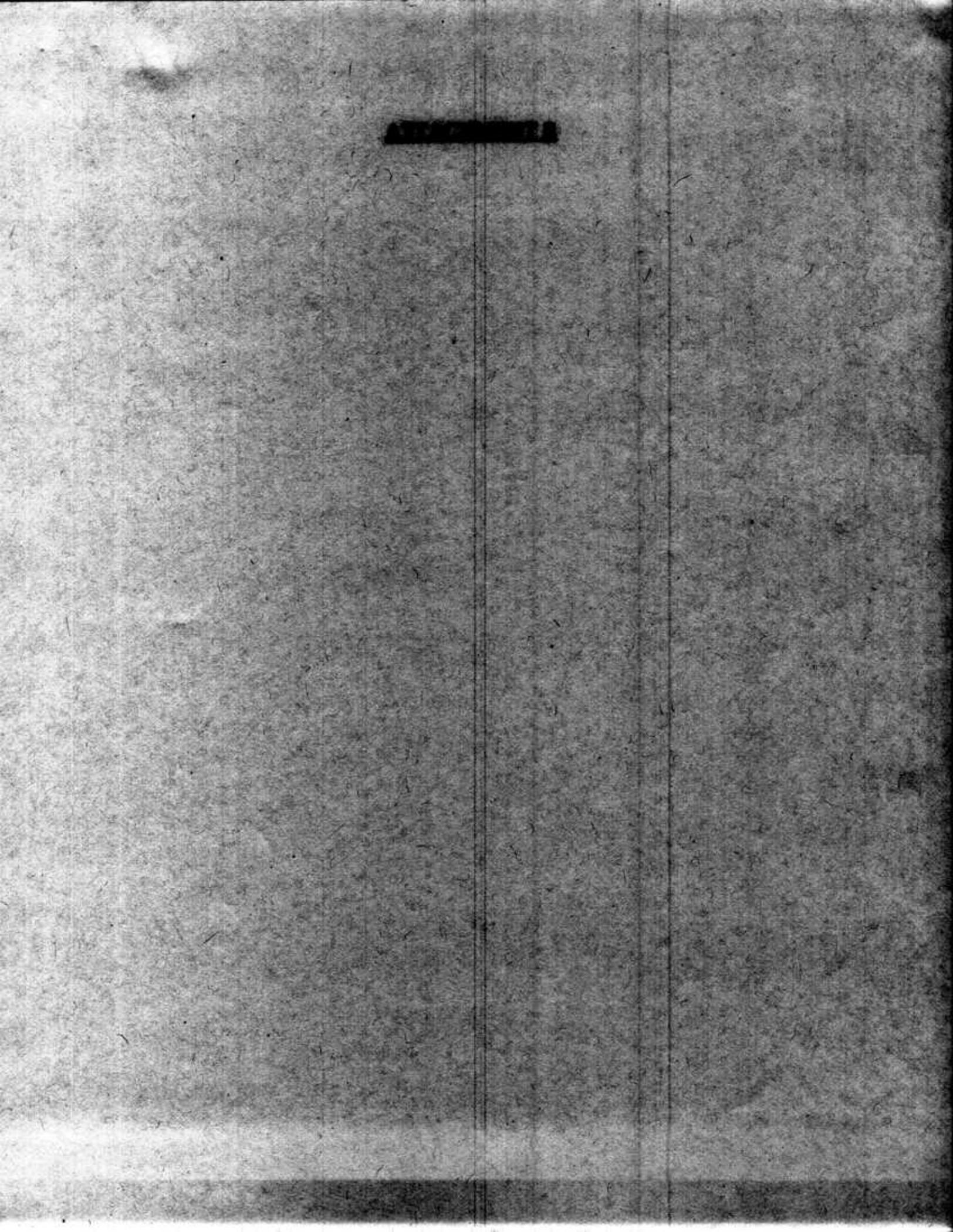
Many interested stakeholders look forward to the discussion of this and other important issues at the upcoming WRAP meeting.

Sincerely,
CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT


Terry Ross
Western Regional Vice-President

cc: State Air Directors
Staff Council
WRAP Participants

P. O. Box 288, Franktown, CO
Telephone: (303) 814-8714 Fax: (303) 814-8716



Estimate of WRAP Emissions Cap on construction of Greenfield Coal Capacity

WRAP recommended its new source set-aside be limited to 27,000 TPY across the entire nine state affected region. Of this amount, 9,000 TPY are allocated for each 5-year period beginning 2003-2007. These set-asides are for all qualifying new sources- electric powerplants, industrial boilers, and major process emission sources (e.g. smelters).

Utilities account for roughly 66% of the total 1998 emission inventory of affected sources. If new source allocations were allocated similar to the inventory, roughly 6,000 TPY of the 9,000 TPY in 5-year new allocations would be provided to new electric generating capacity.

The amount of coal-fired capacity that can be built under the 6,000 TPY cap is a function of the achievable emission rate. Assuming an average 10 MMBtu/MWh heatrate, the amount of new coal capacity growth allowed under the WRAP emissions cap every 5 years is as follows:

Emission limit		6,000 TPY New Coal Generator Cap	
#SO ₂ /MMBtu	#/MWh	GWh	Potential new MW@85%CF
0.15	1.5	8,000	1,074 MW
0.10	1.0	12,000	1,612 MW
0.05	0.5	24,000	3,223 MW
0.04	0.4	30,000	4,029 MW

(These limits are far below what is being achieved in the east and below the tightest limits being debated by states for further emission reductions).

A review of the two lowest emitting coal-fired units in each WRAP state (except Idaho (no coal unit) and Oregon (no FGD controlled unit) indicate that limits of 0.05-0.10 #SO₂/MMBtu are achievable for bituminous coal units and limits of 0.08-.15 #SO₂/MMBtu are achievable for PRB coal units.

Utility	Station	Unit	2000 ER	SO ₂ Removal Performance		Plant Location	Origin
				Design	Actual Type		
Salt River	Navajo	1	0.038	92%	96% Limestone	AZ	AZ
Intermountain	Intermountain	1	0.046	90%	94% Limestone	UT	UT
Salt River	Navajo	2	0.054	92%	94% Limestone	AZ	AZ
Salt River	Navajo	3	0.056	92%	94% Limestone	AZ	AZ
Deseret G&T	Bonanza	1	0.063	95%	92% Limestone	UT	UT
Sierra Pacific	Reid Gardner	4	0.065	85%	93% Sodium Carbonate Lime-Alkaline Fly	NV	UT
Platte Rv G&T	Rawhide	1	0.072	80%	84% Ash	CO	SPRB
Tri-State G&T	Craig	3	0.106	85%	87% Lime	CO	CO
APS	Cholla	2	0.111	90%	89% Lime	AZ	NM
Plains G&T	Escalante	1	0.130	95%	93% Limestone	NM	NM
Sierra Pacific	North Valmy	2	0.146	70%	80% Lime	NV	UT
Black Hills	Neil Simpson II	1	0.148	92%	89% Lime	WY	PRB
Basin Electric	Laramie River	1	0.155	90%	82% Limestone	WY	PRB
PSNM	San Juan	4	0.393	75%	77% Limestone	NM	NM

As current experience shows, the Flue Gas Desulfurization (FGD) performance does depend upon the input coal characteristics. If one examines just the 11 announced new coal-fired powerplants (totaling 5,100 MW) in the WRAP states and assumes that these units are held to the demonstrated emission limits that

have currently been achieved by these exemplary plants, the estimated emissions from these plants would total 19,605 TPY. These announced plants are expected to come online prior to 2008 and would far exceed the estimated 6,000 TPY new source set-aside.

This analysis suggests that the WRAP emissions cap will likely have adverse effects on Western power prices by not allowing for the most cost-efficient power generation to be built. If coal-fired generation were capped, higher cost alternatives would have to be developed to meet the regions growing power needs. This shift could also create other energy policy challenges (natural gas transport, reliability risks from reduced fuel diversity, etc...) and other environmental issues.

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 18, 2001

EXECUTIVE ORDER

ACTIONS CONCERNING REGULATIONS THAT SIGNIFICANTLY
AFFECT ENERGY SUPPLY, DISTRIBUTION, OR USE

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to appropriately weigh and consider the effects of the Federal Government's regulations on the supply, distribution, and use of energy, it is hereby ordered as follows:

Section 1. Policy. The Federal Government can significantly affect the supply, distribution, and use of energy. Yet there is often too little information regarding the effects that governmental regulatory action can have on energy. In order to provide more useful energy-related information and hence improve the quality of agency decisionmaking, I am requiring that agencies shall prepare a Statement of Energy Effects when undertaking certain agency actions. As described more fully below, such Statements of Energy Effects shall describe the effects of certain regulatory actions on energy supply, distribution, or use.

Sec. 2. Preparation of a Statement of Energy Effects.

(a) To the extent permitted by law, agencies shall prepare and submit a Statement of Energy Effects to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for those matters identified as significant energy actions.

(b) A Statement of Energy Effects shall consist of a detailed statement by the agency responsible for the significant energy action relating to:

(i) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented, and

(ii) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

(c) The Administrator of the Office of Information and Regulatory Affairs shall provide guidance to the agencies on the implementation of this order and shall consult with other agencies as appropriate in the implementation of this order.

Sec. 3. Submission and Publication of Statements.

(a) Agencies shall submit their Statements of Energy Effects to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, whenever they present the related submission under Executive Order 12866 of September 30, 1993, or any successor order.

(b) Agencies shall publish their Statements of Energy Effects, or a summary thereof, in each related Notice of Proposed Rulemaking and in any resulting Final Rule.

Sec. 4. Definitions. For purposes of this order:

(a) "Regulation" and "rule" have the same meaning as they do in Executive Order 12866 or any successor order.

(b) "Significant energy action" means any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking:

(1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and

(ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or

(2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

Sec. 5. Judicial Review. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH

THE WHITE HOUSE,
May 18, 2001.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

May 18, 2001

EXECUTIVE ORDER

ACTIONS TO EXPEDITE ENERGY-RELATED PROJECTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to take additional steps to expedite the increased supply and availability of energy to our Nation, it is hereby ordered as follows:

Section 1. Policy. The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.

Sec. 2. Actions to Expedite Energy-Related Projects. For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

Sec. 3. Interagency Task Force. There is established an interagency task force (Task Force) to monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy. The Task Force also shall monitor and assist agencies in setting up appropriate mechanisms to coordinate Federal, State, tribal, and local permitting in geographic areas where increased permitting activity is expected. The Task Force shall be composed of representatives from the Departments of State, the Treasury, Defense, Agriculture, Housing and Urban Development, Justice, Commerce, Transportation, the Interior, Labor, Education, Health and Human Services, Energy, Veterans Affairs, the Environmental Protection Agency, Central Intelligence Agency, General Services Administration, Office of Management and Budget, Council of Economic Advisers, Domestic Policy Council, National Economic Council, and such other representatives as may be determined by the Chairman of the Council on Environmental Quality. The Task Force shall be chaired by the Chairman of the Council on Environmental Quality and housed at the Department of Energy for administrative purposes.

Sec. 4. Judicial Review. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit,

substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH

THE WHITE HOUSE,
May 18, 2001.

CEED

THE CENTER FOR ENERGY
AND ECONOMIC DEVELOPMENT

November 1, 2001

Via E-Mail, Facsimile And Overnight Courier

Chair
Council on Environmental Quality
Executive Office of the President
722 Jackson Place, NW
Washington, DC 20503

Attn: V. A. Stephens
Energy Project Streamlining Task Force

The Center for Energy and Economic Development (CEED) submits these comments to the Energy Task Force in response to the Council on Environmental Quality's Federal Register notice (66 FR 43586, August 20, 2001) requesting information on federal administrative regulatory programs that are believed to be "impediments to federal agencies' completion of decisions about energy-related projects" and "examples of permitting or other decision-making processes which should be improved or streamlined."

CEED is a non-profit organization formed by the nation's coal producing companies, railroads, a number of electric utilities, equipment manufacturers, and related organizations for the purpose of educating the public, including public-sector decision-makers, about the benefits of affordable, reliable and environmentally compatible coal-based electricity.

CEED respectfully calls the Task Force's attention to provisions contained in the Regional Haze Rules (RHR) promulgated by the U.S. Environmental Protection Agency (EPA) and the Federal Land Managers' (FLMs) Air Quality Related Values Workgroup (FLAG Report) being implemented by the National Park Service, U.S. Forest Service and U.S. Fish and Wildlife Service. CEED believes that both the RHR and FLAG stand to significantly and adversely impact the country's ability to achieve the President's National Energy Policy goals of increased production, transmission and conservation of energy. For these reasons and those set forth below, CEED believes both the RHR and FLAG are technically indefensible, impractical and unworkable. CEED respectfully requests that the Task Force urge EPA and the FLMs to either withdraw these programs or revise them in a way that is consistent with these comments.

A. FLAG

President Bush's May 16, 2001 National Energy Policy requires detailed policy coordination and review by federal agencies with respect to actions involving energy development. Further, the President's May 18, 2001 Executive Order entitled "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use" requires that federal agency actions must include an analysis and "Statement of Energy Effects" in their respective actions.

Attn: V. A. Stephens
Energy Project Streamlining Task Force
Chair
Council on Environmental
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November 1, 2001
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The FLAG process was adopted by the National Park Service, U.S. Forest Service and U.S. Fish and Wildlife Service in early January 2001, prior to the development of the National Energy Policy and Executive Order. According to FLAG documents, it became "effective" on April 1, 2001. FLAG claims to establish "consistent policies and processes both for identifying 'air quality related values' (AQRVs) and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I areas, (certain national parks and wilderness areas) and in Class II areas (all other federal, state and tribal lands)." AQRVs include such things as visibility, flora, fauna, soil and water quality. CEED believes that the FLAG process is neither consistent with the Federal Clean Air Act nor based on sound scientific principles. (See Attachment A.)

FLAG imposes additional air permitting requirements on new energy projects. As a result, it will add additional costs, project delays and result in potential permit denials. FLAG will do this because it establishes new "acceptability" values and metrics for determining "adverse impacts" and "limits of acceptable change" for AQRVs in the specified geographic areas. Substantial questions remain as to the scientific validity of these "acceptability" values.

Under the guise of a "guidance document," FLAG is instead a binding policy developed by the three FLM agencies to substantively function as a set of definitive regulatory requirements that mandate and compel additional analyses. Up until April 1, 2001, the legal standard which new projects had to meet was to model against the federal health standards and Class I increments – using methods prescribed by EPA at 40 CFR Part 51, Appendix W. (See Attachment A.) Now, under FLAG, additional modeling hurdles and thresholds have been erected by the three FLM agencies, without the benefit of rulemaking. Any new energy project will have to do air quality modeling to prove it will have "acceptable" impacts. As demonstrated by the attached map of the western United States, very little land mass (public or private) is not covered by FLAG's dramatic extension of federal jurisdiction (See Attachment B.) FLAG indicates that any failure to follow its prescribed process may result in "substantial delay" to a project.

This governance by guidance is very surreptitious -- but when the country is in the throws of a growing energy crisis it is even more worrisome when the "guidance" has such far-reaching impacts. FLAG did not go through rulemaking required by the federal Administrative Procedure Act and is therefore the type of government action (a substantive legal rule in the guise of a "guidance document") that the D.C. Circuit Court of Appeals, the court with principal national responsibility for judicial oversight of federal agencies like EPA and the FLMs, has repeatedly overturned because of due process circumvention. FLAG should, therefore, be withdrawn pursuant to the President's Executive Orders. In its place, an enhanced AQRV protection process should be developed notice and comment rulemaking under the federal Administrative Procedure Act, utilizing validated scientific principles and incorporated into EPA PSD regulations at 40 CFR Part 51, Appendix W.

Attn: V. A. Stephens
Energy Project Streamlining Task Force
Chair
Council on Environmental
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B. REGIONAL HAZE RULES

The RHR was published in the Federal Register on July 1, 1999 (64 Fed. Reg. 35714) and took effect on August 30, 1999. The RHR contains provisions of general national applicability for all states (§ 308) and alternative provisions (§309) by which states within the Grand Canyon Visibility Transport Commission ("GCVTC") region can opt to be governed.

Under the RHR, all states must calculate the uniform rate of progress in visibility (measured in deciviews) needed for each Class I area within the state to attain "natural visibility conditions" by the year 2064, as compared with a baseline period. Notably, the baseline period is defined as visibility impairment only on the 20% most and 20% least impaired days expressed as an annual average for the years 2000-2004.

The "60 year glidepath to natural conditions" and the measures needed to achieve it become the state's reasonable progress goal under CAA § 169A.

Each SIP under § 308 must include a ten-year, long-term strategy ("LTS") to achieve the reasonable progress goals. "The long-term strategy *must* include *enforceable* emissions limitations, compliance schedules, and other measures *as necessary to achieve* the reasonable progress goals established by states having mandatory Class I federal areas." SIP due dates under § 308 are timed in accordance with EPA's interpretation of the TEA-21 legislation. Under EPA's view there will be three years of air quality monitoring data development before states are required to submit attainment/nonattainment designations under the new PM_{2.5} standard (unless a state follows the earlier Annex time frame under § 309 discussed below). EPA will have one year to act on area designations. Regional haze SIPs for areas designated as "attainment or unclassifiable" for PM_{2.5} will be due one year after designation. Regional haze SIPs for areas designated as nonattainment for PM_{2.5} will be due three years after designation.

A principal component of the RHR is provisions respecting the Best Available Retrofit Technology requirement (BART) concerning SO₂, PM₁₀, and NO_x emissions for certain stationary sources placed in operation between 1962 - 1977. BART requires the analysis of several cost-benefit factors. EPA's "new" BART for regional haze provisions applies only to the first ten-year implementation period. States are given two options regarding "regional haze BART" for stationary sources:

RHR § 308(e)(4) allows as an "alternative" to mandating BART controls on BART-eligible sources, a state may substitute its participation in a regional emission trading program that at least includes all sources subject to BART. If selected, EPA requires a state to demonstrate that greater progress towards the reasonable progress goal will be made using a trading program "or other alternative measures" than through the alternative of requiring BART retrofits at BART-eligible

Attn: V. A. Stephens
Energy Project Streamlining Task Force
Chair
Council on Environmental
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plants, that the emissions reductions will be achieved during the first ten-year LTS period, and that the program is administratively feasible.

Western States have been given the limited option to be governed by requirements found in RHR § 309. Under the § 309 approach, the Western Regional Air Partnership (WRAP) submitted an "Annex" to EPA at the end of September, 2000. The Annex contains an SO₂ trading program for all SO₂ sources above 100 tpy in the western states. If approved, the Annex SO₂ trading program will serve as the model for visibility-related trading programs under the RHR throughout the country.

Because it stands to serve as a precedential visibility-related trading program, CEED wishes to bring to the Task Force's attention that following the development and submittal of the WRAP Annex to EPA, a growing state and federal dialogue emphasizing the need for a comprehensive energy policy capable of meeting present and future energy needs emerged and raised serious and substantial questions concerning the regional SO₂ emissions cap contained in the Annex. States like Colorado and stakeholders like CEED and others called for immediate action to be taken by the WRAP and EPA to better determine whether the Annex unrealistically and unnecessarily conflicts with any present or future demands for electrical power development. (See Attachments C and D, respectively.)

Like the State of Colorado, many western governors know that the answers to these questions will have far-reaching implications for their citizens in terms of lifestyle impacts, energy, economic and environmental considerations. Answering these important questions in a timely fashion would seem to be made all the more important since WRAP modeling has shown that the Annex SO₂ strategy will not achieve a humanly perceptible improvement in visual air quality in western Class I areas. In order to facilitate broad consideration of this important issue, CEED is providing the Task Force with a copy of an independent analysis that concisely summarizes one point of view. Attachment E was prepared by Energy Ventures Analysis who tracks new power plant construction for the National Electric Reliability Council. A similar point of view and concern has recently been expressed by the State of Colorado:

We have spent additional time reviewing the Annex since it was adopted by the WRAP last September. We have a better understanding of the Annex and remain concerned about the policy implications of adopting a backstop program to improve visibility in Class I areas that cannot demonstrate a perceptible improvement in visibility.

We are concerned that a state such as Colorado with high projected growth rates, could experience substantial difficulty in meeting the new source set aside over the long term. Colorado may eventually be subject to reliance on other states for power generation and be required to pay a premium for electric utility costs. We are concerned that new sources that

Attn: V. A. Stephens
Energy Project Streamlining Task Force
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Council on Environmental
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may be considering Colorado as a future location may be persuaded to locate elsewhere based on the need to purchase allocations in order to be permitted.

We are also concerned about the analysis to determine new source growth in the region for electric power generation and "other sources" given the pending discussions related to the development of a new energy policy for our country under the Bush Administration that would substantially increase the likelihood of new source growth in Colorado.

(See Attachment C.)

Given these concerns, CEED believes the Energy Task Force should investigate these issues and EPA should not approve a program that lacks any perceptible visibility benefit while potentially standing to significantly impair the ability of the western states to develop additional energy resources.

C. CONCLUSION

Processes such as FLAG and emissions cap and trade visibility programs that may create delay and confusion in the issuance of PSD permits and the development of new and cleaner energy sources and also has the potential to replace state discretion with federal authority as part of the permitting process is not appropriate. In order to achieve the goals and objectives outlines in the President's National Energy Policy Report, the Task Force should work with EPA and the FLMs to modify the RHR and FLAG, as suggested herein, so that these regulatory programs are sound from both a legal and policy standpoint and respect and follow the language of the federal Clean Air Act and congressional intent.

If you have any questions or would like to meet to discuss CEED's comments further, please contact the undersigned.

Sincerely,

Terry Ross
Western Regional Vice-President
**CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT**
Telephone: (303) 814-8714
E-mail: tross@ceednet.org

ATTACHMENT A
FEDERAL LAND MANAGERS' AIR QUALITY RELATED VALUES
WORKGROUP

I. Overview of the Regulatory Framework

New Source Review (NSR) is the federal CAA permitting program that regulates the construction of major new stationary sources and major modifications. NSR regulations require new major stationary sources and major modifications at existing major stationary sources to obtain permits, perform health and visibility/air quality impact analyses, and install stringent air pollution control equipment for new construction at the plants. NSR consists of more than one distinct sub-program: PSD for areas in attainment with health-based National Ambient Air Quality Standards (NAAQS), and Non-attainment NSR (NNSR) for those that are not in attainment with NAAQS. The NSR program involves a complex set of regulations (40 CFR Parts 51, 52, and 60) and EPA guidance documents that began with, and have evolved since, the 1970 Clean Air Act Amendments.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR 52.21 which is part of the federal PSD program that applies as part of a federal implementation plan (FIP) for states that have not submitted a PSD program meeting the regulatory requirements of 40 CFR 51.166 - the other set of regulations which contains standards for PSD provisions in state implementation plans (SIPs). Many states have an EPA-approved PSD program, pursuant to an EPA-approved SIP.

In §§ 161 and 165 of the federal CAA, Congress specifically delineated the roles of EPA, the Federal Land Manager (FLM) and the states in issuing PSD permits for sources located near Class I areas. Under this program, a complete permit application must include, among other things, an air quality analysis showing compliance or noncompliance with the Class I increments. A permitting authority must act on a complete application within one year of filing. See, CAA § 165(c).

Upon the filing of a permit application for a source that may affect a Class I area, the permitting authority must provide notice of the application to the FLM. The FLM may then consider, whether a proposed major emitting facility will have an adverse impact on the AQRVs of such areas. CAA § 165(d)(2)(A) and (B). Where the emissions from the proposed source are not projected to cause or contribute to an increment exceedance, nothing more is required of the permit applicant unless the FLM demonstrates "to the satisfaction of the State" that the source "will have" an adverse impact on an AQRV, and the Governor of the state (or, on appeal, the President) does not overrule the FLM. See, CAA § 165(d)(2)(C)(ii).

By contrast, where the applicant's emissions would cause or contribute to an increment exceedance, the FLM must "certify" that no adverse impact on an AQRV in the Class I area would result before "the State may issue a permit." See, CAA § 165(d)(2)(C)(iii). In this latter case, if the FLM denies a certification, that decision may be reversed by the President if the applicant shows "to the satisfaction of" the Governor of the state that the proposed facility will not have an adverse effect on AQRVs and the President determines that issuance of a permit is in the national interest.

Under the CAA, the AQRV demonstration – whether undertaken by the FLM or the

applicant – is to take place in accordance with rules issued by EPA. Under CAA § 161, EPA is obligated to adopt rules addressing such "measures as may be necessary" to guide states in implementing the PSD program. Under CAA § 165(e), EPA must issue regulations addressing the nature of ambient air quality analyses to be performed in support of a permit, and must identify by rule scientifically credible modeling techniques that can evaluate the effect of emissions from new sources on visibility and any other AQRV. For the PSD program to work as envisioned by Congress,¹ any AQRV protection efforts should be in the context of how the statute and EPA regulations call for those demonstrations.

II. THE RECENT FLAG PROCESS

A. What is FLAG?

As indicated, the FLAG process was adopted by the National Park Service, U.S. Forest Service, and U.S. Fish and Wildlife Service in early January 2001 and became "effective" on April 1, 2001. FLAG claims to establish "consistent policies and processes both for identifying [AQRVs] and for evaluating the effects of air pollution on AQRVs, primarily those in Federal Class I areas, (certain national parks and wilderness areas) and in Class II areas (all other federal, state and tribal lands)." AQRVs include such things as visibility, flora, fauna, soil and water quality.

The FLAG process requires a project applicant to submit an analysis for FLM review containing a defined set of assessments that are stated to be the only way in which an FLM will potentially comment on a proposed project. FLAG establishes several prescriptive definitions and standards that are to be applied by the FLMs. Some of these prescriptive FLAG requirements are:

- Extends impact assessments beyond Class I Wilderness Areas to Class II areas (all other federal lands).
- Requires the use of a yet-to-be-approved model (CALPUFF) in the context of FLAG visibility impact determination criteria for determining whether a project represents an "unacceptable adverse impact."
- Establishes a defined threshold for requiring an applicant to conduct a regional or multi-source cumulative air quality impact study before determining the "acceptability" of that individual source.
- Establishes a procedure on how an applicant must calculate "deposition" effects and leaves "acceptability" judgments up to a particular FLM. The FLAG process requires an applicant to obtain and use model input values from the FLMs, such as ozone and ammonia, that are necessary in order to run the FLAG-required model.

¹ As Congress observed, "[t]he States and Federal agencies must do "all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. Nothing could be more detrimental to the intent of this section and the integrity of this act than to have the process encumbered by bureaucratic delay." S. Rep. No. 127, 95th Cong., 1st Sess. 32 (1977).

- Establishes “natural conditions” values for each Class I area in the U.S. Establishes “acceptability” values (“critical loadings” and “limits of acceptable change”) for specific AQRV’s and areas. In determining “acceptability” FLAG requires the use of a screening model that ignores circumstances such as wind direction and differences in topography (elevation) when assessing the potential (and “acceptable”) impacts of a source on a Class I area.

B. FLAG Imposes New and More Stringent Requirements for Permit Applications Than Those Contained in the CAA

Under the guise of a “guidance document,” FLAG is instead a binding policy developed by the three FLM agencies to substantively function as a set of definitive regulatory requirements that mandate and compel additional analyses. Up until April 1, 2001, the legal standard which new projects had to meet was to model against Class I increments. Now, under FLAG, additional modeling hurdles and thresholds have been erected by the three FLM agencies, without the benefit of rulemaking. Any new project will have to do air quality modeling to prove it will have “acceptable” impacts, and FLAG indicates that any failure to follow its prescribed process may result in “substantial delay” to a project.

Given the prescriptive nature of the FLAG process and how it is being implemented, FLAG is not simply the FLMs’ efforts to generally inform states and permit applicants of a tentative position the FLMs intend to take in future proceedings. Instead, FLAG establishes legal standards that affect future permit applicants rights and responsibilities through the FLMs’ articulation of what is required to satisfy their view of required elements of NEPA planning or a PSD permit – *i.e.*, the legal norm necessary to avoid an adverse FLM recommendation and/or suggested veto of a proposed permit.² Further, the FLMs have stated their intent that FLAG work as a component part of an integrated regulatory process that includes other federal rules such as EPA’s existing Regional Haze Rule and forthcoming New Source Review Reform rule.

Moreover, FLAG reserves to the FLM the authority to determine the completeness of an application while the studies on AQRVs that the FLM has prescribed are undertaken by the permit applicant. As a result, the FLM can, through information requests to the applicant, circumvent the requirement that applications be acted on within one year.

The expansion of an FLM role to include Class II areas does not find support in the Clean Air Act. The CAA visibility program protects mandatory Class I areas, which are the federal Class I areas specified in CAA §162(a). Soon after the adoption of the 1977 CAA Amendments, the Secretary of the Interior identified, in consultation with other FLMs, those mandatory Class I areas where visibility is an important value. See 43 Fed. Reg. 7721 (1978). EPA reviewed that list and

² See, e.g., “Only the threat of remand of a permit or revocation of [permitting] authority will get the attention of some state and local programs.” Memorandum from Don Sheperd (NPS) to John Bunyak (NSP), Dennis Crumpler (EPA), and Lew Nagler, dated December 4, 1998. (emphasis added)

concluded that visibility is an important value for 156 of the eligible 158 mandatory Class I areas. See 44 Fed. Reg. 69,122 (1979). Two wildernesses, Rainbow Lake (Wisconsin) and Bradwell Bay (Florida), were excluded. The list of the 156 mandatory Class I areas is codified at 40 CFR Part 81, Subpart D. Each mandatory Class I area is the responsibility of the FLM with authority over such lands (e.g., the Secretary of Agriculture for U.S. Forest Service lands and the Secretary of the Interior for National Park Service and U.S. Fish and Wildlife Service lands). See CAA § 302(i).

If one were to compare a map of Class II areas with a map of Class I areas, one would see that FLAG creates a mechanism for significant program expansion. Such an expansion goes beyond what Congress authorized. In fact, Congress has made clear that EPA or the FLMs are prohibited from requiring "the use of any automatic or uniform buffer zone or zones" around mandatory federal Class I areas. See, CAA §169A(e). Further, specific congressional action is required before non-federal property can be regulated in accordance with the Property Clause of the federal Constitution (Article W, § 3, Clause 2). While it has not done so, Congress may always specifically designate newly created parks and wilderness areas or other federal lands as mandatory Class I federal areas.

C. FLAG Shifts the Burden of the AQRV Analysis

While Congress gave the FLMs the "affirmative responsibility" to protect AQRVs – those attributes in a mandatory federal Class I area that could be affected by a degradation of the ambient air quality, Congress gave to the states the authority to decide when an AQRV in a Class I area will be adversely impacted by emissions from a new or modified major source. Although the FLMs have an affirmative duty to review applications for such proposed facilities and may attempt to demonstrate to the state that an adverse effect to an AQRV in a Class I area will occur, the demonstration must prove the adverse effect "to the satisfaction of the State." See CAA § 165(d)(2)(C)(ii). The FLAG report, however, defines "adverse impact" on an AQRV as "an unacceptable effect, as identified by an FLM, that results from current, or would result from predicted, deterioration of air quality in a Federal Class I or Class II area." (Emphasis added.) FLAG Phase I report (December 2000) p. 15.

The express state – FLM relationship set out by Congress in CAA § 165 has long been recognized in EPA regulations (40 CFR 52.66(p)(3) and (4)) and enforced by EPA administrative law judges. See In Re: Hadson Power, 4 E.A.D. 258 (E.A.B 1992), See also In Re: Old Dominion Electric, 3 E.A.D. 779 (E.A.B. 1992) (State must give reasonable consideration to FLMs' adverse impact assertions, but the [state] permitting authority has final determination, and the permitting authority's discretion takes precedence if it was not exercised in an arbitrary or capricious manner).

Under the CAA, if there is compliance with the NAAQS and PSD increments, the FLM must demonstrate that the proposed facility will have an adverse impact on an AQRV. That demonstration must provide proof not merely of a risk of harm, but of demonstrable harm to an AQRV caused by the pollution from a new source. Despite the CAA's detailed statutory scheme, FLAG establishes a different process with requirements that obviate the role of the existing (or future) Class I increment standards. In doing so, FLAG always imposes on the permit applicant the burden of demonstrating "no adverse impacts" of AQRV's– even if there is no exceedance of the applicable increment. If the FLMs are concerned that the Class I increments for Class I Areas are not adequately protecting AQRVs, the federal CAA already provides EPA with the authority to

develop additional welfare-based standards as only the Administrator of the EPA can promulgate regulations under the federal CAA. In the absence of utilizing that lawful and available approach, the FLMs cannot unduly assert themselves when no potential increment violation is shown. Nevertheless, FLAG requires, under certain defined circumstances, that an individual source conduct a cumulative modeling assessment. However, CAA §165(d) expressly sets out that the AQRV determination is for an individual source's impacts on any AQRV or increment – not a group of sources in a region beyond the realm of an individual project.

If left unchecked, the FLAG approach to PSD permitting has three practical implications for permit applicants and state permitting authorities. First, permit proceedings will take far longer than the one-year period anticipated by Congress, because state permitting authorities and applicants will have to attempt to divine what analyses are needed in response to the FLM's "speculative" notice of potential adverse effects, and the applicant must then conduct those analyses – even in the absence of adequate data and analytical techniques. In addition, these concerns may be amplified when one adds in the Class II issues that presumably come into play with an FLM certification.

Second, whereas the FLMs are assigned the burden of demonstrating "to the satisfaction of the State" that a proposed source "will have" an adverse effect on an AQRV (where there are no PSD increment exceedances), FLAG would place the burden of performing this analysis in the first instance on the applicant. This burden is likely to be difficult to meet given that the FLM's adverse impact allegations may be "speculative," and that the applicant's response must be "comprehensive" even in the face of inadequate data and analytical techniques.

Third, the FLM is given a decision-making role that preempts the authority of the state permitting agency. That is, because the FLM must identify AQRVs and define whether there are "adverse impacts" on those AQRVs, the FLM dictates not only what analyses must be performed, but ultimately whether a proposed source can be constructed without undertaking mitigation measures that may also be dictated by the FLM. Such a subjective standard is inconsistent with what Congress authorized where a permitting authority (state or EPA) was given the task of balancing the various issues – it did not give the FLMs a veto (either expressly or indirectly by allowing them to develop a process like FLAG).

June 21, 2001

Via Hand Delivery

Robert E. Brady
Chairman
Colorado Air Quality Control Commission
4300 Cherry Creek Dr., S.
OED-OPPI-A5
Denver, CO 80246-1530

Chairman Brady and Commissioners:

I regret that I am not able to participate in the Commission's informational hearing today on regional haze, given that I have a pre-existing commitment. The visibility issues you are considering are very important to the Center for Energy and Economic Development ("CEED"), and we have a longstanding involvement in them. As such, I wanted to bring an issue to the Commission's attention, as I attended the Western Regional Air Partnership's May 23, 2001 meeting in New Mexico.

Prior to the WRAP meeting, CEED requested that the WRAP assess whether the proposed emission trading program adversely impacts the future development of new electricity generating facilities in western states, including Colorado. CEED pointed out the need for such a study, based upon initial concerns and questions raised by the North American Electric Reliability Council (attached).

Unfortunately, CEED has not received a response to its request or the attached assessment. In any event, CEED believes this information is useful to the Commission as it assesses which regional haze program to develop and implement in Colorado. Thank you for this opportunity to comment.

Sincerely,

Terry Ross
Regional Vice-President

Enclosure

CEED

**THE CENTER FOR ENERGY
AND ECONOMIC DEVELOPMENT**

November 2, 2001

James M. Souby
Executive Director
Western Governors Association
1515 Cleveland Place Suite 200
Denver, CO 80202-5114

Dear Mr. Souby:

We understand that the Western Regional Air Partnership's upcoming May 23, 2001 meeting in Pueblo of Acoma, New Mexico includes an agenda item entitled "Update on Energy and Air Quality Issues." It appears there will also be much discussion focused on the Annex the WRAP previously submitted to EPA. As you know, the growing state and federal dialogue emphasizing the need for a comprehensive energy policy capable of meeting present and future energy needs has raised questions concerning the regional SO₂ cap in the Annex and exactly what steps must now be taken to better determine whether the Annex unrealistically and unnecessarily conflicts with any future demands for electrical power development.

Many western governors know that the answers to these questions will have far-reaching implications for their citizens in terms of lifestyle impacts, energy, economic and environmental considerations. Further, answering this important question in a timely fashion would seem to be made all the more important since WRAP modeling has shown that the Annex SO₂ strategy will not achieve a humanly perceptible improvement in visual air quality in western class I areas. In order to facilitate broad consideration of this important issue prior to the WRAP meeting, I wanted to provide you with a copy of a recently prepared independent analysis that concisely summarizes one point of view. The attached was prepared by Energy Ventures Analysis who tracks new power plant construction for the National Electric Reliability Council.

Many interested stakeholders look forward to the discussion of this and other important issues at the upcoming WRAP meeting.

Sincerely,
CENTER FOR ENERGY AND ECONOMIC
DEVELOPMENT

Terry Ross
Western Regional Vice-President

cc: State Air Directors
Staff Council
WRAP Participants

total 19,605 TPY. These announced plants are expected to come online prior to 2008 and would far exceed the estimated 6,000 TPY new source set-aside.

This analysis suggests that the WRAP emissions cap will likely have adverse effects on Western power prices by not allowing for the most cost-efficient power generation to be built. If coal-fired generation were capped, higher cost alternatives would have to be developed to meet the regions growing power needs. This shift could also create other energy policy challenges (natural gas transport, reliability risks from reduced fuel diversity, etc.) and other environmental issues.