**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

March 9, 2011

Ms. Sheila C. Holman
Director
Division of Air Quality
North Carolina Department of
Environment and Natural Resources
1641 Mail Service Center
Raleigh, North Carolina 27699-1641

Dear Ms. Holman:

As we discussed recently with you and your staff, the U.S. Environmental Protection Agency (EPA) has determined that it is important that we clarify our interpretation and expectations regarding Federal Land Manager (FLM) notification and visibility assessment requirements applicable to proposed new and modified sources subject to the Clean Air Act's New Source Review (NSR) program. We appreciate the investment of your time in trying to resolve these complex issues as well as your commitment to implement these requirements in accordance with EPA's interpretation of the applicable federal regulations and North Carolina's approved state implementation plan (SIP). There are, however, some statements made by the North Carolina Department of Environment and Natural Resources (NC DENR) in its recent filing with the North Carolina Environmental Management Commission (EMC) ("Respondent's Written Exceptions and Argument") and the presentation entitled "PSD Permitting – The State Program, EMC Meeting- March 10, 2011" that do not accurately reflect EPA interpretations of its regulations. Therefore, we have concluded that it is in the best interest of all concerned for EPA to explain exactly how it expects North Carolina as well as other states to implement the FLM notification and visibility assessment requirements.

Regarding North Carolina's obligation to notify the FLM of any proposed new major sources or major modifications to existing sources that "may affect" visibility as required pursuant to 40 C.F.R. § 307(a)(1), we recognize and appreciate that NC DENR has committed to provide the FLM with timely notice of any such proposed source. As we discussed, EPA expects NC DENR to interpret the phrase "may affect" as it appears in North Carolina's SIP (and in NC DENR's recently promulgated revisions at 15A NCAC 02D.0530(t)(2) and 15A NCAC 02D.0531(m)(3)) consistent with the interpretation provided in EPA's New Source Review Workshop Manual (draft, Oct. 1990). Specifically, a proposed new or modified source "may affect" visibility in a Class I area if it would be located within 100 kilometers (km) of a Class I area, or if the source would be located further than 100 km from a Class I area but other factors (such as the proposed source's size) raise concerns about potential visibility impacts. Under such circumstances, EPA expects NC DENR to provide the FLM with written notification of the

proposed new or modified source "within 30 days of receipt of and at least 60 days prior to public hearing by the State on the application for a permit to construct." *See* 40 C.F.R. § 51.307(a)(1). EPA disagrees with the interpretation of "may affect" provided by NC DENR to the EMC in its recent briefing, specifically, that the term "may affect" is synonymous with "has the potential to exceed a Class I increment." *See* Respondent's Written Exchange and Argument, p. 4; *see also* pp. 20-26. The FLM notification requirement is not related to or contingent upon the analysis performed to determine whether the Class I increment is exceeded.

As we discussed on a recent call with your staff, EPA's regulations instruct that the FLM notification described above must "include an analysis of the anticipated impacts on visibility in any Federal Class I area." *See* 40 C.F.R. § 51.307(a)(1). This analysis involves an assessment of how a proposed new or modified source's emissions would affect visibility as compared against what visibility would be in a Class I area under *natural* conditions. The requirement that the visibility assessment evaluate the source's impact on natural conditions is clearly stated in EPA's regulations. Specifically, the regulations define "adverse impact on visibility" as "for purposes of section 307, *visibility impairment* which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area." 40 C.F.R. § 51.301 (emphasis added). The term "visibility impairment" is defined as "any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) *from that which would have existed under natural conditions*." *Id.* (emphasis added). Finally, "natural conditions" is defined as "naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration." *Id.* In sum, under the plain language of the federal regulations, the required assessment of a proposed new or modified source's visibility impacts must involve an analysis of how the project's emissions would impact natural conditions. The regulatory provisions quoted above are expressly incorporated into North Carolina's SIP and are binding on NC DENR.

EPA disagrees with NC DENR's contention in its briefing to the EMC that EPA requires the adverse impact analysis to be "based on current background visual range conditions." *See* Respondent's Written Exchange and Argument, p. 5. As explained above, EPA's regulations unambiguously require that the visibility assessment involve an analysis of the project's visibility impacts as compared to "that which would have existed under natural conditions." This does not mean, however, that current conditions are irrelevant to the ultimate determination of whether the visibility impairment caused by a proposed new or modified source rises to the level of an "adverse impact on visibility." As provided in EPA's regulations, such a determination involves a broad examination of whether any visibility impairment would "interfere[] with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area." 40 C.F.R. § 51.301. Current visibility conditions may be relevant to that determination. Furthermore, even if the FLM ultimately concludes that a proposed new or modified source will have an adverse impact on visibility, the state retains the right to decide differently and authorize the source's construction. *See* 40 C.F.R. § 51.307(a)(3). In making such a decision, the State can consider current visibility conditions.

Finally, please note that in accordance with EPA's regulations, it is the State's responsibility to provide the FLM with modeling results demonstrating a project's anticipated visibility impacts as measured against natural conditions. *See* 40 C.F.R. § 307(a)(1). The State

must provide such information to the FLM at the time that it provides the FLM with notice of the proposed new or modified source. *See, id.* North Carolina's SIP-approved NSR regulations instruct that this analysis shall be "provided by the source." *See* 15A NCAC 02D.0530(q)(1) (EPA approval date Oct. 15, 1999) and 15A NCAC 02D.0531(i)(2) (EPA approval date Nov. 10, 1999).

Thank you for your willingness to work together with EPA and the FLM to ensure that the construction of new major sources or major modifications to existing sources will not result in an adverse impact on visibility in any Class I area. We are hopeful that improved communication amongst the three agencies regarding their expectations with respect to the protection of visibility and other air quality related values will avoid any future misunderstandings.

Sincerely,

Beverly H. Banister

Beverly H. Banister
Director
Air, Pesticides and Toxics
Management Division

cc: Sandra Silva, Chief,
Branch of Air Quality, FWS