



North Carolina Department of Environment and Natural Resources

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December 1, 2014

EPA Docket Center  
U.S. Environmental Protection Agency (EPA)  
Mail Code 28221T  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Attn: Docket No. EPA-HQ-OAR-2013-0602

Subject: Comments on Proposed Rulemaking – Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Sir/Madam:

The North Carolina Department of Environment and Natural Resources (NCDENR) is providing comments on the proposed rule “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units” published in the *Federal Register* on June 18, 2014 (79 FR 34830). NCDENR believes EPA’s proposed rules under § 111(d) to reduce carbon dioxide emissions from both power plants and beyond power plants is legally and technically flawed. EPA appears to recognize the legal vulnerabilities by proposing to make each of the “building blocks” independently severable – as if realizing they will be vacated by the Court during judicial review. NCDENR offers the following comments on the proposed rule and trusts that the input will be considered as EPA develops the final rule.

“Legal Trigger” for State Plan Submittals

While there are a number of technical and legal issues in the proposed rule, the issue that I want to begin with is limited state resources. If this rule is finalized in its current form, states will be immediately required to amend not only their state air programs, but will be required to fundamentally restructure the state’s entire energy generation and delivery system. This significant undertaking will run parallel with judicial review of this rulemaking. States have been through several exercises where EPA’s legal interpretations have resulted in states taking actions to satisfy a federal rule that is later determined by the Courts to be illegal. Look no further than the Clean Air Mercury Rule (CAMR) and the Clean Air Interstate Rule (CAIR). A more recent example is the Prevention of Significant Deterioration (PSD) Tailoring Rule for GHG permitting.

The final rule, whatever form it ultimately takes, should not require states to begin taking action until the completion of judicial review. This is to preserve the state’s limited resources and ensure that actions taken in response to the EPA rule will not be for naught. NCDENR is calling this approach a “legal trigger” deadline, and we urge the EPA to respect their state partners and include this provision in the final rule’s implementation schedule. Finally, NCDENR urges that the final

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compliance deadline be tolled by the litigation timeframe, similar to how EPA handled the implementation of the Cross State Air Pollution rule following the U.S. Supreme Court decision.

### NCDENR Legal Concerns with Proposed Rule

With respect to the significant legal issues associated with the currently proposed rule, NCDENR sent a letter to EPA Administrator Gina McCarthy on January 27, 2014 with its various legal concerns outlined in a principles document attached to the letter. The letter and principles document are also attached to these comments in Appendix A so that they will be part of the official record. Since that time, North Carolina has identified more legal faults in the proposal. The following discussion briefly outlines NCDENR's legal concerns with the proposed rule.

- 1) EPA's current proposal to regulate *new* fossil fuel-fired electric utility units under section 111(b) of the Act is based on its finding that carbon capture and sequestration (CCS) has been adequately demonstrated. CCS has not been adequately demonstrated. Far from having been demonstrated, there is uncertainty with respect to even the feasibility of the separation technology on a commercial scale as well as continued concerns about the availability of geologic formations for subsequent sequestration. The legal implication is critical since EPA is barred from implementing an existing source rule under 111(d) without having successfully promulgated a new source standard under 111(b).
- 2) Section 111(d) prohibits the overlap of 111(d) with two other programs in the Act. Section 111(d) prohibits EPA from regulating pollutants from source categories regulated under sections 112 as well as pollutants regulated under that program. In 2011, EPA issued regulations under section 112 applicable to fossil fuel-fired electric generating units, thereby foreclosing regulation under section 111(d). In the past, EPA has suggested that the provision which was the culmination of both Senate and House amendments represents a conflict in the statutory language of section 111(d) with regard to whether the 112 prohibition was pollutant specific or source category specific. NCDENR disagrees with this assertion, as there is no internal conflict in section 111(d). Prior to 1990, section 112 was a pollutant-specific program. In 1990, the structure of section 112 was changed from a program that regulated *pollutants* to one that regulates *source categories*. To prevent overlap with the newly structured 112 program, Section 111(d) was augmented to exclude not only section 112 pollutants, but also section 112 regulated source categories. The two exclusions are entirely self-consistent and should not be used to invoke *Chevron* deference. This question has been considered in the litigation of EPA's Clean Air Mercury Rule in 2007. NCDENR agrees with Natural Resource Defense Council (NRDC) who also argued in that case that the text of Section 111(d)(1)(A) prohibits EPA from regulating a pollutant that is "emitted from a source category which is regulated under section 112." Regarding *Chevron* deference, NCDENR also agrees with NRDC when they argued the perceived ambiguity was "manufactured" by EPA in an "attempt to exploit a non-substantive difference between the two amendments to 111."
- 3) Additionally, NCDENR cautions EPA from reading the Supreme Court's decision in *AEP v. Connecticut* to grant EPA the authority to regulate GHGs under section 111(d). Dicta in that

case regarding the suitability of § 111(d) in regulating GHGs was based on an erroneous paraphrase of the relevant statute. In addition, that decision was issued prior to EPA's regulation of electric generating units under § 112.

- 4) While NCDENR takes no position on whether EPA should establish a NAAQS for greenhouse gas emissions, the agency is concerned that a CAA § 111(d) action is prohibited because GHGs have constructively been listed under CAA § 108. As a result of the EPA's Title II rulemaking, all of the conditions precedent to list greenhouse gases under CAA § 108 appear to have already been met. NCDENR agrees with arguments made by the Sierra Club in *NRDC v. Train (1976)* when the Sierra Club succeeded in forcing EPA to define a NAAQS for lead under substantially similar facts.

In that case, as is the case now, EPA has made an endangerment finding under Title II of the CAA. Second, EPA found then for lead, and found now for GHGs, that both are emitted from numerous or diverse mobile or stationary sources. The court in *NRDC v. Train (1976)* found that once the first two provisions under § 108(a)(1) are met, the third provision is constructively satisfied. Because all three criteria under § 108 are satisfied, EPA is prohibited from regulating GHGs under § 111(d).

- 5) In cases where EPA does have the authority to establish emission guidelines under section 111(d), that authority is limited. EPA can only establish a unit-specific guideline that describes what control technologies have been demonstrated. NCDENR agrees with the Sierra Club when it argued in *Asarco v. EPA (1978)* that § 111 of the CAA cannot be applied to a combination of facilities within a plant site or the plant site as a whole. It certainly cannot be expanded to include facilities outside the plant site, or to source categories outside the proposed § 111(d) source category. The plain language of the Act as well as legal precedent precludes EPA and States from implementing building blocks 2, 3, and 4 – all designed to require emission reductions outside of the affected emissions unit.
- 6) EPA's economic justification for the proposed rule relies heavily on the reductions in a § 108 pollutant (PM) that EPA believes will result as a corollary of forcing America's electric generation to convert substantially to natural gas. In other words, EPA is relying on the regulation of a § 108 pollutant to justify a rule under § 111(d) – a provision that explicitly prohibits regulation of a § 108 pollutant. EPA must defend the regulation of GHGs based on the benefit of reducing GHGs.
- 7) In defining a specific rate for each state and then mandating each state meet that predetermined rate, EPA runs counter to the U.S. Constitution. In *D.C. v. Train* 521 F. 2d 971 (CADC 1975), *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1977). These cases stand for limitations the Constitution places on Federal agencies when they seek to press state governments into federal service. The

proposal may include placatory language about flexibility of the states, but the underlying mandate each state is given is clear.

Finally, on an equitable issue, EPA has defined reductions on a state-by-state basis. The basis was the existing power generation technologies and policies unique to each state. For example, some states relied more on nuclear generation, while others relied more on coal combustion for their generation. EPA then based each state's CO<sub>2</sub> reduction requirement on each state's natural gas electricity generation, nuclear generation, biomass generation, solar generation, wind generation, policies that incentivize energy efficiency, and policies that reduce consumption of electricity through demand side management. Since EPA based the potential improvements on the current energy portfolio, the resultant rule has the outcome of requiring the smallest CO<sub>2</sub> reductions from states with the highest coal usage. This outcome is a direct result of EPA's use of source categories for compliance other than that regulated by the proposed standard, *i.e.*, fossil fuel-fired power plants.

NCDENR believes the Clean Air Act's § 111(d) for affected electric generating units (EGU) should simply apply to each affected unit taking into account the statutory factors such as technical feasibility, cost of achieving reductions, and the remaining useful life of the unit to determine what the best system of emission reduction should be.

With that being said, and in no way prejudicing the legal arguments above, NCDENR is commenting on the rule in its totality, recognizing the various technical and policy concerns with each of the building blocks in the proposed rule.

#### NCDENR Policy Concerns with Proposed Rule

In the proposed rule and in numerous meetings and webinars, EPA continues to emphasize that states have significant flexibility in deciding how to construct a plan to meet the state mandates. However, the reality is that the assumptions included in the calculation for each building block are quite aggressive, leaving little flexibility in the final state plans. NCDENR offers the following suggestions for bringing true flexibility to the states as the 111(d) plans are developed. First, NCDENR recommends eliminating the interim goals. The beginning interim year of 2020 is very aggressive, when considering the final rule will be issued in June 2016, with most states expected to take the allowed two years to develop an individual state plan or three years to develop a multi-state plan. This would mean EPA review of the plan would not be completed until 2019 or 2020 for a multi-state plan. There is little time for compliance with the interim goal by 2020.

Next, NCDENR recommends that after removing the unlawful reductions associated with natural gas dispatching, renewable energy generation, and energy efficiency/demand side management offsets, EPA only requires states to meet the final alternate state goals for 2025 or the final state goals for 2030. Further, NCDENR recommends that EPA allow each state to decide whether to plan for the 2025 alternate final state mandate or the 2030 final state mandate.

Similarly, NCDENR recommends that EPA use the renewable energy (RE) goal established in a state's renewable energy portfolio standard (REPS), if one has been adopted, rather than make

arbitrary adjustments to such REPS in the setting of a state's goal. For those states that have not adopted an REPS, NCDENR recommends EPA allow states to choose between the RE goal as proposed or the alternative RE goal as outlined in the proposal. The states can determine which calculation approach is most appropriate for their given situation.

Finally, NCDENR recommends that EPA incorporate a multi-year averaging approach to develop a baseline (*e.g.*, 2010-2012). This approach would be more defensible since it would cover a longer time period and be less sensitive to normal variations from outages, weather, fuel costs, and dispatching. It would also allow states to account for significant reductions already achieved. These various recommendations will allow states to evaluate the final goals and make decisions on the necessary plans by providing some flexibility to the states in what is contained in the plans.

#### NCDENR Technical Concerns with Proposed Rule

Appendix B contains NCDENR's response to EPA's various requests for comments throughout the proposed rule. Appendix B is in a table format with the EPA request for comment on the left and the NCDENR response on the right. Also included in the table is the Federal Register notice page reference.

#### NCDENR Technical Concerns with Goal Calculation for North Carolina

In reviewing the spreadsheet and the inherent calculations EPA relied on to establish the state goals for North Carolina, NCDENR discovered a number of errors or incorrect assumptions in the calculations. Appendix C provides details on these errors. NCDENR does not believe the proposed Building Block 1 is consistent with section 111(d) of the CAA as it arbitrarily defines improvements in heat rates without regard to the statutory factors. EPA has taken a simplistic "one size fits all" approach to a complicated case-by-case engineering analysis. Additionally, NCDENR does not believe that Building Blocks 2-4 are legally authorized under the CAA. However, information on these three building blocks is included in the comments. NCDENR trusts that EPA will make the recommended corrections as outlined in Appendix C so that the final goals for North Carolina will be based on correct assumptions. Two major areas of concern include the assumptions for existing and under construction natural gas combined cycle capacity and the misrepresentation of the state's Renewable Energy and Energy Efficiency Portfolio Standard. However, the comments in Appendix C contain issues on the four building blocks, and all need to be addressed in order to establish an accurate and more technically sound state goal for North Carolina. Additionally, NCDENR is providing technical comments on the Technical Support Document addressing the conversion from a rate-based to a mass-based goal for CO<sub>2</sub>.

One area we want to bring to your attention is that EPA unlawfully imposes a standard for affected existing EGUs that is more stringent than the standard for new EGUs. Compared to North Carolina's mandatory final goal of 992 lb/MWh, the proposed new source performance standard for a new coal unit is 1,000 – 1,050 lb/MWh and for a new gas unit is 1,100 lb/MWh. EPA's logic implies that a new fossil unit in North Carolina, which can only be constructed using the absolute best control technology, requires a far less stringent compliance requirement than existing units. There is no legal or rational basis to set North Carolina's mandatory goals for existing units below

the standards required for new units. To remedy this flaw, EPA should simply recognize the case-by-case analysis based on the statutory factors provided under Section 111.

#### NCDENR Comments on the Notice of Data Availability

The release of the Notice of Data Availability on October 30, 2014 has not allowed states enough time to fully evaluate and comment on the options. However, NCDENR offers the following comments.

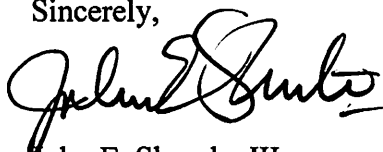
In the Notice of Data Availability (NODA) related to the proposed Clean Power Plan, EPA has requested comment on the glide path, whether a phase-in of Building Block 1 (BB1) and BB2 would be appropriate. For states like North Carolina that have already achieved high heat rate improvements (HRI), as documented in the technical comments section, there exists little to no room for further HRI in the next few years. NCDENR does not support the concept of a glide path, and believes that a state should not be denied the right to meet the final goal through infrastructure changes such as extending the life of a nuclear plant or conversion from coal to gas late in the 2020-2029 performance period (were those mechanisms found to be legally authorized).

EPA is also seeking comment on the NODA whether to allow credit for early reductions, which could provide flexibility to defer other emission reductions until later in the 2020 to 2029 period. NCDENR supports all measures to give credit for early reductions. Additionally, our proposed idea of requiring only the final goal enables additional infrastructure improvement projects (e.g., natural gas pipeline expansion or transmission improvements) to be incorporated into a long term schedule rather than adhering to an arbitrary phase-in schedule established by the EPA.

Other aspects related to the NODA (e.g., useful life of EGUs with pollution controls, co-firing with natural gas, regional approach to RE, alternative baseline year) have been addressed in this letter and supporting documents and are not repeated here.

Thank you again for the opportunity to comment on this proposed rule. I trust that the comments will be considered as EPA prepares the final rule. If you have any questions regarding our comments, please contact Sheila Holman of my staff at (919) 707-8430 or [Sheila.holman@ncdenr.gov](mailto:Sheila.holman@ncdenr.gov).

Sincerely,



John E. Skvarla, III  
Secretary, NCDENR

Attachments