

**N.C. Department of Environment & Natural Resources Comments on EPA's Proposed Rules for Controlling Greenhouse Gas Emissions under the Clean Air Act, Section 111(d)**

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Good evening. My name is Sheila Holman and I am the Director of the Division of Air Quality in Department of Environment and Natural Resources, or NCDENR. I am here to provide comments regarding the proposed guidelines for greenhouse gases (GHGs) from existing power plants on behalf of NCDENR. NCDENR believes EPA's proposed rules under §111(d) to reduce GHGs 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.

While there are a number of technical and legal issues in the proposed rule, the issue that I wanted 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 shaky 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 rulemakings from the Clean Air Interstate Rule and the Clean Air Mercury Rule. A more recent example is the PSD Tailoring Rule.

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 any final rule.

With respect to the significant legal issues associated with the currently 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 their 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 this 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) Next, 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 recent past in litigation of EPA's Clean Air Mercury Rule in 2007. NCDENR agrees with NRDC who also argued in that case that the text of Section 111(d)(1)(A) prohibits EPA from regulating-e 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 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 already 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. EPA has already made this finding. Finally, 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.

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 GHG reduction requirement on each State’s natural gas electricity generation, nuclear generation, solar generation, wind generation, policies that incentivized 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 GHG 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.*, coal-fired power plants.

NCDENR believes the Clean Air Act’s §111(d) for coal-fired power plants should simply apply to each coal-fired power plant taking into account the statutory factors such as the remaining useful life of the unit to determine what the emission standard should be.

Thank you for the opportunity to give comment to this very important rule.