Testimony before the

House Committee on Energy and Commerce

Subcommittee on Energy and Power

"EPA's Proposed greenhouse gas emissions Standards for New Power Plants and H.R. __, Whitfield-Manchin Legislation."

November 14, 2013

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North Carolina Department of Environment and Natural Resources

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Summary of Testimony

Legal Issues – There are serious questions concerning EPA's authority to regulate greenhouse gas emissions from stationary sources under the Clean Air Act (Act). Rather than pursuing its duty under section 108 of the Act, EPA appears to be following a course pursuant to section 111 of the Act to regulate greenhouse gas emissions from stationary sources. Under section 111(b) EPA is proposing a standard for new sources that does not meet the requirements of the law. Additionally, EPA seeks to regulate existing sources under authority that does not exist in section 111(d).

Technical Issues – 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. There is continuing uncertainty with respect to the application of this technology on this scale as well as continued concerns about the availability of geologic formations for sequestration.

Implementation Issues – EPA's contemplated approach to regulate greenhouse gas emissions from existing fossil fuel-fired electric utility units under Act section 111(d) raises serious concerns about the roles of the federal and state governments in implementing air pollution control programs. The Act charges the States - not EPA - with the responsibility to develop and implement air pollution control programs. Any EPA regulatory action designed to address

greenhouse gas emissions from fossil fuel-fired utility units should acknowledge and respect this cooperative federalism and allow States the ability to define the requirements for sources located within their States.

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Good morning Chairman and members of the Committee, I am Donald van der Vaart, with the North Carolina Division of Air Quality. I am here on behalf of John Skvarla, the Secretary of the North Carolina Department of Environment and Natural Resources. Thank you for the opportunity to testify today.

I would note that the Clean Air Act (Act) specifically provides that States – not the EPA – "have the primary responsibility" for implementing programs that protect the air resources of this Nation. It is an indisputable fact that States, like North Carolina, have been very successful over the past 30 years implementing programs that protect public health and welfare while providing for economic development.

Before I comment on the specifics of EPA's use of section 111 of the Act I wanted to note issues that my comments will not address. First, my comments are not about the scientific uncertainty of the impact anthropogenic greenhouse gas emissions have on climate. My comments do not address the accuracy or inaccuracy of the IPCC models relied upon by EPA or the divergence between the models' predictions and actual temperatures over the past 15 years. These issues are critical to any decision on whether, in the absence of Congressional authorization, EPA should regulate greenhouse gas emissions from stationary sources.

Against this background I offer three specific concerns about EPA's current actions to regulate greenhouse gas emissions from fossil fuel-fired electric generating units.

First, EPA is required by Congress to base any New Source Performance Standard (NSPS) on the best system of emission reductions that "the Administrator determines has been adequately demonstrated." EPA's recently proposed NSPS for utility units assumed carbon capture and storage – or CCS – has been "adequately demonstrated." One need only look at the yet to operate Kemper County Energy Facility in Mississippi, with its substantial governmental funding, as prima facie evidence that EPA's conclusions are unsupported. In addition to the fact that there is not a single fossil fuel-fired utility plant operating with CCS, EPA themselves acknowledged geologic sequestration is not generally available at the emission units themselves. Even if a State is blessed with the requisite geologic formations, facilities would be required to build miles of pipelines simply to reach the formation. EPA's proposed approach will pit the reliability of this nation's electricity supply against the considerable uncertainty of environmental permitting of these pipelines superimposed on the unproven technology of CCS. Sound science, rather than speculation should drive environmental regulation.

Second, **s**ection 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. 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 there is a conflict in the statutory language of section 111(d) with regard to whether the 112 prohibition was pollutant specific or source category specific. This is a false choice 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 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.

Section 111(d) also prohibits regulating pollutants listed under section 108. A pollutant must be listed under section 108 when three criteria are satisfied. Those criteria were satisfied when EPA published its endangerment finding under section 202. While North Carolina takes no position on whether EPA should establish a NAAQS for greenhouse gases, all of the conditions necessary to list greenhouse gases under section 108 have already been met. The listing in itself prohibits EPA from regulating greenhouse gas emissions under section 111(d). Indeed, EPA may already be under a pre-existing, non-discretionary duty to issue criteria and simultaneously propose a National Ambient Air Quality Standard for greenhouse gases.

Finally, in cases where EPA does have the authority to establish emission guidelines under section 111(d), that authority is limited. EPA is not authorized to impose emissions standards on existing sources. Rather, EPA can only establish a unit-specific guideline that describes what control technologies have been demonstrated. Once EPA provides that guideline, section 111(d) allows States to develop unit specific emission standards after considering many factors including the cost, physical constraints on installing controls, and the remaining useful life of the emission units. The plain language of the Act as well as legal precedent precludes EPA and States from designing a standard that relies on reductions made outside of the emissions unit.

Any flexibility in compliance with a standard based on a specific emission unit resides with the States who have the primary responsibility for implementation of this program.

Thank You.