NORTH DAKOTA
DEPARTMENT of HEALTH

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Submitted electronically via *Regulations.gov*

Ms. Gina A. McCarthy
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Proposed *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations* (Docket No. EPA-HQ-OAR-2015-0199)

Dear Administrator McCarthy:

The North Dakota Department of Health (Department) respectfully submits these comments in response to the above-noted proposed rulemaking by the U.S. Environmental Protection Agency (EPA) entitled *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations*, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (the "Proposed Rule"). For the reasons stated below, the Department respectfully requests that EPA promptly withdraw the Proposed Rule.

I. The North Dakota Department of Health

The Department is the agency charged with implementing and enforcing North Dakota's laws and regulations implementing the federal Clean Air Act (CAA). Specifically, the Department oversees programs to implement New Source Performance Standards (NSPS) and the State's permitting programs for stationary sources under Titles I and V of the CAA. Additionally, the Department is the technical expert agency that makes all air quality related technical determinations - including Best Available Control Technology (BACT) determinations. See *United States v. Minnkota Power Coop., Inc.*, 831 F.Supp. 2d 1109 (D. N.D. 2011). In this capacity, the Department has independently evaluated the several technical and legal issues presented by the Proposed Rule and accordingly believes that EPA must withdraw the Proposed Rule.

II. EPA's Proposed Rule Requirements

The Proposed Rule establishes the requirements that EPA will impose on any State that "fails to submit a satisfactory [state] plan," 42 U.S.C. § 7411(d), implementing EPA's final Section 111(d) Rule, *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). EPA calls this Section 111(d) rule the "Clean Power Plan" ("Power Plan"). EPA's Power Plan sets carbon dioxide emission limits that are based on three buildings blocks that EPA considers to be the "best system of emission reduction." Those building blocks are: (1) requiring coal-fired power plants to improve their efficiency; (2) replacing coal-fired generation with natural gas generation; and (3) replacing fossil-fuel-fired generation with renewable-energy generation. 80 Fed. Reg. at 64,667. EPA's Power Plan CO_2 emission reduction requirements for North Dakota are nearly four times more stringent than EPA first proposed. EPA's Clean Power Plan imposes one of the most significant and burdensome requirements on North Dakota amongst all states. If North Dakota does not submit an EPA-approved plan for meeting EPA-set CO_2 emission limits, EPA will impose upon North Dakota the carbon trading program outlined in the Proposed Rule.

The Proposed Rule presents two different approaches for a trading program—a rate- or mass-based trading program—but the final Federal Plan will adopt only one of these approaches. Both approaches utilize the Power Plan's three building blocks. The rate-based trading program would set emission rates for each power plant, expressed as emissions of CO_2 per unit of energy; the power plant must emit below the applicable rate or apply emission rate credits ("ERCs"). 80 Fed. Reg. 64,989-90. EPA would allocate ERCs to power plants that (1) produce emissions less than the CO_2 rate cap; (2) shift to natural gas generation; (3) shift to renewable energy; or (4) construct new nuclear units. *Id.* at 64,990. ERCs may be bought, sold, transferred, or banked for future use.

Under EPA's mass-based approach, North Dakota would distribute emissions allowances to individual power plants up to the mass-based requirement EPA established for North Dakota in the Power Plan. 80 Fed. Reg. at 65,011. Each allowance would authorize the emission of one short ton of CO_2 during the compliance year. *Id.* at 65,012. If North Dakota declines to distribute the allowances, EPA would distribute the allowances in its place. *Id.* Again, power plants may transfer, buy, sell, or bank the allowances. *Id.* Though EPA's mass-based approach allows North Dakota to allocate the allowances, North Dakota must shift its electricity production to natural gas and renewable energy in order to achieve EPA's requirements. *Id.* at 64,667, 64,727, 65,011. In addition, the Proposed Rule includes rate- and mass-based model trading rules for potential use by North Dakota in developing its own plan, which EPA says would be considered "presumptively approvable." *Id.* 64,969.

North Dakota believes the Proposed Rule is unlawful and should promptly be withdrawn for three primary reasons. *First*, the Proposed Rule is predicated on EPA's unlawful CAA Section 111(d) rule—the Power Plan. *Second*, EPA lacks statutory authority to impose a carbon credit trading program on North Dakota. *Third*, the Proposed Rule is arbitrary and capricious and otherwise contrary to law under the federal Administrative Procedure Act.

III. Summary of the Department's Concerns with the Proposed Rule.

North Dakota has a significant interest in the Proposed Rule because it fully exercises it's sovereign authority under federal and state law on behalf of its citizens. *See Ark. Elec. Coop.*

Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983); 16 U.S.C. § 824(a). North Dakota therefore objects to EPA's attempts to displace North Dakota's sovereign authority which, as EPA recognizes, will likely increase North Dakota's citizens and businesses electricity prices, *see* 80 Fed. Reg. at 65,018. The flaws with EPA's Proposed Rule are many:

1) CAA § 111(d) prohibits EPA from issuing regulations governing a pollutant that is "emitted from a source category which is regulated under Section 7412 of this title." Because CO_2 is emitted from lignite-fueled EGU's, and because lignite-fueled EGU's are regulated by EPA under Section 112 through EPA's Mercury Air Toxics (MATS) regulation, EPA may not regulate CO_2 emissions from coal-fueled EGU's under CAA § 111(d).

2) Even if EPA does have authority to issue CAA § 111(d) regulations governing CO_2 emissions from lignite-fueled EGU's, the Proposed Rule is based on an impermissible intrusion on North Dakota's express authority under CAA § 111(d) to "establish" standards of performance. Under CAA § 111(d), EPA's authority is limited to adopting a "procedure" under which "each State shall submit to the Administrator a plan which (A) establishes standards of performance...." The Proposed Rule is far more than procedural. Rather, the Proposed Rule is based on an usurpation of North Dakota's authority to "establish" performance standards by dictating what the standards must be. Additionally, EPA has structured the Power Plan and Proposed Rule in a way that would prevent North Dakota from, as provided in CAA § 111(d)(1)(B), considering "the remaining useful life of the existing source" to which a state-established performance standard applies.

3) The Proposed Rule is based on an approach that is not consistent with the language, context, legislative history, and consistent past administrative interpretation of CAA § 111(d). Instead, the Proposed Rule is built on new and redefined terminology never before used in the CAA § 111(d) program. For the first time, EPA has set state-by-state "goals," (which are really legally enforceable mandates) for states like North Dakota. However, neither CAA § 111(d) nor EPA's CAA § 111(d) regulations authorize EPA to set binding statewide "goals." Notably, the term "goal" is not even used in the CAA or EPA's implementing regulations. Similarly, for the first time, EPA defines a "system" of emission reduction to be mandated reductions in the amount of time facilities within the regulated source category are allowed to operate. Forcing North Dakota lignite-fueled EGU's to reduce operation is not a "system" of emission reduction under CAA § 111(d).

4) EPA's new "interpretation" of CAA § 111(d) set forth in the Power Plan coerces North Dakota to submit a plan that contains what EPA calls, "portfolio" measures. These measures would be used, for instance, to increase the use of renewable energy and to induce North Dakota citizens and business to reduce electric consumption. The measures would be undertaken by states or third parties and, upon EPA approval, would become enforceable against those entities. CAA § 111(d), however, does not provide EPA the authority to create federally enforceable obligations on entities that do not own or operate facilities within the regulated source category. Rather, CAA § 111 authorizes standards to be set for facilities within EPA-listed source categories. CAA § 111 does not apply to any other facilities or entities that are not part of the listed source category.

6) EPA does not possess lawful authority to regulate the electric grid in North Dakota. That authority rests with FERC as to wholesale transactions and the North Dakota

Public Service Commission as to retail transactions. Determining the proper balancing of electric resources to meet the needs of electric consumers in North Dakota consistent with the public interest is a state function held by the North Dakota Public Service Commission, which has an "integrated resource planning" process which sets long-term resource portfolios for regulated electric utilities in North Dakota.

7) EPA's "building blocks" analysis of the "best system of emission reduction" set forth in the Power Plan is not based on accurate or reasonably demonstrated assumptions in North Dakota and is not consistent with the realities of the electric grid.

For these reasons, and those discussed in greater detail below, the Department respectfully urges EPA to immediately withdraw the Proposed Rule.

IV. The CAA Does not Authorize EPA to Make Federally Enforceable, State Plan "Portfolio" Measures that Apply to Facilities That are not in the Regulated Source Category.

Under what EPA's Power Plan calls its "portfolio approach," state plans may contain measures that do not apply directly to facilities within the regulated source category. Under this approach, state plans could include measures that either states or third parties would carry out to, for instance, generate certain amounts of renewable energy or induce the public to reduce electricity consumption. With respect to EPA's specific Power Plan requirements for North Dakota, that is a practical necessity in order to possibly achieve the significant emission reductions EPA has required. Once EPA approves a state plan with these "portfolio" measures, the measures would become federally enforceable against the state or the third party. The Department respectfully submits that the CAA prohibits EPA from making federally enforceable, state-plan measures that are not standards of performance applicable to facilities in the regulated source category.

CAA § 111(b) provides for EPA to list categories of sources and then to establish "standards of performance for new sources *within such category."* (Emphasis added.) CAA § 111(d) provides for states to submit plans which "(A) establish[] standards of performance for any existing source for any air pollutant ... (ii) to which a standard of performance under this section would apply *if such existing source were a new source."* (Emphasis added.) Thus, the measures that state CAA § 111(d) plans must include, and which EPA can approve (or disapprove), are performance standards that apply to facilities *within the listed source category.* Congress did not give EPA authority to approve state-plan measures that are not performance standards or that apply to third parties.

EPA's prior CAA § 111(d) regulations parallel this structure by providing that state plans must contain "emissions standards" and that these standards "shall apply to designated facilities within the State." EPA's regulations define "designated facility" as "any existing facility (see § 60.2(aa)) which emits a designated pollutant and which would be subject to a standard of performance for that facility if the existing facility were an affected facility (see§ 60.2(e))." Thus, a "designated facility" for which state plans must establish existing-source performance standards is the same as an "affected facility" for which EPA establishes new source performance standards, except that a "designated facility" is an existing facility. Paralleling EPA's CAA § 111(b) regulations, EPA's CAA § 111(d) regulations contain a number of Subparts, each defining the "designated facility" for which states must submit plans containing

performance standards. These "designated facilities" are the facilities within the regulated source category to which the performance standards apply. Thus, again, performance standards cannot be set for facilities in unlisted source categories.

V. The Portfolio Measures in the Power Plan Cannot be Imposed on North Dakota nor Required by EPA Through a Federal Plan - Such as the Proposed Rule

It is axiomatic that EPA only has the authority granted to it by Congress. *Louisiana Pub. Svc. Comm. v. FCC,* 476 U.S. 355, 374 (1986) ("an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it"); *Center for Biological Diversity v. EPA,* 722 F.3d 401, 413 (D.C. Cir. 2013 (Kavanaugh, J. concurring) ("EPA has discretion to act only within the statutory limits set by Congress"). EPA does not have authority to regulate (directly or indirectly) wholesale energy markets or state retail electric markets. Similarly, the CAA simply does not authorize EPA to order the construction of renewable generation sources, the increased utilization of gas fired generation, or the creation of demand side efficiency programs. EPA is therefore plainly relying on states to impose these measures, and is forcing North Dakota to take those measures by setting inflexible emission rate caps North Dakota will lack authority to alter. EPA recognizes it will be necessary for North Dakota to amend its laws to enforce EPA's requirements, and in doing so, is effectively dictating the sovereign legislative power of North Dakota.

EPA's underlying approach in the Power Plan is not lawful. Congress may encourage States to act, but "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States,* 505 U.S. 144, 161 (1992), *quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 288 (1981) (punctuation omitted). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York,* 505 U.S. at 162 (citation omitted). The Supreme Court subsequently confirmed that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States,* 521 U.S. 898, 933 (1997), *quoting New York* at 188.

When Congress regulates private activity under the Commerce Clause, Congress may "offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." *New York,* 505 U.S. at 167. The Clean Air Act relies on this principle of "cooperative federalism." See *Sierra Club v. Korleski,* 681 F.3d 342, 343 (6th Cir. 2012) ("The federal Clean Air Act is a model of cooperative federalism.") (citation omitted). But cooperative federalism works only when the State is offered a constitutionally permissible choice. *New York* involved a statute that gave States a choice between regulating low-level radioactive wastes in accordance with federal standards or taking title to, and possession of, the wastes. *New York,* 505 U.S. at 169 and 175. Congress lacked the authority to impose either option as a freestanding requirement. *Id.* at 175. "A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176 (citation omitted). This provision therefore infringed on state sovereignty in violation of the Tenth Amendment. *Id.* at 177.

The Proposed Rule and the Power Plan offers North Dakota a false choice of either (1) using State police powers to impose a "system of emission reduction" and achieve numeric emission reduction requirements that are each based upon EPA's Building Blocks, or (2) allowing EPA to impose a FIP that it has no authority to execute under the CAA. Should a state fail to submit a plan acceptable to EPA, EPA cannot commandeer the state's legislative power to impose renewable portfolio requirements, regulate private demand for electricity, or order companies to build new and unnecessary renewable power sources. EPA has no power to force these behaviors itself, and thus proposes to force North Dakota to do so or risk having EPA seize North Dakota's legislative power for itself. This fails to offer North Dakota a choice between "regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167.

In the Power Plan, EPA has based its emission reduction requirements for North Dakota on imposition of the building blocks. Because EPA lacks the authority to impose a Federal Plan with emission reduction targets that can only be met using Building Blocks 2 and 3 to directly implement the system of emission reduction and achieve the carbon targets in a State that does not submit a State plan, or where EPA disapproves the plan, EPA will have to exercise power that belongs to the States (or FERC), which it cannot do without exceeding its statutory authority or directly commandeering State police powers in violation of the Tenth Amendment

VI. EPA Does Not Have Legal Authority to Impose a Carbon Credit Trading Program in North Dakota

CAA § 111(d)(1) provides that "[t]he Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which . . . establishes standards of performance for any existing source for any air pollutant . . ." 42 U.S.C. § 7411(d)(1). And "[t]he Administrator shall have the same authority . . . to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan. . . ." 42 U.S.C. § 7411(d)(2). "Standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

The CAA's plain language makes clear that in the event that a State does not submit an approved plan, EPA's authority is limited to establishing "standards of performance" for individual "building[s], structure[s], facility[ies], or installation[s]" reflecting the level of emissions achievable through the "application" of the "best system of emission reduction." EPA has no authority under the plain text of Section 111 to impose on States a CO_2 emission trading regime that shifts energy generation away from coal-fired power plants. That is because "standards of performance" must be "*app[licable] . . . to* a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B) (emphasis added); *accord id.* § 7411(a)(2) (discussing standards of performance "which will be applicable to" individual new sources (emphasis added)).

Applicable case law authority confirms that EPA cannot impose a CO_2 emission trading program under CAA §111. In *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the D.C. Circuit rejected EPA's attempt to implement a limited trading scheme that allowed plants to avoid CAA § 111 standards when increasing emissions from one facility by decreasing emissions from another facility within the plant. *Id.* at 328. The D.C. Circuit explained that

CAA § 111 requires new source performance standards for individual "stationary sources" defined as "any building, structure, facility, or installation." *Id.* at 326. As a result, the court found that EPA lacked authority to allow sources to avoid installing the emission reducing technology so long as total emissions across multiple sources do not increase. *Id.* at 328. In the Proposal, EPA is attempting to establish an even more extensive trading regime: the Proposal would allow entire power plants, let alone individual sources, to avoid meeting performance standards by purchasing credits or allowances. That is contrary to the D.C. Circuit's decision in *ASARCO.*

The Proposed Rule is also fundamentally inconsistent with EPA's requirements for new power plants under the final CAA § 111(b) rule, which is the legal prerequisite for both the Power Plan and the Proposal. *See* 80 Fed. Reg. 64,510 (Oct. 23, 2015). EPA's CAA § 111(b) rule requires new stationary sources to satisfy strict emission limits based on applying pollution control technology applied to each source. In contrast, the Proposed Rule's trading scheme does not set standards of performance for sources at all and sets, instead, state-wide emissions limits. The Proposed Rule also distributes emissions credits and allowances based on the Power Plan's Buildings Blocks two and three, which are not measures of a source's "performance," but substitutes for lignite-fueled electricity fossil-fuel fired energy. In these two ways, the Proposed Rule goes well-beyond regulating the efficiency of individual power plants and is fundamentally inconsistent with the CAA § 111(b) rule's new source performance standards. There is no statutory basis for these two vastly different approaches. Both CAA § 111(d) and CAA § 111(b) require that "standards of performance" be "appl[icable] . . . to a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B); *accord id.* § 7411(a)(2).

This disconnect is illustrated by the fact that the emissions limits for existing sources (under the Proposed Rule) are much more stringent than the limits for new sources (under EPA's Section 111(b) rule). *Compare* 80 Fed. Reg. at 64,707 (1,305 lb. CO_2/MWh), *with* 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015) (1,400 lb. CO_2/MWh); 80 Fed. Reg. at 64,707 (771 lb. CO_2/MWh), *with* 80 Fed. Reg. at 64,513 (1,000 lb. CO_2/MWh); 80 Fed. Reg. at 65,012. EPA itself recognized this disconnect, stating that there is "a larger incentive for affected EGUs to shift generation to new fossil fuel-fired EGUs relative to what would occur when the implementation of the BSER took the form of standards of performance incorporating the subcategory-specific emission performance rates representing the BSER." 80 Fed. Reg. 64,977-78. This disconnect exists precisely because the CAA § 111(b) rule applies subcategory-specific emission performance rates consistent with the CAA. And the Proposed Rule applies stringent controls that cannot be achieved with source-specific performance measures. EPA's extensive efforts in the Proposed Rule to mitigate "leakage" from existing sources to new sources, 80 Fed. Reg. 65,019-65,025, would be entirely unnecessary if EPA's approach complied with the CAA.

Congress' decision to expressly authorize EPA to adopt trading programs under other provisions of the CAA demonstrates EPA lacks authority to impose one here. For example, Congress expressly provided for an extensive emission allocation and transfer system under the acid rain program. 42 U.S.C. §§ 7651-7765. Congress also expressly enacted a more limited trading program for modifications of certain major stationary sources in ozone nonattainment areas. *Id.* at § 7511a(c)(6)-(8); *see also Michigan v. EPA*, 213 F.3d 663, 685-88 (D.C. Cir. 2000).The absence of such trading authorization is significant, confirming what the language and structure of Section 111 make clear: Section 111 standards are technology-forcing and meant to apply uniformly directly to affected sources. *See Ethyl Corp.*, 51 F.3d at 1061-63 (declining to "imply authority" for agency action under one statutory provision when a nearby statutory

provision expressly grants that authority in a different context); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion." (citation omitted)).

VII. Additional Concerns for Not Pursuing the Proposed Rule

In addition to the several material defects in the Proposed Rule, the Department offers the following additional comments.

a. The proposed model trading rules and Federal Plan look more like an Advanced Notice of Proposed Rulemaking (ANPR) instead of proposed rule and plan. By having so many issues on which EPA is requesting comment, EPA is skirting the APA and CAA requirements for public notice and comment. The number of issues for which comment is requested could ultimately lead to final trading rules and a Federal Plan that do not resemble the proposal. North Dakota experienced this first hand with EPA's final Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units: Final Rule (80 FR 64662 – 64964) which does not look anything like the proposed rule and should have been subject to additional public comment.

b. If EPA does finalize the model trading rules without further comment, it should be done immediately. This will allow states the opportunity to review each rule before September 6, 2016 and make a decision on how to proceed.

c. If EPA truly believes that the CO_2 emissions reductions requirements imposed on North Dakota will not cause reliability issues, then there is no need for set-asides or a safety valve to address reliability issues. However, the Department believes reliability issues could occur do to the vast number of lignite-fired power plants that are expected to shut down. A safety valve for reliability to prevent disruption of normal, reliable power must be included in the Federal Plan.

d. The model trading rules should provide states the maximum flexibility. Trading will be essential to prevent the cost of this program from becoming intolerable for ratepayers. As shown under the Acid Rain program, trading provided the least costly option for achieving compliance. Without trading, more expensive options will have to be implemented which will increase rates more.

EPA must make emission rate credits (ERCs) and allowances interchangeable – that is, ERCs may be used in a mass based state and allowances used in a rate based state. By having two types of emission reduction credits (ERCs and allowances) there may not be sufficient credits available in one or both trading programs. If this happens, costs of the Power Plan will skyrocket. In North Dakota, stakeholders have estimated the Power Plan will increase electric rates by 40-60% based on adequate ERCs or allowances being available. If ERCs or allowances are not available, rate increases could be much larger.

e. A safety valve should be included for cost in the Federal Plan. As pointed out in Comment VII.d, the cost for the Power Plan to North Dakota rate payers and rate payers in 10 surrounding states that use electricity generated in North Dakota will be very high. The Power Plan will have a devastating effect on North Dakota's economy not only from rate increases but from lost jobs and a reduced energy industry. If EPA's prediction that the Power Plan will

actually save rate payers money by 2030 is correct (see Fact Sheet, The Clean Power Plan, Benefits of a Cleaner, More Efficient Power Sector), then a safety valve for cost would not be used. However, if EPA's prediction is incorrect, a safety valve for cost would be a prudent precaution. The Department believes a safety valve for cost should be available for any state where electric rate increases due to the Power Plan exceed the national average. The safety valve should extend the time for achieving compliance as well as allowing higher emission rates or mass emissions in those states.

f. EPA should finalize both a rate based and a mass based Federal Plan – not one or the other. A rate based Federal Plan may be more appropriate (less cost) in a state that has an increasing demand for electricity whereas a mass based Federal Plan may be appropriate in a state with a shrinking demand. In order to keep the cost of the Power Plan as low as possible, both types of Federal Plans must be available for a state.

g. EPA cannot regulate a source unit under both CAA 111(b) and 111(d). When an affected unit under 111(d) is modified or reconstructed, it can only be regulated under 111(b). CAA § 111 sets up distinct requirements for "new" and "existing" sources. Since 40 CFR 60.14 and 60.15 make it clear that modified or reconstructed sources are treated as "new" sources, they cannot be regulated as "existing" sources under CAA 111(d).

h. EPA's approach in addressing "remaining useful life" is not in compliance with the CAA. CAA § 111(d)(1)(B) states "Regulations of the Administrator under this paragraph shall permit the state in applying a standard of performance **to any particular source** [emphasis added] under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of **the existing source** [emphasis added] to which such standard applies." The consideration of remaining useful life must be based on an individual source basis, not a collective source category. EPA's dismissal of this requirement of the CAA by developing generic emission goals (limits) and a trading program is without merit (80 FR 64982 - 64984). The Federal Plan must evaluate the remaining useful life of each individual affected unit since it effectively replaces a state 111(d) plan.

i. EPA requests comment on the type of low-or-zero-emitting electricity in federal plans that would be eligible to generate ERCs for compliance purposes. To keep the cost of EPA's Power Plan as low as possible, EPA should not limit the types of sources that can generate ERCs. The Federal Plan should be general in nature and open-ended to allow evaluation of sources on a case-by-case basis to determine if ERCs are generated.

j. There should be no limit on the number of ERCs or allowances that can be banked. In addition, any ERCs or allowances earned during the interim period should be available for use in the final compliance period and there should be no shelf life. Any actions by EPA to limit the use of ERCs or allowances will only drive up the cost of the Power Plan.

k. Regarding the distribution of allowances, the methodology proposed by EPA is reasonable. Three years of generation data is necessary to take into account any anomalous years. However, there may be situations where a plant was down for a large portion of the 3-year period. In this case, provisions should be made to allow substitution of generation data from a different period that is representative of normal operations.

l. For sources that operated in the historical data set for allocating allowances, but retire before the start of the program, allowances should be allocated to these sources. This will

provide an incentive for early retirement of these units. Any unit that retires should continue to receive those allowances indefinitely. This will help reduce rates for those customers of a unit that retires and reduces the amount of CO_2 emitted to the atmosphere.

m. All allowances within a state under the Federal Plan should be distributed to the affected sources. Auctioning any portion of the state's allowance allocation will only drive up the cost of generating electricity which will be passed on to the rate payers. The Power Plan will be very expensive for rate payers in states like North Dakota without the added expense of affected units having to buy allowances allocated to the state.

n. EPA must consider the effect the FP will have on costs for low income rate payers in each state. In North Dakota, as with other states, low income people have to decide between paying for electricity, or food, or medicine, and heat for their home. The Department believes this is a public health issue caused solely by EPA's Power Plan that can have severe consequences.

VIII. Conclusion

For the reasons stated in these comments, the Department respectfully urges EPA to promptly withdraw the Proposed Rule.

Sincerely,

Terry L. O'Clair, P.E.
Director
Division of Air Quality

TLO/TB:saj
cc: Honorable Jack Dalrymple, Governor of North Dakota
Wayne Stenehjem, Attorney General of North Dakota
Dave Glatt, EHS Chief
North Dakota Public Service Commission