Testimony before the

House Committee on Energy and Commerce

Subcommittee on Energy and Power

"EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues"

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Chairman Whitfield, Ranking Member Rush and members of the subcommittee, thank you for inviting me to testify this morning. As Secretary of the North Carolina Department of Environment and Natural Resources, I'm grateful for the opportunity to testify today and share my views on this important topic.

The Clean Air Act (Act) specifically provides that states – not the Environmental Protection Agency (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 robust economic development.

Before I comment on the specific issue of state resources, I would like to note issues that are intentionally omitted from my comments. First, my comments will not address the scientific uncertainty of the impact anthropogenic greenhouse gas emissions (GHGs) have on climate. My comments do not discuss the accuracy, or lack thereof, of the Intergovernmental Panel on Climate Change (IPCC) models relied upon by the EPA to develop this rule, or the divergence between the models' predictions and actual temperatures over the past 15 years. Although these issues are critical to any decision in regulating greenhouse gases, my comments are limited to separate, but equally important, aspects of any final 111(d) rulemaking: state resources, state and utility planning efforts, and the legal frailty of the rule.

First I will address state resources and advocate for what North Carolina has called the “Legal Trigger” approach to §111(d) implementation.

Given the almost certain litigation that will ensue if the proposed rule under §111(d) is promulgated, states such as North Carolina are at risk of investing unnecessary time and resources if they move forward with developing and enacting state §111(d) plans prior to the resolution of litigation. North Carolina recommends that the EPA amend submittal deadlines contained in the Subpart B regulations – rules that implement §111(d). More specifically, the EPA should require states to submit a §111(d) plan only after the conclusion of due process afforded by the judicial review process. Employing this legal trigger approach would ensure that states, the EPA and regulated sources (which need considerable time to enact such sweeping changes to electricity generation) do not expend their limited resources in an attempt to satisfy yet another EPA rule that ultimately is vacated or remanded.

The federalist structure of the CAA establishes a procedure whereby the EPA promulgates a new rule that sets forth requirements designed to address some aspect of the CAA. Once the rule is finalized, each state must take action – usually in the form of state legislation or rulemaking – to avoid sanctions directly or to avoid sanctions on its sources. The state then submits that set of rules to the EPA for approval. The time required to complete the EPA review process varies dramatically; it can take a few months to many years during which time the states implement and enforce their state rule.

These obstacles are compounded when the federal rule that required the state to act is struck down by the court. This forces the state to both repeal its earlier work and begin a new planning process – legislation, rulemaking, implementation and enforcement – and the process must often be amended again when the EPA revises its illegal rule in an attempt to satisfy the courts.

This is not just an academic concern – there are several recent cases where this study in futility has occurred. The EPA's attempts to address economic inequity in regional energy markets through interstate pollution rules such as the 1997 Interstate NOx Rule, the Clean Air Interstate Rule (CAIR), and the Cross-State Air Pollution Control Rule (CSAPR) are prime examples of the negative impacts on states when the EPA accelerates implementation ahead of judicial review. States, in an attempt to satisfy these interstate pollution rules, spent substantial resources requiring emission reductions only to find out that the rules, or portions of the rules, were illegal.

The potential for the 111(d) rule to have this whipsaw effect on states is particularly dangerous because of the scope of the proposed 111(d) rule. There is one tenet on which nearly all stakeholders agree – the 111(d) rule will fundamentally restructure both how energy is generated and consumed in America. I would argue that the EPA's section 111(d) is to energy what the Affordable Care Act is to healthcare. Like the ACA, the proposed 111(d) rule is an attempt to impose a one size fits all solution that will transform the nation's energy system.

This fundamental change to America's electricity model will come at the hands of a rule that few consider legally firm. Even the EPA has acknowledged the rule is not likely to survive a judicial challenge intact. The rule actually contains the following disclaimer: "[the] building blocks [are]

… severable, such that in the event a court were to invalidate our finding with respect to any particular building block" the remaining building blocks would survive. See 79 Fed. Reg. at 34892. In my more than 20 years of implementing air quality rules, I am not aware of any rule where the EPA has made an *a priori* acknowledgment of legal infirmity.

But in the face of this frailty, state plans, which must be drafted and put in place prior to judicial review, will require major legislative changes to allow, for example, switching from a cost-based energy dispatch model (i.e.: the priority for dispatch is based on lowest cost generation) to a carbon dioxide dispatch model (i.e.: the priority for dispatch is based on generation with the lowest carbon dioxide emissions). If judicial review results in invalidating portions of the 111(d) rule, decisions made by utilities to shutdown coal-fired power plants prior to cost recovery and installing new gas-fired generation may become irretrievable stranded costs that will unnecessarily increase utility rates. Under the EPA's current proposal, legislative changes, utility planning and regulatory execution will proceed while the 111(d) rule is under judicial review.

The EPA's acknowledgment of the legal frailty of their creative interpretation of the CAA not only argues for the legal trigger, but also calls into question the more general issue of Chevron deference. In this rule, like many other EPA rulemakings, the EPA characterizes statutory language as "ambiguous" in order to direct courts into granting to grant the agency Chevron deference. The touchstone of Chevron deference – wherein the court defers to an agency's interpretation of an ambiguous statute – is the expertise the agency gained when it was entrusted with implementation of a certain statute (here the CAA). Unfortunately, the EPA's recent legal

track record is so poor that one can only wonder if the agency has abused its public trust and therefore Chevron deference should be withdrawn.

Once again, this is not a debate about the science of climate change, nor is it a question of whether the EPA should or should not regulate GHGs. Simply stated, if the EPA wants to transform America's power system by forcing a round peg into the square hole that is §111(d), it should have the prudence to allow the final rule to be reviewed by the courts before requiring states to undertake such a Herculean effort.

Thank you for the opportunity to testify. I would be happy to answer any questions you may have.