



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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Attention: Docket ID No. EPA-HQ-OAR-2015-0199
U.S. Environmental Protection Agency
EPA Docket Center
Federal eRulemaking Portal: <http://www.regulations.gov>

Re: South Dakota Department of Environment and Natural Resources' comments on "*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 ID No. EPA-HQ-OAR-2015-0199)

Thank you for the opportunity to comment on the 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,*" published in the Federal Register on October 23, 2015. This proposed rule outlines EPA's federal plan for states that do not submit a 111(d) plan or submits a plan EPA does not approve.

South Dakota does not agree and is challenging EPA's statutory authority to implement EPA's final emission guidelines for developing state implementation plans regulating greenhouse gases from existing electric generating units. The South Dakota Department of Environment and Natural Resources (DENR) recommends EPA withdraw this proposal because the underlying statutory authority (i.e. emission guidelines for developing state implementation plans) is unlawful. If EPA disregards this recommendation, DENR encourages EPA to adopt a federal plan that provides EPA the flexibility to implement either a mass-based or rate-based program that meets the unique circumstances of each state. DENR provides specific comments in Attachment A.

DENR encourages EPA to remember that each state has unique circumstances and EPA will need flexibility to develop a plan for a state that will provides reliable and affordable electricity. Therefore, the federal plan, like EPA's final emission guidelines, should be used as guidance and not the ultimate standard.

Thank you again for the opportunity to comment on the proposed rule.

Sincerely,

Steven M. Pirner
Secretary

Attachment A
South Dakota's Comments on EPA's Proposed Model Rule

Overall Comment

Throughout the preamble, EPA is proposing different methods for implementing the federal plan in cases where a state fails to submit a 111(d) plan or a 111(d) plan EPA does not approve. In doing so, EPA is establishing a one size fits all regulations. A one size fits all regulation will not provide EPA with the flexibility needed to evaluate each state on a case-by-case basis and implement a federal plan that meets the goals of the Clean Power Plan and provides reliable and affordable electricity. Therefore, DENR recommends EPA establish federal rules that are flexible and require EPA to conduct a case-by-case analysis of all options to ensure what EPA implements in a state will provide reliable and affordable electricity not only in that state but the neighboring states. In addition, EPA's case-by-case analysis and decisions for that particular state should be open for public comment.

Rate-Based and Mass-Based Approach

On page 64970 of the preamble, EPA intends to finalize a single approach—either a rate-based or mass-based approach—in its federal plan and requests comments on which approach states prefer. EPA believes a single approach will enhance the consistency of the federal trading program, achieve economies of scale through a single, broad trading program, ensure efficient administration of the program and simplify compliance planning for affected electric generating units.

EPA's logic may work for states with a federal plan but may not be the best approach for the neighboring states. In the final emission guideline, EPA does not allow trading between opposite approaches except in certain scenarios. By adopting one approach, EPA is unintentionally limiting the flexibility states have in developing their 111(d) plans because states will want to adopt the same approach as their neighbors to ensure trading is possible to help keep the cost of complying with the Clean Power Plan down.

DENR recommends that EPA develop a rate-based and mass-based federal plan.

Purchase of Allowances

On page 64977 of the preamble, EPA requests comment on the expectation of a competitive Emission Rate Credit and allowance market and comment on potential program design choices that could address any identified market power concern. The open market for the Acid Rain Program has worked well in the past. However, there is a difference between the Acid Rain Program and the Clean Power Plan. Under the Acid Rain Program, affected facilities were able to install air pollution controls to reduce air emissions and their need for sulfur dioxide allowances. This resulted in additional sulfur dioxide allowances available for facilities that need to purchase allowances. In the Clean Power Plan, there is no air pollution control that is economically available at this time for carbon dioxide. Facilities will not be able to reduce carbon dioxide emissions to lower their need for allowances but will have to purchase them.

Having an open market may allow organizations or individuals to purchase allowances and either retire them or hold onto them until the market goes up. With the limited number allowances available at the start, facilities with affected electric generating units will have no choice but to shutdown or buy allowances at a higher price. This will result in stranded assets and higher than expected electric prices for consumers.

DENR recommends that EPA restrict the entities that can purchase allowances to the facilities that need allowances to operate their affected fossil fuel-fired units. This will help ensure no one purchases them with the intention of inflating the prices and driving up the cost of producing electricity.

Trading Between Rate-Based and Mass-Based States

On page 64978, EPA is requesting comment on if renewable energy in a mass-based state plan should be granted Emission Rate Credits and allowed to trade those credits to a rate-based state provided it can be demonstrated there is a power delivery contract or power purchase agreement. Reduction of greenhouse gases is a national issue; therefore it should not matter if the electricity is sold in the rate-based state or not since renewable energy will replace electricity produced from fossil fuels somewhere in the grid.

DENR agrees that renewable energy produced in a mass-based state plan or federal plan should be issued Emission Rate Credits and allowed to sell/trade those credits to a state with a rate-based plan. DENR recommends that EPA remove the requirement for demonstrating that electricity from the renewable energy is meeting load in the rate-based state.

Leakage Issues

On page 64978 of the preamble, EPA requests comment on the proposed treatment of leakage in a mass-based approach. EPA is concerned that facilities will install new units to supplement or replace existing units to comply with the Clean Power Plan. In the final emission guideline, EPA created set-asides to address this issue even though EPA states it does not have the authority to regulate new sources (i.e., leakage) under Section 111(d) of the Clean Air Act.

EPA's final emission guidelines is designed to reduce carbon dioxide emissions from existing fossil-fuel fired power plants. If new fossil-fuel fired power plants are installed to replace existing units, then the final emission guideline is no longer applicable and the new source must comply with Section 111(b) requirements, established on October 23, 2015. By proposing to regulate new sources under Section 111(b) and 111(d), EPA is trying to regulate electric power plants under two separate regulations. Congress prohibited in the Clean Air Act, new sources from being regulated under Section 111(d) just like it prohibited existing sources from being regulated under Section 111(d) if regulated under Section 112.

DENR recommends that EPA eliminate any requirements for addressing leakage and allow states to establish set-asides if the state determines it is necessary in implementing the Clean Power Plan.

On page 65020 and 65027 of the preamble, EPA's proposed approach for addressing leakage in a state is requiring set-asides for renewable energy projects and for existing natural gas-fired combustion turbines. EPA is seeking comments on all aspects of the set-aside options. By establishing set-aside allowances for renewable energy projects and natural gas fired combustion turbines, EPA is limiting even further the allowances existing sources will have to comply with the Clean Power Plan. It may even have the opposite effect and promote new fossil fuel-fired electric generating units because utilities will not have enough allowances to operate the existing coal-fired units efficiently and will need to strand those assets and replace them with other options.

As stated earlier, EPA does not have the authority to regulate new sources under Section 111(d) of the Clean Air Act and DENR recommends EPA eliminate any requirements for addressing leakage in the federal plan. If EPA decides to move down this illegal path, DENR recommends all set-asides developed by states be considered and not just those identified in the federal plan. In addition, before implementing the federal plan for a particular state, EPA should first conduct a case-by-case analysis to determine if leakage is occurring before implementing set-asides in the particular state. This will provide citizens in the state and neighboring states an opportunity to comment on EPA's analysis and set-aside approach. This path will help EPA develop a plan for that particular state that provides reliable and affordable electricity.

Emergency Circumstances

On page 64982 of the preamble, EPA is requesting comments on the idea of creating an allowance set-aside available in emergency circumstances in which an affected electric generating unit is compelled to provide reliable and critical generation but does not have the allowances needed and none are available to offset its emissions during this situation.

DENR recommends that EPA address emergency situations by exempting them from needing allowances during emergency situation. EPA's existing rules already allow for exemptions. For example, units are exempt from certain emission standards under the New Source Performance Standards during startup, shutdown, and malfunctions. EPA also provides exemptions for ambient air monitoring concentrations that exceed standards during exceptional events. Therefore, allowing for exemptions during emergency situations where allowances are not available is a viable option EPA could implement.

Emission Rate Credits Limits

On page 64990, EPA is requesting comments on if it should limit the scope of the federal plan on what qualifies for Emission Rate Credits. By limiting the scope of what qualifies as Emission Rate Credits, EPA is limiting its ability to implement the Clean Power Plan.

DENR recommends that EPA maintain as much flexibility as necessary to ensure it can provide reliable and affordable electricity where the federal plan is implemented. Therefore, EPA should not limit the scope of what qualifies for Emission Rate Credits.

Rate-Based Approach Based on Subcategorized Rates

On page 64990 of the preamble, EPA is requesting comments on basing a rate-based approach on the subcategorized rates established in the final emission guidelines. Although DENR is challenging EPA's emission rates established for the subcategories, EPA's subcategory rates provide EPA the greatest flexibility in providing reliable and affordable electricity.

Therefore, DENR agrees with using a subcategorized rate.

Banking of Emission Rate Credits

On page 65010 of the preamble, EPA is requesting comments on whether there should be a quantitative limit or cap on the number of Emission Rate Credits that can be banked and if Emission Rate Credits can be banked between the interim and final compliance periods. If EPA limits the number of Emission Rate Credits that can be banked, it may discourage renewable energy projects if the beneficiary of the project has already maximized its Emission Rate Credits.

DENR recommends that EPA should not limit the amount of Emission Rate Credits someone can have. For the same reasoning, EPA should allow banking between the interim and final compliance periods.

Methodology for Distributing Allowances

On page 65015, 65017, and 65018 of the preamble, EPA requests comment on the different approaches of allocating allowances based on historical emissions, giving a portion of the allowances to load-serving entities rather than to affected electric generating units, etc. By defining how EPA will allocate allowances in the federal plan and federal model, EPA is trying to use a one size fits all strategy which in most cases does not work. Each state that the federal plan will be implemented in may be different and require EPA to use one or multiple methods of allocating allowances to ensure the area has reliable and affordable power. By conducting a case-by-case basis, EPA will provide a transparent record of the decision it makes and provide everyone a chance to provide input on EPA's allocation method.

DENR recommends that EPA conduct a case-by-case analysis of all allocation options and allows itself to use the option or options that best fits the need of the state.

Handling of Modified or Reconstructed Affected Electric Generating Units

On page 65027 of the preamble, EPA request comments on how to handle affected electric generating units that modify or reconstruct and are no longer affected units. EPA proposes in this case that the allowances allocated to the affected electric generating unit continue until the next compliance period and then the allowances would be allocated to the renewable energy set-aside.

DENR agrees the allowances already allocated to the electric generating unit should continue until the next compliance period. DENR recommends the allowances for the next and future

compliance periods be evaluated on a case-by-case basis to determine what the best method of allocating allowances will be for the particular state. For example, if it was the only affected electric generating unit for the state, then placing those allowances in a renewable energy set-aside might be the right thing to do. However, if there are multiple affected electric generating units that have to purchase allowances it might be better to give them the allowances to keep the cost down for the consumers. Conducting a case-by-case analysis and presenting it to the public for comment before it is finalized will provide transparency and allow everyone an opportunity to provide input before a final decision is made.