State of North Dakota

January 31, 2022

SUBMITTED ONLINE VIA https://www.regulations.gov/; Docket ID No. EPA–HQ–OAR–2021–0317; FRL–8510–02–OAR

The Honorable Michael Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C., 20460

Ms. Karen Marsh & Ms. Amy Hambrick
Sector Policies and Programs Divisions
Office of Air Quality Planning and Standards (E143-05)
U.S. Environmental Protection Agency
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Re: State of North Dakota Comments on Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (86 Fed. Reg. 63,110) (November 15, 2021) [EPA–HQ–OAR–2021–0317; FRL–8510–02–OAR]

Dear Administrator Regan, Ms. Marsh, and Ms. Hambrick:

On November 15, 2021 the Environmental Protection Agency (EPA) announced the proposed "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review" (86 Fed. Reg. 63,110) [EPA–HQ–OAR–2021–0317; FRL–8510–02–OAR] (hereinafter the "2021 NSPS Proposal."). The State of North Dakota ("North Dakota" or the "State"), respectfully submits these comments in response to the 2021 NSPS Proposal.

As described below, the 2021 NSPS Proposal has several significant technical and legal flaws and North Dakota submits that EPA cannot proceed with any "methane" rulemaking until these flaws are addressed.[1] North Dakota respectfully urges the EPA to modify the 2021 NSPS Proposal on these grounds, and to return to the proper limits of its regulatory authority as set forth in the Administrative Procedure Act ("APA") and the Clean Air Act ("CAA").

[1] North Dakota also supports the comments submitted by the State of West Virginia et al on the 2021 NSPS Proposal.

I. North Dakota's Interest in the Proposed Rulemaking.

The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In this "experiment in cooperative federalism," (*Michigan v. E.P.A.*, 268 F.3d 1075, 1083(D.C. Cir. 2001)), the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," with States having the primary responsibility for controlling sources of air pollution (*BCCA Appeal Group v. E.P.A.*, 355 F.3d 817, 821-22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*") (emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . .")).

For decades, North Dakota had the lead role in properly regulating emissions from the oil and natural gas sector and has developed considerable expertise in this area. That is because oil and gas production are central to North Dakota's economy and the welfare of its citizens, responsible for 54% of the value of the State's economy, generating approximately 76% of the State's tax revenue and creating approximately 66,000 good-paying jobs in the State. And, the State of North Dakota is ranked 3rd in the United States among all states in the production of oil and gas. North Dakota produces over 500,000,000 barrels of oil per year and over 900,000,000 million cubic feet of natural gas per year. As such, North Dakota has a vested interest in the subject matter of the 2021 NSPS Proposal.

A. North Dakota's Long Participation in Rulemakings Affecting North Dakota's Regulation of the Oil and Natural Gas Sector.

1. EPA's 2016 Methane New Source Performance Standard Rule.

North Dakota participated in EPA's 2016 rulemaking that culminated in the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources." 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule"). After EPA did not adequately take into account the comments filed by North Dakota and other stakeholders, North Dakota initiated the lead petition for judicial review of the 2016 Rule in *North Dakota v. EPA*, No. 16-1242 (D.C. Cir. filed July 15, 2016), asserting in part that EPA (1) failed to make the necessary endangerment finding with respect to the oil and natural gas source category in order to establish standards of performance for methane; (2) that the 2016 Rule was arbitrary and capricious and not in accordance with law for several reasons, including failing to be supported by the administrative record and relying on insufficient justifications for increased regulation; and (3) that the 2016 Rule violated the Tenth Amendment and principles of cooperative federalism by neglecting North Dakota's role in regulating emissions from the oil and natural gas source category and thus commandeering North Dakota's state-delegated programs under the CAA. *See North Dakota v. EPA*, No. 16-1242.

Before North Dakota's challenges to the 2016 Rule were briefed on the merits, the D.C. Circuit held the case in abeyance so that EPA could reconsider the 2016 Rule. Eventually, EPA promulgated a new rule in September of 2020, entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57,018 (Sept. 14, 2020) (the "2020 Rule"). The 2020 Rule corrected many of the errors of the 2016 rule, including removing its broad and unjustified endangerment finding in the 2016 Rule, and returning to a statutorily appropriate view of endangerment. The 2020 Rule was later disapproved by a resolution of Congress under the Congressional Review Act, which was signed by President Biden on June 30, 2021.

2. The Bureau of Land Management's 2016 Venting and Flaring Rule.

North Dakota separately and successfully challenged the Bureau of Land Management's ("BLM") 2016 venting and flaring regulation entitled, Waste Prevention, Production Subject to Royalties and Resource Conservation Rule ("Final Rule"), 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("2016 Venting and Flaring Rules). North Dakota successfully argued that the 2016 Venting and Flaring Rule usurped the sovereign authority of North Dakota to regulate oil and gas operations on non-federal lands in the state, upended the cooperative federalism required by the CAA and Mineral Leasing Act ("MLA"), and that BLM's decision to justify the benefits of the rule on global "social cost" of methane emissions was arbitrary and capricious. *See Wyoming et al. v. U.S. DOI et al.,* Case No. 16-cv-00285 (D. Wyo. 2016). The Court agreed with North Dakota and vacated the 2016 Venting and Flaring Rule. *See* Order on Petitions for Review of Final Agency Action in Case No. 16-cv-00285 (ECF No. 284, October 8, 2020) (Attachment 1).

3. EPA's Clean Power Plan and Affordable Clean Energy Rules.

North Dakota also challenged how EPA has exercised its authority under Section 111 of the Clean Air Act to set standards of performance for existing sources in litigation over the Clean Power Plan and the subsequently promulgated Affordable Clean Energy Rule, which is now before the Supreme Court of the United States. *See North Dakota v. EPA et. al.*, No. 20-1780 (Consolidated in Case No. 20-1530 with Case Nos. 20-1531 and 20-1778). There is a high likelihood that the Supreme Court will rule on the contours of EPA's regulatory authority to set standards of performance for existing sources under Section 111 of the CAA, which could impact the scope of EPA's authority in promulgating the 2021 NSPS Proposal.

B. The 2021 NSPS Proposal is Not Necessary Because North Dakota Extensively Regulates Emissions from the Oil and Natural Gas Sector.

North Dakota already comprehensively regulates GHG emissions from the oil and natural gas sector through the North Dakota Department of Environmental Quality ("NDDEQ") and the North Dakota Industrial Commission ("NDIC").

1. The North Dakota Department of Environmental Quality.

The NDDEQ is the primary delegated implementation and enforcement authority for the CAA in North Dakota. The NDDEQ has adopted air pollution control rules which state that it is the purpose of those rules and regulations "to state such requirements as shall be required to achieve and maintain the best air quality possible, consistent with the best available control technology, to protect human health, welfare, and property; to prevent injury to plant and animal life; to promote the economic and social development of this state; to foster the comfort and convenience for the people; and to facilitate the enjoyment of the natural attractions of this state." N.D. Admin Code ("NDAC") § 33.1-15-01-01.

The NDDEQ Division of Air Quality regulates the oil and gas industry under the North Dakota Air Pollution Control Rules which include (1) Ambient Air Quality Standards (§ 33.1-15-02); (2) Restriction of Visible Air Contaminants (Ch. 33.1-15-03); (3) Control of Organic Compounds Emissions (§. 33.1-15-07); (4) Standards of Performance for New Stationary Sources which adopts by reference 40 CFR part 60 Subpart OOOO and OOOOa (§ 33.1-07-12-02); (5) Designated Air Contaminant Sources, Permit to Construct, Minor Source Permit to Operate, Title V Permit to Operate (§ 33.1-15-14); (6) Restriction of Odorous Air Contaminants (H2S) (§ 33.1-15-16); (7) Restriction of Fugitive Emissions (Ch. 33.1-15-17); and (8) Control of Emissions from Oil and Gas Well Production Facilities (Oil well registrations) (§ 33.1-15-20).

2. The North Dakota Industrial Commission.

The NDIC, Department of Mineral Resources, Oil and Gas Division has jurisdiction to administer North Dakota's comprehensive oil and gas regulations found at NDAC, Chapter 43-02-03. These regulations include regulation of the drilling, producing, and plugging of wells; the restoration of drilling and production sites; the perforating and chemical treatment of wells, including hydraulic fracturing; the spacing of wells; operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; disposal of saltwater and oil field wastes through the ND UIC Program; and all other operations for the production of oil or gas.

The NDIC has already been implementing programs to reduce methane emissions from the oil and natural gas sector, which efforts will be undermined by the 2021 NSPS Proposal. While NDIC is not the "SIP" agency for purposes of CAA regulation, the NDIC is committed to reducing waste from oil and gas production activities and has imposed stringent waste reduction requirements on oil and gas operators.

For example, the NDIC made significant changes to its Gas Capture Policy on September 22, 2020 that already address many of the actions in the 2021 NSPS Proposal to reduce emissions of greenhouse gases ("GHGs") and other pollutants from the Crude Oil and Natural Gas Source category, including:

1. Changed the definition of stranded gas to spacing units with no drilling activity in the previous 5 years and limited flaring allowance to the first 12 months for new wells in the spacing unit.

2. Clarified the standard method for how gas capture percentage is to be calculated.
3. Required a sundry notice with documentation to qualify for the 14 day flowback flaring variance.
4. Required a sundry notice with documentation to qualify for the initial production test flaring variance and reduced the maximum time period from 46 to 31 days.
5. Required a sundry notice with documentation to qualify for the *force majure* flaring variance.
6. Required a sundry notice with documentation to qualify for the system maintenance and upgrade flaring variance.
7. Required a sundry notice with documentation to qualify for the old well flaring variance if newly completed wells exceed system capacity.
8. Required a sundry notice with documentation to qualify for the right of way delay flaring variance and limited private ROW variance to 180 days and federal ROW variance to 365 days.
9. Required notice and hearing to qualify for the safety, reservoir damage, or gathering system curtailment flaring variance.
10. Required a sundry notice with documentation to qualify for the temporary storage flaring variance.
11. Required a sundry notice with documentation to accumulate gas capture credits and limited credits (expire after 12 months).

For the 14 months preceding the NDIC's changes gas capture from all producing oil and gas wells averaged 87% and average flared volume was 399,842,000 cubic feet per day. At the EPA Flare Efficiency Study values of 98%-99% destruction efficiency for flares, this resulted in an estimated 5,998,000 cubic feet per day of methane-butane emissions. For the 14 months since the NDIC's changes, gas capture has averaged 93% and average flared volume was 222,637,000 cubic feet per day, which resulted in an estimated 3,340,000 cubic feet per day of methane-butane emissions, a reduction of 2,658,000 cubic feet per day. Thus, just in the last year North Dakota reduced emissions associated with flaring by 56% or a total of 970,170,000 cubic feet.

North Dakota, through the NDDEQ and NDIC, is already working diligently to reduce emissions from the Crude Oil and Natural Gas source category, without the need for costly or duplicative regulations from EPA in the 2021 NSPS Proposal. Additional federal regulations overlaid on the NDDEQ's and NDIC's existing regulations has the practical effect of duplicating or displacing these regulations that are already effectively controlling methane emissions in the State. For example, North Dakota already completely prohibits venting under NDDEQ and NDIC Rules (*See e.g.* NDAC Chapter 7, § 33.1-15-07-02(1) (prohibiting venting unless controlled by flares or other approved control device). Yet, in the 2021 NSPS Proposal, EPA notes instances where venting may be allowed under the NSPS OOOOb discussion (*see* 86 Fed. Reg. at 63,179-80), which would lessen North Dakota's more stringent regulations and cause uncertainty for operators. And, this is not the only area for potential confusion. The 2021 NSPS Proposal indicates significant new OOOOa regulations which will overlap with North Dakota's existing Chapter 7 regulations. Without seeing the text of those regulations, the effects are impossible to predict. However, North Dakota believes it is likely the 2021 NSPS Proposal would create duplicative reporting, which

reporting burdens would have a net effect of decreasing environmental protections through additional confusion and reporting burdens placed on operators. *See* Section VI.E, *supra* (discussing the OOOOa regulations and potential duplicative reporting requirements in more detail).

II. The 2021 NSPS Proposal Lacks Any Regulatory Text and Violates the Notice and Comment Requirements of the Administrative Procedure Act.

The 2021 NSPS Proposal entirely lacks *any* regulatory text, and thus the technical support documents and regulatory impact analyses are incomplete and lack the information necessary for North Dakota (or any member of the public) to have full notice of and have the opportunity to constructively comment because no actual rule text has been proposed. *See* 86 Fed. Reg. at 63,115 (noting EPA plans to issue a "supplemental RIA," meaning that the current RIA is incomplete and cannot be fully evaluated). Conceding that it has not proposed any regulatory text, EPA expresses an intent to issue a "supplemental proposal and supplemental RIA for the supplemental proposal to provide regulatory text for the proposed NSPS OOOOb and EG OOOOc." 86 Fed. Reg. at 63,115/3.

As a result, the 2021 NSPS Proposal does not comply with the APA's minimum requirement EPA's proposed rules must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved" as required by 5 U.S.C. § 553(b)(3), such that would afford North Dakota a reasonable and meaningful "opportunity to participate in the rulemaking" under 5 U.S.C. § 553(c). This is particularly important in the case of complex technical regulations such as those at issue here, where very slight differences in phrasing, terminology and cross referencing can have a material impact on the legal, technical and economic consequences of the rule. This concern is even higher for States such as North Dakota, which will have the obligation to interpret, implement and enforce any final rule.

Thus, because the November 15, 2021 Federal Register notice of the 2021 NSPS Proposal is in the form of an "advanced notice of proposed rulemaking" since it does not propose the text of a specific rule, if and when EPA chooses to propose any specific regulatory text associated with the 2021 NSPS Proposal, EPA is obligated under the APA to provide North Dakota, and the public, notice of and an opportunity to comment on the proposed rule. Any action by EPA to simply publish new regulatory text for the first time as a final rule based on the notice published in the Federal Register on November 15, 2021 will be a clear violation of the notice and comment provisions of the APA.

Further, public notice and an opportunity for comment must be provided for any revisions to the 2021 NSPS Proposal that EPA might make. Given that EPA in this proceeding is soliciting comments "on *all aspects* of the proposal to enable the EPA to develop a final rule," 86 Fed. Reg. at 63,115/3, any future related proposals and public comment periods should likewise include all aspects of any proposed rule and not split the process into multiple proceedings or rulemakings.

III. EPA Lacks Authority to Establish Standards of Performance for New Sources Under Section 111(b) Until it Makes an Endangerment Finding for the Oil and Natural Gas Source Categories for Transportation and Storage and Well Liquid Unloading Operations.

The 2021 NSPS Proposal seeks to establish Section 111(b) regulations for new sources in the oil and natural gas source category not just for production, but also for transportation and storage and well liquid unloading operations by relying on prior endangerment findings for GHGs. *See* 86 Fed. Reg. at 63,124 (citing to the 2009 Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA (74 Fed. Reg. 66,496, December 15, 2009)) and related 2016 Endangerment and Cause or Contribute Findings for GHG emissions from aircraft under section 231(a)(2)(A) of the CAA (81 Fed. Reg. 54,422, August 15, 2016).

EPA asserts that these prior endangerment findings are sufficient to include the oil and natural gas source categories for transportation and storage and well liquid unloading operations by relying on the 2016 Rule because that rule "affirmatively expanded the source category to include the transmission and storage segment." 86 Fed. Reg. at 63,135 (citing 81 Fed. Reg. at 35,832). However, the 2016 Rule was challenged by many parties including North Dakota in the D.C. Circuit. One of the key challenges to the 2016 Rule was whether the endangerment finding was properly expanded to include the oil and natural gas source category for transportation and storage and well liquid unloading operations, rather than production operations. Thus, the 2016 Rule did not resolve the disputed endangerment finding on which EPA relies again for this rulemaking.

To establish new source emission limits for specific categories of stationary sources, EPA must first list the category of stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). In doing so, EPA must make two separate findings: (1) that a given form of air pollution "may reasonably be anticipated to endanger public health or welfare"; and (2) that a given category of stationary sources "causes, or contributes significantly to" that air pollution. EPA has not made either finding in the 2021 NSPS Proposal for the specific category of oil and natural gas for the transportation and storage and well liquid unloading operations. Further, for all of the reasons set forth in the rulemaking and litigation record related to the 2016 Rule, EPA cannot rely on that disputed and inadequate endangerment finding to support this rulemaking. Therefore, without the necessary and adequate endangerment finding, EPA's proposed requirements under Section 111(b) for the transportation, storage and well liquid operations are unlawful.

IV. EPA Lacks Authority to Establish Standards of Performance for Existing Sources Under Section 111(d).

In the 2021 NSPS Proposal, EPA also proposes to impose nationwide emissions requirements for limiting methane emissions from existing designated sources under Section 111(d) of the CAA. EPA is proposing to set a best system of emission reduction ("BSER") for *existing sources* that is identical to that for *new sources*, requiring a fixed 95 percent reduction of VOC emissions from those sources. *See* 86 Fed. Reg. at 63,179.

However, existing sources under Section 111(d) are regulated much differently from new sources under Section 111(b). Whereas EPA can directly impose standards of performance on *new sources* under Section 111(a) and (b), EPA can only establish BSER for *existing sources* under Section 111(d) as a *guideline*, and the States then has the authority to set the actual standards of performance by applying the BSER. Thus, EPA has the authority to impose standards of performance on new sources, while States, applying EPA guidance, have that authority for existing sources. The 2021 NSPS Proposal would subvert that statutory framework, with EPA assuming the authority to impose national standards of performance on existing sources, eliminating any meaningful distinction between new and existing sources, and effectively displacing the States from their central role in the Clean Air Act in establishing standards of performance for existing sources.

The text of Section 111(a) and 111(d), when read together, set forth a four-step process by which EPA establishes a BSER guideline, States create plans establishing standards of performance for existing sources based on the States' application of the guidelines in the BSER, which plans are then submitted to EPA for review and approval.

First, in accordance with the definition of "standard of performance" under Section 111(a)(1), EPA determines the BSER that is "adequately demonstrated," taking into consideration certain enumerated statutory criteria: cost, any nonair quality health and environmental impacts, and energy requirements. 42 U.S.C. § 7411(a)(1). The BSER established by EPA is not a "standard of performance." A standard of performance is a "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application" of BSER. *Id.* EPA's BSER is not itself the emissions standard or emissions limitation, but rather is a guideline to be "applied" by the States in the process of the States setting "emission limitations" that are "achievable." *Id.*

Second, for existing sources, EPA "shall prescribe regulations" under which *States shall* establish "standards of performance for any existing source for any air pollutant." *Id.* at (d)(1). Since the States "establish" the standards of performance, that means it is the States that determine, for existing sources, what "emissions limitations" are "achievable," applying EPA's BSER guidelines. In promulgating its Section 111(d) procedures, EPA "shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id.* This language in Section 111(d)(1) explicitly lays out the cooperative federalism framework of the CAA for the regulation of existing sources, mandating that the States have the primary role in setting standards of performance and emission limitations, and mandating that States have the authority to make source-specific determinations in setting those standards of performance "for any existing source." *Id.*

Third, under subsection (d)(1), States create plans establishing "standards of performance" for existing sources and "provide[] for the implementation and enforcement of such standards of performance" (i.e., of the standards established by the State). 42 U.S.C. § 7411(d)(1). It is at this stage that States establish standards of performance for existing sources, applying EPA's BSER to

determine what emission limitations are achievable by those existing sources. In so doing, States take into consideration source-specific factors (including but not limited to the remaining useful life of the existing source) in setting standards of performance that are "achievable" (*Id.* at (a)(1)) for "any existing source" (*Id.* at (d)(1)).

Lastly, these State plans are submitted to EPA for its review and approval. *Id.* at (d)(1)-(2).

These provisions, read in concert, mandate that the States have the authority to set the standards of performance and emission limitations, and further mandate that the States have the authority to make source specific determinations in setting those standards of performance "for any existing source." *Id.* at (d)(1). Any BSER *guideline* created by EPA must not infringe on the States' authority to establish emission limitations and determine what emission limitations are "achievable" by existing sources, including the States' authority to take source-specific factors into account in establishing the standards of performance. Otherwise the primary role designated to the States under Section 111(d)(1) is rendered superfluous if EPA has already assumed primacy in Section 111(d)(1). Therefore, under the plain language of Section 111(d), EPA exceeds its authority if it promulgates BSER *guidelines* which instead create mandatory national emission limitations that tie the States' hands in establishing Section 111(d) plans by infringing on the States' authority to (1) "establish[] standards of performance for any existing source" and (2) "take into consideration" source specific factors in applying the standards of performance "to any particular source." *Id.*

The 2021 NSPS Proposal violates this statutory separation of authority by proposing a fixed national standard of 95 percent VOC emissions reduction that would apply to both *new* and *existing* sources. *See* 86 Fed. Reg. at 63,179/2 ("the BSER analysis for existing sources supports proposing presumptive standards for reducing methane emissions from existing pneumatic controllers that are the same as those the EPA is proposing for new, modified, or reconstructed sources (for NSPS OOOOb). EPA's proposal to assume for itself the authority to impose fixed national emission standards on existing sources and thus displace the State's authority to establish standards of performance for existing sources violates Section 111(d).

Further, EPA's attempt to label this 95 percent VOC emission reduction requirement as a "presumptive standard[] that States may use in the development of State plans for specific designated facilities" is a misonomer. 86 Fed. Reg. at 63,117. EPA admits that it "is proposing to translate the degree of emission limitation achievable through application of the BSER (i.e., level of stringency) into presumptive standards." *Id.* In effect, this action, if finalized, would displace North Dakota's sovereign authority to apply the BSER guidelines to determine the degree of emission limitation that is achievable, because EPA has already precisely made that determination.

This very issue is currently before the Supreme Court in *North Dakota v. EPA et. al.*, No. 20-1780 (Consolidated in Case No. 20-1530 with Case Nos. 20-1531 and 20-1778), where certiorari has been granted and oral argument is set to proceed on February 28, 2021. One of the key issues the Supreme Court will soon rule on is the extent of EPA's authority under Section 111(d) to impose emissions standards on existing sources. EPA should refrain from proposing and finalizing any

regulatory provisions regarding existing sources in this rulemaking until the Supreme Court issues its decision.

V. Executive Order 13990, Climate Change, and the Social Cost of Carbon Cannot Justify the 2021 NSPS Proposal.

The 2021 NSPS Proposal is also unlawful because it relies on Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," issued on January 20, 2021, and the stated need to "address the far-reaching harmful consequences and real economic costs of climate change" (86 Fed. Reg. at 63,113/3), including calculating the social cost of carbon, methane, and nitrous oxide as justifications for promulgating the rule (*Id.* at 63,258/3). EPA also relies on Executive Order 12866, "Regulatory Planning and Review," issued September 30, 1993, which requires that agencies EPA projected the emissions reductions, costs, and benefits that may result from a proposed regulatory action as further justifying their quantification of the "social cost of carbon."

EPA's authority to promulgate NSPS regulations must be based on its statutory authority under the Clean Air Act as authorized by Congress, which cannot be expanded or amended by a President's Executive Orders. In particular, EPA cannot justify costs the costs that will be imposed on American citizens and businesses if the 2021 NSPS Proposal was finalized by trying to balance those costs against speculative global benefits that might be reaped outside of the United States using the very dubious "social cost of carbon" calculations directed by EO 12866. Federal agency efforts to rely on "global benefits" to justify "national costs" imposed by regulations has already been rejected by the courts. In *Wyoming et al. v. Jewell et al.*, to which North Dakota was a party, the United States District Court for the District of Wyoming struck down the Bureau of Land Management's ("BLM's") 2016, 2017, and 2018 regulations seeking to reduce waste of natural gas from venting, flaring, and leaks during oil and gas production activities, in part based on the BLM's justification for those regulations based on the "social cost of methane." *See* Order on Petitions for Review of Final Agency Action, Case No. 2:16-cv-00285 (D. Wyo., October 8, 2020). The Court found that BLM's statutory authorization under the Mineral Leasing Act to "prevent waste" from *domestic* oil and gas operations could not be justified by using "a *global* emissions metric to quantify the benefits arising from a rule designed to curb domestic waste under the MLA." *Id.* at 47.

In the 2021 NSPS Proposal, EPA relies on the ''Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under E.O. 13990 (IWG 2021)'' published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). The IWG 2021 support document ignores the admonishment of the Court in *Wyoming et al. v. Jewell et al.*, and attempts to justify the costs on U.S. citizens and companies of the 2021 NSPS Proposal by relying on a "global" calculation of GHG emission reductions because "a global perspective is essential for SC-GHG estimates because climate impacts occurring outside U.S. borders can directly and indirectly affect the welfare of U.S. citizens and residents." IWG 2021, at 4.

At the outset, EPA's "social cost of carbon" calculations are entirely speculative, seeking to attach a global cost to U.S. methane emissions, an effort that is based on countless layers of unproven and untested assumptions regarding environmental, social, political and economic conditions in vast areas where EPA has no jurisdiction or expertise. EPA's references to peer reviews does not transform these assumptions into facts or even good guesses: it is absurd to even pretend to estimate the global social cost of methane emissions 25, 50 or 100 years into the future and use that as a justification to impose costs on U.S. citizens. Accordingly, the output of EPA's "social cost of carbon" calculation are speculative and it is arbitrary and capricious to rely on them.

Further, as the Court decided in *Wyoming v. Jewell*, EPA cannot rely on purported benefits that might accrue to citizens outside the United States to justify the imposition of burdens on the citizens of the United States. EPA cannot evade that judicial determination with vague and unquantified references to the effect that climate change impacts occurring outside of U.S. borders might affect the welfare of U.S. citizens by affecting tourism or "spillover pathways" such as economic or political destabilization. Indeed, the Regulatory Impact Analysis ("RIA") provided by EPA does not event attempt to calculate the domestic benefits of the 2021 NSPS Proposal, and calculates benefits based solely on alleged global benefits. *See* Regulatory Impact Analysis for the Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, at 3-1 ("We estimate the climate benefits under the proposal using an interim global measure of the social cost of methane."). Assuming that the social cost of carbon can be estimated with any reasonable degree of accuracy, the global estimates can be over than 20 times higher per ton of carbon emissions than the equivalent domestic estimates. *See, e.g.*, Social Cost of Carbon, Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis, GAO 20-245 (June 2020) at p. 16.

And, to the extent that EPA believes that domestic benefits are somehow embedded in its speculative estimate of the global cost of carbon in the RIA for the 2021 NSPS Proposal, it has not quantified them. This is a stark difference from the RIA for the 2020 Rule, which justified the rule based on *domestic* carbon benefits, and separately broke out the estimated global carbon benefits of the rule in an additional section. Regulatory Impact Analysis for the Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, at Chapter 7, Section 7.3 (Forgone Global Climate Benefits). In order to adequately justify the 2021 NSPS Proposal, EPA must similarly break out the domestic versus global carbon benefits of the proposal. Until EPA does so, EPA has not supported this proposed rule with a single dollar arising from a specifically identified benefit accruing to U.S. citizens associated with the reduced methane emissions claimed for this proposal. Thus, EPA's reliance on "global benefits" to justify the domestic costs of the 2021 NSPS Proposal is arbitrary and capricious and contrary to law.

VI. The 2021 NSPS Proposal has Several Technical Flaws that Must Be Addressed.

For the several reasons outlined above, the 2021 NSPS Proposal has serious legal flaws that EPA must address before moving forward with proposing and promulgating any final rule. Additionally, the following technical problems with the 2021 NSPS Proposal must also be addressed before moving forward with any proposed or final rule.

A. EPA has not and, in the absence of proposed regulatory text, cannot, evaluate the costs of the 2021 NSPS Proposal.

EPA solicits comment on the costs associated with developing and submitting state plans for emission guidelines ("EG") OOOOc. 86 Fed. Reg. at 63,261. However, it is not reasonable to expect North Dakota to evaluate the cost of implementing a rule when EPA has not even proposed rule text. Without the regulatory text of the rule itself (i.e., what EPA proposes to publish in the Code of Federal Regulations), North Dakota does not know what it will have to do nor what it will cost. When EPA, consistent with its obligations under the APA, publishes a proposed rule for comment, North Dakota will be able evaluate the likely costs of the proposal.

North Dakota similarly does not believe EPA could reasonably make the calculation that the proposed rule "does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate or the private sector in any one year" in accordance with the Unfunded Mandates Reform Act. 86 Fed. Reg. at 63,260. In the RIA cited for that calculation, EPA concedes that for evaluating the regulatory actions "[w]e do not analyze the regulatory impacts of all proposed requirements because we either do not have sufficient data or because it is assumed the provisions would not result in compliance cost or emissions impacts; in these instances, we qualitatively discuss the proposed requirements". *See* Regulatory Impact Analysis for the Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, at 1-4. EPA also acknowledges that State programs have varying requirements but then proceeds to select California and Colorado as a baseline to evaluate other State programs. *See id.* at 2-29 (noting that "California and Colorado have requirements at least as stringent as those in the proposed rule for well site and compressor station fugitives; natural gas processing plant leaks; pneumatic controllers; pneumatic pumps in the production, gathering and boosting, and processing segments; pre-OOOO reciprocating and wet-seal centrifugal compressors in the gathering and boosting and processing segments; and storage vessels). This is based in part on EPA's assumption that "California and Colorado have requirements at least as stringent as those in the proposed rule" and that they "contribute significantly to national production levels" for the oil and gas industry. *Id.* at 2-29.

The conclusion that California and Colorado are good and representative models for the costs of the 2021 NSPS Proposal and as the baseline to evaluate other State programs is arbitrary and fails to take into account the actual oil and gas production sector in the United States. As North Dakota noted earlier, it is ranked 3rd in the United States among all states in the production of oil and gas, just behind Texas and New Mexico. Those three states account for over 60% of the oil and gas

production nationwide, whereas Colorado and California are ranked 5th and 7th respectively, accounting for just 8% of total production volumes in the United States. *See* U.S. Energy Information Administration, at https://www.eia.gov/state/rankings/?sid=US#/series/46. EPA should therefore instead use states such as North Dakota, Texas, and New Mexico as better and more representative baselines for evaluating the 2021 NSPS Proposal.

Further, California's and Colorado's air quality issues have forced those States to implement increasingly stringent air emission requirements that have still failed to put them in attainment with air quality standards. These circumstances, along with their much higher populations, do not make them representative of other States or relevant for determining the costs other States might incur in implementing EPA's proposal. North Dakota believes EPA cannot fairly characterize the costs in the absence of an actual proposed rule, and in any event has underestimated the compliance costs that States will incur in developing the required EG plans for OOOOc. The RIA does not appear to have sufficient data to accurately calculate these costs and the baseline data that is biased. Overall, in both the proposed rule and related RIA, EPA downplays the burden of developing these plans.

In addition, North Dakota believes EPA is missing opportunities to decrease that burden. One example is the first optical gas imaging camera used by North Dakota was obtained with the assistance of an EPA grant. Use of this camera has dramatically changed how North Dakota conducts its inspections of the Oil and Natural Gas Sector. North Dakota encourages EPA to continue to focus on collaborating with the States to invest in cost-effective improvements to emissions control program implementation and enforcement to achieve performance improvements.

B. EPA must provide adequate time to develop the State plan.

EPA does not propose a timeframe for States to develop the required EG plans under the proposed OOOOc rule. However, in the Regulatory Impact Analysis EPA assumes that the process will take three years. North Dakota agrees that developing the EG plans under the proposed OOOOc rule will take substantial resources and time, but without proposing any actual regulatory text North Dakota does not understand how and cannot realistically comment on how EPA reached this conclusion.

EPA also proposes requiring States to "meaningfully engage with members of the public, including overburdened and underserved communities, during the plan development process and prior to adoption and submission of the plan to the EPA". 86 Fed. Reg. at 63,145. North Dakota consists of several federally recognized Indian Nations including the Mandan, Hidatsa, and Arikara Nation which has substantial oil and gas development within its borders. While North Dakota does not have CAA delegation for those areas, it is expected that during the development of the State plan North Dakota will have consultations with affected tribal authorities. These discussions will impose additional time constraints upon North Dakota that must be taken into account in any proposed or final rule.

C. EPA should exclude a "wellhead only well site" from fugitive emissions monitoring as proposed in the rule.

North Dakota agrees with EPA's proposal that "wellhead only" well sites be excluded from fugitive emissions monitoring based on considerable research and rationale already established in the 2016 NSPS OOOOa rulemaking as well as the 2020 Technical Rule. North Dakota also agrees with the proposal to exclude well sites from fugitive emissions monitoring upon those sites becoming wellhead only well sites as provided in the 2020 Technical Rule. North Dakota's own experience supports EPA's conclusion that emissions from these sources are "extremely low". 80 Fed. Reg. at 56,611. North Dakota has only observed a handful of wellhead only well sites with fugitive emissions, and it appears that in those rare cases that the emissions were more a result of operator error. North Dakota believes that the safety risk alone precludes any widespread issue of fugitive emissions from these sites.

D. EPA should not exclude oil wells that produced associated gas from the affected facility definition if they route the gas to a sales line.

EPA offers an alternative proposal for oil wells with associated gas under NSPS OOOOb, where affected facilities are only defined as those oil wells that produce associated gas and do not route the gas to a sales line. 86 Fed. Reg. at 63,238. North Dakota does not believe that removing oil wells where associated gas is routed to a sales line from the definition of an affected facility is necessary, and that if adopted this alternative proposal will only complicate the reporting process and unduly burden both owners and operators in addition to the delegated entities in charge of ensuring compliance with the rule.

Since there is no draft regulatory text, the alternative proposal does not explain what documentation would be required for instances where access to the sales line is disrupted. In such a case, would those oil wells become an affected facility only for as long as the sales line was disrupted? Would the reporting party only report for that specific time period, and would there be an additional notification requirement for those oil wells if they would thus become an affected facility every time the sales line is unavailable? North Dakota is concerned that for oil wells that produce associated gas and where sales line access is not a guarantee (as is common in North Dakota) they will be constantly changing their "affected facility" status.

It is also important to note that along with disruptions to the sales lines themselves, associated gas production can fluctuate significantly from larger oil well sites consisting of multiple oil wells, where predictable decreases in production over time is interrupted by dramatic spikes in production as new oil wells are drilled and brought into production, potentially displacing capacity in the sales lines for gas from older, lower producing wells. This is in addition to the older wells themselves going through associated gas production fluctuations via workovers and recompletions. In such pipeline capacity situations, access to a sales line may not be feasible even if there are no issues with the sales line itself. North Dakota requires that control devices (such as flares) be operational even if all associated gas is routed to a sales line in case of such issues, as they are expected to occur.

The original proposed requirement in the 2021 NSPS Proposal states for oil wells routing all associated gas to a sales line "the only requirement would be to certify that this is occurring." 86 Fed. Reg. at 63,238. North Dakota believes this is appropriate as it should already be known or easily available due to the royalty requirements on the sold gas. The proposed requirement also allows a continuous record for all destinations of associated gas through either its sale, beneficial use, or control. In addition, North Dakota believes it will serve as a reminder that when access to a sales line is not available the only appropriate alternatives for associated gas are beneficial use or control, not venting.

North Dakota believes EPA should adopt the original proposal of the 2021 NSPS Proposal OOOOb where every oil well that produces associated gas would be an "affected facility", and should not adopt the alternative interpretation offered in the 2021 NSPS Proposal of defining the affected facility as each oil well that produces associated gas and does not route the gas to a sales line.

E. EPA should allow any required documentation to be first sent to the States delegated by EPA with the implementation and enforcement authority for the 2021 NSPS Proposal.

EPA proposes requiring electronic reporting of performance test reports, annual reports, and semiannual reports through the Compliance and Emissions Data Reporting Interface (CEDRI). 86 Fed. Reg. at 63,185. For States that have been delegated authority by the EPA to oversee the implementation and enforcement of NSPS OOOO and OOOOa, it is currently burdensome to require owners and operators to solely submit documents through CEDRI. States with delegated authority have no control over CEDRI, and cannot implement State automation, tracking, and other processes for these reports without first either retrieving the data from CEDRI themselves and then uploading the data into their own systems, or by requiring the owner or operators to resubmit the data directly to the State.

Nonetheless, North Dakota supports the use of electronic reporting and agrees with EPA "that the electronic submittal of these reports in the proposed NSPS OOOOb will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability, will further assist in the protection of public health and the environment, and will ultimately result in less burden on the regulated community." 86 Fed. Reg. at 63,185. North Dakota also agrees that "[e]lectronic reporting can also eliminate paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public." However, requiring those reports to be controlled solely through CEDRI undermines many of those goals, requiring States that are supposed to be helped by electronic reporting to instead be burdened by a system over which they have no control of or input into. North Dakota agrees with the intent of CEDRI, but disagrees with its implementation.

CEDRI allows owners and operators to meet their annual NSPS OOOOa reporting obligations by uploading a single report containing all their affected facilities in the United States rather than breaking up the report by state, county, etc. This creates challenges for North Dakota, which includes several federally recognized Indian Nations, including the Mandan, Hidatsa, and Arikara Nations, which have substantial oil and gas development. Since North Dakota does not have CAA delegation for those areas, there is no current way in CEDRI to differentiate locations within tribal boundaries without manually locating each facility suspected to be within those boundaries. In addition, the public cannot generally access reports within CEDRI and instead must wait until such reports have been sent to EPA's WebFIRE repository which is available to the public. WebFIRE itself has a general disclaimer that "These records and any related attachments may or may not have been reviewed by the state, local, or tribal air pollution agency or delegated authority." As CEDRI reports do not require North Dakota's review before being sent to WebFIRE, the public may not be certain over the accuracy of the data or if North Dakota has even had the chance to review the data beforehand.

Lastly, EPA acknowledges that CEDRI or even EPA's Central Data Exchange itself may suffer outages. 86 Fed. Reg. at 63,185. While most outages are expected to be short-lived, those related to a shutdown of the federal government may be considerably longer based on the recent historical record. If CEDRI access was cutoff during a prolonged shutdown, this would severely disrupt the work of a delegated State such as North Dakota. WebFIRE (if still online) would be a sufficient backup for past data, however as a shutdown progresses, the more out of date it becomes. This is especially concerning for CAA compliance work, as air pollution does not stay at a site and allow itself to be cleaned up later.

North Dakota suggests that the proposed rule be simplified to require owners and operators to submit their reports "to the Administrator", as is the general requirement in many other regulations (e.g. NSPS Subpart Kb), and for CEDRI to be the initial point of submission where EPA, not the State, is implementing the program. Should EPA insist on explicitly requiring CEDRI, North Dakota suggests that language referencing or based on § 60.4(a) (*All requests, reports, applications, submittals, and other communications to the Administrator pursuant to this part shall be submitted in duplicate to the appropriate Regional Office of the U.S. Environmental Protection Agency…)* be included instead, to include wording requiring the duplicate be submitted through CEDRI. In this manner, the delegated State can immediately receive the required report independent of CEDRI's status, and EPA will receive the duplicate for their own use. This flexibility is vital in allowing North Dakota and other delegated entities to continue the implementation and enforcement work that is required and expected, both by EPA and the public.

F. North Dakota Does Not Support a Separate Program Authorizing Community or Citizen Group Emission Detection.

EPA solicits comment on whether or how to take advantage of Methane Detection Technologies to help identify and remediate large emission events, including potentially to implement a program whereby communities and others could be enlisted to identify large emission events.

As described earlier, North Dakota regulates oil and gas sources in the State in a robust manner via the existing regulatory programs administered by the NDDEQ and NDIC, respectively. North Dakota, through these agencies, also already relies in part on citizen input in identifying emissions events. However, North Dakota does not support a separate program by which communities or citizen groups would be separately empowered to separately identify and detect emissions events, particularly if the information so gathered would be presumptively considered "credible evidence" for enforcement purposes. Such a program has serious pitfalls, including safety concerns, access rights (North Dakota's regulators have proper legal access to safely inspect production operations), and the technical validity of any data collected by citizens using sophisticated monitoring equipment that is designed for use by trained professionals. Further, the need for such a discrete new program is not clear, given that the Clean Air Act already provides broad authority for citizen suits and North Dakota is unaware of systemic or material barriers that prevent citizens from exercising that right.

For these reasons, North Dakota does not support a separate program empowering communities or citizen groups to conduct separate emission inspections outside of those programs already robustly established in the State.

VII. Conclusion.

For the reasons set forth in these comments, EPA must drastically rework the 2021 NSPS Proposal to return to the limits of its authority in the CAA, and should not proceed with the rulemaking proposal until the serious flaws identified are addressed.

Sincerely,

/s James L. Semerad
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North Dakota Department of Environmental Quality

/s Lynn D. Helms
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