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**Re: Public Comments on Proposed Rule to Exempt Non-Emergency Generators  
from Title V and Minor New Source Review Permitting Requirements**

Dear Ms. Quinlan:

The Southern Environmental Law Center, CleanAIRE NC, Moms Clean Air Force – North Carolina Chapter, North Carolina Conservation Network, North Carolina Environmental Justice Network, Richmond County Coalition for Justice and Black Empowerment, Sierra Club – North Carolina Chapter, and Southern Alliance for Clean Energy submit these comments on the proposed rule published by the North Carolina Department of Environmental Quality (“DEQ”), which would redefine certain facilities’ potential emissions as their actual emissions in order to enable such facilities to avoid applicability of Title V and minor New Source Review permitting requirements.

Because the proposed rule conflicts with federal law and cannot be incorporated into North Carolina’s State Implementation Plan (“SIP”), we urge DEQ to withdraw the proposal or, at a minimum, substantially revise it to correct the deficiencies identified below and provide a new public comment period on the revised proposal.

To the extent that these types of facilities may be more likely to be sited in environmental justice communities, we are concerned that DEQ’s analysis fails to consider the disproportionate impacts this proposal would have on the health and welfare of communities that are already overburdened by exposure to air pollution and who experience greater health disparities resulting from such exposure.

**I. The proposed rule conflicts with applicable federal law and cannot be incorporated into the SIP because it would interfere with DEQ’s ability to enforce applicable Clean Air Act requirements.**

The Clean Air Act prohibits EPA from approving a proposed SIP revision “if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the Clean Air Act].”<sup>1</sup> The proposed rule cannot be incorporated into North Carolina’s SIP because it would

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<sup>1</sup> 42 U.S.C. § 7410(l).

interfere with DEQ’s ability to enforce federal permitting requirements for major sources subject to Title V permitting requirements.

The proposed rule conflicts with the plain language of the Clean Air Act, which prohibits any “major source” from operating “except in compliance with a [Title V] permit issued by a permitting authority.”<sup>2</sup> The Act defines a “major source” as “any stationary facility or source of air pollutants which *directly emits, or has the potential to emit*, one hundred tons per year or more of any air pollutant.”<sup>3</sup> In enacting this definition, Congress chose to include sources that actually (or “directly”) emit above this threshold as well as those that have to potential to emit above this threshold. If Congress intended for Title V permitting requirements to apply only to facilities with *actual* emissions above the specified threshold, it would not have included the phrase “or has the potential to emit.” DEQ is entitled to no deference in its interpretation of this statutory language,<sup>4</sup> and a reviewing court would apply the well-established “canon of statutory construction that a statute may not be interpreted ‘in a manner which would render any of its words superfluous.’”<sup>5</sup>

In DEQ’s own words, the proposed rule “redefines potential emissions as actual emissions.”<sup>6</sup> But DEQ does not have authority to “redefine” these regulatory terms. Federal rules implementing the Clean Air Act require that “[a]ll” SIPs “use the specific definitions” set forth in 40 C.F.R. § 51.165, including the definitions of “Potential to emit” and “Actual emissions.”<sup>7</sup> “Deviations” from such federal definitions cannot be incorporated into a SIP unless “the State specifically demonstrates that the submitted definition is *more stringent, or at least as stringent, in all respects* as the corresponding [federal] definition.”<sup>8</sup> DEQ’s rulemaking materials do not include such a demonstration.

40 C.F.R. § 51.165(a)(1)(iii) defines “Potential to emit” as “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.”<sup>9</sup> A source’s “potential to emit” may be reduced below its “maximum capacity” by a “physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material

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<sup>2</sup> *Id.* § 7661a(a).

<sup>3</sup> *Id.* §§ 7661(2)(B), 7602(j) (emphasis added).

<sup>4</sup> *See, e.g., Savage v. N.C. Dep’t of Transp.*, 388 N.C. 196, 200 (2025) (“This Court has long held that ‘questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo.’ . . . Under de novo review, the reviewing court must ‘consider a question anew, as if not considered or decided by the agency previously . . . and cannot defer to the agency its duty to do so.’”) (internal citations omitted).

<sup>5</sup> *State v. Morgan*, 372 N.C. 609, 614 (2019) (quoting *State v. Coffey*, 336 N.C. 412, 417 (1994)); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *United States v. Umeti*, 167 F.4th 687, 699 (4th Cir. 2026) (“It is axiomatic that, ‘[i]n interpreting a statute, we should strive to give effect to every word that Congress has used to avoid surplusage.’”) (quoting *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 472 (4th Cir. 2011)).

<sup>6</sup> N.C. Dep’t of Env’t Quality, *Regulatory Impact Analysis of Amendment to 15A NCAC 02Q .0807* at 7 (June 26, 2026), <https://edocs.deq.nc.gov/AirQuality/DocView.aspx?id=645306&dbid=0&repo=AirQuality> (“Regulatory Impact Analysis”).

<sup>7</sup> 40 C.F.R. § 51.165(a)(1).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *See also id.* § 70.2.

combusted,” but “*only if* the limitation or the effect it would have on emissions is federally enforceable.”<sup>10</sup> To qualify as an “emission limitation” under the Act, a requirement must “limit[] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis.”<sup>11</sup> To qualify as “federally enforceable,” a requirement must be “enforceable by the Administrator.”<sup>12</sup>

In the Regulatory Impact Analysis, DEQ indicates that this proposed rule, if adopted, would provide the required federal enforceability because it would be incorporated into North Carolina’s SIP.<sup>13</sup> But the proposed rule does not actually establish any “limitation” in the first place; it does not impose any enforceable fuel throughput limit or restriction on hours of operation. DEQ itself states that the proposed rule would “replace the hard-wired fuel throughput limits with a more customizable approach.”<sup>14</sup> That customizable approach is merely comprised of recordkeeping and reporting requirements, with no limitations that could be enforced by the Administrator. Indeed, the proposed rule language anticipates scenarios where unpermitted facilities ultimately have actual emissions that exceed the major source threshold, yet it merely requires such facilities to submit a notification and permit application following such an exceedance.<sup>15</sup> As such, the rule as proposed does not establish a federally enforceable “limitation” that can be used to reduce a facility’s potential emissions below its maximum capacity to emit.

If DEQ nevertheless adopts the proposed rule as drafted, it would put the State at risk of being subject to federal sanctions. Federal rules governing the Title V permitting program require States to “keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures.”<sup>16</sup> If EPA determines that a State “is not adequately administering or enforcing such program,” then that State “shall be subject to certain Federal sanctions,”<sup>17</sup> such as a prohibition on federal grants for transportation projects,<sup>18</sup> withdrawal of approval of the State’s Title V permitting program and implementation of a federal permitting program,<sup>19</sup> and imposition of “fees to cover the Administrator’s costs of administering the provisions of the permitting program.”<sup>20</sup>

A reasonable alternative would be for DEQ to develop a general permit for this category of facilities. Such an approach could accomplish DEQ’s apparent goal of reducing regulatory burden and costs on these facilities without sacrificing the benefits that regulatory oversight and legal enforceability provide for air quality and public health and without incurring the risk of federal sanctions.

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<sup>10</sup> *Id.* § 51.165(a)(1)(iii) (emphasis added); *see also id.* § 70.2.

<sup>11</sup> 42 U.S.C. § 7602(k).

<sup>12</sup> 40 C.F.R. § 51.165(a)(1)(xiv).

<sup>13</sup> Regulatory Impact Analysis at 6.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> Proposed Rule at 3 (subsection g).

<sup>16</sup> 40 C.F.R. § 70.4(i).

<sup>17</sup> *Id.* § 70.4(k).

<sup>18</sup> *Id.* § 70.10(b)(2)(ii), (b)(3) (providing for application of sanctions described in 42 U.S.C. § 7509(b)).

<sup>19</sup> *Id.* § 70.10(b)(2)(i), (b)(2)(iii), (b)(4), (c)(1).

<sup>20</sup> *Id.* § 70.10(d).

## II. The proposed rule cannot be incorporated into the SIP because it would interfere with the state's ability to maintain compliance with the NAAQS.

The Clean Air Act prohibits EPA from approving a proposed SIP revision “if the revision would interfere with any applicable requirement concerning attainment.”<sup>21</sup> In addition to exempting certain facilities from Title V permitting requirements, the proposed rule would exempt such facilities from minor New Source Review permitting requirements.<sup>22</sup> This would eliminate preconstruction review for this category of sources, which is the mechanism by which DEQ ensures that emissions from new and expanded facilities will not cause or contribute to air pollution in excess of any national ambient air quality standard (“NAAQS”). This proposal would thus impede the State’s ability to attain (and maintain attainment of) the NAAQS and cannot be incorporated into North Carolina’s SIP.

Section 110(a)(2)(C) of the Act requires every SIP to include “regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved.”<sup>23</sup> Similarly, 40 C.F.R. § 51.160(a) requires every SIP to include:

Legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in . . . [i]nterference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

This federal rule also requires that every SIP “must include *means by which the State* or local agency responsible for final decisionmaking on an application for approval to construct or modify *will prevent such construction* or modification if . . . [i]t will interfere with the attainment or maintenance of a national standard.”<sup>24</sup>

DEQ’s regulatory analysis for the proposed rule does not include “air quality modeling” or “an attainment or maintenance demonstration based on EPA’s most recent technical guidance to show that even without the control measure . . . , the area (as well as interstate and intrastate areas downwind) can continue to attain/maintain the NAAQS.”<sup>25</sup> According to EPA’s guidance for demonstrating non-interference under Section 110(l) of the Clean Air Act, if the State does not conduct such an air quality analysis, its only other option is to “substitute” the measure being removed from the SIP “with another measure that achieves equivalent or greater emission reductions.”<sup>26</sup> Because DEQ’s proposed rule would repeal an existing requirement for certain facilities to obtain a preconstruction permit,

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<sup>21</sup> 42 U.S.C. § 7410(l).

<sup>22</sup> See Regulatory Impact Analysis at 6–7.

<sup>23</sup> 42 U.S.C. § 7410(a)(2)(C).

<sup>24</sup> 40 C.F.R. § 51.160(b) (emphasis added).

<sup>25</sup> U.S. EPA, *Demonstrating Noninterference Under Section 110(l) of the Clean Air Act When Revising a State Implementation Plan*, at 11 (June 8, 2005), <https://perma.cc/HL5B-KVM8> (internal citations omitted).

<sup>26</sup> *Id.* at 6. Such alternative measures “should be quantifiable, permanent, surplus, enforceable and contemporaneous (when the substitute is a new measure).” *Id.*

without establishing an alternative means for evaluating such facilities' impacts on air quality prior to construction, it cannot be incorporated into the SIP.

**III. The proposed rule cannot be incorporated into the SIP because it would interfere with the state's ability to achieve reasonable further progress in a nonattainment area.**

Although there are currently no nonattainment areas in North Carolina, it is reasonably foreseeable that there will be in the near future. In particular, DEQ should be planning for Davidson County to be designated as a nonattainment area for the primary annual NAAQS for fine particulate matter ("PM<sub>2.5</sub>"), which was recently revised to 9.0 micrograms per cubic meter ("µg/m<sup>3</sup>").<sup>27</sup> The certified 2023–2025 design value for the Lexington Water Tower air monitor in Lexington is 9.1 µg/m<sup>3</sup>.<sup>28</sup> As a result, the area in which the Lexington Water Tower monitor is located should be formally designated nonattainment by February 6, 2027.<sup>29</sup>

The forthcoming designation of Davidson County as a nonattainment area for the primary annual PM<sub>2.5</sub> NAAQS will trigger a series of obligations for DEQ, including preparation and submittal of a nonattainment plan for incorporation into the SIP.<sup>30</sup> Such a nonattainment plan "shall require reasonable further progress,"<sup>31</sup> which is defined as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date."<sup>32</sup>

The Clean Air Act prohibits EPA from approving a proposed SIP revision "if the revision would interfere with any applicable requirement concerning . . . reasonable further progress (as defined in section 7501 of this title)."<sup>33</sup> In addition to interfering with DEQ's ability to maintain compliance with the NAAQS in most areas of the State, allowing certain facilities with potential emissions that exceed the major source threshold to avoid Title V and minor New Source Review permitting requirements will likely interfere with the ability of DEQ to ensure that reasonable further progress is made towards attaining the primary annual PM<sub>2.5</sub> NAAQS in Davidson County by the attainment date.

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<sup>27</sup> See 40 C.F.R. § 50.20(a); Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16,202 (Mar. 6, 2024).

<sup>28</sup> See U.S. EPA, *PM<sub>2.5</sub> Design Values, 2025 (xlsx)*, at tbl.5a row 667 (last updated June 12, 2026), [https://www.epa.gov/system/files/documents/2026-06/pm25\\_designvalues\\_2023\\_2025\\_final\\_06\\_12\\_26.xlsx](https://www.epa.gov/system/files/documents/2026-06/pm25_designvalues_2023_2025_final_06_12_26.xlsx).

<sup>29</sup> See *All. of Nurses for Healthy Env'ts et al. v. Zeldin*, 2026 WL 2078145 (N.D. Cal. 2026) (ordering EPA to promulgate final designations for the 2024 annual PM<sub>2.5</sub> NAAQS for all areas of the country by February 6, 2027).

<sup>30</sup> See 42 U.S.C. § 7502(b).

<sup>31</sup> *Id.* § 7502(c)(2).

<sup>32</sup> *Id.* § 7501(1).

<sup>33</sup> *Id.* § 7410(l).

**IV. In addition to being unlawful, the proposed rule is technically flawed and reflects bad policy.**

*1. The proposed rule is technically flawed.*

Not only does the proposed rule conflict with federal law by unlawfully redefining potential emissions as actual emissions, it also fails to establish mechanisms for accurately calculating actual emissions. Given these compounding legal and technical flaws, it would be arbitrary and capricious to proceed in adopting the rule as proposed.

First, DEQ provides no explanation of the basis for the emission factors set forth in Table 1, which the proposed rule would require to be used by certain facilities in calculating their actual emissions. In the absence of any description of the source of these emission factors, it is impossible to evaluate whether they properly account for worst-case emission rates when considering all types of engines to which the rule would apply. While Table 1 establishes different emission factors based on the type of fuel combusted, emission rates for such engines also vary depending on other variables such as the manufacturer, model, size, date of manufacture, and certification tier.

Second, Table 1 contains no emission factors for PM<sub>2.5</sub>, and the Regulatory Impact Analysis does not provide any explanation for this omission. According to EPA, scientific studies have not identified a concentration of PM<sub>2.5</sub> below which adverse health effects are not observed, meaning there is no known safe level of exposure.<sup>34</sup> By failing to require applicable facilities to calculate and report their emissions of PM<sub>2.5</sub>, the proposed rule risks authorizing major sources of this pollutant to be constructed and operate without any regulatory oversight or accountability for those emissions.

Third, the proposed rule only requires calculation and reporting of emissions attributable to on-site fuel storage for facilities with engines that combust gasoline.<sup>35</sup> The Regulatory Impact Analysis does not provide any explanation for not requiring calculation and reporting of emissions attributable to on-site storage of natural gas, diesel, or liquified petroleum gas. Such emissions must be included in any facility-wide calculation of emissions, especially if such a calculation is relied upon by a facility to avoid Title V and minor New Source Review permitting requirements.

*2. The proposed rule reflects bad policy.*

To the extent that these types of facilities may be more likely to be sited in environmental justice communities, we are concerned that DEQ's analysis fails to consider the disproportionate impacts this proposal would have on the health and welfare of

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<sup>34</sup> See 89 Fed. Reg. at 16238 (Mar. 6, 2024) (explaining that “health effects can occur over the entire distribution of ambient PM<sub>2.5</sub> concentrations evaluated, and epidemiologic studies conducted to date do not identify a population-level threshold below which it can be concluded with confidence that PM<sub>2.5</sub>-associated health effects do not occur”); *id.* at 16228 (describing scientific studies that “consistently demonstrate” there is “a linear, no-threshold [concentration-response] relationship between short-term PM<sub>2.5</sub> exposure and mortality”).

<sup>35</sup> Proposed Rule at 2, 4 (subsections (e)(5), (h)(2)(C), (i)(2)).

communities that are already overburdened by exposure to air pollution and who experience greater health disparities resulting from such exposure.

In addition, the Regulatory Impact Analysis indicates that DEQ would reduce or even eliminate inspections at facilities that take advantage of the proposed permitting exemption.<sup>36</sup> But DEQ retains authority to conduct inspections at unpermitted facilities.<sup>37</sup> In addition, as DEQ acknowledges, a subset of facilities to which the proposed rule may apply will continue to be subject to federal New Source Performance Standards.<sup>38</sup> These federal rules include recordkeeping and other requirements that are expressly subject to inspection.<sup>39</sup> DEQ's failure to plan for such inspections and related enforcement activity is particularly concerning given that the lack of a permit increases the likelihood that facility operators will not be aware of, understand, or feel obligated to comply with applicable requirements that remain in place to protect air quality and public health.

Finally, the Regulatory Impact Analysis concludes that implementation of the proposed rule will likely result in net increases in costs for the State.<sup>40</sup> DEQ is already understaffed and resource-constrained, which over the long term will impede its ability to effectively implement and enforce air quality laws throughout the State. Adoption of the rule as proposed would only exacerbate this problem. Moreover, this proposal appears to be primarily intended to reduce regulatory burdens for data centers, which is a rapidly expanding industry in North Carolina. As a result, the total net costs to state government may be substantially higher than DEQ's estimate, which appears to be based solely on existing facilities. Especially considering that the proposed rule is unlawful and technically flawed, there is no reasonable basis to proceed with adoption of this fiscally detrimental proposal.

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We urge DAQ to withdraw the proposal or, at a minimum, substantially revise it to correct the deficiencies identified above—which could be accomplished by developing a general permit for this category of facilities—and provide an opportunity for public review and comment on the revised proposal.

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<sup>36</sup> Regulatory Impact Analysis at 14 (explaining that cost-benefit analysis assumes “labor savings for inspections”).

<sup>37</sup> *See, e.g.*, N.C. Gen. Stat. § 143-215.3(a)(2)( “No person shall refuse entry or access to any authorized representative of the Commission or Department who requests entry for purposes of inspection[.]”); 15A N.C. Admin. Code 02D .0605(a)(5), (f) (requiring “unpermitted sources” to maintain “records needed to determine compliance with rules in Subchapters 02D or 02Q of this Chapter” and requiring that “[r]ecords and reports required to demonstrate compliance with the [monitoring, recordkeeping, and reporting] requirements of 15A NCAC 02D .0600 shall be made available to personnel of the Division for inspection”).

<sup>38</sup> Proposed Rule at 2 (applicable to an engine that “is subject to one or more emission standards under 40 CFR Part 60, Subpart IIII or JJJJ”).

<sup>39</sup> *See, e.g.*, 40 C.F.R. § 60.7(f) (“Any owner or operator subject to the provisions of this part shall maintain a file of all measurements . . . and all other information required by this part recorded in a permanent form suitable for inspection.”); *id.* § 60.11(d) (“Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include . . . inspection of the source.”).

<sup>40</sup> Regulatory Impact Analysis at 19 (estimating a net increase in costs to state government of \$1,233 for each “newly exempt” facility that would be subject to quarterly reporting requirements and between \$2,123 – \$4,010 for each “already exempt” facility); *id.* at 23 (explaining that the proposed rule is “expected to . . . impos[e] modest net costs on the State”).

Respectfully submitted,



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