Testimony of Dakota Resource Council
SB 2238
February 11, 2021
Scott Skokos # 256

Chairman Kruen & members of the committee, my name is Scott Skokos and I am testifying on behalf of Dakota Resource Council and our members. DRC was founded in the late 1970s by farmers and ranchers that wanted to promote sustainable use of North Dakota's natural resources and family-owned and operated agriculture. Currently DRC has over 600 dues paying members and several thousands of supporters statewide. Thank you for allowing me to testify today. I stand here today in opposition to SB 2238.

The testimony to follow reviews some of our issues with SB 2238. In our view, this proposed bill would place certain restrictions on the creation and submission of the North Dakota Regional Haze State Implementation Plan (SIP), which would be in conflict with the federal Regional Haze Rule. Many elements of this bill are unnecessary, unclear, and at odds with the Clean Air Act. As a result, if passed this bill at best could result in costly litigation, and at worst could result in North Dakota losing its ability to administer the Clean Air Act through the Department of Environmental Quality.

**1. SB 2238 Creates Unnecessary Parallel Requirements**

The proposed Bill includes language that generally parallels requirements already in the Regional Haze Rule. This includes some of the text in Paragraphs 1, 2.a, 2.b(3), 3, and 6. In addition, Paragraph 4 would require that any required emission limit be configured such that a pollution source has the flexibility to employ any pollution control it desires in order to meet that limit. Although control cost analyses focus on specific controls that have been identified as being technically feasible, the final emission limit can be met using any technology the pollution source desires. This has been a long standing feature of the Regional Haze Rule and EPA Guidance and there is no need to reinforce it through legislation.

The overall effects of these parallel requirements would be to introduce unnecessary duplication, and cause the North Dakota Department of Environmental Quality to spend resources comparing this proposed legislation to the Regional Haze Rule in an attempt to identify conflicts. Thus, these requirements serve no useful purpose and should not be finalized.

**2. SB 2238 Creates Requirements that would be in Conflict with the Regional Haze Rule**

The following sections detail specific aspects of this Bill that if finalized would be in conflict with the Regional Haze Rule:

a. *The Price of Electricity is Not a Consideration under the Regional Haze Rule*

Paragraph 2.b(2) would require that when considering controls for Electric Generating Units, the North Dakota Department of Environmental Quality must consider the potential impact on the price of electricity. There is no place in the Regional Haze Rule for such a consideration. Controls for the upcoming North Dakota Regional Haze SIP would be considered under the "Long Term Strategy" section of the Regional Haze Rule, mainly covered in 40 CFR Section 51.308(f). Specifically, Section 51.308(f)(2)(i) requires that North Dakota "evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment." These four "reasonable progress factors," are the main metrics states use when considering regional haze emission controls. Notably, there is no consideration given to the price of electricity here or in other sections of the Regional Haze Rule. However, if a control introduces such a burden to the pollution control source that it is in danger of going out of business, the Regional Haze Rule and EPA's Guidance have noted that such a source can submit an affordability analysis which can be considered by states and EPA. EPA's position on the impact on the price of electricity and the affordability of controls are long standing features of the Regional Haze Rule and there are a number of examples of EPA expressing these views in responses to comments received in its proposed actions. Therefore, because the text in Paragraph 2.(b)2 would be in conflict with the Regional Haze Rule, it should not be finalized.

*b. SB 2238 Could Result in a Separate Review of the North Dakota Regional Haze SIP, Which Could Result in A Missed Deadline*

Section 51.308(f) requires that the North Dakota Regional Haze SIP be Submitted to EPA by July 31, 2021. The proposed legislative review required under Paragraph 5 could therefore cause North Dakota to miss this deadline. Should North Dakota miss this deadline, EPA would be obligated to start a "Federal Implementation Plan (FIP) clock." Under Section 110(c) of the Federal Clean Air Act, EPA is required to promulgate a Federal Implementation Plan (FIP) within two years of the effective date of a finding that a state has failed to submit a SIP. This occurred in the previous round of Regional Haze SIPs and culminated with EPA issuing a number of FIPs.

Even if the North Dakota Regional Haze SIP is modified according to direction from the North Dakota Legislature and submitted on time, it may include elements that are in conflict with the Regional Haze Rule, placing it in danger of being rejected by EPA. Therefore, this requirement should not be finalized.

*c. Paragraph 2(b)(1) of SB 2238 Impermissibly Grafts a "Perceptibility" Factor onto the Statute.*

Paragraph 2(b)(1) would require DEQ to consider whether individual controls "improve visibility by more than a de minimis amount, more than a humanly perceptible amount." This would effectively graft a fifth "perceptibility" factor onto the four-factor statutory definition of reasonable progress. Moreover, EPA has consistently maintained that perceptibility of visibility improvements from individual controls should not be a determinative factor. This is because an individual source's "contribution to haze may be significant

relative to other source contributions in the Class I area," and controls should be required if they are cost effective in terms of tons of pollution reduced per dollar because the regional haze program is designed to achieve gains in the aggregate by the total of measures reducing emissions to benefit Class I national park and wilderness visibility.

*d. Paragraph 2(b)(2) and (3) of SB 2238 Impermissibly Focus on a Comparison of the Total Costs of any Individual Control to Visibility Improvements at Class I Areas.*

Paragraphs 2(b)(2) and (3) require DEQ to compare the total cost of controls at an individual facility with the visibility benefit at Class I areas. Although states must calculate the capital costs of controls, EPA has consistently rejected total cost, in and of itself, as a determinative factor for controls. The cost of reducing pollution will always be more than doing nothing at all and is not in isolation an accurate metric for evaluating reasonable control costs. States must evaluate the cost of controls against the total anticipated pollution reductions. BART Guidelines, 40 C.F.R. pt. 51 app. Y(IV)(D)(4)(c). To the extent this bill attempts to supplant EPA's regulatory cost-effectiveness analysis, the proposed statute is contrary to federal law.

*e. Paragraphs 6 of SB 2238 is contrary to the Clean Air Act and the Regional Haze Rule*

Paragraph 6 provides that "[a]ny new control measures mandated by the state plan are effective only upon final approval by the environmental protection agency." This proposed provision conflicts with the Clean Air Act, which requires that the state implementation plan itself include "enforceable emission limitations," 42 U.S.C. § 7410(a)(2)(A), and prohibits EPA from approving any plan that is not itself enforceable under state law. *Id*. § 7410(a)(2)(E). The Regional Haze Rule, in turn, provides that each state implementation plan "must include *enforceable* emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas." 40 C.F.R. § 51.308(d)(3) (emphasis added). The state cannot condition the enforceability of its plan on federal approval.

*f. Paragraph 7 of SB 2238 is Ambiguous*

Paragraph 7 states, "The department may not include in the state regional haze plan any mandatory control measures that have been implemented previously only with the direct assistance of financial support from the state or federal government through a program intended to encourage the development of emerging emission reduction technologies and techniques." This requirement appears to be unclear, possibly misworded, and subject to multiple interpretations, intended to either preclude certain controls or impermissibly graft on an additional requirement for controls. Regardless of the its intended formulation, it cannot usurp responsibility from the North Dakota Department of Environmental Quality to make a determination of the technical feasibility of a control under Section 51.308(f)(i) of the Regional Haze

Rule, as that would place the legal delegation of authority EPA granted North Dakota to implement the Regional Haze Program in jeopardy.

**4. Conclusion**

Thank you for the opportunity to testify today. DRC urges this committee to give this bill a do not pass recommendation due to the possible clean air act compliance issues that this law could create. North Dakota does not need to subject itself to unnecessary litigation or the risk of having the federal government take over its administration of the Clean Air Act.