Volume 51
Number 2 *Symposium: Continuing to Fight Today's Environmental Challenges: Climate Change, Health Concerns, Energy, and Food Supply*

*pp.*405-446

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The Clean Energy Incentive Program: A (Stayed) Invitation to Technological Innovation and Market Transformation in the Electric Energy Industry

Michael A. Mullett

THE CLEAN ENERGY INCENTIVE PROGRAM: A (STAYED) INVITATION TO TECHNOLOGICAL INNOVATION AND MARKET TRANSFORMATION IN THE ELECTRIC ENERGY INDUSTRY*

Michael A. Mullett**

I. INTRODUCTION

Global climate change is perhaps the most challenging, complex, and controversial issue to face humanity since the dawn of the nuclear age at the conclusion of World War II in 1945. It also promises to be one of the most contested issues in the 2016 Presidential elections, especially in relation to whether the commitments that President Barack Obama made on behalf of the United States at the November 2015 Paris, France, Climate Change Conference to reduce American emissions to Earth's atmosphere of carbon dioxide ("CO_2") will be honored by his successor.[1] As a practical

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* This Article is based on a presentation given at the Valparaiso University Law School's Environmental Law Symposium in November 2015. While it is unlikely that the contents of this Article will be severely impacted, the 2016 Presidential Election could convert the final Clean Power Plan ("CPP") rule and the proposed the Clean Energy Incentive Program ("CEIP") rule into "dead letters." Furthermore, the Supreme Court's review of the D.C. Circuit en banc decision on the multiple pending challenges to the basic legal foundation of the CPP may fundamentally impact both the final CPP rule and the proposed CEIP rule even assuming that they are implemented. Finally, while this Article was being edited when the presidential election was concluded, the editors of Volume 51 did not change the language to reflect the result. As a result, any substantial changes affecting the CEIP made in the near future will be addressed in an addendum to this Article appearing in the *Valparaiso University Law Review* Volume 52.

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1 *See, e.g.*, Chris Mooney et al., *The U.S. and China Just Joined the Paris Climate Deal – Which Could Be Bad News for Donald Trump*, WASH. POST (Sept. 3, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/09/03/u-s-and-china-just-ratified-the-paris-climate-agreement-which-could-be-bad-news-for-donald-trump/?utm_term=.2a686

matter, this issue will turn on whether the next President of the United States will continue to develop and implement the Clean Power Plan ("CPP") announced by the Obama Administration on the eve of the Paris Conference in August of 2015.[2] Of particular importance in this context is the question of whether the 45th President of the United States will follow his or her predecessor in pursuing early action to achieve CPP emissions reduction goals through that Plan's Clean Energy Incentive Program ("CEIP").[3] This Article will explain the primary purposes and principal provisions of this proposed Program and analyze the major uncertainties and contingencies that it faces in the immediate future.[4]

II. CLEAN ENERGY INCENTIVE PROGRAM: BACKGROUND

The CEIP is an integral and important component of the Obama Administration's and the Environmental Protection Agency's ("EPA") historic CPP.[5]

On August 3, 2015, announcing his Administration's intent to promulgate and implement the CPP, President Obama called the Plan "the single most important step America has ever taken in the fight against global climate change."[6] He highlighted the purposes and provisions of the Plan in these words:

> Here's how it works: over the next few years, each State will have the [chance] to put together its own plan for reducing emissions[,] because every State has a different energy mix. Some generate more of their power from renewables; some from natural gas, or nuclear, or coal. And this [P]lan reflects the fact that not everybody is

411c5d1 [https://perma.cc/3D2W-TS2H] (noting Donald Trump promised to withdraw from the Paris Climate Agreement).

2 *See Remarks by the President in Announcing the Clean Power Plan*, WHITE HOUSE (Aug. 3, 2015), https://www.whitehouse.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan [https://perma.cc/7R2G-JD8U] (announcing the CPP).

3 *See* Zoë Schlanger, *Does the Clean Power Plan Still Stand a Chance? Only if the Next President Is a Democrat*, NEWSWEEK (Feb. 10, 2016), http://www.newsweek.com/does-clean-power-plan-still-stand-chance-it-depends-who-we-elect-425114 [https://perma.cc/8Z6W-Z6F3] (recognizing that the future of the CPP will be determined by the 2016 presidential election); *see also Clean Energy Incentive Program*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/cleanpowerplan/clean-energy-incentive-program [https://perma.cc/9QRC-7C2H] (explaining the CPP's Incentive Program).

4 *See infra* Parts II–V (detailing the CPP and the CEIP).

5 *See* JONATHAN L. RAMSEUR & JAMES E. MCCARTHY, EPA'S CLEAN POWER PLAN: HIGHLIGHTS OF THE FINAL RULE 10 (Congressional Research, 2016) (highlighting the CEIP's key role jump starting CO_2 emissions reductions ahead of the CPP's 2022 implementation).

6 *Remarks by the President in Announcing the Clean Power Plan, supra* note 2.

starting in the same place. So we're giving states the time and the flexibility they need to cut pollution in a way that works for them.

And we'll reward the states that take action sooner instead of later[,] because time is not on our side here. As states work to meet their targets, they can build on the progress that our communities and businesses are already making.

A lot of power companies have already begun modernizing their plants, reducing their emissions and[,] by the way, creating new jobs in the process. Nearly a dozen states have already set up their own market-based programs to reduce carbon pollution. About half of our states have set energy efficiency targets. More than [thirty-five] have set renewable energy targets. Over 1,000 mayors have signed an agreement to cut carbon pollution in their cities. And last week, [thirteen] of our biggest companies, including UPS and Walmart and GM, made bold, new commitments to cut their emissions and deploy more clean energy.

So the idea of setting standards and cutting carbon pollution is not new. It's not radical. What is new is that, starting today, Washington is starting to catch up with the vision of the rest of the country. And by setting these standards, we can actually speed up our transition to a cleaner, safer future.

With this Clean Power Plan, by 2030, carbon pollution from our power plants will be [thirty-two] percent lower than it was a decade ago. And the nerdier way to say that is that we'll be keeping 870 million tons of carbon dioxide pollution out of our atmosphere. The simpler, layman's way of saying that is it's like cutting every ounce of emission due to electricity from 108 million American homes. Or it's the equivalent of taking 166 million cars off the road.

By 2030, we will reduce premature deaths from power plant emissions by nearly [ninety] percent[,] and thanks

> to this plan, there will be 90,000 fewer asthma attacks among our children each year. And by combining this with greater investment in our booming clean energy sector and smarter investments in energy efficiency and by working with the world to achieve a climate agreement by the end of this year, we can do more to slow, and maybe even eventually stop, the carbon pollution that's doing so much harm to our climate.[7]

In conjunction with the President's announcement of the CPP, EPA Administrator Regina "Gina" McCarthy stated, "[w]e're proud to finalize our historic Clean Power Plan. It will give our kids and grandkids the cleaner, safer future they deserve. The United States is leading by example today, showing the world that climate action is an incredible economic opportunity to build a stronger foundation for growth."[8] The EPA also told the public and media:

> The Clean Power Plan accelerates the transition to a clean energy future, which is happening even faster than expected—which means carbon and air pollution are already decreasing, improving public health year by year. By 2030, the plan will cut carbon pollution from the power sector by nearly a third and additional reductions will come from pollutants that can create dangerous soot and smog, translating to significant health benefits for the American people. By 2030, emissions of sulfur dioxide from power plants will be [ninety] percent lower and emissions of nitrogen oxides will be [seventy-two] percent lower, compared to 2005 levels. Americans will avoid up to 90,000 asthma attacks and spend up to 300,000 more days in the office or the classroom, instead of sick at home. And up to 3,600 families will be spared the grief of losing a loved one too soon . . . .
>
> [The] EPA's plan reflects unprecedented public input, including more than 4.3 million public comments on the proposal, and hundreds of meetings with stakeholders. It

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7 *Id.*

8 *Obama Administration Takes Historic Action on Climate Change/Clean Power Plan to Protect Public Health, Spur Clean Energy Investments and Strengthen U.S. Leadership*, U.S. ENVTL. PROTECTION AGENCY (Aug. 3, 2015), https://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/c5df9981993c6df785257e96004d4f14!OpenDocument [https://perma.cc/B7WC-PYLT].

> works by building on strategies states and businesses are already using. Today, the United States uses three times more wind and [twenty] times more solar energy than it did in 2009, and the solar industry added jobs [ten] times faster than the rest of the economy. It safeguards energy reliability by setting common-sense, achievable state-by-state goals that build on a rapidly growing clean energy economy and gives states and utilities the time and flexibility they need to meet their goals.
>
> The final rule establishes guidelines for states to follow in developing and implementing their plans, including requirements that vulnerable communities have a seat at the table with other stakeholders. [The] EPA is proposing a model rule states can adopt, as well as a federal plan that the EPA will put in place if a state fails to submit an adequate plan. Both the proposed model rule and federal plan focus on emissions trading mechanisms to make sure utilities have broad flexibility to reach their carbon pollution reduction goals. [The] EPA also finalized standards to limit carbon pollution from new, modified[,] and reconstructed power plants.[9]

In a fact sheet accompanying its CPP media release, the EPA also touted the specific public benefits it expected to be realized from including the CEIP in the CPP:

- Encourage the widespread development and deployment of wind and solar, which is essential to longer term clean energy and climate strategies and consistent with the Clean Air Act's directive to advance newer technologies.
- Jumpstart job gains that are anticipated from construction and installation of Renewable Energy ("RE") and Energy Efficiency ("EE") projects under the CPP.
- Provide incentives to follow through on planned investments in zero-emitting wind and solar power in advance of the CPP's first performance period.
- Provide near term health benefits from reductions in sulfur dioxide, particulates, and nitrogen oxides.
- Level the playing field for implementing energy efficiency in low-income communities, which has been historically limited by

9 *Id.*

economic barriers, bringing jobs and lower energy costs to consumers in those areas.[10]

Subsequently, in the final CPP published in the Federal Register on October 23, 2015, the EPA incorporated the CEIP as an optional program that states could use to incentivize early investments in RE generation, as well as in EE measures in low-income communities.[11]

In the final CPP, the agency laid out the critical parameters of the CEIP and stated that it would undertake additional public and stakeholder engagements and seek input from these groups before fully developing the specific details related to the design and implementation of the program.[12] In its proposed Federal Plan and Model Rules, the EPA solicited comments on a number of issues related to implementation of the CEIP.[13] In addition to the formal public comment period on the Federal Plan and Model Rules, the EPA also conducted outreach to and engagement of interested parties in several ways in the months following promulgation of the CPP.[14]

Based on its extensive research, outreach, and input, the EPA published its proposed CEIP in the Federal Register on June 30, 2016, modifying in several respects the Program's general parameters as described in the CPP and also elaborating its specific programmatic

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10 Fact Sheet, *The Clean Power Plan – Clean Energy Incentive Program*, U.S. ENVTL. PROTECTION AGENCY (Aug. 2, 2015), https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-ceip.pdf [https://perma.cc/3BLN-423Y].

11 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,829–30 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60) (recognizing that the CEIP was established to incentivize investment in renewable energy ("RE") and energy efficient ("EE") ventures, which target low-income communities); RAMSEUR & MCCARTHY, *supra* note 5, at 10 (explaining that the CEIP was part of the CPP final rule).

12 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,830 (outlining measures the agency would take to properly develop the program).

13 *See Clean Energy Incentive Program (CEIP) Design and Implementation Rule*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=EPA-HQ-OAR-2016-0033 [https://perma.cc/S5BB-UB8S] (noting the Environmental Protection Agency ("EPA") solicited comments on CEIP implementation); *see also* 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, Proposed Rule, 80 Fed. Reg. 64,966, 64,978, 65,000–01 & 65,025–26 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 78) (soliciting comments on Federal Plan and Model Rules generally and describing the CEIP and outlining how it would be incorporated in rate-based and mass-based plans specifically).

14 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,663, 64,672 (noting the extensive outreach and engagement undertaken and the millions of comments received following publication of the proposed CPP rule).

design in considerably more detail.[15] Most notably, the EPA included hydropower and geothermal, along with solar and wind, as CEIP-eligible RE technologies and added solar projects to energy efficiency measures as CEIP-eligible actions in low-income communities.[16]

The central purpose of the CEIP, as currently proposed, is to incentivize early investments in wind and solar RE generation generally, as well as in solar and demand-side EE projects implemented in low-income communities particularly to generate carbon-free megawatt hours ("MWh") or reduce end-use energy demand during 2020 and/or 2021, the two years immediately preceding the CPP compliance period of 2022–2030.[17] Although state participation in the CEIP is optional, a state opting to participate in the CEIP must make a (non-binding) statement of its intent to participate in its initial CPP submittal to the EPA.[18]

To achieve the central purpose of the CEIP, states are enabled and encouraged to award project sponsors early action allowances, if implementing under the CPP a mass-based trading program, or early action emission rate credits ("ERCs"), if implementing a rate-based trading program.[19] The EPA will provide matching allowances or ERCs up to a national total equivalent to 300 million short tons of CO_2 emissions.[20] The matching allowances or ERCs awarded for eligible early clean energy actions will be doubled for qualifying projects in low-income communities.[21]

Eligibility is limited to projects that commence commercial operation on or after January 1, 2020, (in the case of wind, solar, hydropower, and geothermal) or commence operations on or after September 6, 2018 (in the case of low-income EE).[22]

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15 *See* Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. 42,940 (proposed June 30, 2016) (to be codified at 40 C.F.R. pt. 60, 62) (publishing the CEIP proposed rule).

16 *See id.* at 42,965 (explaining that the EPA expanded the CEIP to include geothermal and hydropower technologies).

17 *See id.* at 42,942 (outlining the CEIP's purpose of promoting early investment in wind, solar, and demand-reduction technologies); RAMSEUR & MCCARTHY, *supra* note 5, at 10–11 (recognizing the CEIP's role as incentivizing pre-2022 solar and energy efficiency investment in low-income communities, among other goals).

18 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,669 (articulating the requirements for state participation in the CEIP).

19 *See* Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. at 42,943 (discussing the CEIP's role in allowing states to award incentives).

20 *See id.* (setting the aggregate size of the matching allowances).

21 *See id.* (providing a two-to-one award for qualifying low-income projects).

22 *See id.* at 42,946 (establishing start dates for RE and EE projects in low-income communities).

III. CLEAN ENERGY INCENTIVE PROGRAM: DESIGN DETAILS

EPA's final CPP rule is a massive document, requiring over 300 densely-printed pages as promulgated in the October 23, 2015, Federal Register.[23] Not surprisingly then, the CPP is wide-ranging, very complex, and dauntingly detailed in its contents.[24] However, while highly touted by the EPA and widely praised by supporters of the CPP, the CEIP was described only generally in the final CPP Rule, with critical details of its program design expressly reserved for a later rulemaking.[25]

At the time this Article was published, this later rulemaking had progressed only to the point of a proposed rule, published in the Federal Register on June 30, 2016, and subject to a period of further comment, following which the EPA would proceed to prepare and publish a final rule on a timetable yet to be determined.[26] This proposed CEIP rule required over forty more pages of text, tables, and footnotes in the Federal Register, the contents of which are necessarily even more complex and detailed than the general provisions, which were included in the final CPP rule.[27] In addition, the proposed CEIP rule modified, in important respects, several of its general provisions included in the final CPP rule.[28] Accordingly, this section of the Article summarizes the principal, more detailed, and somewhat modified provisions included in the proposed CEIP rule.[29]

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23 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662–964 (creating a final rule that spans more than 300 pages in the Federal Register).

24 Dan Utech & Rohan Patel, *Here's What They're Saying about President Obama's Clean Power Plan*, WHITE HOUSE (Aug. 3, 2015), https://www.whitehouse.gov/blog/2015/08/03/here-s-what-theyre-saying-about-president-obama-s-clean-power-plan [https://perma.cc/HN6S-6UPR] (highlighting comments from industry leaders recognizing the complexity of the CPP).

25 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,670 (recognizing that the CEIP design and implementation details would come in a subsequent rulemaking process); Jason Kuruvilla, *The Clean Power Plan Is a Win for Consumers*, CONSUMER REP. (Sept. 27, 2016), http://consumersunion.org/2016/09/cpp-win-for-consumers/ [https://perma.cc/YRN3-KJMH] (praising the CEIP's assistance to low- and fixed-income households).

26 *See* Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. at 42,940 (proposing the CEIP).

27 *See id.* at 42,940–82 (detailing the CEIP in over forty-three pages).

28 *See id.* at 42,946 (recognizing that the CEIP was modified to address comments in response to the initial CEIP proposal in the CPP rule).

29 *See infra* Parts III.A–D (discussing the proposed CEIP rule's provisions in detail).

A. The Size of the EPA Matching Pool in Terms of Allowances and ERCs

In the final CPP as promulgated on October 23, 2015, the EPA determined that a matching pool of 300 million short tons was an appropriate reflection of the CO_2 emission reductions that could be achieved in 2020 and 2021 through realistic amounts of additional early investment in technologies associated with zero CO_2 emissions.[30]

To estimate short tons of CO_2 avoided, the EPA projected that additional early investment in wind and solar could result in 400 million MWh of clean generation in 2020 and 2021, and applied the assumption that each MWh of such clean generation would displace approximately 0.8 short tons of CO_2 from carbon-emitting generation.[31] Four hundred million MWh multiplied by 0.8 short tons of CO_2 per MWh results in 320 million tons of CO_2 emissions.[32] The EPA then applied a conservative downward adjustment to this calculation to set the size of the matching pool of CO_2 emissions at 300 million short tons.[33]

In the proposed CEIP, the EPA is using the relationship between tons of CO_2 and allowances that was established in the final CPP to determine the overall amount of matching allowances available through the EPA matching pool.[34] Under a mass-based state plan, an allowance represents a limited authorization to emit one ton of CO_2.[35] Thus, for mass-based plans, the matching pool will be equal to 300 million allowances.[36]

Similarly, the EPA is proposing to establish the size of the matching pool, in the form of ERCs, based on the projection of 400 million MWh of wind and solar generation in 2020 and 2021, and with the application of the same conservative downward adjustment the EPA used to adjust 320 million short tons of CO_2 emissions to 300 million short tons in setting the size of the matching pool in the final CPP.[37] Under a rate-based state plan, one MWh of qualified generation earns one ERC.[38] Thus, the EPA proposes that the size of the matching pool, for rate-based plans, will be equal to 375 million ERCs.[39]

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30 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,939, 42,950.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,950.
37 *Id.*
38 *See id*. (expanding upon the megawatt hours ("MWh") qualifications in relation to ERCs).
39 *Id.*

Significantly and necessarily, then, allowances and ERCs are distinct tradable compliance instruments used by states implementing mass-based and rate-based emission standards, respectively, and are not interchangeable under the CPP.[40]

B. Awards for CEIP-Eligible MWh, in Terms of ERCs and Allowances

Under the CPP, eligible CEIP RE projects may receive an award of two early action ERCs for every two MWh of clean energy generated in rate-based states.[41] This award is comprised of one ERC issued by the state and one matching ERC issued by the EPA.[42] In addition, eligible low-income community projects are eligible for a doubled award of four ERCs for every two MWh of energy saved in rate-based states.[43] This award consists of two early action ERCs by the state and two matching ERCs issued by the EPA.[44]

While the final CPP specified the ERC award ratios for CEIP-eligible MWh that may be used by rate-based states, the EPA stated that the Agency would propose in a future action the allowance award ratios for eligible MWh that mass-based states may use.[45] The EPA is proposing that the allocation of early action allowances by a state, and the award of matching allowances by the EPA, will be based on a 0.8 short tons of CO_2/MWh factor.[46] As discussed previously, this is the same factor applied by the EPA when it established the size of the matching pool of 300 million short tons of CO_2 emissions.[47] Thus, for eligible CEIP RE projects in a mass-based program, the proposed 0.8 short tons of CO_2/MWh factor would result in 0.8 allowances awarded for every one MWh.[48] Given the "double" award available to low-income community projects, for each MWh of CEIP-eligible energy savings or generation would entitle a low-income community project under a mass-based program to receive 0.8 early action allowances from the state and 0.8

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40 *Id.*

41 Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,950; *see also id.* at 42,973 (explaining that a "project," for purposes of the CEIP, may include a program that aggregates multiple projects); *infra* Appendix for text of regulation incorporated by reference.

42 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,950 (explaining the award process for low-income communities).

43 *Id.*

44 *Id.*

45 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,830 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60) (discussing the EPA's approach to allowances in conjunction with eligible MWhs).

46 Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,950.

47 *Id.*

48 *Id.*

matching allowances from the EPA, for a total award of 1.6 allowances per MWh.[49]

C. *Division of the Matching Pool of 300 Million Short Tons of CO_2 Emissions into a Reserve for Renewable Energy Projects and a Reserve for Low-Income Community Projects*

In the final CPP, the EPA expressed its intent to divide the matching pool of 300 million short tons of CO_2 emissions into a RE reserve for wind and solar projects, and a second reserve for low-income demand-side EE projects.[50] In the proposed CEIP, the EPA is proposing that the RE reserve would also include awards (on a one-to-one basis) to geothermal and hydropower projects and that the low-income community reserve would also provide awards (on a two-to-one basis) to solar projects implemented serving low-income communities.[51]

The EPA is also proposing, consistent with the intent stated in the final CPP, that the matching pool be divided evenly between the two reserves, with fifty percent (150 million allowances, or 187.5 million ERCs) made available for eligible CEIP RE projects and the other fifty percent made available for eligible CEIP low-income community projects.[52]

The EPA is also proposing to replace the term "commence construction" in defining the time frame for eligible RE projects with the term "commence commercial operation," in conjunction with changing the date of project eligibility to "on or after January 1, 2020."[53]

The EPA estimates that potential energy savings from eligible CEIP low-income demand-side EE projects could reach up to thirty-nine million MWh in 2020 and 2021 combined, thus absorbing approximately ten percent of the matching allowances or ERCs provided by the EPA in the matching pool.[54] The EPA estimates that generation from solar projects

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49 *See id*. at 42,951 (providing that this project would be able to receive a total award of eighty allowances with forty coming from the state and the EPA matching the other forty).

50 *See id*. at 42,942 (explaining that the timing elements of the CEIP can be changed once the petitions for review of the CPP have been resolved).

51 *See id*. at 42,951 (discussing the reasoning behind the matching pool, which gives half of the 300 million available to the CEIP RE projects and the other half to eligible CEIP low-income community projects).

52 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,973 (explaining that an eligible CEIP low-income community project means a project that meets the program's requirements, and a "project," for purposes of the CEIP, may include a program that aggregates multiple projects); *see also infra* Appendix 1 (providing the specific text of the regulation).

53 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,951–52 (observing the EPA is not reopening its decision to set the size of the CEIP matching allowance pool at 300 million).

54 *See id*. at 42,952 (calculating how these allowances would be distributed to best serve

serving low-income communities could reach up to eight million MWh in 2020 and 2021 combined, thus absorbing approximately an additional two percent of the matching allowances or ERCs provided by the EPA in the matching pool.[55]

Eligible low-income community projects are proposed to receive CEIP awards on a two MWh to one MWh basis, with half of the award coming from the state, and half of the award coming from the EPA.[56] Thus, the projected thirty-nine million MWh of low-income energy efficiency savings and eight million MWh of solar generation implemented to serve low-income communities would be eligible to receive approximately forty-seven million matching ERCs, or thirty-eight million matching allowances from the EPA.[57]

Notwithstanding proposals from some commenters for alternative relative apportionments, the EPA continues to propose a fifty-fifty split of the matching pool between RE and low-income community projects for several policy and technology-driven reasons:

(1) The apportionment achieves the policy objective of the CEIP, which is to ensure incentives for deployment of additional projects in both reserves (RE projects as well as low-income community projects);
(2) The rapid evolution of technology and consumer demand for electric energy in the United States as a whole impacts both renewable energy and energy efficiency for all customer classes and groups;
(3) The EPA analyses do not support the need for a reserve for low-income community projects larger than 150 million allowances/187.5 million ERCs in order to meet realistic projections of demand during the CEIP period; and
(4) The EPA is expanding the scope of eligible projects in low-income communities to include solar as well as energy efficiency technologies, thereby increasing the opportunity

low-income eligible communities).

55 *See id.* at 42,951–52 (recognizing further that the EPA estimates that generation from solar power projects alone, which are designed directly to help low-income communities, could reach up to eight million MWh in 2020 and 2021 combined, providing an additional two percent of the matching allowances provided by the EPA).

56 *See id.* (discussing the reasoning behind the 50-50 apportionment being appropriate due to technological advances and consumer demand for energy).

57 *See id.* (observing the need for an even apportionment of the matching funds between RE projects and low-income community projects).

for these communities to benefit from both of these rapidly evolving, zero emissions technologies.[58]

Nonetheless, the EPA is expressly inviting further comment and input from stakeholders on the apportionment issue as the CEIP rulemaking moves forward.[59]

D. Apportionment of the Matching Pool among the States: Allowances and ERCs Available in the Renewable Energy and Low-Income Community Reserves

The final CPP expressed the EPA's intent to apportion the three hundred million ton matching pool among states based on the amount of reductions from 2012 emissions levels, which the affected electric generating units ("EGUs") in each participating state are required to achieve relative to those in other states.[60] The EPA's apportionment of the Renewable Energy and Low-Income Community reserves, on a state-by-state basis, is shown in Tables 1 and 2.[61]

TABLE 1—PROPOSED STATE SHARES OF MATCHING POOL[62]
[Allowances*]

State/tribe	Available matching allowances (mass-based plan states)		
	Renewable energy reserve (50%)	Low-income community reserve (50%)	Total share (100%)
Alabama	4,683,458	4,683,458	9,366,916
Arizona	2,579,426	2,579,426	5,158,852
Arkansas	3,280,844	3,280,844	6,561,688
California	328,268	328,268	656,536
Colorado	3,334,788	3,334,788	6,669,576

58 *See id.* at 42,952, 42,965 (explaining why the apportionment of the matching allowances is appropriate for several technological and policy reasons).

59 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,952–53 (providing that the EPA seeks comments on this and other approaches a state could use to best ensure that a state cannot receive tax incentives on a wind or solar project that is funded by a CEIP award).

60 *See* Carbon Pollution Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,830 (explaining an affected Electric Generating Unit ("EGU") means a steam generating unit, integrated gasification combine cycle ("IGCC"), or stationary combustion turbine that meets the relevant applicability conditions in C.F.R. § 60.5845); *see also infra* Appendix 1 (providing the text of the regulation incorporated by the reference).

61 *See infra* Tables 1 and 2 (depicting the apportionment of the matching funds state-by-state).

62 Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,953–54.

Connecticut	104,122	104,122	208,244
Delaware	207,588	207,588	415,176
Florida	4,845,372	4,845,372	9,690,744
Georgia	4,133,434	4,133,434	8,266,868
Idaho	22,392	22,392	44,784
Illinois	8,953,081	8,953,081	17,906,162
Indiana	8,631,114	8,631,114	17,262,228
Iowa	3,286,774	3,286,774	6,573,548
Kansas	3,173,445	3,173,445	6,346,890
Kentucky	7,429,292	7,429,292	14,858,584
Lands of the Fort Mojave Tribe	8,827	8,827	17,654
Lands of the Navajo Nation	2,434,598	2,434,598	4,869,196
Lands of the Uintah and Ouray Reservation	263,264	263,264	526,528
Louisiana	2,246,141	2,246,141	4,492,282
Maine	31,109	31,109	62,218
Maryland	1,459,162	1,459,162	2,918,324
Massachusetts	255,705	255,705	511,410
Michigan	5,591,791	5,591,791	11,183,582
Minnesota	3,004,354	3,004,354	6,008,708
Mississippi	535,959	535,959	1,071,918
Missouri	5,656,983	5,656,983	11,313,966
Montana	1,965,515	1,965,515	3,931,030
Nebraska	2,222,542	2,222,542	4,445,084
Nevada	504,431	504,431	1,008,862
New Hampshire	161,696	161,696	323,392
New Jersey	669,007	669,007	1,338,014
New Mexico	1,234,572	1,234,572	2,469,144
New York	836,656	836,656	1,673,312
North Carolina	4,011,884	4,011,884	8,023,768
North Dakota	3,225,953	3,225,953	6,451,906
Ohio	7,182,558	7,182,558	14,365,116
Oklahoma	3,100,508	3,100,508	6,201,016
Oregon	231,529	231,529	463,058
Pennsylvania	7,559,018	7,559,018	15,118,036
Rhode Island	53,511	53,511	107,022
South Carolina	2,479,202	2,479,202	4,958,404
South Dakota	396,310	396,310	792,620
Tennessee	3,267,125	3,267,125	6,534,250
Texas	15,600,288	15,600,288	31,200,576
Utah	2,101,783	2,101,783	4,203,566
Virginia	2,079,819	2,079,819	4,159,638
Washington	1,127,151	1,127,151	2,254,302
West Virginia	5,260,335	5,260,335	10,520,670
Wisconsin	3,590,805	3,590,805	7,181,610
Wyoming	4,656,486	4,656,486	9,312,972
Total	149,999,975	149,999,975	299,999,950

*. . . [s]hares that may be provided to states and territories where goals have yet to be established would be distributed from the [three hundred] million short ton matching pool, if the [EPA] moves forward with [setting those goals and shares]. Once those [goals and shares] are determined, if at all, Table 1 would be updated to reflect the shares for all states, territories and tribes receiving CEIP matching allowances. [The EPA] anticipate[s] that the overall total share of the CEIP matching pool needed for states and territories where goals have yet to be established would be no more than five percent of the total pool (or about [fifteen] million allowances).

TABLE 2—PROPOSED STATE SHARES OF MATCHING POOL[63]
[Emission rate credits*]

State/tribe	Available matching ERCs (rate-based plan states)		
	Renewable energy reserve (50%)	Low-income community reserve (50%)	Total share (100%)
Alabama	5,854,323	5,854,323	11,708,646
Arizona	3,224,283	3,224,283	6,448,566
Arkansas	4,101,055	4,101,055	8,202,110
California	410,335	410,335	820,670
Colorado	4,168,485	4,168,485	8,336,970
Connecticut	130,153	130,153	260,306
Delaware	259,485	259,485	518,970
Florida	6,056,715	6,056,715	12,113,430
Georgia	5,166,792	5,166,792	10,333,584
Idaho	27,991	27,991	55,982
Illinois	11,191,352	11,191,352	22,382,704
Indiana	10,788,892	10,788,892	21,577,784
Iowa	4,108,467	4,108,467	8,216,934
Kansas	3,966,806	3,966,806	7,933,612
Kentucky	9,286,616	9,286,616	18,573,232
Lands of the Fort Mojave Tribe	11,034	11,034	22,068
Lands of the Navajo Nation	3,043,247	3,043,247	6,086,494
Lands of the Uintah and Ouray Reservation	329,080	329,080	658,160
Louisiana	2,807,677	2,807,677	5,615,354
Maine	38,886	38,886	77,772
Maryland	1,823,952	1,823,952	3,647,904
Massachusetts	319,632	319,632	639,264
Michigan	6,989,739	6,989,739	13,979,478
Minnesota	3,755,443	3,755,443	7,510,886
Mississippi	669,949	669,949	1,339,898
Missouri	7,071,229	7,071,229	14,142,458
Montana	2,456,894	2,456,894	4,913,788
Nebraska	2,778,178	2,778,178	5,556,356
Nevada	630,539	630,539	1,261,078
New Hampshire	202,121	202,121	404,242
New Jersey	836,258	836,258	1,672,516
New Mexico	1,543,216	1,543,216	3,086,432
New York	1,045,820	1,045,820	2,091,640
North Carolina	5,014,855	5,014,855	10,029,710
North Dakota	4,032,441	4,032,441	8,064,882
Ohio	8,978,197	8,978,197	17,956,394
Oklahoma	3,875,635	3,875,635	7,751,270
Oregon	289,411	289,411	578,822
Pennsylvania	9,448,773	9,448,773	18,897,546
Rhode Island	66,889	66,889	133,778
South Carolina	3,099,003	3,099,003	6,198,006

63 *Id.* at 42,954–55.

South Dakota	495,387	495,387	990,774
Tennessee	4,083,907	4,083,907	8,167,814
Texas	19,500,360	19,500,360	39,000,720
Utah	2,627,229	2,627,229	5,254,458
Virginia	2,599,773	2,599,773	5,199,546
Washington	1,408,939	1,408,939	2,817,878
West Virginia	6,575,419	6,575,419	13,150,838
Wisconsin	4,488,506	4,488,506	8,977,012
Wyoming	5,820,607	5,820,607	11,641,214
Total	187,499,975	187,499,975	374,999,950

*. . . [s]hares that may be provided to states and territories where goals have yet to be established would be distributed from the [three hundred] million short ton matching pool, if the Agency moves forward with [setting those goals and shares]. Once [those goals and shares] are determined, if at all, Table 2 would be updated to reflect the shares for all states, territories and tribes receiving CEIP matching ERCs. [The EPA] anticipate[s] that the overall total share of the CEIP matching pool needed for states and territories where goals have yet to be established would be no more than five percent of the total pool (or about 18.75 million ERCs).

E. Reapportioning Matching Allowances and ERCs among CEIP Participating States

The preamble to the final CPP indicated that, following receipt of final state plans, the EPA would execute a reapportionment of matching allowances or ERCs among the states, if it proves necessary as a result of eligible entities electing not to participate.[64] However, some stakeholders during the informal outreach period following promulgation of the final rule raised significant concerns regarding the practicality of such reapportionment.[65] These concerns revolve primarily around the timing of when the EPA would know that additional matching allowances or ERCs were available for reapportionment and whether a later reapportionment would actually be capable of addressing remaining unmet demand for eligible CEIP projects.[66] "The EPA agrees that timing considerations may create a degree of uncertainty that makes reapportionment among states inappropriate."[67] Additionally, the wind and solar tax credit extensions approved in late 2015 after promulgation

64 *See* Carbon Pollution Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,830–31 (explaining that after September 6, 2018, any matching allowances that remain undistributed will be distributed to the states that have met the requirements for the CEIP participation).

65 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,955 (observing that the significant concerns raised by stakeholders were largely due to timing considerations that created uncertainty when reapportioning matching funds between states).

66 *See id.*; *see also id.* at 42,973 (defining an eligible CEIP project to mean a project that meets the requirements of C.F.R. § 60.5737(d) or (e), and that a "project," for purposes of the CEIP may include a program that aggregates multiple projects and explaining that a state can only distribute early action allowances or ERCs to eligible CEIP projects); *infra* Appendix 1 (providing the text of the regulation incorporated by reference).

67 81 Fed. Reg. at 42,955.

of the final CPP in August 2015 could also impact the need for any allowances or for ERCs that may become available for reapportionment.[68] Therefore, the EPA decided not to include reapportionment provisions in the CEIP proposed rule.[69]

Nonetheless, the EPA is requesting further comment on whether to include reapportionment provisions in the final CEIP, and if so, the methodology that should be used for reapportioning matching allowances or ERCs.[70] The presumptive reapportionment provisions on which the EPA is soliciting further comment are highlighted as follows:

(1) States that choose not to participate in the CEIP, or states with approved state plans that do not contain approved CEIP provisions, would not be eligible to receive an apportionment;
(2) If a state elects not to participate in the CEIP or the CEIP provisions of a state's approved state plan are disapproved, the matching allowances or ERCs listed for that state in Tables 1 and 2, *supra,* would be reapportioned to the other states that are participating in the CEIP via an approved state plan with approved CEIP provisions, or via a federal plan;
(3) This reapportionment would be executed on a pro-rata basis, using the same calculation method used to establish the initial apportionment of matching allowances or ERCs among the states; and
(4) Any matching allowances or ERCs that are not awarded from a state's matching allowance or ERC apportionment by January 1, 2023 would be retired by the EPA.[71]

IV. CLEAN ENERGY INCENTIVE PROGRAM: DEFINITE NEXT STEPS

Both the immediate future and longer-term implementation of the CEIP are at issue and in jeopardy because of litigation over the CPP as a whole.[72] This litigation began even before the EPA's final rule was promulgated, and it is currently before the United States Circuit Court for the District of Columbia following the United States Supreme Court

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68 *Id.* at 42,955–56 (observing that because the wind and solar tax extensions could affect reapportionment, the EPA did not include reapportionment provisions in the CEIP).

69 *See id.* (recognizing the challenges behind creating reapportionment provisions).

70 *See id.* (discussing that states that choose not to participate in the CEIP program would not be eligible to receive any matching allowances or ERCs).

71 *See id.* (showing that state plans including implementations of the CEIP must adhere to certain requirements to provide for the most effective administration of a state's CEIP).

72 *See* Emily Holden & Rod Krucko, *The Fate of the Obama Administration's Signature Climate Change Rule Is in the Hands of the Courts*, ENVTL. & ENERGY NEWS, http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal [https://perma.cc/MJ5R-KVBG] (recognizing the tedious litigation process surrounding the CPP).

issuing a stay of the final rule pending a final judicial decision on its merits.[73]

Environment & Energy News has concisely highlighted the past, present, and likely future of this litigation in this graphic timeline:

> JUNE 2014
> U.S. EPA releases draft Clean Power Plan.
>
> JUNE–AUGUST 2014
> Industry and 12 states file suit in D.C. Circuit to block draft rule.
>
> JUNE 2015
> D.C. Circuit rejects early challenges to draft rule as premature.
>
> AUGUST 2015
> EPA announces final rule.
>
> SEPTEMBER 2015
> Early challenges are dismissed pending *Federal Register* publication.
>
> OCTOBER 2015
> Clean Power Plan is published in *Federal Register*.
>
> OCTOBER 2015
> States and industry sue and ask for stay
>
> JANUARY 2016
> D.C. Circuit declines to stay rule.
>
> FEBRUARY 2016
> U.S. Supreme Court grants state and industry request to freeze Clean Power Plan during D.C. Circuit litigation.
>
> SEPTEMBER 2016
> D.C. Circuit to hear oral arguments en banc.
>
> SEPTEMBER 2016 (PRE-STAY)
> Initial state plans due

[73] *See id.* (explaining the difficult journey the CPP has taken, going in and out of federal court before it was even finalized).

LATE 2016–EARLY 2017
D.C. Circuit expected to issue decision. Losing side expected to appeal to Supreme Court.

2017–2018
Supreme Court expected to issue a decision either upholding or vacating the rule entirely, or remanding portions to EPA.

SEPTEMBER 2018 (PRE-STAY)
Final state plans due.

2022 (PRE-STAY)
Start of interim compliance period.

2030 (PRE-STAY)
Final requirements must be met.[74]

As a result of this pending litigation, the only definite next steps for the CEIP at this time appear to be the closing of the comment period on the EPA's proposed CEIP rule on November 1, 2016, and the holding of oral argument on the EPA's final CPP rule before the D.C. Circuit sitting en banc on September 27, 2016.[75]

A. Nature of Comments Expected on the EPA's Proposed CEIP Rule

The comment period on the EPA's proposed CEIP rule was originally scheduled to close on August 29, 2016, but was initially extended through September 2, 2016, and subsequently extended until November 1, 2016.[76] Comments must be submitted online at www.regulations.gov, and identified with Docket ID No. EPA-HQ-OAR-2016-0033.[77] The EPA also conducted a single public hearing on the proposed rule in Chicago, Illinois on August 3, 2016.[78]

The scope of the comments that the EPA expects to receive on its proposed CEIP rule is unquestionably ambiguous (and, probably,

74 *Id.*

75 *See id.* (summarizing the significant next steps in the CEIP litigation process).

76 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 47,325 (explaining the EPA made this date change to better align the public comment period with the public hearing time period); *see also id.* at 59,950 (explaining the reason the EPA made this change in date was to allow for requested tribal consultation in response to the proposed rule).

77 *See id.* at 42,941 (discussing what individuals should consider as they prepare their comments for the EPA).

78 *See id.* at 42,940 (outlining the agenda of the hearing).

advisedly so). Specifically, the EPA has defined the scope of comments it expects in these expressly limiting terms:

> In this action, the EPA is not reopening its decision to establish the CEIP, the maximum size of the matching pool, the requirement for states to include a mechanism in their plans that ensures that the award of early action allowances or early action ERCs will not impact the CO_2 emission performance of affected EGUs required to meet CO_2 emission standards under the [CPP] . . . any other design parameters not expressly opened for comment or proposal in this document, or its determination of legal authority and rationale for the CEIP provided in the preamble to the final [CPP] . . . .[79]

However, only a few paragraphs later, the EPA also uses this expansive language to describe the comments, which it invites and will welcome:

> The EPA values the comments related to the topics that have been submitted to date, both on the October 23, 2015, proposal as well as to the CEIP non-regulatory docket that closed on December 15, 2015. We have reviewed and considered the comments submitted through the federal plan and model trading rules rulemaking docket that closed on January 21, 2016, as well as the non-regulatory docket. These comments have informed various aspects of this proposal. We encourage those who have submitted comments already on the CEIP to re-submit those comments and/or any updated or additional comments through the comment submittal process for this rulemaking proposal. We heard from many stakeholders that they would like an opportunity to comment on a more developed proposal regarding these CEIP topics; the EPA is responding to those requests by issuing this proposal, which provides a new opportunity to submit comments on the CEIP topics addressed here.[80]

Plainly, changes that the EPA has made in the CEIP provisions included in the final CPP rule are open for comment and subject to change in a final CEIP rule (e.g., reapportionment of allowances; ERCs initially

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79 *Id.* at 42,944.

80 *Id.* at 42,947.

apportioned to states that do not opt to participate in the CEIP; and technologies eligible for the CEIP Renewable Energy and Low-Income Community components).[81] With equal clarity, program details included in the proposed CEIP rule, but not the final CPP rule, are also open for comment (e.g., the size of the EPA matching pool in terms of the absolute numbers of allowances and ERCs, and the division of allowances and ERCs between Renewable Energy and Low-Income Community projects).[82]

The EPA expects comments on and possible changes in a final CEIP rule with certain provisions of the final CPP rule with applicability to the CEIP that it is re-proposing in the CEIP proposed rule (e.g., CEIP-related aspects of the mass-based and rate-based model trading rules).[83]

Nonetheless, the EPA also expressly stated regarding its proposed CEIP rule, "[t]his action does not re-open those aspects of the CEIP as finalized that the EPA is not expressly proposing to change or requesting comment on."[84] While the scope of this limitation on the CEIP provisions in the proposed rule, which are not open for comment and change in a final rule, is not explicitly detailed by the EPA—presumably this language encompasses (at least) such fundamental matters as the existence of the CEIP with RE and Low-Income Community components, its optional nature for purposes of inclusion in state CPPs, and the EPA's ability to include the CEIP as an integral component of federal CPPs in states not filing their own Plans.[85] However, as explicated above, the full scope of this language is inherently ambiguous so its use by the EPA suggests this ambiguity was probably intended to leave the scope of comments in the hands of the eventual commenters.

The wide range of comments effectively invited by this inherent ambiguity is well-illustrated by the content of the few comments submitted to the EPA before the August 3, 2016 Public Hearing.[86] There are only seven comments, all of them from individuals, six of whom chose to remain anonymous.[87] But all of them are directed to the fundamental

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81 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,946 (observing that any key changes impacting the timing of the CEIP should not be taken as having any correlation with the Supreme Court's stay).

82 *See id.* at 42,946–47 (expressing that the EPA is responding to numerous stakeholders' comments by issuing this proposal).

83 *See id.* (explaining these mass-based and rate-based model trading rules are characterized as an example of an optional regulatory text).

84 *Id.*

85 *See id.* (discussing that in the proposed federal plan for the CPP, the EPA expressed its intent to implement the CEIP in states that are willing to be subjected to a federal plan).

86 *See id.* at 42,946–47 (recognizing the agency invites comments on the variety of approaches the EPA could take in a federal plan to ensure the best possible plan is produced).

87 *See Clean Energy Incentive Program (CEIP) Design and Implementation Rule*, *supra* note 13

parameters of the CEIP, especially the general importance of its inclusion in the CPP, as well as the need for it to be mandatory rather than optional.[88] Those few comments that also discuss program details raise matters not specifically addressed by the EPA in its proposed rules, such as the CEIP's specific importance to the protection of the lives and health of children, and the need for the jobs it creates to be targeted to those in low-income communities and/or displaced by the transition to clean energy.[89]

Media reports of the oral comments offered at the August 3, 2016, Public Hearing conducted by the EPA also provide some amount of empirical insight into at least some of the more impassioned and contested matters likely to be addressed in the final written comments on the proposed CEIP rule when they are eventually filed and become publicly available.[90] Notably, *Midwest Energy News* reported that numerous advocacy organizations speaking for "people from across the country" characterized the CEIP as a "powerful tool to advance economic justice" and called on the EPA "to use the relatively modest program to help atone for a long history of disproportionate impacts of fossil fuels on low-income, black, Latino, Appalachian[,] and Native American residents."[91] In particular, "[m]ost of those who testified . . . called for revisions to the proposal to ensure that benefits are directed toward communities most impacted by pollution and climate change, and to make sure even states that have been hostile to the Clean Power Plan participate."[92] However, this impassioned plea for a CEIP revised to be both mandatory in nature and limited in focus to efficiency and renewable energy projects in low-income communities was not shared by all speakers, with at least one group calling for early action incentives for upgrades to aging nuclear power plants and commercial development of modular nuclear reactors and carbon capture technologies for coal plants.[93]

(reporting comments on numerous issues pertaining to the proposed CEIP provisions).

88 *See id.* (portraying comments submitted through August 2, 2016).

89 *See id.*

90 *See* Ellyn Fortino, *Enviros Rally in Chicago, Testify at EPA Hearing on Clean Energy Incentive Program*, PROGRESS ILL. (Aug. 3, 2016), http://www.progressillinois.com/posts/content/2016/08/03/enviros-rally-chicago-testify-epa-hearing-clean-energy-incentive-program [https://perma.cc/Y7T2-BHHC] (providing various comments addressed at the hearing, such as the EPA should not provide credits for projects that would happen even without offering incentives).

91 Kari Lydersen, *Clean Power Plan Offers Chance to Right Past Injustices, Advocates Say*, MIDWESTERN ENERGY NEWS (Aug. 8, 2016), http://midwestenergynews.com/2016/08/08/clean-power-plan-offers-chance-to-right-past-injustices-advocates-say/ [https://perma.cc/E8DF-NDM6].

92 *Id.*

93 *See id.* (reporting that many community and environmental justice groups do not

However, the full import of the current comment period for the proposed CEIP rule will not, and cannot, be known until after the close of the comment period on November 1, 2016.[94] At that time, all of the written comments, which were yet be filed at the time of the August 3, 2016 Public Hearing, will have been filed, including those of the major institutional proponents and opponents of the CPP as a whole.[95] Those institutional commenters opposed to the CPP as a whole will focus their comments on the topics that reinforce their opposition, such as the claim that the EPA lacks the statutory authority to promulgate early action initiatives like the CEIP and that the EPA has over-estimated the benefits and under-estimated the costs of the CEIP.[96] By contrast, those institutional commenters supportive of the CPP as a whole will focus their comments on the topics for which the EPA has solicited comments to improve the final CEIP rule. These comments include: adaptation to the timing issues posed by the Supreme Court stay; re-apportionment of "early action" allowances and ERCs unclaimed by states not opting to participate; refinement of trading rules for "early action" allowances and ERCs claimed by states opting to participate in the CEIP; and coordination of the financial incentives for renewable energy represented by "early action" allowances and ERCs and those represented by the federal tax credits extended to the end of 2022 by legislation enacted in December 2015.[97]

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advocate for carbon trading because they believe doing so would allow power plants to continue polluting disproportionally in low-income and minority communities).

94 *See id.* (describing the final version of the CEIP as proposed to take effect as part of the CPP even though the Plan is currently under stay by the Supreme Court).

95 *See id.* (reporting numerous concerns from individuals who voiced their comments at the Chicago hearing on August 3, 2016, including demands that race be included as well as income when defining low-income communities that would benefit from the CEIP).

96 *See* Marlo Lewis, *Clean Energy Incentive Program: New Unlawful Element in EPA's Power Plant Rule?*, GLOBALWARMING.ORG (Aug. 19, 2015), http://www.globalwarming.org/2015/08/19/clean-energy-incentive-program-new-unlawful-element-in-epas-power-plant-rule [https://perma.cc/HXP2-E8U4] (explaining there is no discussion of the CEIP's statutory basis in either the final rule or the EPA's proposed Federal Plan).

97 *See* Thomas A. Lorenzen et al., *EPA Seeks Comments on Clean Energy Incentive Program*, CROWELL MORNING (June 23, 2016), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/EPA-Seeks-Comments-on-Clean-Energy-Incentive-Program [https://perma.cc/A98A-RU5P] (stating the EPA does not properly explain why tax incentives have anything to do with the policy goals pertaining to the final CPP); Dylan Sullivan, *EPA Adds Detail to the Clean Energy Incentive Program*, NAT'L RES. DEF. COUNCIL (June 22, 2016), https://www.nrdc.org/experts/dylan-sullivan/epa-adds-detail-clean-energy-incentive-program [https://perma.cc/2WKV-ML5X] (indicating that the EPA proposed double-credit extra incentives be provided in low-income communities).

B. Judicial Review by the D.C. Circuit Sitting En Banc

The oral argument on the CPP as a whole was originally scheduled to occur before a three-judge panel of the D.C. Circuit on June 2, 2016.[98] However, on its own motion, the D.C. Circuit rescheduled the argument to be heard before the entire court sitting en banc on September 27, 2016.[99]

Certain interests following the CPP litigation have argued that the CEIP offers independent legal arguments for the D.C. Circuit to overturn the CPP.[100] However, the briefs of the actual Petitioners and Respondents before the court do not support this view of the present case.[101] Indeed, the only argument actually being made currently by the Petitioners in their brief relating to the CEIP specifically, is that emissions related to the CEIP are among several factual considerations which the EPA failed to evaluate properly in its cost-benefit analysis of the overall CPP.[102] The EPA has responded that the Petitioners have mischaracterized the role of the CEIP and misinterpreted the EPA's cost-effectiveness analysis of the CPP by failing to recognize that the emissions avoided before the CPP interim compliance period by the CEIP would offset emissions incurred during that period under the CPP.[103] But whichever view of the facts the D.C. Circuit adopts, it appears unlikely that the CEIP will provide independent legal grounds to set aside the CPP as a whole in the case currently pending before that court.

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98 *See* West Virginia v. EPA, No. 15-1363 (D.C. Cir. 2016), https://www.edf.org/sites/default/files/content/2016.05.16_order_setting_en_banc_september_oral_argument.pdf [https://perma.cc/48EK-2QFN] (stating the time and date of the original oral argument that was set to occur before a three-judge panel of the D.C. Circuit on June 2, 2016).

99 *See id.* (showing the original oral argument was rescheduled before the entire court on September 27, 2016).

100 *See* Lewis, *supra,* note 96 (discussing that the Competitive Enterprise Institute ("CEI") has argued that the EPA lacks statutory authority to initiate "early action," such as that proposed in the CEIP, and that the CEIP as included in the final CPP rule was not part of the CPP as described in the proposed CPP rule, and thus its inclusion in the final CPP rule should be found unlawful).

101 *See* Brief of Petitioners, at 71, West Virginia v. EPA, No. 15-1363 (D.C. Cir. 2016), https://www.edf.org/sites/default/files/content/2016.02.19_petrs_opening_brief_*pt._2*.pdf [https://perma.cc/BZ9U-J2G9] (challenging the CEIP on factual, rather than legal, grounds).

102 *See id.* (reiterating the only argument made by the current petitioners that criticized the EPA for failing to evaluate the impacts of the CEIP in the cost-benefit analysis of the overall CPP).

103 *See* Brief of Respondent at 158–59, West Virginia v. EPA, (No. 15-1363) (D.C. Cir. 2016) https://www.edf.org/sites/default/files/content/epa_final.pdf [https://perma.cc/5BUB-NA7J] (speculating that the CEIP would result in large amounts of emissions). The EPA states that Petitioners incorrectly conflate a theoretical regulatory maximum with the modeling projections used to assess emissions impacts and ignores compensating reductions before the start of the Rule's performance period. *Id.*

Indeed, the EPA appears to be taking the opposite tack in its proposed CEIP rule, which was issued *after* both the Supreme Court's stay and the D.C. Circuit's order for en banc consideration of the CPP.[104] Notably, the EPA explicitly states: "A state may participate in the CEIP only after the EPA approves a required state plan or the EPA promulgates a federal plan for that state that includes the CEIP."[105] These actions will not occur until sometime after the judicial stay has been lifted.[106] Thus, the EPA is expressly recognizing that the CEIP cannot become effective unless and until the CPP does.[107] Moreover, the EPA makes the express argument in the CEIP that it is severable from the remainder of the CPP:

> The EPA intends for the CEIP to be considered severable from the remainder of the Clean Power Plan. As an optional program that is not required for achievability of the emission performance rates or equivalent state goals, the CEIP is in fact severable. Although the Agency believes, as explained in the preamble to the final Clean Power Plan, that the CEIP provides a number of benefits, 80 FR 64829–64831, nonetheless, all other aspects of the Clean Power Plan would still be implementable in the absence of the CEIP.[108]

In addition, the CEIP as a whole is still a proposed rule and thus not yet final nor ripe for judicial review.[109]

Consequently, the CEIP as a component of the CPP will stand or fall in the pending D.C. Circuit case based on the arguments regarding the

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104 *See* Tomas Carbonell, *En Banc Review of the Clean Power Plan—What the Court Order Means, and Doesn't Mean*, CLIMATE 411 (May 26, 2016), http://blogs.edf.org/climate411/2016/05/26/en-banc-review-of-the-clean-power-plan-what-the-court-order-means-and-doesnt-mean/ [https://perma.cc/A3M4-Y4VX] (concluding that the D.C. Circuit's new order for en banc review avoids the need for a second round of briefing and oral argument).

105 *See Clean Energy Incentive Program Design Details*, REGULATIONS.GOV, https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0033-0001 [https://perma.cc/9JBE-HUKX] (explaining that the EPA will provide further direction on submittal timing requirements, as well as any other adjustments in timing that may be needed, upon the resolution of the judicial petitions for review of the CPP).

106 *See* Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. 42,944 (propose June 39, 2006) (to be codified at 40 C.F.R. pt. 60, 62) (explaining that the EPA approval of a state plan or promulgation of a federal plan will not occur until after the judicial review process is concluded and the Supreme Court stay is lifted).

107 *See id.* (concluding that the CEIP is contingent on the CPP becoming effective).

108 *Id.* at n.11. The EPA's position maintains that the CEIP is severable from the CPP and furthermore, that the CPP still functions and works without the CEIP. *Id.*

109 *See, e.g.*, *In re* Murray Energy Corp. v. Envtl. Prot. Agency, 788 F.3d 330, 334–36 (D.C. Cir. 2015) (dismissing the CEIP's premature challenge to a proposed, rather than the final, CPP rule).

legality of the CPP as a whole rather than the CEIP by itself.[110] Thus, "[u]ntil the judicial review of the Clean Power Plan is complete, the fate of the Clean Energy Incentive Program remains uncertain."[111]

Certainly, the proponents of the CPP as a whole were encouraged regarding that final rule's prospects by the D.C. Circuit's own denial of Petitioners' stay motions on the express grounds that those motions "have not satisfied the stringent requirements for a stay pending court review."[112] Notably, the White House released a statement saying, "[w]e are pleased that the court has rejected petitioners' attempts to block the Clean Power Plan from moving forward while litigation proceeds . . . . We look forward to continuing to work with states and other stakeholders taking steps to implement the Clean Power Plan."[113]

However, when the Supreme Court surprised virtually all interested parties and informed observers by granting on February 9, 2016, the stay of applications filed with the Court immediately following the D.C. Circuit's order denying them, the perspectives of proponents and opponents of the CPP were reversed.[114] Notably, House Speaker Paul Ryan (R-Wis.) called the stay "a victory for the American people and our economy," while House Majority Leader Kevin McCarthy (R-Calif.) declared it a "welcome development."[115]

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110 *See* Clean Energy Incentive Program Design Details, 81 Fed. Reg. at 42,944 (explaining the EPA position that the CPP can stand with or without the optional CEIP, but the CEIP cannot stand without the CPP).

111 Rebecca Chillrud, *EPA Unveils New Details for Clean Energy Incentive Program: Agency Will Invite Public Comments*, ENVTL. & ENERGY STUDY INST. (June 29, 2016), http://www.eesi.org/articles/view/epa-unveils-new-details-for-clean-energy-incentive-program [https://perma.cc/NNW9-VRYD]. Chillrud concluded that until a decision has been made by the courts on the CPP, the fate of the CEIP will remain uncertain. *Id.*

112 Order Denying Motions for Stay at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016), https://www.edf.org/sites/default/files/content/2016.01.21_order_denying_stay_motions.pdf [https://perma.cc/5S4A-MHY6].

113 *See* Emily Holden & Ellen M. Gilmer, *EPA Foes Threaten Supreme Court Battle to Freeze Climate Rule*, E & E PUB., LLC (Jan. 22, 2016), http://www.eenews.net/stories/1060031027 [https://perma.cc/7VSU-F5FM] (reporting the Obama administration's agreement with the D.C. Circuit's decision to reject the petitioners' attempt to block implementation of the CPP pending judicial review).

114 *See generally* Order Granting Application for Stay, West Virginia. v. EPA, No. 15-1363 (U.S. Feb 9, 2016), https://www.edf.org/sites/default/files/content/2016.02.09_scotus_stay_order_west_virginia.pdf [https://perma.cc/C73J-K2FZ]; *see also* Amanda Reilly & Robin Bravender, *Is Obama's Signature Climate Rule Doomed?*, E & E PUB., LLC (Feb. 10, 2016), http://www.eenews.net/stories/1060032134 [https://perma.cc/AZ6N-AF2W] (reporting that the high court's decision to stay the CPP while a lower court hears the case blindsided supporters of the regulation, giving critics reason to believe that the justices would ultimately invalidate the rule).

115 *See* Reilly & Bravender, *supra* note 114 (contrasting the Obama administration's opinion with that of Republican leaders who supported the Supreme Court's ruling).

This change in perspective was linked to one of the "stringent requirements" required for a stay of an agency rule pending litigation as to its legality, specifically the requirement that the petitioner "demonstrates a strong likelihood of success on the merits."[116] The D.C. Circuit's denial of the stay plainly implied that the three-judge panel who reviewed the stay petition had preliminarily concluded that the opponents of the CPP were *not* going to demonstrate "a strong likelihood of success on the merits" with their challenge to the rule.[117] By contrast, however, the Supreme Court's grant of the stay, plainly implied that five of the Justices (Roberts, Kennedy, Scalia, Thomas, and Alito) had preliminarily concluded that the Plan's opponents *could* demonstrate "a strong likelihood of success on the merits."[118] Lawyers interviewed by Environment & Energy News, both supporting and opposing the rule, said they could not recall the Supreme Court ever halting a rule before a lower court weighed in on whether it was legal.[119] James Rubin, a widely-quoted authority on CPP developments who is not directly involved in the case, observed that he interprets the stay decision "to mean that this court, the way it's constituted, would likely find against the rule."[120]

However, less than a week following the Supreme Court's stay decision, perspectives shifted dramatically once again in response to the sudden, unexpected death of Justice Scalia.[121] This shift occurred because Scalia's death raised for knowledgeable observers the specter of a 4-4 decision by the Supreme Court upholding as a matter of law whatever decision the D.C. Circuit makes on the merits of the CPP.[122] For instance, Ann Carlson, an environmental law professor at the University of California, Los Angeles, told *Greenwire*, "[i]n many respects, the death of

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116 *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("[A] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . .").

117 *See id.* (stating that because the likelihood of prevailing on the merits is the key requirement for a stay, the denial of the stay logically implied that the D.C. Circuit did not expect petitioners to prevail on the merits).

118 *Id.*

119 *See* Emily Holden et al., *SCOTUS Halts Clean Power Plan, Stuns States Planning Carbon Cuts*, E & E PUB., LLC (Feb. 10, 2016), http://www.eenews.net/climatewire/stories/1060032136 [https://perma.cc/6TB9-8JT7] (reporting the rareness of the Court denying a rule before the lower court ruled whether it was legal).

120 *See* Reilly & Bravender, *supra* note 114 (discussing James Rubin's opinion on the ruling and what he contends it implies for the Court's final ruling on the merits).

121 *See* Robin Bravender, *Scalia's Death "Puts All the Action" in D.C. Circuit*, E & E PUB., LLC (Feb. 19, 2016), http://www.eenews.net/stories/1060032665 [https://perma.cc/8KQT-LKHP] (articulating how perspectives on the Court's ruling were altered when Justice Antonin Scalia died).

122 *See id.* (concluding Justice Scalia's death would result in the CPP decision being a 4-4 decision in the absence of the appointment and confirmation of a ninth justice to replace Justice Scalia).

Justice Scalia puts all the action now in the D.C. Circuit, even though the case is stayed by the Supreme Court order."[123]

The virtually unprecedented decision by the D.C. Circuit Court of Appeals, on its own motion, to hear the case en banc without it being first heard and decided by a three-judge panel underlined the conclusion that "all the action" is now in that court.[124] However, this per curiam action was more likely driven by pragmatic judicial decision-making considerations than judicial partisan politics, in that en banc review will now: (1) expedite a decision by the D.C. Circuit on the premise that whichever side would have lost a three-judge panel decision would have requested en banc review before seeking Supreme Court review; (2) provide all judges participating in the en banc review with the opportunity to review the extensive briefing of the case over the D.C. Circuit's summer recess; (3) assure that all viewpoints on the D.C. Circuit will be heard and considered in reaching a decision; and (4) thereby make more credible the D.C. Circuit decision and opinion, whatever they may say and whenever they may issue, if and when they are ultimately subjected to Supreme Court review.[125]

V. THE CLEAN ENERGY INCENTIVE PLAN: UNCERTAIN FUTURE FATE

A. Politics Will Determine the Law

Beyond the decision and opinion of the D.C. Circuit, politics rather than law is likely to decide the ultimate fate of the CPP and its key CEIP component.[126] This is because the time demands of judicial decision-making will necessarily defer any Supreme Court review of the case until after the 2016 Presidential Election and subsequent January 2017 Presidential Inauguration, likely extending until late 2017, or even into 2018, any decision by the high court.[127]

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123 *Id.*

124 *See* Ellen M. Gillmer & Robin Bravender, *Latest Legal Twist Shuffles Calendars,* GREENWIRE (May 17, 2016), http://www.eenews.net/stories/1060037396 [https://perma.cc/PN8A-NM2F] (reporting that setting oral arguments for en banc review may be seen as an accelerated path to the U.S. Supreme Court for the losing side before the D.C. Circuit).

125 *See Dorsey & Whitney's Rubin Says D.C. Circuit Decision Likely to Affect Substance of Arguments*, E & E TV (May 19, 2016), http://www.eenews.net/tv/videos/2132/transcript [https://perma.cc/2RU5-J2Z5] (discussing the impact of the court's decision on the CPP's legal timeline and prospects for the case overall).

126 *See* Reilly & Bravender, *supra* note 114 (confirming politics will have a strong influence on deciding the CEIP).

127 *See id.* (discussing that, because of the vastly different views of both candidates running for president and their differing opinions on what type of Supreme Court Justice should be elected by those candidates, the 2016 election has had a drastic effect on the future of the

B. The Principal Plausible Scenarios

There are several plausible alternative scenarios for the future of the CPP and CEIP depending on the outcome of the 2016 Presidential election.[128] Democratic Party nominee Hillary Clinton has publicly stated:

> The Obama Administration's Clean Power Plan is a significant step forward in meeting the urgent threat of climate change. It sets a smart federal standard that gives states the flexibility to choose how to reduce carbon pollution most effectively. And it drives investments in clean energy and energy efficiency, reduces asthma attacks and premature deaths, and promotes a healthier environment and a stronger economy. It's a good plan, and as President, I'd defend it.[129]

By contrast, Republican Party nominee Donald Trump has publicly stated that within his Administration's first 100 days in office, "[w]e're going to rescind all the job-destroying Obama executive actions including the Climate Action Plan . . . ."[130] In short, according to the two major parties' Presidential nominees' own words, if there is a Clinton Presidency, then there will still be a CPP and CEIP; if there is a Trump Presidency, then there will not. Further, while a widespread expectation among Senate Republicans of a Clinton Presidency could lead to a late revival of President Obama's nomination of Merrick Garland to the Supreme Court, the next Presidential administration will most likely appoint Justice Scalia's successor to the Supreme Court.[131] Moreover, the next administration will decide whether to appeal to the Supreme Court

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CEIP).

128 *See Statement from Hillary Clinton on President Obama's Clean Power Plan*, https://www.hillaryclinton.com/briefing/statements/2015/08/02/obama-clean-power-plan/ [https://perma.cc/E43H-ATKD] [hereinafter Clinton] (showing how Hillary Clinton strongly supports the CPP and believes that it is important to prevent climate change).

129 *See id.* (illustrating Hillary Clinton's admiration of the Obama Administration's CPP in meeting the urgent threat of climate change). Clinton states that, if she were elected President, she would support it. *Id*.

130 *See An American First Energy Plan* (May 26, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-formal-policy-address-on-energy [https://perma.cc/Y7A5-FZG9] (showing Donald Trump's position on the Climate Action Plan is to rescind the Obama executive action).

131 *See, e.g.*, Reuters, *Two GOP Senators Say They'll Consider Garland after Election*, NEWSWEEK (Mar. 17, 2016), http://www.newsweek.com/orrin-hatch-jeff-flake-merrick-garland-election-438069 [https://perma.cc/4NLG-BVF7] (inferring that, because of the political ideology that both presidential candidates are expected to appoint with the death of Justice Scalia, the 2016 election will determine the future of the CPP and CEIP).

any decision of the D.C. Circuit regarding the CPP and its key CEIP component.[132] In addition, the next Presidential administration will decide whether to complete the CPP rulemaking process—including finalizing the CEIP—once the currently pending judicial review has run its course.[133]

A Clinton administration would almost certainly appoint a Supreme Court Justice favorable to the CPP and CEIP, appeal any D.C. Circuit decision overturning them, and complete the pending rulemaking process for both once judicial review is over.[134] A Trump administration would almost certainly *not* appeal a D.C. Circuit Court decision adverse to the CPP and CEIP, would appoint a Supreme Court Justice opposed to them, and terminate any rulemaking relating to them at the earliest opportunity.[135]

Consequently, whether there will ever be a CPP and CEIP for the next administration to implement is necessarily speculative at this time.[136] The ultimate result will depend entirely on the outcome of the 2016 Presidential election:

> Legal experts are looking ahead to determine what could occur depending on which party clinches the White House.
>
> "By the time the Clean Power Plan gets up to the Supreme Court, assuming that the Supreme Court decides to review any decision by the D.C. Circuit, we will probably have a ninth justice of the Supreme Court," [UCLA law professor Ann] Carlson said, noting that a Democratic appointee would be more likely to swing the court in favor of upholding the Clean Power Plan.
>
> "You could say that the election is really what's going to decide the fate of the Clean Power Plan," she said. "That's

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132 *See* Holden & Krucko, *supra* note 72 (discussing that the next presidential administration will decide whether to appeal the CPP after judicial review).

133 *See id.* (summarizing how the CPP's fate may now hinge on what happens with Justice Scalia's vacant seat).

134 *See id.* (claiming that Hillary Clinton would appoint a Supreme Court Justice in favor of the CPP and CEIP).

135 *See id.* (showing, in contrast to a Clinton Administration, a Trump Administration would not appeal to the Supreme Court a D.C. Circuit decision invalidating the CPP).

136 *See* Reilly & Bravender, *supra* note 114 (showing that, while both candidates could possibly influence the CEIP, for now the CEIP's fate remains speculative).

> assuming that President Obama does not succeed in getting his Supreme Court justice confirmed."[137]

Moreover, even if there is a Clinton Presidency, there can be no certainty regarding the precise provisions of a final CPP and CEIP following the promulgation of final rules for both. In the first place, Clinton has said:

> Of course, the Clean Power Plan standards set the floor, not the ceiling. We can and must go further. As President, I will launch a Clean Energy Challenge to give states, cities[,] and rural communities that are ready to lead the tools and resources to succeed. By combining the Clean Power Plan with my Clean Energy Challenge, we'll achieve two big goals:
>
> - We will have half of a billion installed solar panels by the end of my first term in office,
> - We will generate enough renewable energy to power every home in America within 10 years of my taking office.[138]

In the second place, even in that CPP + Clean Energy Challenge scenario in a Clinton Administration, the ultimate result will depend on the outcome from another round of judicial review of further challenges to the scope of the EPA's statutory authority and the legality of its administrative decision-making initiated by climate action opponents.[139]

VI. CONCLUSION

At this juncture, the future of the CEIP is inextricably intertwined with that of the CPP, which was intended to jump start with clean energy "early actions" involving both renewable energy and energy efficiency, especially in low-income communities. As a result, the future of the CEIP is necessarily uncertain at this time, and its promise of technological innovation and market transformation in the electric energy industry will be delayed for now and may possibly even be denied ultimately due to the primacy of Presidential election returns and Supreme Court decisions in relation to the EPA's environmental rulemaking. Only time, the 2016

137 *Id*.
138 Clinton, *supra* note 129.
139 *See id*. (expanding on Clinton's statement regarding President Obama's CPP).

electoral process, and the ensuing 2017 and 2018 judicial and administrative processes can and will finally tell the tale.[140]

[140] *See supra* Part V (addressing to the extent possible that this present uncertainty regarding the future of the CEIP as a crucial component of the CPP, the Valparaiso University Law Review has requested and Professor Mullett, has agreed to prepare an addendum to this Article to be published in Volume 52 of the *Valparaiso University Law Review* to report and analyze intervening electoral, judicial, and administrative developments).

APPENDIX 1

REGULATIONS INCORPORATED BY REFERENCE

The CEIP is premised on many terms and phrases with definitions common to the CPP as a whole and others particular to the program itself.[141] The defined terms and phrases in turn incorporate by reference both final and proposed regulations. To implement this framework, the definitions for the defined terms and phrases used in the foregoing Article are found in the footnotes accompanying the first use of the term or phrase. The regulations incorporated by reference in those definitions are included in this Appendix.

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§ 60.5737 What is the Clean Energy Incentive Program and how do I participate?[142]

(a) This section establishes the Clean Energy Incentive Program (CEIP). Participation in this program is optional. Under the CEIP, States may allocate early action allowances or issue early action emission rate credits (ERCs) to projects in paragraphs (a)(1) and (2) of this section.

(1) Early action allowances or ERCs may be issued to eligible CEIP renewable energy (RE) projects that generate electricity during calendar years 2020 or 2021.

(2) Early action allowances or ERCs may be issued to eligible CEIP low-income community projects that reduce electricity end-use or generate electricity and serve a low-income community during calendar years 2020 or 2021.

(b) For the CEIP the matching pool of allowances and ERCs for each State is specified in Tables 5 and 6 of this subpart.

(1) A State that participates in the CEIP, in accordance with the requirements of this section, will award on behalf of the EPA, matching allowances or ERCs, as applicable under its plan, from the State's apportioned matching allowances or ERCs specified in Tables 5 or 6 of subpart UUUU, as applicable.

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[141] For all definitions common to the CPP as a whole, see Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,959–61 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60); for all additional definitions specific to the CEIP, see also Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. 42,973, 42981–82 (proposed June 30, 2016) (to be codified at 40 C.F.R. pt. 60, 62).

[142] *See supra* note 141 and accompanying text.

(2) Each State's apportionment in tables 5 and 6 of this subpart is divided into a reserve of matching allowances or ERCs that may be awarded to eligible CEIP RE projects, and a reserve that may be awarded to eligible CEIP low-income community projects. Matching allowances or ERCs in each reserve may be awarded by a State on behalf of the EPA only for the eligible CEIP project type specified for the reserve.

(3) Any matching allowances or ERCs that are not awarded by January 1, 2023 will be retired by the EPA.

(c) If you participate in the CEIP, your plan must include the requirements in paragraphs (c)(1) through (10) of this section.

(1) Requirements that define the CEIP projects that will be eligible under your State's CEIP and that meet the requirements included in paragraphs (d) and (e) of this section.

(2) Requirements that restrict early action allowances to be allocated, or early action ERCs to be issued, only for electricity generation or savings achieved by eligible CEIP projects on or after January 1, 2020, and no later than December 31, 2021.

(3) Requirements for the process for the allocation of early action allowances, or the issuance of early action ERCs, to eligible CEIP projects that meet the requirements of § 60.5805 for ERC eligible resources.

(4) Requirements for a tracking system that meets the requirements of § 60.5810 in the case of a rate-based plan or § 60.5820 in the case of a mass-based plan.

(5) Requirements for EM&V plans that meet the requirements of § 60.5830.

(6) Requirements for monitoring and verification (M&V) reports that meet the requirements of § 60.5835.

(7) A mechanism that ensures that the issuance of early action allowances or ERCs would have no impact on the emission performance by affected EGUs required to meet rate-based or mass-based emission standards during the interim and final performance periods. Where a state issues early action ERCs, the mechanism must account for the issued early action ERCs on a one-for-one basis during the first step of the interim period.

(8) The definition(s) of "low-income community" you will apply to determine eligibility of CEIP low-income community projects. You must select a definition(s) that exists under a federal law, or under a state or local law in your state, or

under a utility-administered program in your state, as of October 23, 2015. Routine updates of underlying federal, state or local data do not constitute a new definition for the purposes of this section.

(i) You may select different definitions for low-income community eligibility that consider geographic scale and/or different types of projects, but you must apply the selected definitions consistently across the State.

(ii) [Reserved]

(9) Requirements for recordkeeping and reporting that are consistent with the applicable requirements in § 60.5860(c) and (d). Where requirements at § 60.5860(c) refer to ERCs, such requirements must also apply, as applicable under your plan, to early action ERCs, matching ERCs, early action allowances, and matching allowances under the CEIP. Where requirements in § 60.5860(d) refer to ERCs or allowances, such requirements must also apply, as applicable under your plan, to early action ERCs, matching ERCs, early action allowances, and matching allowances under the CEIP.

(10) Your plan must not prohibit an eligible CEIP project from receiving early action ERCs or allowances on the basis that the project is located in Indian country.

(d) An RE project must meet the requirements in paragraphs (d)(1) through (4) of this section to be considered an eligible CEIP RE project.

(1) The project must be connected to and deliver energy to the electric grid in the contiguous United States.

(2) The project must either:

(i) Be located in a State participating in the CEIP, including Indian country within the borders of a State participating in the CEIP; or

(ii) Benefit a State participating in the CEIP or Indian country within the borders of a State participating in the CEIP.

(3) The project must commence commercial operation on or after January 1, 2020.

(4) The project must generate electricity from a wind, solar, geothermal, or hydropower RE resources, measured in MWh consistent with the requirements of § 60.5830(c)(1).

(e) A low-income community demand-side EE project must meet the requirements of paragraphs (e)(1) through (5) of this section to be considered an eligible CEIP low-income community project.

A low-income community renewable energy project must meet the requirements of paragraphs (e)(2) and (e)(5) through (8) of this section to be considered an eligible CEIP low-income community project.

(1) The project must save electricity in residences or buildings that are connected to the electric grid in the contiguous United States.

(2) The project must either:

(i) Be located in a State participating in the CEIP, including Indian country within the borders of a State participating in the CEIP; or

(ii) Benefit a State or Indian country within the borders of a State participating in the CEIP.

(3) The project must commence operation on or after September 6, 2018.

(4) The project must save electricity measured in MWh consistent with the requirements of § 60.5830(c)(2).

(5) The project must be implemented in a "low-income community" as defined in your plan for purposes of the CEIP and consistent with the requirements in paragraph (c)(8) of this section.

(6) The project must be connected to and deliver energy to the electric grid in the contiguous United States.

(7) The project must commence commercial operation on or after January 1, 2020.

(8) The project is a solar RE resource and is implemented to serve a low-income community, by providing direct electricity bill benefits to low-income community ratepayers. Such a project would be eligible for an award from the low-income community reserve of the matching pool for the energy generation that exclusively benefits low-income ratepayers, measured in MWh consistent with the requirements of § 60.5830(c)(1).

(f) Upon the EPA's approval of your plan that includes approved CEIP provisions, or upon promulgation of a federal plan for your State that includes the CEIP, the EPA will deposit your apportioned matching allowances or ERCs, as listed in tables 5 and 6 of subpart UUUU, into an account within your EPA-approved or EPA-administered tracking system. Following your allocation or issuance of early action allowances or ERCs to an eligible CEIP project provider, you must then award to the project

provider matching allowances or ERCs on behalf of the EPA, according to paragraphs (f)(1) through (3) of this section.

(1) You must award matching allowances or ERCs on behalf of the EPA from your account no sooner than 60 days following State allocation or issuance of early action allowances or ERCs to a project provider.

(2) The EPA retains the authority to obtain documentation from you at any time to determine that your allocation of early action allowances or issuance of early action ERCs is in accordance with the requirements of this section.

(3) The EPA retains the authority to place a hold on your account, preventing the award of matching allowances or ERCs to an eligible CEIP project provider, if the EPA believes that you did not allocate early action allowances or issue early action ERCs in accordance with the requirements of this section.

(g) You must allocate early action allowances or issue early action ERCs, and you must award matching allowances or award matching ERCs on behalf of the EPA, according to paragraphs (g)(1) and (2) of this section.

(1) Allocation of early action allowances and award of matching allowances, is based on a 0.8 short ton of CO_2 per MWh factor, such that:

(i) For eligible CEIP RE projects, you must calculate early action allowances and matching allowances to be allocated and awarded to the project provider according to the following equations:

$$Early\ Action\ Allowances = 0.8(^{short\ ton}/_{MWh}) \times \frac{MWh\ generated}{2}$$

$$Matching\ Allowances = 0.8(^{short\ ton}/_{MWh}) \times \frac{MWh\ generated}{2}$$

Where:

Early Action Allowances = Allowances, denominated in short tons, allocated by the State rounded down to the nearest whole integer.

Matching Allowances = Allowances, denominated in short tons, awarded by the EPA rounded down to the nearest whole integer.

MWh generated = MWh generated by the eligible CEIP RE project.

(ii) For eligible CEIP low-income community projects, you must calculate early action allowances and matching allowances to be allocated and awarded to the project provider according to the following equations:

$$Early\ Action\ Allowances = 1.6(^{short\ ton}/_{MWh}) \times \frac{MWh\ saved\ or\ generated}{2}$$

$$Matching\ Allowances = 1.6(^{short\ ton}/_{MWh}) \times \frac{MWh\ saved\ or\ generated}{2}$$

Where:

Early Action Allowances = Allowances, denominated in short tons, allocated by the State rounded down to the nearest whole integer.

Matching Allowances = Allowances, denominated in short tons, awarded by the EPA rounded down to the nearest whole integer.

MWh saved or generated = MWh saved or generated by the eligible CEIP low-income project.

(2) Early action and matching ERCs will be issued and awarded such that:

(i) For every two MWh of electricity generated by an eligible CEIP RE project, you must issue one early action ERC to the project provider, and award on behalf of the EPA one matching ERC to the project provider.

(ii) For every two MWh in end-use electricity savings achieved by an eligible CEIP low-income community project, you must issue two early action ERCs to the project provider, and award on behalf of the EPA two matching ERCs to the project provider.

(3) A State may only allocate early action allowances from its established emission budget for the 2022–2024 interim step period.

(4) When awarding matching allowances or ERCs on behalf of the EPA, a State must assign a vintage for each awarded matching allowance or ERC that corresponds to the vintage of the related early action allowance or ERC on the basis of which the matching allowance or ERC was awarded.

(5) A State may only allocate or issue early action allowances or ERCs to eligible CEIP projects in a total amount not to exceed the number of matching allowances or ERCs apportioned to the State in Tables 5 or 6 of this subpart.

§ 60.5790 What must I do to meet my plan obligations?[143]

(a) To meet your plan obligations, you must demonstrate that your affected EGUs are complying with their emission standards as specified in § 60.5740, and you must demonstrate that the emission standards on affected EGUs, alone or in conjunction with any State measures, are resulting in achievement of the CO_2 emission performance rates or statewide CO_2 emission goals by affected EGUs using the procedures in paragraphs (b) through (d) of this section. If your plan requires the use of allowances for your affected EGUs to comply with their mass-based emission standards, you must follow the requirements under paragraph (b) of this section and § 60.5830. If your plan requires the use of ERCs for your affected EGUs to comply with their rate-based emission standards, you must follow the requirements under paragraphs (c) and (d) of this section and §§ 60.5795 through 60.5805.

(b) If you submit a plan that sets a mass-based emission trading program for your affected EGUs, the State plan must include emission standards and requirements that specify the allowance system, related compliance requirements and mechanisms, and the emission budget as appropriate. These requirements must include those listed in paragraphs (b)(1) through (5) of this section.

(1) CO_2 emission monitoring, reporting, and recordkeeping requirements for affected EGUs.

(2) Requirements for State allocation of allowances consistent with § 60.5815.

(3) Requirements for tracking of allowances, from issuance through submission for compliance, consistent with § 60.5820.

(4) The process for affected EGUs to demonstrate compliance (allowance "true-up" with reported CO_2 emissions) consistent with § 60.5825.

(5) Requirements that address potential increased CO_2 emissions from new sources, beyond the emissions expected from new sources if affected EGUs were given emission standards in the form of the subcategory-specific CO_2 emission performance rates. You may meet this requirement by requiring one of the options under paragraphs (b)(5)(i) through (iii) of this section.

143 *Id.*

(i) You may include, as part of your plan's supporting documentation, requirements enforceable as a matter of State law regulating CO_2 emissions from EGUs covered by subpart TTTT of this part under the mass-based CO_2 goal plus new source CO_2 emission complement applicable to your State in Table 4 of this subpart. If you choose this option, the term "mass-based CO_2 goal plus new source CO_2 emission complement" shall apply rather than "CO_2 mass-based goal" and the term "CO_2 emission goal" shall include "mass-based CO_2 goal plus new source CO_2 emission complement" in these emission guidelines.

(ii) You may include requirements in your State plan for emission budget allowance allocation methods that align incentives to generate to affected EGUs or EGUs covered by subpart TTTT of this part that result in the affected EGUs meeting the mass-based CO_2 emission goal;

(iii) You may submit for the EPA's approval, an equivalent method which requires affected EGUs to meet the mass-based CO_2 emission goal. The EPA will evaluate the approvability of such an alternative method on a case by case basis.

(c) If you submit a plan that sets rate-based emission standards on your affected EGUs, to meet the requirements of § 60.5775, you must follow the requirements in paragraphs (c)(1) through (4) of this section.

(1) You must require the owner or operator of each affected EGU covered by your plan to calculate an adjusted CO_2 emission rate to demonstrate compliance with its emission standard by factoring stack emissions and any ERCs into the following equation:

$$CO_2 emission\ rate = \frac{\sum M_{CO2}}{\sum MWh_{op} + \sum MWh_{ERC}}$$

Where:

CO_2 emission rate = An affected EGU's adjusted CO_2 emission rate that will be used to determine compliance with the applicable CO_2 emission standard.

M_{CO2} = Measured CO_2 mass in units of pounds (lbs) summed over the compliance period for an affected EGU.

MWh_{op} = Total net energy output over the compliance period for an affected EGU in units of MWh.

MWh_{ERC} = ERC replacement generation for an affected EGU in units of MWh (ERCs are denominated in whole integers as specified in paragraph (d) of this section).

(2) Your plan must specify that an ERC qualifies for the compliance demonstration specified in paragraph (c)(1) of this section if the ERC meets the requirements of paragraphs (c)(2)(i) through (iv) of this section.

(i) An ERC must have a unique serial number.

(ii) An ERC must represent one MWh of actual energy generated or saved with zero associated CO_2 emissions.

(iii) An ERC must only be issued to an eligible resource that meets the requirements of § 60.5800 or to an affected EGU that meets the requirements of § 60.5795 and must only be issued by a State or its State agent through an EPA-approved ERC tracking system that meets the requirements of § 60.5810, or by the EPA through an EPA-administered tracking system.

(iv) An ERC must be surrendered and retired only once for purpose of compliance with this regulation through an EPA-approved ERC tracking system that meets the requirements of § 60.5810, or by the EPA through an EPA-administered tracking system.

(3) Your plan must specify that an ERC does not qualify for the compliance demonstration specified in paragraph (c)(1) of this section if it does not meet the requirements of paragraph (c)(2) of this section or if any State has used that same ERC for purposes of demonstrating achievement of a CO_2 emission performance rate or CO_2 emission goal. The plan must additionally include provisions that address requirements for revocation or adjustment that apply if an ERC issued by the State is subsequently found to have been improperly issued.

(4) Your plan must include provisions either allowing for or restricting banking of ERCs between compliance periods for affected EGUs, and provisions not allowing any borrowing of any ERCs from future compliance periods by affected EGUs or eligible resources.

§ 60.5845 What affected EGUs must I address in my State plan?[144]

(a) The EGUs that must be addressed by your plan are any affected steam generating unit, IGCC, or stationary combustion turbine that commenced construction on or before January 8, 2014.

(b) An affected EGU is a steam generating unit, IGCC, or stationary combustion turbine that meets the relevant applicability conditions specified in paragraph (b)(1) through (3) of this section, as applicable, except as provided in § 60.5850.

(1) Serves a generator or generators connected to a utility power distribution system with a nameplate capacity greater than 25 MW-net (i.e., capable of selling greater than 25 MW of electricity);

(2) Has a base load rating (i.e., design heat input capacity) greater than 260 GJ/hr (250 MMBtu/hr) heat input of fossil fuel (either alone or in combination with any other fuel); and

(3) Stationary combustion turbines that meet the definition of either a combined cycle or combined heat and power combustion turbine.

144 *Id.*