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Comments submitted by Marlo Lewis, Ph.D. (Senior Fellow, Competitive Enterprise Institute), Craig Rucker (Executive Director, Co-Founder, CFACT), E. Calvin Beisner, Ph.D. (Founder & National Spokesman, The Cornwall Alliance for the Stewardship of Creation), Amy Ridenour (Chairman, The National Center for Public Policy Research), Honorable Kathleen Harnett White (Distinguished Senior Fellow-in-Residence & Director, Armstrong Center for Energy & Environment, Texas Public Policy Foundation), Craig Richardson, M.A. (Executive Director, E&E Legal), George Landrith (President, Frontiers of Freedom), H. Sterling Burnett, Ph.D. (Research Fellow, Managing Editor, Environment & Climate News, Heartland Institute), Wayne F. Brough, Ph.D. (Chief Economist and Vice President of Research, FreedomWorks), Daniel Simmons (Institute for Energy Research, Vice President for Policy), Kenneth Haapala (President, Science and Environmental Policy Project), Phil Kerpen (President, American Commitment), Karen Kerrigan (President & CEO, Small Business & Entrepreneurship Council), Timothy F. Ball, Ph.D., Ted Baehr, Ph.D. (Founder and Publisher, MOVIEGUIDE®),

Timothy D. Terrell, Ph.D. (Associate Professor of Economics, Wofford College), William L. Anderson, Ph.D. (Professor, Department of Economics College of Business, Frostburg State University), Kevin A. Lewis, Th.M., J.D. (Professor of Theology & Law, Biola University), Craig Vincent Mitchell (Associate Professor of Philosophy, Politics, and Economics, Criswell College), James Wanliss, Ph.D. (Professor of Physics, Presbyterian College)

Docket ID No. EPA–HQ–OAR–2016–0033

Via electronic delivery to: http://www.regulations.gov

Re: Clean Energy Incentive Program Design Details; Proposed rule

Thank you for the opportunity to comment on the Environmental Protection Agency's (EPA) proposed rule titled "Clean Energy Incentive Program Design Details."[1] The individuals listed above respectfully present our views in this joint letter. Organizational affiliations, titles, and logos are included for identification purposes only. Please direct inquiries about ideas and information discussed herein to Marlo Lewis, Senior Fellow, Competitive Enterprise Institute, 1310 L Street, NW, 7th Floor, Washington, D.C. 20005, 202-331-2267, marlo.lewis@cei.org.

I. Introduction

Twenty-eight States joined by numerous industry and non-profit groups are challenging the legality of EPA's carbon dioxide (CO_2) emission standards for existing electric utility generating units—the so-called Clean Power Plan ("CPP" or "Power Plan").[2] Petitioners don't address the Clean Energy Incentive Program (CEIP) in the litigation, but not because none objects to it. The proposed CPP rule and subsequent notice of data availability neither mention the CEIP by name nor describe its mechanisms or provisions, denying the public the opportunity to raise legal concerns about it in the CPP comment periods.

If the Court of Appeals, or subsequently the Supreme Court, vacates the Power Plan, the CEIP Design Details rule will be null and void as well. However, the Courts may uphold the Power Plan or parts of it. If so, the CEIP could be challenged in future litigation based on concerns raised during the present comment period. This joint comment letter raises both procedural and substantive concerns about the proposed CEIP Design Details rule.

Procedural Concerns. EPA claims the CEIP Design Details rule is "consistent with" the Supreme Court's decision, on February 9, 2016, to stay the Power Plan. We disagree. The rulemaking is inconsistent with a major purpose for which the stay was granted:

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[1] EPA, Clean Energy Incentive Program Design Details; Proposed rule, 81 FR 42940-42982, June 30, 2016, https://www.gpo.gov/fdsys/pkg/FR-2016-06-30/pdf/2016-15000.pdf

[2] EPA, Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units; Final rule, 80 FR 64622-64964, October 23, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf

shield States from having to expend additional unrecoverable resources. The CEIP is both a method of complying with the CPP and an "incentive program" potentially affecting the bottom lines of hundreds of CPP-regulated entities. Therefore, Power Plan opponents can ill-afford to sit out this rulemaking. To participate effectively, opposing States will have to devote additional resources of time, money, and agency expertise. As Milton Friedman might have put it, there's no such thing as a free rulemaking.

Nken v. Holder, the Supreme Court case EPA invokes to claim it is not enjoined from further action on the CPP, actually undermines the agency's position. EPA took further regulatory action when the Cross State Air Pollution Rule (CSAPR) and NO_X Sip Call were stayed; however, those proceedings are distinguishable in important respects from the current rulemaking.

In addition, neither the proposed Power Plan rule nor the subsequent notice of data availability afforded public notice of, and opportunity to comment on, the program elements EPA would later adopt and call the "Clean Energy Incentive Program" in the final rule. Specifically, the public had no warning EPA would establish an early action credit program, provide bonus credits through a federal "matching pool," and discriminate against investors in coal plant heat-rate improvements and gas generation by limiting participation to investors in renewable energy and demand-side energy efficiency. By springing the CEIP on the unwary public in the final rule, EPA illegitimately exempted the program from legal scrutiny in the litigation pending before the D.C. Circuit Court of Appeals.

Substantive Concerns. The CEIP is an "early action credit" program. Through the CEIP, EPA would award allowances and emission rate credits worth 300 million short tons of CO_2 to utilities for qualifying renewable energy and energy-efficiency projects that begin commercial operation before the start of the CPP compliance period. EPA says virtually nothing about the statutory basis of the CEIP. That is not surprising. Three lines of evidence—statutory analysis, legislative history, and regulatory history—compel the conclusion that EPA has no authority to award regulatory credits for "early, voluntary" greenhouse gas reductions.

II. Procedural Concerns

<u>CEIP Design Details Rulemaking Is Inconsistent with the Stay</u>

EPA contends the current rulemaking is consistent with the stay because (1) a stay is not an injunction, (2) the CEIP is an "optional" program that "relies on voluntary measures," and (3) EPA modified or issued regulations during previously stayed rules.

On the first point, that a stay is not an injunction, EPA cites the Supreme Court's ruling in *Nken v. Holder*:

> A stay has the effect of ''halting or postponing some portion of [a] proceeding, or [] temporarily divesting an order of enforceability.'' *Nken v. Holder*, 556 U.S. 418,

> 428 (2009). A stay is distinct from an injunction, which ''direct[s] the conduct of a particular actor.'' Id. The EPA has not been enjoined by any court from continuing to work with state partners in the development of frameworks to reduce CO_2 emissions from affected EGUs. This action proposes several changes and additions to the CEIP, which is an optional program, and proposes optional example regulatory text for use by States in the design of their plans. This is wholly consistent with the EPA's statutory authorities and the precedents discussed later in this preamble, and is consistent with and unaffected by the February 9, 2016 stay orders.[3]

The foregoing paragraph is unpersuasive. To begin with, *Nken v. Holder* undermines rather than supports EPA's position.

In *Nken*, the distinction between an injunction and a stay is not as sharp as EPA contends. The Court reviewed an appellate court's decision not to stay a judicial order to deport an immigrant pending resolution of his appeal. "A stay pending resolution of an appeal certainly has some functional overlap with an injunction, particularly a preliminary one," the Court observed, explaining: "Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined."

The difference is that "a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct." In other words, "instead of directing the conduct of a particular actor, a stay operates on the judicial proceeding itself." Further, "It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability."[4]

EPA treats the phrase "or [] temporarily divesting an order of enforceability" as if it merely explains how a stay halts or postpones some portion of a proceeding. But it's clear from the complete sentence ("***either by*** halting or postponing . . . ***or by*** temporarily divesting")[5] that "halting or postponing" can cover more than just enforcement actions. Moreover, EPA ignores key context: A stay "operates upon the judicial proceeding itself" and prevents an action before its legality is conclusively determined "by temporarily suspending the source of authority to act."

The "proceeding" at issue here, of course, is not a judicial order but the CPP. The proper inference to be drawn from *Nken* is that the stay not only temporarily divests the CPP of enforceability, it also operates upon the CPP ***as a proceeding***. That implies additional work on the rule should stop. More importantly, a stay temporarily suspends EPA's ***source of authority to act***. The source of EPA's authority to act on the CEIP is either the CPP (the final rule of which the CEIP is a part and without which it has no validity), or the agency's interpretation of CAA 111(d), the putative statutory basis of

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[3] 81 FR 42944

[4] Nken v. Holder, 556 U.S. 418, 428-429 (2009)

[5] Emphasis added

both rulemakings. Since EPA's source of authority to act has been temporarily suspended, the current rulemaking is out of bounds.

EPA knocks down a strawman when it says the stay does not enjoin the agency from working with States on "***frameworks*** to reduce CO_2 emissions" (emphasis added). The stay is directed not at frameworks ***in general*** but at one ***specific*** framework—the CPP. EPA is not working with States to develop any old framework but the very "proceeding" on which the stay "operates."

The stay of the CPP has "some functional overlap" with an injunction or stop-work order, as becomes obvious when we consider the purposes for which the stay was granted. Those purposes are spelled out in petitioners' "application for a stay," which is literally what the Court granted: "The ***application*** for a stay submitted to The Chief Justice and by him referred to the Court is granted."[6]

Among other purposes, State petitioners sought relief from having to "continue to expend significant and unrecoverable resources" on the Power Plan. The CEIP, of course, is part of the Power Plan.

The application goes into this matter in some detail:

> **B. The States Have Expended And Will Continue To Expend Significant And Unrecoverable Resources.**
>
> The Power Plan will also entail massive financial expenditures by States, which are entirely irreparable. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost always produces the irreparable harm of non-recoverable compliance costs."); Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.").
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> 1. The States' efforts under the Plan will cost them tens of thousands of unrecoverable hours and millions of un-refundable dollars. See, e.g., Durham Decl. ¶ 6 (7,100 hours of 9 senior staff members); McClanahan Decl. ¶ 6 ($500,000 to $1 million on consultants alone); Gore Decl. ¶ 6 ($760,000 per year); see also AP, Wyoming regulators seek $550K for climate change planning, Casper Star Tribune (Jan 18, 2016) ("Wyoming environmental regulators have asked for about $550,000 to prepare for [the Power Plan]."). States on both sides of this case submitted declarations below explaining that they are responding to the Plan right now.

[6] Supreme Court, Order in Pending Case, West Virginia Et Al. v EPA Et Al., February 9, 2016, emphasis added, http://www.globalwarming.org/wp-content/uploads/2016/02/Supreme-Court-Grants-Motion-to-Stay-Feb-9-2016.pdf

> Efforts are being made by those opposing the Plan, see, e.g., Hyde Decl. ¶ 10; Lloyd Decl. ¶¶ 86, 93; Stevens Decl. ¶¶ 5-10; Thomas Decl. ¶ 7; Bracht Decl. ¶¶ 7-8, and also those supporting the Plan, see, e.g., Snyder Decl. ¶ 47; Chang Decl. ¶ 30; Clark Decl. ¶ 16; McVay Decl. ¶ 18; Wright Decl. ¶ 24. Indeed, EPA's Administrator recently boasted that the Plan "is being actively engaged by every state in the United States." Joel Kirkland, Obama's A-Team Touts Clean Power Plan's enforceability, E&E News (Dec. 7, 2015).[7]

States commenting on the CEIP Design Details rule, or simply monitoring the rulemaking, will expend resources of time, money, and agency expertise. As Milton Friedman might have put it, there's no such thing as a free rulemaking. Indeed, EPA recently granted a two-month extension of the comment period due to the rule's complexity.[8] The additional resources States will expend to analyze and comment on the proposal will likely be significant.

Consequently, EPA's assurance that the CEIP is "optional" and "relies on voluntary measures"[9] is irrelevant. Whatever might be said about the CEIP as a ***program***, some States will likely not regard ***participation in the current proceeding*** as optional, for two reasons. First, the CEIP is an option for complying with the CPP. The CEIP awards credits to "early actors," and EPA defines credits as "tradable compliance instruments."[10] Because the Courts may uphold the Power Plan, no State can afford to be indifferent to EPA-proposed changes in compliance options.

The CEIP is "voluntary" only in the sense that it would slightly increase regulated entities' timing flexibility under the Power Plan. In that regard, the CEIP is no different than the "flexibility"[11] the CPP already provides "with respect to the timeframes for plan development and implementation, as well as the choice of emission reduction measures."[12] Despite those vaunted flexibilities, States have incurred unrecoverable expenditures. They will do so again due to the current proceeding, contrary to the application for a stay granted by the Court.

In addition, the CEIP is an "early action credit" program potentially affecting the bottom lines of hundreds of regulated entities. Through the CEIP, EPA plans to award allowances and emission rate credits worth 300 million short tons of CO_2 to utilities for renewable energy (RE) and demand-side energy efficiency (EE) projects that begin

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[7] STATE OF WEST VIRGINIA, STATE OF TEXAS *et al. applicants* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency, *respondents*, APPLICATION BY 29 STATES AND STATE AGENCIES FOR IMMEDIATE STATE OF FINAL AGENCY ACTION DURING PENDANCY OF PETITIONS FOR REVIEW, January 26, 2016, pp. 41-42 (footnotes omitted), http://www.globalwarming.org/wp-content/uploads/2016/02/Final-States-SCOTUS-Stay-App-ACTUAL-M0116774xCECC6.pdf

[8] "Iowa officials noted they support the goals of the CEIP but said it may be too complex." Emily Holden, "EPA pushes back comment deadline on early credit program," ClimateWire, August 26, 2016

[9] 81 FR 42943

[10] 81 FR 42943, 40 C.F.R. § 60.5880, https://ecfr.io/Title-40/sp40.7.60.uuuu#se40.8.60_15880

[11] The terms "flexible" and flexibility" occur 25 times and 220 times, respectively, in the final CPP rule.

[12] 80 FR 64666

commercial operation before the start of the CPP compliance period. As explained below, early action schemes transfer wealth, in the form of tradable credits, from those who don't act early to those who do, creating winners and losers. What's more, unlike any previous greenhouse gas early action program, the CEIP discriminates against emission reductions achieved via heat-rate improvements in coal power plants and baseload shifting from coal to gas. Given those wealth-transfer effects, even States not intending to participate in the CEIP may feel constrained to participate in the rulemaking ("If you're not at the table, you'll be on the menu.")

Lastly, although EPA took further regulatory action under two previously stayed rules, those cases are distinguishable in important respects from the current proceeding.

"When the D.C. Circuit Court stayed the Cross-State Air Pollution Rule (CSAPR) *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. December 30, 2011), the EPA proceeded to issue two rules making a number of revisions to the stayed rule," the agency points out.[13]

That case is distinguishable from the current proceeding in three respects. First, the harms petitioners sought to avoid solely concerned the impacts of EPA's regulations on electricity prices, electric supply reliability, and state economies. Petitioners did not argue that the ***rulemaking itself*** compels them to expend significant unrecoverable resources; they did not request a stay to avoid throwing good money after bad.[14] Second, the rules EPA issued were "direct final rules"—rulemakings that do not significantly engage the resources of State agencies.[15] Third, both rules aimed to alleviate harms cited by petitioners in their stay applications and petitions for expedited review. In stark contrast, the CEIP Design Details rule does not seek to alleviate any CPP-related harms cited by petitioners.

"Similarly, when the D.C. Circuit Court stayed the nitrogen oxide (NO_X) state implementation (SIP) Call, issued under authority of CAA section 110(k)(5), *Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999), the Agency proceeded to institute direct federal regulation of the sources to achieve functionally the same result under CAA section 126(c)," EPA states.[16] Again, a direct federal regulation does not consume significant State agency resources. More importantly, the NO_X SIP Call case is fundamentally unlike the current proceeding.

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[13] 81 FR 42945

[14] KANSAS UTILITIES' MOTION FOR STAY OF FINAL RULE AS APPLIED TO KANSAS The Kansas City Board of Public Utilities – Unified v. Environmental Protection Agency, Case No. 1302, October 21, 2011, pp. 6-14; Petitioners' Corrected Motion for Stay of Final Rule, State of Texas v. Environmental Protection Agency, Case No. 1302, September 22, 2011, pp. 16-18

[15] EPA, Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Direct final rule, 77 FR 10342-10349 February 21, 2012; EPA, Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Final rule, 77 FR 34830-34846, June 12, 2012

[16] 81 FR 42945

In *Nken*, the Supreme Court described a stay as "temporarily suspending the ***source of authority to act***" (emphasis added). CAA section 110(k)(5) and CAA section 126 are ***separate authorities***. Clearly, staying EPA action under Sec. 110(k)(5) does not stay EPA action under Sec. 126. There is thus no valid analogy between the Sec. 126 rule and the current proceeding.

Without Warning

The proposed CEIP Design Details rule claims "EPA included the CEIP in the Clean Power Plan EGs [emission guidelines] in response to the many comments we received supporting the early action crediting concept we discussed in the Clean Power Plan Proposed rule, *see* 79 FR 34918-34919."[17] In fact, there was no discussion of the "early action crediting concept." The key words "credit" and "allowance" are absent from those pages.

As described in the CEIP Design Details rule, the CEIP "operates by means of states allocating or issuing early action compliance instruments—called early action allowances or early action emission rate credits (ERCs)—which are then matched by EPA with additional compliance instruments—called matching allowances or matching ERCs."[18] There was no way to guess the outlines of this program from the proposed CPP rule.

What EPA discusses in the proposed Power Plan is the concept of baseline protection—ensuring that State actions taken before the start of the CPP compliance period "could be recognized as contributing toward meeting a state's required emission performance level for affected EGUs."[19] Credit for early action may be a means to that end, but it is not the only means.

The proposed CPP also gave no hint EPA would recognize only early emission reductions from RE and demand-side EE projects and exclude early reductions from improvements in coal power plant heat-rate efficiency and baseload shifting from coal to gas generation. The generic idea of baseline protection draws no invidious distinctions based on technology type or fuel source, nor did any previous greenhouse gas early action proposals disqualify any bona fide emission reductions based on the associated technology or fuel source. In contrast, the CEIP discriminates against early actors who achieve emission reductions via investments in coal and gas generation.

EPA's plan to create a "matching pool" of early action credits and allowances is also unprecedented. It too is a novelty absent from previous early credit programs or proposals.

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[17] 81 FR 42942
[18] 81 FR 92943
[19] 79 FR 34918

In sum, based on the proposed CPP rule, the public had no way to guess the final rule would include any of the distinctive program elements that constitute the CEIP.

Indeed, the proposed CPP rule devoted only two substantive sentences to the embryo that would later mutate into the CEIP:

> Specifically, the EPA is proposing that, for an existing state requirement, program, or measure, a state may apply toward its required emission performance level the emission reductions that existing state programs and measures achieve during a plan performance period as a result of actions taken after the date of this proposal. . . .This option would ensure that actions taken after proposal of the emission guidelines and prior to 2020 as a result of requirements in a state plan, could be recognized as contributing toward meeting a state's required emission performance level for affected EGUs.[20]

All commenters could reasonably infer from the proposed rule is that States taking action to reduce power-sector CO_2 emissions before the compliance period starts[21] would receive some sort of recognition, ensuring they would not have to make the same reductions twice. There was no indication EPA would establish an early action credit program, create a "matching pool" to reward early actors with bonus credits, and award no credits for early CO_2 reductions achieved through heat-rate efficiency improvements and generation shifting from coal to gas.

The proposed CEIP Design Details rule claims the proposed CPP rule "discussed mechanisms for recognizing and providing incentives for early action in the Clean Power Plan proposal and requested comment on design elements and different approaches, see 79 FR 34830, 34918-34919 (June 18, 2014)."[22] In fact, no mechanisms were discussed, and the proposed rule invited comment only about matters of timing—whether State contributions recognized by EPA would begin on the date the rule is proposed, the date the rule is promulgated, the end of the base period EPA uses to calculate State goals, 2005, or some other year.[23]

The proposed CEIP Design Details rule also claims "The Agency identified additional considerations regarding approaches to incentivize early action in a notice of data availability on which the public also had an opportunity to comment, see 79 FR 64543, 64545-64546 (October 30, 2014)."[24]

While the notice of data availability mentions "allowing credit for early reductions," the word "credit" in this context indicates only the generic idea of baseline protection. EPA

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[20] EPA, Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units; Proposed rule, 79 FR 34918, June 18, 2014, https://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf

[21] 2020 in the proposed rule, later changed in the final rule to 2022. Due to the ongoing litigation, the compliance period starting date may be "adjusted" again. 81 FR 42942.

[22] 81 FR 42944

[23] 79 FR 34918

[24] 81 FR 42944

outlines two approaches. EPA again gave no indication the final rule would create an early action credit program, establish a federal "matching pool," and restrict participation to investors in RE and demand-side EE projects:

> In the first approach, full accounting of emission reductions continues to begin in 2020 but credit could be received for certain pre-2020 reductions that could be used to reduce the amount of reductions needed during the 2020–2029 period. The EPA also requests comment in the proposed rule on a second approach in which states could choose early (e.g., pre-2020) implementation of state goal requirements, which could provide states with the ability to achieve the same amount of overall emission reductions but do so by making some reductions earlier (79 FR 34919).[25]

In a recent letter to EPA administrator Gina McCarthy, Chairman James Inhofe and ten GOP colleagues on the Senate Environment and Public Works Committee point out that "neither the spring nor fall 2015 editions of the Unified Agenda identified the CEIP as an upcoming rule. Accordingly, it was unexpected when EPA's January 2016 Action Initiation List (AIL), which identifies newly commenced rulemakings on a monthly basis, first listed CEIP."[26] The AIL does not describe the CEIP as an early action crediting program, nor does it mention EPA's plan to create a credit "matching pool." Moreover, EPA released the pre-publication version of the CEIP Design Details rule on June 16, 2016—almost two months after briefs were due in the CPP litigation.

To sum up, the public did not have adequate notice of and opportunity to comment on the CEIP, a major program element of the final Power Plan rule.[27] Had EPA described the bare bones of the CEIP in either the proposed rule or the notice of data availability, the public could have raised legal concerns about it in the comment periods. EPA effectively—and, thus, illegitimately—denied opponents the opportunity to challenge the CEIP in the current litigation.[28]

Disturbing Optics

Before turning to substantive matters, we offer a comment on the optics of the proposal. Although any supplemental rulemaking would conflict with the stay by putting pressure

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[25] EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Notice of Data Availability, 79 FR 64545-64546, October 30, 2014, https://www.gpo.gov/fdsys/pkg/FR-2014-10-30/pdf/2014-25845.pdf

[26] Senator James Inhofe, et al., Letter to the Honorable Gina McCarthy, September 7, 2016, http://www.epw.senate.gov/public/_cache/files/047620af-edf3-4593-82ef-b1be8eb3c250/09.07.2016-epw-majority-to-mccarthy-re-litigation-and-reg-transparency.pdf; EPA's 2016 Action Initiation List is available at https://www.regulations.gov/document?D=EPA-HQ-OA-2008-0265-0089

[27] CAA Sec. 307(d)(6)(C): "The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation."

[28] CAA Sec. 307(d)(7)(B): "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."

on States to expend additional unrecoverable resources, the CEIP Design Detail rule appears to add insult to injury.

The CEIP's function is to spur utilities to "act early," i.e. jump-start compliance with the Power Plan. So EPA is engaged in a rulemaking that has no validity apart from the Power Plan, for the purpose of accelerating compliance with the Power Plan, even though the Supreme Court has suspended compliance with the Power Plan.

To CPP supporters, EPA's determination to forge ahead despite the stay may look like bold defiance. To us, it looks like nose thumbing.

III. Substantive Concerns

CEIP Basics

EPA describes the CEIP as an "early action crediting" program.[29] The phrase "early action" occurs 252 times in the proposal.

The word "early" means ***before*** the CPP compliance period, which EPA expects to start in 2022 unless "adjusted" to accommodate delays arising from the litigation.[30] Under the CEIP, utilities that meet a portion of their Power Plan requirements by investing in RE and demand-side EE projects that begin commercial operation in 2020 or 2021 will receive tradable early action allowances or emission rate credits from both participating States and EPA. Specifically:

- Wind or solar projects will receive 2 early action credits for 2 megawatt hours (MWh) of generation, 1 credit from the state and 1 matching credit from the EPA—a total award of 1 credit for each MWh of renewable electricity.
- Demand-side energy-efficiency and solar projects implemented in low-income communities will receive 2 credits for 1 MWh of avoided generation, 1 credit from the state and 1 matching credit from the EPA—a total award of 2 credits for each MWh of energy savings.[31]

EPA will limit the supply of matching credits to an amount equal to 300 million short tons of CO_2.[32]

No Explanation of Statutory Authority

EPA discusses the CEIP by name in three rulemakings: the final CPP rule, the proposed CPP Federal Plan rule, and, of course, the proposed CEIP Design Details

[29] 80 FR 42942
[30] 81 FR 42942
[31] 81 FR 42943, 42949
[32] 81 FR 42943, 42949-42956

rule. Even in combination, the three rules say next to nothing about the CEIP's statutory basis.

The topic is not addressed in any way in the proposed Federal Plan,[33] even though the proposal mentions the CEIP 29 times. There is no explicit discussion of the issue in the final CPP rule, which mentions the CEIP 57 times.

The CEIP Design Details rule explicitly discusses the topic in just one place. EPA asks: "*What are the statutory authorities for this action, including legal authority and basis for the CEIP?"* The agency answers:

> The CEIP is an optional component of the Clean Power Plan, and the Clean Power Plan is an exercise of the EPA's authority under section 111(d) of the CAA, 42 U.S.C. 7411(d). The legal authority and rationale supporting the Clean Power Plan are discussed in the final rulemaking and accompanying Legal Memorandum. See, e.g., 80 FR 64662, 64707–64710 (October 23, 2015). The rationale and legal authority for the CEIP in particular are also set forth in the final Clean Power Plan. Id. 64831–64832[34]

There is even less to that uninformative paragraph than meets the eye. The first set of pages cited, 80 FR 64707-64710, do indeed set forth EPA's version of the "legal authority and rationale" for the Power Plan. However, those pages do not mention the CEIP. The second set of pages, 80 FR 64831-64832, explains the mechanics of the CEIP and why EPA believes the program is beneficial but does not discuss the program's statutory basis.

The final CPP rule may implicitly address the CEIP's legal basis in this one sentence:

> The specific criterion the EPA is establishing for eligible EE projects—namely that these projects be implemented in low-income communities—is also consistent with the technology-forcing and development design of CAA section 111.[35]

If we catch EPA's drift, the agency contends that, like the CPP of which it is a part, the CEIP is lawful because it is "consistent with the technology-forcing and development design of CAA section 111."

The problem with that explanation is obvious. If the technology-forcing aspect of a rulemaking were sufficient to make it lawful under Sec. 111, there would be no legal dispute over the Power Plan itself. The Supreme Court would not have granted an

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[33] EPA, Federal Plan Requirements for Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 FR 64966-65116, October 23, 2015, https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22848.pdf

[34] 81 FR 42944

[35] 80 FR 64831

application to stay the CPP, and the Court of Appeals would not have granted petitions for expedited review.

No Authority: Statutory Text

We assume *arguendo* that, under the U.S. Constitution, the "laboratories of democracy" are free to transfer wealth from their own ratepayers to special interests via renewable energy quota, cap-and-trade, and other forms of market favoritism. If such policies and measures are constitutional, then States also have the authority to award regulatory credits for "early" CO_2 reductions.

EPA, however, is not a sovereign state. An administrative agency of the federal government, EPA has no authority save that delegated to it by Congress. EPA's putative authority for the Power Plan is CAA Sec. 111. The provision contains none of the terminology associated with an early action program ("early," "voluntary," "credit," "allowance," "allocation," "transfer," "award," "participant").

Courts have held that an agency may look beyond the plain meaning of legislative language "when that meaning has led to absurd or futile results."[36] However, EPA has regulated industrial sources under CAA Sec. 111 for more than 40 years. In no previous Sec. 111 rulemaking did EPA create a credit for early reductions program. Regulatory history provides no evidence CAA 111 leads to absurd or futile results unless construed as authority for early credits.

In explaining the policy rationale for the CEIP, EPA states: "Commenters raised concerns that the fast pace of reductions underlying the emission targets in the proposed rule could potentially shift investment from RE to natural gas, thus dampening the incentive to develop wind and solar projects, in particular."[37] Conceivably, those commenters, and EPA as well, may regard a dash to gas as an absurd result, rendering the CPP futile as a plan for expanding the market share of renewables.

However, promoting renewables is a political preference, not a statutory objective. CAA Sec. 111 provides authority to reduce emissions, not pick energy market winners and losers. EPA is supposed to take "cost" into account when setting CAA Sec. 111 emission performance standards.[38] If States can more economically achieve their CPP-mandated reductions via investment in gas rather than renewables, then doing so is reasonable, not absurd, and the result is efficient, not futile.

Agencies may also look beyond the text of a statute if the meaning is ambiguous. However, EPA does not identify any ambiguity in CAA Sec. 111 such as might make

[36] United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1939)
[37] 80 FR 64831
[38] CAA 111(a)(1)

authority for an early credit program a "permissible construction."[39] As noted above, EPA says virtually nothing about the CEIP's statutory basis.

When Congress does authorize an early action credit program, it has no trouble making its intention clear. For example, CAA Sec. 404(e) contains detailed instructions on how EPA is to "allocate" "allowances" to utilities for "early reductions" of sulfur dioxide (SO_2)—i.e. reductions achieved prior to the 1995-1999 compliance period.[40] Congress enacted both Sec. 404 and Sec. 111 in its current form in the 1990 Clean Air Act Amendments. The Supreme Court has stated that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[41] The reasonable presumption is that Congress acted intentionally and purposefully when it did not include "allocate," "allowances," and "early reductions" in Sec. 111.

EPA cites a separate provision, CAA Sec. 103(g), as authority for the agency "to continue coordinating and assisting in the development of CO_2 pollution prevention and control efforts of the states and local governments, even in light of the stay of the Clean Power Plan." EPA observes that 103(g) "expressly authorizes the Agency to develop 'non-regulatory strategies . . . for preventing or reducing multiple air pollutants, including . . . carbon dioxide, from stationary sources, including fossil fuel power plants.'"[42] That is correct. However, contrary to EPA, that means Sec. 103(g) provides no authority for either the current rulemaking or early action crediting.

The first sentence of the provision states:

> In carrying out subsection (a) of this section, the Administrator shall conduct a basic engineering research and technology program to ***develop, evaluate, and demonstrate non-regulatory strategies*** and technologies for air pollution prevention.[43]

EPA overlooks the obvious. The provision deals solely with "non-regulatory strategies." Indeed, the term "non-regulatory" is repeated in each of the next four paragraphs outlining the program's major elements. Moreover, while mentioning "carbon dioxide" among other air pollutants, the provision concludes by admonishing EPA not to jump to regulatory conclusions: "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." In stark contrast, early

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[39] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)

[40] Text is available at https://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap85-subchapIV-A-sec7651c.htm

[41] *Russello v. United States*, 464 U.S. 16, 23 (1983)

[42] 81 FR 42945

[43] CAA Sec. 103(g), https://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapI-partA-sec7403.htm

action crediting is a ***regulatory strategy***. As previously mentioned, EPA defines early action allowances and credits as "tradable ***compliance instruments***."[44]

In addition, EPA's authority under Sec. 103(g) extends only to actions that "develop, evaluate, and demonstrate" non-regulatory strategies and technologies. EPA's objective in the CEIP Design Details rule is not to ***demonstrate*** the feasibility or cost-effectiveness of early action crediting but to ***implement it on a national scale***. For that reason as well, the CEIP is outside the scope of Sec. 103(g).

No Authority: Legislative History

Credit for early action was an issue of recurring controversy during 1997-2005, and understandably so. Although sometimes promoted as a third way between the Kyoto Protocol and "inaction," early action crediting was a strategy to build the accounting framework and corporate clientele for cap-and-trade.[45] Early reduction credits worth peanuts or nothing at all in a free market could be worth millions in a carbon-constrained economy. Thus every early actor would have an incentive to lobby for a cap.[46]

Former Sen. Joe Lieberman (D-Conn.) was the chief advocate of early action crediting in the U.S. Congress. Unlike EPA, however, Lieberman never claimed federal agencies already possess authority to award or certify credits for "early" reductions. Lieberman tried but failed to persuade Senate colleagues to support a version of the 1992 Energy Policy Act that included a GHG early credit program.[47] Instead, House and Senate conferees established the Section 1605(b) voluntary reporting of greenhouse gases program, which does not award or certify credits.[48]

Years later, in the 105th Congress, Lieberman sponsored legislation to give the executive branch ("The President") the power Congress considered but declined to delegate to it in 1992. On October 2, 1998, Sens. Lieberman, John Chafee (R-R.I.), and Connie Mack (R-Fla.) introduced S. 2167, the Credit for Early Voluntary Action Act.[49] The bill's subtitle speaks volumes: "***To amend the Clean Air Act to authorize the***

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[44] 81 FR 42950, emphasis added

[45] "Proponents of voluntary early credit approaches also point to the potential political benefits: if a broad cross section of business, environmental groups, and others could come together behind such a program, it would provide some political impetus for more ambitious goals, including eventual ratification of the Kyoto Protocol." Ian Parry and Michael Toman, Greenhouse Gas "Early Reduction" Programs: A Critical Appraisal, July 2000, Resources for the Future, Climate Change Issues Brief No. 21, p. 2, http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-CCIB-21.pdf

[46] Statement of Marlo Lewis on S. 388, the Climate Change Technology Deployment and Infrastructure Credit Act of 2005, Senate Energy and Natural Resources Committee, April 14, 2005, http://www.openmarket.org/wp-content/uploads/2010/08/marlo-lewis-testimony-early-action-crediting-senate-energy-april-14-2005.pdf

[47] Sen. Lieberman: "Along with Senator Wirth, I prepared a simple amendment, virtually identical to one offered by Representative Cooper to H.R. 776, the House energy bill which was adopted unanimously on a bipartisan basis by the House Subcommittee on Energy and Power." 138 CR S1611, February 8, 1992

[48] The text is available at http://www.eia.gov/survey/form/eia_1605/1605text.html.

[49] Text is available at https://www.congress.gov/105/bills/s2617/BILLS-105s2617is.pdf

President to enter into agreements to provide regulatory credit for voluntary early action to mitigate greenhouse gases" (emphasis added). The legislation's core premise was that the CAA does not authorize "the President" (hence EPA) to award regulatory credit for greenhouse gas reductions. For an executive agency to have that authority, Congress would have to ***amend*** the CAA.

The bill's statement of purpose echoed that assessment:

> The purpose of this Act is to encourage voluntary greenhouse gas emission mitigation actions by ***authorizing the President*** to enter into binding agreements under which entities operating in the United States will receive credit, usable in any future domestic program that requires mitigation of greenhouse gas emissions, for voluntary mitigation actions before 2008 [emphasis added].

In the 106th Congress, Sens. Lieberman, Chafee, and Mack, joined by Sens. Warner, Moynihan, Reid, Jeffords, Wyden, Biden, Collins, Baucus, and Voinovich, introduced S. 547, the Credit for Voluntary Reductions Act.[50] In this iteration, perhaps to mollify industry stakeholders who regard the Department of Energy as friendlier territory than EPA, the bill does not prejudge which existing law Congress would amend or which agency would administer the program. However, as in the previous version, S. 547 would "authorize the President" to do that which he could not yet do: "provide regulatory credit for voluntary early action."

Among environmental groups, the Pew Center on Global Climate Change took the lead in promoting credit for early action to the business community.[51] During the same week Lieberman, Chafee, and Mack introduced S. 2167, the Pew Center published a major report on credit for early action. Among the report's key conclusions:

> For such an incentive to be effective, participants must know in advance the credits they will earn for particular GHG reductions or sequestration activities and be given clear assurances that they possess a legally enforceable right to receive earned credits. ***Existing law does not provide the legal framework to give participants that right***. For that reason, the crediting mechanism should be clearly delineated by statute or in agreements authorized by statute . . . .
>
> Our review of existing statutory authorities indicates that the ***Executive Branch currently lacks authority to set up an early action crediting program***. If such a program is to have binding effect, then it will have to be authorized by law.[52]

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[50] Text is available at https://www.congress.gov/106/bills/s547/BILLS-106s547is.pdf

[51] In November 2011, the organization renamed itself the Pew Center for Energy and Climate Solutions. See Jean Chemnick, "Pew Center changes names, funding sources," Greenwire, November 9, 2011.

[52] Robert R. Nordhaus and Stephen C. Fotis, Analysis of Early Action Crediting Proposals, Pew Center on Global Climate Change, October 1, 1998, emphasis added, http://www.globalwarming.org/wp-content/uploads/2016/08/Robert-Nordhaus-and-Stephen-Fotis-Early-Action-and-Global-Climate-Change-Pew-Center-October-1998.pdf

Although credit for early action was controversial, there was no controversy about the President's lack of authority to implement it under existing law. The Clinton administration began promoting the idea in October 1997 as part of its climate change policy initiative.[53] Coincident with the introduction of S. 2167 and publication of the Pew report in October 1998, the Clinton administration, via the President's Council on Sustainable Development, formulated and promoted "principles" of early action crediting.[54] At no time did the administration claim it could implement an early action program under existing law, nor did Sen. Lieberman, the Environmental Defense Fund, or any other environmental group suggest the executive branch could do so.

In its 1998 Annual Report to Congress, published in April 1999, the U.S. Energy Information Administration described credit for early action as a "not-yet-legislated program":

> In October 1997, the White House announced that it favored "credit for early reductions," shorthand for a ***not-yet-legislated program*** in which companies that reduced emissions prior to the 2008-2012 target date for the Kyoto Protocol would receive some to-be-defined "credit" for their actions. The announcement generated intellectual ferment as policymakers, companies, and advocates attempted to define the notions of "credit," "early," and "reductions."[55]

A "not-yet-legislated program" is a program Congress has not yet authorized.

None of the credit for early reduction proposals introduced in Congress ever came close to being enacted. No additional co-sponsors joined Chafee, Lieberman, and Mack on S. 2167 in the 105th Congress. No additional co-sponsors joined the 12 senators who introduced S. 547 in the 106th Congress. On the House side, H.R. 2221, a bill to defund any early action credit program Congress might authorize, introduced by Rep. David McIntosh (R-Ind.), had 32 co-sponsors.[56] That put paid to the House companion bill to S. 547, Rep. Rick Lazio's H.R. 2520, which got 15 co-sponsors.[57]

Without a viable House companion, S. 547 lost momentum. None of the early credit bills in the 105th and 106th Congresses came to a vote either in committee or before the full Senate or House. Lieberman did not reintroduce early credit legislation in subsequent Congresses.

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[53] "Second, we must urge companies to take early actions to reduce emissions by ensuring that they receive appropriate credit for showing the way," President Clinton, Remarks to the National Geographic Society, October 22, 1997, http://www.presidency.ucsb.edu/ws/?pid=53442

[54] Press Release, October 17, 1998, "U.S. Environmental and Business Leaders Agree Early Action Is Needed to Reduce Greenhouse Gas Emissions and Present Principles for Early Action to Vice President Gore." http://clinton3.nara.gov/PCSD/tforce/cctf/cpress.html

[55] U.S. Energy Information Administration, Annual Report to Congress 1998 (April 1999, 1998DOE/EIA-1073), https://books.google.com/books?id=eDyi8HliyQ4C&source=gbs_book_similarbooks

[56] Text is available at https://www.congress.gov/bill/106th-congress/house-bill/2221.

[57] Text is available at https://www.congress.gov/bill/106th-congress/house-bill/2520.

No Authority: Regulatory History

On February 14, 2002, President G.W. Bush brought early crediting back from the political graveyard by directing the Department of Energy (DOE) to enhance the "accuracy, reliability, and verifiability" of the Voluntary Reporting of Greenhouse Gases Program (VRGGP), established pursuant to Section 1605(b) of the 1992 Energy Policy Act, and "to give transferable credits to companies that can show real emission reductions."[58]

To carry out Bush's directive, DOE conducted one of the most extensive rulemakings in its history. Over a three-year period, DOE convened four public comment periods, two national workshops, and four regional workshops on its proposed revisions of the 1605(b) reporting program.[59] The length and scope of the proceeding is a reflection of what was at stake: the accounting rules under which regulatory credits, potentially worth billions of dollars in a future emissions trading scheme, would be divvied up.

Some 80 organizations participated in the first comment period, which closed June 6, 2002. Several commenters pointed out that DOE has no authority under the 1992 Energy Policy Act, or any other statute, to award credit for early reductions. The clear implication—explicitly stated in two comment letters—is that no federal agency has such authority under existing law. DOE eventually acknowledged in a March 2005 interim final rule that it has no authority to award or certify transferable credits.[60]

Ironically, some of today's leading CPP advocates, such as the Natural Resources Defense Council, Union of Concerned Scientists, and the Pew Center on Global Climate Change, helped nail the legal case against the Bush initiative.

One commenter, the Electric Power Industry Climate Initiative (EPICI), insinuated the executive branch could award regulatory credits for early voluntary GHG reductions. However, EPICI ultimately conceded no such statutory authority exists.[61] All other

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[58] The White House, "President Announces Clear Skies & Climate Change Initiatives," February 14, 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020214-5.html; Global Climate Change Policy Book, February 14, 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/climatechange.html

[59] The proceeding began modestly with a "Notice of inquiry and request for comment" rather than a proposed rule. Department of Energy, Voluntary Reporting of Greenhouse Gas Emissions, Reductions, and Carbon Sequestration, Notice of inquiry and request for comment, 67 FR 30370-30373, May 6, 2002, http://2001-2009.state.gov/g/oes/rls/prsrl/press/jan/10022.htm

[60] Department of Energy, Guidelines for Voluntary Greenhouse Gas Reporting; Interim final rule and opportunity for public comment; revised general guidelines, 70 FR 15176, March 24, 2005, http://regulations.justia.com/regulations/fedreg/2005/03/24/05-5607.html

[61] See comments of Robert P. Gehri, EPICI, September 20, 2002, http://www.globalwarming.org/wp-content/uploads/2016/08/Robert-Gehri-EPIC-September-20-2002.pdf; Marlo Lewis, CEI, November 22, 2002, http://www.globalwarming.org/wp-content/uploads/2016/08/lewism1-Response-to-EPICI-November-18-2002.pdf; Eric Holdsworth, EPICI, March 5, 2003, http://www.globalwarming.org/wp-content/uploads/2016/08/Eric-Holdsworth-EPICI-March-5-2003.pdf; and Marlo Lewis, CEI, June 19, 2003, http://www.globalwarming.org/wp-content/uploads/2016/08/lewism3-CEI-EPICI-Again-June-19-2003.pdf.

organizations that commented on the legality of the President's proposal forthrightly stated DOE has no authority to award credits under the 1992 Energy Policy Act.[62] As mentioned, two comment letters denied the executive branch's authority to institute an early credit program ***under any current law***.

The Natural Resources Defense Council, in a joint letter with National Wildlife Federation, National Environmental Trust, Union of Concerned Scientists, U.S. Public Interest Research Group, World Wildlife Fund, and Minnesotans for an Energy Efficient Economy, stated:

> First, it is clear that section 1605(b) [of the Energy Policy Act] confers no authority on the administration to give credits against future global warming emissions limitations on companies that have made filings under that section. In fact, the 1992 EPACT legislation pointedly rejected proposals made at the time to confer credit status on reported reductions. . . .
>
> This [the President's February 14, 2002 proposal to provide transferable credits for certified voluntary greenhouse gas reductions] appears to be a request for legislative recommendations, because ***the administration*** has no authority under section 1605(b) or ***any other current law*** to ensure penalty protection or to give out transferable credits.[63]

In its comments, the Pew Center stated:

> ***The Pew Center's review of existing statutory authorities indicates that the Executive Branch currently lacks authority*** to assure that current efforts to reduce GHG emissions receive credit under a future law. If a baseline protection program is to have binding effect, it must be authorized by law.[64]

CPP: Picking Winners and Losers

EPA created the CEIP to ensure "the fast pace of reductions" driven by CPP emission targets did not "shift investment" into gas rather than renewables.[65] Although any rulemaking may have coincidental energy market impacts, picking energy market

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[62] Comments of Northeast States for Coordinated Air Use Management, June 5, 2002, http://www.globalwarming.org/wp-content/uploads/2016/08/colburn-Northeast-States-for-Coordinated-Air-Use-Management-June-5-2002.pdf; and Generators for Clean Air, June 2002, http://www.globalwarming.org/wp-content/uploads/2016/08/mannato-Generators-for-Clean-Air-June-2006.pdf

[63] Natural Resources Defense Council, National Wildlife Federation, National Environmental Trust, Union of Concerned Scientists, U.S. Public Interest Research Group, World Wildlife Fund, Minnesotans for An Energy-Efficient Economy, Voluntary Reporting Comments, June 5, 2002, emphasis added, http://www.globalwarming.org/wp-content/uploads/2016/08/doniger-NRDC-et-al-June-5-2002.pdf

[64] Comments of the Pew Center on Global Climate Change Regarding Greenhouse Gas Emissions, Reductions, and Sequestration, June 2002, emphasis added, http://www.globalwarming.org/wp-content/uploads/2016/08/cochran-Pew-Center-on-Global-Climate-Change-June-20021.pdf

[65] 80 FR 64831

winners and losers is not a bona fide statutory purpose of CAA 111 performance standards.

Indeed, a major criticism of the Power Plan generally is that it is a strategy to expand the market share of renewables rather than to improve the environmental performance of existing coal and gas power plants. The CPP sets performance standards for ***existing*** coal and natural gas power plants that are more stringent than those EPA sets for ***new*** coal and gas power plants.[66] Which is to say, coal and gas power plants that may be decades old are held to emission standards EPA considers infeasible and unaffordable for brand new state-of-the-art sources. Moreover, the new source standard for coal power plants can only be met via carbon capture and storage (CCS)—a technology that is both costly and inadequately demonstrated.[67] The CPP is transparently designed to undermine the economics of coal generation and advantage renewables at the expense of gas.

The CEIP will enhance EPA's ability to pick market winners and losers through the CPP. As noted above, utilities that achieve early emission reductions via investment in coal and gas generation will be ineligible to receive credits. In addition, as explained below, the CEIP will transfer wealth, in the form of tradable emission credits, from those who don't "act early" to those who do.

<u>CEIP: Coercive Zero-Sum Game</u>

During the late 1990s and early 2000s, proponents touted early action credits as "voluntary" and "win-win." In fact, an early credit program sets up a coercive, zero-sum game. To avoid credit inflation—that is, avoid exceeding a State's "mass-based" or "rate-based" CPP goals—the supply of emission allowances or emission rate credits in the compliance period must be reduced by the exact number of allowances/credits awarded for early reductions.

Two consequences inexorably follow. First, for every company that earns a credit in the early action period, there must be another that loses a credit in the compliance period. Second, companies that do not "volunteer" are penalized—forced in the mandatory period to make deeper emission cuts than the State goal would otherwise require, pay higher credit prices than would otherwise prevail, or purchase more credits than they would otherwise need for compliance.

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[66] The existing source performance standards for coal and gas power plants are 1,305 lbs. CO2/MWh and 771 lbs. CO2/MWh, respectively (80 FR 64667). The new source standards for coal and gas power plants are 1,400 lbs. CO2/MWh and 1,000 lbs. CO2/MWh, respectively (80 FR 64512).

[67] Ian Austin, "Technology to Make Clean Energy from Coal Is Stumbling in Practice," New York Times, March 29, 2016, http://www.nytimes.com/2016/03/30/business/energy-environment/technology-to-make-clean-energy-from-coal-is-stumbling-in-practice.html?_r=1; Ian Urbana, "Piles of Dirty Secrets Behind a 'Model' Clean Coal Project," New York Times, July 5, 2016, http://www.nytimes.com/2016/07/05/science/kemper-coal-mississippi.html?_r=0; Marlo Lewis, "Carbon Capture and Storage: Adequately Demonstrated?" GlobalWarming.Org, March 31, 2016, http://www.globalwarming.org/2016/03/31/carbon-capture-and-storage-adequately-demonstrated/#more-25583

The coercive, zero-sum dynamic of an early credit program is easily illustrated. Assume for simplicity's sake there are only four utilities (A, B, C, and D) in a State, each emitting 25 tons of CO_2, for a statewide total of 100 tons. Also assume the State's mass-based goal is an emissions reduction target of 80 tons. Absent an early credit program, each utility would receive 20 allowances during the compliance period, and have to reduce its emissions by 5 tons.

Now assume EPA creates an early action program that sets aside 20 allowances for reductions achieved before the compliance period. That reduces each utility's compliance period allocation from 20 allowances to 15 (4 utilities X 15 credits each = 60 + 20 early action credits = 80, the total State emissions budget).

Finally, assume that Utilities A and B each earns 10 allowances for early reductions. In the compliance period, A and B will have 25 allowances apiece (10 + 15), which is 5 more (25 instead of 20) than an equal share under the cap would give them. In contrast, C and D will each have 5 fewer allowances (15 instead of 20). Thus, C and D must make deeper reductions than the State goal would otherwise require, or they must purchase additional allowances from A and B. They will probably also have to pay higher prices for A and B's allowances. Bottom line: Early reducers profit at the expense of non-participants.

That early action crediting is a wealth transfer scheme was widely recognized during the debates on the Lieberman and Bush DOE proposals. The Center for Clean Air Policy wrote: "Credits earned should be subtracted from the pool of allowances given out in the binding program, rather than added to it. ***This means that early reducers will be rewarded at the expense of those who do not participate***."[68] As one CCAP scholar put it: "This is the essence of an early reductions program—it reallocates first budget period allowances from those who don't take early action to those who do."[69]

The Pew Center report similarly argued that the environmental integrity of a cap-and-trade program requires that early credits be "drawn down" from the compliance period budget rather than added to it.[70] Resources for the Future observed: "If the United States were to implement an emissions control program during that [2008-2012 Kyoto Protocol compliance] period with tradable carbon allowances, holders of early reduction credits would be allocated a share of the allowances, implying fewer allowances for others."[71]

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[68] Center for Clean Air Policy, Key Elements of Domestic Program to Reward Early GHG Emissions Reductions, January 1999 (emphasis added), https://web.archive.org/web/20061003185351/http://www.ccap.org/pdf/erc.pdf

[69] Tim Hargrave, CCAP, personal communication with Marlo Lewis, CEI, February 2, 1999

[70] Nordhaus and Fotis, Analysis of early reduction crediting proposals, p. 21

[71] Parry and Toman, Greenhouse Gas "Early Reduction" Programs: A Critical Appraisal, p. 1

Enron lobbyist John Palmisano, who boasted the Kyoto Protocol would be "good for Enron stock!!,"[72] opined that Chafee-Lieberman-Mack (S. 2167) would "transfer substantial wealth to so-called early actors while imposing substantial penalties upon those companies that are neither good nor bad but merely choose, for whatever reasons, to wait to control emissions until a regulatory control program goes into effect."[73] As more companies participate, "more and more pain will be imposed on fewer and fewer non-participating companies," he cautioned.

Apparently, EPA understands the pain and penalty imposed by early credit programs on non-participants. That would explain why EPA sets a limit, equivalent to 300 short tons of CO2, on the pool of "matching credits" the agency will award for early action. Inflict too much pain, and the CEIP could become a political liability for the Obama administration and EPA.

Similarly, the CEIP might intensify opposition to the CPP if the early credit option directly pits one State against another. Accordingly, EPA proposes that States in which "EGUs have greater reduction obligations will be eligible to secure a larger proportion of the federal matching pool . . ."[74]

Nonetheless, two inconvenient facts remain. First, the CEIP will transfer wealth from investors in fossil generation to investors in RE and demand-side EE projects, and from utilities that don't act early to those that do. Transferring wealth from politically-disfavored to politically-preferred market actors is a function outside the scope of CAA 111.

Second, although EPA proposes to limit the size of the matching pool, the pool itself will intensify the pain inflicted on those who do not invest early in RE and demand-side EE projects. To repeat, the supply of emission allowances in the compliance period must be reduced by the exact number awarded for qualifying "voluntary" reductions in the early action period. Under the CEIP, EPA will increase the number of allowances awarded by States for early action via a matching pool equivalent to 300 million short tons of CO_2. Those bonus credits will be subtracted from the pool of allowances available to non-early actors in the compliance period. Investors in coal and gas generation are treated as non-early actors even if they achieve early CO_2 reductions via coal-plant heat-rate improvements and baseload shifting from coal to gas.

IV. Conclusion

In *Utility Air Regulatory Group v. EPA*, the Supreme Court admonished EPA not to "rewrite clear statutory terms to suit its own sense of how the statute should operate" and make sure it can cite "clear congressional authorization" whenever it "claims to

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[72] Robert Bradley, Jr., "The Enron Revitalization Act of 2009 (from the Kyoto Protocol to Waxman Markey)," July 1, 2009, MasterResource.Org, https://www.masterresource.org/climate-policy/this-agreement-will-be-good-for-enron-stock-from-kyoto-to-waxman-markey/

[73] Marlo Lewis, personal copy of Palmisano memorandum

[74] 80 FR 64830

discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[75] The Power Plan flouts the Court's admonition and the CEIP increases the scope of EPA's overreach.

The unstated logic of EPA's CPP and CEIP rulemakings appears to be as follows:

(1) Replacing fossil generation with renewable generation is a goal on which all right-thinking people ("progressives") agree. Hence, the CAA must authorize EPA to restructure State power markets, even though no provision of the Act expressly or by clear implication grants such authority, and even though a bill explicitly directing EPA to de-carbonize the U.S. power sector via CAA rulemakings would have been dead on arrival even in periods when Democrats controlled the White House and both chambers of Congress.

(2) Traditional CAA 111(d) performance standards that require improvement in the design and operation of existing facilities won't achieve power-sector de-carbonization. Hence the provision must authorize the agency to set ***existing source*** performance standards more stringent than those considered feasible and affordable for ***new*** sources, forcing owners to invest in ***new*** renewable facilities that ***are not even sources***, reduce output from coal and gas facilities, or simply shut them down. In other words, CAA 111(d) must authorize EPA to promulgate existing source performance standards that are actually ***non-performance mandates***.

(3) Again, because performance improvements at the source cannot realize EPA's policy vision, CAA 111(d) must authorize EPA to regulate the economic activities of ***source owners and operators***, not just the physical objects (buildings, facilities, structures, installations) specified as "sources" in the Act. For the same reason, 111(d) must authorize EPA to define "best system of emission reduction" to include market-restructuring policies such as cap-and-trade and renewable energy quota, not just facility-specific technologies and management practices.

(4) A national early credit program will facilitate States' efforts to implement the aforementioned ***market-restructuring policies***. Consequently, CAA 111(d) must also authorize EPA to administer an early action credit program, and to increase the pain and penalty inflicted on non-participants by awarding bonus credits in addition to those awarded by participating States, even though three lines of evidence—statutory analysis, legislative history, and regulatory history—show no such authority exists.

(5) All of those program elements so perfectly accord with the agency's "sense of how the statute should operate" that EPA did not need to solicit public comment on the CEIP before announcing it in the final CPP rule, does not need to explain the program's statutory basis, and need not consider whether the rulemaking is consistent with the purposes of the stay as explicated in the application granted by the Court.

[75] Utility Air Regulatory Group v. EPA 134 S. Ct. 2444, 2446 (2014)

EPA's pattern of overreach is unrelenting. We therefore do not expect the agency to be influenced by our arguments. We do however hope that placing those arguments in the public record may be of use in potential future litigation on the CPP.