



November 1, 2016

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 This comment letter is a revised version of the joint comment letter submitted by me (Marlo Lewis) and 18 co-signers on September 29, 2016.² This letter presents more clearly the main arguments in the previous letter, provides additional evidence, and makes one technical correction.³ It also includes an executive summary to provide a better overview of the complete contents of the letter. 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 (CO₂) emission standards for existing electric utility generating units—the so-called Clean Power Plan ("CPP" or "Power Plan").⁴ 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 an 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

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 Available at <https://cei.org/blog/people/48462>

³ When the Court of Appeals stayed EPA's Cross State Air Pollution Rule (CSAPR), the agency issued a direct final rule in February 2012. The joint letter overlooked the parallel proposal included in the rulemaking, and mistakenly inferred the direct final rule did not significantly engage State agency resources.

⁴ 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>

litigation based on concerns raised during the present comment period. This comment letter raises both procedural and substantive concerns about the proposed CEIP Design Details rule.

II. Executive Summary

A. Procedural Concerns

The CEIP Design Details Rule flouts the Supreme Court's decision of 9 February 2016 to stay the Power Plan.

The rulemaking is inconsistent with a major purpose for which the stay was granted: 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.

Invoking *Nken v. Holder* (2009), a Supreme Court decision about a judicial order to deport an immigrant, EPA argues that a stay is not an injunction or stop-work order, all it does is divest a proceeding of its enforceability; hence the agency may continue to develop the Power Plan even though the rule has been stayed. But in *Nken*, the Court held that a stay “operates on the judicial proceeding itself.” The proceeding at issue here is the Power Plan. Since the stay operates upon *it*, further rule development should stop.

The Court also stated that a stay prevents an action “by temporarily suspending the source of authority to act.” EPA's source of authority to act on the CEIP is either the Power Plan (the final rule of which the CEIP is a part and without which it has no validity) or the agency's interpretation of Clean Air Act (CAA) section 111(d), the putative statutory basis of both rulemakings. Since EPA's source of authority to act has been temporarily suspended, the current rulemaking is out of bounds for that reason as well.

EPA notes that it took further regulatory action when the Cross State Air Pollution Rule (CSAPR) and NO_x SIP Call were stayed. However, those actions are distinguishable in important respects from the current proceeding.

Unlike the Power Plan petitioners, the CSAPR petitioners did not argue that the rulemaking itself compels them to expend significant unrecoverable resources. Their objective was solely to reduce regulatory impacts, not avoid throwing good money after bad.

Moreover, the two CSAPR regulations addressed concerns raised in States' application for a stay by increasing States' emission budgets for nitrogen oxides (NO_x) and sulfur

dioxide (SO₂). In contrast, the CEIP does not alleviate any harms identified in States' application but rather aims to accelerate compliance with the stayed rule.

EPA's continuing regulation of nitrogen oxides during the stayed NO_x SIP Call was kosher because EPA acted under CAA Sec. 126, a separate "source of authority" from CAA Sec. 110, the statutory basis for the NO_x SIP Call. In contrast, EPA claims to base both the stayed Power Plan and the CEIP Design Details rule on one and the same source of authority: CAA Sec. 111(d).

EPA claims the CEIP Design Details rulemaking is also authorized by CAA Sec. 103(g). That claim does not survive inspection. Sec. 103(g) solely authorizes EPA to "develop, evaluate, and demonstrate" "non-regulatory strategies" for reducing air pollution. The CEIP establishes a credit for early action program, and the credits, being "tradable compliance instruments," are regulatory in nature. Moreover, the point of the CEIP is not to develop or evaluate early action crediting or demonstrate its feasibility but to implement it on a national scale. On both counts, the CEIP Design Details rule exceeds EPA's Sec. 103(g) authority.

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.

Neither the proposed Power Plan rule nor the subsequent Notice of Data Availability outlined the basic program elements EPA would later adopt as the CEIP in the final Power Plan rule. Specifically, the public had no warning EPA would establish an early action credit program, provide bonus credits through a federal-state "matching pool," and exclude from the program early actors who reduce CO₂ emissions by either improving the heat-rate efficiency of coal power plants or shifting baseload generation from coal to gas.

Under 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." By keeping the public in the dark about CEIP program specifics during the Power Plan comment periods, EPA illegitimately denied opponents the opportunity to challenge the CEIP in the controversy before the Court of Appeals.

B. Substantive Concerns

EPA is virtually silent about the CEIP's statutory basis.

In three rulemakings that mention the CEIP by name—the final Power Plan, EPA's proposed Federal Plan, and the CEIP Design Details rule—EPA says next to nothing about the CEIP's statutory basis. The closest EPA comes to articulating a legal theory is a single sentence in the final Power Plan rule (80 FR 64831):

The specific criterion the EPA is establishing for [CEIP] eligible EE [demand-side energy efficiency] 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.

The problem with that rationale is obvious. If the technology-forcing aspect of a regulatory strategy were sufficient to make it lawful under Sec. 111, there would be no legal dispute over the CPP itself. The Supreme Court would not have granted the application to stay the rule, nor would the Court of Appeals have granted petitions for expedited review.

EPA's virtual silence about the statutory basis of the CEIP is unsurprising. No federal agency has authority under any existing statute to establish a greenhouse gas early action credit program.

Three lines of evidence—statutory analysis, legislative history, and regulatory history—compel the conclusion that EPA may not award regulatory credits for “early” greenhouse gas reductions.

When Congress wants EPA to administer an early action credit program, it has no trouble making its intention clear. For example, CAA Sec. 404(e) directs EPA to establish an early credit program for SO₂ emissions from power plants. Sec. 404 was enacted via the 1990 CAA Amendments, which also revised CAA Sec. 111. The latter provision contains none of the terminology associated with an early action program (“early,” “voluntary,” “credit,” “allowance,” “allocation,” “transfer,” “award,” “participant”).

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.” The reasonable presumption is that Congress intentionally and purposefully excluded early crediting language from Sec. 111.

Credit for early action was an issue of recurrent legislative and regulatory controversy during the late 1990s and early 2000s. However, the one point on which all early credit advocates—in Congress, the executive branch, industry, and environmental groups—either assumed from the get-go or eventually acknowledged is that no federal agency has authority under existing law to award or certify regulatory credits for “early” greenhouse gas reductions. None of the bills designed to supply the authority lacking under current law ever came close to being enacted.

CAA Sec. 111 does not authorize EPA to pick energy market winners and losers.

A major legal objection to the CPP generally is that it is chiefly a strategy to expand the market share of renewables rather than to improve the “environmental performance” (lower the CO₂ emission rate) of existing coal and gas power plants. CAA Sec. 111(d) authorizes EPA to regulate emissions from stationary sources, not to pick energy

market winners and losers. By subjecting existing, decades-old coal and natural gas power plants to CO₂ standards that are unachievable even for new power plants with state-of-the-art control technology, the Power Plan effectively forces owners of those facilities to reduce output, shut down their facilities, or invest in new renewable generation.

“Produce less electricity,” “close the plant,” or “subsidize your competitor’s wind farm” are non-performance mandates, not valid performance standards, as they do nothing to lower the emissions rate of existing coal and gas power plants.

The CEIP compounds the illegality of the Power Plan by denying early action credits to utilities that achieve pre-compliance period CO₂ reductions through coal plant efficiency upgrades and generation shifting from coal to gas. The CEIP is the first greenhouse gas early credit program ever adopted or proposed to discriminate against classes of early reducers based on their fuel source or core technology.

That is all the more arbitrary considering the mismatch between the “building block” strategies on which CPP emission standards are based and eligibility for CEIP early action credits. The CEIP will award credits for investment in demand-side energy efficiency (EE) projects even though EPA originally proposed and later rejected EE investment as a building block strategy. Conversely, the CEIP will deny credits for investments in coal plant heat-rate efficiency and generation shifting from coal to gas even though those emission-reduction methods are CPP building block strategies.

The logic at work here is clearly political rather than statutory. EPA is biased against fossil fuels and seeks to rig the marketplace against fossil fuels. There is no evidence, textual or otherwise, that Congress enacted Sec. 111(d) to pick energy market winners and losers or transfer wealth from fossil energy interests to alternative energy interests.

III. Procedural Concerns

CEIP Design Details Rulemaking Is Inconsistent with the Stay

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 CO₂ 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.⁵

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."⁶

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")⁷ 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 Power Plan. The proper inference to be drawn from *Nken* is that the stay not only temporarily divests the rule of enforceability, it also operates upon the Power Plan **as a proceeding**. That implies additional work on the rule should stop.

Furthermore, a stay temporarily suspends the **source of authority to act**. The source of EPA's authority to act on the CEIP is either the Power Plan (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 both rulemakings. Since EPA's source of

⁵ 81 FR 42944

⁶ *Nken v. Holder*, 556 U.S. 418, 428-429 (2009)

⁷ Emphasis added

authority to act has been temporarily suspended, the current rulemaking is out of bounds for that reason as well.

EPA knocks down a strawman when it says the stay does not enjoin the agency from working with States on “**frameworks** to reduce CO₂ emissions” (emphasis added). The stay is directed not at frameworks **in general** but at one framework **in particular**—the CPP. EPA is not working with States to develop some generic framework but the very “proceeding” on which the stay “operates.”

A stay “certainly has some functional overlap with an injunction” in the present case, given a key purpose for which the stay was granted. That purpose is 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.”⁸

Among other objectives, 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.”).

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.

⁸ 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).⁹

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 granted a two-month extension of the comment period due to the rule's complexity and because some stakeholders did not want to divide their efforts between analyzing the proposal and preparing for the CPP oral argument.¹⁰ The additional resources States will expend to comment on the CEIP Design Details Rule will likely be significant.

EPA's assurance the CEIP is "optional" and "relies on voluntary measures"¹¹ is irrelevant. States may still feel constrained to participate in the proceeding for two reasons. First, the CEIP is an option for complying with the Power Plan. The CEIP awards credits to "early actors," and EPA defines credits as "tradable compliance instruments."¹² 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"¹³ the CPP already provides "with respect to the timeframes for plan development and implementation, as well as the choice of emission reduction measures."¹⁴ 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 CO₂ to utilities for renewable energy (RE) and demand-side energy efficiency (EE) projects that begin

⁹ 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>

¹⁰ "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

¹¹ 81 FR 42943

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

¹³ The terms "flexible" and flexibility" occur 25 times and 220 times, respectively, in the final CPP rule.

¹⁴ 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 investment in fossil-fuel technologies. Given those wealth-transfer effects, even States not intending to participate in the CEIP may feel pressure 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," EPA points out.¹⁵

The CSAPR rulemakings¹⁶ differ from the current proceeding in several ways. 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.¹⁷

Second, the stay instructed EPA to "continue administering the [vacated] Clean Air Interstate Rule pending the court's resolution of these petitions for review." Whether EPA could in principle regulate the interstate transport of NO_x and SO₂ emissions was never in question. In contrast, whether EPA can set CO₂ standards for existing power plants so stringent that owners can comply only through generation-shifting or investing in new non-sources is in question.

Third, both CSAPR rules aimed to address concerns cited by petitioners in their stay applications and petitions for expedited review. For example, the final rule:

- increased Georgia's 2014 SO₂ budget by 40,334 tons, the 2014 annual NO_x budget by 13,198 tons, and the 2014 ozone-season NO_x budget by 5,762 tons;
- increased Indiana's SO₂ budget for 2012 and 2014 by 5,338 tons;
- increased the Kansas 2012 and 2014 SO₂ budgets by 452 tons, the 2012 annual NO_x budget by 640 tons and the 2014 annual NO_x budget by 5,794 tons;

¹⁵ 81 FR 42945

¹⁶ 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

¹⁷ 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

- increased Louisiana's 2012 and 2014 ozone season NO_x budgets by 89 tons;
- increased Mississippi's 2012 and 2014 ozone-season NO_x budgets by 115 tons;
- increased Missouri's 2012 and 2014 annual and ozone-season NO_x budgets by 26 tons;
- increased Ohio's 2012 and 2014 annual SO₂, annual NO_x, and ozone-season NO_x by 5,163, 2,765, and 1,221 tons respectively;
- increased Nebraska's 2012 and 2014 SO₂ budgets by 3,110 tons;
- increased New York's 2012 and 2014 annual SO₂, annual NO_x, and ozone-season NO_x budgets by 5,444 tons, 694 tons, and 127 tons respectively;
- increased the Oklahoma 2013 and 2014 ozone-season NO_x budgets by 859 tons; and,
- increased the Texas 2012 and 2014 annual and ozone-season NO_x budgets by 2,731 and 1,142 tons respectively.¹⁸

In no case did EPA reduce a State's NO_x or SO₂ budgets. The petitioning States in general had reason to be pleased with the agency's post-stay rulemaking activity. In contrast, the CEIP Design Details rule does not address any concerns raised by petitioners, and the function of the CEIP itself is to accelerate compliance with the CPP, a rule they consider unlawful and oppose.

EPA goes on to state: "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)."¹⁹ Because EPA's 126(c) rule is a "direct federal regulation," the associated rulemaking would not raise the same resource concerns as the proposed CEIP Design Details rule.

More importantly, the NO_x SIP Call case is fundamentally unlike the current proceeding. 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."²⁰ In fact, there was no discussion of the "early

¹⁸ 77 FR 34838-34842

¹⁹ 81 FR 42945

²⁰ 81 FR 42942

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.”²¹ 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.”²² Credit for early action may be a means to that end, but it is not the only means. For example, EPA could recognize a State’s “early” contributions by adjusting the State’s final compliance period rate-based or mass-based CO₂-reduction target.

The proposed CPP rule devoted only two substantive sentences to the baseline protection embryo that would later morph 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.²³

All commenters could reasonably infer from the excerpt above is that States taking action to reduce power-sector CO₂ emissions before the compliance period starts²⁴ would receive some sort of recognition, ensuring they would not have to make the same reductions twice. EPA gave no indication it would establish an early action credit program, which as such would be focused not on State “contributions” but the investments of covered entities; create a “matching pool” to reward early actors with bonus credits; and award no credits for early CO₂ reductions achieved through heat-rate efficiency improvements and generation shifting from coal to gas, despite those being

²¹ 81 FR 92943

²² 79 FR 34918

²³ 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>

²⁴ 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.

two of three “building block” strategies EPA used to calculate CO₂ performance standards for coal and gas power plants.

No previous greenhouse gas early action proposals disqualify bona fide emission reductions based on the covered entity’s core technology or fuel source. Nor did previous early credit plans include a federal “matching pool” to incentivize participation in what is already an incentive program.

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

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).”²⁵ 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.²⁶

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).”²⁷

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 for States rather than tradable credits for covered entities. EPA outlines two approaches, which 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

²⁵ 81 FR 42944

²⁶ 79 FR 34918

²⁷ 81 FR 42944

amount of overall emission reductions but do so by making some reductions earlier (79 FR 34919).²⁸

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.”²⁹ 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 Power Plan 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. Under 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.” 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.

IV. Substantive Concerns

CEIP Basics

EPA describes the CEIP as an “early action crediting” program.³⁰ 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.³¹ 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:

²⁸ 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>

²⁹ 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>

³⁰ 80 FR 42942

³¹ 81 FR 42942

- 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.³²

EPA will limit the supply of matching credits to an amount equal to 300 million short tons of CO₂.³³

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 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,³⁴ 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. 64831–64832³⁵

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

³² 81 FR 42943, 42949

³³ 81 FR 42943, 42949-42956

³⁴ 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>

³⁵ 81 FR 42944

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 111.³⁶

EPA seems to suggest 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 legal theory 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 application to stay the CPP, and the Court of Appeals would not have granted petitions for expedited review.

No Authority: Statutory Text

I 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” CO₂ 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.”³⁷ 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

³⁶ 80 FR 64831

³⁷ *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1939)

the incentive to develop wind and solar projects, in particular.”³⁸ Conceivably, those commenters, and EPA as well, 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.³⁹ 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 authority for an early credit program a “permissible construction.”⁴⁰ 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 SO₂—i.e. reductions achieved prior to the 1995-1999 compliance period.⁴¹ 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.”⁴² 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 CO₂ 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.’”⁴³ 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 Sec. 103(g) states:

³⁸ 80 FR 64831

³⁹ CAA 111(a)(1)

⁴⁰ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)

⁴¹ Text is available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap85-subchapIV-A-sec7651c.htm>

⁴² *Russello v. United States*, 464 U.S. 16, 23 (1983)

⁴³ 81 FR 42945

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.⁴⁴

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.”

EPA suggests that because the CEIP is an “optional” element of the Power Plan it is non-regulatory. But as EPA never tires of saying, the Power Plan already gives States plenty of options how to comply. That does not make the Power Plan non-regulatory, because covered entities do not have the option not to comply. The CEIP simply adds another element of flexibility to a **regulatory program**. As noted earlier, EPA defines early action allowances and credits as “tradable **compliance instruments**.”⁴⁵

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 develop or evaluate early action crediting or demonstrate its feasibility or cost-effectiveness but **implement it on a national scale**. For that reason also, 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 thinly veiled strategy to build the accounting framework and corporate clientele for cap-and-trade.⁴⁶ Early reduction credits worth peanuts or nothing at all in a free market could yield million-dollar windfalls in a carbon-constrained economy. Thus every early actor would have an incentive to lobby for a cap.⁴⁷

⁴⁴ CAA Sec. 103(g), <https://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap85-subchapl-partA-sec7403.htm>

⁴⁵ 81 FR 42950, emphasis added

⁴⁶ “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>

⁴⁷ 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>

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 greenhouse gas early credit program.⁴⁸ Instead, House and Senate conferees established the Section 1605(b) voluntary reporting of greenhouse gases program, which does not award or certify credits.⁴⁹

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.⁵⁰ The bill’s subtitle speaks volumes: “**To amend the Clean Air Act to authorize the 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 early 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.⁵¹ In this iteration, perhaps to mollify industry stakeholders who regard the Department of Energy as friendlier territory than EPA, the bill does not prejudice 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.⁵² During the same week

⁴⁸ 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

⁴⁹ The text is available at http://www.eia.gov/survey/form/eia_1605/1605text.html.

⁵⁰ Text is available at <https://www.congress.gov/105/bills/s2617/BILLS-105s2617is.pdf>

⁵¹ Text is available at <https://www.congress.gov/106/bills/s547/BILLS-106s547is.pdf>

⁵² 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.

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.⁵³

Although the Lieberman bills were 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.⁵⁴ 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.⁵⁵ 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 proponent 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."⁵⁶

⁵³ 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>

⁵⁴ "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>

⁵⁵ 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>

⁵⁶ U.S. Energy Information Administration, Annual Report to Congress 1998 (April 1999, 1998DOE/EIA-1073), https://books.google.com/books?id=eDyi8HliYQ4C&source=gbv_book_similarbooks

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.⁵⁷ That put paid to the House companion bill to S. 547, Rep. Rick Lazio’s H.R. 2520, which got 15 co-sponsors.⁵⁸

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.

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.”⁵⁹

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.⁶⁰ 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

⁵⁷ Text is available at <https://www.congress.gov/bill/106th-congress/house-bill/2221>.

⁵⁸ Text is available at <https://www.congress.gov/bill/106th-congress/house-bill/2520>.

⁵⁹ 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>

⁶⁰ 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>

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.⁶¹

Ironically, some of today's leading Power Plan 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 greenhouse gas reductions. However, EPICI ultimately conceded no such statutory authority exists.⁶² All other organizations that commented on the legality of President Bush's proposal forthrightly stated DOE has no authority to award credits under the 1992 Energy Policy Act.⁶³ 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 [Bush's 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.⁶⁴

⁶¹ 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>

⁶² 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>.

⁶³ 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>

⁶⁴ 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-

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.⁶⁵

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.⁶⁶ Although any rulemaking may have coincidental energy market impacts, picking energy market 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.⁶⁷ 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 new sources using state-of-the-art control technology.

For example, the new source standard for coal power plants is 1,400 lbs. CO₂/MWh. It can only be met via carbon capture and storage (CCS)—a technology that is both costly and inadequately demonstrated.⁶⁸ The standard of existing coal power plants is even more stringent—1,305 lbs. CO₂/MWh. Similarly, whereas the new source standard for natural gas power plants is 1,000 lbs. CO₂/MWh, the standard for existing gas power plants is 771 lbs. CO₂/MWh. Owners and operators have the option to meet those unachievable standards by building or investing in new renewable units, which are not even sources (emitting facilities) under CAA Sec. 111. The CPP is transparently

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>

⁶⁵ 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>

⁶⁶ 80 FR 64831

⁶⁷ 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).

⁶⁸ 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>

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 participate. Only investment in RE and demand-side EE projects can qualify for CEIP credits. And as explained below, early action credit programs are designed to transfer wealth, in the form of tradable credits, from those who don't act early to those who do.

CEIP: Coercive Zero-Sum Game

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, purchase more credits than they would otherwise need for compliance, or pay higher credit prices than would otherwise prevail.

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 CO₂, 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 than an equal share under the 80-ton 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—very likely at higher prices—from A and B. 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.***”⁶⁹ 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.”⁷⁰

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.⁷¹ 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.”⁷²

Enron lobbyist John Palmisano, who boasted the Kyoto Protocol would be “good for Enron stock!”,⁷³ 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.”⁷⁴ 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 . . .”⁷⁵

Nonetheless, three inconvenient facts remain. First, all early credit programs transfer wealth from those who don’t act early to those who do. Second, the CEIP rigs the game

⁶⁹ 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>

⁷⁰ Tim Hargrave, CCAP, personal communication with Marlo Lewis, CEI, February 2, 1999

⁷¹ Nordhaus and Fotis, Analysis of early reduction crediting proposals, p. 21

⁷² Parry and Toman, Greenhouse Gas “Early Reduction” Programs: A Critical Appraisal, p. 1

⁷³ 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/>

⁷⁴ Marlo Lewis, personal copy of Palmisano memorandum

⁷⁵ 80 FR 64830

by excluding from participation companies that achieve early CO₂ reductions via investments in coal and gas generation. Third, although EPA proposes to limit the size of the matching pool, the pool itself will intensify the pain and penalty inflicted on those who invest in more efficient coal generation or increased gas generation rather than in RE and demand-side EE projects.

The CEIP wealth-transfer scheme is all the more arbitrary considering the mismatch between the “building block” strategies on which CPP emission standards are based and eligibility for CEIP early action credits. The CEIP will not award credits for early reductions achieved through investments in coal plant heat-rate efficiency and generation shifting from coal to gas, even though those are CPP building block strategies. Yet the CEIP will award credits for investment in demand-side EE projects even though EPA proposed but in the final rule rejected demand-side EE as a CPP building block strategy.⁷⁶

The logic operating here is political, not statutory. EPA is biased against fossil fuels and seeks to rig the marketplace against fossil fuels. There is no evidence, textual or otherwise, that Congress enacted Sec. 111(d) to pick energy market winners and losers or transfer wealth from fossil energy interests to alternative energy interests

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 discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.”⁷⁷ 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 unachievable even by new sources with state-of-the-art control technology, forcing owners to invest in **new** renewable facilities that **are not even sources**, reduce

⁷⁶ 80 FR 64776

⁷⁷ *Utility Air Regulatory Group v. EPA* 134 S. Ct. 2444, 2446 (2014)

output from coal and gas facilities, or simply shut them down. In other words, because all right-thinking people want to decarbonize electricity, 111(d) must authorize EPA to promulgate existing source performance standards that are functionally ***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 ***owners and operators outside the source***, not just the physical objects (buildings, facilities, structures, installations) specified as "sources" in the Act. In other words, 111(d) must put pressure on states to restructure their electric power sectors via new or more aggressive renewable energy quota and cap-and-trade schemes.

(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, even though three lines of evidence—statutory analysis, legislative history, and regulatory history—show no such authority exists.

(5) What's more, because the power to pick energy market winners and losers is essential to the triumph of the progressive vision, 111(d) must authorize EPA to implement a discriminatory early credit program, denying eligibility to early actors who reduce CO₂ emissions via investment in fossil energy assets.

(6) For the same reason, 111(d) must authorize EPA to increase the pain and penalty inflicted on fossil-energy interests whom it excludes from participation by means of an unprecedented "matching pool" that will further reduce the supply of compliance-period credits available to fossil-energy interests by an amount equivalent to 300 million short tons of CO₂.

(7) 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.

EPA's pattern of overreach is unrelenting. I therefore do not expect EPA to be swayed by these comments. However, placing the comments in the public record may be of use in potential future litigation on the CPP.