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of Environmental Quality**

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January 21, 2016

Ms. Gina McCarthy
Administrator
Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 28221T
Attention: Docket ID NO. EPA-HQ-OAR-2015-0199
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations

Ms. McCarthy:

The attached document is submitted on behalf of the Arkansas Department of Environmental Quality (ADEQ) and the Arkansas Public Service Commission (APSC) (collectively referred to as the Agencies). The Agencies submit these comments on the United States Environmental Protection Agency's (EPA) "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations" (Proposed Rule) with the caveat that we recognize and support the Arkansas Attorney General's legal challenges to the Clean Power Plan and its ancillary components. Submittal of these comments does not indicate that the Agencies support the Clean Power Plan. Rather, we are continuing to explore strategies for Arkansas to retain control and influence over our future, and to allow for growth in our state as our economy continues to expand.

As we consider a balanced energy future, Arkansas has several factors in our favor. Arkansas benefits from plentiful and diverse energy resources including natural gas, coal, hydropower, and biomass. Arkansas utility regulators were some of the first in the South to advance energy efficiency projects and net metering for distributed renewable energy. Utilities are investing in utility-scale solar in Arkansas. Preservation of this diverse energy supply is vital to keeping energy costs affordable and preserving reliability for Arkansas's citizens and businesses.

When the Clean Power Plan was finalized in the Fall of 2015, Arkansas Governor Asa Hutchinson directed the Agencies to seek out the lowest cost option to compliance. At this point, we are fully engaged in discussions with our stakeholders on developing and implementing guiding principles which will shape our actions. The Agencies are committed to working together with other state agencies, ratepayers and stakeholders, as we develop a roadmap and ultimately a state strategy for Arkansas.

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Throughout the process, we will continue to move forward with a state strategy that does not create unnecessary or artificial constraints that are inconsistent with the Clean Air Act.

In developing these comments, the Agencies sought significant input from a diverse group of stakeholders. During November and December of 2015, the Agencies hosted a series of listening sessions in which we sought input from stakeholders on items for comment in the Proposed Rule that are of importance to Arkansas. The Agencies also hosted a stakeholder meeting to discuss the Proposed Rule. Furthermore, the Agencies invited any interested party to submit additional information to consider as we developed our comments.

Our comments on the Proposed Rule are intended to offer constructive feedback in order to ensure that the proposed presumptively approvable model trading rules provide a reasonable framework that the state could choose to incorporate into a state plan and that the federal plan provides for crediting of a broad selection of carbon reduction measures and flexibility for states and affected entities to ensure the reliability and cost-effectiveness of the energy grid. In finalizing the federal plan, EPA should consider the impact of federal plan design choices on all states, including those that submit a state plan, and ensure a broad market for trading of compliance instruments between states subject to a federal plan and states subject to a state plan. The Agencies urge EPA to reconsider certain design choices for the Clean Energy Incentive Program presented in the Clean Power Plan, as well as those included in the Proposal, to provide flexibility, avoid undesired consequences, and achieve the goal of incentivizing investment in renewable energy and energy efficiency in low-income communities.

We appreciate this opportunity to provide our comments to you and we hereby request that they be given your utmost consideration.

Sincerely,



Becky W. Keogh
Director, ADEQ



Ted Thomas
Chairman, APSC

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(LB/MWH)11

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The Arkansas Department of Environmental Quality (ADEQ) and Arkansas Public Service Commission (APSC) (collectively the Agencies) comment below on the proposed “Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; and Amendments to Framework Regulations” (Proposed Rule) published by the U.S. Environmental Protection Agency (EPA) on October 23, 2015.¹ The Agencies acknowledge the legal challenges to EPA’s authority to promulgate the “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” (EGs) made by the Arkansas Attorney General’s office and supports those litigation efforts. Because the outcome of the litigation is uncertain and there is currently no legal stay of the EGs in place, we are continuing to explore the best strategies for Arkansas to retain as much control and influence over our future as possible, and to allow for growth in our state economy. Accordingly, submission of these comments should not be interpreted as conveying support to EPA’s rulemaking under section 111(d) of the Clean Air Act (CAA). Rather, these comments are solely intended to further the state’s goal of developing the least-cost compliance option for implementation of the EGs in whatever form they survive, if at all, at the close of the legal challenge process. Additionally, the Agencies endorse the comments submitted by the Midcontinent States Environmental and Energy Regulator’s Comments on the Clean Energy Incentive Program (CEIP)² and the Proposed Rule.

Background

The Proposed Rule amends the CAA section 111(d) framework regulations, presents presumptively approvable rate-based and mass-based model trading rules, and establishes federal plan requirements on affected electric generating units (EGUs) in the case where a state does not submit an approvable state plan to implement the EGs. The amendments to the 111(d) framework regulations extend the deadlines for EPA action on state plans and revise the process for EPA action on state plans under CAA section 111(d) to more closely align with the process for EPA action on state implementation plans (SIPs) under CAA section 110. The rate-based and mass-based model trading rules set forth options that states may adopt or tailor for implementation of the final EGs in a state plan. The model rules would be presumptively approvable by EPA. States may also submit plans that differ from the model trading rule provisions, so long as the state demonstrates that the means for addressing EGs requirements are at least as stringent as the proposed model approaches. Lastly, EPA proposes two approaches to implementing a federal plan—a mass-based approach and a rate-based approach—in the case where a state does not submit an approvable state plan; however, EPA proposes to only finalize a single approach.

¹ Source: Docket ID, EPA-HQ-OAR-2015-0199

² “Midcontinent States Environmental and Energy Regulators’ Comments on the Proposed Clean Energy Incentive Program” (included with this submission following comments by the Agencies)

111(d) Regulatory Framework Amendments

EPA Action on State Plans

EPA is proposing to amend the section 111 regulatory framework by updating certain procedures under CAA section 111(d) for issuance of partial or conditional approvals, error corrections, a SIP-Call like mechanism, and timelines for EPA action on state plans similar to the process under CAA section 110. However, the Agencies would like to point out that EPA stated in the Proposed Rule that “a CAA section 111(d) state plan is not a CAA section 110 state implementation plan (SIP).” EPA goes on to state that “[a]lthough there are similarities in the two programs, approvability criteria for CAA section 111(d) plans need not be identical to approvability criteria for SIPs.”

The Agencies do not find it appropriate to assimilate CAA section 110 requirements into the section 111 construct; however, should the Clean Power Plan be implemented, the Agencies support a procedure for partial and conditional approvals that may be similar to mechanisms provided in section 110. However, the Agencies are opposed to the use of a SIP-Call mechanism as provided in section 110(k)(5), which states the following:

(5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184, or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this Act to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D, unless such date has elapsed).

This particular section is not appropriate to be incorporated into 111(d) plans. Section 111(d) does not mandate a duty to reach “attainment” because section 111(d) does not address the national ambient air quality standards, which clearly is the primary purpose of section 110. Under section 111(d), a state plan must include enforceable standards of performance and carbon dioxide emission limits in the case of the EGs for existing units in a source category for which EPA has proposed new source performance standards and that are not regulated under CAA section 110 or CAA section 112. Thus, in the case of a state plan pursuant to the Clean Power Plan, the Agencies find no basis for nor relevance in establishing a “SIP-Call” mechanism into section 111(d) plans. Furthermore, if the United States Congress had intended to require states to respond to a “SIP-Call” mechanism under section 111(d), it would have included such a provision in the statute. The Agencies are opposed to any program that imposes requirements outside of the states’ statutory responsibilities. It is important that

EPA allow states broad flexibility in the development of standards of performance, and a “SIP-Call” would very likely restrict the state’s flexibility.

EPA is also proposing to update the deadlines for acting on state submittals and promulgating a federal plan under 40 CFR 60.27(b), (c), and (d) (to more closely track the current versions of CAA sections 110(c) and 110(k)) to allow EPA 12 months to approve and disapprove submittals of all plans or plan revisions, not just the EGs, after receipt. EPA also proposes slight modifications to the provisions related to issuing a proposed federal plan in 40 CFR 60.27 (c), changing the 6-month deadline for issuing a final federal plan to 1 year, and setting the deadline for promulgation of a federal plan to run from the date of the EPA’s action on a state submittal, rather than from the original deadline for a state submittal.³ The Agencies agree that it is reasonable to extend to 12 months the deadline for EPA to review state plans to approve or disapprove and to 1 year to issue a federal plan.

Sources that Modify or Reconstruct

EPA is currently proposing that new, modified, or reconstructed sources subject to section 111(b) would not simultaneously become subject to state plans under section 111(d). On October 23, 2015, EPA published the final carbon pollution standards for new, modified, and reconstructed power plants to be codified at section 111(b) of the Clean Power Plan.⁴ Unlike section 111(d), which applies to certain existing stationary sources, section 111(b) sources are subject to a wholly distinct set of standards, and EGUs subject to 111(b) would not be permitted to either generate emission reduction credits (ERCs) under a rate-based plan or be required to hold allowances under a mass-based plan.

Despite section 111(b) explicitly applying to modified or reconstructed sources, EPA initially proposed preventing affected existing EGUs from exiting the 111(d) program by modifying or reconstructing.⁵ However, under the Proposed Rule, EPA is now taking the position that existing stationary sources that modify or reconstruct would become subject to the 111(b) standard, and this would move the existing sources out of the 111(d) program.

Unlike EPA’s previous position, the currently proposed interpretation is consistent with the current definitions of a “new source” and “stationary source” under sections 111(a)(6) and 111(a)(2) as the definition for new sources includes both new and modified stationary sources.⁶ In addition, this interpretation allows affected EGUs greater flexibility in how they meet regulatory requirements under the CAA as a whole by allowing existing EGUs to elect to fall under section 111(b) if they modify or reconstruct.

³ 80 FR 65038

⁴ 80 FR 64510

⁵ 79 FR 34903.

⁶ The term “new source” means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source. 42 U.S.C.A. § 7411. The term “stationary source” means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to non-road engines shall be construed to apply to stationary internal combustion engines. 42 U.S.C.A. § 7411. The term “existing source” means any stationary source other than a new source.

In addition, allowing affected EGUs to fall under 111(b) instead of 111(d) in the event the EGU modifies or reconstructs would not reduce the overall stringency of the section 111 program according to EPA. EPA addressed concerns about relative stringency of 111(b) as compared to 111(d) in the Proposed Rule by stating that “the [CAA] section 111(d) rule cannot be said to be more stringent than the [CAA] section 111(b) rule.”⁷

State-determined Allocations

EPA is seeking comment on the proposal to provide states with the opportunity to determine its own allocations and allowance-distribution methodologies via delegation of federal plan authority under a mass-based trading approach. EPA should permit states to replace the federal plan allowance distribution provisions with a state determined allocation approach, which gives the states the ability to determine how to distribute allowance allocations among affected EGUs. The Agencies see the advantage of states handling allocations via a delegation of the federal plan authority as this would provide the greatest amount of flexibility to the states. A state-determined allocation approach will give states under a federal plan the opportunity to address particular state priorities as they are in a better position to evaluate what market conditions would be more favorable to attract investments while reaching the EPA-mandated goals in reducing carbon dioxide (CO₂) emissions. States are better suited than the federal government to determine how best to distribute allowances in the most cost-effective manner for the state and in the manner most beneficial to ratepayers.

Treatment of States Entering or Exiting the Trading Program

EPA is proposing that a state must transition to a state plan at the conclusion of a federal plan compliance period and is requesting comment on whether there are reasons that a state should be allowed to transition from a federal plan to a state plan in the middle of a compliance period. EPA also seeks comment on what requirements should be put in place to allow this type of transition while ensuring the integrity of both the federal plan and the state plan and while enabling the affected EGUs covered by the plans to understand and meet their compliance requirements.

A state should be allowed to transition from a federal plan to a state plan in the middle of a compliance period; however, this transition should take into account any inconsistent obligations on affected EGUs between the state plan and the federal plan. During this transition period, EPA should allow a state to assume the primary responsibility for enforcing the existing federal measures without altering the obligations of EGUs in the middle of a compliance period. Implementation of state plan provisions that would not conflict with existing federal compliance obligations during the transition period, should be allowed. This would prevent affected units from basing investments on assumptions that would no longer be accurate after the approval of a state plan with different obligations and would ensure a smooth transition for EGUs that may wish to make significant investments over multiple years.

EPA is requesting comment on an alternative of providing the opportunity for a state to give notice to EPA of its intent to submit a state plan to replace the federal plan (or a state allowance-

⁷ 80 FR 64991

distribution methodology to replace federal plan allocations), and for the agency to delay recording federal plan allocations for sources in that state until a later date than proposed. EPA requests comment on whether this alternative would help smooth the transition from federal plan implementation to state plan implementation, and on the tradeoff between recording allowances in a timely way and providing this increased timing flexibility.⁸

If a state cannot transition from a federal to a state plan implementation in the middle of a compliance period, it would be appropriate for a state to submit a notification of its intent to replace the federal plan and request EPA to delay recording federal plan allocations for sources in that state until a later date than proposed, as well as to delay the tradeoff between allowances in a timely way and providing this increased timing flexibility. These actions would contribute to a smooth transition from a federal plan implementation to a state plan implementation.

Support for State Implementation

The state planning process and implementation of the EGs will place a significant administrative burden on state agencies. Already, employees at the Agencies have expended over 300 hours on understanding the EGs and preparing for its implementation, including, but not limited to: reading the rule and associated technical documentation; attending briefing sessions with State officials; participating in group calls and webinars on the EGs; participating in states' groups discussions on the EGs; preparing presentations on the EGs and the Proposed Rule for various state and local groups; outreach and communications with affected facilities and stakeholders; and preparation for press events. The Agencies foresee that preparation of a state plan will entail a lengthy process and require several dedicated staff members, as well as significant resources from other state agencies, stakeholders, and the legislature. Work on developing and implementing a state plan should not come at the expense of state agencies' other core programs.

EPA should provide states with the support necessary to meet their obligations under the EGs including sufficient financial resources necessary to develop and implement a state plan. EPA should also develop an EPA-administered tracking system for both the mass-based approach and the rate-based approach that a state can elect to utilize. The final rate-based and mass-based model rules should provide for flexibility and multiple options that could be considered presumptively approvable under each approach.

Federal Plan and Model Trading Rules Structure

Federal Plan Approach and Timing of the Final Federal Plan and Model Trading Rules

EPA proposes to finalize both the rate-based and mass-based model trading rules in the summer of 2016; however, EPA intends to finalize only a single approach—either the mass-based or rate-based

⁸ 80 FR 65029

approach—for every state in which it promulgates a federal plan. EPA states that the agency will finalize a federal plan only after issuing a finding that a state has failed to submit a plan or after disapproval of a submitted plan. As a result of this proposed timeframe, states will not know before the deadline to submit a state plan, which approach will be implemented as part of a federal plan.

Although finalization of a single approach—either the mass-based or rate-based approach—would allow for trading among all states subject to a federal plan, such a one-size-fits-all option for the federal plan may have unintended consequences. Finalization of a single approach to the federal plan in all states may result in an impediment to trading linkages between states subject to a federal plan and states subject to a state plan. For instance, if a state subject to a rate-based federal plan were in a regional transmission organization (RTO) dominated by states subject to mass-based state plans, the disparity between compliance obligations and the reduced trading opportunities may result in higher cost of compliance and a requirement for a greater reserve margin within the RTO. The Agencies urge EPA to finalize both the rate-based and mass-based approaches to the federal plan, as well as the model trading rules, by September 6, 2016.

Furthermore, EPA should allow a state that fails to submit an approvable state plan by September 6, 2016, or September 6, 2018 in the case of an extension, to choose whether a rate-based or mass-based federal plan will be imposed on their state. Finalizing both approaches to the federal plan and the model trading rules will provide additional flexibility to states and avoid artificial constraints to trading.

Although it is the position of the Agencies that EPA should finalize both approaches to the federal plan, it is vital that, if only a single approach is to be finalized, EPA should finalize the federal plan before September 6, 2016 so that states can consider how the federal plan may impact policy options for state plans and factor this into the development of their final state plans. For instance, if a state submits a mass-based state plan in 2018, but EPA finalizes a rate-based federal plan for all states that fail to submit an approvable plan, the state with the mass-based state plan may have fewer trading partners and thus have a higher than anticipated cost of compliance. The breadth of trading opportunities to comply with the EGs is an important factor in determining the cost of compliance. Therefore, EPA should finalize the federal plan on or before the September 6, 2016 deadline for states to submit an initial plan.

Market Liquidity of Compliance Instruments

The Agencies support the inclusion of a “trading ready” legal mechanism in the Proposed Rule, which would allow trading between states with rate-based federal plans or states with mass-based federal plans, respectively. This allows states in which EPA imposes a federal plan to enter into a multi-state trading program without formal negotiation or EPA-approval. The Agencies support structuring compliance instrument markets in such a manner as to allow the affected entities access to the largest possible market, which would provide the greatest possible liquidity to affected EGUs seeking compliance instruments. A state’s ability to participate in multi-state markets for compliance instruments is critical to the creation of a healthy market under the EGs or the Proposed Rule, and the inclusion of a “trading ready” mechanism facilitates multi-state market participation.

As stated above, the Agencies suggest that EPA revise the Proposed Rule to provide a state with the ability to determine which plan to impose in the event a state plan is not approved and a federal plan is implemented.⁹ This would ensure that a state retains the ability to choose to participate in the largest possible market for trading instruments and that EGUs would have the greatest access to market liquidity even if a federal plan were imposed. The Agencies strongly disapprove of EPA's current position in which a state is unable to provide input into which plan would be imposed upon it in event EPA does not approve a state plan. EPA's decision about which federal plan to impose ultimately determines the states with which states will have the ability to trade compliance instruments, and state input is critical to ensuring the most economically beneficial outcome for a particular state.

The Agencies also support expanding the scope of interstate trading to link states in which a federal plan is imposed to any state that has an approved state plan meeting the proposed conditions for linkages under the EGs. Under both the mass-based approach and the rate-based approach, EPA should provide states with the opportunity to utilize an EPA-administered tracking system and should allow states with an interoperable tracking system to trade with federal plan states. This would prevent an artificial division of markets in states with otherwise compatible federal and state plans. This would also lower costs for EGUs in linked states by providing a broader market with increased liquidity from which EGUs may purchase compliance instruments.

In addition, the Agencies support the use of a multi-year compliance period. A multi-year compliance period would allow a greater number of compliance instruments to be traded for that compliance period than a single-year compliance period would allow. A greater number of compliance instruments in the market at a given time would facilitate the purchase or sale of compliance instruments and increase market liquidity. Increased liquidity of compliance instruments would reduce the cost of compliance with the EGs and promote reliability by allowing EGUs that need to run for grid reliability purposes to purchase the necessary compliance instruments.

The Agencies also support the unlimited saving, or "banking," of compliance instruments in the Proposed Rule including the banking of interim compliance period's instruments for use during the final period. This would provide EGUs with a greater amount of flexibility in how they comply with the EGs while not lowering the overall stringency of the program. Preventing allowances from being banked would increase the overall stringency of the EGs by lowering the overall amount of carbon dioxide affected EGUs would be permitted to emit over the life of the program. In addition, allowing unlimited banking of compliance mechanisms would increase liquidity in compliance instrument markets by obviating the need for EGUs that bank compliance instruments to purchase additional instruments on the open market. This would lower demand for compliance instruments overall and reduce the costs of EGUs to comply with Proposed Rule and the EGs.

The Agencies do not support a limit or cap on the number of ERCs that can be banked. Allowing unlimited banking of ERCs provides an added benefit to EGUs by allowing such flexibility and, therefore,

⁹ See *Supra* p.6.

an additional incentive for ERC generation. Similarly, the Agencies do not support allowing ERCs to expire after any duration of time. There is precedent for this in the Cross State Air Pollution Rule (CSAPR) in which tradable instruments do not have expiration dates.

Eligibility of Biomass as a Carbon Reduction Measure

EPA should include biomass as an eligible measure to reduce CO₂ under both the rate-based and mass-based approaches to the federal plan and model rules. Biomass, when sustainably harvested and used as fuel to generate electricity, is carbon neutral; therefore, the combustion of biomass should be eligible to generate ERCs under a rate-based plan. Biomass should also be eligible to receive renewable energy incentives or set-asides if such elements are included in a state or federal plan. The Agencies urge the EPA to develop a list of biomass feedstocks that would be considered presumptively carbon neutral under the federal plan and model trading rule. Biomass feedstocks not included on the presumptive list should be eligible for consideration as carbon neutral if it is demonstrated that the feedstock can be used as a method to control increases in CO₂ in the atmosphere. Once such a sustainability demonstration has been made, the biomass feedstock should be added to the pre-approved biomass list.

Arkansas has a great abundance of available biomass, including biomass from sustainably managed forests, forest-derived industrial byproducts, and waste-derived feedstocks. Including forest biomass as part of the state's energy solution will create new markets for landowners and provide them incentives to continue growing healthy, sustainable working forests which serve as carbon sinks. If EPA does not include biomass as an eligible measure under the federal plan and model trading rules, states, like Arkansas, may be unable to utilize this means of reducing CO₂ resulting in missed economic opportunity and potentially increased cost of compliance with the EGs.

Affected EGUs

In the "Federal Plan Affected EGU Technical Support Document", EPA lists the proposed affected EGUs and the applicable standards that would be applied to each under a rate-based federal plan. The Harvey Couch plant in Stamps, Arkansas, a 110 MW capacity plant that operated on natural gas and petroleum, was included in this list; however, the unit retired in 2015. Since this unit is no longer in operation, it should be removed from EPA's list of affected units.

Reliability

The dispatch of EGUs within Arkansas is controlled by two RTOs. Many states are served by multiple RTOs and are dependent upon generation sources from other states. In order to ensure grid reliability within regions, EPA should consider concurrent review of state plans and federal plans on a regional basis. Concurrent review will help to mitigate impacts that actions taken in one state might have on grid reliability in other states.

Additionally, the proposed federal plan does not include a reliability safety valve, as is included in the final EGs. The safety valve included in the EGs is intended to ensure reliability in the event of unforeseeable events that may impact the grid. The safety valve mechanism allows individual EGUs to operate temporarily at emission levels above those set by a state or federal plan, if the unit is critical to

maintaining generation capacity. Although market-based flexibility is proposed as the reliability mechanism for federal plans, this flexibility may not be sufficient to mitigate grid reliability impacts under certain circumstances. In some situations, grid reliability may be adversely impacted in a state subject to a federal plan if state plans in surrounding states are not compatible with the federal plan imposed on that state. The EGs require states to demonstrate that reliability has been considered in any plan submitted to EPA for approval. In the event that a state fails to submit a plan or submits a plan that is not approvable, the state will become subject to a federal plan. Any federal plan imposed on a state should contain all provisions necessary to ensure grid reliability. The Agencies support the inclusion of a reliability safety valve in the final federal plan.

Permitting Requirements

EPA is proposing, under the federal plan, the need for Title V permits for sources with affected EGUs to include any new applicable requirements that the plan places on the affected units and that any changes that may be required for an operating permit with respect to a trading program under the federal plan may be made using the minor permit modification procedures of the Title V rules. EPA is proposing to issue guidance to assist permitting authorities and sources by providing guidance similar to that developed for permitting under CSAPR.

The Agencies agree that a guidance similar to the one developed for permitting under CSAPR would be helpful. EPA should clarify exactly what changes to a Title V permit would qualify as a minor modification, especially that the language in the model trading rule regarding minor modifications would not relieve a source from the obligation to obtain a construction permit for projects otherwise subject to major or minor New Source Review (NSR) pursuant to Title I of the Act or an approved state program.

EPA invites comment on potential scenarios in which affected EGUs, particularly small entities, could be subject to the requirements of the NSR program as a result of taking compliance measures under the federal plan, and any ideas for harmonizing or streamlining the permitting process for such sources that are consistent with judicial precedent.

The Agencies request that EPA provide further guidance on how EPA would view increased utilization of a plant in terms of a change in the method of operations as well as demand growth under the NSR program. The Agencies can foresee the possibility of an EGU operating differently, with or without a modification, and experiencing an increase in use.

The Agencies also request that EPA provide guidance on how to deal with increased emissions that may result from more frequent start-up and shut-down of a plant changing its operating scenario, for example, from a baseload generator to an intermittent generator.

Interaction with other EPA rules

EPA should take steps to streamline the numerous rules that affect EGUs in Arkansas. These rules, which include the Mercury and Air Toxics Standards (MATS), the Regional Haze Rule, and CSAPR,

may limit the flexibility EPA intended to allow in the EGs and the Proposed Rule or create inconsistent obligations across programs. Arkansas EGUs are already required to install a variety of emissions control technologies under other rules that may increase the costs of EGU operation or decrease of the gross output of a particular unit by adding an additional parasitic load used to operate certain control technologies.

For example, EPA's Regional Haze Federal Implementation Plan Proposed Rule would require Entergy White Bluff units 1 and 2 to install a dry Flue-Gas Desulfurization System (dry scrubbers) based on factors including the remaining use life of the EGUs and a cost-analysis of the installation of the dry scrubbers based on the remaining useful life.¹⁰ However, the cost impact of complying with the EGs and the Proposed Rule may render EPA's analysis of the remaining useful life and the cost analysis assessment inaccurate. Requiring the installation of control technologies such as dry scrubbers may limit the flexibility that an EGU would otherwise have in meeting the EGs and the Proposed Rule. This could create a situation where control technologies that are required by one or more other rules would become inconsistent with the least-cost option for compliance with the EGs and therefore unnecessarily increase overall costs of compliance.

Additionally, the installation of emissions control technologies as a requirement of other programs may add a parasitic load to the EGU, decreasing the heat-rate of the EGU, which may negatively affect compliance with the EGs and the Proposed Rule. For example, dry scrubbers generally add parasitic load requirements that are between one and two percent of the gross output of a facility.¹¹ At the same time, carbon dioxide is chemically produced during the use of dry scrubbers, which can add to the overall greenhouse gas emission of an EGU.¹² EPA should streamline the various programs affecting Arkansas EGUs in order to minimize the negative effects of those programs when the requirements of one may be at cross-purposes with another.

Rate-based Implementation Approach

Compliance

Under a rate-based approach to the federal plan and model trading rules, EPA proposes to implement a trading program in which ERCs generated by eligible resources may be purchased and traded to comply with a subcategory-specific emission rate. The subcategory-specific rates to be applied in the rate-based approach are those established for fossil steam generating units and natural gas combined cycle (NGCC) units in the final EGs. EPA proposes to use a glide path during the interim compliance period in which the subcategory-specific rates decrease over time before achieving the final

¹⁰ 80 FR 18944 at 18973, "Promulgation of Air Quality Implementation Plans; State of Arkansas, Regional Haze and Interstate Visibility Transport Federal Implementation Plan."

¹¹ Nicholas P. Cheremisinoff, Clean Electricity through Advanced Coal Technologies: Handbook of Pollution Prevention and Cleaner Production 86 (2012).

¹² *Id.*

rate in 2030. Furthermore, EPA proposes to implement multi-year compliance periods over which affected EGUs must meet their applicable emission rate target, taking into account any adjustments for acquired ERCs. Table 1 lists the proposed subcategory-specific rates for each compliance period.

TABLE 1 GLIDE PATH SUBCATEGORY-SPECIFIC EMISSION RATES IN POUNDS OF CO₂ PER NET MEGAWATT HOUR (LB/MWH)¹³

Subcategory	2022 – 2024 Compliance Period Rate	2025 – 2027 Compliance Period Rate	2028 – 2029 Compliance Period Rate	Final Rate 2-year Compliance Periods beginning with 2030
Fossil Steam EGUs	1,671	1,500	1,380	1,305
NGCC EGUs	877	817	784	771

Should EPA finalize a rate-based federal plan, the use of subcategory-specific emission rates for fossil steam units and NGCCs is preferable to a state goal rate or alternative rates. Such an approach avoids providing different incentives to similar affected EGUs and allows ERCs to be fungible across state boundaries and between states subject to a federal plan and states with a rate-based state plan. The ability to trade ERCs across states will create a broader and more inclusive trading program by allowing trading linkages between states with a rate-based state plan and states subject to a rate-based federal plan.

Eligibility of Measures for ERC Issuance under the Federal Plan

EPA proposes that ERCs will only be issued to affected EGUs that perform at a rate below the applicable emission standard, affected NGCC units, new nuclear units, existing nuclear units with capacity uprates, and select Renewable Energy (RE) resources (wind, solar, geothermal, and hydropower). EPA proposes that all affected NGCCs will be eligible to produce a special type of ERC called a Gas-Shift ERC (GS-ERC) based on the emission reductions expected from an incremental increase in NGCC generation to 75 percent capacity. EPA proposes that other low and zero-emitting resources including combined heat and power, waste heat power, distributed RE generation, biomass and demand-side energy efficiency would not be eligible to generate ERCs under the federal plan, but could generate ERCs under the model trading rule implemented by a state.

Generally, the Agencies support the issuance of ERCs to units that perform at a rate below the applicable emission standard and the issuance of GS-ERCs for all affected NGCC generation; however, EPA should not limit the issuance of ERCs to low and zero-emitting resources under the federal plan as proposed. Such a limitation would artificially reduce the number of ERCs available to affected EGUs and make it more difficult to comply with the EGs. This in turn would reduce market liquidity of ERCs having repercussions on affected EGUs in states subject to the federal plan and in states under a state plan that have trading linkages to federal plan states. EPA should consider a wide variety of low- and zero-emitting electricity, including biomass, combined heat and power, waste heat power, distributed RE

¹³ Source: Docket ID, EPA-HQ-OAR-2015-0199, 80 FR 64990

generation and demand-side energy efficiency (EE), as eligible for ERC issuance and should establish a process whereby new technologies can be added to the set of eligible measures under a federal plan.

ERC Issuance

EPA proposes to issue ERCs to eligible ERC generators once per year, but requests comment on different intervals at which ERC issuance should occur. ERCs should be issued as frequently as practicable to maintain a liquid market. Other air programs issue ERCs for various pollutants and do so more frequently than once per year. The Santa Barbara County Air Pollution Control District in California, which issues ERCs for reductions in nitrogen oxides, particulate matter, sulfur dioxide, and reactive organic compounds emissions, issues ERCs on a quarterly basis.¹⁴ Other air programs issue ERCs to sources that reduce emissions above and beyond state and federal requirements as long as an application is submitted within a certain time after the emission reduction is achieved and that application is approved.¹⁵ Frequent issuance of ERCs is needed to ensure market liquidity and to enable EGUs to better factor ERC availability into their bids for dispatch in the energy market. Therefore, EPA should issue ERCs as frequently and expeditiously as possible.

Liability Risk for ERC Validity

EPA is soliciting comment on the ways that EPA could safeguard the validity of an ERC. In the Proposed Rule, EPA states that “the responsibility for the validity of the ERC rests with the affected EGU.”¹⁶ EPA places this responsibility on the affected EGU despite acknowledging that a variety of situations may result in improper issuance of an ERC including paperwork errors and fraud. The party responsible for the improper issuance would not necessarily be the affected EGU, but the liability for the invalid ERC would nevertheless fall to the EGU. The penalty for an EGU that fails to hold a sufficient amount of ERCs is surrendering twice the amount of the ERCs it lacks from its compliance account, or if it fails to hold a sufficient amount in its compliance account by surrendering additional ERCs purchased in the open market. Purchasing additional ERCs from the open market would place upward pressure on the price of ERCs. This would punish not only the affected EGU, but potentially all affected EGUs to the extent this would increase the price of ERCs. Affected EGUs may also feel the need to carry additional ERCs to safeguard against this kind of scenario.

In addition to this method potentially punishing affected EGUs that are not responsible for the ERCs invalidity, the method also fails to provide the necessary deterrence value against parties responsible for the invalid ERC when those parties are not affected EGUs. The Agencies support transferring liability from the affected EGUs to the specific party responsible for the invalid ERC. An

¹⁴ <http://www.ourair.org/erc-guide/>

¹⁵ Sources must submit an application within 180 days of achieving the emission reduction to be eligible to receive ERCs from the Southwest Clean Air Agency in Washington (<http://www.aqmd.gov/home/permits/emission-reduction-credits/erc-faqs>).

Sources must submit an application within 1 year of achieving an emission reduction to be eligible to receive ERCs from the Idaho Department of Environmental Quality (<http://www.deq.idaho.gov/air-quality/regulatory-programs/emission-reduction-credits/>).

¹⁶ 80 FR 64991

alternative method with this effect would deter errors and misconduct by parties other than affected EGUs that may cause ERC invalidity. This would more effectively safeguard the validity of an ERC.

Mass-based Implementation Approach

Compliance

Under the mass-based implementation approach to the federal plan and model trading rule, EPA proposes a trading program in which each state will have an aggregate emission limit based on the mass-based goal finalized in the EGs. Allowances, in short tons of CO₂, will be allocated from the state budget and used for compliance with the EGs. EPA proposes to require all affected EGUs to hold and surrender allowances equal to emissions, including emissions from co-fired biomass, for each compliance period. EPA proposes to use the same multi-year compliance periods proposed under the rate-based approach.

The Agencies support the issuance of allowances in short tons of CO₂ and the use of multi-year compliance periods under the mass-based approach; however, the Agencies do not agree with the proposed requirement to hold and surrender allowances equal to all reported emissions including co-fired biomass. In the Proposed Rule, EPA discusses an alternative which would include biomass as an eligible measure to reduce carbon emissions. Under such an approach, EPA suggests that, for the purposes of compliance under a mass-based federal plan, an “affected EGU would need to hold allowances equal to its emissions less the emissions attributed to the co-fired biomass.” This alternative reasonably credits the carbon-reducing potential of biomass utilization for energy production. As biomass feedstocks grow, they sequester the CO₂ that will be released when the biomass is combusted for energy. Sustainably-produced biomass is a net-zero emission energy source and should be encouraged as a carbon-reduction measure rather than penalized by requiring an affected EGU that co-fires biomass to surrender allowances for CO₂ emissions attributed to the co-fired qualified biomass.

Allowance Recordation

EPA proposes to record allowances seven months prior to the start of each compliance period. EPA also seeks comment on an alternative in which allowances are recorded 13 months prior to the start of each compliance period. It is important for EPA to record allowances in a timely fashion in order to allow for planning by the affected EGU and to do so in a way that does not limit a state’s ability to replace a federal plan with a state plan or replace federal allocations with state-determined allocations.

EPA requests comment on an approach in which EPA would delay recording of EPA-determined allocations upon notification by the state of its intent to submit a state allowance-distribution methodology. EPA also requests comment on a similar approach for states that notify EPA of their intent to submit a state plan. The Agencies assert that this delay in allowance recordation upon receipt of a state’s intent to submit a state allowance-distribution system or a state plan is appropriate and would provide flexibility to states that wish to replace the federal plan allowance distribution methodology or replace the federal plan with a state plan. Given this flexibility, EPA could generally

record allowances earlier because a mechanism would be in place to delay recordation in the event a state wished to replace the allocation methodology or the federal plan.

Allocation Methods for Units that Change Status

In the Proposed Rule, EPA proposes to continue allocating allowances to an affected EGU that does not operate for two full consecutive years until the next compliance period for which allowances have not yet been recorded. For a unit that is reconstructed or modified such that it is no longer an affected EGU, EPA proposes to discontinue issuing allowances to that unit starting with the next compliance period for which allowances have not yet been recorded. Those allowances that would have otherwise been allocated to the retired, reconstructed, or modified affected unit would be allocated to a RE set-aside.

Units that retire, modify, or reconstruct should be able to trade allowances recorded to them indefinitely and should continue to receive allowances after changing status. This approach has precedent in the Acid Rain Program in which allocations continue to be allocated indefinitely. Similarly, precedent exists in CSAPR in which allocations continue to be allocated to a unit that does not operate for two consecutive years for a limited period of four years.¹⁷ The Agencies understand EPA's rationale for discontinuing allowances to a unit that no longer needs them under the proposed mass-based approach to the federal plan and model rule; however, the timeframe for which EPA proposes to limit continued allocations to units that change status may be too short. The timeframe proposed may result in an incentive for less-efficient EGUs that would otherwise retire to remain in operation for a longer period of time. The proposed timeframe may also create a disincentive for less-efficient EGUs to undergo modifications or reconstructions that would reduce emissions. This would potentially make state compliance more difficult and less cost-effective.

Continuing to provide allowances to units for a longer period after they retire may reduce the potential incentive to keep operating less-efficient EGUs that would otherwise retire and may help mitigate the impacts of stranded investment for retiring an EGU prior to the end of its remaining useful life. Retired EGUs would be able to sell allocations received after retirement to generate revenue, which could be used to pay off remaining debt on the prematurely retired EGU. This sale of allocations would thereby mitigate the costs that would otherwise be passed on to ratepayers in order to fund payment of existing debt. If a state, under a state plan, chooses to limit the period over which allowances are distributed to units that change status, any method of redistributing those allowances should be presumptively approvable.

EPA also proposes an "Alternative Compliance Pathway for Units that Agree to Retire Before a Certain Date" (Alternative Compliance Pathway) in which a unit that commits to a retirement date during the interim compliance period would not be allocated any allowances and would be limited to an enforceable CO₂ emission limit equal to the allowances it would have received during the compliance

¹⁷ 76 FR 48292 "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals" Final Rule

period had it not been set for retirement. The allowances that would have otherwise been allocated to the retiring unit would be removed from the state's budget.

The Agencies acknowledge that the intent of the Alternative Compliance Pathway is to reduce the burden on affected EGUs that retire during the interim compliance period; however, as proposed the Alternative Compliance Pathway would remove allowances from the state's budget. The Agencies recommend that units that commit to retiring during the interim compliance period should continue to receive allowances throughout the interim years and should be able to borrow allowances from future periods during the interim years. In this way, the intent of the Alternative Compliance Pathway is achieved, but allowances are not removed from the total budget or the market, and EGUs which do not use all of their allowances prior to retiring may receive value by selling unused allowances allocated to them.

Allocation Methods to Address Leakage

In comments submitted by the Agencies on the proposed EGs, the Agencies expressed the concern that the EGs may create an incentive to shift emissions from 111(d) affected units to new fossil capacity when existing NGCC capacity is available and appropriately situated to serve the load in question. In the final EGs, EPA established a requirement to adopt a new source complement target or to develop a mechanism to address the incentive for leakage to new build NGCC for states which implement a mass-based plan.

In the Proposed Rule, EPA discusses an approach to address the incentive for leakage that would be used under a mass-based federal plan and would be presumptively approvable under the mass-based model trading rule. Under this approach, five percent of a state's budgeted allowances would be placed in a renewable energy set-aside during each compliance period and an output-based set-aside for NGCCs would be implemented, beginning with the second compliance period, based on 10 % of a state's NGCC capacity, the hours in a year, and the allocation rate for the set-aside. EPA contends that the use of set-asides does "not have the effect of increasing the stringency of the federal plan because the overall budget of allowances remains the same."

Although the total number of allowances remains the same under a set-aside program, the number of allowances initially distributed to affected EGUs is reduced under such a program. Affected EGUs must then purchase additional allowances from the set-aside that may have otherwise been allocated to them. Additional costs of compliance for affected EGUs, if any, would then be passed on to ratepayers. EPA should carefully evaluate the impacts of strategies used to address leakage before finalizing the federal plan and model trading rules to ensure that these strategies do not increase the overall cost of compliance for ratepayers.

Clean Energy Incentive Program

The Clean Energy Incentive Program (CEIP) was included in the final EGs; however, EPA did not propose or request comment on this program in the EGs proposed rule. Therefore, all aspects of the CEIP should be open for comment, not just those included in the Proposed Rule. EPA should design the

CEIP to work with existing state programs for Evaluation, Measurement and Verification (EM&V), to avoid a potential disincentive to delay construction and implementation of eligible resources, to be flexible in the amount of early action credits available to the eligible RE and EE resources, and to implement the program without increasing the compliance burden for affected EGUs. In addition to the comments below, the Agencies agree with the comments submitted by the Midcontinent States Environmental and Energy Regulator's Comments on the Clean Energy Incentive Program (CEIP).

Commencement Date for Eligible Projects

In the final EGs, EPA states that the CEIP is designed to incentivize investment in certain RE and demand-side EE projects that commence construction or implementation following the submission of a final state plan or after September 6, 2018; however, in restricting eligibility to those projects which commence construction or implementation after September 6, 2018 as outlined in the final EGs, EPA may be unnecessarily delaying the construction of RE and implementation of EE projects which would otherwise reduce emissions prior to 2018. For instance, a solar farm that would otherwise be built in 2016 or 2017 may delay commencement of construction to take advantage of CEIP credits. The result would be a delay in the deployment of a renewable energy project that could have lowered carbon intensity. Furthermore, the eligibility timeframe based on construction commencement in the final EGs was not part of the initial EGs proposal and therefore should be open for comment. The Agencies recommend that EPA allow RE and demand-side EE projects which commence construction following the submission of an initial state plan submittal, which includes a non-binding intent to participate in the CEIP, to be eligible for CEIP credits.

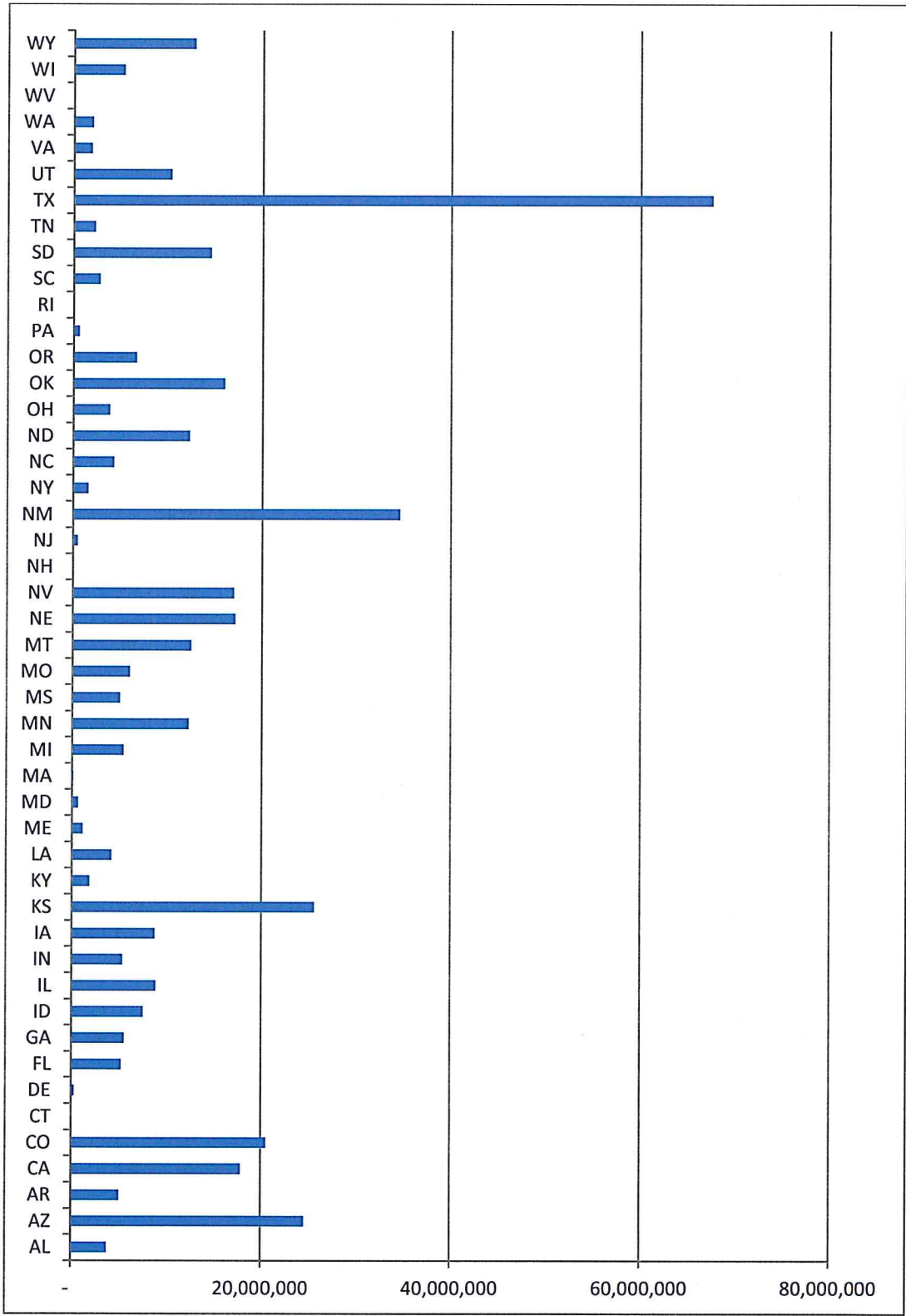
Wind/Solar and Low-Income EE Split for EPA Early Action Credits

EPA requests comment on how EPA should split the 300 million short ton CO₂ emissions-equivalent matching pool between the wind/solar reserve and the reserve for EE in low-income communities. Creating a defined number of credits available in each reserve that applies generally across the country does not take into account the differing RE potential and availability of EE opportunities in different states. In EPA's "Data File: Renewable Energy (RE) Alternative Approach" spreadsheet issued in support of the proposed EGs, EPA lists the RE technical potentials for utility-scale solar, onshore wind, geothermal, and hydropower for each state.¹⁸ This data obtained from the National Renewable Energy Laboratory's (NREL) "U.S. Renewable Energy Technical Potentials: A GIS-Based Analysis" study demonstrates the differing RE technical potentials among states with affected EGUs. The total of the RE technical potentials from the NREL study are shown in Figure 1. In EPA's "Data File: Demand-Side Energy Efficiency Appendix – Potential Studies," the annual average high achievable potential ranged from 0.31 % to 3.1 % when comparing the potential across all sectors among different jurisdictions.¹⁹ For the annual average low achievable potential, potentials across all sectors ranged from 0.19 % to 2.3 %. Due to the difference in opportunities for RE and EE available in each state, the Agencies suggest that EPA maintain flexibility with regards to the amount of matching credits available rather than establishing a set split of credits between the two reserves.

¹⁸ <http://www.epa.gov/sites/production/files/2014-06/20140602tsd-proposed-re-alternative-approach.xlsx>

¹⁹ <http://www.epa.gov/sites/production/files/2015-11/df-cpp-demand-side-ee-studies.xlsx>

FIGURE 1 STATE RE TECHNICAL POTENTIALS (GWH)



Distribution of EPA Early Action Credits

EPA proposes to distribute early action credits—either in the form of ERCs or allowances—from the EPA matching pool to states based on the amount of reductions that affected EGUs in a state are required to achieve from the 2012 baseline relative to reductions required in other participating states. This method appropriately provides a larger proportion of credits to states with greater emission reductions required to achieve their state goal. EPA’s proposal to redistribute any unused early action credits among participating states in the same manner is also appropriate.

State Matching of Early Action Credits

In the final EGs, EPA establishes the CEIP to enable states to award early action emission rate credits and allowances to eligible renewable energy or demand-side energy efficiency projects that reduce end-use energy demand during 2020 and/or 2021. EPA will match a portion of the early action credits to states up to the equivalent of 300 million tons of CO₂ emissions. States may participate in the CEIP by issuing early action credits “in a manner that would have no impact on the emission performance of affected EGUs.” States participating in the CEIP are not required to account for matching ERCs or allowances issued to the state by EPA.²⁰ Although participation in the CEIP is optional for states in the final EGs, EPA proposes to implement the CEIP in all states subject to the federal plan in the Proposed Rule.

In the Proposed Rule, EPA discusses several alternatives for ensuring that early action credits do not have an impact on the emission performance of affected EGUs. Under the mass-based implementation approach, EPA proposes to include a set-aside for early action credits during the first interim compliance period. Under the rate-based implementation approach, EPA discusses two options for maintaining the stringency of the EGs. Under the first option, EPA requests comment on retiring a number of ERCs during the interim period equal to the amount of early action ERCs awarded in 2020 and/or in 2021. Under the second option, EPA suggests that a state’s emission performance rate could be adjusted to achieve the same stringency as the initial EGs, taking into account the additional borrowed ERCs used as early action credits.

The methods EPA presents to maintain the stringency of the EGs in states participating in the CEIP are problematic. Under the mass-based implementation plan, EPA would use a set-aside approach that lessens the pool of allowances distributed to affected EGUs. Thus, affected EGUs would be required to purchase additional allowances, which would otherwise have been allocated to them, from projects awarded CEIP early action credits. Under the rate-based implementation approach, both options pose problems. Under the first option, generators of borrowed ERCs retired during the interim period would not receive compensation for these ERCs from EGUs that would otherwise purchase the ERCs to achieve compliance with the EGs. Under the second option, EPA would be making the performance rates for affected EGUs more stringent than the best system of emission reductions (BSER) established in the final EGs and would in effect take away the advantage of using a uniform subcategorized rate. If different states are awarded different levels of ERCs, and the state rate targets

²⁰ 40 CFR 60.5737(c)

are adjusted accordingly, this would have a deleterious effect on the fungibility of ERCs across jurisdictional boundaries. In order to maintain a “trading ready” system across states subject to a rate-based federal plan and states subject to a rate-based state plan, EPA should maintain the uniform subcategorized rate targets and not alter state targets to adjust for early action credits awarded under the CEIP.

Due to the problematic nature of accounting for the state portion of the CEIP early action credits, EPA should rethink the requirements for participation in the program. According to the final EGs, states are required to include a mechanism that enables issuance of early action ERCs or allowances without impacting the emission performance standard required under the EGs; however, states are not required to account for matching ERCs or allowances from EPA. If EPA were to issue the 300 million short ton equivalent early action credits without requiring a match from the state, EPA would avoid the problem of having to employ set-asides, retiring ERCs that would otherwise be purchased by affected EGUs, or adjusting state targets away from the uniform subcategorized rates to maintain the stringency of the EGs. The effect on the stringency of state performance standards without requiring a match from the state pool of allowances or ERCs would be the same as would be achieved by requiring the state to employ these accounting mechanisms for its portion of early action credits.

Although the requirement for states to issue early action credits to receive EPA matching credits was established in the final EGs, this requirement was not included in the proposed EGs and should therefore be open for comment. The Agencies support the issuance of early action credits to incentivize development of renewable energy and energy efficiency prior to the compliance period; however, the Agencies urge EPA to restructure the CEIP to offer the EPA pool of early action credits without requiring a match from the state which would alter the emission performance targets established in the final EGs.

Conclusion

The Agencies submit these comments on the Proposed Rule to ensure that the presumptively approvable model trading rules provide a reasonable framework that the state could choose to incorporate into its state plan and that the federal plan provides for crediting of a broad selection of carbon reduction measures and flexibility for states and affected entities to ensure the reliability and cost-effectiveness of the energy grid. In finalizing the federal plan, EPA should consider the impact of federal plan design choices on states that submit a state plan and ensure a broad market for trading of compliance instruments between states subject to a federal plan and states subject to a state plan. EPA should reconsider certain design choices for the CEIP presented in the EGs, as well as those included in the Proposed Rule, to provide flexibility, avoid undesired consequences, and achieve the goal of incentivizing investment in renewable energy and energy efficiency in low-income communities.

MIDCONTINENT STATES ENVIRONMENTAL AND ENERGY REGULATORS

December 15, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, D.C. 20460

**RE: Midcontinent States Environmental and Energy Regulators' Comments on
the Proposed Clean Energy Incentive Program**

Dear Administrator McCarthy:

Participation in this letter should not be interpreted as conveying support or opposition to EPA rulemaking under Section 111(d) of the Clean Air Act, nor does it necessarily represent the views of our respective states.

The Midcontinent States Environmental and Energy Regulators (MSEER) group brings together state air and public utility regulators from 13 states to explore and assess implementation options to meet proposed federal carbon dioxide emissions targets as set forth in the Clean Power Plan (as published in 80 Fed. Reg. 64966, October 23, 2015). Further, MSEER states are interested in the Clean Energy Incentive Program (CEIP) that is part of the Clean Power Plan (CPP) (Docket ID: EPA-HQ-OAR-2015-0734).

While the MSEER states have not yet made any formal decisions on whether or how states might approach CPP implementation, we nevertheless provide the following comments concerning the CEIP, in the interest of better understanding

the CEIP, and in the hope of providing the greatest flexibility to states in their plan development.

In a document entitled “Clean Energy Incentive Program Next Steps”, dated October 21, 2015, your Agency listed a number of CEIP provisions on which you were seeking comment. These comments will respond to some of the areas indicated by that document.

1. **“Criteria for eligible projects, including those for EE projects implemented in low-income communities,” and “Definition of ‘low-income community’ for eligible projects”.** In the CEIP, EPA uses the term “low-income communities” instead of “low-income individuals” to describe for whom the CEIP allowances/credits will be awarded. We assume that this means that EPA is not seeking individual income verification for those impacted by energy efficiency programs, and support that reading. We understand that there are numerous ways to qualify for low-income provisions under myriad federal programs, but to individually qualify beneficiaries of energy efficiency programs for the CEIP could be too burdensome for states, and may negatively affect the cost-benefit analysis of these programs. EPA could take a number of different approaches to qualifying programs for allowances/credits under the CEIP, and the MSEER states recommend the broadest possible definition, to allow for wider implementation of such programs. These measures could include:
 - a. A definition of low-income communities that has a geographic basis on as broad a scale as possible (no smaller than a census tract), and a presumptive qualification based on existing income data, or qualification with a minimal showing that energy efficiency programs in a particular area would disproportionately benefit low-income residents;
 - b. As broad a definition of “low-income” as possible. We know that there are various income thresholds in different federal programs, and a broader definition would allow for maximization of energy efficiency programs under the CEIP;
 - c. An allowance for existing energy efficiency programs in states that already target low-income residents. For these programs, a minimal showing that the program is meeting its goals should be required;

- d. Coordination with existing federal programs that serve low-income communities, such as LIHEAP, FRPL, Head Start, Home Investment Partnership, Supplemental Nutrition Assistance, and many others. Programs that are serving geographic areas under these programs should also result in a presumptive qualification for these areas under the low-income provisions of the CEIP.
2. **“Definitions for ‘commence construction’ of an eligible RE project and ‘commence operations’ of an eligible low-income EE project” and “The date from which a project may be deemed eligible to qualify for the CEIP”.** The MSEER states believe that the earliest possible trigger date should be allowed for this definition, and would suggest no later than September 6, 2016, as the date by which states are required to submit either a state plan or a request for extension under the CPP. This would allow states to begin the planning process for these programs now, would strengthen the non-binding commitment of the states to utilize the CEIP that is required in September of 2016, and would send an immediate signal for those who wish to work on energy efficiency (EE) and renewable energy (RE) projects.
3. **“EM&V requirements for eligible projects, requirements for M&V reports of quantified MWh, and requirements for verification reports from an independent verifier.”** EPA has been part of efforts to establish best practices for evaluation, measurement and verification (EM&V), and should incorporate those best practices to the greatest extent possible, to give states a clearer idea of what would be acceptable. EPA could adopt a default set of EM&V criteria to further this goal. In addition, the states recommend that EPA accept results from utility-funded programs evaluated by qualified third-party verifiers that substantially rely on the International Performance Measurement and Verification Protocol (IPMVP), or which rely on protocols developed by the DOE Uniform Methods Project, or similarly recognized protocols. States should be provided clear guidance about the acceptable protocols for independent EM&V. The CEIP should also allow enough flexibility to recognize protocols that come into acceptance between now and 2022.

4. **“Mechanism for reviewing project submittals and issuing early action allowances/ERCs”, and “Timing of allocation of matching allowances/ERCs to a state by the EPA as well as timing for awards from these allocations to eligible project providers.”** The MSEER states seek greater clarity on this item, as it is unclear how the issuance of allowances/credits will be accomplished. EPA should provide to the states clear protocols for implementation so states know what will be required of them, and project developers and states will be able to identify whether there are potential barriers to implementation or projects that require further consultation with EPA.

5. **“Size of the two matching allowance/ERC reserves under the CEIP—one for low-income EE projects, one for wind and solar projects.”** While the MSEER states do not take a specific position as to how the 300 million tons of allowances/ERCs should be divided, we do feel that the allocation should allow for flexibility to adjust, in order that all 300 million tons are utilized. It is impossible to know at this point, and even during implementation of a program, the exact amount of qualifying credits a project may earn, and the EPA should give flexibility to shift between RE and EE to fully utilize the pool of allowances/credits.

Thank you very much for your consideration of these comments.

Sincerely,

Members of the MSEER Steering Committee

A handwritten signature in black ink that reads "Nancy Lange". The signature is written in a cursive, flowing style.

Nancy Lange

Commissioner

Minnesota Public Utilities Commission

Vince Hellwig

Vince Hellwig
Senior Air Policy Advisor
Michigan Agency for Energy



David Thornton
Assistant Commissioner
Minnesota Pollution Control Agency



Ted Thomas
Chairman
Arkansas Public Service Commission



Chad LaFontaine
Air Division
Mississippi Department of Environmental Quality

- (1) To date, MSEER discussions have brought together representatives from Arkansas, Illinois, Indiana, Iowa, Kentucky (observer only), Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, South Dakota and Wisconsin (observer only).