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Attn: Docket ID No. EPA-HQ-OAR-2016-0033

EPA Docket Center EPA/DC  
EPA WJC West Building  
Room 3334  
1301 Constitution Avenue NW  
Washington, DC 20004

**RE: Comments of the Large Public Power Council on the Proposed Clean Energy Incentive Program Design Details, Docket No. EPA-HQ-OAR-2016-0033**

**Introduction**

The Large Public Power Council (LPPC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA or Agency)'s Proposed Clean Energy Incentive Program (CEIP) Design Details<sup>1</sup> under the Clean Power Plan (CPP).<sup>2</sup>

Founded in 1987, the LPPC is comprised of 26 of the nation's largest public power systems, providing power to 30 million Americans. LPPC has been deeply involved in the recent major EPA rulemakings affecting the power generation sector, and remains focused on working with the Agency to ensure the continued delivery of reliable, low-cost electricity while protecting the environment. LPPC member utilities own and operate more than 71,000 MW of diverse generation capacity and will be greatly affected by this rulemaking.

LPPC supports the establishment of the CEIP in order to encourage early emission reductions before the start of the Clean Power Plan regulatory program. However, as discussed in our prior comments on the proposed CEIP, we have concerns about particular design details of the CEIP and are providing specific recommendations to improve upon this early action incentive program. In addition, as suggested by EPA in

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<sup>1</sup> Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940 (June 30, 2016) [hereinafter, "Proposed Rule"]. See also EPA, Clean Energy Incentive Program (June 30, 2016), <https://www.epa.gov/cleanpowerplan/clean-energy-incentive-program> (last visited August 4, 2016).

<sup>2</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter, "Final CPP Rule"].

the current CEIP proposal,<sup>3</sup> LPPC has attached our comments on the Federal Plan and Model Trading Rules from earlier this year as an addendum to this document, in order to re-submit them as part of this rulemaking for EPA’s consideration.

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<sup>3</sup> Proposed Rule at 42,947.

## **I. General Comments on the CEIP Proposal**

LPPC has attached our previous Federal Plan and MTR comments to this submission as an addendum. To reiterate—but not replace—those comments, we have also included a summary of our prior comments below.

### **A. EPA Should Include the CEIP in All States with a Federal Plan and Provide States with an Opt-Out Option Under Partial State Plans.**

EPA has indicated that it plans to implement the CEIP in all states for which it issues a Federal Plan.<sup>4</sup> LPPC supports this proposal and generally supports a broad application of the CEIP, given that it would encourage early action before the start of the CPP regulatory program and serve several other important functions. These other functions include the following: increasing the liquidity of markets for allowances and emission rate credits (ERCs) under the emission trading programs; smooth out transitions in the early years of the CPP; and lower the overall cost of compliance.

However, should a state decide to submit a partial state plan (e.g., by choosing its own allocation methodology for emissions allowances), LPPC believes that the state should have the opportunity to opt-out of the CEIP. Allowing states this choice would preserve the optional nature of the CEIP so long as states submit at least a partial state plan. Furthermore, providing an opt-out option for states with partial plans takes on added importance given that stringency of each state's emission limit must be increased to reflect the distribution of CEIP incentive credits.<sup>5</sup> To put in other words, states that submit a partial state plan should have the opportunity to decline participation in the CEIP, especially given that participation could substantially reduce number of state-issued compliance instruments issued in the first interim compliance period.

### **B. EPA Should Not Require Any Program Stringency Adjustments that Reduce the Availability of State-Issued Compliance Instruments**

EPA has proposed that state-issued incentive credits (allowances or ERCs) distributed under the CEIP should be accounted for in the initial interim compliance period of the program.<sup>6</sup> The proposed EPA approach for states with mass-based plans requires the CEIP incentive allowances be allocated (and therefore deducted) from the state's allowance budget for the first interim period that occurs during the first three years of the CPP regulatory program.<sup>7</sup> Similarly, in the case of states with rate-based plans, EPA is proposing to offset the incentive ERCs distributed by applying an "adjustment factor"

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<sup>4</sup> Proposed Rule at 42,942, 42,944.

<sup>5</sup> *Id.* at 42,959.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

that would reduce the value of all quantified and verified MWh reported from eligible ERC projects during the first interim step period.<sup>8</sup>

LPPC opposes this proposal. As we said in response to the Model Trading Rules proposal, no adjustment should be necessary to “pay for” the early emission reductions that occur as a result of the CEIP, given that there will be no net increase in CO<sub>2</sub> emissions under the program. Like the NO<sub>x</sub> SIP Call and Clean Air Interstate Rule, we believe EPA should not deduct early action credits from the applicable state emission budgets.<sup>9</sup>

### **C. EPA Should Make Several Changes to the CEIP’s Resource Eligibility Rules, Including Making All Incremental Non-Emitting Resources Eligible, Expanding the Eligibility Period and the Credit-Earning Period, and Letting States or the Market Determine Credit Allocations by Project Type**

LPPC reiterates its general support for the rationales and objectives for the CEIP, but believes EPA can make several improvements to the proposed approach that EPA has taken to defining eligible resources.

#### **1. The CEIP Should Be Open to All Incremental, Non-Emitting Resources**

As described in more detail below, LPPC believes that the most sensible approach to deciding which technologies participate in the CEIP is to make all incremental non-emitting resources eligible to earn early action credit. In the proposed rule, EPA has only slightly expanded resource eligibility beyond its initial proposal of only wind and solar resources; the Agency now intends to also include hydropower and geothermal projects.<sup>10</sup> The inclusion of these resources is appreciated and is an improvement on the CEIP. We have LPPC members who are contemplating hydropower uprates that could now participate in the CEIP and geothermal may be an attractive option to other members.

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<sup>8</sup> *Id.*

<sup>9</sup> See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,429 (Oct. 27, 1998). See *also* Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call, 70 Fed. Reg. 25,162, 25,285-86 (May 12, 2005).

<sup>10</sup> Proposed Rule at 42,942 (n. 2); *id.* at 42,964-42,965 (discussing technologies in more detail). EPA also seems to clarify that offshore wind projects are indeed eligible for the CEIP. See *id.* at 42,965 (“any scale or type of wind and solar project” is eligible); *id.* at 42,965 (n. 88, referencing proposed 40 C.F.R. § 60.5737(a)(3) at 80 Fed. Reg. 64,943). LPPC agrees that all grid-connected projects using eligible technologies should be allowed to participate in the CEIP. However, since EPA has not proposed to change the intended text of 40 C.F.R. § 62.16435(a) (about ERC eligibility, which mentions only “on-shore utility scale wind” in its listing of technologies eligible to generate ERCs; see 80 Fed. Reg. 65,093), more direct clarification on this front would still be helpful. In the text of the C.F.R., EPA should clearly state that “any scale or type” of wind project is indeed eligible for the CEIP.

However, LPPC continues to oppose the distinction between categories of non-emitting resources as arbitrary, not supported by substantial evidence, and not the most sensible way to encourage early emission reductions prior to the start of the CPP regulatory program. Opening up CEIP participation to all incremental non-emitting resources—including wind, solar, hydropower, geothermal, biomass, wave and tidal, and nuclear—will do the most to incentivize early emission reductions. Also, EPA seems to suggest that energy efficiency (EE) projects would be eligible for CEIP credit in Federal Plan states, as it would under a state-run low-income communities program.<sup>11</sup> A clear and unambiguous statement to that effect would be appropriate to forestall any confusion about the scope of the CEIP in Federal Plan states.

## **2. CEIP Eligibility Should Start on the Publication Date of the Final CPP Rule**

EPA has proposed to change the eligibility criteria for the CEIP so that renewable energy (RE) projects that “commence commercial operation” after January 1, 2020 and energy efficiency (EE) projects that “commence operation” after September 6, 2018 can participate in the CEIP in 2020 and 2021.<sup>12</sup> Although LPPC supports EPA’s decision to replace the “commence construction” cutoff with a clearer milestone, LPPC believes that no distinctions need to be made between RE and EE projects, and no waiting period needs to be observed before incentivizing early carbon emission reductions.

As we observed in response to the Model Trading Rules, if EPA’s goal is to promote greater investment in non-emitting resources, EPA should provide credit to *all* projects that come online between the time the Clean Power Plan was finalized (i.e., October 23, 2015) and the beginning of the program in 2022. LPPC opposes any arbitrary wait time between publication of the final CPP rule and CEIP eligibility, since such a period only encourages projects to delay operations until they can be sure that their projects will be eligible.

## **3. Emission Reductions Achieved From the Date of State Plan Submission to the Start of the First Interim Compliance Period Should Receive CEIP Credit**

Despite LPPC’s call for an adequate explanation in our MTR comments, EPA has still not explained why CEIP projects should only receive credit for emissions reductions achieved in the years 2020 and 2021.<sup>13</sup> LPPC maintains that the most sensible

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<sup>11</sup> See *id.* at 42,981.

<sup>12</sup> *Id.* at 42,963, 42,964.

<sup>13</sup> *Id.* at 42,971; see also *id.* at 42,947 (noting that despite the concerns of multiple commenters, EPA’s modification to the eligibility rules only responds to “some of these concerns”).

approach to incentivizing emissions reductions before 2022 is to give credit for all of early emissions reductions achieved after submission of the state plan. As we said before, imposing an arbitrary waiting period makes no sense and should be abandoned.

#### **4. Established Utility Program Definitions of Low Income Communities Should be Acceptable in States Administering the CEIP as well as in Federal Plan States**

LPPC supports EPA’s proposal to allow states to use established utility program definitions of low-income communities in their state plans. This “flexibility to use existing local, state or federal definitions that best suit their specific economic and demographic conditions”<sup>14</sup> is what LPPC called for in our MTR comments. Though EPA did not establish a default low-income definition at 200% of the national poverty line for each household, LPPC believes that the flexibility afforded to the states will permit each participating state to fashion a sensible low-income community definition that takes into account local circumstances and existing programs. As explained below, the same approach should be taken in Federal Plan states.

#### **5. Instead of Choosing For Them, EPA Should Permit States or the Market to Determine the Allocation of Compliance Units by Project Type**

EPA has proposed that a firm 50/50 split in compliance instruments between RE and low-income projects be observed in every CEIP-participating state.<sup>15</sup> LPPC opposes this proposal, on the grounds that EPA should defer to the states’ expertise regarding the needs of their own electricity markets.

LPPC also suggests that Federal Plan states use a single crediting pool setup, whereby compliance instruments are awarded on a first-come, first-serve basis to eligible projects regardless of project type. This would allow the market to determine the optimal allocation, rather than setting it *ex ante* through regulations.

In the alternative, should some minimum allocations to each project category be necessary to ensure project diversity in each state, LPPC suggests a different approach in a separate section below. In particular, an allocation of 30% to RE projects, 30% to low-income communities projects and 40% left to the discretion of the state would also be sensible.

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<sup>14</sup> Proposed Rule at 42,961 (“At the local level, definitions may include established utility program definitions administered by a municipality, a public power entity, a rural electric cooperative or other analogous utility provider not subject to state oversight.”).

<sup>15</sup> *Id.* at 42,951, 42,952.

## **II. Detailed Comments on Specific Elements of the CEIP Proposal**

This section expands upon several key design issues of the proposed CEIP rule that LPPC initially discussed in its comments submitted on the Model Trading Rules, as summarized above. On each issue, LPPC offers additional suggestions on how EPA could make changes to the CEIP proposal to improve efficiency and effectiveness of this early action program.

### **A. EPA Should Further Expand the Technologies Eligible to Earn Incentive Credits under the CEIP**

For the reasons discussed above, LPPC supports EPA's expansion of the program to allow hydropower and geothermal projects to participate in the RE portion of the CEIP, and supports EPA's inclusion of rooftop solar in the low-income communities portion of the program. These changes move the program towards technology neutrality – the inclusion of all incremental, non-emitting generating technologies in the CEIP.

However, EPA has not embraced true technology neutrality; its proposal still contains arbitrary distinctions between types of non-emitting technologies that can earn incentive credits and those technologies that cannot earn such credits. Both market realities and EPA's stated policy goals lead to the conclusion that non-emitting technologies, such as nuclear, biomass, and wave and tidal resources should also be included. These apparently disfavored non-emitting technologies stand to contribute to carbon emission reductions before the start of the regulatory program just like wind, solar, hydro and geothermal projects, but have not been given full and adequate consideration by EPA.

EPA appears particularly resistant to including incremental, non-emitting nuclear power in the CEIP, despite its recognized potential to address the climate challenge.<sup>16</sup> Nuclear technologies are precisely the kind of “highly adaptable zero-emitting technologies”<sup>17</sup> that will form “the essential foundation of longer-term climate strategies.”<sup>18</sup> Indeed, both U.S. and international climate change experts have concluded that nuclear energy can play a significant role in future strategies to reduce CO<sub>2</sub> emissions.<sup>19</sup> Finally, because nuclear power plants serve as baseload capacity,

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<sup>16</sup> See, e.g., Henry D. Jacoby, *et al.*, *Ch. 27: Mitigation. Climate Change Impacts in the United States*, The Third National Climate Assessment at 657 (2014), available at <http://nca2014.globalchange.gov/downloads>; International Panel on Climate Change, *Summary for Policymakers*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change at 20 (2014), available at [http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc\\_wg3\\_ar5\\_summary-for-policymakers.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf).

<sup>17</sup> Final CPP Rule at 64,831.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Jacoby *et al.*, *supra* note 16 at 657 (“Many technologies are potentially available to accomplish emissions reduction. They include ways to increase the efficiency of fossil energy use and

they are uniquely positioned to help mitigate the shift to baseload gas generation (specifically natural gas combined cycle generation) that is currently being driven by low natural gas prices and high costs for nuclear and coal-fired generation in the electric power sector.

EPA appears to believe that nuclear power does not meet the criteria that CEIP resources “can be deployed with shorter lead times,”<sup>20</sup> however, this argument 1) lacks citation or support in the administrative record beyond reference to EPA’s own conclusions and 2) ignores the fact that nuclear power developers are currently working to bring new capacity online in the next few years.<sup>21</sup> Nuclear plant owners are also actively considering capacity expansions (‘uprates’) at existing plants.<sup>22</sup>

Furthermore, it is worth observing that certain new nuclear projects—for example, uprates of existing facilities and projects employing small modular reactors—could have significantly shorter lead times than traditional nuclear projects.<sup>23</sup> These lead times could be on par with lead times for hydroelectric facilities—which EPA is proposing to include in the CEIP. In addition, although traditional nuclear plants typically take longer to develop and construct, allowing nuclear technology to receive credit under the CEIP could provide an incentive to developers of existing projects that are already initiated to accelerate their construction schedule so that the non-emitting generation from these facilities will be available to displace emitting generation earlier than if nuclear technologies were not eligible for the CEIP.

Finally, nuclear may in fact contribute *more* to near-term emission reductions before the start of the CPP regulatory program than the additional technologies EPA now proposes to include in the CEIP. The U.S. Energy Information Administration projects that in the

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facilitate a shift to low-carbon energy sources, sources of improvement in the cost and performance of renewables (for example, wind, solar, and bioenergy) and nuclear energy . . .” (emphasis added); see also IPCC Working Group III, *supra* note 16 at 20 (“Nuclear energy is a mature low-GHG emission source of baseload power . . . . Nuclear energy could make an increasing contribution to low-carbon energy supply . . .”).

<sup>20</sup> Proposed Rule at 42,965; see also Final CPP Rule at 64,831.

<sup>21</sup> U.S. Nuclear Regulatory Commission (NRC), Location of Projected New Nuclear Power Reactors (April 26, 2016), <http://www.nrc.gov/reactors/new-reactors/col/new-reactor-map.html>.

<sup>22</sup> NRC, Expected Applications for Power Uprates (May 2, 2016), <http://www.nrc.gov/reactors/operating/licensing/power-uprates/status-power-apps/expected-applications.html>.

<sup>23</sup> See, e.g., International Atomic Energy Agency, Small and Medium Sized Reactors (SMR) Development, Assessment and Deployment (Mar. 3, 2016), <https://www.iaea.org/NuclearPower/SMR/> (“factory-built small modular reactors aim to reduce lengthy construction times while simultaneously increasing quality, thereby minimizing the costs associated with the current time for construction that span 5 to 8 years”).

period 2015-2019, 191.8 MW of new geothermal capacity and 1,008.1 MW of new conventional hydroelectric capacity will be brought into service.<sup>24</sup> Nuclear power, one of the technologies still not included by EPA in the CEIP, is expected to bring more than twice as much new capacity online in that period – 3,322 MW by 2019.<sup>25</sup>

LPPC supports technology neutrality for both sides of the CEIP – in RE projects as well as in projects serving low-income communities. Regardless of how, precisely, emission reductions are delivered to power customers, the CEIP should recognize those reductions. Including all incremental, non-emitting resources in the RE portion of the program (and also in the 2-for-1 match offered by the low-income communities portion) best supports EPA’s goal of incentivizing early action to reduce carbon emissions before 2022.

### **B. EPA Should Expand the Time Period for Earning CEIP Incentive Credits**

Another artificial barrier to incentivizing emission reductions that EPA should remove is the restriction that only eligible generation or savings in 2020 and 2021 will receive credit under the CEIP. As mentioned above, LPPC believes that all early action emission reductions achieved after the submittal of a state plan should receive CEIP credit. Similarly, in the case of those states that failure to submit an approvable state plan, EPA should allow eligible projects to begin earning CEIP credit on the deadline date for state plan submittal. These dates are appropriate because the final state plans (or, where applicable, federal plans) would establish the rules and procedures under which eligible projects could apply for and receive CEIP credit (including whether projects would earn allowances or ERCs for any electricity generated or saved).

In addition, using the plan submittal date as the start date would preserve the incentive for projects to come online and operate as early as possible—a result that EPA claims is a key goal of the CEIP.<sup>26</sup> Furthermore, this expansion of the early action crediting period is consistent with EPA’s other stated goals for the CEIP. As explained in the final CPP rule, the CEIP is intended to “provide affected EGUs and states with additional emission reduction resources to help them achieve their state plan obligations,”<sup>27</sup> to “improve the liquidity, in the early years of the program, of the ERC and allowance

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<sup>24</sup> U.S. EIA, Table 4.5 Planned Generating Capacity Changes, by Energy Source, 2015-2019 at Year 2015-2019 (December 31, 2014), [http://www.eia.gov/electricity/annual/html/epa\\_04\\_05.html](http://www.eia.gov/electricity/annual/html/epa_04_05.html).

<sup>25</sup> *Id.*

<sup>26</sup> See Final CPP Rule, at 64,831 (the CEIP seeks to “preserve the incentive for project developers to execute on planned investments in all types of solar and wind technologies”).

<sup>27</sup> Final CPP Rule at 64,832.

markets,”<sup>28</sup> and to “provide states and affected EGUs additional flexibility in meeting the guidelines.”<sup>29</sup>

Each of these stated rationales for the CEIP supports providing CEIP credit to emission-reducing projects as early as possible. To give a clear timetable around which project developers can plan, LPPC suggests that EPA use the previously recognized expected state plan submittal date as the start date for CEIP crediting. In other words, LPPC believes that CEIP early action credit should be provided for all eligible generation or savings produced from the time that states actually submit their state plans (or the submittal deadlines for states that fail to submit approvable plans) until the last day before mandatory CPP compliance begins. With a project eligibility date keyed to CPP publication (October 23, 2015) and a crediting period starting only two years from now in 2018, LPPC’s suggested approach would eliminate any perverse incentive for project developers to delay commercial operation.

Finally, it should be noted that the Proposed CEIP Rule includes no discussion on how new RE projects would be evaluated if the Supreme Court were to uphold the CPP. In particular, the Proposed Rule is silent on whether EPA would retain or adjust the proposed eligibility cutoff date of January 1, 2020 if, for example, the start date of the CPP regulatory program were extended from 2022 to 2024 if the CPP stay were lifted. This uncertainty must be clarified in the Final CEIP Rule in order to remove the risk of project developers losing credits for voluntarily bringing online RE projects prior to the eligibility start date for the CEIP program. The best way to address this problem is to establish the CPP promulgation date (October 23, 2015) as the eligibility start date for projects. If, however, EPA declines to adopt this approach, it is essential that the agency at the very least adjust the start date to reward projects that were developed during the CPP litigation and to ensure that these projects are not adversely affected by the delays caused by the stay. For the same reasons discussed in this section for early RE projects, EPA should also move up the eligibility start date for EE projects that are voluntarily brought online prior to the start of the CPP program.

### **C. EPA Should Not Disqualify Renewable Energy Projects that are Partially Financed with Investment or Production Tax Credits**

EPA has also called for comment on whether projects receiving federal investment or production tax credits should be eligible to participate in the CEIP.<sup>30</sup> LPPC opposes the idea of excluding RE projects based on their tax status for several reasons. First, the economics of a given project are not determined by any single feature, including

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 64,832 n.780.

<sup>30</sup> Proposed Rule at 42,952, 42,953.

whether the project can receive federal tax credits or whether it will receive CEIP credit. It is possible that some projects would only be economical if they could receive both the PTC/ITC *and* credit under the CEIP. Were EPA to exclude projects that receive the PTC/ITC from eligibility, it is possible that otherwise viable projects would not be built, reducing the emission benefits of the CEIP and hampering the program’s ability to serve the other goals EPA has identified for the program. Indeed, EPA apparently does not seek to exclude all tax-credit-supported projects from the CEIP, as it acknowledges that geothermal resources also receive tax assistance.<sup>31</sup>

Without clear and substantial evidence that Congress’s action in extending the tax credits that support wind and solar has obviated the need for additional incentive programs and removed barriers to deployment, LPPC believes that tax-status-based distinctions are unnecessary. Also, LPPC believes that making such distinctions regarding projects in the low-income communities portion of the program would be particularly unwise. EPA rightfully acknowledges that historic barriers to project deployment exist in low-income communities,<sup>32</sup> and tax credits are important policy measures that help address those barriers.

#### **D. EPA Should Provide for Allocation and Reallocation of Compliance Instruments Based on State Policy Choices and Market Demand**

EPA has proposed a “50-50 apportionment” of compliance instrument pools between RE projects and low-income communities projects.<sup>33</sup> Further, EPA has proposed to prohibit reapportionment of these pools based on project participation – “in other words, should one reserve become fully subscribed, the state would not be permitted to move matching allowances or ERCs into it from the other reserve.”<sup>34</sup> LPPC opposes both of these proposed limitations, the firm 50-50 split between RE projects and low-income communities projects, and the refusal to allow reapportionment based on market conditions.

First, a 50-50 apportionment approach is undesirable, especially as a one-size-fits-all nationwide requirement, since it does not permit states to have more input on the direction the CEIP takes in influencing their electricity supply. LPPC believes the best approach would be to let states determine their own allocation between the two parts of the program, in the same way mass-based states are permitted significant flexibility in allocating their allowances under the final CPP.<sup>35</sup> Providing this flexibility makes sense for many reasons. Most importantly, the supply of RE and low-income projects will

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<sup>31</sup> *Id.* at 42,952 n. 34.

<sup>32</sup> *Id.* at 42,969.

<sup>33</sup> *Id.* at 42,952.

<sup>34</sup> *Id.* at 42,952.

<sup>35</sup> See Final CPP Rule at 64,892.

undoubtedly vary from state to state: some states may have few options for adding new, incremental low-income EE and solar projects, but have significant potential for adding new non-low-income RE projects, while other states may find themselves in the opposite situation. Therefore, EPA should not require all states to allocate 50% of the CEIP pool to each resource class

In the event that EPA determines that an apportionment ‘floor’ must be set for each resource class,<sup>36</sup> LPPC suggests in the alternative that EPA set an initial floor at 30% for each class. Under this ‘30-30’ approach, 30% of the compliance instruments would be available for eligible RE projects, 30% would be available for low-income communities projects, and the remaining 40% would be allocated at the discretion of the state to either (or both) project types. Since LPPC understands the need to have enough compliance instruments available to incentivize both RE and low-income communities projects, it believes that a significant minimum allocation to each project type may be beneficial, so long as the plurality of the compliance instruments can be allocated at the state’s discretion.

Second, reapportionment of compliance instruments should be permitted, because it is not clear across states and project types who exactly will participate in the CEIP. LPPC believes that once participating states have been identified, EPA should re-allocate unclaimed allowances to states that have opted in to the program, since from a national perspective early emission reductions should be incentivized no matter what state they occur in. Additionally, on a state level, states should be permitted to shift allowances from one reserve to another based on program experience. Should project participation lead a state to conclude that the 30% ‘floor’ for a project type will not be fully utilized, the state should have the flexibility to reallocate any compliance instruments they believe may not otherwise be used.

#### **E. Multiple Definitions of Low-Income Communities Should Be Acceptable in Both State and Federal Plan States**

EPA has proposed to give states great flexibility in determining how to define low-income communities for the purposes of the CEIP.<sup>37</sup> LPPC supports this proposal, and thinks EPA is correct in allowing “both geographic and household-based definitions” to be used,<sup>38</sup> from any existing federal, state or local (including utility program) source.

EPA has also asked for comment about whether this flexible approach should be extended to Federal Plan states. LPPC supports that extension, and requests that EPA reflect the possibility of using state, local or utility program definitions for Federal Plan

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<sup>36</sup> Proposed Rule at 42,953.

<sup>37</sup> *Id.* at 42,961.

<sup>38</sup> *Id.*

states in the text of Part 62. As proposed, EPA’s text provides that CEIP applications “must” identify one of only four federally-determined low-income definitions – the New Market Tax Credit Program, Qualified Census Tracts, the Weatherization Assistance Program or the Federal Poverty Level Guidelines—to establish their eligibility.<sup>39</sup> At this point, the proposed text for 40 C.F.R. Part 62 makes no mention of state or local (i.e. utility) definitions, though LPPC believes that it should explicitly provide for their use under a Federal Plan.

### **III. Conclusion**

LPPC appreciates the opportunity to submit comments on the proposed CEIP rule. For the reasons discussed above, we urge EPA to give careful considerations to the preceding LPPC recommendations in the final version of the CEIP Design Details. LPPC’s proposed changes would substantially improve the final rule by tailoring the CEIP’s design details to the realities of building incremental non-emitting energy projects and by providing states and developers with time and flexibility in operating projects while still providing for reliable, affordable electricity.

Sincerely,



John DiStasio, President  
Large Public Power Council

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<sup>39</sup> *Id.* at 42,981.

# ADDENDUM

January 21, 2016

Attn: Docket ID No. EPA-HQ-OAR-2015-0199

EPA Docket Center EPA/DC  
EPA WJC West Building  
Room 3334  
1301 Constitution Avenue, NW  
Washington, DC 20002

**RE: Comments of the Large Public Power Council 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; Amendments to Framework Regulations, Docket No. EPA-HQ-OAR-2015-0199**

## **I. Introduction**

The Large Public Power Council (LPPC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA or Agency)'s Proposed Rule under the Clean Power Plan<sup>1</sup> for Model Trading Rules and the Federal Plan.<sup>2</sup>

Founded in 1987, the LPPC is comprised of 25 of the nation's largest public power systems, providing power to 30 million Americans. LPPC has been deeply involved in the recent major EPA rulemakings affecting the power generation sector, and remains focused on working with the Agency to ensure the continued delivery of reliable, low-cost electricity while protecting the environment. LPPC member utilities own and operate more than 71,000 MW of diverse generation capacity and will be greatly affected by this rulemaking.

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<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,661 (Oct. 23, 2015) [hereinafter, Final CPP].

<sup>2</sup> Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule, 80 Fed. Reg. 64,966 (Oct. 23, 2015) [hereinafter, Proposed Rule].

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### **III. Overarching Issues**

#### **A. EPA Should Provide States the Opportunity to Choose Between Mass- and Rate-Based Federal Plan Options.**

EPA has indicated that it will finalize both rate-based and mass-based Model Trading Rules, but that it will issue federal plans—where necessary—of only one type.<sup>3</sup> LPPC recommends that EPA finalize both of the Federal Plan co-proposals, and allow states to opt for either approach. Allowing states to make such an election would be similar to other flexibilities EPA has proposed to include in the Proposed Rule, such as the ability for EPA to approve partial state plans,<sup>4</sup> to disapprove severable components of state plans,<sup>5</sup> and to allow a state to take responsibility for determining allowance allocations under a mass-based Federal Plan.<sup>6</sup> Moreover, giving states the option to choose between a mass- and rate-based Federal Plan would not require additional rulemaking, because states could simply choose between the mass- and rate-based Model Trading Rules that EPA intends to finalize in this rulemaking (modified as necessary to allow for federal implementation).

Giving states an option to choose between the mass- and rate-based Federal Plan approaches would comport with the cooperative federalism dynamic established under section 111(d). EPA’s primary role in regulating existing source emissions under section 111(d) is to establish procedures requiring states to submit plans to regulate these emissions.<sup>7</sup> This role contrasts with the role Congress established for the Agency in regulating new sources under section 111(b). Under that provision—unlike under section 111(d)—EPA itself has primary responsibility for developing and implementing new source performance standards (NSPS), whereas states play a secondary role in implementation.<sup>8</sup> Additionally, when issuing federal plans, EPA is required to “take into consideration, among other factors, [the] remaining useful lives” of affected sources.<sup>9</sup> Among the “other factors” EPA can take into consideration when issuing federal plans is the expert judgment of a state’s elected government—including elected governing bodies for public power. Thus, the cooperative federalism paradigm embedded in section 111(d) supports involving states in determining what kind of federal plan is most appropriate for their power sector.

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<sup>3</sup> Proposed Rule at 64,968.

<sup>4</sup> Proposed Rule at 65,035.

<sup>5</sup> Proposed Rule at 65,035.

<sup>6</sup> Proposed Rule at 65,027.

<sup>7</sup> 42 U.S.C. § 7411(d)(1).

<sup>8</sup> 42 U.S.C. § 7411(b) & (c).

<sup>9</sup> 42 U.S.C. § 7411(d)(2).

Providing states the flexibility to initially select their preferred approach could also help to reduce compliance costs, enhance flexibility, and promote other policy goals that may be important for states. Some states—particularly those with constant or declining electricity demand and those with pre-existing cap-and-trade programs—may prefer a mass-based approach. Other states—particularly those with a newer fleet of affected electric generating units (EGUs) and those with growing demand for electricity—may prefer a rate-based approach instead. EPA should allow all states the opportunity to help ensure that the power sector in their state is regulated under the most appropriate approach—regardless of whether the state submits its own plan or becomes subject to a Federal Plan.

EPA could ensure that states have the opportunity to express a preference for the rate- or mass-based approach by creating a mechanism through which EPA would notify each state of its intention to impose a Federal Plan, and would provide the governor of the state a reasonable period of time (for example, 60 days) in which to express the state's preference. If the governor provided the state's preference within the required response period, EPA would impose the preferred Federal Plan. If the state governor failed to respond or express any preference, EPA could impose whatever approach it determines to be the most appropriate approach, in light of the state's particular circumstances.

**B. Where a State Fails to Provide a Preference for a Federal Plan Approach, EPA Should Impose an Implementation Approach That Is Most Compatible with Other States in the Same Region.**

Where a state does not express a preference for either a rate- or mass-based approach, EPA should do its best to impose an implementation approach that is compatible with the approaches used by other states in the same region. The regulatory approaches that other states in the region are taking for compliance has implications for the availability of interstate emission rate credit (ERC) and allowance trading, and could also impact regional electricity markets. Therefore, it is appropriate for EPA to consider other states' compliance approaches among the "other factors" EPA must take into account when imposing a Federal Plan. Where most states in a region adopt one type of compliance approach, EPA should consider whether it would be appropriate to use a similar approach for any states in the region that receive a Federal Plan.

As EPA correctly recognizes in the Proposed Rule, section 111(d) provides the Agency with the flexibility to "finalize a different approach to a federal plan in some circumstances."<sup>10</sup> There are at least two circumstances in which a different Federal

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<sup>10</sup> Proposed Rule at 64,970.

Plan approach might be justified: first, where the state expresses a preference for one type of approach (as discussed above); and second, where the approaches taken by other states in the region imply that application of the same type of Federal Plan approach would better facilitate interstate trading and produce the least disruption to regional electricity markets. Therefore, if a state fails to express a preference for any particular Federal Plan approach, EPA should take into account neighboring states' approaches when implementing a Federal Plan for the state.

### **C. EPA Should Not Require States to Regulate Modified and Reconstructed Units Under the Clean Power Plan.**

Section 111(d) of the Clean Air Act directs states to establish standards of performance “for any *existing* source” that meets particular criteria.<sup>11</sup> Under the relevant definitions, in order to be “existing,” a source may *not* be considered a “new source.”<sup>12</sup> The definition of “new source” includes sources that construct *or modify* after the date on which an NSPS standard is proposed.<sup>13</sup> Therefore, any source that modifies—that is, makes “any physical change in, or change in the method of operation of, [the] source which increases the amount of any air pollutant emitted”<sup>14</sup>—would be considered a “new source” and so cannot be an “existing source.” A source cannot be both an “existing source” and a “new source” with respect to a particular set of regulatory requirements.

LPPC strongly supports EPA’s interpretation that, consistent with the above description, it lacks the authority to require state plans to continue to place requirements on sources that modify or reconstruct.<sup>15</sup> This interpretation is most consistent with the statutory definitions of “existing source” and “new source,” and maintains the particular statutory balance established by the Clean Air Act. EPA should *not* make changes to this interpretation.

### **D. EPA Should Include an Effective Reliability Safety Valve in the Federal Plan and Model Trading Rules.**

In the Final CPP, EPA provides a mechanism for states to include a reliability safety valve (RSV) whereby units may operate for up to 90 days without counting emissions that occur in that period when calculating Clean Power Plan compliance. EPA does not include a unit-level RSV as part of its Model Trading Rules or Federal Plan co-proposals. EPA argues that this is because the Model Trading Rules and both Federal

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<sup>11</sup> 42 U.S.C. § 7411(d)(1)(A) (emphasis added).

<sup>12</sup> 42 U.S.C. § 7411(a)(6).

<sup>13</sup> 42 U.S.C. § 7411(a)(2).

<sup>14</sup> 42 U.S.C. § 7411(a)(4).

<sup>15</sup> Proposed Rule at 65,039.

Plan options are market-based trading programs, obviating the need for such a unit-level RSV.

LPPC's comments on the Proposed Rule asked EPA to consider more fully the reliability impacts of the rule and to provide more flexibility to accommodate situations where compliance with the rule and reliability of the grid are in conflict. LPPC is encouraged by EPA's inclusion of a 90-day RSV option for state plans. However, LPPC believes that EPA should also include a unit-level RSV in the Federal Plan and Model Trading Rules to avoid arbitrary treatment of affected units based on whether they are governed by a state or federal plan. EPA acknowledges in the Final CPP rule that EGUs "could face unanticipated system emergencies that could cause a severe stress on the electricity system for a length of time such that the requirements in that state's plan may not be achievable by certain affected EGUs without posing an otherwise unmanageable risk to reliability."<sup>16</sup> This situation could occur for affected EGUs regardless of whether they are subject to a state or Federal Plan. Trading alone does not necessarily "resolve" reliability issues, particularly if there is an unplanned unit or transmission line loss; in such situations an affected unit may be called on to run at a much higher level of utilization (i.e., increased emissions) than was planned for. EPA should provide the same treatment with respect to a RSV for both state plans that allow emissions trading and for a Federal Plan that allows trading.

Further, an RSV must be available for longer than 90 days without a payback requirement. LPPC suggests a minimum of 180 days. There are instances of unplanned outages of units and transmission lines with a duration longer than 180 days. As EPA notes,<sup>17</sup> this RSV provision is particularly important for long, unplanned outages that may occur at nuclear units, hydropower units, large renewables and natural gas combined cycle (NGCC) installations, and their transmission links, which will have a large impact on system reliability and affected units' ability to comply with the Final CPP rule. A RSV of at least 180 days allows more time for state plan revisions and approvals (the only alternative for problems that occur over longer periods), which may take significant time given state and EPA resource constraints.

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<sup>16</sup> Final CPP at 64,878.

<sup>17</sup> Final CPP at 64,878.

#### **IV. Clean Energy Incentive Program (CEIP)**

##### **A. EPA Should Include a Broad CEIP in All Federal Plans.**

EPA has proposed that the Clean Energy Incentive Program (CEIP) will be included for all states for which EPA issues a Federal Plan. LPPC supports this proposal and generally supports a broad application of the CEIP. The CEIP represents an important opportunity for states to encourage and recognize actions that occur prior to the start of compliance in 2022. Moreover, by issuing matching allowances or ERCs (as appropriate) to states participating in the CEIP (whether voluntarily or as part of a Federal Plan), the CEIP will provide EGUs with additional compliance instruments for use during the compliance period. This will increase the liquidity of markets for allowances and ERCs, reducing the ability of any single firm to gain market power over credits. It will also lower the overall cost of compliance, and will smooth out any transitions that would occur in the early years of the Clean Power Plan compliance program.

While LPPC supports the CEIP for states issued a Federal Plan, we believe that if a state submits a partial state plan (e.g., by choosing its own allocation methodology), it should be able to opt out of the CEIP.

In addition, the Proposed Rule includes some ambiguity as to whether end-use energy efficiency (EE) will be eligible for CEIP crediting under the Federal Plan. On the one hand, EPA clearly discusses the eligibility of EE in low-income communities to earn allowances or ERCs as part of the CEIP, and establishes a specific methodology for the distribution of state and EPA matching allowances to these resources. On the other hand, the proposed mass-based co-proposal for the Federal Plan includes a provision that appears to suggest that end-use EE would not be eligible to receive allowances out of the CEIP set-aside.<sup>18</sup> LPPC requests that EPA clarify that end-use EE is, indeed, eligible to receive allowances (or ERCs, as appropriate) under the CEIP in a Federal Plan.

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<sup>18</sup> Proposed Rule at 65,067 (to be codified at 40 C.F.R. § 62.16235(a)(3)) (“All categories of resources other than those listed in paragraphs (e)(3)(iii)(A) and (B) of this section [relating to on-shore wind and solar] . . . are not available or applicable in States where this subpart has been promulgated as a federal plan pursuant to section 111(d)(2) of the Clean Air Act.”).

## **B. CEIP Resource Eligibility.**

### **1. CEIP Resource Eligibility Should Be Open to All Non-Emitting Resources.**

Under the CEIP, only wind and solar generating technologies would be eligible for the CEIP.<sup>19</sup> LPPC opposes EPA's decision to limit eligibility for the CEIP to two particular non-emitting technologies, while prohibiting other technologies from receiving credit for their contribution to early emission reductions. Further, the Proposed Rule's regulatory text is unclear regarding whether off-shore wind would be eligible.<sup>20</sup> EPA should expand the list of eligible technologies to include all incremental non-emitting resources—including but not limited to hydroelectric, geothermal, biomass, wave and tidal, and nuclear resources—and should clarify that off-shore wind is eligible.

In the Final CPP rule, EPA explains that one of the main purposes of the CEIP is to reduce the cost of achieving the emission guidelines by “grant[ing] some form of beneficial recognition to emissions reduction investments that both occur and yield reductions prior to the first date [of the interim compliance period].”<sup>21</sup> In addition, EPA justifies the CEIP on the grounds that it “responds to the urgency of meeting the challenge of climate change in two key ways,” including by “foster[ing] reductions before 2022.”<sup>22</sup> Furthermore, EPA claims that the benefits of the CEIP include “provid[ing] affected EGUs and states with additional emission reduction resources to help them achieve their state plan obligations,”<sup>23</sup> “improve[ing] the liquidity, in the early years of the program, of the ERC and allowance markets,”<sup>24</sup> and “provid[ing] states and affected EGUs additional flexibility in meeting the guidelines.”<sup>25</sup> Finally, with regard to renewable energy (RE) resources, EPA states that an additional goal of the CEIP is “to preserve the incentive for project developers to execute on planned investments in all types of solar and wind technologies” and to “focus[] on the kinds of measures and technologies that are the essential foundation of longer-term climate strategies, strategies that inevitably depend on the further development and widespread deployment of highly adaptable zero-emitting technologies.”<sup>26</sup>

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<sup>19</sup> EE projects in low-income communities would also be eligible for the CEIP.

<sup>20</sup> Compare Proposed Rule at 65,062 (40 C.F.R. § 62.16231) (indicating “metered wind power” is an eligible resource) *with id.* at 65,067 (40 C.F.R. § 62.16235) (indicating “onshore wind” is an eligible resource).

<sup>21</sup> Final CPP at 64,831.

<sup>22</sup> Final CPP at 64,831.

<sup>23</sup> Final CPP at 64,832.

<sup>24</sup> Final CPP at 64,832.

<sup>25</sup> Final CPP at 64,832, n.780.

<sup>26</sup> Final CPP at 64,831.

LPPC generally agrees with these rationales and objectives, but disagrees with the way that EPA has chosen to design and implement an early action program to achieve these objectives. One major problem is that EPA has cherry-picked two apparently favored technologies—wind and solar—while arbitrarily excluding other viable—but apparently disfavored—non-emitting technologies. This decision appears arbitrary and is not justified by EPA’s ostensible rationales for the program.

Indeed, other non-emitting resources other than on-shore wind and solar can be equally effective in achieving EPA’s stated goals and rationales for the CEIP. For example, all non-emitting technologies that generate electricity before 2022 can help to “respond[] to the urgency of meeting the challenge of climate change” by “foster[ing] reductions before 2022.”<sup>27</sup> Moreover, allowing incremental non-emitting resources like off-shore wind, nuclear, geothermal, wave and tidal, and hydroelectric power to participate in the CEIP would provide the same benefits that EPA claims allowing wind and solar to participate would provide. For example, allowing these resources to receive ERCs or allowances from the CEIP would “provide affected EGUs and states with additional emission reduction resources to help them achieve their state plan obligations,”<sup>28</sup> “provide states and affected EGUs additional flexibility in meeting the guidelines,”<sup>29</sup> and improve the liquidity of the ERC and allowance markets.<sup>30</sup>

Furthermore, nuclear, biomass, hydroelectric, wave and tidal, and geothermal technologies are precisely the kinds of “highly adaptable zero-emitting technologies”<sup>31</sup> that will form “the essential foundation of longer-term climate strategies.”<sup>32</sup> Indeed, both U.S. and international climate change experts have concluded that these kinds of energy resources can play a significant role in future strategies to reduce carbon dioxide (CO<sub>2</sub>) emissions.<sup>33</sup>

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<sup>27</sup> See Final CPP at 64,831.

<sup>28</sup> Final CPP at 64,832.

<sup>29</sup> Final CPP at 64,832, n.780.

<sup>30</sup> Final CPP at 64,832.

<sup>31</sup> Final CPP at 64,831.

<sup>32</sup> Final CPP at 64,831.

<sup>33</sup> See, e.g., Henry D. Jacoby, *et al.*, *Ch. 27: Mitigation. Climate Change Impacts in the United States*, The Third National Climate Assessment at 657 (2014), available at

<http://nca2014.globalchange.gov/downloads> (“Many technologies are potentially available to accomplish emissions reduction. They include ways to increase the efficiency of fossil energy use and facilitate a shift to low-carbon energy sources, sources of improvement in the cost and performance of renewables (for example, wind, solar, and bioenergy) and nuclear energy . . . .”); International Panel on Climate Change, *Summary for Policymakers*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change at 20 (2014), available at [http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc\\_wg3\\_ar5\\_summary-for-policymakers.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf) (“many RE technologies have demonstrated substantial performance improvements and cost reductions, and a growing number of RE technologies have achieved a level of maturity to enable deployment at significant

LPPC is concerned that cherry-picking just two technologies for the CEIP could potentially distort energy markets and raise the cost of emission reductions. Specifically, if only wind and solar receive credit, while other resources such as nuclear and hydroelectric uprates do not, project developers and owners could face difficulties financing uprates and other new projects that use technologies that are not included in the CEIP. Consequently, failing to recognize the emission-reducing benefits of early generation from other zero-emitting resources could risk delaying the time in which these resources are brought online, leaving potentially cost-effective emission reduction options on the table or resulting in bottle-necked development pipelines starting in 2022. Conversely, if EPA were to provide recognition through the CEIP to all zero-carbon resources, EPA could incent even greater early emission reductions than would otherwise occur.

Finally, EPA has not adequately explained why other non-emitting technologies should be eligible to receive credit (e.g., in the form of ERCs) for reductions starting in 2022, but are not eligible to receive credit for emission reductions that occur before that date. This arbitrary distinction makes no sense, and should be abandoned. Rather than cherry-picking two non-emitting technologies, EPA should revise the CEIP to allow all non-emitting project types that are eligible for ERCs to be eligible for the CEIP.

## **2. EPA Should Designate October 23, 2015 As the Start Date for CEIP Eligibility.**

Under the Proposed Rule, projects would be eligible for the CEIP if they commence construction (in the case of RE) or operation (in the case of EE) after submittal of a final state plan or after September 6, 2018.<sup>34</sup> LPPC recommends that EPA revise this approach to clarify that any projects that commenced *operation* any time after publication of the Final CPP rule (i.e., any time after October 23, 2015) are eligible for the CEIP. This Section explains why the publication date is the appropriate reference point, and the next Section explains why eligibility for all non-emitting projects should be tied to the date on which they commence *operation*.

EPA's stated goals for the CEIP are to "recognize emission reductions that existing programs provide prior to the initial plan performance period,"<sup>35</sup> and to "help sustain the momentum toward greater RE investment in the period between now and 2022 so as to

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scale . . . . Regarding electricity generation alone, RE accounted for just over half of the new electricity-generating capacity added globally in 2012, led by growth in wind, hydro and solar power. . . . Nuclear energy is a mature low-GHG emission source of baseload power . . . . Nuclear energy could make an increasing contribution to low-carbon energy supply . . . ."; *id.* at 25 ("Bioenergy can play a critical role for mitigation . . . .").

<sup>34</sup> 40 C.F.R. § 60.5737(a)(2); Proposed Rule at 65,025.

<sup>35</sup> Final CPP at 64,829.

offset any dampening effects that might be created by setting the period for mandatory reductions to begin in 2022.”<sup>36</sup> Importantly, EPA disclaims any requirement to demonstrate that projects must be “‘additional’ or surplus relative to a business-as-usual or state goal-related baseline in order to be eligible” for the CEIP.<sup>37</sup>

In light of these rationales, EPA’s selection of the state plan submittal date (or the September 6, 2018 plan submittal deadline) as the cut-off date for CEIP eligibility makes little sense. If EPA’s true goal is to help sustain momentum toward greater investment in non-emitting resources, while offsetting any “dampening effects that might be created by setting the period for mandatory reductions to begin in 2022,”<sup>38</sup> EPA should provide credit to *all* projects that come online between the time that EPA established the final compliance schedule (i.e., the date of publication of the Final CPP rule) and the start date of that schedule. Now that EPA has formally announced a compliance schedule in the Final CPP rule, all project sponsors and developers of non-emitting projects are on notice of this schedule and must evaluate their options in light of the incentives and disincentives established by the Clean Power Plan. Under the current proposal to use the date of plan submission or 2018 as the start date for eligibility for the CEIP, project sponsors that are contemplating commencing operation or construction between now and the time that states submit plans (or 2018) may well decide to delay until they can be sure that their projects will be eligible. Conversely, were EPA to revise the CEIP to designate October 23, 2015 as the reference date, the Agency could better achieve its stated goal of offsetting dampening effects that are created by starting compliance in 2022.

Consequently, EPA should use October 23, 2015 as the starting point for recognizing early actions that are taken to achieve early reductions from the sources regulated under the Clean Power Plan.

### **3. EPA Should Revise the Standard for Eligibility of Renewable and Other Non-Emitting Resources Under the CEIP.**

Under the CEIP, wind and solar resources will only become eligible to generate credits in 2020 and 2021 if they “commence construction” after the date by which a state submits its final state plan (or after September 6, 2018 for states subject to the Federal Plan). EPA has not defined “commence construction” for this purpose. As noted in Section IV.B.2, above, LPPC believes the date for eligibility should be October 23, 2015.

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<sup>36</sup> Final CPP at 64,670.

<sup>37</sup> Final CPP at 64,831.

<sup>38</sup> Final CPP at 64,670.

EPA should revise this requirement or define “commence construction” in such a way as to make the eligibility date for RE (and, as outlined in Section IV.B.1, other non-emitting generating resources) the date that such resource commences *operation* (i.e., delivers power to the grid). This approach carries a number of benefits.

First, this approach will provide a much clearer and administratively straightforward basis on which to determine if a non-emitting generation resource is eligible to receive CEIP credits. There are many potential indications of when a resource commences construction, from the initial design of the project, the financing of the project, the expenditure of funds, the fabrication of parts off-site, the purchase or placement of construction equipment at a site, the beginning of physical changes to a site, the placement of operational equipment at the site, etc. These activities can span a number of years, sometimes with fits and starts. For these reasons, the determination of when a project commences construction is regularly the subject of litigation and uncertainty. Using the date that a project commences *operation*—that is, commences generation of electricity in a manner consistent with the evaluation, measurement, and verification (EM&V) requirements under the Clean Power Plan—would provide a bright-line rule that would create certainty for states, project developers, and credit purchasers.

Second, this change would make the eligibility requirements for non-emitting generation consistent with the requirements for EE projects (whose eligibility is determined based on when they commence operation). EE, RE, and other non-emitting resources all have the same impact on emission reductions, so it is appropriate to put these resources on an equal playing field, rather than the current arbitrarily different treatment.

#### **4. EPA Should Make the Meaning of “Low-Income” Consistent with Definitions in Existing Utility Programs, with a Default Definition of 200 Percent of the Federal Poverty Line.**

EPA requests comment on the meaning of “low-income community” for purposes of the CEIP set-aside.<sup>39</sup> LPPC recommends that EPA defer to each utility or community program’s definition of the term, rather than setting one definition that applies for all communities. Although national benchmarks such as the federal poverty guidelines provide one metric against which to measure income and poverty, these guidelines—and, indeed, any nation-wide metrics—are insufficient to capture the meaning of “low-income” in all communities across the United States. The reason for this is that the goods and services that a given amount of income can purchase vary widely between different states and between different localities within each state.<sup>40</sup> Thus, a family of

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<sup>39</sup> Proposed Rule at 65,024 (“The EPA seeks comment on how a low-income community should be defined as eligible under this set-aside.”).

<sup>40</sup> See, e.g., Press Release, U.S. Dep’t of Commerce, Bureau of Economic Analysis, *Real Personal Income for States and Metropolitan Areas*, 2013 (July 1, 2015),

four with an income of \$24,250 (the federal poverty guideline for 2015<sup>41</sup>) might have a much harder time with the up-front capital requirements of EE in Washington, D.C. or Manhattan than it would in a more rural part of the country. In other words, whether a community is “low-income” can be highly location-dependent.

EPA should recognize the inherently local aspect of the meaning of “low-income” by deferring to the definition used by each community’s load-serving utility for its low-income EE programs. Local utilities, which are typically overseen by local or state officials, can be expected to best understand their customer base and to design their programs to ensure that they target low-income households, as that term is understood in the community.

For customers served by utilities that do not have low-income assistance or EE programs, EPA could set a default low-income definition of up to 200 percent (200%) of the national poverty guideline for each household. This is the level used by the Department of Energy’s Low-Income Weatherization Assistance Program<sup>42</sup> as well as numerous utility programs for low-income households, and therefore represents an appropriate figure to use as a default for states and localities that have not defined the term in the context of EE programs. By setting a default definition and allowing utilities to provide assistance to households with incomes above that rate if they determine that this definition is not appropriate for their service territory, the CEIP will help to encourage all utilities to invest in their low-income communities, regardless of how that term is locally defined.

### **C. EPA Matching Credits Under the CEIP Should Be Divided Among Resource Types by States or by Market Demand.**

In the Final CPP rule, EPA established the overall size of CEIP matching credits: the equivalent of 300 million short tons. However, the Final CPP rule does not indicate how that total will be divided between the two eligible project types: RE and EE in low-income communities.<sup>43</sup>

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<http://www.bea.gov/newsreleases/regional/rpp/2015/pdf/rpp0615.pdf> (Regional Price Parities vary widely among states and metropolitan areas); Alan Cole & Scott Drenkard, Tax Foundation, *The Real Value of \$100 in Each State* (July 8, 2015), <http://taxfoundation.org/blog/real-value-100-each-state-0>.

<sup>41</sup> U.S. Dept. of Health and Human Services, *2015 Poverty Guidelines* (Sept. 3, 2015), <http://aspe.hhs.gov/2015-poverty-guidelines>.

<sup>42</sup> See [Benefits.gov](http://www.benefits.gov), *Weatherization Assistance Program for Low-Income Persons* <http://www.benefits.gov/benefits/benefit-details/580> (last visited Jan. 19, 2016).

<sup>43</sup> See Final CPP at 64,830.

EPA should not divide states' CEIP matching allowances at all. Rather, EPA should leave it to the states to determine the appropriate distribution between RE (and the other non-emitting resources that should be made eligible) and EE.

This would be consistent with EPA's general approach to the Clean Power Plan, in which it has, where possible, provided states the discretion to exercise their greater knowledge of local energy systems and needs and to express policy preferences. For example, the optimal distribution of CEIP credits may be different in a state with significant RE potential and fewer sites at which EE programs can be implemented than it would be in a state a state with significant EE potential but less RE potential.

EPA will, of course, be required to establish a specific set of rules under the Federal Plan. In this situation, however, EPA should allow the market to determine the optimal allocation. EPA could establish a single crediting pool on behalf of the state, for which all resources would be eligible. EPA would continue to match the issuance of a state credit (administered, in this instance, by EPA). Under this approach, there would be no need to determine *a priori* the number of credits that would be allocated to RE versus EE. Rather, this approach allows the relative market demand for RE and EE within a state determine which resources should receive credit. This is appropriate for a Federal Plan because EPA is not an expert in the electricity market needs of any particular state. In addition, to the extent that EPA is concerned that low-income EE projects would get crowded out by RE or other eligible non-emitting projects, the current proposal to provide credits to EE at twice the rate of RE should ensure that EE projects are not likely to be crowded out if both project types are issued credits from a single credit pool.<sup>44</sup>

#### **D. EPA Should Not Require That the CEIP Set-Aside Come from State Budgets.**

EPA has indicated that the CEIP would be constituted with allowances or ERCs in such a way as to maintain the stringency of the mass- or rate-based emission standards during the official compliance periods. For a mass-based approach, EPA proposes that half of the allowances for the CEIP would be set aside from the first compliance period emissions budget, while the other half would be surplus ERCs provided by EPA. For a rate-based approach, EPA provides fewer details, but suggests several approaches that would have the effect of making the emission standards applicable to EGUs during the first compliance period more stringent.<sup>45</sup>

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<sup>44</sup> See Proposed Rule at 65,001 (expressing concern that "historical economic, logistical and information barriers to implementing EE programs in these communities" justifies "reserv[ing] a portion of the federal pool to incentivize investment in these programs"); *id.* at 65,025 (same).

<sup>45</sup> See Proposed Rule at 65,000-01.

LPPC opposes these proposals. No adjustment should be necessary to “pay for” the early emission reductions that occur as a result of the CEIP given that there will be no net increase in CO<sub>2</sub> emissions under the program. EPA’s proposed pool of CEIP credits (ERCs or allowances) is a relatively small amount relative to the size of the reductions required by the Clean Power Plan, and the emission reductions that occur under the CEIP are *additional* to those that would occur during the compliance period because they occur *before* the start of the program. Moreover, other EPA programs, such as the NO<sub>x</sub> SIP Call and the Clean Air Interstate Rule, did not deduct early action credits from the applicable state emission budgets for the same reasons.<sup>46</sup> EPA should follow the example of these other programs by abandoning its proposal to require the state portion of the CEIP early action program to be implemented in a way that would increase the stringency of the interim state goals.

## **V. Mass-Based Federal Plan and Model Trading Rule Design Issues**

### **A. General Design Issues.**

#### **1. EPA Should Clarify How States Can Address New Unit Leakage.**

In the Final CPP rule, EPA requires that all mass-based state plans include provisions that limit incentives for existing units to reduce emissions by “shifting” generation to new fossil-fueled units.<sup>47</sup> The Clean Power Plan provides states three options for addressing this “new unit leakage:”

- (1) States may, under state law, incorporate new units into their mass-based compliance plan in the same way they include existing units;<sup>48</sup>
- (2) States may adopt an allocation methodology that counteracts the incentive to shift generation from existing units to new units (for which EPA has proposed a presumptively approvable option in the Proposed Rule);<sup>49</sup> or
- (3) States may “submit for the EPA’s approval[] an equivalent method which requires affected EGUs to meet the mass-based CO<sub>2</sub> emission goal. The EPA will evaluate the approvability of an alternative method on a case by case basis.”<sup>50</sup>

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<sup>46</sup> See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,429 (Oct. 27, 1998); Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call, 70 Fed. Reg. 25,162, 25,285-86 (May 12, 2005).

<sup>47</sup> Final CPP at 64,822.

<sup>48</sup> Final CPP at 64,949 (codified at 40 C.F.R. § 60.5790(b)(5)(i)).

<sup>49</sup> *Id.* (codified at 40 C.F.R. § 60.5790(b)(5)(ii)).

<sup>50</sup> *Id.* (codified at 40 C.F.R. § 60.5790(b)(5)(iii)).

While the requirements for and operation of the first two options are relatively straightforward—particularly in light of the additional information on option two provided in the Proposed Rule—EPA has provided virtually no guidance or indication of what types of demonstrations may be sufficient under option three. In the only discussion in either the Final CPP rule or the Proposed Rule, EPA indicates that this option could include “a demonstration that emission leakage is unlikely to occur . . . as a result of unique factors, such as the presence of existing state policies . . . or unique characteristics of the state and its power sector . . . .”<sup>51</sup>

However, significant uncertainty remains regarding what would be a sufficient “demonstration,” what types of “unique characteristics” would meet EPA’s requirements, or what additional state policies may be acceptable. LPPC urges EPA to provide further guidance on both the required *process* for making such demonstrations and the *substance* of what additional actions or characteristics may address leakage to an extent that they would be approvable.

## **2. EPA Should Permit Trading-Ready States to Use EPA-Designated Tracking Systems.**

LPPC strongly supports the provisions promulgated by the Final CPP rule that permit states to adopt single-state plans that can nonetheless reap the benefits of interstate trading.<sup>52</sup>

However, in the Proposed Rule, EPA proposes that in order for EGUs in a state with a Federal Plan to trade with other states, those other states must use an EPA-*administered* tracking system—i.e., the existing Allowance Tracking and Compliance System (ATCS)<sup>53</sup>—to track ERCs and/or allowances.<sup>54</sup> However, EPA is also taking comment on whether EGUs in Federal Plan states should be permitted to trade with states whose plans are “ready-for-interstate-trading” but that use an EPA-*designated* rather than EPA-*administered* tracking system so long as the designated tracking system is interoperable with the EPA-administered tracking system.<sup>55</sup>

LPPC supports this alternative proposal. Allowing Federal Plan states to use EPA-designated tracking systems will expand the number of EGUs and other entities from whom EGUs in Federal Plan states can procure allowances and/or ERCs, and vice

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<sup>51</sup> Final CPP at 64,890.

<sup>52</sup> Note, however, that, as outlined in Section VI.A.2, below, LPPC opposes some of the specific requirements that EPA has established for what may constitute a “ready-for-interstate-trading” plan.

<sup>53</sup> ATCS is the mass-based allowance tracking system EPA already operates for existing emission trading programs such as the Acid Rain Program and the Cross-State Air Pollution Rule.

<sup>54</sup> Proposed Rule at 64,997.

<sup>55</sup> Proposed Rule at 64,977.

versa. The interstate trading of allowances and ERCs can reduce compliance costs, increase market liquidity, and reduce the potential for abuse of market power—issues of particular concern for LPPC members. LPPC, therefore, supports provisions such as this alternative proposal that expand the scope of interstate trading.

## **B. General Allowance Allocation Issues.**

### **1. EPA Should Maximize States' Flexibility to Make Allowance Allocation Decisions.**

While the mass-based Federal Plan co-proposal and Model Trading Rule both outline a particular allocation mechanism,<sup>56</sup> in the Final CPP rule EPA indicates that states are free to use any allocation scheme they want, consistent with the requirement to address leakage.<sup>57</sup> EPA proposes that Federal Plan states may submit a partial state plan that only addresses allocation, replacing the EPA default allocation scheme with a state-determined one (again, subject to the requirement to address leakage).<sup>58</sup>

LPPC strongly supports this feature of the Clean Power Plan and the related Federal Plan proposal. States are in the best position to determine the needs of their particular electric system and to make choices that reflect and further their policy goals in this regard.

### **2. If States Do Not Determine Allowance Allocations, Allowances Under the Mass-Based Federal Plan and Mass-Based Model Trading Rule Should Be Allocated by Subcategory and Based on Each EGU's Historic Share of Generation Within the Subcategory.**

Under the mass-based Federal Plan and Model Trading Rule, EPA discusses multiple methods for allocating allowances in the event it implements a Federal Plan.<sup>59</sup> EPA proposes an allocation approach that it intends to use for the Federal Plan,<sup>60</sup> but does not provide regulatory text for the approach. Under the proposal, EPA would allocate most allowances to affected EGUs *pro rata*, based on each EGU's average historic generation in 2010-2012.

LPPC supports aspects of this approach, but recommends that EPA adopt a modified approach under which each state's allowance pool would first be subdivided between the two subcategories of affected EGUs, and then allocated to EGUs in each

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<sup>56</sup> See Proposed Rule at 65,063-67 (40 C.F.R. § 62.16235).

<sup>57</sup> See Final CPP at 64,892.

<sup>58</sup> Proposed Rule at 65,027.

<sup>59</sup> Proposed Rule at 65,015-18.

<sup>60</sup> Proposed Rule at 65,015.

subcategory based on each EGU's share of the subcategory's generation during a baseline period.

LPPC believes an allocation approach that recognizes the fact that EGUs in the fossil steam subcategory will be required to make significantly greater reductions than EGUs in the gas turbine subcategory makes sense, and would be more equitable than an approach that treats all EGUs the same regardless of the amount of reductions they must make. Higher-emitting fossil steam EGUs will be required to go further than less carbon-intensive gas turbine EGUs to reduce their emissions. If they are unable to reduce their emissions sufficiently, fossil steam EGUs will face the need to purchase a significant number of allowances. Conversely, EGUs with historically lower carbon emissions such as most gas turbines will face lower compliance costs and will need to do less to comply with a mass-based program. Therefore, the Federal Plan and Model Trading Rule should provide for separate pools of allowances for the fossil steam and gas turbine subcategories based on each subcategory's share of the state's historic emissions during an appropriate baseline period (e.g., 2010-2012). For example, if fossil steam generation accounted for 60 percent of a state's historic emissions and gas turbine generation accounted for 40 percent, the Federal Plan and Model Trading Rule would allocate 60 percent of the available allowances for each compliance period to the fossil steam allowance pool, and 40 percent to the gas turbine pool. These subcategorized pools should be calculated separately for each state to reflect the differences in states' resources and generation mixes.

Dividing the allowance pool among subcategories is reasonable because EPA's rate-based emission guidelines, from which the mass-based goals are derived, are formulated on a subcategory basis that recognizes the different emission rates of existing fossil steam and NGCC units. It is also appropriate because fossil steam and NGCC units often serve different roles in the electric system, with slower-ramping fossil steam units typically serving a baseload function and faster-ramping NGCC units serving an intermediate or load-following function. Furthermore, because the marginal cost of emitting a ton of CO<sub>2</sub> is the same regardless of which entity receives the allowances in a cap-and-trade program, dividing the overall allowance pool based on historic emissions would not affect the stringency of the program or alter the incentive that all high-emitting EGUs would have to reduce their emissions. However, by providing a separate pool of allowances for EGUs with higher historic emission rates, EPA could help to reduce the relatively greater cost impact of the Clean Power Plan on ratepayers that rely on higher-emitting fossil steam generation while providing utilities that operate these EGUs with a source of allowances that can be sold and used to help transition to lower- or non-emitting generation sources and EE as appropriate.

Within each subcategory's pool of allowances, EPA should distribute allowances to individual EGUs based on each EGU's share of total generation (in MWh) within the

subcategory. Distributing allowances within subcategories based on generation provides greater recognition for more efficient units within each subcategory while ensuring that units in the high-emitting fossil steam subcategory receive more allowances per MWh than do units in the lower-emitting gas turbine subcategory.

This approach provides a compromise between EPA's proposed approach (which could result in an under-allocation of allowances to fossil steam generators and an over-allocation to NGCC units) and an emissions-only approach, which would not provide adequate recognition for the higher-efficiency units within each subcategory. It is a reasonable approach and therefore should be adopted in the Federal Plan and Model Trading Rule.

### **C. Treatment of Retired EGUs.**

#### **1. EGUs That Retire During the Compliance Period Should Continue to Receive Allowances Either Indefinitely or for a Defined Period After Retirement.**

Under the Proposed Rule, EPA proposes to take away an EGU's allowance allocation if it is deemed retired on the "allowance recordation date" for the next compliance period. A unit would be considered retired if it did not operate for two consecutive calendar years prior to the allowance recordation date.<sup>61</sup> Thus, a unit that operated for a single hour in one of the previous two calendar years would receive a full allowance allocation for the entire next compliance period, but a unit that did not operate at all would receive no allowances for the applicable compliance period.

This proposal, combined with the high expected value of emission allowances, could lead to several unfavorable results. First, EPA's proposal to take away allowances after retirement could lead utilities to delay or cancel retirements of high-emitting units so as to avoid losing the value of their allowance allocation. It could also lead utilities to keep uneconomic units operating at very low levels to avoid being designated "retired"—an outcome that would likely be highly economically inefficient. Furthermore, EPA's proposal to tie the amount of allowances retired units receive to the allowance recordation date could lead utilities to time their retirements around this date so as to maximize their allowance allocations.<sup>62</sup> Consequently, this approach creates an incentive for units to remain operating just in order to secure allowances, even if it would be efficient for them to retire, driving up program costs and potentially reducing the environmental benefits of the program.

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<sup>61</sup> Proposed Rule at 65,067 (40 C.F.R. § 62.16240(a)(2)).

<sup>62</sup> For example, under EPA's proposal, utilities could choose to keep uneconomic units running until just after the "two consecutive calendar year" mark to ensure that the retired unit receives an allocation for the next compliance period.

Rather than impose an arbitrary cut-off date for allocating allowances for the next compliance period, EPA should allow retired units to retain their allocation indefinitely. This approach would mirror the approach that EPA adopted for other mass-based trading programs, including the Acid Rain Program.<sup>63</sup>

Allocating allowances indefinitely would remove several perverse incentives created by EPA's proposed approach. Retired units would no longer be encouraged to stay online in order to continue receiving allowances, and thus a greater number of retirements would occur than under EPA's proposal. Operators would no longer have an incentive to time their retirements around the allowance recordation date. Furthermore, this approach would be simpler to administer and plan for.

A less favorable alternative than LPPC's preferred approach, but one that is more favorable than EPA's proposal, would be to allocate allowances to retired units for a defined period after retirement. LPPC recommends that EPA provide allowances for the duration of the anticipated life of a unit,<sup>64</sup> with a minimum of five years after actual retirement, on a unit-by-unit-basis. Such a policy would provide certainty and would help to control the extent to which utility financial investments in assets become stranded.<sup>65</sup> This approach would help to provide utilities with a reasonable amount of time to transition away from the retired fossil-fueled unit and to cleaner sources of electricity. This transition period typically involves increasing the utilization and emissions of other affected fossil units while lower-carbon alternatives are phased in. LPPC believes that a minimum of five years is a reasonable period to allow for a transition from a high-emitting unit to lower-emitting alternatives. Therefore, if EPA decides not to allow units to retain their allowance allocations indefinitely, EPA should revise the proposed mass-based Federal Plan and Model Trading Rule to clarify that units that retire will receive an allowance allocation at least until the end of the anticipated life of the EGU, with a minimum of at least five years after the EGU retires. For example, a unit that commenced operation in 1988 and ceased operation at the end of 2022 would receive allowances at least through 2027; a unit that commenced operation in 1988 and ceased operation at the end of 2024 would receive allowances at least through 2029. In both examples, the period to receive allowances would be longer for units with anticipated lives extending beyond 2027 or 2029, respectively.

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<sup>63</sup> See Acid Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring, Excess Emissions and Administrative Appeals, 58 Fed. Reg. 3,590, 3,595 (Jan. 11, 1993).

<sup>64</sup> The preamble to the Final CPP rule has discussion of its stranded assets analysis, assuming a 40 year "book" life or a coal-fired EGU and a 20 year "book" life for pollution control retrofits (based on Securities and Exchange Commission data that may not be relevant to public power generators). See Final CPP at 64,872. These time periods do not reflect anticipated actual lives of units or already scheduled and contracted capital cost recovery periods for our members.

<sup>65</sup> In addition, this proposal would more clearly fulfill EPA's obligation to take into account the remaining useful life of units under section 111(d). 42 U.S.C. § 7411(d)(2).

Such a rule would be inferior to a permanent allocation approach because the loss of the allowance allocation after the fixed period would still create a disincentive to retirement. As with EPA's current proposal, the fact that units would lose their allowance allocation could still encourage utilities to keep inefficient units operating at low levels to avoid being designated "retired." Such a rule would also be more administratively complex to administer than our preferred option for a permanent allocation.

However, a fixed-period approach that is not tied to the allowance recordation date would still have advantages over EPA's proposed approach. Most importantly, under this approach, units would no longer have an incentive to time unit retirements around EPA's allowance recordation dates. This change will eliminate any incentive to keep high-emitting units running slightly longer just to secure an additional emission allocation, thereby ensuring that utilities are able to take a more economically reasonable approach to phasing out high-emitting units, while also simultaneously promoting earlier retirements than might otherwise be the case under EPA's Proposed Rule.

A fixed-period rule that is not tied to the allowance recordation date would be easier to administer. If a unit were deemed retired after receiving an allowance allocation, it would be allowed to retain these allowances (including any allowances allocated for the next compliance period). On the next allowance recordation date after the date on which the unit is deemed retired, EPA would determine the number of additional allowances to which the unit is entitled, and would allocate those allowances to the unit. The number of allowances distributed to the EGU could be *pro-rated* based on the number of additional days of allowances the retired unit is entitled to, with the remainder of allowances redistributed to other units as discussed in Section V.C.3 below.

Therefore, if EPA declines to allow retired units to retain their allocations indefinitely (which is LPPC's preferred approach), the Agency should revise its proposal to allow retired units to receive allowances until the end of the anticipated life of a unit, with a minimum of at least five years.

**2. EGUs That Retire After Publication of the Clean Power Plan Rule But Before 2022 Should Receive Allowances in the Same Manner As Units That Retire After the Start of the Program; No Allowances Should Be Allocated to EGUs That Retired Before the Publication of the Clean Power Plan Rule.**

As discussed above, the mass-based Federal Plan co-proposal and Model Trading Rule proposal provide specific and detailed criteria under which an affected EGU that ceases operation ("retires") would or would not continue to receive allowances based on historic

generation.<sup>66</sup> The Federal Plan and Model Trading Rule are not as clear regarding the allocation of allowances to EGUs that operated during the 2010-2012 historical baseline that retire *prior to* the first compliance period. While the regulatory text does not indicate whether such units will receive allowances, the Allowance Allocation TSD appears to suggest that such units would *not* receive allowances after retirement,<sup>67</sup> and EPA specifically requests comment on this point.<sup>68</sup>

LPPC strongly supports an allocation of allowances to units that cease operations after the issuance of the Final CPP rule, but before the start of compliance, in the same manner as units that retire after the start of the program (see Section V.C.1, above). A policy that prevents units that retire before the start of compliance from being allocated allowances risks creating a perverse incentive to delay retirement in order to secure at least those allowances to which the EGU would be entitled to for at least five years.

This concern is even more acute than the incentive EPA identifies in the Proposed Rule for units that utilities are considering retiring after the start of the program.<sup>69</sup> Starting in 2022, decisions to hold off on retirement of a unit in order to receive allowances in the next period may increase the overall economic cost of Clean Power Plan compliance (and so rightly should be discouraged). However, such decisions would not impact the overall *environmental integrity* of the program as it is the state-wide emission budget that will determine total emissions in a compliance period. This is not the case for units that delay retirement *before* the program begins. For these units, any incentive to delay retirement can result in an increase in overall emissions to the extent that the generation from the otherwise-retired EGU would have been replaced by lower-emitting generation or energy savings. In order to avoid this incentive and resulting emissions increase, EPA should include in its mass-based Federal Plan co-proposal and mass-based Model Trading Rule a provision making clear that units that retire after October 23, 2015, but before January 1, 2022, will receive allowances in the same manner as units that retire after the start of the program (i.e., for at least five years).

The same concerns would not apply to units that retired between the historic baseline (2010-2012) and the publication of the Final CPP rule. That is, unlike units that retire after October 23, 2015, units that had retired before publication of the Final CPP rule by definition would not face an incentive to delay retirement solely or primarily in order to

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<sup>66</sup> Proposed Rule at 65,026.

<sup>67</sup> EPA, Docket ID EPA-HQ-OAR-2015-0199, Allowance Allocation Proposed Rule Technical Support Document at 3-4 (Aug. 2015) (“Allowance Allocation TSD”), at <http://www.epa.gov/cleanpowerplan/proposed-federal-plan-clean-power-plan-technical-documents>.

<sup>68</sup> Proposed Rule at 65,016.

<sup>69</sup> See Proposed Rule at 65,026 (“Continuing allocations to non-operating units for a period of time reduces the incentive to keep a unit operating simply to avoid losing the allowance allocations for that unit (e.g., a unit that would otherwise be retired due to age and inefficiency).”).

receive an initial allowance allocation. No allocation is needed for these units and, as outlined in Section V.C.3, below, these allowances should be redistributed to other affected EGUs *pro rata* based on their historic generation.

### **3. EPA Should Redistribute Allowances That Would Have Been Allocated to EGUs That Retire to Other EGUs Within the Same Subcategory Based on Historic Generation.**

To the extent EPA does not adopt LPPC's suggested revision regarding retired EGUs in Sections V.C.1 and V.C.2 above, it must determine how to redistribute allowances that would have been allocated to retired EGUs. EPA proposes that these allowances would be reallocated to the Renewable Energy Set-Aside (RE Set-Aside).<sup>70</sup>

LPPC opposes this proposal. For a mass-based Federal Plan, these allowances should, instead, be reallocated to the remaining affected EGUs within the same subcategory (i.e., fossil steam or NGCC), *pro rata*, based on historic generation. As indicated in the Proposed Rule, EPA has a long history of administering emission budget trading programs under the Clean Air Act in which allowances are allocated to affected EGUs based on historic operation. This approach provides allowances primarily to those units that are subject to regulation, which is "fair and reasonable in light of [the distributional effects] and the overall purpose of CAA section 111."<sup>71</sup> Absent a clear legal reason to the contrary—and none has been discussed—EPA should continue to follow this historic allocation approach for allowances that are reallocated. In addition, as described in Section V.E.2, this approach is consistent with EPA's proposed approach to reallocating allowances from the output-based allocation set-aside (OBA Set-Aside).

This approach should also be the default reallocation methodology included in the mass-based Model Trading Rule. However, for the mass-based Model Trading Rule, allowance reallocation should be discretionary. That is, as with all other allocation choices, if allowances are reallocated at all (which is not a requirement under the Clean Power Plan), they should be reallocated based on the *state's* policy preferences outlined in its state plan. This approach should be used for partial state or tribal plans that address allocation in states otherwise subject to the Federal Plan.

Relatedly, *if* EPA determines to retain the current proposal to redistribute allowances allocated to retired EGUs to the RE Set-Aside as part of the Model Trading Rule, EPA should make clear that this is merely a default rule and is *not* part of the presumptively approvable allocation-based leakage provision. Continuing to allocate allowances to retired EGUs or reallocating such allowances to other EGUs would not contribute to any

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<sup>70</sup> Proposed Rule at 65,027.

<sup>71</sup> Proposed Rule at 65,015.

incentive to shift generation from existing affected EGUs to new fossil fuel-fired EGUs. In fact, such reallocation could further discourage leakage. By providing additional allowances to affected EGUs, EPA would reduce the costs of compliance for those EGUs and so would reduce the economic incentive to reduce generation in favor of new units. No allocation to the RE Set-Aside is necessary to accomplish this purpose. Therefore, states opting to address emissions leakage through EPA's presumptively approvable set-aside methodology need not include a provision that redistributes allowances from retired EGUs to the RE Set-Aside.

#### **4. EPA Should Distinguish Between Mothballed and Decommissioned Units for Allocation Purposes.**

Another problem with EPA's proposed approach to retired EGUs is that it would treat all units that cease operations for two years the same, regardless of whether the unit had actually retired and decommissioned or was merely "mothballed" or placed in cold storage. This distinction is critical for both reliability and market efficiency reasons. In certain circumstances, an electric utility may cease operating an affected EGU for two years or more, but retain the capability to restart the unit if required to address system emergencies. These emergencies would primarily include major reliability events such as the unexpected shut-down of a large baseload facility or the loss of a large transmission line. Such a situation is sometimes referred to as "mothballing" a unit, or putting the unit into "cold storage"—phrases that recognize that there is a possibility that the unit will be re-started in the future.

The high costs of restarting mothballed units may make such situations uncommon, but they are not unheard of. For example, as part of their mandate to ensure reliable supplies of electricity, some utilities may decide that the risk of temporarily losing a large baseload generating unit or transmission line on which they rely warrants maintaining a unit in "cold storage" rather than completely retiring the unit. In other cases, independent system operators (ISOs) may encourage certain units to remain offline but available in case of reliability emergencies, even where those units are no longer economical. For example, many ISOs administer a process whereby they review potential unit retirements and enter into Reliability Must Run Agreements with generators that the ISO determines are necessary to maintain reliability.<sup>72</sup>

In addition, ISO rules typically distinguish between at least two kinds of inoperative facilities—those that are "mothballed" and those that are "decommissioned." Unlike decommissioned facilities, mothballed facilities are included in power flow modeling, interconnection studies, and other analyses of power and transmission needs in ISO markets. Mothballed units are also typically permitted to emerge from mothballing

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<sup>72</sup> See, e.g., ERCOT Protocols § 3.14 (Dec. 10, 2015), available at [http://www.ercot.com/content/wcm/current\\_guides/53528/03\\_121015\\_Nodal.doc](http://www.ercot.com/content/wcm/current_guides/53528/03_121015_Nodal.doc).

status and participate as existing resources if the need arises, whereas decommissioned units can no longer participate in the wholesale electricity market. Thus, mothballed units (as distinct from decommissioned units) that do not operate for two years should be considered to be in almost the same operating posture as units that operate at very low levels but later increase their output when needed for reliability or other reasons. Like low-capacity-factor units, mothballed units are generally incorporated into power system modeling assumptions and are able to provide power at short notice when system needs justify increased operation. Accordingly, EPA's retirement rules should carefully distinguish between mothballed and decommissioned units when determining whether a particular unit is "retired" such that it will no longer need an allowance allocation, and should ensure that mothballed units are not penalized for coming out of mothball status when they are needed to address a reliability issue.

#### **D. Renewable Energy Set-Aside.**

##### **1. All Non-Emitting Resources Should Be Eligible.**

Under the proposed mass-based Federal Plan and Model Trading Rule, only certain RE technologies would be eligible to receive credit under the RE Set-Aside program. Specifically, only metered resources employing the following technologies would be eligible for the program: on-shore wind, solar, geothermal power, and hydropower.<sup>73</sup> Other low- and non-emitting resources, such as offshore wind, nuclear, non-metered solar, and biomass facilities, would be ineligible. EPA's exclusion of these resources is arbitrary and should be abandoned. Instead, EPA should make all non-emitting resources eligible for the RE Set-Aside.

EPA's rationale for the RE Set-Aside is that it would "address concerns regarding leakage by lowering the marginal cost of production of . . . incented clean energy technologies . . ." <sup>74</sup> According to EPA, providing allowances to incremental RE generation "will make RE more competitive against new sources, reducing the potential for leakage to new sources." <sup>75</sup>

However, these rationales do not justify limiting the RE Set-Aside only to the specified RE resources. Under a mass-based compliance system, all non-emitting resources face competition from new natural gas generating facilities, emissions from which would not be subject to the emissions cap. Thus, EPA's rationale for the RE Set-Aside should be expanded to support providing an incentive to all non-emitting resources, not just those identified in the rule. EPA should revise this provision of the proposed mass-

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<sup>73</sup> Proposed Rule at 65,023.

<sup>74</sup> Proposed Rule at 65,022.

<sup>75</sup> Proposed Rule at 65,022.

based Federal Plan and Model Trading Rule to specify that all non-emitting resources that are eligible to generate ERCs<sup>76</sup> are eligible for the RE Set-Aside.

## **E. Output-Based Allocation Set-Aside.**

### **1. LPPC Supports EPA's Proposal for the Output-Based Allocation Set-Aside.**

Under the Proposed Rule, existing NGCC units under a mass-based Federal Plan or Model Trading Rule would receive additional allowances from the Output-Based Allocation Set-Aside (OBA Set-Aside) for all generation in excess of 50 percent of their capacity. EPA states that this set-aside is intended to reduce the incentive for electric utilities to shift generation from existing affected EGUs to new fossil fuel-fired units that are not subject to an allowance requirement because they are not regulated under section 111(d).<sup>77</sup> LPPC supports this approach towards addressing section 60.5790(b)(5)(ii) of the Final CPP.

### **2. EPA Should Redistribute Allowances from an Undersubscribed OBA Set-Aside to EGUs Based on Subcategory and Historic Generation.**

As part of the allocation methodology for limiting new unit leakage, EPA has proposed to establish a state-specific pool of allowances to be allocated to existing NGCC units in order to reduce the incentive to shift generation from those units to new NGCC units.<sup>78</sup> While the allocation to an individual NGCC unit from the pool will depend on that unit's output in the previous compliance period, the overall size of the pool is fixed. As such, it is possible that this OBA Set-Aside will be undersubscribed—that is, there will be more allowances in the pool than are given out based on generation. EPA has proposed that in this situation, all excess allowances from the set-aside will be redistributed to all affected EGUs based on their *pro rata* share of generation.<sup>79</sup>

As outlined in Section V.B.2, LPPC recommends EPA adopt a modified approach under which the excess allowances under the set-aside be redistributed, *pro rata*, to the two subcategories of affected units in each state's allowance pool, and then allocated to EGUs in each subcategory based on each EGU's share of the subcategory's generation during the baseline period.

However, if EPA does not adopt this recommendation, LPPC would support EPA's current proposal.

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<sup>76</sup> See Section VI.B, below.

<sup>77</sup> Proposed Rule at 65,021.

<sup>78</sup> Proposed Rule at 65,020-22.

<sup>79</sup> Proposed Rule at 65,022.

## **VI. Rate-Based Federal Plan and Model Trading Rule Design Issues**

### **A. General Rate-Based Plan Design.**

#### **1. LPPC Supports EPA's Proposed Market-Based Trading-Ready Emissions Standard Approach to Rate-Based Compliance.**

Under both the rate-based Federal Plan co-proposal and the Model Trading Rule, EPA has proposed a market-based emission rate trading program. Under this approach, affected EGUs generating electricity at emission rates below their emission rate limit as well as other low- and zero-emission generating and energy saving resources (such as new RE, new and uprated nuclear power, and end-use EE) can generate ERCs. ERCs are then purchased and used by affected EGUs in order to demonstrate compliance, with each ERC representing 1 MWh that can be added to the denominator of the unit's compliance rate.<sup>80</sup>

LPPC generally supports market-based approaches to compliance. Such approaches recognize and reward least-cost emission reduction approaches and minimize the price impacts on rate-payers for the same level of environmental performance. LPPC, therefore, supports the inclusion of a market-based ERC trading approach to compliance as part of the rate-based Model Trading Rule, and urges EPA to adopt such an approach to the extent that it promulgates a rate-based Federal Plan for any state.

In addition, both the rate-based Federal Plan co-proposal and proposed rate-based Model Trading Rule have been developed to qualify as "ready-for-interstate-trading" plans.<sup>81</sup> As such, EPA has proposed to permit the interstate trading of ERCs and the use of ERCs issued by any other "ready-for-interstate-trading" state (including other rate-based Federal Plan states) by EGUs in any rate-based Federal Plan state. As is outlined above, LPPC generally supports any measure that will facilitate interstate trading of compliance instruments. As such, LPPC specifically supports EPA's proposal to allowing the interstate trading of ERCs among for Federal Plan states as well as with other "ready-for-interstate-trading" states. For example, as discussed in Section V.A.2, EPA should not limit the use of ERCs issued by states using an EPA-*administered* tracking system (e.g., ATCS), but should also permit the use of ERCs issued by states that utilize an EPA-*designated* tracking system that is interoperable with ATCS.

#### **2. EPA Should Permit States to Link Rate-Based Plans with Mass-Based Plans for the Purpose of Interstate Trading.**

Under the Proposed Rule, interstate trading linkages between Federal Plan states and other states would only be allowed between states that "implement the same type of

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<sup>80</sup> See generally Proposed Rule at 64,989-90.

<sup>81</sup> Proposed Rule at 65,011.

trading program as the federal plan trading program . . . *i.e.*, mass-based trading programs can link to mass-based trading programs only, and rate-based trading programs can link to rate-based trading programs only.”<sup>82</sup> Therefore, states subject to a mass-based Federal Plan would be unable to trade with states that implement rate-based systems, and states subject to a rate-based Federal Plan would be unable to trade with states that implement a mass-based compliance system.

LPPC recommends that EPA allow EGUs to convert ERCs into allowances for compliance in mass-based states, and permit allowances to be used for compliance in rate-based states. Limiting trading as EPA proposes would be unwise because it would artificially limit the size of the interstate compliance instrument markets and thereby erode many of the benefits from interstate trading that EPA cites in support of the Clean Power Plan and Proposed Rule. LPPC is concerned that the U.S. power grid could become fragmented—divided between states (including those subject to Federal Plans) employing a rate-based approach and those employing a mass-based approach.

There does not appear to be any legal or policy rationale for prohibiting such trading, and EPA has provided no explanation for this restriction in either the Proposed Rule or Final CPP rule. Moreover, such trading could be implemented without adversely impacting the overall CO<sub>2</sub> emission reduction goals of the Clean Power Plan.

To implement rate-to-mass trading, EPA could establish a standard conversion rate for ERCs to short tons that is based on the amount of additional emissions the ERC would allow EGUs to emit in the rate-based state. Upon conversion, the ERC would be removed from the compliance tracking system in the rate-based state (to ensure that no EGU could use it for compliance), and a new emission allowance would be created in the tracking system for the mass-based state. In the context of calculating the mass-based goals under the Final CPP rule, EPA already employed an approach relating extra MWh of non-emitting generation and pounds of CO<sub>2</sub> emissions.<sup>83</sup> EPA should consider this or another appropriate approach to allow conversions between ERCs and allowances.

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<sup>82</sup> Proposed Rule at 64,976-77.

<sup>83</sup> See EPA, Docket ID EPA-HQ-OAR-2013-0602, CO<sub>2</sub> Emission Performance Rate and Goal Computation Technical Support Document for CPP Final Rule at 24 (Aug. 2015), at <http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-technical-documents> (“The mass adjustment reflects the ability of affected EGUs to procure incremental RE to increase their own generation and emissions if subject to an applicable rate-based standard. In that rate-based compliance scenario, *every zero-emitting MWh added to the denominator of an EGU’s effective emission rate would enable that EGU to add another MWh of generation with twice the emissions intensity of the applicable rate-based standard*, because the average intensity of that emitting MWh combined with the zero-emitting MWh would then equal the applicable rate-based standard and thus maintain that EGU’s compliance.”) (emphasis added).

No conversion would be needed to allow EGUs in rate-based systems to use emission allowances for compliance. Because each emission allowance represents the right to emit a short ton (2,000 lbs.) of CO<sub>2</sub>, these allowances could be used directly to adjust the emission rate of EGUs subject to a rate-based limit. EGUs subject to a rate-based limit would simply subtract 2,000 lbs. from their reported emissions for each allowance surrendered for compliance, resulting in a lower overall emission rate. The surrender and retirement of each allowance by the EGU in the rate-based state would allow the EGU in the rate-based state to increase its emissions by 2,000 lbs., while *preventing* an EGU in a mass-based state from emitting the same amount, thus maintaining the integrity of the program and ensuring that overall emissions across the system would be equivalent to a system in which the allowance could only be used for compliance by an EGU in a mass-based state.

Given that converting between mass- and rate-based compliance instruments is technically feasible (as evidenced by the process EPA used to calculate mass-based state goals) and would not compromise the environmental integrity of the Clean Power Plan, EPA should revise its proposal and allow such trading to occur between mass- and rate-based plans—including between states that submit their own implementation plans and between such states and states subject to a Federal Plan.

## **B. ERC Generation.**

### **1. EPA Should Clarify and Expand the Eligibility of Low- and Zero-Emitting Resources to Generate ERCs.**

LPPC opposes EPA's proposal that the types of low- and zero-emitting resources that would be eligible to generate ERCs under the Federal Plan would be significantly more restricted than the types of resources eligible to generate ERCs under the rate-based Model Trading Rule or under approvable state plans. Specifically, the rate-based Federal Plan co-proposal would limit ERC generation eligibility to new on-shore utility scale wind, utility scale solar photovoltaics, concentrated solar power, geothermal power, utility scale hydropower, and new nuclear units or capacity uprates.<sup>84</sup> On the other hand, under the rate-based Model Trading Rule, any low-or zero-emission resource that reduces generation from fossil fuel-fired EGUs may be eligible, with specific identification of: certain metered and non-metered distributed renewable generation, wave and tidal generation, demand side EE, combined heat and power (including waste heat power), waste-to-energy, transmission and distribution (T&D) efficiency, demand side management (e.g., demand response) that saves electricity,

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<sup>84</sup> Proposed Rule at 65,093 (“All categories of resources other than on-shore utility scale wind, utility scale solar photovoltaics, concentrated solar power, geothermal power, nuclear energy, or utility scale hydropower . . . are not available or applicable in States where this subpart has been promulgated as a federal plan pursuant to section 111(d)(2) of the Act.”).

off-shore wind, small hydroelectric, and certain qualified biomass, in addition to the resources outlined above.<sup>85</sup>

For states under a Federal Plan, EPA should issue ERCs to *all* resources that are eligible under the Model Trading Rule. Each of these resources, when properly accounted for, has the same impact on EGU emission rates. EPA has identified acceptable accounting methodologies as part of the rate-based Model Trading Rule. As such it should provide equal treatment to these resources under a Federal Plan.

In addition, for both any rate-based Federal Plan and the rate-based Model Trading Rule, EPA should identify and include a specific process for adding new eligible resource types and EM&V methodologies. This will facilitate the inclusion of new resource types that were not specifically identified in the Federal Plan or Model Trading Rule, with the potential to increase flexibility, lower compliance costs, and incentivize the development of new technology. In order to provide flexibility and lower compliance costs, LPPC urges EPA to develop a methodology for the inclusion of new resources that would not require a full rulemaking or a revision of an otherwise approved state or federal plan.

To the extent that EPA determines that the inclusion of demand-side EE measures cannot be included in the Federal Plan due to administrability concerns,<sup>86</sup> EPA should permit states to opt in to inclusion of EE in a Federal Plan. This flexibility would be similar to the method and legal basis on which EPA has proposed that states may issue partial state plans to establish alternative allowance allocation systems. Specifically, EPA should permit the issuance of ERCs to any end-use EE measure for which *the state* agrees to fulfill the administrative and other requirements necessary for issuance of ERCs, as outlined in the rate-based Model Trading Rule. State responsibilities would include the establishment of EM&V requirements, the approval of EM&V plans, and the issuance of ERCs for resources that submit monitoring and verification (M&V) reports consistent with those plans.<sup>87</sup>

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<sup>85</sup> Proposed Rule at 64,995; *id.* at 65,094 (40 C.F.R. § 62.16435(a)(4)); *id.* at 65,004 (distributed renewable generation); *id.* at 65,095 (T&D efficiency). Note that the description of resources eligible to generate ERCs under the rate-based Model Trading Rule is somewhat inconsistent between the Proposed Rule preamble and various proposed regulatory text provisions. As such, LPPC requests that EPA clarify that all of the above listed resources would be eligible to generate ERCs under the rate-based Model Trading Rule.

<sup>86</sup> See Proposed Rule at 64,994-95.

<sup>87</sup> See *generally* Proposed Rule at 64,999-65,001, 65,005-08. See also EPA, Draft Evaluation Measurement and Verification (EM&V) Guidance for Demand-Side Energy Efficiency (EE) (Aug. 3, 2015), [http://www2.epa.gov/sites/production/files/2015-08/documents/cpp\\_emv\\_guidance\\_for\\_demand-side\\_ee\\_-\\_080315.pdf](http://www2.epa.gov/sites/production/files/2015-08/documents/cpp_emv_guidance_for_demand-side_ee_-_080315.pdf).

## **2. All Non-Emitting Resources Should Be Eligible to Generate ERCs if Located in a Mass-Based State.**

Under the Clean Power Plan, only certain low- and non-emitting resources are eligible to generate ERCs if located in a mass-based state.<sup>88</sup>

LPPC objects to this provision. Allowing only certain low- and non-emitting resources located in mass-based states to generate ERCs is arbitrary and discriminates against forms of non-emitting generation that should have an equal place in assisting utilities to comply with the Clean Power Plan. EPA’s conclusory explanations for excluding these resources are unreasonable and do not support making a distinction between the various non- and low-emitting generation technologies. Therefore, EPA should revisit this issue in the context of the Proposed Rule and clarify that all resources that are eligible to generate ERCs in rate-based states are also eligible to generate ERCs in mass-based states as long as they can meet the specific requirements for resources in mass-based states (including showing that electricity was intended for consumption in a rate-based state).

## **3. Measuring Generation Eligible for ERCs.**

LPPC supports EPA’s requirement for the use of a revenue quality meter on RE projects for recognition of their generation in rate-based plans and in the CEIP. However, LPPC notes that EPA has not proposed how to measure generation from a nameplate capacity uprate, despite the fact that such generation is also eligible to earn ERCs. The revenue quality meter requirement does not apply to those potential generation sources of ERCs as the electricity from the uprate cannot be measured separately (because there is only one generator for a unit). The output of the generator will be measured using a “revenue quality meter.”

LPPC suggests EPA explicitly recognize the following formula to determine the share of generation eligible for ERCs due to a nameplate capacity uprate at an eligible resource:

$$\frac{(\text{capacity rating}_{\text{new}} - \text{capacity rating}_{\text{old}})}{\text{capacity rating}_{\text{new}}} \times \text{MWh}_{\text{year}} = \text{MWh eligible for ERCs}$$

Where  $\text{capacity rating}_{\text{old}}$  is the capacity rating of the nuclear or hydropower unit prior to the uprate,  $\text{capacity rating}_{\text{new}}$  is the capacity rating after the uprate, and  $\text{MWh}_{\text{year}}$  is the total number of megawatt hours generated by the unit in a calendar year.

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<sup>88</sup> See 40 C.F.R. § 60.5800(a)(3)(ii); *id.* § 60.5800(a)(4)(i) (the only resources located in mass-based states that are eligible to generate ERCs are “[r]enewable electric generating technologies using one of the following renewable energy resources: Wind, solar, geothermal, hydro, wave, [and] tidal”).

## **C. Additional ERC Issues.**

### **1. EPA Should Clarify That State Energy Officials Can Serve As Independent Verifiers.**

Both the rate-based Federal Plan co-proposal and the proposed rate-based Model Trading Rule would require that in order to be eligible to generate ERCs, project sponsors must have submitted an eligibility application that was verified by an accredited independent verifier.<sup>89</sup> Additionally ERCs may only be issued for MWh of generation (and in the case of the Model Trading Rule, energy savings) that have been verified by an accredited independent verifier.<sup>90</sup>

EPA has proposed a set of requirements for what entities can serve as accredited independent verifiers,<sup>91</sup> and requests comment on those requirements.<sup>92</sup> LPPC takes no position at this time on the general criteria for the accreditation of and conflicts of interest limitations on independent verifiers. However, LPPC urges EPA to make clear that relevant state agencies, commissions, or departments such as state energy offices or state public utility commissions, would presumptively be considered accredited independent verifiers. While EPA certainly cannot commandeer state officials in service of implementation of the Clean Power Plan (particularly under a Federal Plan), providing states with the *opportunity* to act as independent verifiers presents no constitutional concerns. In particular, state energy offices and public utility commissions are often already engaged in verification and certification of electricity generation and energy savings by entities within the state. Therefore, permitting these expert state agencies to serve as independent verifiers will reduce compliance costs for ERC issuance and facilitate certainty for those resources already undergoing state review.

### **2. EPA Should Revise Its Proposed ERC Buyer Liability Rules.**

The proposed rate-based Federal Plan and Model Trading Rule include the following provision: “If an affected EGU obtained sufficient facially valid ERCs to meet its emission standard, but those ERCs were found to be invalid, then it may be subject to federal enforcement as specified in paragraph (c)(5)(iii) of this section.”<sup>93</sup>

This provision is problematic because it is ambiguous as to what situations could lead to federal enforcement. Therefore, at a minimum, EPA should establish a clear rule for assigning liability for invalid ERCs. Furthermore, this language could be interpreted to place the onus on affected EGUs to verify the validity of each ERC they purchase.

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<sup>89</sup> Proposed Rule at 65,095 (40 C.F.R. § 62.16445(a)(6)).

<sup>90</sup> Proposed Rule at 65,095 (40 C.F.R. § 62.16445(d)).

<sup>91</sup> Proposed Rule at 65,100-01 (40 C.F.R. § 62.16470).

<sup>92</sup> Proposed Rule at 65,002.

<sup>93</sup> Proposed Rule at 65,092.

LPPC recommends that in clarifying this language, EPA make clear that EGUs would not be liable for ERCs procured from third parties that are later invalidated.<sup>94</sup>

Verifying the validity of every ERC purchased from a third party is likely to be a monumental task that would be impossible (because the data is not publicly available) or, at a minimum, administratively untenable. Moreover, because EGUs would have no direct control over ERCs issued by third parties, imposing liability on the EGU for the error or fraud of a third party could significantly discourage purchases of ERCs from third parties, significantly driving up the costs of compliance.

In addition, making affected EGUs liable for the after-the-fact invalidation of ERCs is not necessary to ensure the integrity of the program. Under the Clean Power Plan proposed Federal Plan, and Model Trading Rule, ERCs may only be issued after being reviewed and verified by a state regulatory agency or by EPA itself. Most ERC-eligible resources must also comply with stringent EM&V, M&V, and third-party verification rules. These provisions should provide ample assurance that each ERC issued under a state or federal program is valid. If, after complying with these EM&V and M&V requirements, third-party verification rules, and passing state or federal review, an ERC is subsequently found to be invalid, it should not be the responsibility of the affected EGU to make up for the fraud or mistake of the ERC project sponsor. Rather, EGUs should be entitled to assume that all ERCs approved by the state or EPA are valid and eligible for use in complying with the state or Federal Plan.

Therefore, EPA should revise these provisions of the proposed rate-based Federal Plan and Model Trading Rule to make it clear that EGUs will not be held liable for ERCs purchased from third parties that are later invalidated.

### **3. EPA Should Administer ERC Tracking Through Its Existing ATCS Operated by Clean Air Markets Division.**

EPA has proposed to operate a rate-based tracking system incorporated into ATCS.<sup>95</sup>

LPPC supports EPA development and operation of an ERC tracking system as part of ATCS. The use of ATCS, and operation of it by EPA's Clean Air Markets Division, will provide added confidence in the viability of ERCs as a reliable compliance tool. This will, in turn, lower compliance costs for rate-based states, reduce liability risks for ERC purchasers, and ensure that ERC generators receive appropriate compensation.

To that end, LPPC urges EPA to develop such a system regardless of whether it intends to issue a rate-based Federal Plan. This will provide important, presumptively

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<sup>94</sup> For ERCs generated by an owner or operator of the EGU itself, liability for invalidation appears to be a reasonable remedy in cases of fraud or mistake.

<sup>95</sup> Proposed Rule at 64,997.

approvable infrastructure that can be relied upon by states opting for a rate-based state compliance plan.

**VII. Conclusion**

EPA should incorporate the recommendations of LPPC and its members in the final version of the Proposed Rule. The proposed changes would substantially improve the final rule by tailoring building block emission reduction levels to each state's circumstances, providing states with additional time and flexibility in developing or changing their plans, and allowing regulated entities to comply in a manner that is technically feasible and consistent with their obligations to provide reliable and affordable electric service.

Sincerely,

A handwritten signature in black ink, appearing to read "JD", with a long horizontal flourish extending to the right.

John DiStasio, President  
Large Public Power Council