



November 1, 2016

U.S. Environmental Protection Agency
Attention Docket ID No. EPA-HQ-OAR-2016-0033
EPA Docket Center, U.S. EPA, Mailcode: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Clean Energy Incentive Program Design Details, Proposed Rule, Docket ID No. EPA-HQ-OAR-2016-0033, 81 Fed. Reg. 42,940 (June 30, 2016)

Dear Sir or Madam:

The American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Wood Council, Brick Industry Association, Corn Refiners Association, Council of Industrial Boiler Owners, Electricity Consumers Resource Council, National Association of Manufacturers, and U.S. Chamber of Commerce (collectively, “the Associations”)¹ appreciate the opportunity to submit the following comments on the Environmental Protection Agency’s (“EPA’s”) proposed Clean Energy Incentive Program Design Details, Docket ID No. EPA-HQ-OAR-2016-0033, 81 Fed. Reg. 42,940 (June 30, 2016) (“proposed CEIP”).

The Associations represent the nation’s leading energy and manufacturing sectors that form the backbone of the nation’s industrial ability to grow our economy and provide jobs in an environmentally sustainable and energy efficient manner. Significantly, the Associations both represent companies that generate electricity and are directly regulated by the Clean Power Plan and companies that require affordable and reliable energy to produce products critical to the success and growth of the American economy. Many of the Associations are among more than a hundred states, trade associations, and private petitioners challenging the legality of the Clean Power Plan in the D.C. Circuit, and believe that the Clean Power Plan is unlawful and should be set aside in its entirety. As EPA is aware, the Supreme Court has fully stayed the implementation of the Clean Power Plan. To the extent the courts ultimately uphold the legality

¹ A description of each Association is included in Appendix A.

of any aspect of the Clean Power Plan, the Associations have a strong interest in any proposals to implement the Clean Power Plan, including the proposed CEIP.

The CEIP, which is intended by EPA to encourage action in advance of the Clean Power Plan's initial 2022 compliance date, was one of the most significant new issues presented in the final Clean Power Plan. However, EPA continues to arbitrarily pick winners and losers among certain renewable energy and energy efficiency programs and ignores technologies and fuels that effectively reduce GHG emissions and are similarly situated to realize EPA's regulatory goals. The Associations accordingly have several concerns with the proposed CEIP. First, EPA lacks the authority to proceed to promulgate the CEIP at this time in light of the Supreme Court's stay of the Clean Power Plan, and EPA should cease any further work on the CEIP unless and until a potential scenario arises where the litigation process is complete and the stay is lifted. Further, all of the compliance deadlines in the Clean Power Plan and CEIP must be tolled by at least the length of the stay. *NRDC v. EPA*, 22 F.3d 1125, 1137 (D.C. Cir. 1994). In a scenario where the courts ultimately uphold some part of the Clean Power Plan and its compliance deadlines are appropriately tolled, the Associations believe EPA must at that time re-open this docket for post-litigation comments and must re-propose all aspects of the CEIP for public comment. Second, to the extent EPA moves forward with the CEIP, it must provide additional flexibility to allow market forces and state policies to determine the types of energy technologies that are used to comply with the Clean Power Plan's GHG emission reduction goals. Third, EPA must refrain from imposing unduly restrictive criteria to exclude energy technologies that have the potential to reduce GHG emissions in accordance with EPA's goals under the Clean Power Plan.

I. EPA Should Not Proceed with the CEIP Rulemaking While the Supreme Court Stay Is in Place

At the outset, given the pendency of the Supreme Court's stay of the Clean Power Plan, EPA should not have taken this action and must postpone any further action on the CEIP until the Clean Power Plan litigation has concluded. As an initial matter, the CEIP is fundamentally intertwined with the implementation of the Clean Power Plan, and development of the CEIP at this time would violate the Supreme Court's stay. Further, proceeding with the CEIP rulemaking at this time has the potential to waste the resources of both EPA and interested stakeholders as the outcome of the Clean Power Plan litigation may fundamentally alter how, if at all, the CEIP could be implemented.

The Supreme Court's decision to stay implementation of the Clean Power Plan in the midst of litigation before the D.C. Circuit is virtually unprecedented. The Supreme Court's stay demonstrates the strength of petitioners' arguments and raises a significant likelihood that the Clean Power Plan could be substantially altered—or even vacated entirely—after judicial review. Under these circumstances, it would be inappropriate for EPA to move forward with the CEIP at this time. As EPA acknowledges, the CEIP was first announced in the final Clean Power Plan, *see, e.g.*, 81 Fed. Reg. at 42,944, and this proposal is intended to provide additional details regarding implementation of the CEIP.² Because the CEIP was included in the final Clean

² As the Associations have explained in prior comments on the CEIP, EPA's inclusion of the CEIP in the final Clean Power Plan rule was unlawful because it was not a logical outgrowth of EPA's proposed rule. *See* EPA-HQ-OAR-2015-0734-0123, EPA-HQ-OAR-2015-0199-0898, The Associations continue to reserve the right to seek judicial

Power Plan, the Supreme Court's stay applies to the CEIP, and EPA must not take further steps to implement that program. Further, in any event, the CEIP is a voluntary compliance option designed specifically to be used by states to implement the Clean Power Plan. Because the CEIP is inextricably tied to implementation of the Clean Power Plan, the Supreme Court's stay of EPA action to implement the Clean Power Plan applies equally to the CEIP.

In addition to the pending stay, there are several scenarios in which the courts' ultimate resolution would lead to the Clean Power Plan being vacated or significantly altered. Thus, there is a significant likelihood that the CEIP would also have to be withdrawn or at a minimum revised substantially to comport with the courts' final decision regarding the legality of the Clean Power Plan. In fact, EPA acknowledges in the proposed CEIP that a supplemental rulemaking will be necessary at the conclusion of the Clean Power Plan litigation to, at a minimum, revise the relevant dates for the CEIP program to account for the passage of time under the Supreme Court's stay. 81 Fed. Reg. at 42,942. Under these circumstances, proceeding with the CEIP rulemaking is an inappropriate use of the limited resources of EPA, the States, and other interested stakeholders. Rather than proceeding based on the current structure of the Clean Power Plan, it is in the best interests of all parties to halt further action to implement the Clean Power Plan until after the Supreme Court stay has been lifted. Otherwise, if the courts ultimately uphold some element of the Clean Power Plan under which some aspect of the CEIP remains relevant, EPA and all interested stakeholders would have to engage in a new rulemaking process and expend additional rulemaking resources for a second time.

EPA asserts that it is necessary to complete the CEIP now so that states seeking to move forward with implementation plans can incorporate the CEIP program into their SIPs.³ However, for these states such direction is even more troublesome, since they would potentially have to rewrite their entire SIPs after the final Clean Power Plan decision is issued. Thus, rather than completing additional rulemakings to encourage such States to proceed with implementation of the Clean Power Plan during a judicial stay and further review, EPA should recognize the significance of the Supreme Court stay and (1) halt all action to implement the Clean Power Plan (including finalizing the CEIP rule) and (2) encourage states to delay action to implement the Clean Power Plan until litigation is complete and the courts have spoken with finality. To act otherwise and continue rulemakings to implement the Clean Power Plan violates the Supreme Court's stay and encourages states to spend limited resources to implement EPA programs that should be deferred in light of the Supreme Court stay and that face serious legal challenges that may well make any implementation actions obsolete.

review of all aspects of the CEIP, including EPA's failure to follow statutory procedures when adopting the CEIP program.

³ For similar reasons, we disagree with EPA's assertion that the CEIP is relevant to a Federal Implementation Plan ("FIP") at this time. EPA cannot issue a FIP unless a state fails to submit a State Implementation Plan ("SIP") or submits a SIP that is disapproved by EPA. As noted above, the stay of the Clean Power Plan requires that the rule's SIP submission deadlines be tolled by at least the length of the stay, *NRDC*, 22 F.3d at 1137. Should the Clean Power Plan be upheld, we reserve the right to challenge any aspect of a FIP that is issued by EPA in the future—including EPA's proposed inclusion of the CEIP—and to challenge any compliance deadlines that are not appropriately tolled in light of the stay.

II. If EPA Inappropriately Proceeds with the CEIP Rulemaking, It Should Provide Additional Flexibility for Early Action

EPA's originally stated goal of using an early action incentive program to reduce costs for meeting the Clean Power Plan's aggressive targets would be better achieved by allowing for more flexibility in the types of projects that can qualify for the CEIP. As EPA explained in the Clean Power Plan:

[T]he overall cost of achievement of the emission performance rates or state goals could be reduced by an approach that granted some form of beneficial recognition to emission reduction investments that both occur and yield reductions prior to the first date on which the program of the interim plan performance period.

80 Fed. Reg. at 64,831; *see also* 81 Fed. Reg. at 42,944. EPA went on to assert that an early incentive program could (1) reduce energy bills through early application of energy saving technologies, (2) accelerate the rate at which costs of energy efficiency and renewable energy technologies will fall during the interim compliance period, and (3) provide additional emission reduction resources to aid in achieving state plan obligations. 80 Fed. Reg. at 64,832.

In a scenario where the courts ultimately uphold the Clean Power Plan in a manner that allows for its implementation, a properly designed and implemented early action incentive program has the potential to provide important benefits for compliance, both by promoting the development of technologies that can reduce net GHG emissions and by providing early reductions in GHG emissions that can be banked for compliance at a later date. At the same time, however, it is imperative that any early action incentive program avoid unnecessary distinctions between the many CO₂ reducing technologies and sources of energy that are available to comply with the Clean Power Plan and instead allow market forces (and state-driven policy choices) to dictate the types of programs that should be used in each state to comply with the Clean Power Plan's emission reduction goals. Any program where EPA arbitrarily picks winners and losers and thus limits access to compliance incentives among similarly effective options would be inconsistent with EPA's stated goal of providing maximum flexibility to the states and realizing cost-effective GHG reductions from a diverse group of programs. Thus, while the Associations support the concept of increased flexibility and allowance of early action to be recognized in the event that ultimate compliance with the Clean Power Plan is necessary, significant changes are needed to the proposed CEIP to expand the scope of the program to increase accessibility for all CO₂ reducing technologies and sources of energy.

III. EPA Must Not Restrict Technologies and Sources of Energy that Are Eligible for Participation in the CEIP

The proposed CEIP fails to provide states with sufficient flexibility because it applies to only a portion of the strategies that can contribute to compliance with the Clean Power Plan. Specifically, EPA proposes to limit CEIP eligibility to facilities that "generate wind, solar, geothermal, or hydropower [renewable energy] resources" 81 Fed. Reg. at 42,981 (proposed 40 C.F.R. § 62.16435). While the Associations support EPA's proposal to expand CEIP eligible sources to include geothermal and hydropower facilities, this change does not go far enough. From a compliance perspective, the goal of the CEIP and Clean Power Plan implementation

plans generally should be to promote efficient, least-cost, and flexible approaches to achieving EPA's emission reduction goals without discriminating among different types of programs and energies and without imposing other externalities and impacts on the power delivery system such as lower reliability. As it stands, EPA's proposed preference to grant early action credit only for specific types of resources while excluding others is inconsistent with this goal and results in arbitrary decision making inconsistent with the goals of the program. Thus, rather than limiting early action incentives to some technologies and energy sources, while excluding others, EPA must create a level playing field by making the CEIP available to all technologies and energy sources that can reduce net GHG emissions from the electricity sector, including, but not limited to, other forms of renewable energy identified in the Clean Power Plan, energy efficiency measures, and other forms of electricity generation that can help achieve compliance with state emission reduction goals, such as natural gas, nuclear, CHP, biomass, and waste heat power. Such an approach would help ensure that states have maximum flexibility to design implementation plans that are best suited to their own economic, energy, and environmental conditions.

Further, EPA's proffered justifications for limiting the scope of the CEIP do not withstand scrutiny. In the proposal, EPA includes geothermal and hydropower facilities because they "are capable of contributing to long-term climate change strategies, and can be implemented on the time-scales relevant to the CEIP." 81 Fed. Reg. at 42,965. There is no reason to believe that these are the only two additional types of energy that can meet those two criteria. EPA goes on to solicit comment on whether other additional technologies meet the following criteria for CEIP eligibility: (1) produce zero emissions, (2) are "essential to longer term climate strategies," (3) "require investment and deployment lead times of relatively short duration given the time-limited nature of the CEIP," and (4) "counteract the potential shift from [renewable energy] to natural gas." 81 Fed. Reg. at 42,965. These criteria are either improper for an early incentive program or can be met by more energy sources than those included in the proposed CEIP.

First, in light of the GHG emission reduction goals of the Clean Power Plan, there is no need to limit the CEIP program to those energy sources deemed "zero emitting." EPA should give the states full flexibility to include in early action programs other grid-connected power generation sources, or electric power transmission and distribution technologies that reduce net CO₂ emissions as part of a state's long-term strategy to comply with the Clean Power Plan's emission reduction goals.

Second, as EPA recognized in the Clean Power Plan, there are a number of non-BSER emissions reduction strategies that States can employ to meet the longer-term emission reduction goals set by EPA in the Clean Power Plan. 80 Fed. Reg. at 64,755-58. Having recognized that these energy sources may be employed by states to comply with the Clean Power Plan, there is no reason to exclude them from the CEIP. Instead, EPA should allow states full flexibility to include any emission reduction strategy that can assist in achieving compliance with the Clean Power Plan.

Third, there is no reason for EPA to arbitrarily limit the technologies eligible for inclusion in the CEIP based on the Agency's preconceived notions of the time needed to design and implement various emission reduction projects. The CEIP should be available to any emission reduction project that can be implemented prior to the conclusion of the CEIP (a date

that must be extended due to the stay of the Clean Power Plan). Eliminating this criterion will spur investment in emission reduction technologies by giving all project sponsors the same incentive to complete new projects within the CEIP's time constraints.

Fourth, it is inappropriate for EPA to structure the CEIP in a manner that picks winners and losers among different energy sources. The CEIP promotes certain energy sources for compliance with its environmental regulations, while excluding others, going far beyond EPA's statutory authority.⁴

Therefore, consistent with the Administration's "all of the above" energy strategy, EPA should recognize and promote all fuels and forms of electricity generation that facilitate real emissions reductions and should make the CEIP broadly applicable to all CO₂ reducing technologies and energy types, and let market conditions dictate the types of technologies that can be deployed to provide net emission reductions prior to the start of the compliance period for the Clean Power Plan.

CONCLUSION

For the reasons described above, and subject to the caveats aforementioned, EPA cannot proceed at this time given the pendency of the Supreme Court stay, and it is essential that EPA defer further action on the CEIP until after the Clean Power Plan litigation is complete. However, to the extent that EPA takes further steps regarding the CEIP, it must give maximum flexibility to the states and must not exclude any emission reduction activity that has the potential to reduce net CO₂ emission and help states achieve the Clean Power Plan's emission reduction goals.

Respectfully submitted,

American Chemistry Council

American Forest & Paper Association

American Fuel & Petrochemical Manufacturers

American Petroleum Institute

American Wood Council

Brick Industry Association

Corn Refiners Association

Council of Industrial Boiler Owners

Electricity Consumers Resource Council

National Association of Manufacturers

U.S. Chamber of Commerce

⁴ According to the Energy Information Administration, natural gas fired generation is responsible for significant CO₂ emissions reductions to date in the power sector, which is a trend that should not be impeded by this rule.

Appendix A

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$812 billion enterprise and a key element of the nation's economy.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (AFPM) is a national trade association representing nearly 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Petroleum Institute** (“API”) represents over 630 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources to meet consumer needs.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately 400,000 men and women in family-wage jobs.

The **Brick Industry Association** (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Corn Refiners Association** (“CRA”) is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Electricity Consumers Resource Council** (“ELCON”) is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of industrial commodities and consumer goods from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities in all regions of the United States. Many ELCON members also cogenerate electricity as a by-product to serving a manufacturing steam requirement.

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **U.S. Chamber of Commerce** (the “Chamber”) is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.