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The Clean Power Plan, released by the EPA in August, aims to move the U.S. away from fossil fuel-fired power plants to cleaner-burning natural gas-fired facilities and renewable energy sources. While there are many ways to achieve this, the final rule includes a new program, the Clean Energy Incentive Program, designed to incentivize near-term development of renewable energy sources and certain demand-side energy efficiency projects. Also known as the CEIP, the program will reward developers that are able to complete certain eligible renewable energy or energy efficiency projects before Clean Power Plan restrictions go into effect in 2022.

Annemargaret Connolly and Thomas D. Goslin of Weil, Gotshal & Manges, LLP, note that while the EPA still hasn't issued final rules governing the CEIP, the Clean Power Plan includes a general description of the energy incentive program, as well as details on how the agency expects it to operate. Since the EPA has said it will seek comment on how the CEIP can best be structured, now is the time for project developers and industry participants to jump in and provide the agency with the input it needs to structure the program and to ask the questions they need answers to, they say.

Can EPA's Clean Energy Incentive Program Spur Growth in Renewable and Efficiency Projects?

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On Aug. 3, the Environmental Protection Agency released its final rule regulating emissions of carbon dioxide from certain existing power plants. The rule, known as the Clean Power Plan, is the pièce de ré-

sistance of President Obama's Climate Action Plan, which the administration developed to combat climate change through a series of regulatory and executive actions aimed at cutting greenhouse gas emissions and promoting renewable energy development. When fully implemented, the EPA estimates that the Clean Power Plan will result in a 32 percent reduction in carbon di-

oxide emissions from the electric power sector, the nation's largest source of carbon emissions, when measured against 2005 levels.

To achieve targeted reductions in carbon dioxide emissions, the Clean Power Plan calls for substantial changes in how electricity is generated in the U.S., moving the country away from coal- and oil-fired power plants and toward cleaner-burning, natural gas-fired plants and renewable sources. There are many ways in which the final rule aims to promote this shift, including a new program—one that had not been included in the draft rule released in 2014—that seeks to incentivize near-term development of renewable energy sources and certain demand-side energy efficiency projects.

This program, known as the Clean Energy Incentive Program (CEIP or program), will reward developers that are able to complete certain eligible renewable energy or energy efficiency projects before the Clean Power Plan restrictions first go into effect in 2022. The reward will take the form of credits that can be used by, or sold to, power plants that are regulated under the new rule. The extent of this reward and certain project eligibility requirements remain unclear because the EPA has not yet finalized the CEIP regulations.

That said, the EPA's final rule includes a general description of the CEIP, including important details on how the agency envisions the incentive program operating. The EPA also has committed to engage with stakeholders in the coming months to solicit input on how the program can best be structured before finalizing the CEIP in a subsequent action. Therefore, project developers and industry participants need to understand the CEIP framework set forth in the final rule and how the CEIP fits into the larger Clean Power Plan to be in a position to participate in upcoming opportunities to shape, and ultimately take advantage of, the final CEIP program.

Overview of the Clean Power Plan

To understand how the CEIP might affect demand for renewable and energy efficiency projects, it is necessary to understand the basic mechanics of the Clean Power Plan as a whole. The final rule, totaling 1,560 pages before appendices and exhibits, is exceedingly complicated; but, fundamentally, the rule requires states to reduce carbon dioxide emissions from fossil fuel-fired power plants consistent with state-specific levels established by the EPA.

The Clean Power Plan suggests approaches—referred to in the rule as “building blocks”—that states can employ to meet these standards, which include improving efficiency at coal-fired power plants, bringing more natural gas combined cycle power plants online and increasing use of renewable energy sources. States generally are free to adopt whatever measures they choose, so long as those measures result in reductions in carbon dioxide emissions that meet or exceed the standards set forth by the EPA.

States have until Sept. 6, 2016, to submit plans for achieving these required emissions reductions, though states may request extensions of up to two years if they need additional time, so long as states submit an initial filing by the 2016 date summarizing their plans for

complying with the final rule.¹ These plans must set forth in some specificity how that state will achieve required emissions-reduction targets that the EPA established for every state. The EPA anticipates that states will attempt to meet emissions-reduction targets by retiring old, inefficient power plants; developing new renewable energy sources; generating more electricity from cleaner natural gas-fired plants; and reducing demand for electricity in their states. If a state fails to submit a plan, or if the plan submitted by the state is not approved by the EPA, then regulated power plants in that state will become subject to a federal plan currently being developed by the EPA.

For purposes of understanding how the CEIP will work, it is important to understand that the Clean Power Plan generally allows states to establish carbon dioxide emissions-reduction standards using one of two different methods: (1) a rate-based standard, which limits the amount of carbon dioxide that can be emitted per megawatt-hour of electricity produced in the state; or (2) a mass-based standard, which limits the total amount of carbon dioxide that can be emitted during the compliance period.

No matter which standard of measurement a state employs, however, the actual carbon dioxide emissions-reduction requirements are the same. Different standards of measurement allow for different methods of achieving compliance. For example, a state using a cap-and-trade program, where the total amount, or mass, of carbon dioxide emitted during a compliance period is capped, probably would use a mass-based standard to measure progress, whereas a state that planned to achieve compliance by upgrading existing power plants and bringing online significant renewable generating capacity, which would reduce the average amount of carbon dioxide emitted per megawatt-hour, might elect to use a rate-based measurement. But no matter how emissions are measured, states are responsible for meeting the EPA-determined emissions-reduction goals. Importantly, for purposes of understanding the CEIP program, it is generally presumed that nearly every state plan will make use of some type of credit trading program—whether it be under a mass-based cap-and-trade program or a rate-based emissions-reduction credit scheme—to meet these goals.

The Clean Power Plan requires every state to meet two carbon dioxide emissions-reduction targets, which are stated both in rate-based and mass-based terms in the rule. The first is an interim target that the state must achieve during a phase-in period that takes place from 2022 through 2029. During this eight-year phase-in period, the average amount of carbon dioxide emitted must be at or below the EPA-set standard. States must then meet a final, lower, standard by 2030, which applies from that point forward. The goal of the phase-in period is to provide states with ample time to achieve mandated carbon dioxide emissions reductions while still requiring states to demonstrate that they are making progress toward meeting the final goals.

¹ The EPA did not establish standards for Vermont or the District of Columbia because there are no regulated power plants in those jurisdictions. The EPA also determined that Alaska, Hawaii, Guam and Puerto Rico are not required to submit state plans at this time because the EPA lacked sufficient information to quantify emissions-reduction targets for those jurisdictions at this time.

The interim compliance period in the final rule differs from what was proposed in the draft Clean Power Plan released in 2014. Under the proposed rule, the phase-in period was to run from 2020 through 2029; however, in response to comments from states, EPA pushed back the start date by two years to give states more time to implement emissions reduction plans. While delaying implementation of the first compliance period gives states the additional time they requested, it raised concerns among some that carbon dioxide reduction efforts would be put on hold until 2022. There also was some concern that the shortened phase-in period would cause states to focus investments on natural gas-fired generation at the expense of renewable energy development, and the EPA has made it clear that it is a priority to drive widespread development and deployment of renewable energy technologies through implementation of the Clean Power Plan. In an attempt to address those concerns, the EPA came up with the concept of the CEIP.

Overview of the CEIP

While the CEIP remains a work in progress, the Clean Power Plan sets forth a basic framework for how the program can incentivize early investments in renewable energy or energy efficiency projects. As noted above, the Clean Power Plan generally assumes that most states will employ some form of credit trading to facilitate compliance with emissions reduction goals. Under the CEIP, the EPA will provide additional credits to developers of certain types of renewable and energy efficiency projects. Specifically, under the CEIP, a developer of an eligible solar or wind power project will receive one emissions-reduction credit from the state and one matching credit from the EPA for every 2 megawatt-hours that the project generates in 2020 or 2021.

Certain energy efficiency projects can generate twice that amount. The CEIP will grant developers one credit from the state and one matching credit from the EPA for every single megawatt-hour in end-use savings achieved in 2020 or 2021 by demand-side energy efficiency projects (e.g., energy efficient lighting and HVAC retrofits) that are performed in low-income communities.

In states that design compliance programs that make use of emissions-reduction or similar credits, these credits can be sold to regulated entities that may need them to meet compliance obligations under state plans. Depending on how these compliance programs are structured, and the difficulties faced by regulated entities in achieving compliance with Clean Power Plan requirements, the value of such credits could be substantial.

Under the CEIP, the EPA will provide matching credits up to an amount that represents the equivalent of 300 million short tons of carbon dioxide emissions. These credits will be tailored to work within the state programs, regardless of whether they are using rate-based or mass-based standards. The EPA indicated in the final rule that it intends to reserve a portion of this pool for eligible wind and solar projects, and a portion for low-income energy efficiency projects; however, the EPA has not yet determined how the pool will be divided.

The EPA noted in the final rule that the size of the credit pool effectively represents twice the amount of

carbon dioxide reductions that could be achieved by new solar- and wind-energy projects over a two-year period, based on recent solar and wind installation trends and average capacity factors. This may suggest that the EPA intends to divide the credit pool relatively evenly between renewable and energy efficiency projects, perhaps allocating slightly more credits for renewable energy projects to account for improvements in technology.

Project Eligibility for CEIP Credits

For renewable energy and energy efficiency projects to qualify for credits under the CEIP, the Clean Power Plan sets forth certain requirements that such projects must meet.

- First, only onshore wind and solar energy projects are eligible to participate in the CEIP. The EPA chose to limit the incentive to solar and onshore wind projects because the technology is proven and these projects often require shorter lead times than other, less mature technologies, which would allow these projects to generate megawatt-hours beginning in 2020.
- Second, the project must be located in, or benefit, a state that elects to participate in the CEIP. It is important to underscore that this is a voluntary program and that states must affirmatively elect to participate in the CEIP in their final Clean Power Plan compliance plans. If a state fails to submit a valid compliance plan by the deadline, however, projects performed in that state may be eligible to participate in the CEIP under the federal plan that will apply to such states.
- Third, renewable energy projects will not be eligible for credits under the CEIP unless they commence construction in, or for the benefit of, a state after that state submits a valid compliance plan or, for states that do not submit a plan, after Sept. 6, 2018 (the final deadline for states to submit plans). This creates a potentially narrow window for renewable energy developers to construct projects so that they are operational in time to take advantage of the program. Energy efficiency projects commenced before these dates also will not be eligible for credits under the CEIP.
- Fourth, renewable energy and energy efficiency projects will need to generate metered megawatt-hours or result in quantified and verified electric savings, respectively, in 2020 or 2021.
- Finally, demand-side energy efficiency projects will only be eligible if conducted in low-income communities.

Importantly, the EPA is not requiring that projects demonstrate to states that they are “additional” relative to a business-as-usual baseline in order to be eligible to participate in the CEIP.

State Eligibility to Participate in CEIP

States interested in participating in the CEIP also must meet certain requirements. Such states must include in their first submittals, due on Sept. 6, 2016, a nonbinding statement of intent to participate in the program, regardless of whether that submittal details a final plan or seeks an extension for doing so. The final

rules require a state to include in its first submittal either a detailed description of how the state intends to implement the CEIP program and a statement authorizing its affected power plants to use credits generated under the program to meet compliance obligations, or, at a minimum, a nonbinding statement of intent to participate in the program and a commitment to revise its plan to include the required additional details at a later date. By allowing states to include a nonbinding statement of intent to participate in the CEIP in their initial submittals, the EPA is providing states with additional time to assess the CEIP, which is important given that it is possible that the details of the program may not be finalized until after the initial submittal is due.

If a state elects to participate in the CEIP, its final plan will need to detail how the state will implement certain CEIP requirements. For example, the plan must describe how the state will evaluate project proposals from eligible projects providers; how it will monitor and verify the renewable energy, or energy savings, generated by an eligible project; how it will issue credits to eligible projects; and how it will ensure that no renewable generation or energy savings receives early action or matching credits more than once. In addition, for a state plan incorporating the use of credits to be approved by the EPA, the plan must use an EPA-approved tracking system for credits, which has yet to be developed. For developers looking to take advantage of the CEIP program, it will be critical to engage soon with state policy makers to determine whether and how the state intends to participate in the program.

Implementation of the CEIP

According to the Clean Power Plan, once the EPA approves a final state plan that includes all the necessary requirements for implementing the CEIP, the EPA will create an account of matching credits for the state that reflects its pro rata share of the 300 million short ton carbon dioxide emissions-equivalent matching pool that the state is eligible to receive. That share will be determined by the EPA based on the amount of the carbon dioxide emissions reductions the state is required to achieve relative to other CEIP-participating states. This means states that are required to achieve a greater reduction in carbon dioxide emissions from power plants in their states will be entitled to secure a larger proportion of federal matching credits for eligible projects. The EPA plans to allocate all federal matching credits by Sept. 6, 2018, though it is unclear how this affects states that receive extensions and are not required to submit final compliance plans until the date. To the extent that some states elect not to participate in the CEIP and there are matching credits that remain in the pool after Sept. 6, 2018, the EPA suggests that such credits may be distributed to those states with approved state plans that include requirements for CEIP participation.

States participating in the CEIP also will need to establish pools of credits that can be issued to eligible projects. While many of the specifics concerning state implementation remain unclear, the EPA makes it very clear that the design of the CEIP can have no impact on the aggregate reductions in carbon dioxide emissions required under the Clean Power Plan. The 300 million short ton pool established by the EPA, and any credit pool established by the states, will not constitute credits for emissions beyond those permitted during the compliance periods.

In essence, states will be required to issue credits from compliance programs established for the 2022-2029 interim compliance period to reward projects for benefits realized in 2020 and 2021. In theory, this should have little impact on regulated power plants in states that participate in the CEIP, as the same number of credits will be available to meet compliance obligations, regardless of when they were issued. So it does not appear that states would be prohibited under the CEIP from issuing state credits to renewable and energy efficiency project developers beyond those that are eligible for matching from the EPA pool. If that remains the case under the final CEIP rules, then the number of state credits made available for early action could impact the availability of such credits for similar activities later, during the interim compliance period.

What Comes Next?

The EPA has committed to engaging with stakeholders in the coming months to seek comment on the design and implementation of the CEIP. Developers of renewable energy and energy efficiency projects, and other industry participants, should consider taking advantage of this opportunity to provide the EPA with input on the program, as many open issues remain. EPA will need to provide clarity on questions such as:

- Will there be sufficient time from the date the states submit final compliance plans for developers to construct projects so that they are operational by 2020 or 2021?
- What constitutes the commencement of project construction and will developers that obtain required permits or enter into purchase agreements for equipment prior to the date the relevant state submits its final plan be eligible to participate in the CEIP, or will such activities constitute “construction”?
- What constitutes a “low-income community” for purposes of receiving credits for demand-side energy efficiency projects?
- How much of the federal credit pool will be allocated to renewable energy and energy efficiency projects?
- What does it mean for an out-of-state renewable energy project to “benefit” another state such that the project is eligible for CEIP credits in that state?
- Will the EPA be able to finalize the CEIP rules before the first state submittals are due next year?

In addition, stakeholders should consider engaging with policy makers in the states where they do business to confirm whether that state intends to participate in the CEIP program. Many states have already begun to develop plans to meet Clean Power Plan requirements, and while decisions concerning CEIP participation are unlikely to be imminent, states, much like the EPA, have been seeking input from affected groups on how best to design compliance plans.

Moreover, given the requirement that CEIP-eligible projects cannot commence construction until a final state compliance plan is submitted to the EPA, project developers and other industry participants would benefit from early submission of those plans. Understanding where states are in the process of developing Clean

Power Plan compliance plans may help project developers better understand how best to position themselves to take advantage of CEIP incentives.

While much remains unknown about how the CEIP ultimately will be implemented, information provided by the EPA to date suggests that the program could provide a meaningful incentive for renewable and energy efficiency project developers to undertake new projects in participating states. And while project developers may need to wait several years before they can reap the rewards of the CEIP, now is the time for developers and other stakeholders to engage the EPA and state policy makers to ensure that the program is designed and implemented in such a way as to achieve the Clean Power Plan's goals of increasing early investment in re-

newable energy and energy efficiency to reduce carbon dioxide emissions in the U.S.

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