

The EPA Administrator, E. Scott Pruitt, signed the following notice on 3/28/2017, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>). Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 60**

[FRL-XXXX-XX-XXX]

### **Withdrawal of Proposed Rules: 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; and Clean Energy Incentive Program Design Details**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Withdrawal of Proposed Rules

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is withdrawing the October 23, 2015 proposals for a federal plan to implement the greenhouse gas (GHG) emission guidelines (EGs) for existing fossil fuel-fired electric generating units (EGUs), for model trading rules for implementation of the EGs, and for amendments to the Clean Air Act (CAA) 111(d) framework regulations, and the June 30, 2016 proposed rule concerning design details of the Clean Energy Incentive Program (CEIP).

**DATES:** The proposed rule published on October 23, 2015 entitled “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.” 80 FR 64966, and the proposed rule published on June 30, 2016 entitled “Clean Energy Incentive Program Design Details,” 81 FR 42940, are withdrawn as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

1. Background

On October 23, 2015, EPA published final carbon dioxide EGs under CAA 111(d) for existing EGUs, entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 FR 64662 (October 23, 2015) (Clean Power Plan or CPP). On the same date, in connection with the CPP, EPA published a proposed rule for a federal plan to implement those guidelines, for model trading rules to aid implementation of the guidelines, and for amendments to the existing framework regulations implementing CAA 111(d) “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.” 80 FR 64966 (October 23, 2015) (the October 2015 Proposed Rule). Subsequently, on June 30, 2016, EPA published proposed design details of the Clean Energy Incentive Program (CEIP), an optional program that States could use to incentivize early emission reduction projects under the CPP. “Clean Energy Incentive Program Design Details,” 81 FR 42940 (June 30, 2016) (CEIP Proposed Rule). The EPA never finalized the October 2015 Proposed Rule or the CEIP Proposed Rule, and is not doing so today. Instead, it is withdrawing them both.

The CPP was promulgated under Section 111 of the CAA. 42 U.S.C. 7411. Section 111 of the Clean Air Act authorizes the EPA to issue nationally applicable New Source Performance

Standards (NSPS) limiting air pollution from “new sources” in source categories that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. Section 7411(b)(1). Under this authority, the EPA had long regulated new fossil fuel-fired power plants to limit air pollution other than carbon dioxide, including particulate matter (PM); nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>). See 40 CFR Part 60 subparts D, Da. In 2015, the EPA issued a rule that for the first time set carbon dioxide emissions limits for new fossil fuel-fired power plants. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (New Source Rule), 80 FR 64510 (October 23, 2015). Under certain circumstances, when the EPA issues standards for new sources under Section 111(b), the EPA has the authority under Section 111(d), to prescribe regulations under which each State is to submit a plan to establish standards for existing sources in the same category. The EPA relied on that authority to issue the CPP, which for the first time required States to submit plans specifically designed to limit carbon dioxide emissions from existing fossil fuel-fired power plants.

Due to concerns about EPA’s legal authority and record, 24 States and a number of other parties sought judicial review of the New Source Rule in the U.S. Court of Appeals for the District of Columbia. *State of North Dakota v. EPA*, No. 15-1381 (and consolidated cases) (D.C. Cir.). Similarly, due to concerns about EPA’s legal authority and record, 27 States and a number of other parties sought judicial review of the CPP in the D.C. Circuit. *State of West Virginia v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.). On February 9, 2016, the Supreme Court stayed implementation of the CPP pending judicial review. Oral argument in the D.C. Circuit in *North Dakota* is currently scheduled for April 17, 2017. Following full merits briefing,

oral argument in *West Virginia* was held before the D.C. Circuit, sitting *en banc*, on September 27, 2016. Both challenges to these rules are pending in the D.C. Circuit.

## 2. Energy Development Executive Order and Other Related Notices

On March 28, 2017, President Trump issued an Executive Order establishing a national policy in favor of energy independence, economic growth, and the rule of law. The purpose of that Executive Order is to facilitate the development of U.S. energy resources and to reduce unnecessary regulatory burdens associated with the development of those resources. The President has directed agencies to review existing regulations that potentially burden the development of domestic energy resources, and appropriately suspend, revise, or rescind regulations that unduly burden the development of U.S. energy resources beyond what is necessary to protect the public interest or otherwise comply with the law. The Executive Order also directs agencies to take appropriate actions, to the extent permitted by law, to promote clean air and clean water while also respecting the proper roles of Congress and the States. This Executive Order specifically directs EPA to review and, if appropriate, initiate proceedings to suspend, revise or rescind the CPP.

In EPA's notice announcing the initiation of its review of the CPP, EPA states that, if its review concludes that suspension, revision or rescission of the CPP may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law.

## 3. Why is the EPA withdrawing the October 2015 Proposed Rule and the CEIP Proposed Rule?

The Executive Order directs the EPA to review the October 2015 Proposed Rule and, if appropriate, as soon as practicable and consistent with law, consider revising or withdrawing the October 2015 Proposed Rule. In anticipation of the Executive Order, the EPA had already begun a review of both the October 2015 Proposed Rule, and of the CEIP Proposed Rule, which proposes implementation details for a program that is directly connected to the CPP. In light of the policies set forth in the Executive Order and the Agency's concurrent notice initiating a review of the CPP, EPA has decided to withdraw the Proposed Rules, for the reasons discussed below.

At this time, the EPA is not under an obligation to finalize these rulemakings, nor is there a time-sensitive need for them given the Supreme Court stay of the CPP. The October 2015 proposal and the CEIP proposal were issued at EPA's discretion to implement the 2015 CPP. First, the proposed model trading rules were designed to provide a sample for States wishing to adopt a trading program to implement the CPP. It was the CPP, however, that was designed to establish the binding requirements for state action, while the purpose of the proposed model rules was to give states examples of how to design an approvable program. While model rules may be helpful, they are not required under the CAA. Second, under the Clean Air Act's principles of cooperative federalism, hopefully a federal plan will never be needed to implement Section 111(d) emission guidelines, and a federal plan certainly is not statutorily required early in the implementation process, when the Agency's focus is to assist States in developing approvable state plans. Finally, the CEIP proposal provides details for a voluntary program that was designed to help States and tribes meet their CPP goals by removing barriers to investment in energy efficiency in low-income communities and encouraging early investments in zero-emitting renewable energy generation. The CEIP is not required by the CAA. Furthermore,

because the energy markets continue to change, the appropriateness of the details of the CEIP proposal are dependent on projected market conditions during the time period when it would apply. Changes in CPP compliance dates, including state plan submission dates, would likely necessitate a re-evaluation of the CEIP proposal details.

When EPA initially made these proposals, it assumed that States needed immediate guidance to develop state plans because EPA had set state plan submission dates starting in September 2016. EPA also wanted to be prepared to institute a federal plan immediately if a State missed its submission date. Given the Supreme Court's stay of the CPP, however, the CPP compliance dates must be reviewed. Indeed, the first state plan submission date has already passed, and other compliance dates are likely to pass while the Supreme Court stay is pending. Further, under the Supreme Court's stay of the CPP, States and other interested parties have not been required nor expected to work towards meeting the compliance dates set in the CPP. Thus, as the EPA conducts its review of the CPP and decides what further action to take on the EGU emission guidelines, EPA will ensure that any and all remaining compliance dates will be reasonable and appropriate in light of the Supreme Court stay of the CPP and other factors. Further state action will not be required unless and until there is resolution of the pending litigation or the EPA issues new EGU emission guidelines. This gives the EPA time to re-evaluate these CPP-related proposals.

The EPA believes it should use this time to re-evaluate these CPP-related proposals and, if appropriate, put out re-proposals or new proposals to ensure that the public is commenting on EPA's most up-to-date thinking on these issues. There are a number of reasons why these proposals may ultimately not reflect the Agency's reasoned policy decisions reflecting both the current state of the energy market and the agency's operative understanding of its statutory

authority. First, the Agency has announced that it is reviewing and, as appropriate, may suspend, revise or rescind the CPP. Though our review of the CPP is ongoing and any final decision to suspend, revise or rescind it will be made only after EPA has provided notice and an opportunity for public comment, it is possible that the CPP as promulgated in 2015 will be rescinded and that new emission guidelines, if any, for existing EGUs will be different from the CPP. Because the CPP-related Proposed Rules are designed to provide implementation details related to the specific requirements of the CPP, any changes to the CPP or new emission guidelines would most likely require changes to these CPP-related proposals. Thus, this preliminary action to withdraw these CPP-related proposals will allow EPA to review them in light of its review of the CPP and, if they are still needed, to determine the appropriate next steps for these proposals, which may be to develop new proposals with revisions to ensure they are consistent with and appropriately implement revised emission guidelines, if any. Second, whether or not the EPA makes any changes as a result of its review of the CPP, it is appropriate for the EPA to re-evaluate the proposals in light of the policies set forth in the Executive Order and ensure that what the Agency proposes and seeks public comment on has been developed or reviewed in light of those policies.

As a final point, we want to be clear that our withdrawal of these proposals is not based on any final substantive decision that we have made with respect to these proposals. We are withdrawing these proposals for the procedural reasons that we have discussed above to promote the EPA's review of the CPP and future rulemaking process, and ensure that interested parties have a full opportunity to comment on proposals that reflect the Agency's most up-to-date and relevant thinking. Thus, for the reasons stated above, EPA concludes that, at this time, it is appropriate to withdraw the October 2015 Proposed Rule and the CEIP Proposed Rule. The

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EPA intends to review these proposals in conjunction with its comprehensive review of the CPP. Based on that review, the Agency will determine how best to proceed, which may include the development of new proposals consistent with the requirements of CAA Section 307(d).

4. Statutory Authority

Pursuant to CAA Section 307(d)(1)(V), the Administrator is determining that this withdrawal is subject to the provisions of CAA Section 307(d). The statutory authority for this notice is provided by Sections 111, 301 and 307(d) of the CAA as amended (42 U.S.C. 7411, 7601 and 7607(d)).

5. Impact Analysis

Because the EPA is not promulgating any regulatory requirements, there are no compliance costs or impacts associated with today's final action.

6. Statutory and Executive Order Reviews

Today's action does not establish new regulatory requirements. Hence, the requirements of other regulatory statutes and Executive Orders that generally apply to rulemakings (e.g., the Unfunded Mandate Reform Act) do not apply to this action.

Dated: March 28, 2017.

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E. Scott Pruitt,  
Administrator.

This document is a prepublication version, signed by EPA Administrator, E. Scott Pruitt on 3/28/2017. We have taken steps to ensure the accuracy of this version, but it is not the official version.