

Use of “Third-Party Entities” for State and Federal Implementation of the Clean Power Plan: Issues and Options

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I. Introduction

This paper explores possible roles for various types of private or public entities to carry out functions in mass-based and rate-based programs to implement the Clean Power Plan (“CPP”).¹ The paper refers to these entities as “third party entities” (“TPEs”).

As the paper illustrates, TPEs could provide services helpful both for states implementing the CPP and for the U.S. Environmental Protection Agency (“EPA”) as it implements a Federal Plan, including the Clean Energy Incentive Program (“CEIP”).² The CPP provides a multi-step process for issuing allowances and emission rate credits (“ERCs”) to eligible zero- and low-emitting and energy efficiency projects. While EPA and states could fully implement each of these steps themselves, it could prove beneficial to utilize TPEs to assist with this process. Indeed, EPA has itself contemplated the use of various “designated agents” that can assist with implementing aspects of the CPP, including the process to issue allowances or ERCs to eligible projects under the Federal Plan.³ However, while TPEs *can* be “designated agents” of EPA or states, TPEs need not be agents of the regulator. TPEs can also be independent private entities that provide services to project providers or to the agency (as a contractor, not an agent) for a fee. As discussed herein, such services can streamline the ERC and allowance credit-issuance process and provide benefits to both project providers and the regulator—even if TPEs do not directly provide services to the regulator in an “agent” capacity.

TPEs may be particularly useful in facilitating the incorporation of energy efficiency (“EE”) into state plans, the Federal Plan, and the CEIP—though their role could also be expanded to address renewable energy (“RE”), nuclear power, and any other resource eligible to receive ERCs or allowances. EPA has *proposed* that EE projects not be eligible to earn ERCs

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¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter “CPP”].

² EPA has proposed to implement the CEIP in all states subject to the Federal Plan. *See* 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. 64,996, 64,970, 65,025-26 (October 23, 2015) [hereinafter “Proposed Federal Plan”].

³ *See, e.g.* Proposed Federal Plan at 64,999-65,000 (“It is proposed that the EPA *may designate an agent* to coordinate the project application process and assist with review of applications.”) (emphasis added); *id.* at 65,000 (“For the second step in the credit issuance application process, the EPA proposes that providers submit an M&V report to the EPA, *or its designated agent*, prior to the EPA’s issuance of ERCs.”) (emphasis added).

and allowances under the Federal Plan,⁴ citing potential concerns regarding limitations on its administrative capacity and expertise.⁵ TPEs could reduce EPA’s administrative burden and provide technical expertise, allowing EPA to incorporate EE projects into any Federal Plan. In any event, EPA has committed to issuing ERCs and allowances to EE projects in low-income communities when it administers the CEIP as part of a Federal Plan, as well as EPA “matching” credits for EE projects eligible for CEIP credit under state plans. TPEs could significantly reduce EPA’s administrative burden in this regard by assisting with the review and issuance of CEIP credits to eligible EE (as well as to CEIP-eligible for RE projects). TPEs could also provide various services directly to EE project providers that can simplify, streamline, and enhance the quality and completeness of the documentation submitted to EPA.

This paper will outline the various functions that need to be performed at each stage of the CPP credit issuance process and identify ways in which TPEs could assist project providers, EPA, or states with executing these functions. Specifically, the paper will explore potential roles for TPEs in:

- establishing the preliminary infrastructure and document management services necessary to efficiently issue ERCs or allowances to projects;
- verifying and reviewing project eligibility;
- verifying and reviewing MWh of generation and/or savings eligible for ERC or allowance issuance;
- providing tracking infrastructure for ERCs or allowances;
- assisting with the accreditation and management of Independent Verifiers; and
- assisting with the implementation of the CEIP.

The paper will close by identifying important design features and cross-cutting issues that the EPA and states should consider as they integrate TPEs into their CPP implementation process.

It is not unusual for regulatory programs that incorporate crediting schemes to make use of TPEs. TPEs have been used to help issue credits for greenhouse gas (“GHG”) offset projects as a part of the trading programs implemented by California and the Regional Greenhouse Gas

⁴ Proposed Federal Plan at 65,002 (“The ERC resources proposed in the federal plan must . . . [be] in the following categories of measures: Onshore wind, solar, geothermal power, hydropower, or new nuclear units and capacity uprates at existing nuclear units[.]”); *id.* at 65,023 (for the mass-based plan, proposing that “the following RE measures are eligible: On-shore wind, solar, geothermal power, and hydropower.”).

⁵ Proposed Federal Plan at 65,002 (“While they are currently being proposed as part of the model rule and not the federal plan, the EPA requests comment on the inclusion of other RE measures, demand-side EE measures, and any other measures that may be eligible under the final guidelines as eligible measures under the federal plan. For stakeholders that are submitting comments on the inclusion of such additional measures, the EPA requests comment on how the EPA could implement across applicable jurisdictions a rigorous, straightforward, and widely demonstrated set of EM&V methods, procedures, and approaches that could be implemented in the time frame allowed by the federal plan and that also meet the requirements outlined in the final guidelines.”).

Initiative (“RGGI”); to help issue renewable energy credits (“RECs”) as part of various state renewable portfolio standard (“RPS”) programs; and to help incorporate EE into the forward capacity market run by the New England Independent System Operator (“ISO-NE”). In a number of cases, TPEs have been private entities. However, a TPE role could be—and has been—played by a public entity, such as a state public utility commission (“PUC”), state energy office, or the Department of Energy (“DOE”).⁶ Where applicable, this paper will highlight these examples and will identify lessons learned to assist EPA and states in facilitating effective use of TPEs at all stages of the ERC or allowance issuance process.

As a final note, although TPEs can assist with the implementation of either a mass-based or rate-based plan, this paper uses a rate-based plan for purposes of illustration. The same basic process could apply to the issuance of allowances on the basis of MWh of savings or generation under a mass-based plan, whether for the CEIP or under certain allocation approaches during the compliance period. Similarly, TPEs could be useful not only to EPA, but to states as well—particularly states with limited administrative capacity. Accordingly, this paper will generically refer to the “Regulator,” which could be *either* a state under a state plan or EPA under a Federal Plan.

II. Overview of the CPP Process for Reviewing Project Eligibility and Issuing ERCs

In order to examine the possible roles for TPEs in implementation of a CPP state plan (or Federal Plan), it is helpful to review the process for review and issuance of credits to projects. The CPP provides a multi-step process for issuing ERCs to eligible resources. For a mass-based plan, the proposed Model Trading Rule (“MTR”) outlines more or less the same process for issuing allowances to RE projects (and, at state discretion, EE projects) from the RE set-aside.

Using the ERC process for illustration, this section briefly outlines the major steps in the CPP. These steps are modeled on existing programs established to incorporate offsets into the California Cap-and-Trade Program and the RGGI CO₂ Budget Trading Program⁷—both of

⁶ There is precedent for the use of other governmental entities as TPEs in review and credit issuance processes. For example, for the purposes of establishing and crediting wetland mitigation banks, the district engineer for the Army Corps of Engineers establishes an Interagency Review Team (“IRT”) to review documentation for the creation and crediting of mitigation banks. *See* 33 C.F.R. § 332.8(b). The IRT is “an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank . . .” 33 C.F.R. § 332.2. The IRT will review the instrument for the mitigation bank, which is the legal document for the establishment, operation, and use of the bank, and other appropriate documents and provide comments to the district engineer. *See* 33 C.F.R. § 332.8(b). Additionally, the “IRT will also advise the district engineer in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving modifications to an instrument.” *Id.* Thus, a key function of the IRT is to provide expertise and advice to the district engineers regarding mitigation bank projects and the issuance of credits. Furthermore, the district engineer and IRT members may also enter into memoranda of agreement “with any other federal, state or local government agency to perform all or some of the IRT review functions . . .” 33 C.F.R. § 332.8(b). However, the district engineer retains the final authority for approval of instruments and other required documentation. The wetland mitigation banking process thus provides an example of how an agency can make use of the expertise of other public entities in approving eligible projects and issuing credits. EPA could potentially use the DOE or other public entities with technical expertise to similarly advise on the approval of projects and the issuance of credits for EE and RE projects.

⁷ *See* RGGI Model Rule, Subpt. XX-10, pages 89-137 (Dec. 23, 2013), http://www.rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Model_Rule_FINAL.pdf. Note, however, that no offset projects have been approved as part of RGGI. *See* https://rggi-coats.org/eats/rggi/index.cfm?fuseaction=search.project_offset&clearfuseattribs=true.

which contemplate the use of TPEs. It is therefore not surprising that, as outlined in Section III, TPEs can play roles at each of the steps.

Step 1 – Project Eligibility Application Review and Registration

Potential ERC project providers must submit a Project Eligibility Application to the Regulator for each qualifying project.⁸ The CPP requires the Application to include a description of the project, a projection of anticipated MWh eligible for ERCs over the life of the project, and an Evaluation, Measurement and Verification (“EM&V”) plan.⁹ The proposed rate-based MTR further details presumptively approvable components of the Project Eligibility Application, including the components of the EM&V plan for each type of resource.¹⁰

The Project Eligibility Application must also be reviewed by an Independent Verifier that has been accredited by the Regulator.¹¹ The process for accrediting Independent Verifiers is discussed in more detail below. The Independent Verifier must produce a verification report and provide it to the Regulator as a part of the Project Eligibility Application.

The Regulator then reviews the application. If the Project Eligibility Application is approved by the Regulator, an eligible resource must register with an ERC tracking system.¹²

Step 2 – Periodic M&V Reports and ERC Issuance

Project providers that have been approved at Step 1 must submit to the Regulator periodic M&V Reports documenting the number of MWh saved or generated.¹³ M&V Reports must be generated consistent with the EM&V plan submitted as part of the Project Eligibility Application.¹⁴

The number of MWh and the fact that these MWh were saved or generated consistent with the EM&V plan must be verified by Independent Verifiers that are accredited by the Regulator.¹⁵ After verification, M&V Reports are reviewed by the Regulator.

Based on the Regulator’s review of the project provider’s M&V Report, the Regulator determines the number of ERCs to issue to the provider.¹⁶ ERCs may only be issued

⁸ CPP at 64,951.

⁹ CPP at 64,906; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(a)); *id.* at 64,952 (to be codified at 40 C.F.R. § 60.5830).

¹⁰ *See* Proposed Federal Plan at 65,068-73 (mass-based project-type specific eligibility application and EM&V Plan requirements); Proposed Federal Plan at 65,094-99 (rate-based project-type specific eligibility application and EM&V Plan requirements).

¹¹ CPP at 64,906; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(a)(3)).

¹² CPP at 64,951 (to be codified at 40 C.F.R. § 60.5805(b)).

¹³ CPP at 64,906-07; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(c)).

¹⁴ *See* CPP at 64,952 (to be codified at 40 C.F.R. § 60.5835(b)).

¹⁵ CPP at 64,907; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(c)(2)). The proposed MTR outlines the requirements for verifier reports. *See* Proposed Federal Plan at 65,003.

¹⁶ CPP at 64,907; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(e)).

retrospectively on an *ex post* basis after achieved MWh generation or savings are verified.¹⁷ Once issued, the ERCs can be distributed to the provider's account in a tracking system.

Additional Step – Accreditation of Independent Verifiers

States must establish Independent Verifier qualification criteria consistent with requirements outlined in the CPP, including technical training and expertise and financial independence.¹⁸ The proposed MTR includes presumptively approvable qualifications for Independent Verifiers,¹⁹ including: appropriate technical qualifications;²⁰ knowledge of the CPP trading program rules;²¹ auditing and accounting qualifications;²² and no conflicts of interest (“COI”).²³ Accreditation by an outside organization may be used where that organization's accreditation meets all Clean Power Plan and MTR requirements.²⁴

III. Possible Roles for TPEs in Project Eligibility Review and ERC Issuance Process

As described in Section II above, the Regulator performs several major roles: it reviews Project Eligibility Applications and M&V Reports; registers projects and issues, tracks, and documents ERCs in a tracking system; and accredits Independent Verifiers. Having briefly outlined the key steps of the ERC review and issuance process, this Section III will identify general categories of TPE functions and identify possible ways for TPEs to assist with or facilitate each of these key roles.

A. General Categories of TPE Functions

There are multiple types of functions that can be performed by TPEs that could prove useful to the Regulator in implementing the steps described above. One TPE could provide services in connection with several of the above functions. Similarly, one TPE could perform each type of function or multiple TPEs could perform each type of function. The Regulator could decide that TPEs performing certain functions should be the Regulator's “agent” or contractor; alternatively, the Regulator could decide that it is more efficient to allow TPEs to provide services directly to project providers in an independent or private capacity. Put simply, there are many different permutations of the use of TPEs, and they can thus provide a flexible tool for the Regulator and project providers. The basic categories of TPE functions discussed in this paper are as follows:

Project Document Management: A TPE could provide administrative and ministerial assistance to streamline and standardize the Project Eligibility Application process and M&V Report process.

¹⁷ CPP at 64,909.

¹⁸ CPP at 64,906; *id.* at 64,951 (to be codified at 40 C.F.R. § 60.5805(i)).

¹⁹ Proposed Federal Plan at 65,001; *id.* at 65,100 (proposed 40 C.F.R. § 62.16470).

²⁰ Proposed Federal Plan at 65,001-02; *id.* at 65,100 (proposed 40 C.F.R. § 62.16470).

²¹ Proposed Federal Plan at 65,001; *id.* at 65,100 (proposed 40 C.F.R. § 62.16470).

²² Proposed Federal Plan at 65,100 (proposed 40 C.F.R. § 62.16470).

²³ Proposed Federal Plan at 65,001 & n.75; *id.* at 65,101 (proposed 40 C.F.R. § 62.16475).

²⁴ Proposed Federal Plan at 65,002.

Project Review: A TPE could assist the Regulator in making substantive determinations as to project eligibility (at Step 1) and as to the number of ERCs to issue to a project (at Step 2). The TPE-Reviewer could either make a determination itself, subject to potential Regulator review, or could make a recommendation to the Regulator, with the Regulator making the final determination.

Tracking System: A TPE could develop and run a tracking system for ERCs and archive supporting documentation. Note that it could be quite useful to have the same entity provide both the Project Document Manager function (discussed above) and the Tracking System function, as both types of functions involve creating and managing a paper trail to document project eligibility and ERC issuance. At the very least, the TPEs implementing these two functions should use a platform that is interoperable.

Accreditation of Independent Verifiers: A TPE could assist with accreditation of Independent Verifiers, and could also assist with the review of whether Independent Verifiers have COI with regard to specific projects or project providers.

It is important to note that this list is not meant to be exhaustive or to imply that different TPEs must perform each function.²⁵

B. Clean Power Plan Process Elements and Potential Roles for TPEs

This section examines the functions associated with each step of the process for project eligibility review and ERC issuance and outlines possible roles for TPEs. The below flow chart identifies the two major steps (and sub-steps) in the credit issuance process where TPEs could provide assistance. It is important to note that although the chart shows different types of TPE functions at each step, these different functions need not be performed by separate entities, and the same entity could perform several of the below functions.

The first category of functions is primarily administrative and ministerial and does not require substantive decision making—*i.e.*, management of application processes, completeness

²⁵ For instance, as a part of the California GHG offset credit issuance process, the California Air Resources Board (“CARB”) has made use of private TPEs referred to as “Offset Project Registries” to provide multiple functions. They serve as a TPE-Project Document Manager by assisting with administrative tasks, *e.g.* reviewing applications for completeness. They also engage in TPE-Reviewer functions. Specifically, the Offset Project Registries have the authority to determine whether projects meet the offset eligibility requirements (*i.e.* the “listing” requirements), which is similar to the registering of eligible projects under Step 1 of the CPP process. Cal. Code Regs. tit. 17, § 95975 (b),(f)-(g); *see also* Cal. Code Regs. tit. 17, § 95802(250); *id.* at § 95987(a). Furthermore, the Offset Project Registries can make a substantive determination as to how many credits a project should be issued and issue *preliminary* offset credits (called “registry offset credits”). *See* Cal. Code Regs. tit. 17, § 95802(250); *see also* Cal. Code Regs. tit. 17, § 95980.1(d)(6); *id.* at § 95980.1(e). CARB, however, is responsible for making a final determination in this regard and is responsible for issuing the official CARB offset credits that may be used as a compliance instrument. *See* Cal. Code Regs. tit. 17, § 95981. Thus, in the California program, the Offset Project Registry essentially functions as a TPE-Reviewer that makes a recommendation to the Regulator, with the Regulator making the final determination after a desk review. In addition, the Offset Project Registry also assists with one aspect of the TPE-Accreditation role as it can review Independent Verifier COI. Cal. Code Regs. tit. 17, § 95979(f); *see also id.*, at § 95987(c). The California offset system also makes use of Independent Verifiers to provide verification that a project is eligible and they verify the data used to determine the number of credits a project is entitled to. *See* Cal. Code Regs. tit. 17, § 95977(a); *id.* at § 95977.1.

determination, communications with providers, administering tracking systems for credits, archiving data, and providing a clearinghouse of information. These tasks fall in the Project Document Management or TPE-Tracking System categories for the purposes of this paper, and are highlighted in blue in the chart below. Because these two categories of functions are primarily administrative and are connected, utilizing the same entity to perform them could greatly help to coordinate the management and archival of documentation associated with the issuance of ERCs. In many instances, TPEs performing these functions likely could be private entities providing services directly to project providers, rather than as contractors or “designated agents” of the Regulator. Regardless of whether or not TPEs provide services directly to project providers or the Regulator, the use of TPEs to execute or facilitate these tasks could still greatly streamline and simplify the ERC-issuance process and thus have the ancillary benefit of reducing the Regulator’s administrative burden.

The second major category of tasks is more substantive and would involve supporting the Regulator with determinations as to whether a project is eligible to receive ERCs and the number of ERCs to which a project is entitled. These tasks fall in the TPE-Reviewer category for the purposes of this paper and are highlighted in green below. Using a TPE to execute these tasks would also greatly reduce the Regulator’s administrative burden and could help ensure that an entity with extensive technical expertise assists with these decisions. However, because of the substantive nature of these tasks, the Regulator must pay special attention to ensuring:

- that the TPE-Reviewer is independent from entities applying for ERCs (such as by adopting precautions to avoid COI); and
- (at least with respect to EPA), that the Regulator has not inappropriately delegated regulatory decision-making to a private entity in a way that violates constitutional restrictions (such as by developing processes to ensure sufficient oversight of TPE decisions by the Regulator).

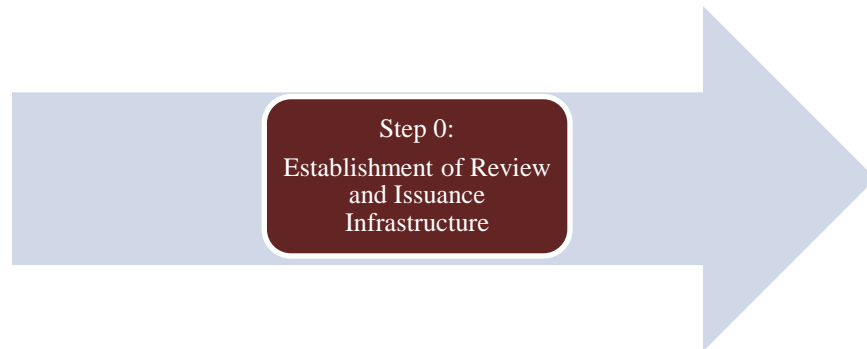
In light of these limitations, it is likely that TPE-Reviewers would need to be “designated agents” or at least contractors that are directly accountable to the Regulator. These issues are discussed in more detail *infra* Section IV.

A third category of functions is the verification functions assigned to Independent Verifiers by the CPP, which are highlighted in purple below.

Flow Chart of Different ERC Issuance Steps and Potential TPE Functions



1. Potential Roles of TPEs in Step 0: Establishment of Review and Issuance Infrastructure



Many basic parameters of the review and issuance process are already established by the CPP. For instance, the CPP and/or the proposed MTR already provide: (1) eligible project types; (2) some requirements and guidance for Project Eligibility Applications, EM&V plans, and M&V Reports; (3) requirements for accrediting Independent Verifiers; and (4) requirements for ERC tracking systems.

Although the CPP and MTR lay this groundwork *on paper*, TPEs can help the Regulator and project providers bring this framework to life by creating the infrastructure necessary to ensure that this process happens as smoothly and efficiently as possible. Among other things, TPE-Project Document Managers could establish online “common applications” or templates based on the CPP’s requirements for the main types of required submissions: Project Eligibility Applications, EM&V Plans, M&V Reports, and Verification Reports. These common applications could standardize and streamline the submittal of the required documentation and help to ensure that applications and reports are complete. While the Regulator could choose to directly engage a TPE to perform such services, TPEs could also provide these services directly to project providers in an independent or private capacity.

TPEs could also assist the Regulator or project providers in helping to elaborate or develop more specific EM&V plans and protocols based on EPA guidance (such as EPA’s Evaluation, Measurement and Verification Guidance for Demand-Side Energy Efficiency²⁶), as well as establish or elaborate protocols for project types that could be eligible, but are not fully addressed by that guidance. For example, the non-profit RGGI Inc. has served this function by aiding certain states participating in RGGI with the development of an offset protocol for US Forest Projects.²⁷ One potential entity that could serve as a TPE or collaborate with TPEs in this regard is the DOE, with its Uniform Methods Project.²⁸ Additionally, TPEs could serve as a

²⁶ U.S. Environmental Protection Agency, Evaluation Measurement and Verification (EM&V) Guidance for Demand-Side Energy Efficiency (EE) Draft for Public Input (Aug. 3, 2015), *available at* http://www2.epa.gov/sites/production/files/2015-08/documents/cpp_emv_guidance_for_demand-side_ee_-_080315.pdf.

²⁷ See RGGI Inc., *Regional Greenhouse Gas Initiative Offset Protocol: U.S. Forest Projects* (June 13, 2013), https://www.rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Forest_Protocol_FINAL.pdf. Note that only Connecticut and New York have approved of the reforestation/afforestation offset project category. RGGI Inc., *Fact Sheet: RGGI Offsets 1*, https://www.rggi.org/docs/Documents/RGGI_Offsets_FactSheet.pdf.

²⁸ U.S. Department of Energy, Uniform Methods Project for Determining Energy Efficiency Program Savings, <http://energy.gov/eere/about-us/ump-home>. For an example in which a federal agency has utilized other governmental entities to assist with project eligibility determinations and crediting, *see supra* note 6, discussing the

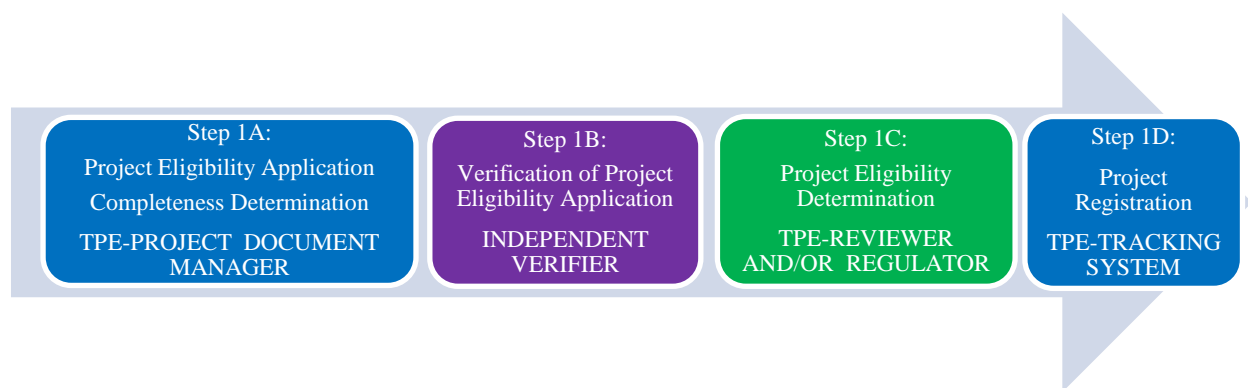
clearinghouse of industry best-practice EM&V protocols for different types of projects that are consistent with EPA and state guidance, where applicable, and could provide standardized forms and EM&V plans consistent with these protocols. Project providers would determine which protocols to use, but a TPE could simplify and standardize this process for common project types. This would help to ensure that EM&V is conducted consistent with the Regulator’s guidance, where applicable, and industry best practice. To the extent the Regulator wants to limit TPE judgment about issues such as “industry best practices,” the Regulator could issue more detailed guidance or regulations itself.

TPEs could also play a critical role at Step 0 by developing tracking systems to monitor ERCs and platforms for archiving relevant documentation associated with issued ERCs. For example, RGGI Inc. has developed an offsets module as part of the RGGI CO₂ Allowance Tracking System that archives relevant information, and has contracted with another private entity, Potomac Economics, to act as Market Monitor.²⁹

As discussed in greater detail below, TPEs could assist with the accreditation of Independent Verifiers. To simplify this process, the Regulator could recognize pre-existing accreditations or certifications issued by private or public TPEs. For example, in order to earn Class III RECs under the Connecticut RPS, M&V must be verified by an Independent Verifier that is a licensed Professional Engineer.³⁰ In effect, rather than accrediting independent verifiers itself, the Connecticut PUC uses the Connecticut Department of Consumer Protection as a TPE-Accreditation Body.

These tasks would largely need to take place before the credit issuance process begins and would pave the way for an efficient and easily administrable credit issuance process. The potential roles that TPEs could play in establishing these various framework elements are discussed in more detail below.

2. Potential Roles of TPEs in Step 1: Project Eligibility Review and Registration



In the proposed Federal Plan, the EPA states that it “may designate an agent to coordinate the project application process *and* assist with review of applications.”³¹ EPA thus acknowledges

wetland mitigation banking program and the district engineer’s use of an Interagency Review Team composed of local, state, and federal public entities to assist with the mitigation bank approval and crediting process.

²⁹ https://www.rggi.org/market/market_monitor.

³⁰ http://mwalliance.org/sites/default/files/uploads/meeaconference/MES-2006_presentations_NARUC_Jacobs.pdf.

³¹ Proposed Federal Plan at 64,999-65,000 (emphasis added).

that TPEs could assist the Regulator with two distinct types of functions associated with the Project Eligibility Application process: (i) TPEs could assist with *ministerial and administrative* aspects of this process, *and/or* (ii) TPEs could assist the Regulator with the *substantive review* of Project Eligibility Applications. This section will identify the different process elements in the Project Eligibility Application process and will highlight ways in which TPEs could be useful.

a. Process Element: Submission of Project Eligibility Application

As discussed above, the CPP requires a provider to submit a Project Eligibility Application in order to register to receive ERCs. The CPP also establishes requirements for what must be included as a part of the application. Specifically, a Project Eligibility Application must include, among other things, a description of the program or project, a projection of the MWh generation or energy savings over the life of the project, an EM&V Plan³² that meets state plan or Federal Plan requirements, and a verification report from an Independent Verifier.³³ The proposed Federal Plan and MTR also requires different information to be included in the Project Eligibility Application depending on the type of resource,³⁴ and establishes criteria for what must be included in the EM&V Plans for each eligible resource type.³⁵

Potential Roles of TPEs:

There are several potential roles that an administrative-focused TPE could play in this process. A TPE playing the role of -Project Document Manager could streamline, simplify, and standardize the Project Eligibility Application process by creating online “common applications” that include all of the information required by the CPP. Such common applications would provide standardized templates that “hardwire” the required information to help ensure that Project Eligibility Applications submitted by the project provider to the Regulator contain all necessary information. Such “common applications” would not only help to avoid incomplete applications (and the need for the Regulator to request additional information), but would weed out ineligible project applications by clearly identifying the relevant criteria and by requiring a prospective applicant to explain how it meets the relevant criteria. These applications would thus significantly reduce both the project provider’s and the Regulator’s burden associated with the application process.

These “common applications” could also hardwire quality assurance/quality control (“QA/QC”) protocols to provide project providers and the Regulator confidence that all regulatory requirements are adhered to. As one example, the proposed Federal Plan and MTR requires an electric generating resource with a nameplate capacity of 1 MW or more to submit a copy of its most recently filed Form EIA-860, and requires a resource with a nameplate capacity of less than 1 MW to submit the information that is required by that form.³⁶ A TPE-Project

³² The EM&V plan must describe how MWh of RE generation or energy savings resulting from the program or project will be quantified and verified. CPP at 64,906.

³³ CPP at 64,906, 64,951 (to be codified at 40 C.F.R. § 60.5805).

³⁴ Proposed Federal Plan at 65,094-95 (proposed 40 C.F.R. § 62.16455).

³⁵ Proposed Federal Plan at 65,096-99 (proposed 40 C.F.R. § 62.16455). The CPP also provides some specific requirements for EM&V Plans for RE and demand-side EE resources. CPP at 64,952 (to be codified at 40 C.F.R. § 60.5830).

³⁶ Proposed Federal Plan at 65,094 (proposed 40 C.F.R. § 62.16445(a)(2)(i)).

Document Manager could build the information required by the Form EIA-860 into the common application process. As another key example, the proposed Federal Plan and MTR requires Project Eligibility Applications to make three certifications/authorizations, two of which require the use of specific language.³⁷ The online application would ensure that the precise language of these attestations and certifications are compliant with the required language. This removes the potential headache of requiring an applicant to re-execute the necessary certifications if the language is altered or varies slightly from what is contained in the regulatory text.

Additionally, the CPP and the proposed Federal Plan and MTR establish specific criteria and guidance for what must be included in EM&V Plans, which are a core component of the Project Eligibility Application. A TPE-Project Document Manager could thus also establish “common applications” or templates based on these EM&V criteria to ensure that a project’s EM&V Plan is include all of the necessary information. These common applications would need to be tailored to the state’s or EPA’s project-specific EM&V requirements for each project type category (developed at Step 0).³⁸

These Project Document Manager services are quite useful and could ease the paperwork burden of both the project provider and the Regulator. The Regulator might thus choose to contract with a TPE to design official “common applications.” However, such “common applications” are not required by the CPP, and the Regulator could also leave such services to the market place. For instance, independent TPEs could develop, compete, and market their services directly to project providers and be compensated directly by project providers for these document management services.

b. Process Element: Project Eligibility Application Completeness Determination

The CPP does not require a separate determination as to the completeness of Project Eligibility Applications. Presumably, however, if a Project Eligibility Application is incomplete, it will be rejected by the Regulator—resulting in wasted administrative resources.

Potential Roles of TPEs:

Although a completeness determination is not expressly required by the CPP, a TPE-Project Document Manager could review applications to ensure they include all required elements. Such review would not only provide a valuable service to the project provider, but could significantly ease the administrative and paperwork load of the Regulator. Experience from the California GHG offset credit program suggests that it is helpful to have an entity manage non-substantive paperwork and communications with the project provider. The California program provides for the use of Offset Project Registries to “list” eligible offset projects. This “listing” is basically a project registration process and is similar to the Project Eligibility Application process required by the CPP. As a part of this process, the Offset Project Registry reviews the listing submission “for completeness” and issues a notice of completeness

³⁷ Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16445(a)(4),(7),(8)).

³⁸ See Proposed Federal Plan at 65,070-73 (proposed 40 C.F.R. § 62.16260) (mass-based project-type specific EM&V Plan requirements); Proposed Federal Plan at 65,096-99 (proposed 40 C.F.R. § 62.16455) (rate-based project-type specific EM&V Plan requirements); see also CPP at 64,952 (to be codified at 40 C.F.R. § 60.5830).

that allows a project to be listed.³⁹ Discussions with a CARB official revealed that the Offset Project Registries have been very helpful with this administrative support (such as collecting paperwork, completeness determinations, and communicating with project operators) as this assistance reduces the need for CARB staff to collect information, interface with project developers, and review incomplete applications.

As discussed above, the Regulator might choose to contract with a TPE or designate a TPE as its agent to conduct this completeness review. However, TPEs could also develop and market their completeness review services directly to project providers and be accountable to project providers. Such a service might be similar to the services provided by online tax preparation services, which create online platforms to incorporate the most recent state and federal tax code requirements, ensure that taxes contain all required information, and simplify submission of taxes to the Internal Revenue Service (“IRS”) or appropriate state entity.

c. Process Element: Substantive Project Eligibility Determination

Under the CPP and proposed Federal Plan and MTR, the Project Eligibility Application must be reviewed by an accredited Independent Verifier, who issues a report verifying that the project meets the Regulator’s eligibility requirements for ERCs and that the project’s EM&V plan meets the relevant requirements, among other things.⁴⁰ This verification report is submitted directly to the Regulator.⁴¹ The Regulator then reviews the Project Eligibility Application, including the verification report, and decides whether to approve it.

Potential Roles of TPEs:

The Independent Verifier is one type of entity that plays a role in the review of a project’s eligibility by preparing a verification report for the project provider that is submitted to the Regulator. However, the Regulator could *also* use a separate TPE to review the entire application, including the verification report, and assist in making the *substantive determination* as to whether to approve the application. The level of deference to the TPE-Reviewer could vary depending on the Regulator’s preferences or needs. The TPE-Reviewer could provide a substantive recommendation to the Regulator, which would make the ultimate final decision. RGGI Inc. provides an example: while under RGGI each state is responsible for all regulatory determinations, including offset project qualification, RGGI Inc. provides “technical assistance to the participating states in reviewing applications for emissions offset projects.”⁴²

Alternatively, if legally permitted to do so, the TPE-Reviewer could make the eligibility determination on the Regulator’s behalf, subject to later audit. For example, Pennsylvania has delegated authority to make the final determination of what entities qualify as an Alternative Energy System—which are resources, including energy efficiency resources, eligible to generate credits for compliance with its Alternative Energy Credit (AEC) Program (the Pennsylvania

³⁹ Cal. Code Regs. tit. 17, § 95975(f)-(g).

⁴⁰ See CPP at 64,906, 64,951 (to be codified at 40 C.F.R. § 60.5805); Proposed Federal Plan at 65,003.

⁴¹ Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16445)(d).

⁴² <https://www.rggi.org/rggi>.

equivalent of an RPS)—to its AEC Program Administrator.⁴³ The AEC Program Administrator acts as a TPE-Reviewer on behalf of the Pennsylvania Department of Environmental Protection (“PA DEP”). PA DEP oversees the AEC Program Administrator through regular status reports and meetings. Any disputes between the Program Administrator and Program participants are settled by the Pennsylvania PUC.⁴⁴ The participation of EE in ISO-NE’s forward capacity market serves as another example of this approach. ISO-NE permits state PUCs to act as its agent. These PUC’s are tasked with determining whether specific EE projects meet the ISO-NE eligibility requirements (including that the EM&V Plan is consistent with ISO-NE EM&V requirements).

A third option is a hybrid approach that would allow a TPE to make the *eligibility* determination for the purposes of registering a project, but allow the Regulator to review this determination on the back end before it actually issues credits to the project. Under this approach, the Regulator would review project eligibility at the same time it reviews a project’s M&V Report, *i.e.*, as part of Step 2 of the process.⁴⁵ This approach would avoid the need for the Regulator to review two separate submissions. However, delaying the Regulator’s review of eligibility until the ERC issuance step could create significant uncertainty for project providers as to whether their projects are qualified.

d. Process Element: Project Registered in Tracking System

After the Regulator (or TPE-Reviewer) approves a Project Eligibility Application, the project must be registered in an ERC tracking system.⁴⁶ This is the end of the first step.

Potential Roles of TPEs:

A TPE could develop and implement an ERC tracking system that meets CPP requirements.⁴⁷ The TPE-Tracking System could also be responsible for physically registering a project once its Project Eligibility Application is approved by the Regulator or a TPE-Reviewer.

⁴³ See 52 Pa. Code § 75.64(b); see also Pennsylvania Public Utility Commission Bureau of Technical Utility Services, *Request for Proposals: Alternative Energy Credits Administrator*, RFP-2015-2, at 23-24 (May 15, 2015), http://www.puc.pa.gov/General/pdf/RFP/RFP-2015-2_TUS-AEC_Admin.pdf [hereinafter “AEC RFP”].

⁴⁴ AEC RFP at 24.

⁴⁵ California’s GHG offset program uses a variant of this hybrid approach: the Offset Project Registry can “list” a project without CARB’s approval, but the ultimate decision on whether to issue offset credits is retained by CARB at the end of the entire process. Similarly, generators seeking RECs under various state RPS programs are able to register with M-RETS—the Midwest Renewable Energy Tracking System—and receive certificates from M-RETS before the state PUC determines that the generator is eligible. In allowing generators to register, “M-RETS will not determine eligibility for state or voluntary programs. Each individual state will be responsible for determining whether or not a particular generating unit qualifies for a state program.” Thus projects can obtain RECs before a particular state program has confirmed their eligibility. See Midwest Renewable Energy Tracking System Operating Procedures at 6, 11 (May 3, 2016), available at <http://www.mrets.org/wp-content/uploads/sites/8/2014/03/Operating-Procedures-.pdf> (hereinafter M-RETS Operating Procedures).

⁴⁶ CPP at 64,951 (to be codified at 40 C.F.R. § 60.5805(b)); Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16445(b)).

⁴⁷ See CPP at 64,906, 64,951 (to be codified at 40 C.F.R. § 60.5810).

The TPE-Tracking System could also serve important documentation functions. The CPP requires ERC tracking systems to “document[] and provide[] electronic, internet-based public access to all information that supports the eligibility of eligible resources and issuance of ERCs and functionality to generate reports based on such information, which must include, for each ERC, an eligibility application, EM&V plan, M&V reports, and Independent Verifier verification reports.”⁴⁸ The TPE-Tracking System would thus be responsible for archiving and providing public access to these documents and for linking them with a project’s account and the serial numbers for any ERCs issued to that account. A TPE-Tracking System could also record all communications and actions of all involved parties. This paper trail will be helpful in facilitating public accountability and providing access to discovery materials in the case of any Regulator audits, administrative challenges, or litigation. Additionally, by providing this transparent documentation function, a TPE-Tracking System would also provide a valuable benefit to the project provider, as increased transparency can lower the costs of due diligence for ERC purchasers and thus enhance the overall value and confidence in the ERC product and facilitate the purchase of ERCs.

While the TPE-Tracking System would be responsible for these documentation functions on the back end, the TPE-Project Document Manager would assist with assembling the required documentation on the front-end. Thus, there would be significant advantages to having the *same entity* providing *both* the Project Document Management and Tracking System functions. At the very least, if the Project Document Manager is a different entity than the Tracking System, the TPEs implementing these two functions should coordinate to make sure that they use a platform that is interoperable.

For the Federal Plan, EPA currently proposes to use its existing Allowance Tracking and Compliance System (“ATCS”) as the tracking system,⁴⁹ but EPA could *also* decide to delegate part of the tracking system function to a TPE-Tracking System. For instance, in the proposed Federal Plan and MTR, EPA “prop[os]es that ERCs would be tracked in the ATCS.”⁵⁰ However, EPA then goes on to explain that it is *also* “propos[ing] that the agency would establish a *complementary tracking system* for the ERC issuance process.”⁵¹ This complementary tracking system “would provide for transparent access to RE project and program eligibility applications and regulatory approvals as well as information on the activities of accredited third party verifiers . . . as well for the public to be able to generate reports based on this information.”⁵² EPA could thus use the ATCS to implement part of the tracking system function by providing basic tracking information related to ERC transfers, but could also use a complementary TPE-Tracking System to archive, manage, and provide public access to the full package of documentation supporting the issuance of each ERC.⁵³ As another potential model, EPA could potentially allow project providers to register with qualified private TPE-Tracking Systems that

⁴⁸ CPP at 64,951 (to be codified at 40 C.F.R. § 60.5810).

⁴⁹ Proposed Federal Plan at 64,997.

⁵⁰ Proposed Federal Plan at 64,999.

⁵¹ Proposed Federal Plan at 64,999.

⁵² Proposed Federal Plan at 64,999.

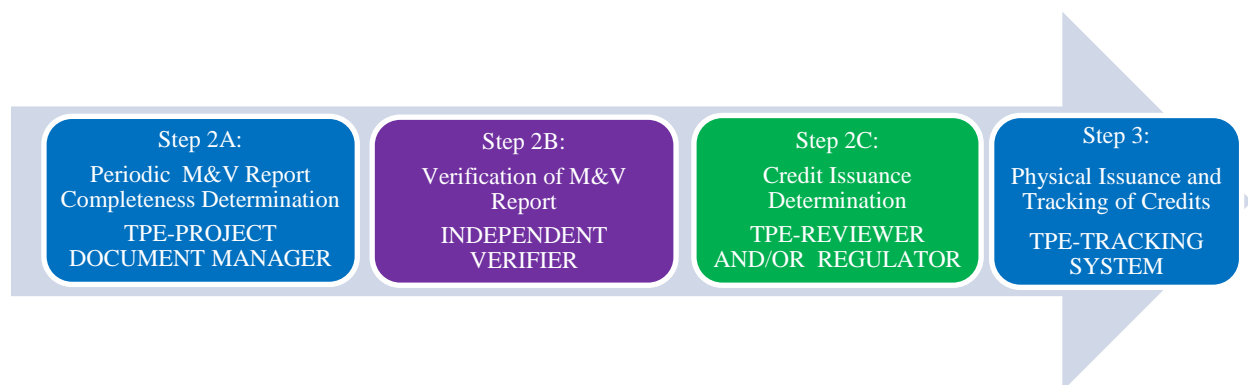
⁵³ It could also prove very helpful for the TPE-Tracking System to have the capabilities and infrastructure in place to be able to track other types of non-CPP regulatory credits associated with eligible MWh—such as state-issued RECs.

are interoperable with and link to the ATCS tracking system, and provide these document archival services for project providers.

The use of a TPE to manage the Tracking System may also be of particular interest to states that do not already have a tracking system in place. The TPE-Tracking System could coordinate with the state and EPA to ensure that the state tracking system is interoperable with ATCS and other state tracking systems.⁵⁴ Indeed, it is essential for state and federal tracking systems to be interoperable in order to maximize the potential for multi-state trading. It could thus be very useful for different states and EPA to use a *single entity* as a TPE-Tracking System in order to promote multi-state trading and minimize the need to coordinate and ensure the interoperability of different TPE platforms across 50 states.

There is ample precedent for the use of TPEs to create, operate, and maintain tracking systems. Such systems have proven particularly popular for programs that, like the CPP, take advantage of interstate trading of compliance instruments. For example, most state RPS programs require tracking of RECs in a multi-state, private tracking system, such as PJM-GATS, NEPOOL-GIS, WREGIS, and MRETS.⁵⁵ Similarly, the nine states participating in RGGI all utilize the RGGI COATS tracking system operated by RGGI Inc.⁵⁶

3. Potential Roles of TPEs in Step 2: Periodic M&V Reports and ERC Issuance Determinations



In the proposed Federal Plan, EPA states that “[f]or the second step in the credit issuance application process, the EPA proposes that providers submit an M&V report to the EPA, *or its designated agent*, prior to the EPA’s issuance of ERCs.”⁵⁷ EPA notes that it “will review and approve M&V reports, and may designate an agent to coordinate and assist with M&V reports[,]” and that if the M&V Report “meets [certain] requirements, pursuant to review by the

⁵⁴ For instance, M-RETS, the tracking system used for RPS programs in various states in the Midwest, manages the import, export, and conversion of RECs from other jurisdictions and tracking systems, including the Michigan Renewable Energy Certification System (“MIRECS”), the North American Renewables Registry (“NAR”) and the North Carolina Renewable Energy Tracking System (“NC-RETS”). See Midwest Renewable Energy Tracking System Operating Procedures at 76-78, App’x C (May 3, 2016), available at <http://www.mrets.org/wp-content/uploads/sites/8/2014/03/Operating-Procedures-.pdf> (hereinafter M-RETS Operating Procedures).

⁵⁵ Jam Hamrin, *REC Definitions and Tracking Mechanisms Used by State RPS Programs* at 3 (June 2014), <http://www.cesa.org/assets/2014-Files/RECs-Attribute-Definitions-Hamrin-June-2014.pdf>.

⁵⁶ <https://www.rggi.org/market/tracking>.

⁵⁷ Proposed Federal Plan at 65,000 (emphasis added).

EPA or its designated agent, ERCs will be issued to the provider by the EPA through the ATCS.”⁵⁸

EPA thus expressly proposes that TPEs could assist the Regulator with the review of M&V Reports. As with the review of Project Eligibility Reports, a TPE could assist the Regulator with *ministerial and administrative* aspects of the M&V Report process, *and/or* with the *substantive review* of M&V Reports and the number of ERCs a project should receive. This section will identify the different process elements associated with the M&V Report and ERC issuance process and will highlight ways in which TPEs can assist the Regulator and/or project provider and help achieve efficiencies in the process.

a. Process Element: Submission of M&V Report

The CPP requires a project provider to submit an M&V Report annually (or on another periodic basis) in order to receive ERCs for MWh generated or saved during the prior year, and establishes requirements for what must be included as a part of the report. An M&V Report must include, among other things, documentation of completed EM&V in accordance with the EM&V Plan; data documenting the resulting MWh savings or generation values, as determined on a retrospective (ex-post) basis; and a verification report from a third-party Independent Verifier.⁵⁹

Potential Roles of TPEs:

There are several potential roles that a TPE-Project Document Manager could play in this process. First, a TPE-Project Document Manager could streamline and standardize the M&V Report requirement by creating online common applications, with the relevant requirements hardwired in. This would ensure that the application is complete and contains the proper information. For instance, the proposed Federal Plan would require the M&V Report to be accompanied by a certification that uses specific language.⁶⁰ The use of a standard online M&V Report template would ensure that the precise language of this certification is compliant with the required language. The TPE-Project Document Manager could also hardwire a timeline into the application system to assure that M&V Reports are timely and could annually provide notice of M&V Report deadlines to eligible resources that are registered in a tracking system. As discussed above, such “common application” services provide a valuable benefit to the project provider, but also provide an ancillary benefit to the Regulator. Depending on the Regulator’s preferences, it could hire a TPE to provide services to it directly, or it can allow private TPEs to provide these services directly to project providers in the market for a fee.

b. Process Element: M&V Report Completeness Determination

The CPP does not require a separate completeness determination for M&V Reports. Presumably, however, if an M&V Report is incomplete, it will be rejected.

⁵⁸ Proposed Federal Plan at 65,000 (emphasis added).

⁵⁹ CPP at 64,906-07, 64,951 (to be codified at 40 C.F.R. § 60.5805(c)); *id* at 64,952 (to be codified at 40 C.F.R. § 60.5835); *see also* Proposed Federal Plan at 65,000, 65,003, 65,099 (proposed 40 C.F.R. § 62.16460).

⁶⁰ Proposed Federal Plan at 65,099 (proposed 40 C.F.R. § 62.16460).

Potential Roles of TPEs:

Although a completeness determination is not required by the CPP, a TPE-Project Document Manager could review M&V Reports to ensure they include all required elements. This service would not only provide an important benefit to project providers by helping to ensure their reports are not rejected, but could reduce the administrative and paperwork load of the Regulator. As discussed above, CARB’s experience with administering the California GHG offset credit program suggests that it is helpful to have a third-party entity manage non-substantive paperwork and communications with project providers. Under the California program, the Offset Project Registry reviews the verification statements for “Offset Project Data Reports”⁶¹—which are analogous to M&V Reports required by the CPP—to make a determination as to whether they are complete.⁶²

c. *Process Element: Substantive Determination as to M&V Reports and the Number of MWh Eligible for ERCs*

Under the CPP, the M&V Report must be reviewed by an accredited Independent Verifier who issues a report verifying that the M&V Report requirements are met.⁶³ The proposed Federal Plan and MTR requires the verification report to, among other things, verify the adequacy and validity of the data submitted to quantify eligible MWh of generation or savings, and provide a QA/QC check of that data to ensure all generation or savings data are within a technically feasible range for that specific eligible project.⁶⁴ This verification report is submitted to the Regulator⁶⁵ and makes a recommendation as to the number of MWh eligible for ERCs. The Regulator then reviews the M&V Report, including the verification report, and determines the number of ERCs to which a project is entitled.

Potential Roles of TPEs:

The Independent Verifier is one type of entity that plays a role in the review of a project’s M&V Report by conducting QA/QC review and preparing a report that is submitted to the Regulator regarding the number of MWh that are eligible for ERCs.⁶⁶ However, the Regulator could *also* use a TPE to review the entire M&V Report, including the verification report, and to make the *substantive determination* as to the number of ERCs that should be issued. Depending on the Regulator’s preferences, needs, and legal authority, this TPE-Reviewer could make this determination on the Regulator’s behalf, subject to later potential audit, or the TPE could provide

⁶¹ The “Offset Project Data Report” is a report prepared by the project operator that provides documentation required by an Offset Protocol, *i.e.*, a documented set of procedures and requirements to quantify ongoing GHG reductions achieved by an offset project. *See* Cal. Code Regs. tit. 17, § 95802(248) (definition of “Offset Project Data Report”); Cal. Code Regs. tit. 17, § 95802(251) (“‘Offset Protocol’ means a documented set of procedures and requirements to quantify ongoing GHG reductions or GHG removal enhancements achieved by an offset project and calculate the project baseline. Offset protocols specify relevant data collection and monitoring procedures, emission factors, and conservatively account for uncertainty and activity-shifting and market-shifting leakage risks associated with an offset project.”).

⁶² Cal. Code Regs. tit. 17, § 95980; Cal. Code Regs. tit. 17, § 95980.1(a).

⁶³ *See* CPP at 64,906, 64,951 (to be codified at 40 C.F.R. § 60.5805).

⁶⁴ Proposed Federal Plan at 65,003, 65,100 (proposed 40 C.F.R. § 62.16465(c)).

⁶⁵ *See* Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16445(d)).

⁶⁶ *See* Proposed Federal Plan at 65,003.

a final recommendation to the Regulator, who would perform a desk review and make the ultimate final issuance decision.

The Pennsylvania AEC Program provides an example of the former. The AEC Program Administrator is tasked with certifying AECs, including from energy efficiency resources, on behalf of the Pennsylvania PUC.⁶⁷ California's GHG offset program provides an example of the latter approach.⁶⁸ As another variant, M-RETS determines the number of RECs a project should receive based on the data submitted to M-RETS from Qualified Reporting Entities, which can be control area operators, interconnecting utilities, scheduling coordinators, or independent third-party meter readers.⁶⁹ M-RETS runs a QA/QC check to ensure the data are feasible and issues the corresponding number of certificates, pending confirmation from the project that number is accurate.⁷⁰ These RECs can then be used to demonstrate compliance with participating state Renewable Portfolio Standards before the State PUCs.

d. Process Element: ERCs Issued and Monitored in Tracking System

After the Regulator or TPE-Reviewer approves of the number of ERCs to which a project is entitled, ERCs can be issued into the project provider's account.⁷¹

Potential Roles of TPEs:

As discussed above, a TPE-Tracking System could both develop and implement an ERC tracking system that meets CPP requirements. The TPE-Tracking System could also be responsible for physically issuing ERCs with serial numbers into a project provider's general account once the M&V Report is approved by the Regulator (or a TPE). The TPE-Tracking System would transparently track the chain of custody for each ERC to ensure that there is no double counting, and would make this information and supporting documentation (including

⁶⁷ 52 Pa. Code § 75.65(d); AEC RFP at 25-26.

⁶⁸ Specifically, an Offset Project Registry is authorized to review the verification statement for the "Offset Project Data Report," and can then make a substantive determination as to the number of offset credits a project should receive. Cal. Code Regs. tit. 17, § 95980; Cal. Code Regs. tit. 17, § 95980.1(a). The Offset Project Registry then issues the appropriate amount of *preliminary* offset credits. See Cal. Code Regs. tit. 17, § 95980.1. However, the issuance of these credits is essentially a preliminary determination, because they are not final compliance instruments. Rather, the preliminary credits must be submitted to CARB for review, and exchanged for ARB Offset Credits issued by CARB. These preliminary credits are canceled by the Offset Project Registry once CARB notifies it that a project is eligible to receive CARB-issued credits. See Cal. Code Regs. tit. 17, § 95987(i). It is thus ultimately CARB and not the Offset Project Registry that is responsible for the final determination regarding the issuance of credits. See Cal. Code Regs. tit. 17, § 95981; *id.* at § 95981.1.

⁶⁹ M-RETS Operating Procedures at App'x D. M-RETS will also accept generation data in some cases from Self-Reporting Generators. Small generators with a nameplate capacity less than or equal to 150 kW or generators using Distributed Generation Aggregation may opt to be treated as a Self-Reporting Generator. M-RETS Operating Procedures at 28. A Self-Reporting Generator must enter actual cumulative meter readings no less frequently than annually, and these readings must be verified by a Third Party Verifier or Qualified Reporting Entity, not less than annually. *Id.* at 28-29.

⁷⁰ M-RETS Operating Procedures at 33.

⁷¹ Proposed Federal Plan at 65,000 ("If the application meets these [M&V Report] requirements, pursuant to review by the EPA or its designated agent, ERCs will be issued to the provider by the EPA through the ATCS."); *id.* at 65,095 (proposed 40 C.F.R. §62.16445); see also CPP at 64,951 (to be codified at 40 C.F.R. § 60.5805).

Project Eligibility Applications, M&V Reports, and verification reports) available to the public. Additional considerations regarding the use of TPE-Tracking Systems are discussed above *supra* Section III.B.2.d.

4. Potential Roles of TPEs in Accreditation and Management of Independent Verifiers

a. Process Element: Accreditation of Independent Verifiers

The proposed Federal Plan and MTR establishes presumptively approvable criteria for accreditation and COI for Independent Verifiers.⁷² The proposed Federal Plan and MTR also requires Independent Verifier accreditation applications to document the specific individual Independent Verifiers that will provide services, including the lead verifiers, as well as key personnel and any contractors or subcontractors (together referred to as “the independent verification team”).⁷³ Once accredited, *only* the accredited independent verification team identified in the application and accredited by the Regulator may provide a verification report.⁷⁴

Potential Roles for TPEs:

As noted above, the Regulator could accredit Independent Verifiers itself, or could use a TPE-Accreditation Body to assist with this process (such as in Connecticut). TPE-Accreditation Bodies could assist with the initial accreditation of Independent Verifiers, as well as the periodic reviews and audits to ensure that Independent Verifiers are maintaining the necessary qualifications. TPEs could also assist the Regulator with ongoing accreditation tasks associated with ensuring that new members added to “independent verification teams” meet the necessary requirements. As with other TPEs, the types of tasks a TPE-Accreditation Body might perform fall into two major categories: administrative/ministerial and substantive.

TPE-Accreditation Bodies could conduct various administrative tasks, including completeness determinations, and communicate with the prospective Independent Verifiers. TPE-Accreditation Bodies could also create common applications for the initial accreditation of Independent Verifiers, as well as for the review of COI and approval of new personnel or personnel changes. These applications would hardwire the criteria prescribed by the Regulator.

Depending on the Regulator’s needs, TPE-Accreditation Bodies could also assist with the substantive decision to accredit Independent Verifiers and/or the substantive review of Independent Verifier personnel changes. As with other substantive decisions, the TPE-Accreditation Body could be responsible for making the determination, subject to potential audit by the Regulator, or could make a recommendation to the Regulator, who would make the ultimate final accreditation decision.

In evaluating Independent Verifier applications, the Regulator could also use or recognize already-established accreditation standards issued by private or public TPEs for criteria such as technical qualifications or auditing/accounting qualifications. Indeed, in the proposed Federal

⁷² See Proposed Federal Plan at 65,101 (proposed 40 C.F.R. § 62.16475).

⁷³ Proposed Federal Plan at 65,100 (proposed 40 C.F.R. § 62.16470).

⁷⁴ Proposed Federal Plan at 65,100 (proposed 40 C.F.R. § 62.16470).

Plan and MTR, EPA notes that it may “recognize, in part, accreditation by an outside organization where such outside accreditation demonstrates that federal plan requirements are met.”⁷⁵ EPA has also already proposed to recognize ANSI accreditation under ISO 14065 for GHG validation and verification bodies.⁷⁶ The Regulator (with or without the help of a TPE) could identify comparable reliable and well-established accreditation standards and industry best practices for Independent Verifiers of specific EE and RE projects, and could choose to recognize these standards as meeting the Regulator’s requirements.

The Department of Energy could also assist the Regulator with identifying accreditation standards (either alone or in consultation with the TPE).⁷⁷ As EPA recognized in the proposed Federal Plan and MTR, third-party entities can assist with skills certification for workers that perform EM&V for RE and EE projects. According to EPA, these entities could include “Parties aligned with the DOE’s Better Building Workforce Guidelines and validated by a third party accrediting body recognized by DOE; or parties aligned with an apprenticeship program that is registered with the federal DOL, Office of Apprenticeship; or parties aligned with a state apprenticeship program approved by the DOL, or by another skill certification validated by a third party accrediting body.”⁷⁸

b. Process Element: Ensuring that Independent Verifiers Do Not Have Conflicts of Interest With Respect to Specific Projects

The CPP prohibits Independent Verifiers from having COI. Additionally, the proposed Federal Plan and MTR requires Independent Verifiers to demonstrate that they have no COI with respect to each eligible resource, and prohibits Independent Verifiers from providing verification services for an eligible resource “without the approval of the Administrator.”⁷⁹

Potential Roles for TPEs:

The Regulator could conduct this COI review itself, or could use a TPE-Accreditation Body or other TPE to assist with or oversee this process. Using a third party for this role has regulatory precedent. In California’s offset program, for example, although CARB must *initially* select Independent Verifiers via executive order, the Offset Project Registries are authorized to review COI information and to approve the verification body to provide verification services for a particular project.⁸⁰ As with the process for accrediting Independent Verifiers, TPE-Accreditation Bodies or other TPEs could create common applications for the review of COI and, like the California offset program, could also engage in substantive review of those applications depending on the preferences of the Regulator.

⁷⁵ Proposed Federal Plan at 65,002.

⁷⁶ Proposed Federal Plan at 65,100 (proposed 40 C.F.R. § 62.16470).

⁷⁷ If EPA contracts with or orders services from the DOE, it should consult the requirements of the Economy Act, 31 U.S.C. § 1535, which authorizes the inter-agency performance of work or services on a reimbursable basis. Among other things, the Economy Act outlines the procedures for providing such services and reimbursement, and requires that the agency determine that the services ordered from another agency “cannot be provided by contract as conveniently or cheaply by a commercial enterprise.”

⁷⁸ Proposed Federal Plan at 65,008.

⁷⁹ Proposed Federal Plan at 65,101 (proposed 40 C.F.R. § 62.16475)(d).

⁸⁰ Cal. Code Regs. tit. 17, § 95979(f).

5. Potential Roles of TPEs in Implementing the CEIP

EPA has not fully delineated the process for issuing CEIP credits, but EPA has specified that state plans (or a Federal Plan)⁸¹ must establish requirements based on the process for issuing ERCs under the rate-based plan.⁸² Projects would need to demonstrate eligibility, demonstrate entitlement to CEIP credits by documenting MWh of generation/savings, undergo verification, and be monitored in a tracking system. Thus, one can expect that TPEs could provide substantial assistance to the Regulator in facilitating the issuance of CEIP credits in all of the ways discussed herein with respect to the issuance of ERCs under the rate-based plan. EPA also could use TPEs for various tasks associated with issuing EPA CEIP credits to “match” CEIP credits issued under state plans.

IV. Design Features and Cross-Cutting Issues

A. Method of Selecting TPEs

In order to make use of TPEs, the Regulator will need to have procedures in place to select them, including criteria for determining if TPEs are qualified. This procedure would likely vary depending on the type of TPE and the type of functions it performs, and could include notice-and-comment rulemaking, an application and approval process, or a request for proposals (“RFP”).

For the most part, the mode of selection likely need not be through notice-and-comment rulemaking, especially if EPA includes procedures and criteria for selecting various types of TPEs as a part of its final Federal Plan rule. This is particularly likely to be true for TPEs that conduct ministerial tasks or for TPEs that only make a recommendation to EPA, with EPA reviewing the recommendation and making the final substantive determination. Similarly, states that include procedures and criteria for selecting TPEs as a part of their state plans should not be required to amend their state plans in order to select TPEs.

For instance, under the California offset program, CARB’s regulations provide that the Regulator will approve, through CARB executive order, any Offset Project Registry that submits an application that meets the regulatory criteria.⁸³ This procedure has resulted in the approval of three Offset Project Registries.⁸⁴

Other methods could be used and may be more appropriate depending on the TPE’s function. For instance, the Regulator could issue an RFP to select certain types of TPEs. This method might be preferable for TPE functions that involve substantive determinations over which the Regulator wishes to retain strong oversight. For example, under the Pennsylvania AEC Program, the Pennsylvania PUC selects a single AEC Program Administrator through an RFP

⁸¹ EPA has proposed to implement the CEIP in all states subject to the Federal Plan. Proposed Federal Plan at 64,970, 65,025-26.

⁸² CPP at 64,943 (to be codified at 40 C.F.R. § 60.5737(e)).

⁸³ See Cal. Code Regs. tit. 17, § 95986 (“Within 60 calendar days following completion of the application process, the Executive Officer shall approve an Offset Project Registry if evidence of qualification submitted by the applicant has been found to meet the requirements of section 95986 and issue an Executive Order to that effect.”).

⁸⁴ See <http://www.arb.ca.gov/cc/capandtrade/offsets/registries/registries.htm>.

process.⁸⁵ Picking a single TPE through an RFP is more likely to ensure that the TPE is accountable directly to the Regulator. Furthermore, using one TPE directly chosen by the Regulator will avoid a situation in which multiple TPEs might compete with each to perform the same function and pander to the project providers to obtain their business. Such competition could result in a “race to the bottom” and slipping standards—at least where the TPE must obtain business from and is directly compensated by the project provider—because TPEs might feel pressured to approve of eligibility applications and M&V Reports in order to retain or attract business.⁸⁶

Lastly, TPEs that provide services directly to project providers likely do not need to be “selected” by the Regulator in a traditional sense. Instead, the Regulator could allow project providers to select TPEs in the free market to provide various services. Depending on the type of TPE, the Regulator may or may not feel the need to implement some sort of qualification process to screen TPEs to make sure they are qualified to provide the services they offer to project providers.

Because the TPE selection process must be informed by the TPE’s specific function, considerations for selecting each of the major TPE types are discussed below:

TPE-Project Document Manager: The Regulator can select a TPE-Project Document Manager to assist with the administration of various approvals and completeness determinations, and to serve as the primary point of contact with project providers submitting Project Eligibility Applications and M&V Reports. TPE-Project Document Managers could likely be selected with an application and approval process, similar to the CARB Offset Project Registries. TPE-Project Document Managers also could function as private entrepreneurs that provide independent document management services directly to project providers. For instance, a Project Document Manager may offer its services to project providers, for a fee, and assist them with ensuring that their eligibility applications and M&V reports are complete and comply with applicable regulations and can submit them on the project provider’s behalf to the Regulator. In this instance, the Regulator might not need to “select” the TPEs in a traditional sense; rather the project providers would select the TPE to assist them with this process.

TPE-Reviewer: The Regulator would need to decide whether it has a need for a TPE-Reviewer to assist with substantive determinations, *e.g.*, the determination as to whether a project is eligible for ERCs and, if so, how many. This TPE-Reviewer would have significantly more substantive responsibility than the other types of TPEs and the Regulator would likely need to develop additional criteria and requirements for this type of TPE to ensure that it has the

⁸⁵ See AEC RFP. See also

⁸⁶ An observer knowledgeable about the California offset program suggested that an RFP might have been a better method to select Offset Project Registries—at least with respect to their TPE-Reviewer functions. Under the current system, Offset Project Registries are compensated directly by the offset provider. Some of the registries also have long-standing relationships with providers, as the registries existed *prior* to the creation of the California GHG offsets program. In addition, there are multiple Offset Project Registries, allowing project providers to “shop” among registries. According to the observer, this structure has led Offset Project Registries to sometimes act more as advocates for the project providers than as agents for CARB. This has proved problematic with respect to the Offset Project Registries’ TPE-Reviewer functions, but not with respect to their more administrative TPE-Project Document Manager functions.

proper technical qualifications⁸⁷ and has no COI. Regulators should pay particular attention to the manner in which the TPE-Reviewer is selected (and compensated). The incentives created through the selection and compensation process will have a direct bearing on the performance of the TPE-Reviewer and the likelihood that COI develop. For instance, an RFP might be more appropriate (and potentially legally necessary) for this type of TPE in order to ensure that the TPE will be fully accountable to the Regulator.

Furthermore, in selecting a TPE-Reviewer, the Regulator should consider whether one or multiple TPEs should perform this role. Having only one TPE-Reviewer (or only one TPE-Reviewer for each type of eligible resource, if more specialization is necessary to gain the requisite level of expertise) might allow the Regulator to maintain greater oversight, ensure consistency in the decision process, avoid forum shopping, and prevent a race to the bottom spawned by competing TPEs. On the other hand, selecting multiple TPEs could prevent monopolistic behavior—which is a meaningful consideration if the TPE is compensated through fees collected from project providers. Monopolistic behavior also could be avoided through price restraints, flat fees, or other checks imposed by the Regulator. However, as discussed below, there may also be legal constraints requiring the Regulator to directly compensate TPE-Reviewers, rather than through project fees.

TPE-Tracking System: The CPP indicates that a TPE-Tracking System would need to be approved as a part of a state plan, and requires that a state plan “must require that ERCs may only be issued through an ERC tracking system *approved as part of the State plan.*”⁸⁸ States thus would likely need to select a TPE-Tracking System to perform ERC tracking functions prior to when they submit their state plans. If the TPE-Tracking System function is performed by multiple entities, each tracking system should be interoperable with all others to ensure that trading may take place.

TPE-Accreditation Body: If the Regulator uses a TPE-Accreditation Body to engage in the substantive aspects of selecting or overseeing Independent Verifiers, the Regulator would need to develop a process to select this TPE-Accreditation Body. In this case, it would be beneficial to include provisions outlining the selection process and necessary criteria in its state plan or the Federal Plan.

The Regulator could also choose to recognize accreditations issued by already-established TPE-Accreditation Bodies and could rely on assistance from the DOE (or another TPE) to vet accreditation bodies. Under this model, a TPE-Accreditation Body would not necessarily need to be “selected,” but the Regulator would merely choose to recognize the pre-existing accreditations issued by the TPE for the purposes of meeting the Regulator’s requirements. The Independent Verifiers themselves would seek the accreditation services of the TPE, and would use that accreditation to demonstrate that they meet the Regulator’s requirements.

⁸⁷ The TPE-Reviewer would preferably be well-versed in industry best practices and protocols and would need to become an expert in EPA’s EM&V Guidance, among other things.

⁸⁸ CPP at 64,951 (to be codified at 40 C.F.R. § 60.5805(f)) (emphasis added).

B. Compensation and Conflicts of Interest

Another cross-cutting issue is the need to ensure that TPEs are adequately compensated. In some instances, it may be desirable or legally necessary to have TPEs be paid for and contracted by the Regulator—especially if they are making substantive determinations for the Regulator or assisting the Regulator with its statutory duties.⁸⁹ In other cases, however, it may make more sense to permit TPEs to provide services to project providers directly and to compensate themselves through project-related fees. This decision will largely depend on the type of services the TPE is providing and to whom the TPE is providing that service. There are two major considerations that must be evaluated in selecting an appropriate compensation scheme: (i) the potential for conflicts of interest to arise; and (ii) the existence of legal constraints affecting the Regulator’s ability to collect and/or spend funds to pay TPEs.

1. Conflicts of Interest

TPEs that do not make substantive determinations, but that perform administrative and tracking roles could likely be compensated directly by project providers without creating COI, provided that the structure of the fee arrangement does not otherwise create any perverse incentives. However, for TPEs that perform final substantive tasks, such as TPE-Reviewers, COI could arise if such TPEs are compensated directly by project providers. To avoid COI, the Regulator ideally would directly compensate such TPEs.⁹⁰

If the Regulator adopts a fee-based system to pay TPEs engaged in substantive tasks, it would be critical for the Regulator to establish rules to avoid COI and to ensure that the fee structure does not create perverse incentives for TPEs. First, the amount of fees should *not* be based on whether an application is accepted, the number of ERCs issued to a project, or the number of eligible project providers. If the fee were based on the number of MWh eligible for ERC issuance, a TPE might be incentivized to inflate the number of qualifying MWh in order to obtain a higher fee. Such “success fee” arrangements should be avoided, because they can result in COI. EPA seems to have recognized the perverse incentives created by such arrangements, because it proposes to prohibit their use for compensating Independent Verifiers. Specifically, the proposed Federal Plan and MTR provides that “[a]ccredited independent verifiers must not be compensated, financially or otherwise, directly or indirectly, on the basis of the content of its verification report (including eligibility approval of an eligible resource, the quantified and verified MWh in an M&V report, ERC issuance, or the number of ERCs issued)[.]”⁹¹ Similar prohibitions should apply to all other TPEs that make any kind of substantive eligibility or

⁸⁹ One possibility is that EPA could embed the program within the Office of Enforcement and Compliance Assurance, which may have an additional source of funds not available to the other divisions within the Agency. States could similarly use agency funds or could seek appropriations from the state legislature.

⁹⁰ Indeed, California’s experience with Offset Project Registries indicates that it might be useful to avoid direct payment of fees from the project provider to the TPE. According to one observer with knowledge of California’s experience, dependence on payment directly from project operators has in some cases led to a client-advocate-like relationship, despite the fact that fees are primarily time-and-materials based, rather than success-based. The effect could be magnified by having multiple Offset Project Registries, which could create incentives to accommodate an operator in order to “keep its business.” In addition, as discussed above, there were long-standing relationships between some of the project operators and the Offset Project Registries in California, as the Offset Project Registries predate the start of the California GHG offsets program.

⁹¹ Proposed Federal Plan at 65,101 (proposed 40 C.F.R. § 62.16475(a)(4)).

issuance determination, such as TPE-Reviewers and potentially TPE-Accreditation Bodies. Instead, the amount of such fees could be based on time and materials or other parameters unconnected to the TPE’s substantive determination.⁹² The Regulator could also determine an appropriate flat fee or fixed fee structure based on the complexity of different types of tasks.

In addition to prohibiting “success fee” arrangements, the Regulator could also insert itself or some other intermediary as a middle man to collect the fee from project providers and then itself distribute it to the relevant TPEs. Such an arrangement could be helpful because it would break the direct financial link between project providers and TPEs, and because the TPEs would receive their money from—and thus be more accountable to—the Regulator. However, only states could likely take advantage of this fee structure. As discussed below, EPA would likely be constrained in its ability to impose and collect fees from project providers and redistribute them to TPEs, because of restrictions imposed by the Miscellaneous Receipts Act. If EPA were to consider such an intermediary role, the agency would need to determine whether such a role was consistent with the MRA and its authority to collect and spend non-appropriated funds.

2. Legal Constraints on the Regulator’s Ability to Compensate TPEs or to Require Project Providers to Pay Fees to TPEs.

EPA should be mindful of appropriations-related laws—such as the Antideficiency Act (“ADA”) and the Miscellaneous Receipts Act (“MRA”)—that may constrain its ability to compensate TPEs in certain ways. These statutes apply only to EPA, not states; however, state agencies should also be cognizant of similar appropriations-related restrictions that may exist in state laws.

a. Antideficiency Act

For TPEs that EPA compensates directly, EPA must ensure that it has enough money in appropriations. The Antideficiency Act provides that agencies may not “(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”⁹³ EPA should be cognizant of the limitations imposed by this section if it enters into contracts with TPEs providing them payment to assist with EPA’s implementation of the Federal Plan.⁹⁴

b. Miscellaneous Receipts Act (“MRA”)

For TPEs that are compensated through fees imposed on project providers or other third parties, EPA should evaluate whether the structure of the payment scheme implicates the MRA.

⁹² Volume based fees could also be problematic, because they could incent TPEs to rush through applications, which could lead to errors.

⁹³ 31 U.S.C. § 1341(a)(1). A corollary to this provision is 31 U.S.C. § 1342, which prohibits the government from accepting voluntary services. Other provisions of the Antideficiency Act are included in other statutory sections, but 31 U.S.C. § 1341 is the key provision.

⁹⁴ See generally, General Accountability Office (“GAO”), *Principles of Federal Appropriations Law*, 3d ed., 2015 Annual Update, ch. 6, § C.2, GAO-15-303SP (Mar. 2015), available at 2006 WL 6179172 (known as the “GAO Red Book”).

The MRA requires that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”⁹⁵ The MRA ensures that agencies remains dependent upon Congressional appropriations,⁹⁶ and a touchstone of the inquiry as to whether an agency has violated the MRA is whether it has improperly “augmented” its Congressional appropriations by retaining or disposing of funds that should have been paid to the Treasury.

The MRA only applies to “*money for the Government,*” and the U.S. Government Accountability Office (“GAO”) has interpreted this to mean money that is “to be used to bear the expenses of the government or to pay the obligations of the United States.”⁹⁷ Penalties and fees paid or owed to agencies also trigger the MRA. For instance, the GAO recognizes that agency’s generally have authority under the Independent Offices Appropriation Act, 31 U.S.C. § 9701 (the User Charge Statute) to collect reasonable fees from recipients of agency benefits or services. However, GAO has made clear that user fees must be deposited in the Treasury, unless an agency has statutory authority to retain fees—the agency cannot circumvent the requirement by having an entity pay fees directly to a contractor.⁹⁸ Thus, if EPA were to impose and collect a fee from project providers, EPA would most likely need to pay it to the Treasury, not to a TPE.

Although physical payment of money from a third party to an agency would significantly increase the likelihood that money must be paid to the Treasury (barring some exception),⁹⁹ an agency does *not* need to take *physical* possession of money for the MRA to apply; the MRA can also be triggered by *constructive* receipt or disposition of “money for the Government.”¹⁰⁰ This issue can come into play when an agency uses a contractor to provide a service to third parties, and those third parties pay the contractor directly for the services, rather than the agency. Even though the money does not touch the hands of the agency, such money would still be viewed as “money for the government” in certain circumstances. Several considerations are likely to increase the likelihood that money paid to a TPE is “money for the Government” that should be deposited in the Treasury:

⁹⁵ 31 U.S.C. § 3302.

⁹⁶ See generally GAO Red Book, ch. 6, § E.2, available at 2006 WL 6179179 at *2; see also *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1361-62 (D.C. Cir. 1996) (“By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes.”).

⁹⁷ See GAO, B-321729 (Nov. 2, 2011).

⁹⁸ See GAO, B-300826 (Mar. 3, 2005); see also GAO, B-300248 (Jan. 15, 2014).

⁹⁹ A significant exception is that, if the government has received money that is for the benefit of another—for instance a statutorily created trust—the MRA does not apply. See GAO, B-321729 at 4 (Nov. 2, 2011). However, there are limits to this exception, and an agency cannot create a “trust” to circumvent the MRA. See *Motor Coach v. Dole*, 725 F.2d 958 (4th Cir. 1984) (finding that scheme of Federal Aviation Administration in which FAA required airlines to pay money into “trust” to purchase buses in lieu of payments to FAA was in violation of the MRA); see also 4B Op. Off. Legal Counsel 684, 687 (1980).

¹⁰⁰ See, e.g., *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356 (D.C. Cir. 1996) (agency’s solicitation requiring bidder for travel agency contract pay the portion of concession fees derived from unofficial travel to a morale fund rather than to the Treasury violated MRA); see also 4B Op. Off. Legal Counsel 684, 688 (1980) (“[T]he fact that no cash actually touches the palm of a federal official is irrelevant . . . if a federal agency could have accepted possession and retains discretion to direct the use of the money. The doctrine of constructive receipt will ignore the form of a transaction . . . we believe that money available to the United States and directed to another recipient is constructively ‘received’ for purposes of [the MRA] . . .”).

- The agency *imposes a fee* on a third party or money is *owed* to the agency for providing a service or benefit (for instance, under the User Charge Statute), but the agency redirects payment or requires payment to be made to a TPE in lieu of the agency.¹⁰¹ An agency cannot simply change the form of the arrangement to avoid having money owed to it, or redirect payment of that money to a third party to circumvent the MRA.¹⁰² Money *owed* to the government must go to the Treasury unless there is a statutory exception.¹⁰³
- The agency owes money to a contractor for a service, and structures the transaction such that a third party pays the agency's obligation to the contractor. This is also likely to increase the likelihood that the MRA is implicated, because the agency could be viewed as transferring its liability to a third party and thus augmenting its appropriations.¹⁰⁴
- A TPE is directly providing a service to a third party for an agency, and the third party pays the contractor for the service directly, *but* the agency has the *statutory obligation* to provide that service.¹⁰⁵ Although the agency would not *physically* receive any funds and the agency is not directly providing the service, such an arrangement would likely be viewed as an end-run around the MRA, because the agency is effectively using money

¹⁰¹ See GAO, B-302811 at 7 (July 12, 2004); GAO, B-300248 (Jan. 15, 2004).

¹⁰² See GAO, B-303413 at 14 (Nov. 8, 2004), *Motor Coach v. Dole*, 725 F.2d 958 (4th Cir. 1984) (rejecting FAA's attempt to allow airlines to pay money into a trust in lieu of paying fees to FAA).

¹⁰³ GAO, B-303413 at 13 (Nov. 8, 2004) ("The heart of the matter in many miscellaneous receipts cases is whether money not received by a government agency nevertheless constitutes money owed to the government for its use that must be deposited into the Treasury.").

¹⁰⁴ See GAO, B-302811 at 7 (July 12, 2004); GAO, B-300248 (Jan. 15, 2004) (finding fees subject to MRA, because "SBA's contractor is not acting independently of SBA but as SBA's agent, and the review fees paid by the lenders substitute for payment that SBA would otherwise make."). This situation is distinguishable from a situation in which the agency has a "no-cost contract," *i.e.*, the contractor provides services under a formal contract at no cost to the government and the government *does not owe* any money to the contractor. See GAO, B-302811 at 7 (July 12, 2004). The GAO has found that contractors may retain fees from third parties if they have entered into a valid "no-cost contract" with the agency. For example, in two related decisions, the GAO found that the General Services Administration's no-cost real estate brokers contract would not violate the MRA. See GAO, B-302811 (July 12, 2004); GAO, B-291947 (Aug. 15, 2003). Under the contract, the brokers would provide lease acquisition services to agencies without cost to the government. Rather, their compensation would take the form of commissions paid by the lessors consistent with industry practice. GAO has found that "[t]he acceptance of services without payment pursuant to a valid, binding no-cost contract does not augment an agency's appropriation nor does it violate the voluntary services prohibition." GAO, B-302811 at 7 (July 12, 2004). However, the GAO Red Book notes that no-cost contracts should be approached "with a great deal of care lest the agency find that it has incurred a constructive augmentation." GAO Red Book, ch. 6, § E.2. For example, GAO rejected the Small Business Administration's ("SBA") attempt to argue that its contract was a no-cost contract (because the SBA's contractors had an ultimate expectation of payment from SBA). See B-302811 (July 12, 2004); GAO, B-300248 (Jan. 15, 2004). If the agency is on the hook for money to a contractor, the agency cannot require a third-party to pay the contractor and thus augment its appropriation.

¹⁰⁵ For instance, in B-300248 (Jan. 15, 2004), the SBA retained a contractor to assist it with its *statutorily required duty* to conduct annual reviews of certain lenders. However, SBA did not pay the contractor out of appropriations, but instead SBA imposed a fee on the lenders being reviewed, and required them to pay the fee directly to the contractor. SBA argued that the fees did not constitute "money for the Government" because they were paid directly to the contractor as compensation for its work. The GAO rejected this argument, finding that SBA's "constructive disposition" of the fees violated the MRA. The fee arrangement amounted to shifting SBA's expenses incident to carrying out its statutorily required duties, and improperly augmented SBA's appropriations. It was thus "money for the Government" used to bear the government's expenses. *Cf. Thomas*, 176 F.3d 500 (fees charged by private party for service were not subject to MRA where agency not statutorily required to perform the service).

from a third party—rather than an appropriation—to carry out its statutory obligations and fund what is required to be a government service.

On the other hand, if the money is *not owed* to the government for a service or action, and an agency *does not have a statutory obligation* to take a certain action or provide a certain service, the MRA is less likely to be implicated. The MRA is also less likely to be implicated if an entity is not the government’s *agent*, but provides a service to third parties as a *private entity or entrepreneur* and charges a fee for that service (even if the government selects the entity).¹⁰⁶ For instance, in *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000), the Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) concluded that fees charged by a private party to a cooperative agreement with an agency were not fees for a service provided by the government and were not subject to deposit in the Treasury under the MRA. The National Science Foundation (“NSF”) (a government entity) and Network Solutions (a private entity) had entered into a cooperative agreement in which Network Solutions was to maintain the Nation’s registry of Internet domain names. Network Solutions charged domain name registrants a one-time registration fee and annual fees thereafter, and retained 70% of the fees as payment for services provided.¹⁰⁷ The D.C. Circuit found that the fees retained by Network Solutions were not paid for “a service or thing of value provided by an agency” under the User Charge Statute, because the service was provided by a *private party* and NSF was *not required* by law to provide the registry.¹⁰⁸ The court also found it relevant that Network Solutions rather than NSF controlled the registration process and Network Solutions was thus not merely NSF’s agent.¹⁰⁹ As a result, Network Solutions was able to retain the payments for the services it provided and these payments were not subject to the MRA.¹¹⁰

The inquiry as to whether the MRA applies is fact-dependent and this paper does not provide an exclusive list of the circumstances that could trigger the MRA. Whether the payment of different types of TPEs implicates that MRA will likely depend on the EPA-TPE relationship, and the types of tasks the TPEs are performing (and whether such task is statutorily required). As the D.C. Circuit’s decision in *Thomas* illustrates, TPEs that perform functions that an agency *could* perform, but is not legally required to perform, can be paid directly by third parties

¹⁰⁶ See GAO, B-300248 (Jan. 15, 2004) (“In both cases, however, we stated that the contractors, not the agencies, were providing the services to the public and, in so doing, were not acting as the government’s agent. Rather, the contractors were independent entrepreneurs who provided a service sought by the public, and thus the fees they collected were not for the use of the government required to be deposited into the Treasury. This is not the situation with SBA. PLP lenders are not seeking independent services from the contractor; they are complying with requirements imposed by SBA.”); see also GAO, B-166506 (Oct. 20, 1975) (EPA permitted to have third-parties directly pay contractor for processing information where contractors were acting as independent entrepreneurs rather than as EPA’s agents); 61 Comp. Gen. 285 (1982) (similar fact pattern involving FEC). Cf. *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 510-11 n.17 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) (considering relevant to question of whether service was a government service the fact that entity was private entity that itself managed the service, rather than agent under the control of the agency).

¹⁰⁷ 30% of the fees were paid to NSF.

¹⁰⁸ *Thomas v. Network Solutions*, 176 F.3d 500, 510-11; see also GAO, B-300248 (Jan. 15, 2004) (“While Network Solutions involved services that were not provided, supervised, or managed by the government, more importantly, it involved services the government was not required to perform. As the court observed, the fact that NSF could have performed the services did not transform what was a private activity into a government service. The SBA situation is markedly different: SBA is statutorily required to review . . . lenders and does so through its agent . . .”).

¹⁰⁹ *Thomas v. Network Solutions*, 176 F.3d 500, 510-11 & n.17.

¹¹⁰ *Id.* at 510-511.

receiving a service—especially if the agency is not micromanaging the service or requiring the third party to make the payment. TPEs performing more administrative tasks for project providers—such as TPE-Project Document Managers—would likely be viewed as more akin to the internet registry services provided by the third-party in *Thomas* and are thus unlikely to implicate the MRA. However, TPEs that perform substantive tasks for EPA—such as making substantive determinations about project eligibility or issuance of credits (TPE-Reviewer tasks)—are more likely to be viewed as agents of the agency assisting with the agency’s required duties (rather than private parties providing services to project providers) and thus may need to be paid by the agency directly. Such a payment structure is also ideal to avoid COI, as discussed above.

C. Degree of Delegation

Most of the TPE functions outlined above involve primarily ministerial and administrative responsibilities. However, some roles, such as the TPE-Accreditation Body and TPE-Reviewer role are more substantive in character. The delegation of regulatory power to private entities poses a number of constitutional complications unique to EPA acting as the Regulator under a Federal Plan. While these constitutional constraints need not prohibit EPA from using TPEs—even TPEs responsible for substantive review—EPA should be cognizant of the constraints posed by legal precedent when selecting and overseeing any TPE.

There are three constitutional doctrines that EPA should consider.

Private Nondelegation Doctrine. Under long-standing and recently affirmed case law, Congress is prohibited from delegating regulatory power to private entities.¹¹¹ Agencies face the same restriction.¹¹² However, use of a TPE as a designated agent need not constitute an unconstitutional delegation of regulatory authority to a private entity so long as the private entity’s tasks are merely ministerial—or, if the tasks are regulatory, the agency retains ultimate authority over decisions.¹¹³ This precedent suggests that use of administrative and ministerial TPEs such as a TPE-Project Document Manager or a TPE-Tracking System would not pose any legal concern. The use of TPEs to make more substantive decisions may require more careful design. Specifically, EPA may be required to serve as the ultimate decision-maker, including issuing a final approval of all registrations and ERC or allowance issuances. There is no legal precedent clarifying the precise degree of oversight that will be considered sufficient. Therefore, EPA would likely be on safer ground approving each determination made by the TPE-Reviewer rather than allowing decisions by the TPE-Reviewer to stand subject to occasional audit or appeal of some fraction of determinations.

¹¹¹ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded sub nom. on other grounds Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225 (2015), *affirmed in relevant part Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, No. 12-5204, 2016 WL 1720357 (D.C. Cir. Apr. 29, 2016).; *Dep’t of Transp.*, 135 S. Ct. at 1237-38 (Alto, J. concurring).

¹¹² *Nat’l Ass’n of Regulatory Util. Comm’rs v. F.C.C.*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (Nondelegation questions are “ typically presented in the context of a transfer of legislative authority from the Congress to agencies, but the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals”).

¹¹³ *Ass’n of Am. Railroads*, 721 F.3d at 671 & n. 5; *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) *Sorrell v. SEC*, 679 F.2d 1323, 1326 (9th Cir. 1982) (“Sorrell’s claim of unconstitutional delegation appears to rest on his mistaken idea that the SEC does not engage in an independent review of NASD decisions”).

Even with some nominal oversight, courts may be suspect of any delegation that gives substantial *substantive* discretion to a private entity without an intelligible principle to guide that entity's decision-making.¹¹⁴ However, this intelligible principle test is, in practice, quite broad;¹¹⁵ this restriction should not pose a problem so long as the Federal Plan provides more than the rubber stamp of decisions made solely at the TPEs discretion. The level of guidance in the proposed model trading rule, including the EM&V guidance, is likely sufficient to clear this bar.

Due Process Limitations. In addition to a general prohibition on delegation regulatory decision-making to private entities, recent caselaw suggests courts may provide heightened scrutiny to the use of private entities if those entities have a competitive stake in the outcome of their own decision-making. For example, courts may be skeptical if EPA relies on TPEs that are also market participants to set the step 0 protocols or accreditation standards used to evaluate whether they and other market participants may reap the benefit of the regulatory scheme.¹¹⁶ However, this constitutional restriction is likely not of significant concern: as described above, EPA has good *policy* as well as legal reasons to limit such conflicts of interest.

Appointments Clause Limitations. Finally, the Constitution's appointments clause requires that any actor with "significant authority" pursuant to the laws of the United States is an "officer" and must be selected in a manner prescribed by the Constitution.¹¹⁷ For those actors subject to oversight (*e.g.*, all private actors that do not pose nondelegation problems), this restriction should pose no additional concern. However, one procedural implication is worth mention. EPA has proposed that all ERCs will be issued through a "Notice of Data Availability" process—that is, publication in the Federal Register.¹¹⁸ However, "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it."¹¹⁹ It may, therefore, be insufficient for EPA to rely on regular audits to confirm the validity of credits issued by the TPE so long as the procedure proposed for the Federal Plan stands. ERC and allowance issuance should at least have the official sign-off of a senior EPA official.

D. Oversight and Consequences

Another major issue is how the Regulator will maintain oversight over different types of TPEs, and the consequences if TPEs make mistakes that lead to the improper issuance of ERCs.

1. *Mechanisms to Maintain Oversight*

¹¹⁴ *Pittston Co.*, 368 F.3d at 394 (a Department may authorize a person or body to act on its behalf only by designating an intelligible principle to which the person or body authorized to act is directed to conform.) (citations and quotations omitted).

¹¹⁵ See *Whitman v. American Trucking Assns.* 531 U.S. 457, 474-75 (2001).

¹¹⁶ See *Ass'n of Am. Railroads*, No. 12-5204 at *5-6.

¹¹⁷ *Id.* at *15.

¹¹⁸ Proposed Federal Plan at 64,999).

¹¹⁹ *Ass'n of Am. Railroads*, No. 12-5204 at *15 (citing *Dep't of Transp.*, 135 S.Ct. at 1239 (Alito, J., concurring)).

There are several ways in which the Regulator can maintain oversight over a TPE, including through limits on the TPE's substantive decision making ability and discretion; audits; and penalties for misconduct.

The first major method is to limit a TPE's ability to make final substantive decisions. As discussed herein, a TPE-Reviewer could either make the substantive determination itself, subject to potential Regulator audit, or can make a recommendation to the Regulator, with the Regulator reviewing the recommendation and making the final determination. If the TPE is not empowered to make the final decision and the Regulator reviews its work, a layer of oversight is built into the process. A drawback of this approach is that it is more burdensome for the Regulator.

Along similar lines, the Regulator could also increase oversight by providing, in the first instance, more specific substantive requirements as a part of a state plan or as a part of a Federal Plan (or as a part of an agency guidance document). The more specificity the Regulator provides up front, the less discretion the TPE would have on the back end. More specificity on required EM&V protocols, for instance, could limit the type of substantive discretion available to the TPE (*i.e.*, determining if an EM&V method is, indeed, "industry best practice"). Such requirements would reduce the degree to which a TPE needs to make judgment calls. However, this approach has the potential downside of ossifying such requirements and preventing them from keeping up with evolving industry best practices. The Regulator would thus need to strike the right balance between providing too many hard requirements on the one hand, and too little guidance on the other.

The second major method of ensuring oversight is auditing. In the proposed Federal Plan, EPA has reserved broad authority to engage in auditing of the ERC issuance process. For instance, as a required component of Project Eligibility Applications, a project provider must include "[a]n authorization that provides for the following: The Administrator may inspect (including a physical inspection of the eligible resource and its meter) and/or audit the eligible resource at any time and verify that the eligible resource and the EM&V plan have been implemented as described in the eligibility application."¹²⁰ Additionally, the proposed Federal Plan and MTR broadly provides that "[t]he Administrator may review and conduct independent audits concerning any submission under the CO₂ Rate-based Trading Program and make appropriate adjustments of the information in the submission[,] and that "[t]he Administrator may deduct ERCs from or transfer ERCs to a compliance account, based on the information in a submission, as adjusted, . . . and record such deductions and transfers."¹²¹ EPA would thus have broad authority to either conduct its own audits or to review independent audits, and to adjust ERCs accordingly.

Audits can be used both by the Regulator to audit TPE decisions, as well as by a TPE to audit other entities, such as Independent Verifiers. For instance, the Regulator could annually audit 10% of the substantive determinations made by a TPE-Reviewer, and a TPE-Reviewer could audit 10% of the verification reports submitted by an Independent Verifier. This layered auditing approach could be used to enhance the oversight potential of the Regulator. The Regulator also could itself audit Independent Verifiers. Regardless of the exact mechanism,

¹²⁰ Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16445).

¹²¹ Proposed Federal Plan at 65,110 (proposed 40 C.F.R. § 62.16565).

audits are a powerful—and likely necessary—tool to ensure proper oversight of TPEs making substantive decisions.

A third way to ensure oversight is to penalize TPEs that do not properly execute their functions, make mistakes, or fail to comply with the Regulator’s rules. For instance, under the CPP, states must adopt provisions for revoking Independent Verifier qualification status.¹²² The proposed rate-based Federal Plan and MTR also provides for accreditation revocation provisions, and provides that the Administrator can revoke an Independent Verifier’s accreditation at any time “for cause,” including if the Independent Verifier fails to fully disclose any issues that may lead to a COI, is no longer qualified to provide verification services, is negligent in the conduct of verification activities, or intentionally misrepresents data in a verification report.¹²³ The Regulator could adopt similar revocation provisions for misconduct or negligence of TPE-Reviewers (and other TPEs if necessary) as another mechanism to ensure oversight. The use of audits can allow the Regulator to identify such misconduct.

As another option, the Regulator could impose financial penalties or liability on TPE-Reviewers (or other TPEs if necessary) if their misconduct or negligence results in the invalidation of ERCs. The Regulator could also require such TPEs to put up bond or pay into a fund that would be used to compensate or indemnify the holders of invalidated ERCs, if the ERCs were invalidated due to the TPE’s misconduct. Indeed, the Regulator could require TPEs to acquire a pool of replacement of ERCs for this purpose.

2. Consequences of ERC Invalidation

Regardless of whether the Regulator chooses to utilize TPEs, ERC invalidation is bound to occur during the implementation of the CPP. However, the use of TPEs and the Regulator’s ability to audit and invalidate their decisions raises the following question: What happens to ERCs that were improperly issued due to mistakes, misconduct, or negligence of TPEs? This question is important because the potential impacts of post-issuance ERC invalidation could be far-reaching and disruptive to the liquidity of ERC markets. Certain invalidation mechanisms could be more disruptive than others.

In the proposed Federal Plan and MTR, EPA primarily appears to propose a buyer liability-based scheme. Specifically, EPA recognizes that “[d]espite safeguards included in the structure of ERC issuance and tracking systems, such as the review of eligibility applications and M&V reports, and EPA issuance of ERCs, ERCs may be issued that do not, in fact, represent eligible zero-emission MWh[.]”¹²⁴ EPA then proposes a buyer liability scheme, under which “[t]he responsibility for the validity of the ERC rests with the affected EGU.”¹²⁵ Specifically, the proposed Federal Plan and MTR states that “[i]f 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”¹²⁶

¹²² CPP at 64,906.

¹²³ Proposed Federal Plan at 65,101 (proposed 40 C.F.R. § 62.16480); *see also id.* at 65,002.

¹²⁴ Proposed Federal Plan at 64,991.

¹²⁵ Proposed Federal Plan at 64,991.

¹²⁶ Proposed Federal Plan at 65,092 (proposed 40 C.F.R. § 62.16420(c)(5)). At the same time, however, EPA also appears to propose that the *eligible resource* would be liable for invalid ERCs that were issued due to errors or misstatement in the Project Eligibility Application or M&V Reports. Specifically, the proposed Federal Plan

Under such a buyer liability framework, one would expect that the project or entity selling the credits and the buyer (*i.e.* the affected EGU) would apportion liability for invalid credits via contract; however, such a scheme could influence buyers to build a steep discount into the price of ERCs to account for the risk of invalidation (which is difficult for buyers to assess) and could decrease their liquidity—especially for more complex project types such as EE. In this context, the use of TPEs to make final substantive determinations as to ERC issuance could also increase the level of perceived risk, because the Regulator has not itself given its stamp of approval to the issuance, and the risk of later invalidation could lead to a reduction in value. However, the degree of increased risk would likely be tied to how specific the Regulator’s up-front substantive requirements are with respect to items such as EM&V. If the substantive requirements that the TPE must apply are judgment-based—*e.g.*, “best practices”—the degree of invalidation risk would be higher than if the substantive requirements are specific and easy for buyers to evaluate. The more specific the requirements are up-front, the lower the invalidation risk will be based on differences in judgment between the TPE and the Regulator.

To avoid these consequences, the Regulator could adopt an alternative liability scheme and shift liability to TPEs or Independent Verifiers under certain circumstances. Specifically, the Regulator could impose liability on an Independent Verifier or TPE-Reviewer *if* the invalid ERCs were issued due to the misconduct, fraud, or negligence of the TPE, *i.e.* if the TPE is somehow culpable and has not merely made an honest or excusable mistake. The TPE could be responsible for purchasing a certain number of replacement ERCs from the market in such circumstances or the Regulator could require the TPE to indemnify the affected buyer that is required to purchase additional ERCs due to the invalidation. Such liability could strongly motivate TPEs to make proper substantive determinations and could provide another oversight mechanism. EPA has adopted a variant of this approach in the context of its significant changes to the Renewable Fuel Standard regulations. Under the modified approach, the buyer has an “affirmative defense” if it acquired Renewable Identification Numbers (“RINs”) that were subject to review by an independent verifier (referred to as an “auditor”), and the requirement to replace the invalid RINs can shift to the auditor or to the fuel provider.¹²⁷

Apart from shifting liability, another way to reduce risk for buyers is to impose a statute of limitations on buyer liability. Under this approach, a buyer might be liable for up to two years after issuance of a credit, but after two years, the buyer would not be liable, even if the credit was later found to be invalid. For instance, under the California offset program, the regulations provide for a statute of limitations, after which offset credits are effectively “safe” and cannot be invalidated. The default statute of limitations is eight years,¹²⁸ but project sponsors can shorten the statute of limitations to three years for certain project types—usually by implementing

provides that ERCs will either be subtracted from the number of ERCs issued to a project in a subsequent reporting period or will be revoked from the general account held by the authorized account representative of the eligible resource “in an amount necessary to correct the error or misstatement.” Proposed Federal Plan at 65,095 (proposed 40 C.F.R. § 62.16450). If an insufficient number of ERCs are in the account to make up the difference, the account representative must submit that number of ERCs to EPA within 30 days or else risk disbarment from future participation in the program. *Id.* It thus appears that in some circumstances the eligible resource may be liable for invalid ERCs.

¹²⁷ 79 Fed. Reg. 42,078 (July 18, 2014).

¹²⁸ Cal. Code Regs. tit. 17, § 95985(b).

additional verification checks.¹²⁹ Establishment of such a statute of limitations might require a change to the Clean Power Plan regulatory provisions.

As a final option, the Regulator could create a reserve bank of credits or insurance pool of credits that could be used by affected EGUs that “buy-in” to the pool and would be used to compensate affected EGUs in the event that some of their credits are invalidated through no fault of their own. If liability were also to be imposed on TPEs or eligible resources, they could also buy into an insurance pool and be entitled to a pay-out as long as the ERCs were not invalid due to fraud or intentional misconduct.¹³⁰ Alternatively, the Regulator might allow TPEs themselves to offer insurance to prospective buyers to reduce the risk of invalidation.¹³¹

E. Appeals

Regardless of which (if any) TPEs a Regulator chooses to utilize, disputes are bound to arise in the course of the ERC issuance process. Accordingly, an important consideration is whether and to what extent dissatisfied parties may appeal decisions and other actions of TPEs, and how such appeals would be made.

The proposed Federal Plan includes an administrative appeals process that allows for various types of parties to appeal adverse decisions under the Federal Plan. EPA proposes to use the pre-existing administrative appeals procedure at 40 C.F.R. Part 78 of its regulations to permit appeals of certain explicitly-identified agency actions to the Environmental Appeals Board.¹³² EPA notes that states may also adopt similar procedural and substantive processes to address disputes over the issuance of ERCs.¹³³ The Part 78 procedures have been used for prior Clean Air Act trading programs and were specifically designed with these types of disputes in mind.¹³⁴

Under the rate-based Federal Plan, the following actions would be appealable under Part 78: decisions on an eligibility application for ERCs; decisions regarding the revocation of eligibility to receive ERCs; decisions regarding the number of ERCs generated; decisions on the disallowance of ERCs for compliance; decisions on the accreditation of Independent Verifiers; decisions on the revocation of accreditation status; and the use of error corrections regarding

¹²⁹ Cal. Code Regs. tit. 17, § 95985(b).

¹³⁰ For instance, for forest sequestration offset projects, CARB has an additional process to limit the impact of invalidation. A portion of ARB Offset Credits issued to a forest sequestration project must be placed into a “Forest Buffer Account.” Cal. Code Regs. tit. 17, § 95983(a). If there is an “unintentional reversal” of the project (i.e. an unintentional rerelease of sequestered CO₂), the Offset Project Operator must notify and explain the reversal to CARB and, where relevant, the Offset Project Registry. Cal. Code Regs. tit. 17, § 95983(b). CARB will then retire a number of ARB Offset Credits in the Forest Buffer Account equivalent to the amount of the reversal. Cal. Code Regs. tit. 17, § 95983(b)(2). For *intentional* reversals, it is the responsibility of the Offset Project Operator to retire additional ARB Offset Credits equivalent to the amount of the reversal. Cal. Code Regs. tit. 17, § 95983(c)(3).

¹³¹ For instance, in the California system, Offset Project Registries are permitted, but not required, to offer insurance and other products to reduce financial exposure of offset invalidation. Cal. Code Regs. tit. 17, § 95987(k).

¹³² Proposed Federal Plan at 64,986, 65,116 (proposed 40 C.F.R. § 78.1). The Environmental Appeals Board is the final EPA decision maker on administrative appeals under all major environmental statutes that EPA administers.

¹³³ Proposed Federal Plan at 65,000.

¹³⁴ Proposed Federal Plan at 64,986.

information submitted by ERC providers, among others.¹³⁵ The Part 78 procedures would thus encompass most of the potential types of TPE decisions contemplated in this paper, and would therefore provide a mechanism for aggrieved parties to appeal the decisions made by the TPE—without resorting directly to litigation.¹³⁶

One question EPA should address is whether TPE decisions would be immediately appealable to the Environmental Appeals Board through the Part 78 appeals process, or if TPE decisions would first be reviewed by EPA directly, prior to recourse to the Part 78 procedures.¹³⁷

Another question the Regulator should address is to what extent the TPE must document and provide an explanation supporting its decision. Requiring an explanatory statement to support a TPE's decision would create a record for the Regulator or Environmental Appeals Board to review if the TPE's decision is appealed.

V. Conclusion

In sum, the use of TPEs can provide significant value to the Regulator and project providers at every step of the ERC issuance process. Administrative-focused TPEs like TPE-Project Document Managers can significantly simplify and standardize the eligibility application and EM&V processes, can provide information checks and QA/QC services to ensure that only complete and appropriate applications make it to the Regulator, and can greatly reduce the administrative burden placed on the Regulator in making the determination as to how many ERCs to issue. TPE-Tracking Systems can also provide extensive assistance to the Regulator by archiving and compiling all documentation, and by linking the relevant documents with a project's account and the serial numbers for any ERCs issued to that account. Similarly, TPE-Reviewers (in combination with Independent Verifiers) can provide significant technical support to the Regulator, can provide checks and balances and QA/QC services to ensure that applications and reports are legitimate and accurate, and can significantly reduce the Regulator's workload. In considering how to select, compensate, and oversee each kind of TPE, the Regulator should carefully consider the functions each TPE performs in order to provide the most robust and efficient ERC issuance process possible.

¹³⁵ Proposed Federal Plan at 64,986, 65,116 (proposed 40 C.F.R. § 78.1). It is worth noting that the types of actions appealable under the mass-based plan are not symmetric with those appealable under the rate-based plan, and potentially do not encompass all types of TPE actions. However, EPA could broaden the scope of potential appeals under the mass-based plan in the final rule adopting the Part 78 procedures.

¹³⁶ EPA proposes that the filing of an appeal and the exhaustion of administrative remedies under Part 78 would be a prerequisite to seeking judicial review. *See* Proposed Federal Plan at 64,986.

¹³⁷ Indeed it is possible that the Administrator of the EPA may need to formally approve of any decision made by a TPE-Reviewer prior to review by the EAB. *See* Proposed Federal Plan at 65,116 (proposed 40 C.F.R. § 78.1) (“This part shall govern appeals of *any final decision of the Administrator* under subparts MMM and NNN of part 62 of this chapter”) (emphasis added).