

September 20, 2002

Jean E. Vernet, Esq.
Office of Policy and International Affairs
Office of Electricity and Natural Gas Analysis
PI-23, Attention: Voluntary Reporting Comments
U.S. Department of Energy
Forrestal Building
Room 7H-034
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Supplemental Comments in DOE NOI Docket, Voluntary Reporting of Greenhouse Gas Emissions, Reductions, and Carbon Sequestration, 67 *Fed. Reg.* 30370 (May 6, 2002)

Dear Ms. Vernet:

As you know, the Electric Power Industry Climate Initiative (EPICI) provided comments to you in response to the above-referenced Notice of Inquiry (NOI) of the Department of Energy (DOE) concerning implementation of the President's directives for revising the guideline procedures in furtherance of the Energy Policy Act of 1992 (EPAAct). Subsequent to the June 5 comment deadline in the NOI, the Secretary of Energy and three other agency heads sent a letter on July 8, 2002, to the President making recommendations for such revisions. In addition, EPICI has had an opportunity to review the docket and the responses of other commenters.

The President's February 14 directives indicated that the Administration will "explore" the adequacy of "existing authority" to "achieve" the reforms sought by him. Moreover, the NOI noted that pursuit of these directives "poses significant policy, technical, and legal questions." Unlike the policy and technical questions, the NOI did not raise any specific legal authority issues. However, some commenters did raise questions about legal authority.

The primary purpose of this letter is to offer EPICI's comments on legal authority as the Administration continues to "explore" the matter. As you will see from the enclosure to this letter, EPICI is not aware of any legal authority inadequacies for achieving the presidential directives. EPICI is also unaware of any "significant. . . legal [authority] questions" posed by the President's directives.

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EPICI requests that you place the enclosed comments in the DOE NOI docket as supplemental comments.

Sincerely,

Robert P. Gehri
Co-chairman, Electric Power Industry
Climate Initiative
Southern Company

Robert H. Rainey, Jr.
Co-chairman, Electric Power Industry
Climate Initiative
Tennessee Valley Authority

Enclosure

WLF:wg

cc (w/ enc):

Vicki A. Bailey, Assistant Secretary,
DOE Office of Policy and International Affairs

Margot Anderson, Deputy Assistant Secretary,
DOE Office of Policy

Larisa Dobriansky, Esq.
Senior Policy Advisor for National Energy Policy

James L. Connaughton, Chairman,
Council on Environmental Quality

Philip A. Cooney, Chief of Staff,
Council on Environmental Quality

R. Glenn Hubbard, Chairman,
Council of Economic Advisors

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bcc (w/ enc):
EPICI Coordinating Committee
EPICI Accounting and Reporting Committee
Q. Shea
E. Holdsworth
J. Kinsman
J. Roewer
W. Fang
J. Brady
E. Yawn
D. Finnegan

**ELECTRIC POWER INDUSTRY CLIMATE INITIATIVE
COMMENTS ON LEGAL AUTHORITY QUESTIONS**

I. Background

A. The President's Directives

On February 14, 2002, in summarizing a “new approach to the challenge of global climate change,” the President “directed” the Secretary of Energy first to “propose improvements to the current voluntary emission reduction registration program under section 1605(b) of the 1992 Energy Policy Act” (EPAct), and second to “recommend reforms to ensure that businesses and individuals that register reductions are not penalized under a future climate policy, and to give transferable credits to companies that can show real emissions reductions.”¹ The President elaborated on the second directive by emphasizing that the registry “will encourage participation by removing the risk that these actions” of reducing emissions through voluntary efforts “will be penalized or inaction rewarded by future climate policy.”

B. Raising the So-Called “Legal Authority” Issue

The February 14 “New Approach” document, under the heading “**Background on Current Registry Program**,” also raised the possibility of legal authority issues in achieving “reforms.” In doing so, the document said there were a “number of proposals” in Congress in the past year “to reform the existing registry — or create a new registry” and that the “Administration will fully explore the extent to which the existing authority under the Energy Policy Act is adequate to achieve these reforms” (Tab 2, at 9-10). No specific reform was mentioned -- such as

¹ “U.S. Climate Change Strategy, a New Approach,” Executive Summary, at 2 (Feb. 14, 2002).

protection against future policy actions, transferable credits or other matters listed in the four-agency letter -- as possibly lacking authority. In fact, the President's document merely states that in revising the section 1605 guidelines, the Administration will consider, as is proper, any issues or questions of legal authority in that process.

In addition, it is important to emphasize that the President's second directive distinguished -- through use of a comma, the word "and" and a second clause -- between the issue of protecting volunteers from the vagaries of possible future changes in climate policy brought about by the Executive or the Legislative Branches (or both), and the issue of transferable credits for such volunteers. However, the July 8, 2002, letter to the President by the Secretary of Energy and the heads of three other agencies appears to blur that difference by paraphrasing the directive, deleting the comma and, most importantly, by making no mention in its recommendations of the baseline protection issue, while including two recommendations about transferable credits. The letter also includes a placeholder for credit for past actions. Nevertheless, we assume that the blurring was inadvertent and that these agencies will follow the President's directive in full.²

C. **Legal Authority Questions Raised by Some Commenters in Response to DOE's Notice of Inquiry**

In its May 6, 2002, Notice of Inquiry (NOI), the Department of Energy (DOE) also did not identify any particular "reforms" that raised issues of "authority" under EAct (67 *Fed. Reg.* 30370). However, the NOI noted that pursuit of the "Presidential directives poses significant

² The letter was signed by the Secretaries of Energy, Commerce and Agriculture and by the Administrator of the Environmental Protection Agency (EPA).

policy, technical, and legal questions.” The notice identified some of the policy and technical questions, but was silent on what might be the “legal” authority questions and did not expressly ask for comments on them. Nevertheless, one commenter, the National Resources Defense Council (NRDC), together with other environmental organizations, addressed this matter in their June 5, 2002, NOI comments to DOE. First, they quoted the President’s directive on penalty protection and transferable credits, saying it “appears to be a request for legislative recommendations,” and then contended that the DOE should recommend to the President “new legislation . . . to place emissions under a cap as early as is feasible,” rather than “legislate rules for rewarding early action in a policy vacuum.” They went on to say that the directive “mixes together two very different issues with quite different solutions: penalty protection and credit for early action,” saying, unlike the four-agency letter, that these are “distinct issues.”

As to the first issue, they contend in a footnote that neither the Administration nor Congress can “resolve this issue short of full cap and trade legislation,” because neither can bind a “future Congress.” However, they did not expressly suggest an absence of legal authority. Regarding the credits issue, they contend that it is a “much more controversial proposition” and that “the administration has no legal authority to recognize or guarantee such credits under existing law.”

II. Summary of EPICI Supplemental Comments

One purpose of these EPICI supplemental NOI comments is to respond, in support of the President's directives, to the aforementioned comments of the NRDC regarding DOE's legal authority. Another is to agree in part with the NRDC and emphasize, as the President did on February 14, that these two very important and "distinct issues" of baseline protection and transferable credits must be addressed by the DOE in revising the guidelines. EPICI's comments also reiterate the importance of the revised guidelines continuing to give clear recognition to reductions, avoidances and projects reported in good faith by entities and persons under the existing 1605 guidelines and the policies of the previous Administration.

As to DOE's legal authority, EPICI concludes that there are no known legal obstacles under existing law to the DOE addressing, as part of its revision of the section 1605 guidelines, both the issue of not penalizing volunteers for taking early action (often at considerable cost to them in resources) to reduce, avoid or sequester greenhouse gas (ghg) emissions in furtherance of the Framework Convention on Climate Change (FCCC) and the objectives of the climate change provisions of EPCAct, and the issue of transferable credits. In reaching this conclusion, EPICI submits that:

- The legislative history of EPCAct shows that the House-Senate conferees in 1992 streamlined section 1605 by transforming it from a combined voluntary/rulemaking program to a voluntary/guidelines program and expanded it to cover reporting of emissions as well as reductions.

- The provisions of the DOE Organization Act, EPAct section 1605 and the FCCC provide a sound legal basis to address these two distinct issues in revising the guidelines as the President has directed.
- There is no statutory or other prohibition in law against addressing these distinct issues in revising the guidelines.
- “Baseline reporting” is more of a definitional or technical matter, while “baseline protection” is a policy matter.
- Existing law -- which includes the DOE Organization Act, EPAct section 1605 and the FCCC -- provides a more than adequate basis for formulating and adopting a policy of baseline protection through recognition or certification of reported reductions, without binding future Congresses or Presidents or resorting to onerous cap and trade approaches.
- Such a baseline protection policy would remove a significant disincentive for volunteers.
- EPICI knows of no Presidential plans (in issuing the February 14 directives) to attempt to bind any future President or Congress, and EPICI certainly is not suggesting such attempts.
- An NRDC contention that in 1992 Congress rejected proposals for credits on reported reductions is not supported by the legislative history of section 1605.
- DOE has ample authority to provide for such credits without running afoul of the Supreme Court’s 1996 holdings in the *Winstar* case, notwithstanding the NRDC claim that that decision acts as a bar to such credits.

III. Discussion

A. Legislative History of Section 1605(b) of EPAct

In spring 1991, the then Senate Energy Committee reported out bipartisan and comprehensive National Energy legislation (S. 1220) based on the urging of the Bush I Administration. It included three very contentious issues: CAFE, ANWR and a WEPCO “fix.” No climate provisions were included in S. 1220. However, after several months in which then Sen. Johnston attempted to convince the Senate of the merits of S. 1220, a motion to proceed

failed on the Senate floor on November 1, 1991. Subsequently, a new Senate energy bill, S. 2166, was considered in the Senate, which did not include the above items. It passed the Senate on February 19, 1992, and was sent to the House.

Early in 1991, the House began, also at the urging of the Bush I Administration, development of its version of an energy bill, H.R. 776, at the Energy Subcommittee level. It was reported by the House Energy and Commerce Committee on March 30, 1992 (H.R. Rep. 102-474, Pt. 1). From March 30 to May 5, 1992, eight other House committees filed reports amending H.R. 776, as reported by the Energy and Commerce Committee. The House reconciled these and passed the bill on May 27, 1992, with a climate title, including a section 1605, without ever considering the Senate-passed bill, S. 2166.³ However, that did not result in a stalemate. Instead the Senate took up H.R. 776, substituted S. 2166 and on July 30, 1992, sent the amended version back to the House and asked for a conference. Like S. 1220, S. 2166 also did not include a climate title. The House agreed to a conference on August 12, 1992.⁴

³ In addition, the House did not follow the usual practice of joining its version, H.R. 776, as an amendment to S. 2166 so that a House-Senate conference could be initiated. Rather, the House sent H.R. 776 to the Senate as a free-standing, House-passed bill.

⁴ Initially, the Senate moved to the consideration of H.R. 776, which had been reported by the Finance Committee, with amendments that struck some provisions and bracketed provisions intended to be “inserted.” 138 *Cong. Rec.* S10558 (daily ed. July 29, 1992). That version retained the House Title XVI on “Greenhouse Warming – Energy Implications,” including section 1605. However, the then chairman of the Finance Committee, Sen. Bentsen, withdrew those amendments and offered a “modified committee amendment” that did not include the above-referenced greenhouse warming title. 138 *Cong. Rec.* S10660, *supra*.

In the subsequent conference between the House and Senate, section 1605 was rewritten by the conferees. The conferees' only comment about the revised provision and their intent was as follows:

The guidelines for the voluntary reporting of greenhouse gases and the national inventory shall address coal bed methane emissions, inventories and reductions. Persons who wish to establish baselines shall be provided an opportunity to do so.

H. Conf. Rep. 102-1018, at 393 (1992).

Nevertheless, during the debate on final passage in the Senate of the Conference-agreed version of H.R. 776, Sen. Lieberman called section 1605 one of several "key provisions" that he "strongly" supported. He said:

First, I am especially pleased about the provision in this bill which establishes a system for corporations to register current emissions of greenhouse gases and allows them to record reductions in greenhouse gases for inclusion in a national data base. The provision will allow Government to recognize the achievements of American businesses who are taking steps to reduce the emissions of greenhouse gases. Major utilities, natural gas producers, appliance manufacturers, forest companies, and others have taken voluntary steps to stop the growth of greenhouse gas emission. Under this provision, these companies can request the Federal Government to approve their reductions for inclusion in the greenhouse gas data base.

* * * * *

Under S. 1605 of this energy bill, companies engaged in these voluntary activities will be able to demonstrate that the Federal Government should approve their reductions for inclusion in the data base.

I believe this provision removes a disincentive facing U.S. firms seeking to reduce voluntarily their greenhouse gas emissions. Without this provision those firms will not have an official data base which can be used by these firms to demonstrate achieved reductions of greenhouse gases. The simple accounting

mechanism removes this disincentive by recognizing positive steps to reduce greenhouse gas emissions.

The provision also preserves American competitiveness as the United States seeks to meet its international obligations under the Rio agreement and potential future agreements. Historically, the United States struggled to demonstrate that past achievements deserve credit as international emissions levels are negotiated. With this section, our negotiators will be able to demonstrate conclusively the real reductions by U.S. firms.

The conferees streamlined some of the details of the program, giving more discretion to the Administration in implementation. Proper implementation is critical. Since the United States committed in the Rio convention to report our actions for international review, I am confident that the agencies will implement these programs appropriately.⁵

138 *Cong. Rec.* S17626 (daily ed. Oct. 8, 1992).

Indeed, the conferees in several ways “streamlined some of the details” of what is now section 1605(b) of EPAAct from the House version. First, they eliminated involvement of an interagency coordinating council and a mandate that a national accounting system for voluntary reductions of greenhouse gases be established by rule. The House had provided that the rule was to “include” 11 specific items set forth in numbered subparagraphs. One included “opportunities for entities to receive official certification of net greenhouse gas emission reductions” relative to a baseline also established by rule. The purpose was for the entities to receive “credit against any future Federal requirements that may apply” to such emissions and to “create a National Greenhouse Registry for the purpose of tracking” ghg emission reductions. Another was to ensure against

⁵ Very similar remarks were made earlier in the House on final passage by that body of the Conference agreement by then Rep. Moorhead, a conferee and the ranking minority member of the Energy Subcommittee, who said, “I am delighted that this program survived in the conference report, albeit with less detail and more discretion for the administration.” 138 *Cong. Reg.* H11438 (daily ed. Oct. 5, 1992).

double counting. Still another was to account for reductions achieved in other countries by U.S. entities.

In addition to these 11 items, the rule was to create a national registry and to “require the identification of persons” who obtained such certifications. Moreover, the rule was to “provide for such certification of voluntary” ghg emission reductions through a panoply of specified measures, actions or methods, such as fuel-switching, carbon fixation, more efficient motor vehicles and appliances, methane recovery, power plant heat improvements and a catchall item of “other actions and methods” that the Secretary decided would result in net ghg reductions. In the case of fuel-switching, the House provided that the rule establish relevant procedures for calculating fuel use, etc.

In lieu of the council, rulemaking, the specified registry, the credit and other House specifics that were to be part of rulemaking, the conferees were far less prescriptive in devising the final version of section 1605 as we know it today. Even though the House version appeared to provide considerable discretion in implementation, the conferees (as noted by Sen. Lieberman) in fact provided even “more discretion to the Administration in implementation,” and in doing so they expanded the voluntary reporting to include not only the reporting of reductions, but also ghg emissions. With these changes, the conferees also emphasized the voluntary nature of reporting and (as Sen. Lieberman said) sought to remove any “disincentive” to volunteering.

As a substitute for the council, the conferees provided for consultation with EPA, “as appropriate.” Instead of rulemaking and the specific registry, the conferees called for secretarially issued guidelines and a “data base” of “information voluntarily reported.” That information would cover both emissions and reductions as well as projects. As to the 11 items, including the provision on certification, the conferees directed that the guidelines cover the voluntary collection and reporting of ghg sources and that they establish “procedures for the accurate reporting” of such information. In addition, the conferees specified that the Secretary act through the Energy Information Administration (EIA), which was given by the Congress in the 1970’s under the DOE Organization Act (42 U.S.C. § 7135) independent authority to “collect, evaluate, assemble, analyze and disseminate data and information” on all manner of energy matters without secretarial approval. The conferees also added provisions on confidentiality and provided for self-certification of the accuracy of the reported information. As to the list of voluntary reduction measures to receive credit, the conferees consolidated many of them in what is now sections 1605(b)(1)(B) and (C).

In addition, the conferees moved the voluntary reporting provisions to subsection (b), while creating in subsection (a) of section 1605 an added directive to the Secretary to develop, through the EIA, an inventory of “national aggregate emissions of each” ghg and to update annually and analyze the inventory “using available data,” while specifying that the subsection “does not provide any new data collection authority.” We understand that the EPA relies heavily on this

subsection (a) through an agreement with the EIA in preparing the U.S. national inventory of greenhouse gas emissions and sinks for submission to the FCCC Secretariat in April of each year.

In short, the conferees clearly “streamlined” section 1605, as noted by Sen. Lieberman, and did not include any prohibition regarding any of the items listed for rulemaking in the House-passed version. In fact, the entire scheme of section 1605 was transformed from a combined voluntary/rulemaking program to a voluntary/guidelines program, and Congress expanded it to cover the voluntary reporting of not only ghg emission reductions, but also ghg emissions.

With this legislative history in mind, these comments examine the so-called “legal authority” issues raised by the NRDC and others for these two different issues — baseline protection and transferable credits — and suggest means of recognition that could be explored under existing law by DOE to ensure that the President’s directives as to those two distinct issues are fully implemented.⁶

⁶ Under the heading “Business Challenge,” the President’s document said that EPA “will launch a new, voluntary Climate Leaders program” in a “test” of new reporting guidelines. These guidelines are under development by the World Resources Institute (WRI) and the World Business Council for Sustainable Development (WBCSD), which are private, non-governmental organizations. As part of the “test,” EPA is modifying the WRI/WBCSD guidelines for this program, which would appear to have the effect of transforming them into a government document insofar as the Climate Leaders program is concerned. Unlike the 1605 guidelines revisions by the DOE, EPA apparently does not plan a *Federal Register* process for public input.

B. Legal Authority Regarding the Two Distinct Issues

Relevant to this discussion is a point made by Sen. Lieberman in his floor remarks. In his view, section 1605(b) intentionally “removes a disincentive facing U.S. firms seeking to reduce voluntarily their greenhouse gas emissions.” He added that this “simple accounting mechanism removes this disincentive by recognizing positive steps to reduce” ghg emissions and that it “preserves American competitiveness as the United States seeks to meet its international obligations under the Rio Agreement” (*i.e.*, the FCCC). EAct is the first U.S. non-research and development-type climate law enacted by Congress and signed by President George H.W. Bush. Bush I also signed the FCCC, which was ratified by the U.S. in 1992, after advice and consent by the Senate.

In this examination, one should bear in mind 1) the DOE Organization Act, which includes as one of its purposes the establishment and implementation of “policies regarding international energy issues that have a direct impact on research, development, utilization, supply and conservation of energy in the United States and to undertake activities involving the integration of domestic and foreign policy” (42 U.S.C. § 7112(10)); 2) the provisions of section 1605, which call for the issuance, after an opportunity for public comment, by the Secretary of guidelines to (among other things) “establish procedures,” including revisions thereof, for accurate “voluntary

(... cont'd)

However, in response to the NOI, WRI recommended that DOE redesign the 1605 guidelines “to transition into a mandatory reporting program” and that DOE build on, and be “consistent with,” the WRI/WBCSD guidelines. EAct does not authorize such a transition, and we question the status of the WRI guidelines in light of modifications by EPA.

reporting” of ghg emission and reduction information, which “may be used by the reporting entity to demonstrate achieved reductions of greenhouse gases”; and 3) the FCCC. Taken together, they provide a sound legal basis for ways to address these two distinct issues.

1. **Reform of existing guideline “procedures” to “ensure that businesses and individuals that register” under section 1605 “are not penalized under a future climate policy”**

As noted above, the President separated the issues of baseline protection and transferable credits. However, the four-agency letter did not, as the President did, address baseline protection as a “separate” objective. Rather, that letter recommended the development of “fair, objective, and practical methods for reporting baselines” as one of several steps in the process of awarding transferable credits. While statements in the four-agency letter could be read to mean that improvements in baseline reporting are sufficient for baseline protection purposes and thus the avoidance of penalties for volunteering, or that transferable credits provide such protection, or both, we look forward to the DOE and the Administration ultimately following the path of separation, as directed by the President, in developing revisions to the guidelines.

One reason for our concern is that we understand “baseline reporting” -- which we consider very important for such matters as estimating the magnitude of emissions and drawing comparisons among various reductions -- to be more of a definitional and technical issue. On the other hand, “baseline protection” is an important policy matter that has economic implications for volunteers in the private sector that must regularly justify use of resources to their shareholders and governmental bodies and that normally cannot incur large marginal costs on altruistic grounds,

particularly when they operate in a competitive landscape. Companies would like and need a reasonable expectation that their voluntary investments will be recognized, through accurate reporting, in the development of future policies, whether administrative or legislative.

This is best illustrated by the discussion over credit for prior actions. Many utilities have taken significant voluntary actions since 1993 to reduce, avoid or sequester ghg's under the prior Administration's voluntary Climate Challenge Program that relied on reporting under section 1605(b) and its guidelines. DOE has not yet signaled in the NOI or the four-agency letter whether it will recognize these actions in revising section 1605(b). That letter merely states that DOE will "[d]evelop a process for evaluating the extent to which past reduction may qualify for credits." If a policy on baseline protection had been in place in 1993 under the section 1605(b) guidelines, this might not be a concern now. In any event, as the guidelines are revised DOE has the opportunity under existing law to adopt that policy now and to apply it to past actions accurately reported.

As noted above, there is every reason to believe that existing law -- including the DOE Organization Act and section 1605(b) -- , coupled with the clear purposes of the FCCC and the absence of any prohibitions, provide a more than adequate basis for achieving the President's baseline protection directive. For example, this may be accomplished in furtherance of section 1605(b)(4), which provides that the "information" on emissions and reductions reported to EIA's database/registry "may be used by the reporting entity to demonstrate achieved reductions" of

ghg's. Clearly, DOE's guideline revisions can enhance such demonstrations through improved transparencies in reporting and appropriate forms of recognition of the reductions.

However, NRDC claims that the legal obstacle to adoption of this policy under existing law is that DOE cannot bind a "future Congress" and that Congress, as well as the President, "has no more power . . . to resolve this issue short of full cap and trade legislation." In reality, that is more of an overstatement than a legal obstacle to adoption of such a policy. As a matter of fact, President after President has -- through Executive Orders, interpretations of law, regulatory changes, the budget, guidelines and other means -- adopted, in the absence of any legal prohibition, policies, programs, processes, procedures, etc. that have a reasonable basis in law and that remained in effect long after he has left office. In addition, in some cases those policies, etc. have been changed or amended by succeeding Presidents. Similarly, Congress has passed many laws that also have lasted for years without change and that have, in effect, bound subsequent Congresses. EPCA is an example. When it was enacted by the 102^d Congress, it contained 30 titles with many provisions, most of which remain unchanged as the 107th Congress nears *sine die* adjournment. In fact, section 1605 remains unchanged. Even the Senate's version of the energy bill, H.R. 4, now in conference, does not amend that section. In particular, section 1103 of title XI of the Senate amendment to H.R. 4 expressly directs that a memorandum of agreement retain section 1605(b). (By way of contrast, section 1031 of title X of the Senate amendment would amend, at least indirectly, Executive Order 13211 of May 18, 2001, thus

affecting an administrative policy.) In short, each new Congress can always enact a law that changes prior laws and policies.

But most importantly, we know of no plans by the President, in calling for these distinctly different reforms, to attempt by guidelines to bind a future President or Congress, and we are not suggesting that he attempt to do so. A recognition or certification by DOE of reductions reported accurately pursuant to revised 1605 guidelines could not be said to have such a binding effect. However, what recognition or certification offers to volunteers is an opportunity for them to demonstrate how and to what extent they, at considerable cost, have under the prior Administration and this Administration taken steps to reduce ghg emissions at the strong urging of Presidents Clinton and Bush and in accordance with the congressional enactment of section 1605 and the purposes of the FCCC. Such an approach, as Sen. Lieberman said, would help to remove a “disincentive” to volunteering. However, a future President and Congress would most assuredly not have any legally binding obligation to accept that demonstration. After all, guidelines are not regulatory in nature. Such recognition and certification also are not contracts. By their very nature, they are non-binding. What they offer is an opportunity for reporting entities to demonstrate their past actions and persuade the government if and when some future policy is debated in one or both of these two branches of government.

The four-agency letter suggests that baseline protection will be provided in the context of a transferable credit. Conceptually, this thinking is similar to the concept of credit for early action that was under discussion in the previous Administration:

- The credit for early action was a form of baseline protection for voluntary actions to reduce ghg emissions in advance of a possible future mandatory program.
- In addition, credits for early action would be tradable, similar to the Bush Administration concept of a transferable credit.
- The primary distinction was with respect to future climate policy. The Clinton policy was clear that the ultimate policy goal was a mandatory program — with or without the Kyoto Protocol — with credits for early action being an interim step towards this goal. The four agencies apparently are considering transferable credits as a hedge against an unknown future policy.

While some may want to link baseline protection and transferable credits, there are likely to be situations where entities may simply want recognition for baseline protection purposes without the formal designation of transferable credits. For example:

- Entities may wish to bank their ghg emission reductions for their own future use, without consideration of trading.
- Most importantly, entities may wish to have a clear policy statement on baseline protection as an incentive to move forward with voluntary ghg emissions reductions, without undue risk that these investments will become worthless if and when a future climate policy regime ever evolves administratively or legislatively.

Moreover, there may be situations where entities seek awards of adjustments for baseline protection purposes. These awards (to be banked for future use) may be separate and apart from transferable credits. Baseline protection awards may be designated for possible future use, whereas transferable credits may be needed currently or in the near term by entities who are

subject to ghg regulatory regimes in the states (such as Massachusetts and New Hampshire) or internationally (in Kyoto Protocol countries, if and when the Protocol enters into force).

Just as relevant is the uncertainty of the development of future climate policy, as well as its substance and timing and the role of this or a future Administration and Congress. While there have been administrative and legislative proposals, no one can predict what, if any, or when such policies might be developed or whether they will be mandatory or otherwise. However, it is in the interest of the FCCC and the public to encourage entities to take actions to address ghg emissions and to provide information thereon. The adoption of a policy of baseline protection as part of the 1605 guidelines is consistent with that encouragement.

2. **Reform of existing guideline “procedures” to “give transferable credits to the private and public sectors that can show real emissions reductions”**

In its response to the DOE NOI, EPICI submitted an extensive paper entitled “Transferable Credits for Voluntary Reductions in GHG Emissions Intensity” that lists six questions about such credits and provides detailed responses. We will not repeat the content of that paper since it is part of the NOI docket.

However, NRDC is critical of including such a credit approach in the revised guidelines. It broadly contends that the “objective” of the Presidential directive is to permit entities to earn credits “that count against a cap before a cap is even agreed.” NRDC said that is “controversial,” and we agree. In fact, even the mere suggestion of a cap program is controversial. However, it

is not our understanding that the Administration, which has been long opposed to a ghg cap program, directed that DOE provide for transferable credits in advance of, or to encourage, a “cap.” Moreover, there is nothing in the paper submitted earlier by EPICI to suggest that our members seek recognition of transferable credits for purposes of a cap, particularly since they have long looked with great disfavor on establishing a cap.

A second NRDC contention is that the “1992 EPA Act legislation pointedly rejected proposals made at that time to confer credit status on reported reductions.” As we have noted above, the House-passed bill, H.R. 776, directed the DOE to establish, in consultation with an interagency council, a national accounting system for voluntary reductions of ghg’s and to do so by rule. The rule was to “include” a list of 11 items set forth in sections 1605(a)(1)-(11) of that House bill. We reiterate that they covered matters such as reductions achieved in other countries, the establishment of equivalency measures for reductions applicable to different ghg’s, provisions on double counting and provisions regarding baselines, together with three items on certification. One permitted a person to file for verification “such documentation as the Secretary considers appropriate for the certification” ghg emission reductions “generated by such person.” Another called for annual certification after the ghg reduction or ghg fixation “has occurred.” A third provided “opportunities for entities to receive official certification” of reductions relative to the baseline “for purposes of receiving credit against any future Federal requirements that may apply” to ghg emissions. All were to be developed by rulemaking, not guidelines. Yet none of these items was included in the final version of the conference report.

Instead, as we have said, the conferees shifted to a scheme of DOE issuing guidelines, not rules, in an effort to streamline “some of the details of the program, giving more discretion to the Administration in implementation,” as pointed out by Sen. Lieberman. The final version called explicitly for guidelines on the “voluntary collection and reporting of information on sources” of ghg’s. They are to provide “procedures” for the “accurate voluntary reporting of information,” not only on reductions, but also on emissions. That shift applied to all of these items or details, not just the one on credits. Yet it cannot be reasonably argued that all or some of the original items were “rejected” by Congress and thus, upon enactment, the DOE could not include “procedures” on, for example, double counting, baselines or reductions achieved in other countries, all of which were in the list of 11, together with the credit provisions. In fact, such matters are now addressed in various ways in the existing 1605 guidelines.

It is unreasonable to claim that one of the 11 items was “pointedly rejected” by the Conferees and not all of the other 10. Moreover, there is nothing in the conference report to suggest such a rejection. Certainly, the remarks of Sen. Lieberman do not support that claim, nor, as noted on p. 8 n. 5, *supra*, do the remarks of one of the conferees, Rep. Moorhead.

Under the guidelines approach, the DOE could, as we have said, propose procedures that give recognition of an entities’ reductions by certification or other means that could make them more

marketable. As to the NRDC's concern that the Administration might enter into "collusive contracts" recognizing the reductions or credits and thus "box Congress into conferring a regulatory benefit," or in the alternative "obligate the government to pay damages if a future Congress failed to recognize the supposed credits" in climate change legislation, we are unaware of any such proposal and believe that the Administration is fully cognizant of the Supreme Court's holdings in *U.S. v. Winstar*, 518 U.S. 839 (1996).⁷ Clearly, EPICI has not urged use of such contracts.

⁷ A footnote in the comments of NRDC purports to briefly summarize the *Winstar* facts and holdings in support of its contention. For purposes of these EPICI comments, there is no need for us to discuss these facts or holdings.