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Citizens Against Government Waste • Citizens for a Sound Economy •
Consumer Alert • Frontiers of Freedom • National Taxpayers Union •
60 Plus Association • Small Business Survival Committee**

January 9, 2004

Mr. Mark Friedrichs
PI-40
Office of Policy and International Affairs
U.S. Department of Energy
Room 1E190
1000 Independence Ave., SW
Washington, DC 20585

Dear Mr. Friedrichs:

Thank you for the opportunity to comment on the Department of Energy's (DOE) proposed rule, *General Guidelines for Voluntary Greenhouse Gas Reporting*, published December 5, 2003 in the *Federal Register* (Vol. 68, No. 234).

On behalf of the organizations listed above, we commend DOE for removing "transferable credits" from its plan to "enhance" the Voluntary Reporting of Greenhouse Gases Program (VRGGP), established under Section 1605(b) of the 1992 Energy Policy Act (EPAct).

As we have explained on previous occasions, transforming the VRGGP into an emission reductions credit program would be both illegal and unwise. It would be illegal because Section 1605(b) furnishes no authority to award regulatory offsets applicable to future emission reduction mandates; and unwise because a credit program would mobilize lobbying for energy rationing schemes such as the Kyoto Protocol, Senator Jim Jeffords's (I-VT) Clean Power Act (S. 366), and the McCain-Lieberman Climate Stewardship Act (S. 139)—policies the Administration rightly opposes.

In the coming months, three interest groups will likely pressure DOE to reverse its decision and include credit provisions in the final rule. Those groups are: (1) corporations that expect to have large quantities of surplus credits to sell under a future Kyoto-style emissions cap-and-trade program, (2) environmental activists who correctly view credits as a strategy to build corporate support for cap-and-trade, and (3) agency officials whose power and prestige would increase dramatically if the VRGGP became the framework for a future energy rationing system. To help DOE resist such pressure, we want to explain, for the record, why DOE was correct to omit from its proposed rule any provisions for an early credit program.

(1) Transferable credits will mobilize lobbying for energy rationing.

Although the implementing rules would undoubtedly be complex, the basic idea of an early credit program is simple. Under such programs, companies that take steps now to reduce emissions of greenhouse gases—chiefly carbon dioxide (CO₂) from fossil energy use—earn credits (emission allowances) they can later use to comply with Kyoto or a similar compulsory regime.

All such schemes are inherently mischievous. Credits awarded for “early” reductions are assets that mature and attain full market value only under a mandatory reduction target or “cap.” That is because, although many companies today would like to sell carbon credits—especially if they can “earn” the credits by reducing or avoiding emissions they would reduce or avoid anyway, in the normal course of business operations—few companies will buy credits unless constrained to do so by the threat or imposition of a cap. Without buyers, there are no sellers and, hence, no market.

Consider the embarrassingly low opening bids at the Chicago Climate Exchange (CCE). The *Greenwire* news service reported that, at the first auction, the exchange’s 22 member companies and municipalities “paid an average of less than \$1 for the right to emit one ton of CO₂.”¹ Why? Former CCE senior vice president for sales and marketing Ethan Hodel explained: “Without regulation and governmentally imposed sanctions, the early evidence . . . is that the American business community is not very interested in a voluntary greenhouse gas cap-and-trade program.” No legal limit on emissions, no demand for credits. Were it not for the risk that Congress may cap carbon emissions in the future, the “bid” price for credits today would be zero.

Enacting a cap would instantly create demand for emission credits, boosting credit prices by orders of magnitude. For example, according to Energy Information Administration (EIA) analyses, carbon equivalent credits would sell for \$93-\$122 per metric ton under Sen. Jeffords’s Clean Power Act, \$79-\$223 per ton under the McCain-Lieberman Climate Stewardship Act, and \$67-\$348 per ton under the Kyoto Protocol.² Clearly, credit holders must lobby for “regulation and governmentally imposed sanctions” if they want to turn “voluntary” reductions into real money.

DOE cannot institute a credit program without creating incentives for participants to lobby to make “voluntary” reductions mandatory.

¹ Lauren Miura, “Voluntary emissions trading draws mild interest, criticism,” *Greenwire*, October 3, 2003.

² EIA, *Analysis of Strategies for Reducing Multiple Emissions from Electric Power Plants with Advanced Technology Scenarios*, October 2001, Table 4, p. 22,

[http://www.eia.doe.gov/oiaf/servicerpt/eppats/pdf/sroiaf\(2001\)05.pdf](http://www.eia.doe.gov/oiaf/servicerpt/eppats/pdf/sroiaf(2001)05.pdf); *Analysis of S. 139, The Climate Stewardship Act of 2003*, June 2003, p. 65,

[http://www.eia.doe.gov/oiaf/servicerpt/ml/pdf/sroiaf\(2003\)02.pdf](http://www.eia.doe.gov/oiaf/servicerpt/ml/pdf/sroiaf(2003)02.pdf); *Impacts of the Kyoto Protocol on U.S. Energy Markets and Economic Activity*, October 1998, p. xiv,

<http://www.eia.doe.gov/oiaf/kyoto/pdf/sroiaf9803.pdf>.

(2) Although touted as “voluntary” and “win-win” (good for business, good for the environment), transferable credits will create a coercive zero-sum system in which one company’s gain is another’s loss.

As explained above, credits only have value in relation to an actual or future emissions cap. A cap is a legal limit on the quantity of emissions a firm, sector, or nation may release. If the cap is not to be broken, then the supply of emission allowances available to companies in the mandatory period must be reduced by the number of credits awarded for “early” reductions in the “voluntary” period. Thus, for every company that earns a credit for early reductions, there must be another that forfeits a credit under the cap. Consequently, companies that do not “volunteer” will be penalized—forced in the mandatory period to make deeper emission cuts than the cap itself would require, or pay higher credit prices than would otherwise prevail.

The coercive, zero-sum nature of early action crediting is easily illustrated. Assume for simplicity’s sake that there are only four companies in the United States (A, B, C, and D), each emitting 25 metric tons (MT) of CO₂, for a national total of 100 MT. Also assume the U.S. emissions reduction target is 80 MT, with the government issuing 80 tradable allowances or credits (1 credit being an authorization to emit 1 MT). Absent an early credit program, each company would receive 20 allowances during the compliance period, and have to reduce its emissions by 5 MT.

Now assume there is an early action program that sets aside 20 allowances for reductions achieved before the compliance period. That reduces each company’s compliance period allocation from 20 credits to 15 (4 companies X 15 credits each = 60 + 20 early action credits = 80, the total U.S. emissions budget). Finally, assume that Companies A and B each earns 10 credits for early reductions. In the compliance period, A and B will have 25 credits apiece (10 + 15), which is 5 more (25 instead of 20) than an equal share under the cap would give them. In contrast, C and D will each have 5 fewer credits (15 instead of 20). C and D must make deeper reductions than the cap would otherwise require—or they must purchase additional credits from A and B. Either way, the early reducers gain at the expense of non-participants.

Programs that penalize non-participants are coercive, not “voluntary.” Programs that enrich participants at the expense of non-participants are zero-sum, not win-win.

(3) Transferable credits will corrupt the politics of energy policy.

Once companies figure out that the program will transfer wealth—in the form of tradable credits—from those who do not “act early” to those who do, many will “volunteer” just to avoid ending up in the shallow end of the credit pool later on. The predictable outcome is a surge in the number of companies holding conditional energy rationing coupons—assets worth little or nothing under current law but worth millions or billions of dollars under McCain-Lieberman, the Clean Power Act, or the Kyoto Protocol. Credits will swell the ranks companies lobbying for anti-consumer, anti-energy policies.

(4) Transferable credits will disadvantage small business.

As explained previously, participants in such programs profit at the expense of non-participants. Most small businesses will not participate, because they cannot afford to hire carbon accountants and engineers. Thus, an early credit program will penalize small businesses.

Proponents may respond that all cap-and-trade proposals now on the table apply only to “major” sources such as electric utilities, large manufacturers, and fossil fuel refiners. Thus, they contend, small businesses will be exempt from emission control requirements, and have no need to purchase credits from their larger cousins.

We consider such assurances disingenuous or naïve. Once created, wealth transfer programs tend to grow. For example, sponsors of the Sixteenth Amendment promised—and perhaps even believed—that a federal income tax would apply only to very large incomes derived from investments, not to the salaries of professionals, and never to the wages of workmen. For several years, that was largely the case. The first income tax in 1913 applied to only 350,000 Americans—the top one percent of the day. Even at the height of World War I, in 1918, only five percent of Americans paid income taxes.³ However, in time, the tax expanded to cover “the wages of janitors and the tips of waitresses.”⁴ Today, more than 80 percent of the population, counting both taxpayers and their dependents, pay income taxes.⁵

Note also that various Clean Air Act regulations are binding upon mom-and-pop operations, like corner dry cleaning establishments.⁶ Moreover, on a per-employee basis, environmental rules impose significantly higher costs on small firms than on large ones. Economists W. Mark Crain of George Mason University and Thomas D. Hopkins of the Rochester Institute of Technology estimate that, in 2000, firms with more than 500 employees spent \$717 per employee to comply with federal environmental rules while firms with fewer than 20 employees spent \$3,328 per employee.⁷

Such facts suggest that any small business exemption from CO₂ controls would likely be temporary—a tactical concession that energy suppression advocates would later retract once a cap-and-trade program were in place. A crediting scheme would simply allow the “big dogs” to corner the credit market before small firms even got in the game.

³ Mark Schmidt, *Income Tax Withholding: Why “First Dibs” for Uncle Sam Leaves Taxpayers Finishing Last*, National Taxpayers Union Policy Paper # 106, July 2002, p. 3; http://www.ntu.org/taxpayer_issues/ntu_policy_papers/pp_ntu_106.php3.

⁴ G. Edward Griffin, *The New American*, April 1, 1996, available at <http://freerepublic.com/forum/a3953fed82135.htm>.

⁵ W. Cleon Skousen, *History of the Sixteenth Amendment*, National Retail Sales Tax Alliance, http://www.salestax.org/library/skousen_16history.html.

⁶ Jonathan Adler, *Taken to the Cleaners: A Case Study of the Overregulation of American Small Business*, Cato Institute Policy Analysis, No. 200, December 22, 1993, <http://www.cato.org/pubs/pas/pa-200.html>.

⁷ W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, Report prepared for the Small Business Administration, Office of Advocacy, RFP no SBAHQ-00-R-0027, October 2001, www.sba.gov/advo/research/rs207tot.pdf.

(5) Transferable credits will limit fuel diversity.

Because coal is the most carbon-intensive fuel (CO₂ emissions per unit of energy obtained from coal are nearly 80 percent higher than those from natural gas and about 35 percent higher than those from gasoline)⁸, Kyoto-type policies would decimate coal as a fuel source for electric power generation. For example, according to EIA’s analysis, in 2025, the McCain-Lieberman bill would reduce U.S. coal-fired electric generation from 2,803 billion kilowatt hours to 560 billion kilowatt hours—an 80 percent decrease.⁹

If adopted, transferable credits will send a political signal that mandatory reductions are in the offing and, hence, that coal’s days are numbered. Consider, for example, William Pedersen’s article, “Inside the Bush Greenhouse,” in the October 27, 2003 issue of *The Weekly Standard*. Although we strongly disagree with Pedersen’s central thesis—that the Administration should endorse “a modest mandatory greenhouse control program”—we cannot fault him for surmising that cap-and-trade was the implicit goal of the Administration’s earlier embrace of a credit program.

Pedersen’s remarks on the Administration’s earlier policy of “[e]ncouraging companies to register emission reductions by suggesting those reductions will have value in the future” are worth quoting:

The administration’s call for voluntary emission reductions and its supporting regulations make sense only on the assumption that the government will impose mandatory controls fairly soon. Who would participate in a “voluntary” reduction program except to stave off a mandatory one? Similarly, company-by-company greenhouse emissions accounts are not needed for general debate on greenhouse policy. Why develop them except as a step toward mandatory controls? Finally, who would participate in a program to register reductions so as not to be “disadvantaged under a future regulatory program” unless they believed such a program was coming?

Establishment of a credit program would be perceived far and wide as a sign that the Administration thinks some kind of carbon regulation is inevitable, or at least highly probable. Anticipating such constraints, many companies would make plans to switch from coal to natural gas. That, in turn, would put additional long-term pressure on natural gas supplies.

According to a recent study by the Industrial Energy Consumers of America (IECA), the supply crunch that began in June 2000 has increased the average price of natural gas by 83 percent. IECA estimates that higher gas prices have cost industrial consumers \$57 billion, residential consumers \$33 billion, and commercial consumers \$21 billion.¹⁰ The report notes that, in addition to the \$111 billion consumer tab, high gas prices have

⁸ EIA, *Analysis of S. 139*, p. 173.

⁹ EIA, *Analysis of S. 139*, p. 176.

¹⁰ IECA, *41 Month Natural Gas Crisis Has Cost Consumers Over \$111 Billion*, December 3, 2003, [http://www.ieca-us.com/downloads/natgas/\\$111billion.doc](http://www.ieca-us.com/downloads/natgas/$111billion.doc).

caused manufacturing job losses, plant shutdowns, and competitiveness and profitability losses, especially among firms that use natural gas as a feedstock.

Clearly, from an economic point of view, any policy that significantly increases the demand for and price of natural gas is ill advised. An early credit program would have exactly those effects.

(6) Transferable credits will encourage States to enact mandatory greenhouse gas reduction policies.

Although most energy companies oppose Kyoto-style regulation, some might support a national greenhouse gas reductions policy if it were the only alternative to a dozen or more partially conflicting statewide policies. Businesses, especially large firms, cannot operate efficiently in balkanized energy and product markets. There is anecdotal evidence that some advocates of state climate policies seek to use the threat of balkanization to force Washington's hand. For example, in a July 17, 2002 letter to President Bush, the attorneys general of 11 states, after affirming their "support" for "states' regulatory and litigation efforts" to curb greenhouse gas emissions "within their borders," warn that "such regulation or litigation will increase the uncertainty of the business community, thus potentially making the most cost-effective solutions more difficult." To avoid a regulatory patchwork, the AGs argue, Bush must adopt nationwide controls on greenhouse gas emissions.¹¹

In reality, if federal policymakers were to ratify the Kyoto Protocol, establish CO₂ standards for vehicles, or cap CO₂ emissions from power plants, they would unleash a regulatory feeding frenzy at the state level. All kinds of state and local agencies would want a piece of the action. The AGs have things exactly backwards. Only by unequivocally rejecting CO₂ controls—and pre-regulatory policies like early credits—can the Administration discourage states from establishing mini-Kyoto regimes.

Nonetheless, the threat of economic balkanization is real. In 2001, Massachusetts adopted regulations requiring power plants to reduce CO₂ emissions. In 2002, New Hampshire enacted cap and trade legislation, New Jersey forced its largest utility—Public Services Enterprise Group—to convert its voluntary greenhouse gas reduction pledge into a legally binding commitment, and California enacted a law requiring "maximum feasible" reductions of greenhouse gas emissions from new motor vehicles. In 2003, New York's Governor Pataki announced a regional program to cap CO₂ emissions from power plants in ten Northeast states. Also in 2003, legislators introduced over 90 climate bills in 27 states—up from 66 bills in 24 states in the previous legislative session.¹²

¹¹ The AGs who signed the July 17, 2002 letter are: Thomas F. Reilly (MA), Bruce M. Botelho (AK), Bill Lockyer (CA), Richard Blumenthal (CT), G. Steven Rowe (ME), J. Joseph Curran, Jr. (MD), Philip Tl McLaughlin (NH), David Samson (NJ), Elliot Spitzer (NY), Sheldon Whitehouse (RI), and William Sorrell (VT), http://www.ago.state.ma.us/press_rel/climate.pdf.

¹² Bourne, A., *Sons of Kyoto: Greenhouse Gas Legislation in the States*, January 2004, American Legislative Exchange Council, <http://www.alec.org/meSWFiles/pdf/Sons%20of%20Kyoto.pdf>.

A federal credit program would aid and abet those who seek to install Kyoto-like regimes at the state and regional levels. Firms acquiring credits for fuel switching and other CO₂-reducing actions would be more inclined to support such policies. Equally important, a federal credit program would send mixed signals, fostering the impression that the Administration is a house divided on climate policy and could be induced to support cap-and-trade if enough states adopt mandatory programs.

(7) Transferable credits have no redeeming environmental value.

A study in the November 1, 2002 issue of *Science* magazine examined possible technology options that might be used in coming decades to stabilize atmospheric CO₂ concentrations.¹³ Such options include wind and solar energy, nuclear fission and fusion, biomass fuels, efficiency improvements, carbon sequestration, and hydrogen fuel cells. The report found that, “All these approaches currently have severe deficiencies that limit their ability to stabilize global climate.” It specifically disagreed with the Intergovernmental Panel on Climate Change’s assessment that, “known technological options could achieve a broad range of atmospheric CO₂ stabilization levels, such as 550 ppm, 450 ppm or below over the next 100 years.”

As the study noted, world energy demand could triple by 2050. Yet, “Energy sources that can produce 100 to 300 percent of present world power consumption without greenhouse emissions do not exist operationally or as pilot plants.” The bottom line: “CO₂ is a combustion product vital to how civilization is powered; it cannot be regulated away.” Given current and foreseeable technological capabilities, any serious attempt to stabilize CO₂ levels via regulation would be economically devastating and, thus, politically unsustainable.

The implication for the debate on transferable credits is clear. No good purpose is served by creating the pre-regulatory ramp-up to unsustainable regulation. An early start on a journey one cannot complete and should not take is not progress; it is wasted effort.

(8) Transferable credits are incompatible with the President’s climate policy agenda.

History amply demonstrates that economies can grow while reducing emissions “intensity” (emissions per unit of GDP).¹⁴ Accordingly, the President seeks to replace Kyoto’s emissions tonnage reduction targets, which are inimical to growth, with emissions intensity reduction goals, which can accommodate growth.

¹³ Martin I. Hoffert et al., “Advanced Technology Paths to Global Climate Stability: Energy for a Greenhouse Planet,” *Science*, Vol. 298, 1 November 2002, 981-987.

¹⁴ For example, from 1980 to 2000, U.S. emissions intensity decreased by 34.7 percent while aggregate emissions, reflecting GDP and population growth, increased by 22.5 percent. General Accounting Office, *Climate Change: Trends in Greenhouse Gas Emissions and Emissions Intensity in the United States and other High-Emitting Nations*, October 28, 2003, p. 4, <http://www.gao.gov/new.items/d04146r.pdf>.

However, to be applicable to a future cap-and-trade program, credits would have to be awarded for “real” (i.e., tonnage) reductions. Consequently, the scheme would ratify rather than replace the Kyoto framework. More critically, an emissions intensity goal provides no alternative to Kyoto if it is coupled with a crediting plan that fuels pro-Kyoto lobbying.

(9) Supply-side reform is a better way to decrease emissions intensity.

The Administration initially viewed transferable credits as a way to motivate companies to achieve the President’s goal of reducing U.S. emissions intensity by 18 percent over 10 years. A word of caution is in order. Government has no competence to set emission intensity targets, whether voluntary or mandatory. Emissions intensity is like capital intensity or labor intensity—a product of each firm’s unique and ever changing circumstances. For the economy as a whole, moreover, emissions intensity is a byproduct of the interactions of millions of decision makers—a result of human action but not of human design. Debates over how much or how fast U.S. emissions intensity should decline implicitly assume the possibility and desirability of centralized economic planning. In reality, government is no better qualified to decide how much carbon-based fuel “we” should use per dollar of output than it is to decide how much capital or labor “we” should use per dollar of output.

Nonetheless, since emissions intensity reduction will likely remain a guiding theme of the Administration’s climate policy through 2004, we want to suggest a superior method of achieving it. Expensing—accelerated capital cost recovery—would help companies reduce emissions per dollar of output, without creating the institutional framework and lobbying incentives for cap-and-trade.

A study commissioned by the American Center for Capital Formation found that, in 2002, the United States ranked in the bottom third in terms of capital cost recovery allowances for investment in energy assets such as power plants, transmission lines, and pollution control equipment. “For example, after five years, a U.S. firm recovers only 29 percent of its investment in a combined heat and power generation facility compared to 51 percent in Germany, 53 percent in Japan, 100 percent in the Netherlands, and 105 percent in China.”¹⁵

By reducing the tax penalty on capital investment, expensing would speed up turnover of plant and equipment. In general, newer facilities are cleaner and more productive than their older counterparts, delivering more output per unit of input, including energy inputs. Expensing would thus accelerate emissions intensity decline while boosting productivity and wages. Expensing is a true “no regrets” policy—desirable whether global warming ultimately proves to be a problem or not.

The Administration’s economic stimulus package raised the annual expensing limit from \$25,000 to \$75,000 and allowed firms to invest \$325,000 annually (up from \$200,000)

¹⁵ Margo Thorning, *A Positive Role for Federal Tax Policy in Promoting Energy Security and Reducing Emissions Intensity*, Special Report, American Council for Capital Formation, November 2002.

before the expensing option begins to phase out.¹⁶ These changes will spur new investment, especially in the small business sector, but are too limited to accelerate capital turnover in the large manufacturing and power generation sectors. If the Administration continues to pursue emissions intensity reduction as a goal, it should consider developing a more comprehensive package of expensing options.

(10) DOE has no authority to issue transferable credits.

The Natural Resources Defense Council, the Northeast States for Coordinated Air Use Management, the Pew Center on Global Climate Change, and the Competitive Enterprise Institute each examined this matter, and independently concluded that neither Section 1605(b) nor any other provision of law authorizes DOE to award transferable credits.

The first rule of statutory construction is to read the statute carefully. In the present case, this task is quite painless—Section 1605(b) is less than one and a half pages long. It is immediately apparent that 1605(b) makes no reference, or even allusion, to tradable credits. Appropriately, the program established pursuant to 1605(b) is, and from its inception has always been known as, a *reporting* system. Consistent with the foregoing, the Conference Report’s discussion of 1605(b) does not say or imply anything about credits.¹⁷ Section 1605(b) simply provides no authority to award credits for reported reductions.

When Congress does create credit programs, it has no difficulty making its intention clear. For example, Title IV of the Clean Air Act (42 U.S.C. Sec. 7651) established a sulfur dioxide allowances trading program. Similarly, Section 508 of the EPA Act (42 U.S.C. 13258) authorized federal and state government agencies to use tradable credits to comply with the Act’s alternative fueled vehicle mandates. The Supreme Court has stated that, “where Congress included particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”¹⁸ Since Congress did not use any of the same or similar terms (“credit,” “allocate,” “transfer”) in Section 1605(b) that it used in Section 508, we may presume that Congress intentionally and purposely omitted such language.

Some proponents might argue that under the Supreme Court’s *Chevron* doctrine, deference is to be given to an agency’s interpretation of a statute “if the statute is silent” and the agency’s interpretation is “based on a permissible construction.”¹⁹ In our judgment, construing 1605(b) as authority for a crediting program is not permissible, because there is no textual ambiguity that might make such a reading plausible. But even

¹⁶ *The President’s Small Business Agenda*, April 29, 2003, <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html>.

¹⁷ The Conference Report’s sole remarks on 1605 are as follows: “The guidelines for the voluntary reporting of greenhouse gases and the national inventory shall address coalbed methane emissions, inventories and reductions. Persons who wish to establish baselines shall be provided an opportunity to do so.” *H. Conf. Rep.* 102-10181 at 393 (1992).

¹⁸ *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842-43 (1984).

if the statute were ambiguous, EIA, which has administered the VRGGP from its inception, has historically taken the position that 1605(b) authorizes a reporting program, and nothing more. For example, in its *Annual Report to Congress 1998*, EIA stated:

In October 1997, the White House announced that it favored “credit for early reductions,” shorthand for a not-yet-legislated program in which companies that reduced emissions prior to the 2008-2012 target date for the Kyoto Protocol would receive some to-be-defined “credit” for their actions. The announcement generated intellectual ferment as policymakers, companies, and advocates attempted to define the notions of “credit,” “early,” and “reductions.”²⁰

Clearly, when EIA published its 1998 report (April 1999), it viewed “credit for early reductions” as a “not-yet-legislated program,” i.e., a program for which there was no existing legislative authority.

Similarly, in his July 15, 1999 testimony on the VRGGP before the House Government Reform Subcommittee on Regulatory Affairs, then-EIA Administrator Jay Hakes, stated: “It should be noted that the EIA’s Voluntary Reporting Program was never designed as an emissions trading program, or as a ‘credit for early reductions’ program.”²¹ Hakes also stated that, “EIA lacks the legal authority to resolve the numerous issues that would be raised by moving towards a crediting program....”²² To transform the VRGGP into a credit program, Congress would have to amend the EPAct.

Some proponents suggest that DOE may award transferable credits because 1605(b) nowhere prohibits the agency from doing so.²³ But to infer authority from the absence of prohibition overturns the central principle of administrative law, namely: “an agency literally has no power to act ... unless and until Congress confers power upon it.”²⁴ Courts do “not presume a delegation of power based solely on the fact that there is not an express withholding of such power.”²⁵

The clincher is that Congress, when it enacted Section 1605(b), specifically considered and rejected the option of establishing an early credit program.

Representative Jim Cooper (D-TN) drafted Section 1605 of the House-passed version of the EPAct (H.R. 776). If enacted, Cooper’s language would have established a credit program. It directed DOE to provide “opportunities for entities to receive official certification of net greenhouse gas emission reductions relative to the baseline for purposes of receiving credit against any future Federal requirements that may apply to

²⁰ EIA, *Annual Report to Congress 1998*, April 1999, DOE/EIA-1073 (98), p. 7, <http://www.eia.doe.gov/pub/pdf/other.docs/017398.pdf>.

²¹ Testimony of Jay Hakes, “The Voluntary Reporting of Greenhouse Gases Program,” July 15, 1999, p. 5, <http://www.eia.doe.gov/neic/speeches/htest715/testimony.htm>.

²² Hakes, Testimony, p. 10.

²³ Electric Power Industry Climate Initiative, Comments on Legal Authority Questions, September 20, 2002, pp. 11, 14, 15, <http://www.pi.energy.gov/EnhancingGHGRegistry/>.

²⁴ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

²⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 842-43 (1984).

greenhouse gas emissions.” In keeping with this, Cooper’s language directed DOE to ensure the credit system’s integrity by providing safeguards against double counting (two or more entities claiming credit for the same reduction), cherry picking (claiming credit for project-level reductions while entity-wide emissions increase), and windfall profits for “anyway tons” (claiming credits for reductions that would occur anyway under existing environmental controls). In addition, as befits a crediting scheme, with its obvious potential to affect companies’ bottom lines under future regulation, Cooper’s language directed DOE to structure participation by means of a legally binding “rule.”

However, when House and Senate conferees produced the final version of the EPAct, they made three fundamental changes to Cooper’s language. First, they deleted the credit provision. Second, they removed the strictures against double counting and other irregularities fatal to a credit program but perfectly compatible with a simple reporting program. Third—consistent with the fact that a reporting program, unlike a crediting system, is not a setup for future regulation—they directed DOE to structure participation via flexible “guidelines” rather than by means of a legally binding “rule.”

In short, when the conferees re-wrote the House version of 1605, they decided not to establish an early credit program. As the Supreme Court has emphasized, “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* [by its silence] to enact statutory language that it has earlier discarded in favor of other language.”²⁶

Other legislative history confirms our interpretation. Senator Joe Lieberman (D-CT) was the chief Senate sponsor of the 1605(b) program. Lieberman would have preferred that Congress establish a greenhouse gas reductions credit program.²⁷ However, in his floor statement following final passage of the EPAct, he did not pretend or insinuate that the 1605(b) program would or could function as a crediting system. Rather, he correctly described 1605(b) as setting up a “simple accounting mechanism” and “data base.”²⁸

In the 105th and 106th Congresses, Lieberman was the leading advocate of credit for early reductions legislation.²⁹ His high-profile push for such legislation in two successive Congresses presents a massive problem for those who claim or suggest that 1605(b) authorizes DOE to award credits. To repeat, Lieberman was a key architect of the 1605(b) provision and presumably understood what it did—and did not—authorize. If 1605(b) already provided authority for transferable credits, then why did he champion early credit legislation in 1998 and again in 1999 and 2000? Indeed, since President

²⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

²⁷ 138 *Cong. Rec.* S1611 (daily ed., Feb. 18, 1992): “Along with Senator Wirth, I prepared a simple amendment, virtually identical to one offered by Representative Cooper to H.R. 776, the House energy bill, which was adopted unanimously on a bipartisan basis by the House Subcommittee on Energy and Power.”

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

²⁹ In the 105th Congress, Senator Lieberman, along with Senators John Chafee (R-RI) and Connie Mack (R-FL), introduced S. 2617, the “Credit for Early Voluntary Action Act.” In the 106th Congress, Senators Chafee, Lieberman, Mack, Warner (R-VA), Moynihan (D-NY), Reid (D-NV), Jeffords (R-VT), Wyden (D-OR), Biden (D-DE), Collins (R-ME), Baucus (D-MT), and Voinovich (R-OH) introduced S. 547, the “Credit for Voluntary Reductions Act.”

Clinton and Vice President Gore also advocated credit for early reductions,³⁰ why didn't Clinton and Gore institute a credit program via administrative action? Finally, why didn't Lieberman call upon the Clinton-Gore Administration to award credits under existing 1605(b) authority?

There is only one reasonable answer to those questions—neither Sen. Lieberman, nor Messrs. Clinton and Gore, viewed 1605(b) as providing authority for anything other than a “simple accounting mechanism” and “data base.”

Consider also the unavoidable implication of Section 2 of Lieberman's “Credit for Early Voluntary Reductions Act” (S. 2617), introduced October 10, 1998, in the 105th Congress. Section 2 states:

The purpose of this Act is to encourage voluntary greenhouse gas emission mitigation actions by *authorizing* the President to enter into binding agreements under which entities operating in the United States will receive credit, usable in any future domestic program that requires mitigation of greenhouse gas emissions, for voluntary mitigation actions before 2008. [Emphasis added.]

Senators do not usually introduce legislation to authorize the President to do something he already has authority to do. Is it not clear from Section 2 of S. 2167 that, in Lieberman's opinion, the President (hence DOE) needed new legislative authority to award credit for early reductions?

Finally, note that Lieberman's early credit legislation and Representative Rick Lazio's (R-NY) House companion bill (H.R. 2520) in the 106th Congress gained little support on Capitol Hill. Lieberman's legislation attracted only 12 co-sponsors on its second go-round. Lazio's House companion attracted a mere 15 co-sponsors. Neither bill ever came to a vote in committee, much less on the Senate or House floor. In short, the Lieberman-Lazio legislation never came close to being enacted into law. The notion that Congress somehow delegated to DOE the authority to administer a greenhouse gas reductions credit program, without anyone noticing until now, is not credible.

Conclusion

DOE's decision to drop early credits from its proposed revision of the VRGGP is a policy breakthrough as significant as the Environmental Protection Agency's disavowal of authority to regulate CO₂, the Senate's defeat of the McCain-Lieberman bill, and Russia's refusal to ratify the Kyoto Protocol. Each of those events is a major setback to those who

³⁰ President Clinton, Remarks to the National Geographic Society, October 22, 1997: “Second, we must urge companies to take early actions to reduce emissions by ensuring they receive appropriate credit for showing the way,” <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi>; Press Release, October 17, 1998, “U.S. Environmental and Business Leaders Agree Early Action Is Needed to Reduce Greenhouse Gas Emissions and Present Principles for Early Action to Vice President Gore,” <http://clinton3.nara.gov/PCSD/tforce/ctf/cpress.html>.

would use climate alarmism to scare the public into embracing environmentally pointless and economically ruinous energy rationing schemes.

Credit advocates will likely lobby hard over the coming months to persuade DOE to reverse its decision. DOE officials should respond with a simple and clear message: The Executive Branch has no authority to implement a credit program, and DOE does not seek such authority, because credits would imperil the public interest in economic growth and affordable energy.

Thank you for considering these comments. We look forward to the opportunity to participate further in DOE's development of policy on these matters. Please direct any questions you may have about these comments to Mr. Lewis and Mrs. Bourne.

Sincerely,

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