

Does the Bush Administration Have Legal Authority to Award Regulatory Credits for Greenhouse Gas Reductions? CEI Responds to EPICI

November 18, 2002

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This paper examines the Electric Power Industry Climate Initiative's (EPICI's) attempted rebuttal of the Natural Resources Defense Council's (NRDC's) argument that the Bush Administration has no authority, under section 1605(b) of the 1992 Energy Policy Act, to provide penalty protection or award regulatory credits to companies that reduce their emissions of greenhouse gases. The paper shows that EPICI:

- Ignores the plain text of 1605(b), which contains no authority, explicit or implicit, to provide penalty protection or credit for early reductions;
- Identifies no ambiguity in 1605(b), such as might be resolved in favor of penalty protection or crediting in light of statutory context or legislative history;
- Relies almost solely on one Senator's remarks – and misconstrues those remarks;
- Ignores the texts of early credit legislation in the 105th and 106th Congresses, and the debates thereon;
- Implausibly and erroneously contends that even though Congress rejected a version of 1605 that directed the Department of Energy (DOE) to establish a crediting system, it nonetheless gave DOE authority to implement such a system;
- Confuses the discretion DOE has in implementing a reporting system with authority to establish a crediting scheme;
- Confuses the absence of statutory prohibitions against penalty protection and early credits with a grant of legislative authority to initiate such policies; and

¹ I would like to thank CEI Counsels Christopher Horner and Ben Lieberman for their helpful comments on this paper.

- Admits in the final analysis that DOE does not really have authority to protect companies' emission baselines or award early credits.

It is, in fact, astonishing that anyone familiar with these issues would interpret 1605(b) as EPICI does. Senators John Chafee (R-RI) and Joseph Lieberman (D-CT) introduced early credit legislation in both the 105th and 106th Congresses. Those bills were intensely controversial, and never mustered anything approaching majority support. Chafee-Lieberman gained only 12 co-sponsors in its second go-round. Representative Rick Lazio's (R-NY) House companion bill attracted just 15 co-sponsors. Neither bill ever came to a vote in committee, much less on the House or Senate floor. The notion that Congress implicitly enacted the substance of those bills seven years earlier, in the 102nd Congress, is preposterous.

On November 18, 2002, DOE will convene the first of a series of stakeholder workshops on how to transform the 1605(b) voluntary reporting program into penalty-protection/regulatory credit program. Absent from DOE's 15-page "Annotated Agenda of Key Issues" is any mention of legal issues. Shouldn't the Administration at least try to demonstrate that what it wants to do is legal before inviting the public to help them do it?

I. Background

On February 14, 2002, President Bush directed the Secretary of Energy, working with other department and agency heads, to enhance the "accuracy, reliability and verifiability" of the Voluntary Reporting of Greenhouse Gases Program (VRGGP), established under Section 1605(b) of the 1992 Energy Policy Act.² Mr. Bush also directed the Secretary 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 emission reductions."³

The Competitive Enterprise Institute (CEI) has long warned that penalty protection, especially in the form of transferable greenhouse gas (GHG) credits, will corrupt the politics of U.S. energy policy. GHG credits attain full market value only under a Kyoto-style cap-and-trade program. In effect, GHG credits are Kyoto stock – assets that mature and bear dividends only if the U.S. Government ratifies Kyoto or enacts a comparable regulatory regime. Thus, if implemented, the Administration's plan will expand and mobilize corporate lobbying for Kyoto and kindred energy rationing schemes.⁴

² 42 U.S.C. 134, sec. 13385.

³ "President Announces Clear Skies & Climate Change Initiatives," February 14, 2002, <http://www.whitehouse.gov/news/releases/2002/02/20020214-5.html>.

⁴ For further discussion, see CEI et al., "An Open Letter to President Bush About His Plan to Award Regulatory Credits for 'Voluntary' Greenhouse Gas Reductions," October 2, 2002, <http://www.cei.org/gencon/027,03237.cfm>; Marlo Lewis, Jr., "If You Build It, They Will Come," Tech Central Station, September 10, 2002, <http://www.cei.org/gencon/029,03195.cfm>; *CEI Comments on the Department of Energy's Greenhouse Gas Reporting Proposal*, June 5, 2002, <http://www.cei.org/gencon/027,03046.cfm>.

In addition, the Administration's crediting plan is internally conflicted. The Administration proposes to award transferable credits for "real" reductions. "Real" reductions are tonnage reductions – the kind required by Kyoto. Yet the Administration wants to replace Kyoto's tonnage targets, which restrict economic growth, with emission intensity targets, which accommodate growth. These goals are incompatible. Awarding credits for tonnage reductions ratifies rather than replaces the Kyoto framework. Credits for "real" reductions are only applicable to, and build political support for, cap-and-trade schemes, which the Administration professes to oppose.

In the *Federal Register* of May 6, 2002, the Department of Energy (DOE) published a Notice of Inquiry requesting comment on how to modify the VRGGP, in accordance with the President's February 14th directive. Individuals from the business, government, and non-profit sectors submitted about 80 comments during the 30-day comment period, which closed June 6th. The comments are available online.⁵

In their joint comment, the Natural Resources Defense Council (NRDC) and six other environmental groups⁶ argued that, "the administration has no authority under section 1605(b) or any other current law to ensure penalty protection or give out transferable credits."⁷ The Northeast States for Coordinated Air Use Management (NESCAUM)⁸ took essentially the same position. According to NESCAUM, "1605(b) was not designed for public recognition, baseline protection or the creation of early credits. Nor was it designed as the infrastructure for emissions trading...we are skeptical about how these [early reduction credits] could be made legally binding without new legislation."⁹ Similarly, the Pew Center on Global Climate Change stated: "The Pew Center's review of existing statutory authorities indicates that the Executive Branch currently lacks authority to assure that current efforts to reduce GHG emissions receive credit under a future law. If a baseline protection program is to have binding effect, it must be authorized by law."¹⁰

On September 20th, the Electric Power Climate Industry Initiative (EPICI) submitted a "supplemental" comment disputing the legal opinions presented by NRDC and others. According to EPICI, "there are no known legal obstacles under existing law to DOE addressing, as part of its revision of the section 1605 guidelines, both the issue of not penalizing volunteers for taking early action...and the issue of transferable credits."¹¹

⁵ <http://www.pi.energy.gov/EnhancingGHGRegistry/>

⁶ NRDC submitted a joint comment with National Wildlife Federation, National Environmental Trust, Union of Concerned Scientists, U.S. Public Interest Research Group, World Wildlife Fund, and Minnesotans for an Energy Efficient Economy. Hereafter cited as NRDC.

⁷ NRDC, p. 7.

⁸ NESCAUM submitted a joint comment with the Air Resources Division of New Hampshire's Department of Environmental Services and the Air Quality Planning and Standards Division of Connecticut's Department of Environmental Protection. Hereafter cited as NESCAUM.

⁹ NESCAUM, Attachment, p. 1.

¹⁰ Pew Center on Global Climate Change, p. 12.

¹¹ Electric Power Industry Climate Initiative Comments on Legal Authority Questions, p. 4; hereafter cited as EPICI.

This wording is artful, because asserting that no law prevents DOE from “addressing” the “issues” of baseline protection and transferable credits is not the same as claiming that DOE has authority to protect baselines and award credits. Yet throughout its supplementary comment, EPICI struggles to rebut NRDC’s opinion that the administration “has no authority under section 1605(b) or any other current law to ensure penalty protection or give out transferable credits.”¹² The present paper examines EPICI’s arguments.

II. Grasping at Straws

EPICI builds its case for interpreting 1605(b) as authorizing penalty protection and transferable credits not on the plain text of the provision, nor on the context created by simultaneously enacted provisions, nor on conference committee report language, nor on the history associated with congressional activities in this area, nor on other relevant statutes. Instead, EPICI relies on the alleged implications of Senator Joseph Lieberman’s (D-CT) floor statement prior to the Senate vote on the 1992 Energy Policy Act, on a semblance of ambiguity in the text, and on Congress’ silence (the absence of express prohibitions against penalty protection and credit for voluntary reductions). This procedure is, to put it charitably, unconventional.

The first rule of statutory construction is to read the text carefully. In the present case this 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 the matters of penalty protection or transferable credits. For this reason the 1605(b) program is, and has been known from its inception, as a reporting system or, as Senator Lieberman described it, a “data base” and “simple accounting mechanism.”¹³ Section 1605(b) neither directs nor authorizes DOE to provide penalty protection or credit for early action. There is no textual support for EPICI’s position.

Courts have held that it is permissible to look beyond the plain meaning of legislative language “when that meaning has led to absurd or futile results.”¹⁴ However, neither EPICI nor anyone else has ever attempted to show that reading 1605(b) literally as authority for an emissions reduction reporting (not baseline protection or crediting) program leads to absurd or futile results. The program was set up to encourage voluntary reporting of GHG reductions, and that is exactly what it does.¹⁵

¹² I apologize for an error in my June 5, 2002 comment to DOE. I mistakenly included NRDC among advocacy groups, like Environmental Defense and Pew Center for Global Climate Change, who advocate giving companies regulatory offsets for GHG emission reductions *before* lawmakers have enacted an emissions cap-and-trade program.

¹³ 138 Cong. Rec. S17626 (daily ed. Oct. 8, 1992), cited by EPICI, p. 8.

¹⁴ *United States v. American Trucking Ass’n*, 310 U.S. 534, 543 (1939).

¹⁵ The number of entities reporting voluntary reductions grew from 105 in 1994 to 222 in 2000 – a more than 100 percent increase. Similarly, the number of greenhouse gas reduction/avoidance/sequestration projects reported rose from 634 in 1994 to 1,882 in 2000 – an almost 300 percent increase. Energy Information Administration, *Voluntary Reporting of Greenhouse Gases 2000*, February 2002, p. ix. [http://www.eia.doe.gov/oiaf/1605/vrrpt/pdf/0608\(00\).pdf](http://www.eia.doe.gov/oiaf/1605/vrrpt/pdf/0608(00).pdf). Of course, one may claim that the 1605(b) program is “futile” because it has not slowed the growth of GHG emissions. By that logic, however, all U.S. voluntary climate programs are futile and, thus, implicitly authorize regulatory controls on GHG

Courts may also look beyond the text of a statutory provision if the meaning is ambiguous. EPICI, however, fails to identify any ambiguity in the text. The closest EPICI comes to finding ambiguity is the statement, in 1605(b)(4), that the reporting entity may use the GHG registry/database to “demonstrate achieved reductions of greenhouse gases.”¹⁶ But this is ambiguous only if one makes the unwarranted assumption that *demonstrating* emission reductions is equivalent to *protecting* baselines or *qualifying* for credits. EPICI stops short of asserting that “demonstrating” is equivalent to “protecting,” but leaves the impression that the one implies the other, and, hence, that the text is ambiguous.

That is nonsense. *If* Congress were to create a penalty protection/early credit program, then companies would of course have to “demonstrate” their reductions to receive protection or credits. But it by no means follows that 1605(b) authorizes protection or crediting because it allows companies to “demonstrate” reductions.

In short, 1605(b) is not ambiguous. However, if there were an ambiguity, the first place to look for clarification would be the context created by other simultaneously adopted provisions.¹⁷ EPICI makes no attempt to show that any enacted provision of law logically requires penalty protection or credit for early action to ensure its proper execution or implementation. This is not surprising, because when Congress does create credit programs, it has no difficulty making its intention clear.¹⁸

The Supreme Court has stated that, “where Congress includes 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 purposely in the disparate inclusion or exclusion.”¹⁹ Section 508 of the 1992 Energy Policy Act establishes a transferable credit program for alternative fueled vehicles. Since Congress did not use the same or similar terms (“credit,” “allocate,” “transfer”) in 1605(b), we may presume that Congress intentionally and purposely omitted such language.

Only if there were still some ambiguity that cannot be resolved by the text or context of the provision would it be proper to construe the meaning of 1605(b) based on legislative history. But, not all parts of legislative history are created equal. Enacted report language carries greater weight than statements made by individual lawmakers in floor debates, committee hearings, and the like. Yet, as EPICI admits, the Conference

emissions. The 1605(b) program has been successful in fulfilling its limited mission – to encourage voluntary reporting of GHG reduction actions.

¹⁶ EPICI, p. 14.

¹⁷ *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 371 (1988): “Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, ... or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law...”

¹⁸ See, e.g., Fleet Credits at U.S.C. Sec. 13258, Biodiesel Fuel Use Credits at 42 U.S.C. Sec. 13220, or the Sulfur Dioxide Allowance Program(s) at 42 U.S.C. Sec. 7651.

¹⁹ *Russello v. United States*, 464 U.S. 16, 23 (1983).

Report's discussion of section 1605(b) says nothing about penalty protection and credit for early action.²⁰

EPICI is thus forced to build its case on Senator Lieberman's October 8, 1992 floor statement (actually, on the alleged implications thereof). But, even if Senator Lieberman's remarks mean what EPICI believes they mean (they do not, as we will see later), that hardly suffices to settle the matter. No individual member can be presumed to speak for Congress as a whole on the meaning of statutory provisions.²¹ As Eskridge and Frickey explain in their text *Cases and Materials on Legislation*: "Unlike statements from committee reports, statements made during committee hearings and floor debates have traditionally been given very little weight by courts and commentators."²² To mention only one reason, in floor debate, members have an incentive to "spin" the discussion to advance their particular agendas. For example, a member may try to manufacture legislative history after the fact, by attributing to a provision a meaning nowhere specified in the plain words of either the bill text or the report language.²³

Senator Lieberman is certainly not above suspicion in that regard. Not only was Mr. Lieberman an original co-sponsor of early credit legislation in the 105th and 106th Congresses,²⁴ he also prepared an amendment to establish a GHG reduction crediting program as part of the 1992 Senate energy bill.²⁵ So it would not be at all surprising if Senator Lieberman, in his October 8th floor statement, construed 1605(b) in terms suggestive of a penalty-protection/early credit program.

²⁰ EPICI, p. 7. The Conference Report's sole remarks on section 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).

²¹ *In re Kelly*, 841 F.2d 908, 912 n. 3 (9th Cir.1988): "Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."

²² William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, American Casebook Series (St. Paul, Minn.: West Publishing Co., 1988), p. 717.

²³ "Among the least reliable kinds of legislative history are floor debates. Not only are they laden with sales talk; but their frequent reference to what a provision means is an unconscious effort to finesse the courts in performing their constitutional function of having the last word on what the statute means." W. Keefe & M. Ogul, *The American Legislative Process* 258 (5th ed. 1981), quoted in Eskridge & Frickey, *Cases and Materials on Legislation*, p. 718.

²⁴ 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-VI), 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."

²⁵ 138 *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." The Cooper Amendment, which became section 1605 of H.R. 776, laid out 11 specific features, to be established "by rule," of a combined reporting/crediting program.

III. What Did Senator Lieberman Really Say?

EPICI quotes Senator Lieberman’s October 8th floor statement on 1605(b) at length. The passages on which EPICI builds its case are reproduced below:

- 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 emissions of greenhouse gases.
- 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 emission levels are negotiated. With this section, our negotiators will be able to demonstrate conclusively the real reductions by U.S. firms.

EPICI attaches great importance to Senator Lieberman’s claims that 1605(b) “removes a disincentive facing U.S. firms seeking to reduce voluntarily their greenhouse gas emissions,” 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.”²⁶ Let’s consider what these statements mean – and don’t mean.

EPICI’s commentary on Senator Lieberman’s remarks is somewhat desultory. The gist, however, appears to be that 1605(b) provides authority for penalty protection, because 1605(b) does in part what a penalty protection system would do – “removes” a “disincentive” to voluntary reductions and “preserves American competitiveness.”

But, just because a registry has some of the same effects as a penalty protection program does not mean that the agency authorized to run the registry is also authorized to provide penalty protection or award credits. Notice that Senator Lieberman ascribes the incentive effects of 1605(b) to the fact that it is a “data base” and a “simple accounting

²⁶ EPICI, p. 12.

mechanism.” That 1605(b) does encourage companies to reduce emissions and demonstrate reductions, is undeniable. It is also beside the point. That fact does not create or imply any legal authority to protect baselines or award credits.

Notice also that when Senator Lieberman says 1605(b) will preserve American competitiveness because it will “demonstrate that past achievements deserve credit,” he is not talking about awarding credits to particular companies. Rather, he is talking about information useful to U.S. diplomats as they *negotiate* “international emission levels.” He is referring to information needed to determine *country* baselines and emission reduction targets in international conferences like Rio and Kyoto, not to any safe harbor provision in domestic law.

IV. Ignoring the Texts of Early Credit Legislation and the Debates thereon

Elevating Senator Lieberman to a controlling legal authority on these matters actually undermines EPICI’s position. After all, if 1605(b) already provides authority for penalty protection and early credits, then why did Senator Lieberman champion credit for early action legislation in the 105th and 106th Congresses? Indeed, since President Clinton and Vice President Gore also advocated credit for voluntary reductions,²⁷ why didn’t Clinton and Gore institute penalty protection and regulatory offsets through administrative action? Finally, why didn’t Senator 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 Senator Lieberman, nor Messrs. Clinton and Gore, interpreted 1605(b) as providing authority for penalty protection or credit for early action.

Section 2 of Senator Lieberman’s “Credit for Early Voluntary Reductions Act” (S. 2617), introduced October 10, 1998, in the 105th Congress, 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 they believe he already has authority to do. Is it not abundantly clear from Section 2 of S. 2617 that Senator Lieberman believed the President (hence DOE) needed new legislative authority to award credit for early action?

²⁷ 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 that 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/cctf/cpress.html>.

In his floor statement on S. 2617, Senator Lieberman stated, in pertinent part:

The point of this legislation is to provide an incentive for companies that want to make voluntary early reduction in emissions of greenhouse gases by guaranteeing that these companies will receive credit, once binding requirements begin, for voluntary reductions they have made before 2008....I'm pleased that this legislation builds on section 1605(b) of the Energy Policy Act which allowed companies to voluntarily record their emissions in greenhouse gas emissions, which I worked hard to include in the Energy Policy Act.²⁸

Note what Senator Lieberman says – and does not say. He says that S. 2617 “builds on” section 1605(b), “which allowed companies to voluntarily record their emissions in greenhouse gas reductions.” He does not say that S. 2617 makes explicit an authority already granted by 1605(b). He does not say that it enables DOE to do more efficiently what it may already do under 1605(b). He makes very clear that the proposed legislation provides something *new* – “an incentive for companies that want to make voluntary early reduction in greenhouse gas emissions by guaranteeing that those companies will receive credit.”

EPICI’s expansive view of 1605(b) is unprecedented in the history of public debate on credit for early action. For example, in his floor statement introducing the House companion bill to the Chafee-Lieberman legislation in the 106th Congress, Rep. Rick Lazio (R-NY) stated, in pertinent part:²⁹

- It [H.R. 2520, the Credit for Voluntary Reductions Act] is simply *authorizing* companies to reduce greenhouse gases without fear of punishment later. [Emphasis added.]
- Section 4--Authority for voluntary Action Agreements. This section *provides the authority* for entering into these agreements to the President and allows delegation to any federal department or agency. [Emphasis added.]
- Section 5--Entitlement to Greenhouse Gas Reduction Credit for Voluntary Action. *Provides authority for credits* for: certain projects under the initiative for Joint Implementation program; prospective domestic actions (includes a significantly revised sequestration); and retrospective past actions. [Emphasis added.]

The clear implication of these remarks is that, absent such legislation, the President lacks authority to protect companies’ baselines or award credits.

The Pew Center for Global Climate Change was a key backer of the Chafee-Lieberman legislation. In her March 24, 1999 testimony before the Senate Environment and Public Works Committee, Pew Center Executive Director Eileen Claussen stated:

²⁸ Hon. Joseph Lieberman, October 10, 1998, *Cong. Rec.*, S12312.

²⁹ Hon. Rick Lazio, July 14, 1999, *Cong. Rec.*, Extension of Remarks, p. E1542.

Solving this problem requires leadership from Congress. An analysis undertaken by the Pew Center and published in October 1998 finds that federal *agencies do not have sufficient legal authority* to provide the certainty that firms need to make significant early investments. *Congress must provide the legislative framework* to remove the disincentives to early action.³⁰ [Emphasis added.]

The International Climate Change Partnership (ICCP) was also a key booster of the Chafee-Lieberman bill. In his July 15, 1999 testimony before the House Government Reform Subcommittee on Regulatory Affairs, ICCP Executive Director Kevin J. Fay stated that, “The current *legal vacuum* provides a disincentive to companies that wish to reduce greenhouse gas emissions or enhance carbon storage” (emphasis added).³¹ Fay’s comment would make no sense if he believed 1605(b) provided legal authority to remove the alleged “disincentive” to voluntary action. At no point in the hearing did Fay or fellow witness and early credit advocate Fred Krupp, Executive Director of Environmental Defense, suggest that DOE could create *regulatory* offsets (remove the “vacuum”) by revising the 1605(b) reporting *guidelines*.

Finally, let us note that the Chafee-Lieberman-Lazio legislation went nowhere. Chafee-Lieberman 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. Neither came anywhere close to winning majority support in either chamber. The notion that Congress implicitly enacted the substance of those bills seven years earlier, in the 102nd Congress, is preposterous.

V. Missing the Obvious

EPICI acknowledges that, when House and Senate conferees produced the 1992 Energy Policy Act in its final form, they re-wrote Representative Jim Cooper’s (D-TN) section 1605 language in H.R. 776, the House-passed version of the energy bill. The House version of 1605(a) directed DOE to establish, “by rule,” a greenhouse gas reduction accounting system that provides “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 greenhouse gas emissions.” In keeping with this, the House version of 1605(a) required DOE to:

- “ensure that no emissions reductions be credited more than once,”
- “ensure an entity’s baseline includes all greenhouse gas emissions from all sources under the control of such entity,” and

³⁰ Available at http://www.senate.gov/~epw/cla_3-24.htm

³¹ Available at <http://reform.house.gov/reg/hearings/071599/fay.htm>

- “ensure that reductions of greenhouse gas emissions which are specifically required under this title, or any other Federal law in effect as of the date of enactment of this Act, shall not be certified.”

In other words, the House version of 1605(a) directed DOE to protect the crediting system’s integrity by building in 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 credit for reductions that would occur anyway under existing emission control requirements).

EPICI acknowledges that 1605(b) as enacted directs DOE to issue “guidelines” for reporting emission reductions, not a “rule” for certifying credits. EPICI, moreover, acknowledges that 1605(b) as enacted contains none of the prophylactic provisions from the House version’s 1605(a) that are essential to the integrity of a crediting program.³² Yet EPICI fails to draw the obvious conclusion: When the conferees re-wrote the House version, they considered but rejected the option of establishing a crediting 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* to enact statutory language that it has earlier discarded in favor of other language.”³³

To avoid this conclusion, EPICI argues that when the conferees re-wrote the House version, and deleted the 11 subsections in 1605(a), including the crediting provisions, they were just “streamlining” the details, as is appropriate for a statute directing DOE to issue “guidelines” rather than a “rule.” Thus, the conferees cannot be understood to have “rejected” the substance or content of any of the deleted 11 provisions, including provisions on crediting. EPICI explains:

The final version called explicitly for guidelines [not rules] on the “voluntary collection and reporting of information sources” of ghg’s [sic]. 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, that 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 [for NRDC] to claim that one of the 11 items was “pointedly rejected” by the Conferees, and not all of the other 10.³⁴

EPICI’s only source for the claim that the conferees “streamlined” rather than “rejected” any provisions of the House version is Senator Lieberman’s remark, in his

³² EPICI, pp. 8-10.

³³ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

³⁴ EPICI, p. 20.

October 8th floor statement, that, “The conferees streamlined some of the details of the program, giving more discretion to the Administration in implementation.” But if we actually compare the House version with the final version, we find that the streamlining occurs in what was section 1605(b) of the House version, which lists 12 types of reductions *eligible to receive credits*. In 1605(b)(1)(B) as enacted, those are summarized as types of reductions *eligible to be reported*. However, section 1605(a) of the House version, which contains the credit authorizing provisions, is not “streamlined” in 1605(b) as enacted, because none of it survived the conference committee. The conferees simply deleted the items in section 1605(a). The House version of section 1605(a), which provided authority for a crediting program, does not appear in any manner, shape, or form in 1605(b) as enacted.

EPICI’s attempt to save the deleted crediting provisions fails for an even more basic reason. Accounting systems have their own logic. Baseline estimation, double counting, and reductions in foreign countries are among the issues DOE guidelines would have to address in any GHG accounting and reporting system worthy of the name. It would be impossible for DOE to carry out its statutory obligation to provide “procedures” for the “accurate voluntary reporting of information” on emissions and reductions without addressing some of the 11 items enumerated in section 1605(a) of the House bill.

In stark contrast, protecting companies’ emission baselines and awarding credit for early action are not intrinsic to the enterprise of GHG accounting. They are policy initiatives fraught with economic implications and political risks.³⁵ A grant of authority to implement a GHG accounting system logically implies authority to “address” such issues as baseline estimation, double counting, and emission reductions in foreign countries. It does not entail, and should not be construed to imply, authority to provide penalty protection or credit for early reductions.

VI. Confusing Discretion with Authority

As noted, EPICI quotes Senator Lieberman’s remark that when the conferees “streamlined some of the details” of the House-passed version, they gave “more discretion to the Administration in implementation.”³⁶ Again, EPICI’s argument is less than crisp on this point, but EPICI appears to suggest that DOE may use its greater “discretion” to protect baselines and award credits. This is exactly backwards.

It is only when voluntary reductions generate credits that potentially confer competitive advantage on some firms at the expense of others that it becomes necessary to have rigorous and consistent accounting standards and practices. Thus, it was entirely appropriate for the House version of 1605, which provided for a crediting scheme, to prescribe “by rule” 11 specific features of the proposed GHG registry. In contrast,

³⁵ As EPICI acknowledges (p. 13), baseline protection, unlike baseline estimation, is an “important policy matter,” rather than a mostly “definitional and technical” issue.

³⁶ EPICI, p. 9.

flexible “guidelines” are appropriate to encourage reporting under various voluntary programs that do not award credits.³⁷

In his July 15, 1999 testimony on 1605(b) before the House Government Reform Subcommittee on Regulatory Affairs, Energy Information Administrator Jay Hakes explained that 1605(b), unlike a crediting program, provides “multiple alternative answers” to such key questions as: Who can report? What is a reduction? Who owns the reduction?³⁸ Hakes explained that 1605(b) was not designed to produce a “set of comparable, verifiable, auditable emissions and reduction reports that represent ‘actual reductions’ and are ‘not double counted.’”³⁹ Rather, “The Voluntary Reporting Program can be viewed as a survey of emission accounting methods and theories actually in use, and a set of illustrations of the potential accounting and baseline problems that must be confronted in designing future policy instruments. A more structured approach would have been less useful for identifying and analyzing accounting issues.”⁴⁰

The conferees gave the administration “more discretion” in implementing 1605(b) – they chose a less “structured” approach – precisely because they did not intend to set up a crediting program.

VII. Confusing the Absence of Statutory Prohibitions with Grants of Legislative Power

On three occasions EPICI notes, or alludes to the fact, that 1605(b) as enacted contains no “prohibition” with respect to any of the 11 items listed for rulemaking in section 1605(a) of the House-passed version.⁴¹ Because Congress did not explicitly prohibit DOE from providing penalty protection, EPICI reasons, DOE may do so under “existing law,” namely, section 1605(b), the DOE Organization Act, and the UN Framework Convention on Climate Change (FCCC).⁴² However, EPICI does not cite a single provision of the DOE Organization Act to substantiate that assertion. The FCCC is not self-executing, and EPICI does not cite any statute enacted pursuant to the FCCC such as might grant DOE the authority to award credits. And, as we have seen, 1605(b) provides no such authority.

Thus, EPICI’s argument boils down to this: DOE may do whatever Congress has not prohibited it from doing. To take that position, however, is to turn the central

³⁷ Dan Lashof and Jeff Fiedler, *Incentives for Reducing Greenhouse Gas Pollution: Principles for Environmentally Credible Early Reduction Credit Legislation*, Natural Resources Defense Council, February 1999, <http://www.nrdc.org/globalwarming/pearly.asp>.

³⁸ Testimony of Jay Hakes, “The Voluntary Reporting of Greenhouse Gases Program,” pp. 5-8, <http://reform.house.gov/reg/hearings/071599/hakes990715.htm>.

³⁹ *Ibid.*, p. 5.

⁴⁰ *Ibid.*, p. 9.

⁴¹ EPICI, pp. 11, 14, 15.

⁴² EPICI, p. 14.

principle of administrative law on its head. Ours is a government of delegated and, hence, limited powers only if agencies are not free to define the bounds of their authority.⁴³

Congress nowhere expressly or by clear implication delegated to DOE the authority to protect companies' baselines or award regulatory offsets in advance of a future mandatory GHG emission reduction program. The only constitutionally permissible inference is that DOE does not have such authority.⁴⁴

EPICI might reply 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."⁴⁵ But, as we have seen, construing 1605(b) as authority for a crediting program is not permissible. Moreover, the Energy Information Administration (EIA), which has administered the voluntary reporting program from its inception, has historically taken the position that 1605(b) is 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."⁴⁶ [Emphasis added.]

Clearly, in April 1999, EIA viewed "credit for early reductions" as a "not-yet-legislated program," i.e., a program for which there was no existing legislative authority. Consistent with this, a current search of "credit" on EIA's Web pages yields no references even suggesting the existence of such authority, as one would expect if EPICI were correct.

⁴³ *ACLU v. FCC*, 823 F. 2d 1554, 1567, n. 32 (D.C. Cir. 1987), cert. Denied, 485 U.S. 959 (1988): "Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent. The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."

⁴⁴ *American Petroleum Institute v. EPA*, 52 F. 3d 1113, 1120 (D.C. Cir. 1995): "To suggest, however, 'that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law ..., and refuted by precedent.' ... Thus, we will not presume a delegation of power based solely on the fact that there is not an express withholding of such power."

⁴⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842-43 (1984).

⁴⁶ 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>

VIII. Folding Like a Tent

After spending 15 pages in ineffectual efforts to rebut NRDC's position, EPICI tacitly concedes that DOE has no authority to protect baselines or award GHG credits:

However, what recognition or certification [penalty protection or credits] 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 congressional enactment of section 1605 and the purposes of the FCCC. Such an approach, as Sen. Lieberman said, would help 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 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.*⁴⁷ [Emphasis added.]

This is an astonishing admission against interest. According to EPICI, all DOE has authority to do is make current reporting requirements more rigorous so reporting entities have a better "opportunity" to "persuade" policymakers to provide penalty protection and credit for early action "if and when" a future regulatory program is "debated."

IX. Conclusion

Baseline protection and transferable credits ultimately have no application except as part of a regulatory (emissions cap-and-trade) program. Protecting baselines and awarding credits prior to enacting a mandatory regime can only prejudice its design and create liabilities for the Federal government if early credits turn out to be incompatible with future climate policies.

Thus, as CEI, NRDC, and Duke Energy separately argued in their June 5, 2002 comments to DOE, it is inappropriate to provide baseline protection or award credit for early action except as part of a duly enacted cap-and-trade program. Indeed, providing penalty protection or credits prior to enactment of a cap would be inappropriate even if the protection/crediting scheme were established "by rule," pursuant to clear statutory directive. To set up a pre-regulatory crediting program via "guidelines," pursuant to no statutory authority, would not only be improper. It would also be illegal.

On November 18, 2002, DOE will convene the first of a series of workshops on how to "improve" the 1605(b) program pursuant to the President's February 14th directive. Absent from DOE's 15-page "Annotated Agenda of Key Issues" is any

⁴⁷ EPICI, p. 16.

mention of legal issues. Shouldn't the Administration at least try to demonstrate that what it wants to do is legal before inviting the public to help them do it?

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