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COMPETITIVE ENTERPRISE INSTITUTE

Fred L. Smith, Jr.
President

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May 2, 2003

Mr. James L. Connaughton
Council on Environmental Quality
Chair
722 Jackson Place, NW
Washington, DC 20502

Dear Jim:

I thought a brief follow up to my comment on your remarks at AEI Monday would be appropriate. As I know you realize, I feel strongly that efforts that could create a *carbon constrained* economy are economically disastrous and morally wrong. Thus, my reaction to sophisticated attempts to design anti-carbon policies without any discussion of whether such policies might not be more risky than the concerns that prompt them.

I am concerned about what I see as a highly biased perspective on global warming policies and thought I would try again to explain why. Incidentally, I should note that I do agree with you on many points. You do present well elements of the Administration's policies – the need to proceed cautiously, the value of exploring a wider array of technological approaches, the concern that poorly considered policies might inadvertently cripple important sectors of our economy such as coal and railroads. However, I have seen no evidence of attention being given to resilience strategy, which –given the weak science, economics and politics of this issue – I believe is superior to carbon suppression options. A resiliency strategy would focus on government policies that slow or block economic and technological growth.

There are many such policies. Global warming advocates worry about coastal flooding. Then we should review current government flood insurance programs which do indeed underprice the risks of living in low living areas. The result is that we're already placing too much commercial and residential investment at risk – eliminating such distortions would be appropriate *in any event!* Global warming advocates are worried about America's low energy efficiencies – then why shouldn't CEQ work with Treasury and others to explore the value of tax reform policies (such as allowing the full expensing of capital investments) which would accelerate capital turnover and thus improve energy efficiency. Again, such reforms can be justified without any reference to climate change fears – they are appropriate *in any event!*

Or consider the fights now ongoing over the regulation of biotechnology – regulations far more restrictive than the regulations imposed on earlier high-error forms of genetic modifications

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(such as hybridization programs). Global warming advocates worry about the risks to flora and fauna of rapid climate change – a risk that would be greatly mitigated were we better able to modify such life forms to enhance their adaptivity. CEQ might become the champion of reducing the impediments to more rapid innovation in this field. Again, this policy would be appropriate *in any event!*

And, of course, there are a vast array of other policies which would accelerate economic and/or technological change – making America (and the world) wealthier and more knowledgeable and thus more able to address whatever risks we might encounter. Those options were ignored by panelists. As Dick Stewart made clear, he sees the choice as between various forms of carbon suppression and "doing nothing." The presumption is that "something" must involve more government interference

The debate on climate change policies should be a debate about the risks and costs of alternative policies (with the option always present of gathering more information – reducing uncertainty – before committing to any path). (I outline that decision making under uncertainty framework in my chapter in **The Costs of Kyoto,** enclosed). But, the presenters at the AEI event act as if the only choices are more or less reductions in greenhouse gases. That is wrong. We realize that the best way of enhancing environmental quality around the world is to encourage these nations to grow their economy and as they do, they will use energy more efficiently, lower energy intensity, and become more resilient.

There is one point that is consistently overlooked in these discussions. With a growing economy and a growing population, we will use more energy, not less. That is true of the world as well. As a result, we may lower energy intensity but with greater energy use there will be greater emissions for decades to come.

In any event, I regret the emotive tenor of my remarks and, as always, wish I could be more persuasive in these situations. Climate change may create risk for the world but climate change policies create far greater risk. It is for that reason that we at CEI are working so hard to ensure a more balanced debate. I would enjoy far more collaboration with you for rational environmental policies and welcome any suggestions for how to achieve that.

Sincerely,

Fred L. Smith, Jr.
President

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From: Fred Smith	Date: December 20, 2002

Number of Pages Including Cover: 5

• **Comments:**

COMPETITIVE ENTERPRISE INSTITUTE

Fred L. Smith, Jr.
President

December 20, 2002

Mr. James Connaughton
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

Dear Jim:

Thank you and your staff for providing us at CEI the opportunity to exchange views on environmental policy. We do seem to agree on several important matters:

- *Environmental Federalism:* States should have more power to set environmental policy within their borders (although not to restrict consumer choice in other states, as California's CO_2 law would do);

- *Agricultural Biotech:* This most promising technology is good for both people and the planet;

- *Egalitarian Focus:* All environmental policy initiatives should in part be supported or opposed based upon their effects on the poor (at home and abroad). Wealthier is *cleaner* as well as healthier!

- *Risk/Risk Tradeoffs rather than the Precautionary Principle:* Current environmental policy presumes that new products and technologies are inherently more risky than the status quo. However, risk taking and innovation are essential to social, economic, and environmental progress. The "inherently safer" chemicals legislation would further entrench the precautionary approach.

- *Senator Inhofe's Chairmanship of the Senate Environment and Public Works Committee:* Senator Inhofe's chairmanship offers the best hope in decades for reforming the EPA, for asking basic questions about the direction and nature of current environmental policy.

On the other hand, our views seem to differ on several other critical issues:

- *Awarding "transferable credits"* for "voluntary" greenhouse gas (GHG) reductions (see below).

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- *Failing to renounce the U.S. signature on Kyoto:* We are dismayed that the Administration has so far failed to "un-sign" Kyoto, as it did the Rome Treaty that created the International Criminal Court. Remaining a Kyoto signatory, coupled with publication of an alarmist Climate Action Report, increases the likelihood that: (1) the United States will face eco-dumping charges under WTO rules; (2) agencies will have to consider "climate impact" under NEPA; and (3) U.S. companies will be liable for damages under the Alien Tort Claims Act.

- *Proposing sweeping Clean Air Act reforms before educating the public:* The Administration seems determined to promote some variant of Clear Skies as a *replacement* for current regulatory policies. This may or may not be a good idea, but the Administration has made little effort so far to popularize the case for Clean Air Act reform. Green groups typically condemn any regulatory modernization as "gutting" and "rollback"; they shape public opinion on environmental issues; and they will use votes on the floors of the Senate and House to portray the Administration as anti-environmental. If we're to change that reality, we must spend the time needed to inform the debate. It is an uncomfortable truth that, unless some crisis forces quick action, enacting major controversial legislation almost always requires sustained effort through several Congresses.

Further discussion might broaden the areas of agreement, but let me touch now upon a few problems we see with the direction CEQ is taking.

I think you acknowledge the legitimacy of our concern that GHG credits will foster the growth of a powerful rent-seeking lobby for Kyoto-style energy rationing schemes. Such credits will have value, after all, only to the extent that policymakers establish a binding carbon cap. Coupon holders will thus lobby fiercely to make "voluntary" programs "mandatory." Yet you assure us (time did not permit a fuller explanation) that safeguards will be adopted to minimize the value such credits would have under a cap. We find this difficult to believe.

Capping carbon will create another iron triangle of government bureaucrats, members of Congress, and industry clients. The interest-group beneficiaries will lobby to capture the program and exploit it for competitive advantage. This happened with peanut quotas, old/new gas production, and oil import quotas. Can you name a single counter example?

The idea that you can build in safeguards against profiteering under a cap is not credible for an even more basic reason. If the credits the Administration plans to award will not be valuable as regulatory offsets under a future Kyoto-type regime, then what is the point of the whole exercise? Why should American Electric Power, Cinergy, Dupont, BP, NEI and other early credit advocates help CEQ build a crediting system, if there is no money to be made under a cap? Why should other companies sign on if the credits won't be valuable enough to provide significant "baseline protection"?

To allay our concern that the Administration is inadvertently mobilizing pro-Kyoto lobbying, you also suggest that environmentalists may decide to buy up and retire the credits, reducing Kyoto's profit potential for early reducers. First, CEI does not view large-scale credit retirement as a realistic scenario. Carbon credits are cheap now, because there is no cap. Conceivably, environmental groups could afford to buy large quantities of credits at current prices. But why would corporate credit holders want to sell credits at today's low prices? They are more likely to wait until there is a cap, and then sell the credits at much higher prices.

Second, if environmental groups do somehow buy up and retire lots of credits, that means fewer emission allowances will be available to U.S. firms under Kyoto or a similar domestic regime. Thus, once a cap is imposed, the costs of compliance will be greater. What then happens to U.S. Government assurances of "baseline protection"? Do we really want an America in which businesses seeking to grow must purchase expansion rights from a cartel of anti-growth advocacy groups?

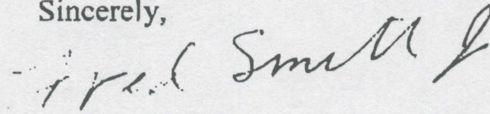
Finally, I want to reiterate our conviction that the Administration has no authority under section 1605(b) of the 1992 Energy Policy Act to transform the Voluntary Reporting of Greenhouse Gases Program into a crediting scheme. We think the Administration should forthrightly address the issue of its legal authority before taking further steps to implement credits. This is a simple requirement of good (transparent and accountable) governance.

If I am not mistaken, you think the Administration is wise to defer discussion of the legal issue, because raising it now would only encourage some members of Congress to reintroduce credit for early reduction legislation. We are confused by this argument. Why would you not want Congress to grant specific statutory authority for what you want to do? Perhaps I misunderstood your point, but in any event, CEI is prepared to run the risk that some legislators may try to supply the authority the Administration now lacks. As you may recall, Senators Chafee (R-RI) and Lieberman (D-CT) introduced early credit legislation in the 105th and 106th Congresses. Chafee-Lieberman mustered only 12 co-sponsors on its second go-round. 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. We've beaten it in the past, and we can beat it again.

In conclusion, we have several questions about the Administration's transferable credit initiative. First, does the Administration intend to take steps to minimize the value transferable credits would have under a future Kyoto-type policy? If so, has the Administration made that objective clear to the multitude of companies participating in ongoing discussions about how to "enhance" the 1605(b) program? Second, does the Administration intend to encourage environmental groups to buy up and retire credits awarded under the "enhanced" 1605(b) program? If so, how will large-scale credit retirement affect the U.S. Government's ability to provide "baseline protection"? Last, does the Administration believe it has statutory authority to award GHG credits? If so, what are the relevant provisions in current law?

I would very much appreciate your thoughts on the foregoing questions. I do appreciate your taking the time to meet with us. I would be even happier if we were more in agreement.

Sincerely,



Fred L. Smith, Jr.
President

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From: Marlo Lewis **Date:** 27/1/03

Number of Pages Including Cover: 4

• **Comments:**

January 27, 2003

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

We are writing to reiterate our concerns about the Administration's plan to award regulatory offsets ("transferable credits") to companies that reduce emissions of carbon dioxide (CO_2) and other greenhouse gases.

Three significant events have occurred since our earlier (October 2, 2002) letter -- events that make the case against carbon credits even more compelling. Those events are: (1) introduction of the McCain-Lieberman bill to establish a Kyoto-style cap-and-trade program for the United States; (2) publication of a major study in ***Science*** demonstrating the futility of regulatory "solutions" to climate change; and (3) your advocacy of expensing as part of the administration's growth and jobs policy.

As noted in our previous letter, transferable carbon credits attain full market value only under a mandatory emissions reduction target or "cap," like those proposed in the McCain-Lieberman bill. Thus, companies that earn carbon credits for "early reductions" will gain incentives to lobby for the bill. If enacted, McCain-Lieberman will have the same effects on consumers as an energy tax. The carbon caps will increase the prices households must pay for electricity, gasoline, and home heating oil, and the impacts will be regressive, imposing proportionately larger burdens on those, like seniors and the poor, who are on fixed or low incomes.

Clearly, McCain-Lieberman is antithetical both to your National Energy Policy, which seeks to secure affordable energy for the American people, and your growth and jobs policy, which seeks to stimulate the economy via tax cuts. The administration's crediting plan will build support for McCain-Lieberman and similar energy rationing schemes.

We share your view that climate policy should emphasize long-term technology change, not short-term regulation. As a study in the November 1, 2002 issue of ***Science*** explains, world energy demand could triple by 2050. However, according to the study, "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." Major technological breakthroughs and decades of market evolution must occur before nations could stabilize atmospheric CO_2 levels while meeting global energy needs. Any serious attempt to stabilize CO_2 levels via regulation would be both futile and economically devastating.

But, if regulatory strategies are unsustainable, then no good purpose is served by providing a pre-regulatory ramp-up to such policies. An early start on a journey one cannot complete and does not want to take is not progress; it is wasted effort.

As an alternative to Kyoto's mandatory tonnage reduction targets, which are anti-growth, you have proposed a voluntary carbon intensity reduction goal, which can accommodate growth. The administration views early credits as a way to motivate companies to invest in newer, less carbon intensive, technologies. However, there is a better way to speed up carbon intensity decline, and it comes straight out of your economic policy playbook: expensing.

Your growth and jobs plan calls for increasing the small business expensing option from $25,000 to $75,000. This is a good first step, but we think the limits on expensing should be expanded even further, and extended to all capital investment.

A study sponsored by the American Council for Capital Formation found that, as of December 2001, the United States lagged behind several of its trade partners in terms of capital cost recovery for electric power generation, pollution control technology, and other energy assets. For example, after five years, a company that builds a combined heat and power plant in the United States recovers only 29 percent of its investment compared to 51 percent in Germany, 53 percent in Japan, 100 percent in the Netherlands, and 105 percent in China.

By removing the tax penalty on capital investment, expensing would encourage more rapid turnover of plant and equipment. In general, state-of-the-art facilities are more productive than older units, delivering more output per unit of input, including energy inputs. Expensing would thus accelerate carbon intensity decline – yet without building political support for energy rationing.

Because expensing enhances productivity and boosts wages, it makes good economic sense whatever science ultimately tells us about global warming. Expensing is a true "no regrets" policy.

We would be pleased to help the Administration develop a climate policy that employs expensing rather than transferable credits to reduce U.S. energy and carbon intensity.

Sincerely,

Fred L. Smith, Jr., President
Marlo Lewis, Jr., Senior Fellow
Competitive Enterprise Institute

Paul Beckner
President
Citizens for a Sound Economy

John Berthoud
President

National Taxpayers Union

L. Patricia Callahan
President
American Association of Small Property Owners

David Keene
Chairman
American Conservative Union

Karen Kerrigan
Chairman
Small Business Survival Committee

James Martin
President
60 Plus Association

Grover Norquist
President
Americans for Tax Reform

Duane Parde
Executive Director
American Legislative Exchange Council

John Powell
Senior Vice President & Chief Operating Officer
The Seniors Coalition

Alex-St. James
Chairman
African American Republican
Leadership Council

Tom Schatz
President
Citizens Against Government Waste

Fran Smith
Executive Director
Consumer Alert

Benjamin C. Works
Executive Director
Strategic Issues Research Institute

DOE's Legal Authority Regarding Transferable Credits: CEI Responds to EPICI—Again

June 19, 2003

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I. Background & Overview

On September 20, 2002, the Electric Power Industry Climate Initiative (EPICI) submitted a supplemental comment to the Department of Energy (DOE) disputing the Natural Resources Defense Council's (NRDC) argument, presented in NRDC's June 5, 2002 comment, that DOE has no authority, under section 1605(b) of the 1992 Energy Policy Act, to provide transferable credits or baseline protection for "early voluntary" greenhouse gas reductions. On November 18, 2002, the Competitive Enterprise Institute (CEI) submitted a supplemental comment rebutting EPICI's criticism of NRDC's legal opinions. On March 3, 2003, Eric Holdsworth submitted a supplemental comment on behalf of EPICI responding to CEI's rebuttal.

The present paper examines EPICI's March 3 response. It finds that EPICI does not engage the substance of any of the arguments CEI presented in its November 18 comment. EPICI once again:

- Fails to identify any legal authority to award baseline protection and transferable credits applicable to a future carbon cap-and-trade program;
- Implausibly and erroneously suggests that even though Congress rejected a version of section 1605 that directed DOE to establish a crediting system, it nonetheless gave DOE authority to implement such a system;
- Misconstrues the purport of Senator Joe Lieberman's (D-Conn.) floor statement following final passage of the Energy Policy Act;
- Confuses the discretion DOE has in implementing a reporting system with authority to implement a baseline protection/crediting system;
- Confuses the absence of statutory prohibition against penalty protection and early credits with a grant of legislative authority to initiate such policies; and

- Tacitly concedes that DOE does not really have authority to protect companies' emission baselines or award early credits.

If implemented, the administration's transferable credit plan will create the institutional framework and lobbying incentives for energy rationing. A more inappropriate project for a Department of Energy is hard to imagine.

Advances in climate science counsel against alarmism, and even alarmists acknowledge that the Kyoto Protocol would be all economic pain for no environmental gain. If the United States embraces Kyoto-style energy rationing, it will not be because science and the public interest carried the day. More likely, it will be because transferable credits corrupted the politics of energy policy, and because industry groups who could have pulled the administration back from the brink chose instead to profit from its confusion.

II. Commentary

EPICI's March 3, 2003 supplemental comment consists of seven paragraphs. Each paragraph is reproduced below in Arial font. Portions on which I comment are repeated in bold italics. CEI's comments are in Times New Roman font.

> **Paragraph 1.** After the Electric Power Industry Climate Initiative (EPICI) submitted on September 25 [sic], 2002 supplemental legal authority comments to the Department of Energy (DOE) docket established on May 6, 2002 (see 67 *Fed. Reg*. 30370), another commenter, Marlo Lewis, submitted a lengthy paper that examines the EPICI comments. That paper apparently does not take issue with our contention that these two concepts, baseline protection and transferable credits, are separate and distinct, but concludes that they "ultimately have no application except as part of a regulatory (emissions cap-and-trade) program" and that "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."
>
> ***That paper apparently does not take issue with our contention that these two concepts, baseline protection and transferable credits, are separate and distinct,***

CEI Comment: EPICI's September 20, 2002 comment asserted, rather than explained, the importance of keeping the two "concepts," baseline protection and transferable credits, "separate and distinct." That comment also highlighted NRDC's agreement with EPICI that baseline protection and transferable credits are "distinct issues," just as EPICI's March 3, 2003 comment notes that CEI "does not take issue" with EPICI on this point. Evidently, this recondite definitional matter is a big deal to EPICI. It is not to CEI.

In most discussions of these issues—for example, the President's February 14, 2002 policy initiative; the Chafee-Lieberman-Lazio legislation of the 106th Congress; and publications of advocacy groups like Environmental Defense, Pew Center on Global

Climate Change, and World Resources Institute—baseline protection is the end to which transferable credits are a means. That is, the central rationale for credits is to protect early reducers from having to do double duty—reduce emissions from already lowered baselines—under a future climate policy.

CEI opposes the administration's plan to award transferable credits for baseline protection. If implemented, it will fundamentally and unavoidably corrupt the politics of energy policy, for two reasons.

First, transferable credits will mobilize lobbying for energy rationing. Transferable credits attain full market value *only* under a Kyoto-style carbon cap. That is because, although many companies would love to sell carbon credits—especially if they can "earn" credits by reducing (or avoiding) emissions they would reduce (or avoid) anyway, in the normal course of business—few companies would want to buy credits unless constrained to do so by the necessity to meet a cap.[1] Since credits trading at $4 to $7 per ton today could be worth $50 to $100 per ton under a cap, every credit holder will have an incentive to lobby to make "voluntary" reductions mandatory.

Second, although touted as "voluntary" and "win-win" (good for business, good for the environment), transferable credits would create a coercive zero-sum game in which one company's gain is another's loss. Transferable credits provide baseline protection and have economic value only if they can be used to offset a company's obligations under a future cap. A cap is an emissions "budget"—a legal limit on the quantity of emissions a specific sector or nation may lawfully release. If the cap is not to be exceeded, then the quantity of emission allowances available to companies in the mandatory period must be reduced by the number of credits awarded for "early" reductions in "voluntary" period. In other words, for every company that earns a credit for "early" reductions, there must be another that loses a credit under the cap.

Thus, transferable credits are, at bottom, a wealth transfer scheme. It is the essence of such programs to reallocate compliance period allowances from companies that do not take "early action" to those who do. Non-participants are penalized, forced in the mandatory period to either pay higher credit prices than would otherwise prevail or make deeper reductions than the cap would otherwise require. Once companies understand this dynamic, many will "volunteer" for "early action" just to avoid getting fleeced by rival firms later on. The predictable result is a surge in the number of companies holding Kyoto coupons that mature only under a cap.

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[1] Consider these remarks by Dupont's Robert Routliffe, as reported in the March 17, 2003 edition of *Greenwire*: "As for carbon trading outside of Kyoto or another regulatory scheme, one industry analyst predicted that participation will be spotty and prices will likely remain low. 'That is going to be a characteristic of any voluntary market. It's hard to get folks to volunteer to spend money,' said Robert Routliffe, manager of GHG emissions trading at DuPont."

Neither EPICI nor any other commenter has explained the accounting procedures whereby DOE might provide baseline protection without issuing credits for "early" reductions. However, whether or not such a system is feasible, any baseline protection program would build a clientele for mandatory reductions, because, under a cap, firms enjoying such protection would gain a competitive advantage vis-à-vis other firms.

> **Paragraph 2.** We disagree with the premise that these concepts "have no application" unless they are part of a regulatory cap and trade program and assume that the Administration also agrees fully with us, particularly in light of the President's directives of February 2002 regarding both concepts. Those directives surely did not reference a cap and trade program, and we presume that none is contemplated.

> ***We disagree with the premise that these concepts "have no application" unless they are part of a regulatory cap and trade program***

CEI Comment: My precise words (see Paragraph 1, above) were that baseline protection and transferable credits "*ultimately* have no application except as part of a regulatory (emissions cap-and-trade) program" (emphasis added). There really should be no dispute on this point. EPICI and others would not be asking for baseline protection and transferable credits if Kyoto did not exist and there were no political constituency for energy rationing. It is pointless to deny the obvious inherent linkage between a pre-regulatory transferable credits program and the regulatory scheme to which such credits would apply.

> ***We ... assume that the Administration also agrees fully with us, particularly in light of the President's directives of February 2002 regarding both concepts. Those directives surely did not reference a cap and trade program, and we presume that none is contemplated.***

CEI Comment: The President implicitly referenced cap-and-trade when he directed DOE to ensure that companies registering emission reductions "are not penalized under a ***future climate policy***" (emphasis added).

The fact that the President does not want cap-and-trade is small comfort, because on climate policy, the administration is a house divided:

- The President opposes the Kyoto Protocol. Yet his State Department refuses to renounce America's participation as a signatory, despite acknowledging (when it renounced Bill Clinton's signature on the Treaty of Rome establishing an International Criminal Court) that non-ratifying signatories remain treaty parties and, thus, are bound by customary international law not to act against the treaty's purposes.

- The President opposes climate alarmism. Yet his Environmental Protection Agency (EPA) published the alarmist *Climate Action Report 2002* (CAR).

Moreover, his EPA and Office of Science and Technology Policy refuse to disavow the CAR even though it violates Federal Data Quality Act standards of objectivity and utility, and even though disavowal would demolish a key premise of the carbon dioxide lawsuit of the state attorneys general.[2]

- The President wants to replace the Kyoto Protocol's absolute tonnage targets, which are anti-growth, with emission intensity targets, which can accommodate growth. Yet his February 2002 initiative proposes to award transferable credits for "real" (i.e., tonnage) reductions—ratifying, rather than replacing, the Kyoto framework.

- Finally, although the President has always opposed Kyoto, his administration initially advocated Kyoto-like controls on carbon dioxide emissions from power plants. Free-market and conservative groups had to mount a full-court press to talk the administration out of that mistake.

In short, the administration's record on climate policy is one of confusion, inconsistency, and bureaucratic moonlighting. DOE's advocacy of a crediting scheme comes straight out of the Environmental Defense-Pew-Lieberman playbook. If implemented, that scheme will create the institutional framework and lobbying incentives for energy rationing. A more inappropriate project for a Department of Energy is hard to imagine. EPICI ought to demand that DOE take a sobriety test. Instead, it plays the part of enabler.

> **Paragraph 3.** We disagree with the paper's contention that guidelines could not give recognition to these concepts and that DOE is legally incapable, in revising the Energy Policy Act (EPAct) section 1605(b) guidelines and improving the existing database/registry, to provide such recognition of these two concepts.
>
> ***[G]uidelines could … give recognition to these concepts … provide such recognition of these two concepts.***

CEI Comment: The issue is not whether DOE's revised 1605(b) guidelines could "give recognition" to "concepts." Rather, the issue is whether DOE has legal authority—in the President's words of February 14, 2002—"to *ensure* that businesses and individuals that

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[2] In their June 4, 2003 lawsuit, the attorneys general of Maine, Massachusetts, and Connecticut argue that EPA, as lead agency in producing the CAR, has already made a scientific determination that carbon dioxide emissions endanger public health and welfare—the trigger for regulatory action under section 108 of the Clean Air Act. The CAR, however, is based on two non-representative climate models—the "hottest" (Canadian Climate Center) and "wettest" (UK Hadley Center) out of some 26 models administration officials might have used. Moreover, as Virginia State Climatologist Patrick Michaels discovered and National Atmosphere and Ocean Administration scientist Thomas Karl confirmed, those models could not replicate past U.S. temperature trends better than could a table of random numbers. At once biased and useless, the CAR flunks Federal Data Quality Act (FDQA) standards of objectivity and utility. Disavowing the CAR as incompatible with FDQA would demolish a key premise of the AGs' lawsuit. Yet the administration seems determined to preserve its alarmist report, going so far as to deny that the CAR is "information" subject to review under the FDQA.

register reductions *are not penalized* under a future climate policy, and to *give transferable credits* to companies that can show real emissions reductions" (emphases added). The issue is whether 1605(b) authorizes DOE to hand out regulatory offsets applicable to a "future climate policy" like Kyoto. As CEI's November 18, 2002 paper noted, 1605(b) contains no hint or trace of such authority.

> **Paragraph 4.** First, as to the question whether "guidelines" could give "recognition" to these two distinct concepts, we simply note that section 1605(b) provides that the Secretary "shall … issue guidelines for the voluntary collection and reporting of information on sources of greenhouse gases" and that the EIA "shall develop forms for voluntary reporting under the guidelines" and "establish a data base comprised" of the voluntarily reported information. While the section is silent on public access and disclosure of the collected or reported information, DOE and the Energy Information Administration (EIA) have interpreted these provisions to provide for public disclosure of the information, subject to EPAct subsection 1605(b)(3) on confidentiality. Indeed, EIA publishes the information annually (see EIA report Voluntary Reporting of Greenhouse Gases 2000 (Feb. 2002)). To our knowledge, there is nothing in EPAct subsections 1605(a) or (b), the current guidelines or any other relevant law applicable to DOE and EIA that would preclude EIA from including "recognition" of these concepts as part of that annual publication.

> ***While the section is silent on public access and disclosure of the collected or reported information, DOE and the Energy Information Administration (EIA) have interpreted these provisions to provide for public disclosure of the information, subject to EPAct subsection 1605(b)(3) on confidentiality.***

CEI Comment: EPICI's point here is that silence is not prohibition. Just as EIA was not precluded by the EPAct's silence from publishing the emissions reduction information reported to it, so, EPICI suggests, EIA is not precluded by the EPAct's silence from instituting a baseline-protection/crediting system. That is a complete non sequitur, because authority to publish information is *clearly implied* in subsections 1605(b)(3) and (4), whereas authority to protect baselines or award credits is not implied in any provisions of 1605.

Let's look at the text. Subsection (3) states: "CONFIDENTIALITY.—Trade secret and commercial or financial information that is privileged or confidential shall be protected as provided in section 552 (b)(4) of title 5, United States Code." This caveat would have no point unless Congress anticipated and desired EIA to publish information. Subsection (4) states: "ESTABLISHMENT OF DATA BASE.—Not later than 18 months after the date of the enactment of this Act, the Secretary through the Administrator of the Energy Information Administration shall establish a data base comprised of information voluntarily reported under this subsection. *Such information may be used by the reporting entity to demonstrate achieved reductions of greenhouse gases*" (emphasis added)." How

in the world could companies use the information they report to "demonstrate achieved reductions" unless the database is public information?

EPICI is grasping at straws. Unlike the authority to publish information, the authority to protect baselines or award credits is not implicit in any component of 1605(b). Silence is not prohibition, but neither is it authority to do whatever Congress has not prohibited. Courts do not presume that Congress has delegated power to an agency simply because the statute does not expressly withhold such power (*American Petroleum Institute v. EPA*, 52 F.3d 1113, 1120, D.C. Cir. 1995). Moreover, 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" (*INS v Cardoza-Fonseca*, 480 U.S. 421, 442-43, 1987). As CEI noted in its November 18, 2002 comment, when Congress adopted the EPAct, it considered and rejected provisions to establish an emissions reduction crediting system.

> ***First, as to the question whether "guidelines" could give "recognition" to these two distinct concepts … there is nothing in EPAct subsections 1605(a) or (b), the current guidelines or any other relevant law applicable to DOE and EIA that would preclude EIA from including "recognition" of these concepts as part of that annual publication.***

CEI Comment: Again, the question at issue is not whether EIA's guidelines can give "recognition" to "concepts," but whether EIA, via guidelines, can "***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." Although EPICI struggles to maintain the fiction that EIA has such authority, its real position is more modest. EPICI's continual refrain about "concepts" and "recognition" boils down to this: Nothing in the law precludes EIA from revising its "annual publication" in ways that a future Congress ***may*** find useful ***if*** it decides ***both*** to enact a cap-and-trade program ***and*** to give credit under the cap for past reductions. This admission against interest is exactly where EPICI ended up in its September 20, 2002 comment. In that document, EPICI stated:

> By their very nature, they ["recognition or certification" of reported reductions] 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. [Page 16]

In the final analysis, EPICI agrees with NRDC and CEI that DOE has no authority to protect baselines or award credits. All DOE has authority to do is "recognize" or "certify" reported reductions so reporting entities have an "opportunity" to "persuade" policymakers to provide baseline protection and transferable credits "if and when" a future cap-and-trade program is "debated." Why EPICI bothers to challenge NRDC and CEI after effectively throwing in the towel is unclear. Perhaps EPICI believes once EIA

starts "certifying" reported reductions, industry will clamor for legislation authorizing baseline protection and transferable credits.

> **Paragraph 5.** Second, as to the question of legal authority for DOE to revise current guidelines to provide such recognition, we refer to our letter and enclosure of September 25 [sic], 2002, which discuss this issue of legal authority at length and conclude that there is ample authority to recognize and apply these two concepts. Our conclusions are based on the legislative history of section 1605, particularly the work of the House-Senate Conference Committee; subsection 1605(b)(4), which states that the information voluntarily reported "may be used by the reporting entity to demonstrate achieved reductions" of greenhouse gases; and the general authority contained in the DOE Organization Act. Referenced also was the Framework Convention on Climate Change (FCCC), which the U.S. signed and ratified in 1992 prior to the enactment of the EPAct. Clearly, the FCC and section 1605 are in accord in encouraging voluntary actions to reduce and report reductions, avoidance and sequestration.

> ***Our conclusions are based on the legislative history of section 1605, particularly the work of the House-Senate Conference Committee;***

CEI Comment: As noted above and in CEI's November 18, 2002 comment, when Congress enacted section 1605, it considered and rejected provisions directing EIA to implement a baseline-protection/crediting system. EPICI again fails to acknowledge the obvious implication of this critical fact of legislative history—EIA has no authority to institute a baseline-protection/crediting program.

> ***subsection 1605(b)(4), which states that the information voluntarily reported "may be used by the reporting entity to demonstrate achieved reductions" of greenhouse gases;***

CEI Comment: EPICI continues to confuse accounting with crediting. Obviously, DOE could not award credits unless it operated a database and reporting system enabling companies to "demonstrate achieved reductions." However, authority to operate a database/reporting system in no way entails or implies authority to award credits. To borrow EPICI's terminology, it is important to keep these two "concepts"—emissions reduction *accounting* and emissions reduction *crediting*—"separate and distinct."

> ***and the general authority contained in the DOE Organization Act. Referenced also was the Framework Convention on Climate Change (FCCC), which the U.S. signed and ratified in 1992 prior to the enactment of the EPAct.***

CEI Comment: Here, as in its September 20, 2002 comment, EPICI invokes the DOE Organization Act without analysis or explanation. EPICI does not cite any provisions to show where and how the DOE Organization Act authorizes baseline protection or transferable credits. As for the FCCC, it is not self-executing, and here, as in its

September 20 comment, EPICI does not cite any statute enacted pursuant to the FCCC that authorizes DOE to provide penalty protection or credits.

> **Paragraph 6.** Contrary to the views expressed in the Lewis paper, EPICI did not rely on remarks made on final passage of EPAct by Democratic Sen. Lieberman for these legal authority conclusions. EPICI did take note of those remarks because they were relevant to the changes made in the Conference Committee to the House and Senate versions of section 1605 that afforded greater "discretion" in the implementation of the new subsection (b) of section 1605. As we noted in footnote 5 of our enclosure to our September 25 [sic], 2002, supplemental comment, a Republican conferee who was a signatory of the Conference Committee's reported bill, Rep. Carlos Moorhead, made similar remarks on final House passage of the bill when he said the conference report survived "with less detail and more discretion for the Administration." 138 ***Cong. Rec.*** H11438 (daily ed. Oct. 5, 1992). Both remarks are supportive of the EPICI view that the final bill that was enacted clearly was revised from the pre-conference versions by 1) shifting from a call for rulemaking to guidelines and 2) discarding 11 specific provisions, including provisions on crediting and double counting, in favor of far more general language. In our view, the Lieberman/Moorhead descriptions of the final version of the law that it was "streamlined" and entailed "less detail and more discretion" are accurate and quite appropriate. They are sound and valuable legislative history in support of the EPICI conclusion that the revised section 1605 provides "more discretion in the program's administration."

> ***EPICI did not rely on remarks made on final passage of EPAct by Democratic Sen. Lieberman for these legal authority conclusions. EPICI did take note of those remarks because … the changes … afforded greater "discretion" in the implementation … As we noted in footnote 5 of our enclosure to our September 25 [sic], 2002, supplemental comment, a Republican conferee who was a signatory of the Conference Committee's reported bill, Rep. Carlos Moorhead, made similar remarks on final House passage of the bill when he said the conference report survived "with less detail and more discretion for the Administration."***

CEI Comment: EPICI's September 20, 2002 comment reproduces most of Sen. Lieberman's floor statement and discusses its alleged implications on five consecutive pages. It quotes one sentence by Rep. Moorhead, in a footnote. Nonetheless, let's grant that EPICI merely 'took note' of Lieberman's remarks. The real issue is whether those remarks (and Moorhead's) mean what EPICI suggests they mean.

> ***Both remarks are supportive of the EPICI view that the final bill that was enacted clearly was revised from the pre-conference versions by 1) shifting from a call for rulemaking to guidelines and 2) discarding 11 specific provisions, including provisions on crediting and double counting, in favor of far more***

general language. In our view, the Lieberman/Moorhead descriptions of the final version of the law that it was "streamlined" and entailed "less detail and more discretion" are accurate and quite appropriate.

CEI Comment: In its September 20, 2002 comment, EPICI suggested that "more discretion" included the discretion to transform the 1605(b) reporting program into a baseline-protection/crediting system. That reading of the statute has no support in the plain text of 1605(b), its logical implications, or its legislative history. In fact, it is not supported by Senator Lieberman's floor statement, which described 1605(b) as establishing a "data base" and "simple accounting mechanism."

As noted in CEI's November 18, 2002 comment, if we 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 11 types of reductions ***eligible to receive credits***. In 1605(b)(1)(B) as enacted, those are summarized ("streamlined") as types of reductions ***eligible to be reported***. However, the House version of 1605(a), which 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," is not summarized or "streamlined" in 1605(b) as enacted. The conferees simply deleted that language.

They are sound and valuable legislative history in support of the EPICI conclusion that the revised section 1605 provides "more discretion in the program's administration."

CEI Comment: As CEI explained in its November 18, 2002 comment, precisely because conferees intended the 1605(b) program to capture data rather than protect baselines, they gave EIA more discretion in implementation. 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 system, to prescribe "by rule" 11 specific features of the proposed GHG registry. In contrast, administrative "discretion" in the development of flexible "guidelines" was appropriate to encourage reporting under various voluntary programs that do not award credits.

Paragraph 7. We also note rather extensive comments in the Lewis paper about bills introduced, but never enacted, during the 105th and 106th Congresses by Sen. Lieberman and others regarding "early credit" proposals. The paper asks why the Senator championed such legislation in those Congresses, if the authority already existed for these two concepts in EPAct. Not knowing the intent of the Senator, we would not presume to reply to this rhetorical question. However, we understand that those bills (S. 2617 and S. 547) were decidedly regulatory in nature, which is exactly the opposite result achieved by the Conference Committee in adopting a revised section 1605. In fact, S. 2617 was an amendment to

the Clean Air Act and depended on the issuance by the President of numerous regulations. S. 547, while not an amendment to that Act, also required the promulgation of regulations. Moreover, EPAct was enacted in the 102d Congress. References to introduced bills in later Congresses can have no bearing on the meaning and legislative history of a prior enactment.

The [Lewis] paper asks why the Senator championed such legislation in those Congresses, if the authority already existed for these two concepts in EPAct. Not knowing the intent of the Senator, we would not presume to reply to this rhetorical question.

CEI Comment: As CEI's November 18, 2002 comment pointed out, even though President Clinton and Vice President Gore supported credit for early reductions, they never attempted to implement a crediting program via administrative action, nor did Sen. Lieberman ever call upon the Clinton-Gore Administration to use 1605(b) authority to provide baseline protection or transferable credits. Sen. Lieberman was an architect of the 1605(b) program, and Senators are not in the habit of introducing legislation to authorize the president to do things that they believe he already has authority to do. Therefore, I do presume that Lieberman twice introduced early credit legislation because it was as obvious to him as it was to Environmental Defense, the Pew Center on Global Climate Change, and the International Climate Change Partnership that 1605 provides no authority to protect baselines or award credits.

However, we understand that those bills (S. 2617 and S. 547) were decidedly regulatory in nature, which is exactly the opposite result achieved by the Conference Committee in adopting a revised section 1605. In fact, S. 2617 was an amendment to the Clean Air Act and depended on the issuance by the President of numerous regulations. S. 547, while not an amendment to that Act, also required the promulgation of regulations.

CEI Comment: As noted above, it would be inappropriate for DOE (or any agency) to award regulatory offsets applicable against a future carbon cap-and-trade program on the basis of flexible "guidelines." The fact that 1605 as enacted is not a regulatory provision is ***prima facie*** evidence that it does not authorize baseline protection or transferable credits.

Moreover, EPAct was enacted in the 102d Congress. References to introduced bills in later Congresses can have no bearing on the meaning and legislative history of a prior enactment.

CEI Comment: EPICI here criticizes as a technical legal point what I offered as a matter of common sense. Sen. Lieberman introduced early credit legislation in the 105th and 106th Congresses. The bill gained only 12 co-sponsors in its second go-round. Rep. Rick Lazio's (R-N.Y.) 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. To claim that

1605(b) authorizes DOE to award transferable credits is to tantamount to asserting that Congress implicitly enacted the substance of the Lieberman-Lazio legislation in 1992—a thesis no informed commenter would defend.

III. Conclusion

DOE's advocacy of a crediting scheme comes straight out of the Environmental Defense-Pew-Clinton-Gore-Lieberman playbook. If implemented, that scheme will create the institutional framework and lobbying incentives for energy rationing. A more inappropriate project for a Department of Energy is hard to imagine. EPICI ought to demand that DOE take a sobriety test. Instead, it plays the part of enabler.

Advances in climate science counsel against alarmism, and even alarmists acknowledge that Kyoto would be all economic pain for no environmental gain. If the United States embraces Kyoto-style energy rationing, it will not be because science and the public interest carried the day. More likely, it will be because transferable credits corrupted the politics of energy policy, and because industry groups who could have pulled the administration back from the brink chose instead to profit from its confusion.

COMPETITIVE ENTERPRISE INSTITUTE

June 5, 2002

Ms. Jean Vernet
U.S. Department of Energy
Office of Policy and International Affairs,
Office of Electricity and Natural Gas Analysis,
PI-23, Attention: Voluntary Reporting Comments

Dear Ms. Vernet:

I am writing on behalf of the Competitive Enterprise Institute (CEI), a non-profit free-market public policy group based in Washington, D.C. This letter responds to the Department of Energy's "request for comment"[1] on the Voluntary Reporting of Greenhouse Gases Program, established under section 1605(b) of the 1992 Energy Policy Act.

On February 14, 2002, President Bush directed the Secretary of Energy, in consultation with other department and agency heads, to propose improvements in the 1605(b) program to enhance its "accuracy, reliability, and verifiability." The President 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."

Although the Department's *Federal Register* notice devotes only one paragraph to the topic, the crediting scheme is the key driver of the President's proposal. It is only when voluntary reductions generate credits that potentially confer competitive advantage on some firms at the expense of others that it becomes urgent to agree upon accounting details. The perceived need for greater "accuracy, reliability, and verifiability" derives solely from the President's directive to transform the 1605(b) reporting program into a crediting program.

Almost four years to the day before the President announced his proposal, the Natural Resources Defense Council (NRDC) clarified the underlying logic: "Flexible reporting guidelines may have been appropriate to encourage reporting actions under the various voluntary programs that do not award credits, but are not acceptable as the basis for awarding real credits."[2]

The President should reconsider this proposal. A crediting program would energize and expand the "greenhouse lobby" – the coalition of politicians, advocacy

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[1] *Federal Register* Vol. 67, No. 87, May 6, 2002, pp. 30370-30373.
[2] 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, available at http://www.nrdc.org/globalwarming/pearly.asp.

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groups, and companies supporting the Kyoto Protocol and kindred energy rationing policies.

Comment Writer's Background

During the 106th Congress, I served as staff director for Rep. David M. McIntosh, Chairman of the House Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. The Subcommittee's investigations were instrumental in challenging three Kyoto-inspired agendas. These were: (1) the Environmental Protection Agency's (EPA's) attempt to interpret the Clean Air Act (CAA) as authorizing regulation of carbon dioxide (CO2); (2) Senator James Jeffords' (R-VT) and Rep. Henry Waxman's (D-CA) "multi-pollutant" bills,[3] with their mandatory CO2 reduction targets; and (3) the Chafee-Lieberman-Lazio legislation to provide regulatory credits for "early voluntary" greenhouse gas reductions.[4]

To expose EPA's misreading of the CAA, the Subcommittee held a joint hearing with the House Science Subcommittee on Energy and Environment,[5] solicited a legal opinion from former CAA conference committee chairman Rep. John Dingell (D-MI),[6] and, in four oversight letters, developed the case that the plain language, structure, and legislative history of the CAA all contradict EPA's claims.[7]

To stop "multi-pollutant" regulation of CO2, the Subcommittee, in June 2000, commissioned the Energy Information Administration (EIA) to examine the impacts of such policies on consumers and energy markets.[8] In December 2000, EIA published a 76-page report responsive to the Subcommittee's request. Among other findings, EIA estimated that a "multi-pollutant" strategy with a requirement to reduce CO2 emissions 7 percent below 1990 levels during 2008-2012 would, in 2010, increase utilities' production costs by $86 billion, reduce coal consumption for electric generation by 50 to 52 percent, and increase consumer electricity prices by 30 to 43 percent.[9]

In March 2001, President Bush disavowed an ill-advised campaign proposal to regulate CO2 as part of a "multi-pollutant" strategy. Pro-Kyoto Democrats and environmental lobbying groups fiercely denounced the President's action, which remains a topic of controversy to this day. White House spokesman Ari Fleischer gave two reasons for Mr. Bush's decision: (1) "describing CO2 as a pollutant is not in accordance

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[3] S. 1369, the Clean Energy Act; H.R. 2900, the Clean Smokestacks Act.
[4] Rep. Rick Lazio's (R-NY) H.R. 2520 was the House companion to Senator John Chafee's (R-RI) and Joseph Lieberman's (D-CT) S. 547, the Credit for Voluntary Reductions Act.
[5] http://www.house.gov/reform/neg/hearings/index.htm, see hearing of 10/6/99, "Is CO2 a Pollutant, and Does EPA Have the Power to Regulate It?"
[6] See Attachment on page 13, also available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:62900.pdf.
[7] http://www.house.gov/reform/neg/oversight/gcc/gcc_index.htm, see letters of 10/14/99, 12/10/99, 3/14/00, and 5/10/00.
[8] Ibid., see letter of 6/29/00.
[9] EIA, *Analysis of Strategies for Reducing Multiple Emissions from Power Plants: Sulfur Dioxide, Nitrogen Oxides, and Carbon Dioxide*, December 2000, pp. xvii-xix.

with the terms of the Clean Air Act," and (2) "in December of 2000, the Clinton administration Department of Energy [i.e., the EIA] came out with a study that said, to have mandatory reductions of CO2 would lead to large increases in the price of electricity."[10] The Subcommittee's investigative actions provided a solid foundation, in legal and economic analysis, for the President's courageous retraction of the errant campaign proposal.

To counter early action crediting, the subcommittee conducted oversight,[11] introduced and marketed counter-legislation,[12] and held a hearing, at which then EIA Administrator, Jay Hakes, testified as a key witness.[13] Through these actions, the Subcommittee exposed early action crediting as a strategy to jump-start implementation of the non-ratified Kyoto treaty, and build a pro-Kyoto business clientele. Rep. Lazio's bill quickly became radioactive among Kyoto opponents in the House,[14] and Senator Lieberman's bill lost steam without a viable House companion. In the 107th Congress, Senator Lieberman did not reintroduce his bill, nor did Senate Majority Leader Tom Daschle (D-SD) reprise the concept in the climate-related provisions of S. 1766, the Senate energy bill, introduced December 5, 2001. In short, early action crediting was politically defunct – until President Bush revived it in his February 14th speech.[15]

It is my hope that the Subcommittee's work may again prove useful to the Administration. This comment will summarize the Subcommittee's investigation of early action crediting, supplemented by other relevant information. It will explain why early action crediting is inimical to the President's goal of securing plentiful, affordable, reliable energy supplies for the American people.

Son of Kyoto Returns – Again

Early action crediting began as a strategy to overcome S. Res. 98, the Byrd-Hagel resolution, which the U.S. Senate, in July 1997, passed by a vote of 95-0. Byrd-Hagel stipulated that the United States should not be a party to any climate treaty that exempts developing countries from binding limits on carbon emissions. The Kyoto Protocol, negotiated by some 160 countries in December 1997, does exempt all developing countries from binding limits. Thus, when the Senate approved Byrd-Hagel, it preemptively rejected the Kyoto Protocol.

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[10] http://www.whitehouse.gov/news/briefings/20010315.html.
[11] http://www.house.gov/reform/neg/oversight/gcc/gcc_index.htm, letters of 5/27/99 and 7/22/99.
[12] http://www.house.gov/reform/neg/hearings/legis/Default.htm, see information on H.R. 2221, the Small Business, Family Farms, and Constitutional Protection Act.
[13] http://www.house.gov/reform/neg/hearings/index.htm, see Hearing of July 15, 1999, "Early Action Crediting: Win-Win or Kyoto through the Front Door?"
[14] McIntosh "upstaged" Lazio, introducing H.R. 2221 – a measure to prohibit funding for early action crediting – just days before Lazio had planned to introduce H.R. 2520. Lazio postponed introducing his bill until a month later. McIntosh's bill eventually gained 32 cosponsors, compared to Lazio's 15.
[15] The proposal resurfaces as "baseline protection" in the April 25, 2002 version of the Senate energy bill (H.R. 4, Title XI, section 1104).

Byrd-Hagel, however, was neither a law nor a formal vote on ratification but a "sense of the Senate" resolution. Consequently, Kyoto supporters set about to change the Senate's "sense." Early action crediting seemed ideally suited to the task, because lawmakers respond to business lobbyists, and a crediting scheme would fuel pro-Kyoto corporate lobbying.

The basic idea was simple: Award credits to companies that "volunteer" to reduce their CO2 emissions before required to do so by Kyoto or a comparable domestic program, and allow those companies to sell or use the credits to comply with future regulation. In effect, participating companies would acquire Kyoto stock that would bear dividends if – but only if – Kyoto or a comparable domestic program were ratified or enacted. Credit-holders would thus acquire an incentive to support ratification of Kyoto and/or lobby for domestic restrictions on CO2.

To sell the concept to the business community, supporters tirelessly repeated the warning that, without credits for "voluntary" reductions, "good corporate citizens" will be "penalized" under a future climate treaty – forced to make reductions from lower baselines than their less "environmentally responsible" competitors.[16] The fear that early actions will be punished by lower emission baselines under an eventual compulsory program, supporters argued, discourages companies from taking voluntary action now to reduce emissions.[17]

Environmental Defense (then known as Environmental Defense Fund, or EDF) was the strategy's chief architect.[18] The Clinton-Gore Administration began promoting the idea in October 1997 as part of its climate change policy initiative.[19] The Pew Center on Climate Change, headed by former Clinton-Gore Kyoto negotiator Eileen Claussen, took the lead in marketing early action crediting to corporate America. In October 1998, these efforts coalesced in a multi-pronged political campaign. The Administration, via the President's Council on Sustainable Development, formulated and promoted "principles" of early action crediting.[20] The Pew Center published a major report advocating a credit

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[16] See, for example, Eileen Claussen's testimony at the March 24, 1999 Senate Environment and Public Works Committee hearing, available at http://www.senate.gov/~epw/cla_3-24.htm.
[17] Testimony of Kevin Faye, Executive Director, International Climate Change Partnership, July 15, 1999, available at http://www.house.gov/reform/neg/hearings/071599/fay.htm.
[18] At the July 15, 1999 McIntosh Subcommittee hearing, EDF Executive Director Fred Krupp claimed EDF "developed" early action crediting "in early 1997." See http://www.house.gov/reform/neg/hearings/071599/krupp.htm. As far as I can determine, EDF's first published writing on the subject is Daniel J. Dudek and Joseph Goffman, "Spurring Early Greenhouse Gas Reductions in the United States," EDF Letter, April 1998, p. 4, available at http://www.environmentaldefense.org/documents/24_Apr98.pdf.
[19] 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." Available at http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi.
[20] 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." Available at http://clinton3.nara.gov/PCSD/tforce/cctf/cpress.html.

for early action program.[21] Most importantly, Senators Joseph Lieberman (D-CT), John Chafee (R-RI), and Connie Mack (R-FL) introduced S. 2617, the "Credit for Voluntary Early Action Act." This was the first Son of Kyoto bill.

With ten internal references identifying the end of the "early action" period as the day before the start of the Kyoto compliance period (January 1, 2008), the bill was a transparent effort to begin implementing a non-ratified treaty. Senator Chafee was upfront about the Kyoto connection in his floor statement on the bill: "The credits would be usable beginning in the first five-year budget period (2008-2012) under the Kyoto Protocol, if the Kyoto Protocol is ratified."[22]

Enron was a prominent member of the Pew Center's Business Environmental Leadership Council, and lobbied aggressively for the Kyoto Protocol. Enron was a major natural gas distributor, and Kyoto would suppress coal as a fuel source for electric power generation, boosting demand for natural gas. In a December 12, 1997 internal memorandum, John Palmisano, Enron's senior director for environmental policy and compliance, described Kyoto as "exactly what I have been lobbying for," adding: "This agreement will be good for Enron stock!!"[23]

However, in an email dated October 14, 1998 — four days after the bill's introduction — Palmisano criticized S. 2617. First, he worried that early reduction credits would relieve the "pressure" Kyoto would put on other companies to purchase Enron's natural gas, solar, wind, and energy management services. But he also worried that the bill was too "blatant":

> This proposal, if adopted, would start implementing Kyoto. And while I support that outcome (personally), I question the likelihood of this initiative having political traction and the wisdom of being blatant vis-à-vis implementing Kyoto. The bill is not incremental. They are going for almost the "whole enchilada."[24]

Alluding to the debate in Congress over whether Clinton-Gore's EPA was trying to implement Kyoto through the regulatory "backdoor," Palmisano characterized S. 2617 as an attempt to implement Kyoto through the legislative "front door."

Whether due to Palmisano's behind-the-scenes criticism or to free market groups' public criticism of S. 2617 as "Kyoto Lite,"[25] the sponsors performed minor cosmetic surgery before re-launching their bill in the 106th Congress. They stripped out all internal references to the Kyoto compliance period, and deleted the word "early" from the title, which in the original version visibly meant earlier-than-Kyoto. On March 4, 1999, the

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[21] Robert R. Nordhaus and Stephen C. Fotis, *Analysis of early action crediting proposals*, October 1, 1998, available at http://www.pewclimate.org/projects/pol_early.cfm.
[22] *Congressional Record*, October 10, 1998, S-12310.
[23] Marc Morano, "Enron: Courting Clinton and the Environmentalists," CNSNews.Com, March 19, 2002, available at http://www.newsmax.com/archives/articles/2002/3/19/83215.shtml.
[24] Personal copy of Palmisano email.
[25] Marlo Lewis, Jr., "Credit for Early Implementation: Kyoto through the Front Door," CEI On Point, January 25, 1999.

sponsors offered S. 547, the "Credit for Voluntary Reductions Act." The Son of Kyoto returned.

President Bush's proposal to convert the 1605(b) reporting program into a crediting program unwittingly resurrects the EDF-Pew-NRDC-Clinton-Gore-Chafee-Lieberman strategy. The President even employs the same rationale as the plan's inventors: to ensure early reducers "are not penalized" under future climate policy. The Son of Kyoto returns — again.

Coercive Zero-Sum Game

In his opening statement at the July 15, 1999 hearing, Subcommittee Chairman McIntosh offered several reasons for concluding that early action crediting was the "centerpiece" of a Clinton-Gore strategy to "divide and conquer business opponents of the Kyoto Protocol."

First, as already noted, early action crediting would reward companies for doing today what they later would have to do under a ratified Kyoto treaty. In the original Chafee-Lieberman bill, the early action period ends December 31, 2007 – one day before the start of the Kyoto compliance period. Thus, said McIntosh, a more honest title for such proposals would be "credit for early implementation."

Second, as also noted, early reduction credits have no value apart from the threat or enactment of a future mandatory program. Thus, participating companies would acquire financial motives to support the Kyoto Protocol or similar regulatory controls on CO2.[26]

Third, although touted as "voluntary" and "win-win" (good for business, good for the environment), early action crediting would create a coercive zero-sum game. It would put the squeeze on many companies to "volunteer," because participants profit at the expense of non-participants. The latter would not merely forego benefits, they would be forced to make deeper emission reductions, or pay higher credit prices, under a future regulatory program.

Here's why. The Kyoto Protocol, like the Jeffords-Waxman "multi-pollutant" bills, would establish an emissions trading program. The economic and environmental integrity of such programs absolutely depends on strict enforcement of an overall emissions reduction target or "cap." If companies "break the cap" (if they exceed the national or industry-wide emissions "budget"), then the credits lose value and the program fails to achieve its environmental objective. Early action programs create credits

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[26] Resources for the Future puts the point more delicately but nonetheless clearly: "Proponents of voluntary early credit approaches also point to potential political benefits: if a broad cross section of business, environmental groups, and others could come together behind such a program, it would provide some political impetus for more ambitious goals, including eventual ratification of the Kyoto Protocol." See Ian Parry and Michael Toman, *Greenhouse Gas "Early Reduction" Programs: A Critical Appraisal*, July 2000, Climate Change Issues Brief No. 21, p. 2, available at http://www.rff.org/CFDOCS/disc_papers/PDF_files/0026.pdf

companies can later use to offset their obligations under a future cap. If the cap is not to be broken, then every credit awarded to companies in the early action period must be subtracted from the total allocation available in the mandatory period. For every firm that gains a credit in the early action period, there must be another that loses a credit in the mandatory period.

The 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 CO_2, for a national total of 100 mt. Also assume the U.S. emission 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 action 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 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) – 5 more (25 instead of 20) than they otherwise would. But, 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.

That one company's gain will be another's loss is widely recognized by proponents as well as critics. The Center for Clean Air Policy writes: "Credits earned should be subtracted from the pool of allowances given out in the binding program, rather than added to it. *This means that early reducers will be rewarded at the expense of those who don't participate*."[27] As one CCAP scholar put it, "This is the essence of an early reductions program – it reallocates first budget period allowances from those who don't take early action to those who do."[28] The Pew Center's monograph also acknowledges that early action credits must be "drawn down" from the compliance period budget.[29] Similarly, Resources for the Future concludes: "If the United States were to implement an emissions control program during that [2008-2012 Kyoto compliance] period with tradable carbon allowances, holders of early reduction credits would be allocated a share of the allowances, implying fewer allowances for others."[30] Enron's John Palmisano opined that S. 2617 could "transfer substantial wealth to so-called early actors while imposing substantial penalties upon those companies that are neither good nor bad but merely choose, for whatever reasons, to wait to control emissions until a regulatory control program goes into effect." As more companies participate, Palmisano cautioned,

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[27] Center for Clean Air Policy, *Key Elements of Domestic Program to Reward Early GHG Emissions Reductions*, January 1999 (emphasis added). available at http://www.ccap.org/.
[28] Tim Hargrave, personal communication, February 2, 1999.
[29] Nordhaus and Fotis, *Analysis of early reduction crediting proposals*, p. 21.
[30] Parry and Toman, *Greenhouse Gas "Early Reduction" Programs: A Critical Appraisal*, p.1.

"more and more pain will be imposed on fewer and fewer non-participating companies."[31]

Growing the Greenhouse Lobby

Since companies that do not act early will be hit with extra burdens in the compliance period, many businesses that otherwise would never dream of investing in carbon reduction projects may do so for purely defensive reasons. Proponents view the coercive aspect of early action crediting as a virtue, because it guarantees many companies will "volunteer" just to avoid getting stuck in the shallow end of the credit pool. The political effect is to grow the mass of companies holding Kyoto stock that derives its entire value from the threat or imposition of a cap.

Unsurprisingly, Clinton-Gore's EPA, EDF and other proponents denied that early action crediting was a strategy to foster pro-Kyoto lobbying. To explore this topic, Rep. McIntosh, in a letter dated July 22, 1999, asked EPA whether, under a well-designed early action program, the credits would be valuable enough to motivate companies to make energy-efficiency, carbon reduction, or carbon sequestration investments beyond those they otherwise would make. Responding on August 12th, EPA stated that, "a well-designed early action credit program could motivate companies to make substantial investments in energy efficiency, carbon reduction or carbon sequestration beyond those that would occur anyway." But, as the Subcommittee pointed out, "if early action credits are valuable enough to change a company's economic behavior, how could they not be valuable enough to change its lobbying behavior?"[32]

Corporate Whining

According to early action proponents, fear of having to do double duty under a future climate policy discourages companies from investing in voluntary emission reductions. Only a crediting program, they contend, can remove the "perverse disincentive" to voluntary action created by the "current legal vacuum."[33] This rationale fails on two counts.

First, there has been no lack of genuine (un-coerced) voluntary action under the 1605(b) program. Since the program's inception in 1994, participation has grown steadily, year-by-year. 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 projects reported rose from 634 in 1994 to 1,882 in 2000 – an almost 300 percent increase. Year 2000 projects "included 187 million metric tons carbon

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[31] John Palmisano, "What Are the Economic and Environmental Benefits from 'Early Crediting'?" draft Enron position paper, March 8, 1999, p. 5.
[32] *Report of the Activities of the House Committee on Government Reform*, H. Rpt. 106-1053, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, Hon. David. M. McIntosh, Chairman, One Hundred Sixth Congress First and Second Sessions 2000, available at http://www.access.gpo.gov/congress/house/house07cr106.html.
[33] See testimony of Kevin Faye at the July 15, 1999 McIntosh Subcommittee hearing, http://www.house.gov/reform/neg/hearings/071599/fay.htm.

dioxide equivalent of direct project-level reductions, 61 million metric tons of indirect project-level reductions, 9 million metric tons of reductions from carbon sequestration, and 12 million metric tons from unspecified project-level reductions."[34] The direct project-level reductions alone represent over 33 percent of the 558 million metric ton U.S. average annual reduction target under the Kyoto Protocol.[35] These numbers speak for themselves. The 1605(b) program is robust, and provides no evidence of significant barriers to voluntary action.

Second, if there is a disincentive to voluntary action, it is the *presence* of the Kyoto Protocol and other CO2-control initiatives like the Waxman and Jeffords bills, not the *absence* of a crediting program. Kyoto-style regulation is what threatens to "penalize" companies that take voluntary action to reduce emissions. Those seriously committed to promoting *voluntary* reductions should lobby *against* Kyoto, not *for* Son-of-Kyoto crediting schemes.

The 1605(b) program was never intended to provide political risk insurance for voluntary reductions, whether through offsetting regulatory credits or any other form of "baseline protection." Participants (mainly utilities and large manufacturing concerns) knew from the start that, under a future regulatory regime, they might have to reduce emissions from lower baselines than non-participants. But, for whatever reasons – environmental, economic, public relations – they nonetheless chose to participate. It is unseemly for any to complain now and pretend they are entitled to a retroactive reward that disadvantages their competition.

Moreover, some participants – notably American Electric Power, Dupont, Entergy, PG&E, and BP[36] – are corporate members of organizations (Pew's Business Environmental Leadership Council, Clean Energy Group, International Climate Change Partnership[37]) that spread climate alarmism and advocate Kyoto-style regulation. They are demanding "baseline protection" from the very policies they promote! Early action crediting would reward such deviousness.

Baseline Manipulation

There is no fair way to select baselines for 1605(b) participants prior to setting industry-wide or national baselines in the context of properly developed, duly enacted regulation. Far from being fair, "protecting" regulatory baselines for a particular group of companies before policymakers have even decided to develop regulation is preferential treatment. Such cart-before-the-horse rulemaking has no precedent under the Clean Air Act.

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[34] Energy Information Administration, *Voluntary Reporting of Greenhouse Gases 2000*, February 2002, p. ix, available at http://www.eia.doe.gov/oiaf/1605/vrrpt/pdf/0608(00).pdf.
[35] Author's calculation, based on Energy Information Administration, *International Energy Outlook 2001*, p. 14.
[36] EIA, *Voluntary Reporting of Greenhouse Gases 2000*, Table B11: Reporting Entities and Sectors, Years Reported, and Form Type, Data Years 1994-2000, available at http://www.eia.doe.gov/oiaf/1605/vrrpt/pdf/0608(00).pdf.
[37] For more information about these groups, see footnote 41, below.

Consider the Title IV sulfur dioxide (SO_2) cap-and-trade program – a program early action advocates misleadingly invoke as a model for their proposals. Title IV allowed companies to bank and use SO_2 reduction credits earned during 1995-1999 (Phase I) to offset the more stringent reductions required in 2000 and beyond (Phase II). The banking provision encouraged "early action" to reduce emissions below the level required in Phase I. However, companies received SO_2 allowances after – not before – Congress and the President enacted Title IV, specified the program's emission reduction targets, determined the number of allowances to be distributed, defined the rules for emissions trading, and established the baseline years for measuring reductions. The program was fair because everyone operated under the same rules, from the same baselines. In stark contrast, early action crediting would allow a collection of insiders to bias future regulation by locking in their baselines before policymakers have even given notice of a proposed rulemaking.

All kinds of creative environmental accounting become possible under early action crediting. For example, many U.S. companies made investments in energy efficiency following the OPEC oil embargo in 1973-74. Presumably, some could document how those investments lowered their emissions baselines. Why shouldn't these companies be eligible for early reduction credits, if any company is?

The Kyoto Protocol shows how critical it is to avoid baseline manipulation in the context of greenhouse gas regulation. The Conference of the Parties adopted the Kyoto Protocol in 1997, and they expected it to enter into force in 2002. Yet Kyoto negotiators picked 1990 as the baseline year from which to measure emission reductions, not 1997 or 2002. Why? The answer has nothing to do with climate, and everything to do with economic advantage.

In the Kyoto negotiations, the Europeans insisted on a 1990 baseline because they believed it would impose minimum sacrifices on Europe while inflicting maximum economic pain on the United States, their chief competitor in global trade.[38] The U.S. economy performed strongly during 1993-97, the European economy did not. Thus by 1997, U.S. energy emissions were significantly higher than 1990 levels, whereas Europe's were close to 1990 levels. For that reason alone, a requirement to reduce emissions below 1990 levels would be more costly for the United States than for Europe. In addition, using a 1990 base year, Britain would reap a windfall in CO_2 reduction credits because, after that date, Britain's electric power sector switched from heavy reliance on subsidized, high-sulfur coal to burning cleaner, non-subsidized North Sea natural gas. Germany would achieve a similar windfall for shutting down obsolete factories and power plants in the former East Germany.[39] If climate negotiators had instead selected a 1997 or 2002 baseline, the European Union would be less zealous

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[38] The 1990 baseline was also critical for securing Russia's participation in Kyoto. The Russian economy – and, hence, Russia's energy-related emissions – collapsed after 1990. The 1990 baseline ensured that, under Kyoto, Russia would become the world's leading supplier of hot air credits.
[39] Tom Randall, Ten Second Response: Recess Notes on Kyoto and CO_2 – May 8, 2001, National Center for Public Policy Research, available at http://www.nationalcenter.org/TSR50801b.html.

about Kyoto, and less hostile to President Bush's energy policies. The politics of climate change would be milder than what we observe today.

Just as countries should not be allowed to manipulate regulatory baselines for competitive advantage, companies too should not be allowed to do so. Awarding regulatory credits outside the context of a duly enacted regulatory program is an open invitation to insider manipulation and gamesmanship.

Risky Insurance

As we have seen, some early action proponents are in the odd position of demanding baseline protection from policies they promote. When this fact is carefully considered, the case for transforming 1605(b) into a political risk insurance program collapses. The U.S. Senate would never ratify the Kyoto Protocol, nor would Congress enact CO2 controls, unless pushed to do so by many of the same policymakers,[40] companies,[41] and activist groups[42] that support credit for early reductions. All Senator Lieberman, Pew, EDF, BP, etc. need to do to ensure that "good corporate citizens" are not "penalized" under a future climate policy is cease and desist their agitation for the Kyoto Protocol. Those advocating credits for baseline protection might as well plead, "We have met the enemy, and it is us."

Furthermore, as Rep. McIntosh pointed out, there is something odd about an insurance policy that makes the insured-against event more likely to happen:

> It would not be smart to purchase fire insurance that virtually guarantees your house will burn down. By the same token it would not be smart to purchase Kyoto insurance that increases the odds of the Protocol being ratified.[43]

An early action credit program would not only expand the coalition for energy suppression policies, it would also demoralize the friends of energy abundance. The

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[40] In the 106th Congress, Senator Jeffords co-sponsored Chafee-Lieberman's S. 547, the Credit for Voluntary Reductions Act, even as Sens. Chafee and Lieberman co-sponsored Jeffords' S. 1369, the Clean Energy Act. In the 107th Congress, Senator Lieberman is an original co-sponsor of Jeffords' S. 556, the Clean Power Act. Of course, former Vice President Gore advocated both CO2 controls and CO2 early reduction credits. See http://www.igc.org/wri/climate/scsb_vicepres.html.

[41] The "Clean Energy Group" – a coalition of electric generating and distribution companies – advocates both "multi-pollutant" regulation of CO2 and an "early credit program" for CO2 reductions. Member companies are: Connectiv, Consolidated Edison, Inc., Entergy Corporation, Exelon Corporation, KeySpan, Northeast Utilities, PSEG, and Sempra Energy. See http://www.mjbradley.com/documents/Briefing_Packet.PDF. Additional corporate supporters of CO2 caps and/or credits include various members of Pew Center's Business Environmental Leadership Council (http://www.pewclimate.org/belc/index.cfm), President Clinton's Council on Sustainable Development (http://clinton2.nara.gov/PCSD/Members/index.html), and the International Climate Change Partnership (http://www.iccp.net/membership.html#memberlist).

[42] E.g., Pew Center on Global Climate Change, Environmental Defense, World Resources Institute (http://www.igc.org/wri/climate/ccji-04.html), and Natural Resources Defense Council (http://www.nrdc.org/globalwarming/pearly.asp).

[43] Opening Statement, "Credit for Early Action," July 15, 1999, available at http://www.house.gov/reform/neg/hearings/071599/dmm.htm.

program would be interpreted far and wide as a signal that the Bush Administration believes some kind of CO2 regulation is inevitable, or at least probable. After all, if the President does not think such regulation is likely, then why bother offering credits to "insure" against it? The implicit message – the smart money is betting on Kyoto – could easily become a self-fulfilling prophecy. Few corporations will forthrightly oppose climate alarmism and energy rationing if they suspect the White House plans to throw in the towel.

The best insurance – the kind that emboldens rather than demoralizes advocates of energy abundance – is a clear and unequivocal "never-on-my-watch" rejection of CO2 regulation, whether of the international (Kyoto) or domestic (Jeffords-Waxman) variety, and of any policy that would legitimize or build political support for such regulation.

Conclusion

In March 2001, President Bush honored his campaign promise to oppose the Kyoto Protocol and pulled the plug on an ill-advised campaign proposal to regulate CO2. As the energy debate in Washington builds to a climax, the President again needs to act with courage and consistency. He should bury early-action crediting, not bring it back from the dead.

Sincerely,

Marlo Lewis, Jr., Ph.D.
Senior Fellow
Competitive Enterprise Institute

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

October 5, 1999

The Honorable David M. McIntosh
Chairman
Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs
Committee on Government Reform
Room B-377 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I understand that you have asked, based on discussions between our staffs, about the disposition by the House-Senate conferees of the amendments in 1990 to the Clean Air Act (CAA) regarding greenhouse gases such as methane and carbon dioxide. In making this inquiry, you call my attention to an April 10, 1998 Environmental Protection Agency (EPA) memorandum entitled "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources" and an October 12, 1998 memorandum entitled "The Authority of EPA to Regulate Carbon Dioxide Under the Clean Air Act" prepared for the National Mining Association. The latter memorandum discusses the legislative history of the 1990 amendments.

First, the House-passed bill (H.R. 3030) never included any provision regarding the regulation of any greenhouse gas, such as methane or carbon dioxide, nor did the bill address global climate change. The House, however, did include provisions aimed at implementing the Montreal Protocol on Substances that Deplete the Ozone Layer.

Second, as to the Senate version (S.1630) of the proposed amendments, the October 12, 1998 memorandum correctly points out that the Senate did address greenhouse gas matters and global warming, along with provisions implementing the Montreal Protocol. Nevertheless, only Montreal Protocol related provisions were agreed to by the House-Senate conferees (see Conf. Rept. 101-952, Oct. 26, 1990).

However, I should point out that Public Law 101-549 of November 15, 1990, which contains the 1990 amendments to the CAA, includes some provisions, such as sections 811, 817 and 819-821, that were enacted as free-standing provisions separate from the CAA. Although

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the Public Law often refers to the "Clean Air Act Amendments of 1990," the Public Law does not specify that reference as the "short title" of all of the provisions included the Public Law.

One of these free-standing provisions, section 821, entitled "Information Gathering on Greenhouse Gases Contributing to Global Climate Change" appears in the United States Code as a "note" (at 42 U.S.C. 7651k). It requires regulations by the EPA to "monitor carbon dioxide emissions" from "all affected sources subject to title V" of the CAA and specifies that the emissions are to be reported to the EPA. That section does not designate carbon dioxide as a "pollutant" for any purpose.

Finally, Title IX of the Conference Report, entitled "Clean Air Research," was primarily negotiated at the time by the House and Senate Science Committees, which had no regulatory jurisdiction under House-Senate Rules. This title amended section 103 of the CAA by adding new subsections (e) through (k). New subsection (g), entitled "Pollution Prevention and Control," calls for "non-regulatory strategies and technologies for air pollution prevention." While it refers, as noted in the EPA memorandum, to carbon dioxide as a "pollutant," House and Senate conferees never agreed to designate carbon dioxide as a pollutant for regulatory or other purposes.

Based on my review of this history and my recollection of the discussions, I would have difficulty concluding that the House-Senate conferees, who rejected the Senate regulatory provisions (with the exception of the above-referenced section 821), contemplated regulating greenhouse gas emissions or addressing global warming under the Clean Air Act. Shortly after enactment of Public Law 101-549, the United Nations General Assembly established in December 1990 the Intergovernmental Negotiating Committee that ultimately led to the Framework Convention on Climate Change, which was ratified by the United States after advice and consent by the Senate. That Convention is, of course, not self-executing, and the Congress has not enacted implementing legislation authorizing EPA or any other agency to regulate greenhouse gases.

I hope that this is responsive.

With best wishes,

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable Dennis J. Kucinich
Ranking Minority Member, Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs
Committee on Government Reform