# COMMENTS OF EDISON ELECTRIC INSTITUTE ON DOE'S INTERIM FINAL GUIDELINES AND DRAFT TECHNICAL GUIDELINES UNDER SECTION 1605(B) OF THE ENERGY POLICY ACT

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## SUMMARY

The Edison Electric Institute (EEI) acknowledges that the Department of Energy (DOE) has made some modifications and improvements in the interim final guidelines from the version proposed in 2003. However, in general DOE has not provided sufficient incentives for registering reductions, avoidances and sequestrations.

As President Bush indicated in his 2002 policy statement, the 1605(b) data base "tool goes hand-in-hand with voluntary business challenges." Moreover, the President said (in relevant part) that an enhanced data base "will encourage participation." But the revised guidelines are inconsistent in several key aspects with voluntary government partnerships, notably DOE's Climate VISION, *i.e.*, Power Partners[SM] in the case of the power sector, and the Environmental Protection Agency's Climate Leaders program. Unless these inconsistencies are addressed, participation in the 1605(b) voluntary reporting program could be diminished. This, in turn, could impede electric utilities in their goals of further reducing greenhouse gas (GHG) intensity under voluntary government partnerships.

In our comments EEI suggests a number of ways to improve the integration of Climate VISION and Climate Leaders into the 1605(b) reporting program:

- Encourage participation by 1) removing tough obstacles to registration and 2) providing more flexibility in baselines, particularly for entities with numerical commitments.

- Through agreements or other arrangements, allow entities that incentivize or are primary financial sponsors of voluntary actions to register GHG reductions (*e.g.*, demand-side management (DSM), coal ash re-use, sequestration and other projects and activities.

- Create a specific subset in the 1605(b) data base for utility-assisted customer reductions (*e.g.*, DSM, coal ash re-use).

- Create clearer and more robust provisions for project-based registration, with the understanding that Power Partners[SM] will rely upon projects as their primary reporting system under Climate VISION.

- Allow registration of emission reduction credits from the Chicago Climate Exchange or other registries (*e.g.*, World Resources Institute, California Climate Action Registry).

- Allow stand-alone project-based registration of off-system reductions (*e.g.*, DSM, sequestration), or alternatively, maintain the unitary 1605(b) data base with parity between project-based and entity-wide reporting.

Our comments also discuss several areas in which registration issues jeopardize participation in 1605(b):

- Stand-alone projects cannot be registered.

- It is too difficult to register entity-wide reductions.

- The treatment of avoided and indirect emission reductions, as well as offsets, needs to be modified.

- Plant closings and government requirements are treated unequally.

- Economic and other output measures should be allowed.

In addition, our comments point out that many provisions need modification for practical and flexible implementation of the reporting system.

Attachment

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ON DOE'S INTERIM FINAL GUIDELINES
AND DRAFT TECHNICAL GUIDELINES UNDER
SECTION 1605(b) OF THE ENERGY POLICY ACT**

## I. General Comments

The Edison Electric Institute (EEI) acknowledges that the Department of Energy (DOE) has made some modifications and improvements in the General Guidelines from the version proposed in 2003. Among these improvements and modifications in the interim final guidelines are that they: abandon the registry concept in favor of the statutory data base for the deposit of all reports; allow the reporting and registration of international projects; modify the *de minimis* provision to permit exclusion from inventories of up to 3 percent of total emissions; recognize trade associations as entities for purposes of reporting and registration; do not require the Chief Executive Officer of an entity to certify the 1605(b) report; allow registration of avoided emissions; provide some flexibility in the baseline period by allowing the use of a multi-year baseline; incorporate protection of confidential business information; and define more terms. We also appreciate DOE's development of the draft Technical Guidelines.

In addition, the last sentence of 10 C.F.R. section 300.12(b) states:

> DOE[1] will notify the entity that reductions meeting these requirements have been credited to the entity as "registered reductions" which can be held by the reporting

[1] We question whether the reference to "DOE" in section 300.12(b) should be to the Energy Information Administration (EIA) since the preamble states that EIA "is responsible for the operation of the 1605(b) program" (70 *Fed. Reg*. 15169), since all

> entity for use (including transfer to other entities) in the event a future program that recognizes such reductions is enacted into law.

This C.F.R. language is arguably an improvement over the 2003 proposed General Guidelines and should be retained, but nevertheless is of questionable and uncertain value. In general, DOE has not provided sufficient incentives for registering reductions, avoidances and sequestrations.[2] Ideally, for reasons that we have explained at great length previously,[3] DOE should explicitly provide policy incentives such as baseline protection and recognition or registration of past and future actions – in accordance with President Bush's directives of February 14, 2002 – in order to promote participation in the Administration's voluntary climate programs.

In this regard, it is our understanding that the aim of both Congress, in enacting section 1605(b) of the Energy Policy Act of 1992 (EPAct), and the President, in calling for "improvements" to the current voluntary 1605(b) reporting program, is to encourage – not discourage – not only accuracy in voluntary reporting of emissions and emission reductions, but also greater voluntary participation by all sectors. While many of the provisions of the revised General Guidelines and draft Technical Guidelines are indeed valuable improvements that are consistent with this joint aim, we are concerned that the

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other references in section 300.12 are to EIA and since the underlying statute provides that EIA administer the "data base" established by DOE.

[2] Hereinafter referred to collectively as "reductions."

[3] See, *e.g.*, EEI Comments of February 17, 2004, which are herein incorporated by reference, pp. 42-58.

lack of incentives,[4] coupled with other burdensome and resource-intensive provisions, particularly the tiered system, could very possibly undercut that aim. That possibility would be a lamentable result because some would use it to argue voluntarism is an ineffective means for reporting on greenhouse gas (GHG) emissions intensity. On the other hand, promoting participation, consistent with the above aim, should help to convince even skeptics that voluntarism is real, workable and beneficial.[5]

Thus, in the absence of any explicit policy incentives for registering reductions, **we urge DOE to maintain the unitary data base currently existing under 1605(b), without separate reporting and registration tiers.** This is especially true since there also do not appear to be any policy incentives for reporting reductions. We also urge that DOE carefully consider and adopt the technical and substantive recommendations for further

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[4] In an article on "Climate Change," the Clean Air Report of June 2, 2005, includes this comment:

> The California Climate Action Registry, a four-year-old program aimed at attracting voluntary industry and municipality reporting of greenhouse gas emissions, has drawn limited support from companies. Many business owners are apprehensive about revealing pollution information with no guarantee of receiving preferential treatment from regulators or regulatory flexibility in the future, sources say.

Given the absence of incentives and the added burden in the 1605(b) program, similar "limited support" and apprehensiveness is just as likely to be the result here.

[5] In the Climate VISION Memorandum of Understanding (MOU) of December 13, 2004, between the power sector and DOE, both parties agreed "to work together to develop and encourage policies and practices that will enhance, facilitate and encourage voluntary efforts" for GHG "emission intensity reductions and that will provide incentives and reduce barriers to such reductions" (emphasis added). While there is no requirement in the MOU to report such reductions under 1605(b), there is an encouragement to do so. Indeed, the MOU states that one important policy to Power Partners[SM] and their companies "is the revision of the guidelines for reporting and registering."

improvements and corrections in both the interim final guidelines and the draft Technical Guidelines that are identified in detail below.

**EEI specifically endorses comments on the guidelines proposals being filed by PowerTree Carbon Company and UtiliTree Carbon Company on forestry and agricultural sequestration and by the Coal Combustion Products Partnership on coal ash re-use.**

## II. Specific Comments and Recommendations

### A. The Two-tier System Has No Legal Underpinning in 1605(b) and Offers No Real Incentive for Large-emitting Entities to Participate.

As the preamble to the interim final guidelines explains, EPAct section 1605(b)(1) directs DOE to 1) "issue guidelines" establishing "procedures" for the "accurate voluntary reporting of information" on "emissions of greenhouse gases, reductions of these gases, and carbon sequestration" and 2) establish, through EIA, a "data base" comprised of "information voluntarily reported." The preamble adds that EPAct section 1605(b)(4) "contemplates a program whereby voluntary efforts to reduce" such emissions "can be recorded" in the EIA established "data base" and that "this record can be used by the reporting entity to demonstrate achieved reductions of greenhouse gases." It notes that in 2002, when the President directed that DOE "propose improvements" in the current 1605(b) voluntary reporting guidelines, he also told DOE that these "improvements are to enhance measurement accuracy, reliability, and verifiability" of the existing voluntary reporting. Thus, according to the preamble, the interim final guidelines "are designed" to

so "enhance" the "information reported" under 1605(b). It then lists four "key elements" of the 2003 proposed General Guidelines and states that "after careful consideration" of public comments by DOE, each has been "retained in the revised General Guidelines." 70 *Fed. Reg*. 15170-71.

Our understanding of two of these "key elements" is that they create two reporting "options" for large-emitting entities:

- One is a new concept, not found in the current guidelines, of reporting by "**registration**" of "information" for the "data base" by large-emitting entities "if they provide entity-wide emissions data and can demonstrate they achieved" such reductions after 2002.

- The second is a simplified procedure for "larger entities" that do not want to go through the added expense and burden of registration that nevertheless allows them to **report** their reductions, however achieved, in the EIA data base.

The second option is more like the current voluntary guidelines. In the case of both options, the "accuracy" of reporting is "enhanced" considerably, which we generally support, although, as discussed below in section II.D.4, neither the provisions of Part 300 that apply exclusively to each option nor those that apply to both options are clearly stated.

A "third key" element is that smaller emitting entities also are allowed to both report and register their reductions in accordance with so-called "simplified procedures" and to have their "registered" reductions treated by EIA and DOE with the same degree of importance and effect as those of "larger" emitting entities that choose the first option.

The interim final guidelines then provide that DOE will "notify" such large and small entities that reductions meeting the "requirements" of section 300.12(b) "have been credited to the entity as registered reductions." Such "credits" then "can be held" by both "for use . . . in the event a future program that recognizes such reductions is enacted into law"[6] (emphasis added). Such "use" is also stated to include the "transfer" of the credits "to other entities."

While favorable treatment of registration "credits" for some "future" legislatively enacted "program" for small-emitting entities might be viewed by them as an incentive to participate in the program under the revised General Guidelines (because the conditions for them to register are significantly less rigorous), it is hardly an incentive for EEI member companies and other large-emitting entities to participate. If anything, it can be viewed as a disincentive because the "credits" of both are treated on an equal basis – even though the "requirements" for registration by small-emitting entities are, as noted above, far less rigorous and thus result in somewhat less accuracy. That will undoubtedly cause future policy-makers to view the credits of both with skepticism at best. Moreover,

[6] At the DOE workshop on April 26, a DOE official took note of the "concern" that "if you are only reporting, you are a second-class citizen, versus if you are registering reductions." However, he did not respond to that concern, other than to say that "[w]e want to establish, and you ought to want us to establish, an official government record of your activities." Transcript of DOE Workshop of April 26-27, 2005, pp. 47-48 (hereinafter referred to as "DOE Workshop Transcript"). EPAct section 1605(b)(4) expressly provides for that "record" independently of any "registration" proposal for any reporting entity, large or small.

the interim final guidelines' bias in favor of small-emitting entities discriminates against large-emitting entities, which cannot avail themselves of the same simplified registration procedures.

For large-emitting entities, their recourse is either not to participate in 1605(b) reporting at all or to participate by reporting only. As discussed below, section 1605(b) does not authorize DOE to revise the 1994 guidelines so as to compel large-emitting entities to make such choices and, if they choose the reporting-only option, to be treated as "second-class citizens."

The preamble continues to explain that comments received on the 2003 proposed General Guidelines calling for "special recognition" of the "registration option" were "mixed." There was "some support for allowing an option to provide more comprehensive data to DOE," but that option was not elaborated upon in the preamble. Others claimed that a "system that differentiated between entities. . .would automatically devalue all reductions not registered" and thus "[m]any supported only one type of recognition, either reporting alone or registration alone, but not two classes of reporting."

However, DOE dismissed all of the above criticisms of the new "system" and instead "retained the distinction between reporting and registration" and the special or simplified registration provisions for small-emitting entities, saying that DOE "continues to believe this is the most effective method for improving the program, including improving the

accuracy of the reports, as directed by the President." The preamble explains the significance of this "method" for large-emitting entities, but is silent on small-emitting entities:

> Under the revised guidelines, large emitters interested in "registering" reductions must submit entity-wide emission inventories and will be recognized only for net reductions in their entity-wide emissions. DOE believes that data that reflect. . .entity-wide emissions and reductions are better indicators of the entity's overall contribution to greenhouse gas reductions and should, therefore, be clearly distinguished from reports that are not entity-wide. DOE believes this characteristic, together with the other additional requirements specified in the guidelines, are sufficiently significant to warrant a unique designation.

70 *Fed. Reg.* 15174.

DOE added that "[c]omments on the issue of registration were often linked to the issue of transferable credits," which DOE abandoned in the preamble.[7] In doing so, DOE quotes, in part, EEI's 2004 comments, where we expressed support for the presidential directive, saying that it would provide "a nonbinding hedge against current and future climate regulatory policy" and that "baseline protection" is a real "incentive to participation" in the revised 1605(b) program. Pointing to EEI's comments, DOE chose to say that since EEI has said "credits" can "only" provide such a "hedge," DOE could not "issue" credits

[7] Contrary to the preamble's assertion that "[n]o commentator" on the 2003 proposed General Guidelines "argued" the issue of DOE's "legal authority" regarding the President's directive for such "credits," in its February 17, 2004, comments EEI referred DOE to the Electric Power Industry Climate Initiative's (EPICI) September 25, 2002, Supplemental Comments to the DOE docket, which concluded that "EPICI is not aware of any legal authority inadequacies" concerning the presidential directive.

that are "guaranteed to have future value," and thus dismissed the transferable credits concept. 70 *Fed. Reg*. 15174, 15176.[8]

In the 2003 proposed General Guidelines, the preamble referred to the establishment of a "registry" and said that it would provide "special recognition to such Guidelines." 68 *Fed. Reg.* 68206 (2003). In the interim final guidelines, there is no mention of the terms "registry" or "special recognition," only provisions for registration. Indeed, like the 2003 version, the interim final guidelines state, as noted above, that EIA will establish a data base "composed of all reports" and that a "portion" thereof "will provide summary information on the emissions and registered emission reductions of each reporting entity" (see section 300.12(d)) (emphasis added). What this apparently means is that 1) all "reports" from those choosing to report only and those seeking registration will be commingled in the EIA data base, and 2) the only recognition of the registrations by large- and small-emitting entities will be in the form of "summary information." This suggests aggregation of the information so it will not be distinguishable between large- and small-emitting entities.[9] Moreover, there is no mention of designating a "portion" of the data base for any "credits." Such a "summary" does not amount to an incentive for participation. In fact, it serves as a further disincentive because of the commingling of large- and small-emitting entity reports.

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[8] As part of EPICI, we acknowledged that the guidelines could not "bind a future President or Congress," and we did not then or now seek such a guarantee.

[9] The draft Technical Guidelines state that "[s]ummary data will be made available by EIA indicating, for each Reporting Year, the registered reductions attributed to each reporting entity and the third parties for whom it reported" and that "EIA will provide cumulative totals of the registered reductions" (p. 275).

**More importantly, there is no legal basis in section 1605(b) for DOE to change after 10 years from a unitary system of reporting to a two-tier system for large-emitting entities and a third system for small-emitting entities.** EPAct section 1605(b)(1) requires the issuance of "guidelines for the voluntary collection and reporting" of emissions and reductions. EPAct section 1605(b)(4) provides for the establishment of a "data base comprised of information voluntarily reported under this subsection." Neither provision provides for classes of "reporting," classes of "information" reported or classes of "volunteers." Nor can the provision in EPAct section 1605(b)(1) that the "guidelines establish procedures for accurate voluntary reporting" be construed to authorize such classes (emphasis added). Yet such class distinctions are precisely what DOE is attempting to establish with the interim final guidelines. There is no legal basis for such distinctions. There certainly is no incentive for such a system, and there are significant disincentives. Indeed, the system itself is a disincentive. Moreover, there will be added burdens and resource costs for participating entities.

While the last sentence of section 300.12(b) is an improvement over the 2003 version as a "hedge" against possible "future climate regulatory policy" changes, it too is "not guaranteed to have future value" regarding such "policy" changes because it cannot bind either the executive or the legislative branches. As an incentive, its value (if any) is speculative at best. Most importantly, it is certainly not a basis in law for adopting such a

tiered system.[10] **Thus, we recommend that DOE maintain the current unitary reporting and data base system contemplated by section 1605(b) and in effect since 1994, albeit with changes to improve accuracy as directed by the President.**

B. Registration Issues Jeopardize Participation in the 1605(b) Program.

A number of key issues demonstrate why registration of reductions may be a road little traveled under the new guidelines.

1. Stand-alone projects cannot be registered.

We have previously explained at great length why project-based activities should receive equal treatment with entity-wide actions in a unitary reporting data base:[11]

- EPAct specifically authorizes and focuses on the reporting of projects.
- A project-based approach recognizes that a ton is a ton.
- A project-based approach is more consistent with company actions that focus on reducing GHGs than an entity-wide reporting approach is.
- GHG emissions trading market realities support project-based reporting.
- Project-based activities can be appropriately registered or recognized within a unitary data base. (EEI's comments specifically explained how this could occur.[12])

The advantages of registering projects were also covered at the DOE workshop by Lee Ann Kozak of the Southern Company. DOE Workshop Transcript, pp. 268-69.

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[10] Section 300.9(d) requires those entities that register must "maintain adequate supporting records for at least three years to enable verification of all information reported." However, such maintenance may need to be longer than three years in order to verify such "credits" depending on if and when the "program. . .is enacted" and on whether such "credits" are, in fact, legislatively recognized. Such longer retention periods will add burdens and costs.

[11] See, *e.g.*, EEI Comments of February 17, 2004, pp. 36-42.

[12] *Id.* at 41-42.

Furthermore, we provide these key statistics for the record (based on 2001-2003 reporting under 1605(b)):[13]

- Of the more than 200 reporters, almost half are from the power sector.
- Of the 417 million metric tons of $CO_2$-equivalent reductions reported in 2003, nearly two-thirds are from the power sector.
- And perhaps most importantly, more than half of all entities report project-level reductions.

It is evident that projects are extremely important to those companies that choose to report on an entity-wide basis. And it is abundantly clear that DOE's interim final guidelines run the risk of losing the many reporters – and associated tons – who report only on a project basis. While these entities may continue to report – although it is not at all clear that they will (see discussion in section II.A, *infra*) – DOE has precluded their opportunity to register under the new two-tier reporting regime.

2. <u>It is too difficult to register entity-wide reductions.</u>

In addition to the unfortunate exclusion of stand-alone projects, the interim final guidelines make it too difficult to register entity-wide reductions.

a. <u>DOE needs to clarify its provisions governing changes in emission reduction methods.</u>

In the context of registering entities that change emission reduction methods, two C.F.R provisions and two exchanges at the DOE workshop on April 27 call for clarification from DOE as they are confusing and possibly misleading. The two workshop exchanges are as follows:

[13] See also EEI Comments of February 17, 2004, at 58-59.

> MR. FRIEDRICHS:. . . .
>
> Another issue, a broad issue, that was raised is, can entities choose which emission reduction calculation method they use year to year to year. In other words, can they change it from year to year. The answer is no. When you start reporting, you select an emission reduction method for your entity, your subentities, and you stick with that method.
>
> If you needed to make a change for one reason or another, you'd have to go back and redo your reports from the time you started, or you'd have to start at the beginning again essentially.
>
> * * * *
>
> MR. KLEIN: Dan Klein with Twenty-First Strategies. Let's say a reporter is. . .registering his absolute emission reductions and then, after a couple of years, finds that his entity's output has fallen. Can that reporter then convert to an intensity-based measure, and if so, is there a restatement or re-registration of past years' activities?
>
> MR. HARVEY: I think we talked a little bit about this already, and Mark's answer I would sort of share again. It provides considerable flexibility to restate – to submit a new entity statement, to submit a new base period calculation if they so choose.
>
> . . . .
>
> MR. FRIEDRICHS: Right, but it's not something that we will permit easily. In other words, a year-to-year change in method. You have two options. You either start from the beginning again with a new base period or you go back and you restate your reductions from your original start year.

DOE Workshop Transcript, pp. 275, 299-300 (emphasis added).

The two C.F.R. provisions are section 300.8(f) and 300.9(b)(3), both of which, particularly in the context of the remarks of DOE and the Environmental Protection Agency (EPA), could be construed to require that when "significant changes occur," etc., reporting entities must go back, possibly over a period of several or more reporting years, and redo their reports *ab initio.* In short, they give the appearance of a bias in favor of changing previous calculation methods, base periods and base values. That possibility

could intimidate any potential participant into thinking that such voluntary reporting is simply not worth such trouble, expense and burden.

Section 300.8(f) refers to the draft Technical Guidelines and states that they "describe when such changes should be made and what information such changes must be reported to DOE."[14] However, those guidelines do not appear to support retroactive calculation and reporting as stated above by the DOE and EPA officials.

The draft Technical Guidelines make it clear that if a registering entity changes its emission reduction method, it has two options: 1) either recalculate its base value, or 2) establish a new base period or base value (pp. 248-50). **The above-cited C.F.R. provisions and passages may give the misleading impression that a registering entity must recalculate its base value – in other words, must recalculate, redo and resubmit all of its previous year's submissions**. But this, according to the draft Technical Guidelines, is not the only option. **The second option – to establish a new base period or base value – could be much less burdensome and costly than the first option, and is one that registering entities need to understand also is available. We recommend that the C.F.R. provisions be clarified in this regard.**

b. <u>The multiple certification and related provisions are extremely burdensome and largely unworkable.</u>

Among the six certification statements that a reporting entity must submit is that:

[14] As in n. 1, *supra*, we question this reference to DOE.

> Any emissions, emission reductions, or sequestration reported that were achieved by a third party are included in the report only if there exists a written agreement with each third party providing that the reporting entity is the entity entitled to report these emissions, emission reductions, or sequestration[.]

Section 300.10(c)(2).

That certification, standing alone, is sufficiently burdensome to companies, such as many utilities, who have hundreds or thousands of third parties providing offsets that may be registered reductions. But, in the case of a reporting entity or aggregator seeking to "register net emission reductions achieved" by such third party, this already burdensome certification is compounded by the inclusion of a provision in section 300.7(d) calling for a second or separate "certification," not by the reporting entity, but by the third party:

> The report to DOE[15] must also include a certification by the third party indicating that it has agreed that the reporting entity or aggregator should be recognized as the entity responsible for any registered reductions and that the third party does not intend to report directly to DOE.

The previously quoted provision in section 300.10(c)(2) should more than suffice. There is no apparent difference between one certification providing that the reporting entity is "entitled" to so report and a second certification indicating that the third party "has agreed" that the reporting entity or aggregator "should be recognized as the responsible entity" for such registration.[16]

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[15] As indicated in nn. 1 and 14, the two references to DOE in section 300.7(d) presumably should be to EIA.

[16] Random House Webster's College Dictionary (2d ed. 1998) defines "entitle" as meaning "to give a right or claim to something."

Similarly, the inclusion of a statement of intent by the third party that it "does not intend to report directly to DOE" is unnecessary. Indeed, such a statement is also already covered by the word "entitled" in section 300.10(c)(2).

Not only is the section 300.7(d) certification overkill, but it is also inconsistent with the policy and purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.*[17] **Thus, we recommend that the above-quoted provision in section 300.7(d) be deleted.** It is more than sufficient that a registering entity certifies under section 300.10 that it has written agreements or contracts with third parties that entitles such entities to register such offsets. See also comments of Bill Fang of EEI, DOE Workshop Transcript, pp. 143-45.

In addition, the fourth sentence of section 300.7(d) provides that the "reporting entity. . .must" treat the third party as if it "were directly reporting to EIA" and "include in its report all of the information on the third party" (regardless whether that party is a large business, government agency, a small business, a household or an individual), "including an entity statement, an emissions inventory (when required)," together with

[17] One of the purposes of that Act is to "minimize the Federal paperwork burden for individuals, small business. . .and other persons." The term "burden" is defined to mean "the time, effort, or financial resources expended by persons to provide information to a Federal agency." See section 3501 and 3502(3). As noted above, such third parties, many of whom will be individuals and small businesses, would incur such expenditures for no benefit or gain to them. Just as importantly, this provision for a second certification by third parties also would undoubtedly result in EEI member companies with many such parties incurring multiple expenditures of resources in order to ensure that such certifications are prepared by the third parties and to collect them for the companies' records under section 300.9.

"an assessment of emission reductions," without explaining what such an "assessment" would entail. The open-ended word "including" would allow DOE/EIA to expand on this list of items from time to time or case by case, thus making the requirement even more uncertain and burdensome.

As previously noted, electric utility customers who are third parties can number in the hundreds or thousands, and many are not all large commercial, governmental or industrial entities. Even for large customers, it is not likely that utilities would have available to them all of the information required under sections 300.3, 300.4 and 300.5 in order to prepare an "entity statement" for such entities. Nor could they easily obtain such information. For small businesses, households, individuals, etc., the implementation of that requirement by utilities is totally impractical and inappropriate. It is not reasonable for DOE to impose this requirement of treating any such third party as if it were a "reporting entity" because it is not such unless it so chooses on its own, in which case it would not be a third party of the utility. This provision creates an unnecessary and unreasonable obstacle for an electric utility with many such parties. **We recommend that it also be deleted or, at a minimum, be reconsidered and sharply curtailed.**

There are two other related concerns with section 300.7(d). First, the sixth sentence of this section provides that net emission reductions of "each" third-party will be "evaluated separately" by the EIA to "determine whether they are eligible for registration." While we agree that EIA should review all reports of entities to ensure consistency with the

guidelines for acceptance purposes as provided by section 300.12(a) and for registration purposes by section 300.12(b), we question why it is necessary and appropriate, let alone cost effective, for EIA to be committed to evaluating "separately" "each" such third party's reductions. Further, it is unclear what the word "separately" entails or what criteria EIA would use in making such evaluations. The sheer number of such third-party reductions would overwhelm EIA.

Moreover, if such evaluations are needed, they should be a part of the section 300.12(a) and (b) process and should not singled out in this section of the General Guidelines. Indeed, under the heading "Determining Registered Emission Reductions" (at p. 275) – which appear to relate to section 300.12 – the draft Technical Guidelines explain that an entity "may" report "offset reductions generated by non-reporting third parties" and that the "quantity" of such reductions "that are eligible for registration is determined independently for each third party, using the same procedures" that would apply to "each reporting entity" (emphasis added). That explanation is somewhat clearer than the above sentence of section 300.7(d), although our comment about sheer numbers overwhelming EIA is still appropriate.[18] **We recommend deletion of this provision from section 300.7(d).**

Second, the last sentence of section 300.7(d) provides:

[18] See also our comments on this draft Technical Guidelines provision in section II.B.6, *infra*.

> If the agreement between the reporting entity and any third party is discontinued, for any reason, all emission reductions of emissions attributable to the third party would be removed by EIA from the records of the reporting entity.

This provision would penalize a reporting entity if the agreement between the entity and the third party terminates "for any reason," including closing of the third-party business or death of the third party. In those instances, all reductions "attributable" to the third party – stretching back potentially many years – that survived EIA's separate evaluation and are part of the credits under section 300.12(b) would be summarily "removed" by EIA from the "records" of the "reporting entity." In some cases, the credits for such reductions might have been transferred to "other entities," as provided in section 300.12(b), and could not be recovered by EIA.

Agreements are normally not meant to exist in perpetuity. They usually exist for a specific period of time, and when the period ends the agreements are extended, renegotiated or terminated. Yet under this section, the reporting entity would be penalized with the loss of reductions whenever the agreement is "discontinued" by its terms or otherwise. That is excessive and unnecessary. If there is termination of an agreement, it would be the responsibility of the reporting entity to give notice as part of its annual reporting of any change in the agreement, including its termination and the possibility of a new agreement. However, such notice should not have retrospective adverse consequences for that entity.

This provision is not in accord with the reporting provisions of EPAct section 1605(b)(1) and the last sentence of EPAct section 1605(b)(4), which allows reporting entities to use the information reported "to demonstrate achieved reductions." **We recommend that it be deleted from section 300.7(d).**

3. The treatment of avoided and indirect emission reductions, as well as offsets, needs to be modified.

    a. The guidelines create a disincentive for utilities that rely upon purchased power to achieve voluntary GHG reductions.

        i. Purchased power agreements or other arrangements should be allowed to rebut the presumption created under 300.8(k).

As noted earlier in these comments, one improvement in the interim final guidelines is the recognition of the concept of avoided emissions. This will enable power generators to report and register emissions reductions resulting from new additions of zero-emitting generation sources (such as wind and nuclear) as well as lower-emitting generation technologies using fossil fuels.

In this regard, section 300.8(k) of the interim final guidelines generally assigns responsibility for reporting rights to the generator based on the principle of ownership of the asset. More precisely, the section provides that "DOE will presume"[19] that the entity "responsible for emission reduction, avoided emission or sequestered carbon is the entity with financial control of the facility, land or vehicle which generated the reporting emissions, generated the energy that was sold so as to avoid other emissions, or was the

[19] As indicated in n.n. 1, 14, and 15, the reference to DOE in this section presumably should be to EIA.

place where the sequestration action occurred" (emphasis added). This provision does not cover all possible circumstances. Moreover, to "presume" is not to conclude with absolute certainty.[20]

DOE should interpret the word "presume" to mean that it might, on occasion, reach a different conclusion, based on the facts. In addition, DOE should not be the only one that can rebut the presumption. **The reporting entity also must have the ability to rebut the presumption created under section 300.8(k).** However, the section is silent as to that ability. Absent from the section is any provision allowing the reporting entity to provide "proof" in its certified report that there are situations where the generator and the reporting entity have agreed that the latter is responsible for the reductions and thus should be able to claim them. The absence of such a provision creates a gap in the section. Perhaps DOE is not familiar with situations in the power sector whereby electric utilities may enter into agreements or other arrangements for the purchase of power from zero- or lower-emitting sources to achieve GHG emission reductions.[21] In order to fill this gap, **we recommend that section 300.8(k) be amended by inserting after the first sentence thereof the following:**

> **Notwithstanding such financial control, if the reporting entity demonstrates in its report that it has a contract or other arrangement with the generator that provides that the reporting entity is responsible for such reductions, and such report is certified pursuant**

[20] Random House Webster's Dictionary (2d ed. 1998) defines "presume" as meaning "*Law*. to assume as true in the absence of proof to the contrary."

[21] In some situations, such agreements may grow out of state regulatory requirements that, for example, mandate a renewable portfolio standard or subject decisions on acquiring new generation to competitive bidding processes.

**to section 300.10(a), EIA will recognize the responsibility of such entity for the reductions in accordance with section 300.12**.

ii. DOE should be flexible in allowing avoided emissions to be calculated on the basis of company-specific or North .American Electric Reliability Council sub-regional data rather than a national average.

The draft Technical Guidelines specify a national average benchmark value of 0.59 metric tons $CO_2$ equivalent ($mtCO_2e$) per megaWatt-hour (MWH) for purposes of calculating avoided emissions. This value was the average intensity of U.S. electricity generation in 2002, and is derived by dividing total emissions (estimated from fuel use data) by total generation (as reported). The draft Technical Guidelines note that this value can fluctuate annually "as a result of a wide range of different factors, including water levels in reservoirs used to generate hydropower, the relative prices of different fuels used in power generation and weather" (section 2.4.3.2.1, p. 158). However, the Draft Technical Guidelines do not provide a rationale for why the avoided emissions calculation should be based on a single national value.

Elsewhere in the draft Technical Guidelines (namely, section 1.F.2.2, pp. 138-40), there is recognition that the average $CO_2$ emission rates can vary widely by North American Electric Reliability Council (NERC) region. The averages over the NERC regions in 2002 ranged from a low of .50 $mtCO_2$ per MWH to a high of .98 $mtCO_2$ per MWH. **Thus, the avoided emissions benefit can be substantially higher in some regions than others, and this should be reflected in the avoided emission reductions reported in 1605(b).**

Under the current guidelines, an entity seeking to register reductions would be able to use location-specific factors for other voluntary actions, but would not be able to use benchmarks more appropriate to the region if the action involved avoided emissions. **Changing the draft Technical Guidelines to allow for the use of NERC sub-regional information for avoided emissions would provide a more accurate representation of the magnitude of avoided emissions (*e.g.*, average of ECAR and the surrounding regions where power is exchanged is 0.72 mt$CO_2$e per MWH).** This approach is similar in the draft Technical Guidelines to the calculation of base values for indirect emissions (section 1.F.2, pp. 138-45). In addition, the quality of the national average and the NERC regional average data are comparable, so the proposed change should not affect the quality of the data reported to the 1605(b) data base.

Even better could be company-specific data, whether based on procurement agreements or other company-specific sources of information. In any event, **DOE should be flexible in allowing avoided emissions to be calculated on the basis of company-specific or NERC sub-regional data rather than a national average.**

b. <u>DOE should be flexible in allowing reductions from transmission and distribution improvements to be calculated on the basis of company-specific or NERC sub-regional data rather than a national average.</u>

Improvements in transmission and distribution (T&D) systems represent some potential for achieving voluntary GHG reductions, as evidenced by the reported range of 6.4-9.2 percent losses in the National Energy Modeling System Electricity Market Module (draft

Technical Guidelines, Table 1.F.4, p. 145).[22] The procedure for estimating emissions reductions for T&D improvements (section 2.4.5.6.4, pp. 269-70) specifies a two-part calculation: Estimating MWH losses, and converting the losses into emissions using a national average emissions factor of .64 $mtCO_2e$ per MWH. The national average factor is based on 2002 national data on the total quantity of delivered electricity (*i.e.*, at the point of use) divided by the total emissions associated with the generation of that electricity.

**The calculation for reductions associated with T&D improvements should be more closely tailored to actual losses in the reporting utility's system or NERC sub-regions.** Losses are a function of the length of T&D systems, their voltages and the age and condition of transformers, as well as other factors. These conditions can vary significantly by region, and entities should be able to estimate emission reductions based on assumptions that more closely represent actual conditions in their areas of operation. National average emissions factor data may be more precise (because total generation is reported data and total emissions are derived from reported fuel use data), whereas the regional factors represent model estimates. However, the degree to which the model data more accurately represents regional conditions outweigh the fact that the model data may be less precise than the reported total data. Therefore, **estimated reductions from T&D improvements should be based on company-specific or NERC sub-regional**

[22] The reference on p. 144 of the proposed Technical Guidelines to Table 1.F.3 should be to Table 1.F.4.

**emissions data rather than a national average.** Where applicable, entities should have the option of providing actual loss data.

Moreover, the Technical Guidelines need to account for technical and market realities for the calculation of reduced losses along a T&D system. For example, the transmission lines are rated in terms of kilovolt-Amps (kVA), and the loading on the transmission lines is likely to be measured in kVA, not kiloWatt-hours (KWH). The kVA measure "total" power, which includes "real" power (measure in KWH) and "reactive" power (measured in rkVA). Since both KWH and rkVA are produced with an energy (Btu) input, reductions in KWH, rkVA or both can result in emission reductions. Thus, reduced losses along a T&D system should not be measured solely in terms of KWH.

In addition, under federal law such as EPAct and Federal Energy Regulatory Commission Order 888, transmission lines are considered to be "open access" to the wholesale power market, and must be open for all entrants that want to ship (or consume) power. Therefore, using a static base year calculation for kVA or KWH losses may not be a relevant statistic, as the "traffic" on a typical transmission line is likely to increase every year. For transmission systems in particular, it is the relative losses, rather than the absolute value of the losses, that may be more relevant. For example, assume that in year 1, there are 1 million KWH moved across a transmission line. With a T&D loss factor of 7 percent, there are 70,000 KWH of losses. In year 2, there are upgrades to the line to reduce losses to 6 percent. However, the traffic on the line increases by 20 percent to 1.2

million KWH. The new losses are 1,200,000 * 6% = 72,000 KWH. However, if no upgrades had been performed, the losses would have been 84,000 KWH. In this case, using absolute values, losses increased by 2,000 KWH. However, due to upgrades, the losses were reduced by 12,000 KWH from what they would have been without any upgrades. The Technical Guidelines should provide information on how to perform this calculation in order to ensure that reporting entities receive appropriate recognition for reducing losses.

c. <u>The guidelines should allow for reporting of emissions reductions from the sponsors of demand-side management programs.</u>

The interim final guidelines do not specifically allow for emissions reductions from demand-side management (DSM) programs. In concept, emissions "saved" as a result of DSM actions are comparable to additional generation from zero- or lower-emitting sources.

Under the interim final guidelines, a customer of a DSM program could report a reduction in indirect emissions associated with the DSM project. The entity responsible for delivery of the DSM program could only report the emissions reductions if it became an aggregator of the DSM customers and had offset agreements with each customer. However, provisions in section 300.7(d) regarding offset agreements and other requirements for reporting are unworkable and make this approach costly and burdensome (see section II.B.2.b, *supra*), so it is very unlikely to occur. This was acknowledged by DOE at the April 27 workshop:

> MR. FRIEDRICHS: Yes. The offset emission reduction procedures that we discussed about before are pretty cumbersome, too cumbersome to accommodate the reporting of, for example, reductions resulting from demand si[d]e management activities that support a broad range of actions by homeowners or other small consumers.
>
> Similarly, the offset reductions aren't really appropriate for use by manufacturers of high efficiency appliances or equipment that may well generate reductions also by small users, homeowners, or small businesses.
>
> We are looking for practical ways of trying to recognize these types of emission reductions in a way that ensures that we are not double-counting, that we do assign responsibility appropriately for those reduction actions.

DOE Workshop Transcript, p. 369.

**EEI has concluded that improvements in the end-use efficiency of electricity consumers represents a significant opportunity to reduce GHG emissions, and that this opportunity needs to be encouraged in the 1605(b) reporting guidelines**. Our conclusion is based on the following points:

1. Actions to improve customer end-use energy efficiency represented a significant part of the power sector's voluntary goal to improve GHG emissions intensity by the equivalent of 3-5 percent by 2012. For example, EIA data for the 2002 base year of the President's voluntary initiative show that utility-sponsored DSM programs achieved electricity savings of 54.07 billion KWH, or 1.56 percent of total electricity consumption.[23] These savings represent 31.9 million metric tons of avoided GHG emissions in that year alone.[24]

2. Utility-sponsored DSM programs are an important component of Climate VISION. The Climate VISION MOU between the power sector and DOE set a specific goal as follows: "As a secondary goal of this MOU, the Power Partners and DOE agree to work collaboratively to spur GHG emission intensity reductions across all sectors of the economy through collaborations with

[23] EIA, Annual Energy Review: 2003 (September 7, 2004).
[24] This estimate is based on the national average emissions factor of 0.59 metric tons of $CO_2$ equivalent per MWH, reported in the draft Technical Guidelines (p. 258). This estimate will vary by region, sub-region and utility system.

electricity end-users/customers in the industrial, commercial, residential, and transportation sectors." A number of EEI member companies sponsor DSM programs to serve their customers, and many of these activities are listed in the "living document" Work Plan referred to in the MOU.

3. Many DSM programs are either mandated by states or have state regulatory approvals. EPAct section 1605(b)(1)(C)(iii) states that the "guidelines shall establish procedures for the accurate reports of information on. . .reductions in greenhouse gas emissions achieved as a result of. . .State or Federal requirements."

4. Utilities provide substantial financial incentives to DSM customers in the form of rebates, special financing arrangements and special service delivery arrangements. Utilities are large investors in such programs, and the emission reductions resulting from these investments should be recognized in the 1605(b) data base in a manner equivalent to ownership of the assets.

**EEI recommends that emission reductions from DSM activities be recognized as a category of avoided emissions or emission reductions. Moreover, EEI recommends that utilities be allowed to report avoided emissions from such programs, subject to guidelines that will avoid duplication of reporting between utilities providing DSM services and the customers who benefit from such services.**

EEI has a strong interest in working with DOE to develop an action-specific calculation method that would permit the reporting of emission reductions from DSM programs sponsored by utilities and energy service companies. We recognize the potential for duplication of reported reductions (particularly for DSM programs with large customers), and are willing to work with DOE to develop specific technical guidelines to avoid potential duplication. (The potential for duplication of reporting in the residential sector

is virtually non-existent.[25]) In the absence of contractual or other agreements governing the allocation of DSM-related avoided emissions between the utility and its customers,

**EEI recommends that DOE adopt the following approach:**

1. **Utilities should be permitted to report DSM avoided emissions for all residential and commercial customers. Utilities could have the option as to whether to notify the customers regarding the inclusion of DSM data in utility reports.**

2. **Residential and commercial customers that do report – which is likely to be an extremely small number of reporters – could be asked to indicate in their reports whether the reductions in indirect emissions resulted from their participation in utility-sponsored DSM programs.**

3. **Utilities could report reductions for industrial customers, provided that these customers are notified in advance of their inclusion in the utility reports. In the absence of any previous agreement, utilities and their large commercial and industrial customers could have the option of negotiating alternative arrangements for the reporting of emissions reductions (*e.g.*, a utility and a large customer could agree to allocate the reductions based upon relative cost-sharing of a DSM project).**

4. **Industrial customers could be asked to indicate in their reports if any of the reductions in indirect emissions resulted from participation in a utility-sponsored DSM program, and if they were notified that their DSM reductions were included in a utility report. If so, they could be asked to provide an explanation of the areas where they may overlap with the utility report.**

5. **Emissions reductions from DSM activities would be calculated using the methodology and instructions currently used in Form EIA-861, combined with regional, sub-regional or company-specific emissions factors as described previously in sections II.B.3.a.ii and b.**

[25] DOE can take official notice of the fact that in 10 years of voluntary reporting under 1605(b), only 11 households have filed reports, and eight of those reports were by one former DOE-EIA employee.

This recommended approach will minimize the possibility of double-counting emissions avoided from DSM projects. It will require coordination between customers and the sponsoring utility, but should be manageable

**EEI also proposes to discuss further with DOE two additional measures to further eliminate the potential of any duplication of reductions from DSM programs in the 1605(b) data base.**

1. EEI is willing to discuss the possibility of establishing a size cap on DSM customers included in utility 1605(b) reports. EEI was not able to compile data on participation in DSM programs by size of customer in time for inclusion in these comments, so we can neither endorse the concept of a size cap nor recommend a particular threshold at this time. Using data from the EIA 1999 Commercial Buildings Energy Consumption Survey, the largest size category of commercial buildings (*i.e.*, those with more than 0.5 million square feet of floor space) had annual average electricity consumption of 15.3 million KWH,[26] which would result in annual indirect emissions for each building of about 9,050 metric tons per year $CO_2$ equivalent,[27] slightly less than the limit of 10,000 metric tons per year for small-emitting entities specified elsewhere in the 1605(b) guidelines. The EIA survey showed that buildings in this size category constituted about 12 percent of total electricity consumption in the commercial buildings sector. If DOE decides to consider a size cap as a companion to the EEI DSM recommendations, EEI would be willing to work with DOE to analyze this data further, as well as to assemble size data from existing utility DSM programs.

2. The format for the DSM data in Form EIA-861[28] (Schedule L of that form is titled "Demand-Side Management Information") could be harmonized with the 1605(b) reporting guidelines to improve transparency and consistency. The Form EIA-861 currently requires data on both peak MW capacity reductions and annual

[26] EIA, 1999 Commercial Buildings Energy Consumption Survey: Consumption and Expenditure Tables (May 21, 2002).
[27] See n. 24, *supra*.
[28] The Form EIA-861 reports are mandated by section 13(b) of the Federal Energy Administration Act. Failure to provide the data specified on the form subjects the reporter to a penalty. The form refers to 18 U.S.C. § 1001, which, as discussed in section II.D.5, *infra*, makes it a crime to report falsely.

MWH savings, including data on both incremental and total annual electricity savings. These data are reported by customer class (residential, commercial and industrial). Elsewhere on the Form EIA-861, utilities must report the total number of customers in each customer category. Finally, utilities are required to report annual expenditures dedicated to DSM programs. This data base provides an independent yardstick for comparing and evaluating utility 1605(b) reports on DSM activities. The relationship between Form EIA-861 data and 1605(b) reports could be enhanced if the commonality of requirements were increased (*e.g.*, Form EIA-861 data could be further categorized by size of customer, if size categories were ultimately adopted in the 1605(b) guidelines).

d. Estimating reductions associated with electricity exports appears to be discriminatory and punitive.

The draft Technical Guidelines (p. 272) provide an "integrated formula" for determining emissions reductions from "exported electricity." This integrated formula consists of three parts:

- Emissions from "exported electricity" in the base period [Exported Emissions $_{\text{Base period}}$].
- The change in generation between the base period and the reduction year, multiplied by a "benchmark" emissions rate [Incremental Generation * Benchmark].
- Emissions from "exported electricity" [Exported Emissions$_{\text{Reduction year}}$].

The first component, base period emissions, is straightforward. The second component serves as an "adjustment" to the base period emissions to account for changes in generation between the base and reporting year. The "benchmark" rate will be set by DOE, and is set in the draft Technical Guidelines at the national average emissions rate. This "benchmark" essentially establishes a generation performance standard for changes in generation beyond the base period. The sum of the first and second components provides what can be characterized as an "adjusted baseline" for purposes of calculating emissions reductions from electricity generation.

If the third component, emissions in the reporting year, is less than the adjusted baseline, the difference may be claimed as emissions reductions. However, if the emissions in the reporting year are greater than the adjusted baseline, the difference is treated as an emissions increase.

This formula for determining reductions is not an intensity-based approach at all, but essentially requires absolute reductions in emissions, albeit from an adjusted baseline. It does not provide reductions based on improvements in a generator's emissions intensity. And since electricity generators are required under the draft Technical Guidelines to use this formula, they cannot report or register reductions based on improvements in their overall intensity. That is inconsistent with EPAct section 1605(b)(1)(B), which directs that the guidelines establish procedures for the accurate voluntary reporting of information on. . .reductions of. . .emissions. . .through any measures."

No other sector is subject to this particularly stringent benchmark/adjusted baseline/performance standard approach. It would discriminate against electric generators. Moreover, it would be punitive because it would prevent electric generators from fully capturing their avoided emissions associated with electricity exports. DOE's discriminatory treatment of electric generators – similar to its treatment of our industry in the DSM area – is unsupportable because the solution is to fashion approaches that avoid double-counting, not penalize the power sector in favor of its customers. **Therefore, we**

**strongly recommend that DOE abandon the benchmark/adjusted baseline/performance standard approach with respect to avoided emissions associated with electricity exports and adopt the same straightforward method of calculating such avoidances that other sectors enjoy.**

4. Section 300.8 should treat plant closings and government requirements equally.

It is unclear whether section 300.8 applies to reporting entities choosing to report emissions and reductions, those choosing to register emission reductions, or both. However that issue is resolved by DOE in identifying which sections and subsections of the revised General Guidelines apply to reporting, registering or both, there is a concern with section 300.8(j) regarding the provisions applicable to "plant closings" and "government requirements."

Section 300.8(j)(1) calls for a reporting entity's report of "emissions reductions" to "indicate" whether they "were the result, in whole or in part, of plant closings, voluntary actions, or government requirements." Thus, whether any of these three causes of such reductions are significant or miniscule, the report must "indicate" which, if any, of these events resulted in reductions. It is unclear what DOE intends to be encompassed by the vague word "indicate." Presumably, all that is intended is a brief statement in the report as to which of these events resulted, "in whole or in part," in reductions. If more is intended, not only is clarification needed, but also an explanation of why more is needed.

It also is unclear why the report must "indicate" that the resulting reductions are due to "voluntary actions," since the second sentence of section 300.8(j)(1) specifies that where the report does not "indicate" that the reductions are due to either "plant closings or government requirements" (or both), they will be presumed by DOE to be the "result of voluntary actions."[29] Silence on the matter in the report should trigger that presumption and make such indication unnecessary.[30]

Oddly, sections 300.8(j)(2) and (3) treat reductions resulting from "government requirements" differently than those resulting from "plant closings." In the case of the former, if the "reductions were associated, in whole or in part, with U.S. or non-U.S. requirements," the report in general merely has to "identify" the requirements and "the effect" such requirements had on the reductions. Whatever that "effect" may be, apparently such reductions will "qualify for registration," although that is by implication because the provision is otherwise silent.[31] As to plant closings, if the reductions, whether significant or not, are the "direct result" of closings "that caused a decline in

[29] The provision does not indicate whether, how, when and under what circumstances the presumption might be rebutted. See previous discussion of rebutting the presumption in section II.B.3.a.i. In addition, we question whether this presumption should be by DOE instead of EIA consistent with section 300.12.

[30] In addition, if 18 U.S.C. § 1001 applies to the report, that should buttress such silence. See discussion of this statutory provision in section II.D.5, *infra*.

[31] The term "U.S." is defined in section 300.2 to include the "50 States, the District of Columbia," Puerto Rico, the Northern Mariana Islands, Guam, American Samoa and other U.S. territories, but strangely not the federal government. Yet the reference in section 300.8(j) to "non-U.S. government" would appear to cover local governments and foreign countries. **We presume that the lack of any reference to the federal government is an oversight, and we recommend that it be corrected consistent with 1605(b).**

output," the "report must identify the reductions," and they "do not qualify for registration."[32] Neither the preamble nor section 300.8 explains why government requirements and plant closings are treated differently.

We are particularly concerned about this distinction because it is wholly inconsistent with the provisions of EPAct section 1605(b)(1)(C), which direct DOE to "issue guidelines" that "shall establish procedures for the accurate voluntary reporting of information on . . . reductions. . .achieved as a result of –

(i) voluntary reductions;
(ii) plant or facility closings; and
(iii) State or Federal requirements . . ."

This statutory language does not treat any of these three actions differently, and it does not authorize DOE or EIA to do so. Each is treated equally in the statute. There is no basis in the statute to do otherwise, nor is any offered by DOE as an explanation for its unequal treatment. Therefore, each should be treated equally in section 300.8(j).

This unequal treatment is particularly troubling with regard to the electric utility industry, which, when it closes plants or units, does not create a migration or "leakage" issue but rather may do so for reasons of lack of demand; substitution of nuclear, renewable or

[32] Section 300.8(j)(2) states that "DOE" – which, consistent with nn. 1, 14 and 15, presumably should be EIA – "presumes that reductions calculated using the emissions intensity method do not result from a decline in output," which seems to say that in the context of that "method," reductions due to plant closings must be reported but such reductions are not disqualified. Apparently, they are disqualified only in the case of absolute reductions, but there is no explanation as to why. Moreover, the section again does not indicate whether, how, when and under what circumstances that presumption might be challenged.

other energy sources; or for other economic reasons that could result in the reduction of emissions. There is nothing in section 300.8(j) to indicate that such reductions are not real reductions. **We recommend that sections 300.8(j)(1) through (3) be modified to read as follows:**

> ***(j) Emission reductions associated with plant closings, voluntary actions and government (including non-U.S. regulatory regimes) requirements.***
>
> **(1) Each report of emission reductions should explain whether the reported emission reductions were, in accordance with section 1605(b)(1)(C), the result, in whole or in part, of plant or facility closings or government requirements. Reductions that were not the result of plant or facility closings or government requirements are presumed to be the result of voluntary actions.**
>
> **(2) If emission reductions were, in whole or in part, the direct result of plant or facility closings or government requirements that caused a decline in output, the report must identify the reductions as such. DOE presumes that reductions calculated using the emissions intensity method do not result from a decline in output.**
>
> **(3) If the reductions were associated, in whole or in part, with Federal, U.S. or non-U.S. government requirements, the report should identify the applicable government requirement involved and the type of effect these requirements had on the reported emission reductions. If, as a result of the reduction, a non-U.S. government issued to the reporting entity a credit, other financial benefit or regulatory relief, the report should identify the government requirement involved and describe the specific form of credit, benefit or relief provided.**

5. Economic and other output measure should be allowed.

In calculating emission reductions, DOE expresses a general preference for physical output measures (as opposed to economic or other measures). Section 300.8(a)(2). For the Power Partners[SM] voluntary program, the output measure is carbon emissions per electricity produced, or $CO_2$ per MWH for the power sector generally.

However, individual utilities may choose the same measure or different measures in calculating emission reductions – such as $CO_2$ (or GHG) emissions, $CO_2$ per energy consumed, $CO_2$ per revenues or even $CO_2$ per GDP – for their company voluntary programs. Consistent with President Bush's national GHG-intensity measure – which is economic in output – economic output measures, such as $CO_2$ per revenues or $CO_2$ per GDP, are equally valid for companies. **Accordingly, we recommend that section 300.8(a)(2) be modified to reflect the view that while physical output measures may generally be preferred in calculating emission reductions, economic or other output measures may be used so long as they are clearly explained.** In the final determination for a reporting entity, all calculations of emission reductions for registering entities must be converted to tons anyway, so the output measure need not be of great significance so long as it is reasonable.

6. <u>DOE should clarify the use of emission trading credits for registered reductions.</u>

Another concern is the role that credits purchased by an entity through emissions trading can play in helping the entity register reductions. At least one such market, the voluntary Chicago Climate Exchange (CCX), exists in the U.S., and it is reasonable to assume that entities that report or register under the revised guidelines will participate in such markets.[33] The preamble to the interim final guidelines points out that when the President directed DOE to improve the 1605(b) program, he referred not only to "working with" but also to "taking into account emerging domestic and international approaches," such as CCX. 70 *Fed. Reg*. 15170.

[33] Some CCX entities also are members of Climate Leaders and Power Partners[SM].

Provided the registering entity meets the provisions in the guidelines for ensuring that the emissions associated with the credit are not being reported by another entity, there should be no restriction on their use by an entity in registering reductions. The credits purchased are associated with verified reductions that have taken place elsewhere but make the same contribution in reducing GHGs.

Of concern is the provision in the draft Technical Guidelines – discussing the reporting by an entity of offset reductions generated by a non-reporting third party – that states that the "quantity of offset emission reductions that are eligible for registration is determined independently for each third party. . ." (p. 275). The draft Technical Guidelines further note that this could lead to a situation where "a reporting entity might not qualify for registered emission reductions, although it might still. . .receive recognition" for those third-party registered reductions contained in its report. Such a procedure could lead to significant confusion by entities as to whether certain reductions qualify for registration, because the reporting entities will not be certain what portion of the offset credits that they have purchased in the market are eligible for registration. This may further affect their ability or willingness to report. Furthermore, we have previously noted the last sentence of section 300.12(b), which indicates that registered reductions can be held by the reporting entity for use, including transfer to other entities. **It would be inequitable for DOE to allow such "credited" reductions to be used or transferred by entities under 1605(b) but not to recognize third-party verified emission credits from CCX,**

**California Climate Action Registry, World Resources Institute (WRI) or similar reporting systems.** Accordingly, **we recommend that DOE not restrict, directly or indirectly, the use of emission trading credits for registered reductions.**

C. The Revised Guidelines Are Inconsistent with Voluntary Government Partnerships.

As President Bush indicated in his 2002 policy statement, the 1605(b) data base "tool goes hand-in-hand with voluntary business challenges." Moreover, the President said (in relevant part) that an enhanced data base "will encourage participation."[34] But the revised guidelines are inconsistent in several key aspects with voluntary government partnerships, notably EPA's Climate Leaders and DOE's Climate VISION, *i.e.*, Power Partners[SM] in the case of the power sector.

In previous communications with DOE and other officials, the power sector strongly urged DOE in revising the 1605(b) guidelines to consider three key points (among other issues):

- Flexibility in baselines.
- Registration of stand-alone, credible projects.
- Baseline protection and recognition or registration of past and future actions.

On the first point, as noted at the beginning of these comments, DOE did provide some flexibility with respect to a multi-year baseline. But the start year can be no earlier than 2002, which is contrary to the start years (or base years) of many participants in the

[34] "U.S. Climate Change Strategy, A New Approach," Part 2, p. 9.

Climate Leaders programs. In addition, no recognition of pre-2002 projects or reductions penalizes utilities that engaged in voluntary actions to reduce GHGs. As a result of actions in support of Climate Challenge and Climate Vision, many utilities shut down older less efficient power plants, increased low-emitting and non-emitting generation and completed heat rate improvement projects prior to 2002. Not providing any form of recognition in the 2005 version of the 1605(b) guidelines actually puts these utilities at a disadvantage. They are starting from a lower emissions baseline and their options for continuous emissions reductions (as required for registering reductions) are less than would be the case if they had done nothing at all. In contrast, the WRI/WBCSD reporting program allows for any base year/base period for which verifiable emissions data are available. **This has serious ramifications for utility participants in both Climate Leaders and 1605(b), because they will be compelled to report inconsistently to two or more government agencies and because their pre-2003 reductions cannot be registered under 1605(b).**[35] See also comments of Bill Fang of

[35] The preamble asserts that "[o]nce the revised General and Technical Guidelines take effect, the 1605(b) program will serve as the primary public emission and emission reduction reporting mechanism" for not only DOE's Climate VISION Program, but also Climate Leaders, while noting that the "establishment of consistent reporting rules for all Federal greenhouse gas reporting programs was supported by many of the comments received by DOE." 70 *Fed. Reg.* 15171 (emphasis added). The preamble notes further that "specific requirements of these other programs" for such reporting "may be more prescriptive in some areas than" those of the "revised 1605(b) guidelines" and contends that those more specific requirements "should not prevent the use" of the 1605(b) program "as the means" for "participating entities" reporting emissions and reductions under the above named programs. *Id.* (emphasis added). **But in fact it is the 1605(b) interim final guidelines that are more "prescriptive" than the Climate Leaders' reporting provisions, which is contrary to the above preamble contention.** Section 1605(b) affords DOE sufficient discretion in fashioning the guideline "procedures" to

EEI, DOE Workshop Transcript, p. 97. **Our strong recommendation is that DOE modify the guidelines to allow flexible baselines to those registering entities electing to undertake voluntary numerical commitments in other programs, such as Climate Leaders.**

As to the other two points, as previously discussed, DOE has allowed neither registration of stand-alone projects nor baseline protection and registration or recognition of past and future actions. Of course, if DOE provides recognition or registration of past actions, it could obviate the problem raised by the first point regarding lack of flexible baselines.

In short, the 1605(b) guidelines should be the handmaiden of voluntary programs under this Administration. To the extent the revised guidelines do not address the three critical points discussed above, we reiterate that they discourage participation in voluntary climate programs and do not serve the President's purposes.

As we have informally discussed with DOE and EIA officials, there are any number of other ways to improve the integration of Climate VISION and Climate Leaders into 1605(b). Discussed throughout these comments, these improvements may be summarized as follows:

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ensure that the voluntary programs (for which the guidelines "serve" for reporting purposes) govern the guidelines' scope and content.

- **Encourage participation by 1) removing tough obstacles to registration[36] and 2) providing more flexibility in baselines, particularly for entities with numerical commitments.**

- **Through agreements or other arrangements, allow entities that incentivize or are primary financial sponsors of voluntary actions to register GHG reductions (*e.g.*, DSM, coal ash re-use, sequestration and other projects and activities).**

- **Create a specific subset in the 1605(b) data base for utility-assisted customer reductions (*e.g.*, DSM, coal ash re-use).**

- **Create clearer and more robust provisions for project-based registration, with the understanding that Power Partners[SM] will rely upon projects as their primary reporting system under Climate VISION.**

- **Allow registration of emission reduction credits from the Chicago Climate Exchange or other registries (*e.g.*, WRI, California Climate Action Registry).**

- **Allow stand-alone project-based registration of off-system reductions (*e.g.*, DSM, sequestration), or alternatively, maintain the unitary 1605(b) data base with parity between project-based and entity-wide reporting.**

D. Many Provisions Need Modification for Practical and Flexible Implementation of the Reporting System.

1. DOE's designation of the guidelines as a rule is contrary to the legislative history of section 1605(b) and could lead to administrative challenges.

In our comments on the 2003 proposed General Guidelines, we pointed out that under section 1605(b) of EPAct the "legislative history of the 1992 law shows that the House-Senate conferees did not intend that the guidelines – which are to establish procedures

[36] These obstacles to registration are detailed in section II.B.

for. . .voluntary reporting of information (section 1605(b)(1)) – should be designated as a rule of any kind."[37] We said:

> **Such a designation appears to be unauthorized and inappropriate. It is also unwise because it could be read as establishing the guidelines as rules or regulations with the force of law and enforceable in a court of law** (particularly in the absence of any statement in the preamble to the contrary and the lack of justification in the preamble for the rule designation). **This, in turn, could invite litigation and embroil the government and reporting entities in disputes over the legal interpretation and enforceability of various provisions in the guidelines.**

EEI's Comments of February 17, 2004, p. 17 (emphasis in original).

At the same time, EEI expressed support for proposing the General Guidelines in the *Federal Register* and "even codifying them in the C.F.R.," saying "it is a better approach than the one adopted by DOE in 1994 for the current guidelines." However, we added that such "policy must conform to the enabling statute and its history, which does not support such publication as a rule." *Id.* at p. 19.

The preamble to the interim final guidelines notes EEI's previous exchange with the Director of the Federal Register and that EEI said, referring to the designation, that "it is unlawful and inappropriate to codify the General Guidelines." 70 *Fed. Reg*. 15176.[38]

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[37] This legislative history was included with EPICI's September 25, 2002, Supplemental Comments to DOE, which is in the DOE docket (see EEI's Comments of February 17, 2004, p. 15) and is incorporated by reference herein.

[38] The notice Summary interchangeably refers to the guidelines as "interim final General Guidelines" and the "Interim final rule" and in the Discussion refers to them as the "revised General Guidelines," without explaining any differences. 70 *Fed. Reg*. 15169. In the Introduction, DOE explains that it "previously indicated" an intention to "provide

However, EEI was not concerned, and is not now, with codification *per se*. Our concern is with the designation of the 1605(b) "procedures" or "General Guidelines" as a "rule" when the underlying statute and its legislative history do not support such designation.[39] As we pointed out in our prior comments, the Director of the Office of the Federal Register did not respond to our comments about the legislative history of section 1605(b).

The preamble to the interim final guidelines indicates that DOE also was non-responsive to that history. Instead, DOE states that such guidelines "are a 'rule' within the meaning

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for further public comment . . . through a supplemental notice of proposed rulemaking," but later "decided to provide for further comment through the device of a notice of interim final rulemaking. . .because. . .the main revisions to the initially proposed General Guidelines were relatively few. . .and were not significant enough to warrant a reproposal as another notice of proposed rulemaking." *Id.* at 15170 (emphasis added). However, this explanation fails to note that the 2003 version of the General Guidelines repeatedly made reference to the Technical Guidelines that did not then exist. Their publication on March 24, 2005, for public comment and their incorporation by reference, together with the number of changes made by DOE in the General Guidelines, were certainly "significant," particularly since the Technical Guidelines, the revised General Guidelines and the yet to be issued EIA forms will "fully implement the revised Voluntary Reporting of Greenhouse Gases Program." Most importantly, 1605(b) does not require the "device" of a notice of interim final rulemaking, nor, as explained below, does 5 U.S.C. § 553(b).

[39] The preamble adds that the "revised General Guidelines will be more accessible to the public, if they are preserved" in the CFR. We certainly agree. However, the Technical Guidelines, which are widely referred to in the interim final guidelines, are not proposed to be added to the C.F.R., and thus they will not be "more accessible to the public," although they are incorporated by reference in the interim final guidelines (see section 300.13). Indeed, the Explanation pages of 49 C.F.R. Parts 400-599 (2004) contemplate potential difficulties on accessibility when they state (at p. vi):

> What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 741-6010.

of that term in the Administrative Procedure Act (5 U.S.C. 551(4)),[40] and they were properly classified as a 'rule document' by the Office of the Federal Register," which is not a justification for the designation. Certainly, it is not dispositive of the matter. First, DOE should not resort to the Administrative Procedure Act's (APA) definition of a "rule" to justify this designation if, as we contend, Congress, in enacting 1605(b), considered whether to establish these "procedures" in the rule context and expressly discarded the idea. Second, DOE apparently did not consider the rulemaking provisions of the APA, which are also relevant and which, among other things, provide for a "notice of proposed rulemaking" being published in the *Federal Register* (5 U.S.C. § 553(b)). However, section 553(b)(1)(A) provides that subsection (b) "does not apply. . .to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. . . ," except when "notice or hearing is required by statute," which is not the case for section 1605(b), as it only provides for an "opportunity" for comment.

Relevant to that subsection is a decision by the U.S. Court of Appeals in American Trucking Association, Inc. v. Interstate Commerce Commission, 659 F.2d 452 (5th Cir. 1981). In that case, which was an effort by the plaintiffs to require the Interstate

[40] 5 U.S.C. § 551(4) defines the term "rule" to mean:
> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Commerce Commission (ICC) to convert "guidelines" issued by the ICC to a rule, the court said that:

> Congress. . .required an administrative agency to follow specific procedures in adopting regulatory rules. It exempted from these procedures, however, general policy statements designed to inform rather than to control. For this reason, the APA itself draws a distinction between rules and guidelines. The APA requires all agencies to conform to its requirements in promulgating rules, but excepts 'interpretative rules' and 'general statements of policy' from the requirements. 5 U.S.C. § 553(b)(3)(A). The APA, however, also does not otherwise describe the characteristics of each classification.

*Id*. at 462 (emphasis added).

The court went on to say:

> There are two criteria for differentiating rules from guidelines. These were considered by the court in American Bus Ass'n v. United States, 201 U.S. App. D.C. 66, 627 F.2d 525 (D.C. Cir.1980), in an analysis with which we agree. A policy statement is in reality a binding norm (a rule) unless (1) it acts only prospectively, and (2) it "genuinely leaves the agency and its decision-makers free to exercise discretion.

*Id.* at 463.

As in the ICC case, this first criterion is met by the interim final guidelines. They are prospective. Second, they are intended to give, consistent with the statutory words, DOE and EIA a large measure of "discretion."[41] However, as noted in the ICC case, "there are sinews of command beneath the velvet words" of the guidelines. *Id.* at 463.[42] We note

[41] See statement of DOE official quoted on p. 48, *infra.*

[42] Subsequently, in Western Coal Traffic League. v. U.S., 694 F.2d 378, 392 (5th Cir.1982), the same court referred to the American Trucking case and said, "As we there held, the status of guidelines as 'rules' is determined by their binding character."

DOE's use in the interim final guidelines of words such as "must" (sections 300.3(a) and (c), 300.4 (a) and (b), 300.5(f), 300.7(a), 300.10(a)), "requirements" (sections 300.12 (b) and (d)) and "prerequisite" (section 300.6(a)), as opposed to the use of words such as "may," "can" and "encouraged" in the same guidelines.[43]

At the workshop, DOE spoke of the word "requirements" in the context of "recognition" and said:

> What we've set up in the guidelines is a type of recognition and that is a recognition for registered reductions. In order to get that recognition, we've set out a number of requirements that entities who want to participate in the program would have to meet. But, of course, participation is entirely voluntary.

DOE Workshop Transcript, p. 281 (emphasis added). Earlier, DOE said, "We very consciously decided in many cases to not use the kind of specific language that might be regulatory in nature." *Id.* at 132 (emphasis added). We are concerned that DOE may not have succeeded in its efforts.

We understand that the designation of the revised General Guidelines as a "rule" does not change the voluntary nature of the program in that no entity is required to participate, and

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The court added, "The fact that the Commission used the term 'guidelines' is not controlling: it is the impact and not the phrasing that matters. * * * The *American Trucking* test primarily identifies 'rules' by whether the agency *intends* them to control the course of its future proceedings." *Id.* at nn. 61, 62 (emphasis in original).

[43] For the draft Technical Guidelines, the words "shall" and "must" appear at pp. 5, 6, 7, 8 and 12, while "should" appears in many other pages of the Technical Guidelines, which, as stated in section 300.13, are incorporated by reference. The "legal effect" of that incorporation by reference "is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. § 552(a))" and "[t]his material, like any other properly issued regulation, has the force of the law." Explanation, 49 C.F.R. Parts 400-599, p. vi (2004). **Having "Technical Guidelines" treated as if they are "regulations" that have "the force of law" is of serious concern.**

even if an entity chooses to participate, it can choose to report or register. That is not our concern. Our concern with the "rule" designation, coupled with the use of the above often-used words of command, can be said to stem largely from the review, acceptance and rejection provisions of section 300.12 and their application. With such designation, there could be an effort by some to challenge or to raise questions administratively with DOE and EIA about decisions regarding such review, acceptance, registration or rejection of reports and reductions, which could result in DOE, EIA and volunteer reporting entities expending additional resources and effort to address such challenges or questions. Such a possibility was at least alluded to at the workshop by the representative of the Natural Resources Defense Council:

> Just from the comments here today, you know, even though on the conceptual approach there seems to be a lot of questions, let alone the details of implementing this in the real world in companies, it's going to be messy. A lot of different decisions are going to get made. You know, for example, companies in the same sector might choose different intensity measures or different ways of dividing up their entity into subentities. That seems to cut against the grain o[f] achieving consistency or reliability when it's reported.
>
> I'm wondering again if there will be any review by any government agency about the choices that are made and whether any further, you know, efforts will be made to achieve those goals.
>
> MR. FRIEDRICHS: Understood. It's our intent to give pretty broad discretion to the reporting entities to select their own metrics and to justify that se[le]ction. The reporting requirements do require the reporting entities to specifically identify what metric is used and to explain why it was chosen. We're hoping that this ensures the kind of transparency which is needed to provide some credibility to the measure used by the individual reporter.
>
> EIA gives a review to all of the reports to ensure completeness and internal consistency of the reports, but they are unlikely to sort of second-guess an output metric by a particular reporter.

DOE Workshop Transcript, pp. 292-93 (emphasis added).

While we understand that DOE's intent is to be flexible, informal and non-controlling and not to treat reports and registrations in a regulatory context, the rule designation may trip up DOE and EIA in this regard. Moreover, there are no benefits to reporting entities of the designation, because, as we previously noted, guidelines or "interpretative" bulletins may be included in the C.F.R. without being in the form of a rule. See EEI Comments of February 17, 2004, p. 20 (referring to the Federal Register Director's January 23, 2004, letter to EEI explaining that "many other agencies have codified guidelines" in the C.F.R. as non-rules).

The preamble states that placing the interim final guidelines in the C.F.R. "will not affect the rights of reporting entities because codification of rule documents does not affect their nature as substantive or procedural or legally-binding or non-binding." 70 *Fed. Reg.* 15177. We again emphasize that we have no concern with codification *per se*. However, the above statement is not helpful because DOE fails to state further in either the preamble or the interim final guidelines that such guidelines are "procedural" – as stated in section 1605(b)(1) – and are not, and should not be construed to be, "legally binding." At the very least, **Part 300 should make it clear that both the General and Technical Guidelines are procedural in nature – consistent with the statute – and either are not legally binding or are nonbinding.**

2. The new guidelines and forms should be effective for reporting purposes in 2006.

The preamble to the interim final guidelines explains that it is DOE's intention to publish in the *Federal Register* a "notice of termination that will take effect and terminate" the "existing" 1994 General Guidelines "immediately prior to the revised General and Technical Guidelines taking effect," although DOE adds that EIA "continues to maintain in its Voluntary Reporting of Greenhouse Gases data base all reports received" under the existing guidelines. 70 *Fed. Reg.* 15171, 15182. The preamble also states that the "interim final rule will be effective September 20, 2005," as will the "Draft Technical Guidelines" that have been "approved" for "incorporation by reference." *Id.* at 15169. The preamble properly recognizes that if this date "proves to be insufficient for considering public comments and finalizing" the guidelines, DOE will "delay" that date. *Id.* at 15170. Since DOE has extended the comment period to June 22, 2005, we presume such a delay will be necessary. *Id.* at 24302. Lastly, because DOE has designated the interim final guidelines as a rule within the meaning of that term in 5 U.S.C. § 551(4), Part III of the preamble (titled "Regulatory Review and Procedural Requirements") to the interim final guidelines states in paragraph K (titled "Congressional Review") that pursuant to 5 U.S.C. § 801 "DOE will report to Congress the promulgation of this rule prior to its effective date." *Id.* at 15182.[44]

[44] Note that 5 U.S.C. § 801(a) requires that "[b]efore a rule can take effect, a Federal agency promulgating" such rule "must submit to Congress" and the "Comptroller General" a "report," which includes the rule, a "concise general statement relating to the rule, including whether it is a major rule," and the proposed effective date. In addition, 5 U.S.C. § 804 defines a "rule" as having "the meaning given such term in section 551" of title 5 of the U.S. Code. The agency must "make available" more listed information to

Relevant to the issue of when the reporting guidelines will be effective is the status of the new EIA forms, including EIA's proposed Simplified Emissions Inventory Tool (SEIT). The preamble to the draft Technical Guidelines states:

> EIA, which is responsible for the operation of the 1605(b) program, is preparing a set of draft forms for reporting under the revised guidelines. Pursuant to the Paperwork Reduction Act of 1995, EIA plans to issue a **Federal Register** notice soliciting public comment on these draft forms as soon as practicable and to complete the comment review, and revisions resulting from that review, before the effective date of the guidelines.

*Id.* at 15169.

At the April 26 DOE workshop, EIA said that "we are presently drafting the forms as they reflect the General and Technical Guidelines as drafted." DOE Workshop Transcript, p. 150. However, if those guidelines "change a little" or a lot, EIA will have to "tweak" them. *Id.* EIA plans to give notice of the forms "shortly after the comment period closes." *Id.* As to the publication thereof, EIA said:[45]

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the Comptroller General. The report is then referred to the appropriate committees of both houses of Congress. If it is not a "major rule," it "shall take effect" as provided by law. Paragraph K proposes that the report to Congress will state that the rule is not a "major rule" as defined by 5 U.S.C. § 804(2). 70 *Fed. Reg.* 15182.

[45] EIA has requested that the Office of Management and Budget (OMB) approve a two-year extension of the Forms EIA-1605 and EIA-1605EZ under the current guidelines. 70 *Fed. Reg*. 15663. On April 22, 2005, we supported that request, which we understand has been approved by OMB:

> EEI strongly urges OMB's prompt approval of the EIA request for a "two-year extension of approval" of the forms that would begin on April 30, 2005, which we understand from EIA is when the current OMB approval expires. In commenting on a November 2004 notice (69 *Fed. Reg*. 64735) last year, EEI recommended such a two-year extension, even though EIA, at that time, only requested one year. We continue to believe that the longer extension is in the public interest and is cost effective, especially since the Department of Energy's (DOE) proposed revision of the existing guidelines for voluntary reporting of

> MR. McARDLE: Under the Paperwork Reduction Act, anytime you do what's called an ICR, an Information Collection Request, the statistical agency or the data collection agency issues a Federal Register notice and either puts the forms in the Federal Register or makes them available.
>
> * * * *
>
> We have. . .a 60-day comment period on the forms. We gather those comments, and then we normally issue. . .a second notice where people submit comments to OMB. Once OMB comes to agreement with EIA that the forms reflect the data collection elements that we need to collect, then the forms would become finalized and effective.

*Id.* at 151.

DOE, EIA and OMB have considerable work to do before the interim final guidelines, the draft Technical Guidelines, the new EIA forms and the SEIT are all finalized and effective for use by any reporting entity. There apparently is some hope at DOE that they could be effective for calendar year 2005. In our view, that is unrealistic and could be burdensome to reporting entities. Reporting entities need a reasonable amount of time to digest the guidelines and the forms and to prepare to respond to them. Moreover, if they were to become effective in 2005, they could be compelled to create and collect data retroactively, which would be an unnecessary and costly burden. Even regulatory

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> emissions and reductions under section 1605(b) of the Energy Policy Act of 1992 will not be finalized until this September at the earliest.
> * * * *
> In the meantime, the above-referenced EIA forms must continue to be approved and available for use by EEI members and others participating in voluntary reporting under the existing section 1605(b) guidelines. OMB's approval of this two-year EIA extension request will help ensure reporting continuity, pending finalization of the revision and the adoption of the new reporting forms and OMB approval of those forms.

programs generally allow for reasonable implementation periods, and ordinarily do not require retroactive application and collection of data.

Given the extension of the comment period – which we requested and welcome – we also question whether EIA will be able to finalize the forms and request and receive OMB approval thereof well before the end of 2005. In addition, there is the report to Congress. Based on the level of complexity and the amount of information that needs to be collected, at least one year is needed prior to the first submittal year for entities which plan to register reductions. This is to understand the program and prepare the required documentation. **Our recommendation is that DOE and EIA should strive to finalize the guidelines and adopt the forms in 2005 and make them effective for 2006 reports to be submitted to EIA in 2007.**

As to the issue of termination of the existing guidelines, we note that section 300.1(e) of the interim final guidelines provides that "EIA continues to maintain" in its data base under section 1605(b) "all reports received pursuant to DOE's October1994 Guidelines" and that "[t]hose Guidelines are available from the EIA." We presume and expect that 1) section 300.1(e) will be part of the final version of the General Guidelines adopted by DOE, and 2) while the current guidelines will be terminated in favor of the revised guidelines, provision will be made in the termination to ensure that they will continue to be applicable to reports included in the data base under those guidelines and be "available from the EIA."

3. <u>While improved, the *de minimis* definition and its application in section 300.6(g) still present unnecessary and potentially costly administration problems that can be avoided.</u>

Section 300.2 now includes a *de minimis* limit for reporting at 3 percent of a reporting entity's "total annual" $CO_2$-equivalent emissions. The definition of the term "*de minimis*" has been changed "as a result of public comment" from the 2003 version with the intention, according to the preamble, of allowing "reporters to omit emissions from their inventories that are, in total, less than 3 percent of the entity's emissions." 70 *Fed. Reg.* 15178. The preamble explains that the "3 percent level appears to be the minimum level considered practical by many potential reporters" and that in light of the "inherent uncertainty of some of the measurement and estimation methods specified in the guidelines, emissions representing less than 3 percent of an entity's total could be considered immaterial. This approach ensures that all reporters may exclude the same percentage share of their total emissions." *Id*.

That is an improvement over the percentage/tonnage alternative limit of the 2003 proposal, although as stated at the recent DOE workshop on the guidelines, some continue to support a limit of 5 percent and at least one member company of EEI that has examined the issue rather extensively continues to urge a "qualitative" approach. At the April 26 DOE workshop, Lee Ann Kozak of the Southern Company referred to the draft Technical Guidelines' discussion of the "Principles" that DOE set forth in "defining a credible report." As to the principle on "accuracy," she pointed out that it states (p. 3):

> In deploying limited resources, reporters should emphasize the emission sources that account for the largest share of total emissions at the possible expense of minor sources.

Kozak said that this "*de minimis*" requirement of a 3 percent threshold "seems to go totally against" this quoted statement, noting that "emissions from electricity generation. . .are probably 95, 98 percent of the total. Yet the amount of time and effort and resources that would have to go into quantifying the de minimis emissions just to prove they are de minimis. . .is just huge." DOE Workshop Transcript, pp. 186-87.[46] Currently the way the guidelines are written provides no real relief for large emitting entities because the recordkeeping effort still needs to take place and the information still needs to be included in their inventory reports. Even though these *de minimis* sources may represent 2 percent or less of the total emissions for large emitting utilities, the percentage of time spent collecting and report the data is many times greater.

**While EEI welcomes the shift to a 3 percent limit only, we support either the qualitative approach or an even higher percentage limit (*i.e.*, 5 percent).** The credibility of the reporting program will not be lessened by adoption of either.

As a separate matter, there are some differences between the preamble and the definition in section 300.2 and some problems with the definition itself. First, the preamble, as noted above, states that reports may "omit emissions" that "are, in total, less than 3

[46] Unlike other sectors, EPA requires, pursuant to regulations issued under section 821 of Pub. L. No. 101-549 (42 U.S.C. § 7651K note), that the electric utility industry monitor $CO_2$ emissions and annually report "such data" to EPA. The revised General Guidelines should be consistent with that provision of law.

percent" of the entity's emissions. However, the proposed definition provides for the omission of emissions that "are less than or equal to 3 percent of the total annual" $CO_2$-equivalent emissions. **The section 300.2 definition version of "less than or equal to 3 percent" rather than "less than 3 percent" is the proper approach, subject, of course, to adoption of the qualitative approach or a higher limit.**

**Second, we recommend that in the definition the words "and of one or more greenhouse gases" be deleted.** The words are problematic because they would lead to an aggregation of "sources" and "gases," which presumably is unintended by DOE. The defined term "emissions" includes all six gases, so there is no need to repeat the words "greenhouse gases."

**Third, section 300.6(g)(1)**, in essentially restating the definition, **states that the reporting entity "may include particular sources of emissions or sequestration," indicating that the words "or sequestration" should be added after "sources" in section 300.2.**

Fourth, section 300.6(g)(2) adds a feature that once a reporting entity excludes from its "annual reports" (which appear to include those that are for the purpose of merely reporting as well as those for registration purposes) "*de minimis* emissions," such entity "must re-estimate the quantity of excluded emissions after any significant increase" therein, "or every five years, which ever occurs sooner." We agree that in connection with annual reporting, if a "significant increase" occurs, the reporting entity should be

required to so re-estimate. However, in the absence of such "significant increase," there is no reason for requiring the entity to go through a resource-intensive re-estimation exercise every five years that would merely support the *status quo*. There is no compelling reason for such a five-year provision, given the fact that 1605(b) is a voluntary program and that these are merely guidelines. **Therefore, we recommend in section 300.6(g)(2) that the sentence end after "such emissions."**

4. <u>The procedures in section 300.12 for review, acceptance, registration and rejection of 1605(b) reports continue to need modification.</u>

The preamble to the interim final guidelines explains that "DOE received few substantive comments" on section 300.12 regarding acceptance by EIA of voluntary reports and the registration of emission reductions. Nevertheless, DOE said that it "has made some changes to more clearly specify the procedures EIA should follow in reviewing and accepting or rejecting reports." 70 *Fed. Reg*. 15180-81.

EEI was one of the respondents submitting comments on February 17, 2004 (pp. 117-20), on the 2003 version of the General Guidelines and welcomes a number of changes to this section, several of which appear to reflect some of our comments. However, there are still a number of concerns about this section.

Our understanding of section 300.12 is that all reports submitted to EIA, whether for registration or not, are either "accepted" as being "consistent with this part and with the Draft Technical Guidelines" or rejected by EIA (see subsections (a) and (c)). We also understand that if a report is not accepted, it may later be resubmitted under subsection

(c) for "further consideration at anytime." If an accepted report is also submitted for registration purposes, EIA, in accordance with subsection (b), must review it to, among other things, "confirm" that the report "complies with the other provisions of this part."[47] If the report's "reductions" meet "these requirements" (*i.e.*, those set forth in the first two sentences of subsection (b)), "DOE will notify" the reporting entity that such reductions "have been credited" to the entity as "registered reductions." If EIA "determines" that the reductions "intended" by the reporting entity to be registered "do not qualify," the report of the reductions also may be resubmitted with modifications for "further consideration at any time." However, the EIA determination that the reductions "do not qualify" does not appear to affect the fact of acceptance by EIA of the report under subsection (a).

Indeed, it is our further understanding of section 300.12 that EIA acceptance of reports and DOE[48] crediting of reductions for registration purposes are two distinct and separate functions. Thus, it would seem that once a report, whether for reporting or registration, is "accepted" by EIA under subsection (a) as being "consistent" with the revised General

[47] The reference to "this part" is apparently to the General Guidelines (10 C.F.R. Part 300). However, in light of section 300.13, titled "Incorporation by reference," the reference to "part" would appear also to be construed to include the "Draft Technical Guidelines." Yet this is unclear because in some sections of the interim final guidelines, there is only a reference to "this part" (see sections 300.9(b), 300.12(b)), and in others the reference is to both sets of guidelines, "these Guidelines" or "DOE's guidelines" (see sections 300.12(d), 300.11(d)). It should be made clear that any reference to the "Guidelines" or "this part" includes both sets of guidelines. If that is not intended, there should be an explanation as to why that is not the case for some provisions but is the case for others. Possibly this could be addressed in sections 300.1 or 300.2.

[48] The reference to DOE presumably should be to EIA. See nn.1, 14, 15, 19 and 29, *supra.*

Guidelines and with the Technical Guidelines, it should, in accordance with the statute, be included in the 1605(b) data base that Congress directed the Secretary of Energy, through EIA, to "establish" within 18 months after enactment of EPAct as "information voluntarily reported" under 1605(b).[49]

However, 300.12(d) provides that EIA "will establish" a data base "composed of all reports that meet the definitional, measurement, calculation, and certification requirements of these Guidelines,"[50] which seems to suggest that EIA is either abandoning its current data base called for in 1605(b) in favor of a new data base covering the new reports as well as reports filed since 1994, or creating a second data base while retaining the current data base for reports filed since 1994. Whichever of these is contemplated by this subsection, it also appears to impose new and additional criteria for deposit of reports in the data base. Yet in subsection (d) there is no reference or indication as to how it is determined, when it is determined or who determines whether the reports accepted under subsection (a) and the registered reductions that qualify under subsection (b) "meet" such criteria.

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[49] Section 300.1(e) refers to this existing data base as EIA's "Voluntary Reporting of Greenhouse Gases" data base. 70 *Fed. Reg*. 15182.

[50] It is unclear why, out of all of the provisions of the interim final guidelines, these four are selected as the sole "requirements" for the reports to "meet." Their selection further illustrates why it is so important, as we urge elsewhere, for the General Guidelines to spell out what provisions thereof apply to reporting, what provisions apply only to registration and what provisions apply to both. At the April 26 DOE workshop, a DOE official said that if an entity "is reporting, it doesn't need to do an entity-wide inventory. It doesn't need to meet the 3.0 minimum quality rating. But it still needs to use the methods identified in the inventory technical guidelines." DOE Workshop Transcript, p. 106. However, these comments do not provide any more information than section 300.12(d) on what constitutes the complete list of "requirements."

The first sentence of subsection (d) appears to be unnecessary. First, this is because, as noted above, EIA has already established the data base, which we assume is "publicly accessible," and can continue to be used for reports under the General Guidelines and the Technical Guidelines. Second, it is unnecessary because it is inconsistent with EPAct section 1605(b)(4) and section 300.12(a). As noted above, once a report is accepted as "consistent" with this "part," under section 1605(b)(4) it should constitute "information voluntarily reported" and should automatically be deposited or included in the data base. Under section 300.12, registration of reductions is, as noted, a separate function that involves notification of the reporting entity by DOE (or EIA). Therefore, **we recommend that the first sentence of section 300.12(d) be amended to read as follows:**

> **All reports that are accepted by EIA pursuant to subsection (a) shall be included in the publicly accessible data base established and maintained by EIA pursuant to section 1605(b)(4) of the Energy Policy Act of 1992.**

As for the second sentence of section 300.12(a), it is preceded by the phrase "[s]ubject to the availability of adequate resources." At the April 26 DOE workshop, DOE and EIA responded to questions about the impact of this phrase on EIA actions notifying reporting entities of the acceptance or rejection of reports:

> MR. FRIEDRICHS: I think EIA's answer would be they will do the best they can to meet that commitment.
>
> Unfortunately, it is extremely unpredictable what the resource requirements will be for reviewing and acting on all of the reports received

> under the revised guidelines. We may get 1000 reports; we may get 10 reports. If we get 1000 reports, I think EIA is going to have trouble responding within six months to all. But that's the reason for the qualifier.
>
> Paul, do you have anything to add to that?
>
> Mr. McARDLE: I agree with you on the budgetary issue. We don't know a priori how heavily subscribed this program will be. Obviously, anything we do is subject to budgetary constraints, so we obviously have to get funding from Congress.
>
> But if we have that funding in place, in terms of notifying people, we would intend to notify people of their acceptance whether they're registered or reported. . . .I don't think going in we would make that distinction. We would notify both, whether they're reporting or registering.

DOE Workshop Transcript, pp. 164-65.

EEI is pleased to see that EIA will notify reporting entities of their acceptance whether the report is submitted for "reporting or registering." Indeed, that is required by subsection (a). Nevertheless, there are two reasons why there is no need for the above phrase. First, if this phrase is needed at all, it is probably needed for the entire section 300.12 and for EIA's implementation of both sets of guidelines, not just for the "six months" period for EIA to accept or reject reports. Further, unless Congress or the President expressly cuts all funds for the 1605(b) program or precludes use of its own appropriations for the program, EIA will not be able to argue that a lack of funding prevents implementation of the program. Second, subsection (a) merely expresses a good-faith EIA intention to act on acceptance within a six-month period. The "six months" is not a deadline and is not mandatory. **Therefore, we recommend deletion of this phrase at the beginning of the second sentence of section 300.12(a).**

Section 300.12(b), titled "*Registration of emission reductions,*" specifies that "EIA will review each accepted report" to "determine if emissions reductions" were properly "calculated" in relation to the "entity's base period" and confirm that the report "complies with the other provisions of this part." It adds that EIA will also "review its records to verify that the entity has submitted accepted annual reports for each year between the establishment of the base period and the year covered by the current report." The section then states that "DOE" will "notify" the reporting entity that "reductions meeting these requirements have been credited to the entity as 'registered reductions. . .'" The reference in section 300.12(b) to "other provisions" is vague, uncertain and open-ended. There is no indication as to what these "other provisions" are. Section 300.12(c) calls for the return of reports if EIA "determines that emission reductions intended for registration do not qualify." There is no mention of a lack of compliance with "other provisions."

EIA review after acceptance for registration purposes should be focused on the "requirements" of the "part" applicable to emission reductions, such as section 300.7, which begins, "Entities that intend to register emission reductions achieved after 2002 must comply with the requirements of this section." As to review of compliance with "other provisions" of this part, we assume that EIA would cover those in its review for acceptance purposes, and this should not be repeated for registration purposes.

**Therefore, we recommend that the first sentence of section 300.12(b) be amended to read as follows:**

> **EIA will review each accepted report of a reporting entity to determine that the emission reductions intended therein for registration comply with the provisions of this part applicable to such reductions and thereby qualify for registration.**

As for the third sentence of section 300.12(b), the reference to "DOE" should be to "EIA," as subsections (b) and (c) require that EIA make the relevant determinations. Logically, EIA would make the notifications. Thus, **consistent with the provisions of EPAct sections 1605(b)(2) and (4) and in order to give some indication of a time frame for EIA to act on registration reports, we recommend that the words "DOE will notify the entity that. . ." be changed to "EIA intends to notify the reporting entity within 90 days of acceptance that. . ."**

The third sentence also states that the registrations "have been credited" to the entity as "registered reductions," but fails to state where the credits will be retained or deposited by EIA. The "data base," which, under the statute, is the repository of all "information" voluntarily reported, could include the registrations. **Therefore, we recommend that the words "in the data base" be inserted after "credited" in the third sentence of section 300.12(b).**

With respect to rejections, section 300.12(c) provides, as noted above, that if a report is not accepted, or if accepted but determined to "not qualify" for registration, "the report

will be returned. . .with an explanation of its inadequacies." It then provides an opportunity for the reporting entity to "resubmit a modified report for further consideration at any time."

Apparently, the rejection concept is new to EIA. At the DOE April 26 workshop, EIA's Paul McArdle said that in his five-year tenure, he did "not recall. . .ever sending a rejection letter," although he did indicate that EIA now sends "a letter first" and then a certificate that the "data has been accepted into the database." DOE Workshop Transcript, p. 174. He added that it is "not something we normally do. We normally try to work with the company to make sure we can get it right." *Id.* When asked if a letter was "envisioned under the proposed guidelines," he responded. "I don't see it in the proposed guidelines at this juncture, either." *Id.* at 175.

While section 300.12(c) does not expressly state that the accompanying "explanation of inadequacies" be in the form of a letter, it appears to contemplate a somewhat more formal rejection process over the more informal "work with the company" process that McArdle says is employed by EIA under the current guidelines. As the Georgia Pacific representative, Sergio Galeano, pointed out, an "entity goes through certain expenditures . . .to obtain a registration." *Id.* at 173. There needs to be a "way to know" what the problem was "in order to correct it." *Id.* at 174. The "explanation" of inadequacies would seem to address that concern. However, it would appear that such explanation needs to be formally communicated to the reporting entity.

Georgia Pacific raised the issue of appeal, should the reporting entity not agree with the rejection. *Id.* at 173-74. EEI also raised this question of appeal or challenge to a rejection in our February 7, 2004, comments on the 2003 version of the General Guidelines (p. 120). However, DOE has never responded to the matter.

This section seems to assume that the reporting entity should accept EIA's rejection of a report, whether it be for acceptance or registration, with the only recourse being for the reporting entity to resubmit it, with modifications to address any "inadequacies." However, that is entirely a one-sided approach that presumes that EIA's application or interpretation of the "part" to a report is always correct and that the reporting entity is incorrect. There is no evidence that such a presumption was contemplated by Congress in enacting 1605(b), and it is neither reasonable nor appropriate for DOE to adopt such an approach. **We recommend that in the first sentence of section 300.12(c), after the word "explanation," DOE insert the words "in writing" and amend the second sentence thereof to read as follows:**

> **Within 90 days after receipt of a rejection and explanation, the reporting entity may submit a response thereto informally requesting EIA's reconsideration, and at any time the reporting entity may submit a modified report for EIA, in accordance with this section, which can either accept the report as consistent with this part and the Technical Guidelines or determine, as appropriate, that the reductions qualify for registration.**

We include the word "informally" because such an exchange in the context of voluntary reporting pursuant to "procedures" or "guidelines" is not in the nature of a formal or adversarial process. We trust that DOE and EIA will agree.

5. Section 300.9 should be consistent with section 300.12.

The preamble to the interim final guidelines explains that DOE "received comparatively few comments" on section 300.9 on reporting and recordkeeping, but nevertheless "DOE has included additional guidance. . .to clarify the intent of these requirements, especially with respect to the types of records that must be maintained." 70 *Fed. Reg*. 15180 (emphasis added).

EEI was one of the previous commenters on this section on February 17, 2004 (pp. 108-11). While we welcome the "additional guidance," several of our concerns still have neither been mentioned or discussed in the preamble nor addressed in revised section 300.9.

Section 300.9(a) of the interim final guidelines continues to retain the following sentence:

> To be recognized under these Guidelines, all reports must conform to the measurement methods established by the Draft Technical Guidelines. . .[51]

(Emphasis added.)

[51] It is unclear whether the reference to "these Guidelines" means the revised General Guidelines (*i.e*., Part 300), the Technical Guidelines, or both. There should be a definition of the term "Guidelines" or "part," and then that defined term should be used throughout Part 300.

We do not understand what the word "recognized" means in the context of the interim final guidelines, particularly since the concept of "special recognition" – discussed in the preamble to the 2003 version of the General Guidelines – has apparently been discarded in the 2005 version. Section 300.12(a) speaks of "acceptance" or "rejection" of "all reports" to "ensure" that "they are consistent with this part" and the Technical Guidelines. There is no mention in that section of the concept of "recognition." Moreover, section 300.12(a) clearly states that if the entity report is "consistent with" Part 300 and the Technical Guidelines, it will be "accepted." If it is not, it will be "rejected." We understand the word "consistent" to cover the totality of the guidelines, not just the "measurement methods" of the "Draft Technical Guidelines," which, according to the "Overview" of the Technical Guidelines, have the "purpose" of defining "permissible methods of calculating reportable emissions and reductions" and a "secondary purpose" to serve as a "guide for reporters" (p. 2). Neither "purpose" is a mandate to "conform," and neither purposes conveys the concept of conforming. **Therefore, we recommend deletion of the second sentence of section 300.9(a).**

The last sentence of section 300.9(a) states:

> This requirement applies to the entities that report to the revised Voluntary Reporting of Greenhouse Gases Program registry for the first time as well as those entities that have previously submitted emissions reports pursuant to section 1605(b) of the Energy Policy At of 1992.

(Emphasis added.)

This sentence stems from section 300.9(a)(1) of the 2003 version of the General Guidelines. EEI questioned its purpose and need in our February 17, 2004, comments (pp. 108-109). Those comments apply equally to the 2005 version.

Second, the term "Voluntary Reporting of Greenhouse Gases Program" appears as part of the title of "Part 300" of the revised General Guidelines, *i.e.*, "**PART 300 – VOLUNTARY GREENHOUSE GAS REPORTING PROGRAM: GENERAL GUIDELINES.**" 70 *Fed. Reg*. 15182. While the term is undefined, it could be understood to cover large-emitting entities that choose to report and those that choose to register, as well as small reporting entities. However, whether it does or not is unclear.

Third, as for the word "registry," this may be the only instance that the word appears in the interim final guidelines. New section 300.12(d) uses the word "data base," consistent with 1605(b), and the preamble to the interim final guidelines no longer refers to a "registry," unlike the 2003 preamble. Again, we do not see any purpose to be served in using this word in this section of the revised General Guidelines.

Fourth, in the case of the word "requirement," which has a mandatory or regulatory connotation, it is unclear whether it refers to the first or second sentence of section 300.9(a), or both. If it refers to the first sentence, we suggest that with the discretionary word "may" in that sentence, the word "requirement" is inappropriate. If it refers to the second sentence, we recommended above that that sentence be deleted, which would

render this sentence unnecessary. Moreover, if the reference is intended to be the second sentence, we fail to see its application to "reports" that have been "previously submitted," unless DOE is seeking to apply retroactively the new "measurement methods" to reports submitted under the current guidelines of 1994. If so, we strongly oppose such retroactivity. **In short, we recommend deletion of the third sentence of section 300.9(a) as well.**

**With respect to section 300.9(b)(1), we recommend that the words "DOE has accepted" be changed to "EIA has accepted" in order to be consistent with section 300.12, which refers to "EIA" acceptance or rejection. Similarly, the references to "DOE" in sections 300.9(b)(2) and 300.9(d)(2) should be changed to "EIA."**[52]

**In the first sentence of section 300.9(d), we recommend that 1) the word "must," which also has a mandatory or regulatory connotation, be changed to "are expected to," and 2) the word "adequate" be deleted**. We recommend deletion because, at the April 26 DOE workshop, a high-level DOE official indicated that 18 U.S.C. § 1001 – which generally makes it a crime to "knowingly and willfully" falsify, conceal, or cover up a "material fact"; make "any materially false, fictitious, or fraudulent statement or representation"; or make or use "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" – should apply to

[52] See also nn. 1, 14, 15, 19, 29 and 48, *supra.*

all entity reports and related certifications.[53] Since the word "adequate" is open-ended, vague and subjective, it is neither appropriate nor necessary given the application of the above statutory provision.

**We also recommend that the second sentence of section 300.9(d) be amended to read as follows:**

> **The records should document that the reporting entity's report to EIA is consistent with the revised General Guidelines and with the Technical Guidelines (incorporated by reference, see § 300.13) by including:**

The reason for the change from "DOE" to "EIA" is explained above. Second, the word "basis" is not informative as to what is intended to be encompassed. Third, the word "including" makes the matters listed in subparagraphs (1) – (5) merely illustrative of

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[53] At the workshop, EEI asked whether "entity statements and certifications" are subject to 18 U.S.C. § 1001. An attorney in DOE's Office of General Counsel said, "I don't know why the statute would not apply. . ." and David Conover added that "our intent would be that it would, and some guidance we've received already from our friends on Capitol Hill is that we should make that clear. It is pretty important about what you say in the statement and certification." DOE Workshop Transcript, pp. 142-43. While the workshop inquiry was about entity statements and certifications, it would appear that the statute's application would apply to the "report" itself in section 300.9(d). In any event, we agree with such "friends" that assuming 18 U.S.C. § 1001 applies by its terms to the report or any part thereof, that should be so explained in the guidelines.

In addition, in addressing section 300.11 on verification, John Shideler of NSF-ISR questioned DOE's provisions as to what "verifiers" are being asked to "certify" to, saying there is a "misunderstanding of what verifiers normally do and how they work." *Id.* at p. 135. While we do not know at this time how and to what extent DOE may revise this section as a result of such comments, we are concerned that such revisions could impose more responsibilities on reporting entities that may choose third-party verification, which would make it even more unlikely, partly because of 18 U.S.C. § 1001, that such entities would seek such verification. In our February 17, 2004, comments, we raised legal objections to some of the provisions of this section that have not been addressed by DOE (pp. 114-16).

what records "must" be maintained and permits DOE to expand the list on a case-by-case basis. It is far too open-ended. Since the term "consistent" is the test in section 300.12(a), it should be adequate for section 300.9(d) as well.

6. Some definitions for the interim final guidelines and draft Technical Guidelines need clarification, revision or deletion.

a. General Guidelines definitions

According to the preamble, section 300.2 "defines the key terms used" in the revised General Guidelines. 70 *Fed. Reg.* 15169, 15177. The preamble asserts that "comparatively few changes" were made in the revision of the proposed 2003 version of the General Guidelines definitions and that a "few more terms have been added" in response to public comments. Our review of the definitions compared to the 2003 version indicates that the interim final guidelines revise 10 of the 17 2003 version definitions, add 12 new definitions and deletes three.

At the DOE workshop, EEI noted some concerns with several definitions. DOE urged EEI to identify them in more detail in our written comments and to suggest revisions, modifications, additions or deletions as appropriate.

The interim final guidelines now add the terms ***"Entity or reporting entity"*** as a new definition, which covers both terms as if they are one. While a definition for both may be helpful, we question defining "entity" and "reporting entity" together. They are not synonymous. Moreover, the term "reporting entity" is a statutory term in EPAct section 1605(b)(4). The term "entity" is not. **We recommend that they be defined separately**.

In the case of an "***Entity***," section 300.1(a) states that the "purpose of the Guidelines is. . .to encourage corporations, government agencies, non-profit organizations, households, and other private and public entities to submit annual reports," etc. However, the words "government agencies," "corporate" and "public" do not appear in the definition. The definition refers to "organizations" and "institutions" without regard to whether they are "private," "public," "for profit" or "non-profit," or whether they are intended to include various parts of government, such as those of the federal, state, District of Columbia and local governments; government corporations; and independent establishments, such as the U.S. Postal Service. In addition, there is no mention of individuals other than those that are heads of a household. In short, these generic references to "any business, institution, organization or household" are vague and not comprehensive.

Section 300.3(a) appears to attempt to expand on, or clarify, the definition in the case of a "reporting entity" by saying that a reporting entity "must be composed of one or more <u>legally distinct</u> businesses, institutions, organizations, or households . . . whose operations affect U.S. emissions of greenhouse gases . . ." (emphasis added). Again, there is no mention of "government agencies," etc. Section 300.3(a) then appears to define the words "legally distinct" as they apply to the term "entity" for "purposes of the program" as "any holding company, corporation, subsidiary, partnership, joint venture, business, operating entity, government, government agency, institution, organization or

household that is treated as a distinct entity under an existing U.S. Federal, state or local law" (emphasis added). However, the words "legally distinct," "distinct entity" and "existing" are not a part of the section 300.2 definition of the term "entity" or, for that matter, the term "reporting entity." Moreover, the word "state" is not defined in section 300.2, and thus the reference to that term in the context of defining the terms "Entity or "reporting entity" has the effect of omitting the District of Columbia. The word "existing" is temporally limited, presumably only refers to laws, etc. in effect when the guidelines are finally published and does not refer to future laws that may become applicable.

The definitions should be complete in section 300.2 and should not be restated, explained or expanded upon in one or more of the sections where they are used. It also is important not to use the term or words being defined in the definitions, as in the case of the terms "Entity or reporting entity," First reduction," "Reporting year" and "Total emissions.".

Furthermore, the words "whole or part" do not belong in the definition of an entity, as that concept is covered by section 300.3(b) where it talks about encouraging an entity to "define itself at the highest level of aggregation," while recognizing that some entities "may conclude that reporting at some lower level is desirable." In addition, section 300.2 includes a definition of the term "***Subentity***," which is referred to as a component of an entity.

Therefore, **we recommend that: 1) the words "or State" be added after "U.S." in the section 300.2 definition of the term "United States or U.S."; 2) the definition of the terms "Entity or reporting entity" be deleted; and 3) the following definitions be substituted therefore**:[54]

- "***Entity***" means any independent establishment[55], government corporation, agency, state or local government, organization or institution thereof, or any private or public person that:

  (1) Is recognized as such under any Federal, State or local government law or regulation that applies to it;

  (2) Is located and operates, at least in part, in the United States; and

  (3) The emissions from such operations are released, at least in part, in the United States.

- "***Agency***" shall have the same meaning as that term has in 5 U.S.C.§551(1).

- "***Government corporation***" shall have the same meaning as that term has in 5 U.S.C.§103.

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[54] **With these revisions, we also recommend that section 300.3(a) be revised as follows:**

> **(a) A reporting entity must be composed, in whole or in part, of one or more businesses, public or private institutions or organizations, households, or other such entities having operations that annually release emissions in the United States. Such entities may be defined by, as appropriate, a certificate of incorporation, corporate charter, corporate filings, tax identification number, or other legal basis of identification recognized under any Federal, state or local law or regulation.**

In the case of section 300.3(b), the second sentence is inadequate as it only applies to those entities that are corporations and subject to the Securities and Exchange Commission or that have "charters." The definition of the term "entity" is far broader. **Regarding the third sentence, we urge deletion of the words "certain businesses and institutions" (because those words also do not cover the scope of the defined term "entity") and substitution of "some entities."**

[55] Note that 39 U.S.C. § 201 established the U.S. Postal Service "as an independent establishment of the United States." We presume that DOE would want the Postal Service, with its vast fleets of vehicles and contract carriers, to participate as an entity.

- "***Person***" shall have the same meaning as the term has in1 U.S.C. § 1.[56]

- "***Reporting entity***" means any participant in the General Guidelines that is an entity and that chooses to either register or report emissions from its sources.

- "***State***" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa, and the Commowealth of the Northern Mariana Islands.

**We also recommend revision** of the terms "***Emissions,***" "***Source***" and "***Subentity***" as follows:

> "***Emissions***" means any release of greenhouse gases into the atmosphere from any anthropogenic source.[57]
>
> "***Source***" means any activity that releases emissions.[58]
>
> "***Subentity***" means a part or component of any reporting entity, such as a discrete business line, facility, plant, transportation fleet, or energy-using system, which has associated with it one or more sources of

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[56] The term "person" is also a statutory term of EPAct section 1605(b)(2). Note that 1 U.S.C. § 1 provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise", the word "person. . .include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

[57] The word "Anthropogenic" is defined in the Technical Guidelines Glossary (p. 276) and, as noted below, such a definition should be added to section 300.2, because the term is used in the General Guidelines as well as the Technical Guidelines.

[58] Regarding the use of this definition, in some sections other words such as "facilities," "property" and "vehicles" are used rather than "source" when referring to emissions (*e.g.*, sections 300.2 (definition of "Subentity"), 300.4(b)(3), 300.8(k)). **The defined term "source" should replace those words.** Moreover, 1 U.S.C. § 4 defines the word "vehicle" as including "every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land," which excludes planes and vessels. That is likely not intended here. In addition, the word "facility" is not defined. In sections 300.5(d)(8) and 300.8(e)(4), it is used with the word "manufacturing." However, section 300.7(b)(2) uses the term "manufacturing plant" in the emissions context, not "manufacturing facility." **The term should be "manufacturing source."**

> emissions that can be distinguished from the emission sources of all other parts or components of such entity; and when aggregated with the emissions of such entity's other parts and components, equal the reporting entity's total emissions."

With this revised definition of "***Emissions,***" it is unnecessary to refer to the words "greenhouse gases" in other definitions where the word "emissions" also appears (*e.g.*, definitions of "***Direct emissions***," "***Indirect emissions***" and "***Subentity***").

In the case of "***Source,***" substituting the word "emissions" for the words "a greenhouse gas" is appropriate because the term "emissions" not only encompasses a reference to greenhouse gases, it also includes the concept that such release is "human induced."

However, the word "activity" in the definition of "***Source***" is defined, but not the word "process." We are uncertain of what DOE intends to be covered by the word "process" that is not covered by the word "activity." Both are probably not needed. However, if both are used, both should be defined.

As to "***Activity***," we question the inclusion of the words "economic production or consumption" and "measurable." The word "economic" does not seem to apply to all possible categories of entities that release emissions, such as government agencies. In addition, the words "production or consumption" do not adequately cover all potential categories, such as generation, transportation or combustion. Moreover, the word "measurable" is covered by the term "***De minimis emissions***" and is unnecessary. Therefore, **we recommend** that the term "***Activity***" be defined to mean "any single

category of anthropogenic action that releases emissions or results in sequestration, the annual changes of which can be assessed generally by using a single calculation method."

With respect to the term "***Start year,***" the term "large emitters" is used. That term and the term "small emitters" are used in section 300.5. Although the word "emitter" is not defined in section 300.2, both "Large emitters" and "Small emitters" are defined in the Glossary (pp. 281 and 284), and their use is not limited to the Technical Guidelines.[59] **We recommend that the terms should be** "***Large-emitting entity***" and "***Small-emitting entity***" and should be defined in section 300.2 as follows:

> "***Large emitting entity***" means a reporting entity that has annual emissions greater than 10,000 metric tons of carbon dioxide ($CO_2$) equivalent.
>
> "***Small emitting entity***" means a reporting entity that has annual emissions equal to or less than 10,000 metric tons of carbon dioxide ($CO_2$) equivalent.

In addition, the second and third sentences of the definition of "***Start year***" are repeated fully in section 300.5(b). Those sentences are actually an elaboration or application of the term "***Start year***" and are not appropriate for a definition. **Both sentences are covered adequately in section 300.5(b) and should be deleted from the definition**.

The definition of "**greenhouse gases**" in section 300.2 lists six specific gases for reporting, all of which have "100-Year Global Warming Potentials" established by the Intergovernmental Panel on Climate Change (IPCC) in its report "Climate Change 2001:

[59] The Technical Guidelines Glossary definition of large emitters is not as comprehensive as the description in section 300.5(c).

The Scientific Basis" (see Technical Guidelines, pp. 9-10). However, the definition lists a seventh category that is open-ended and undefined and apparently could result in the addition of future gases "or particles" without resort to the IPCC process. It raises questions about what is intended by the word "particles" in the context of a definition of greenhouse gases and about what is encompassed or intended by the words "significant, quantifiable climate forcing effects when released to the atmosphere in significant quantities." It is not a definition of a gas, but merely an explanatory statement of what DOE might conclude in the future relying on section 300.1(f) of the revised General Guidelines. It has no definitional purpose or use.[60] **We recommend that the seventh category be deleted.**

Section 300.2 seeks to define the term "***Total emissions***" using the phrase "identified in § 300.6(f)." That is an incorrect reference. In addition, the word "total" before "annual" is unnecessary because it is part of the words "total emissions" that are being defined. Moreover, the phrase "including both direct and indirect entity wide emissions" is unnecessary because, as noted above, the defined word "emissions" covers both "direct" and "indirect" emissions.

b. Technical Guidelines definitions

The draft Technical Guidelines have three parts, including a Glossary. The preamble states that the Glossary "defines terms used only in the Technical Guidelines and references the definitions in section 300.2 of the General Guidelines." 70 *Fed. Reg.*

[60] There also is a grammatical problem with this sentence that is corrected by deleting an extraneous parenthesis after the reference to section 300.1(f).

15164. Section 300.1(c) of the General Guidelines refers to the three-part Technical Guidelines, and section 300.13 states that they "have been approved for incorporation by reference. . .in accordance with 5 U.S.C. 552(a) and 1 CFR, part 51." *Id.* at 15182, 15192.

**Thus, although DOE may not intend for it to apply to the General Guidelines, by being incorporated "by reference" the Glossary is, in fact, a part of the General Guidelines. Accordingly, the definitions therein would appear to apply where the Glossary terms also may be used in the General Guidelines**, notwithstanding the above statement in the preamble that the Glossary terms "only" apply to the Technical Guidelines. Indeed, as noted above, at least three Glossary definitions – Anthropogenic, Large emitters and Small emitters – apply to terms used in the General Guidelines.[61]

[61] Note that 5 U.S.C. § 552(a)(1) provides that a "matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." In addition, 1 C.F.R. § 51 elaborates on this statutory provision, and provides the criteria and procedures for Director approval. Moreover, 1 C.F.R. § 51.5 states that formal approval by the Director "applies to a final rule document" (which may explain why DOE has designated the revised General Guidelines as an "interim final rule" (70 *Fed. Reg*. 15169), even though the proposed Technical Guidelines are surely not yet "final"). It also requires that the "agency" (*i.e.*, DOE) make a "written request for approval at least 20 workings days before the agency intends to submit the final rule document for publication." (We presume that the DOE request is in the docket for the guidelines.) The preliminary pages of title 49 of the *Code of Federal Regulations* under the heading "Incorporation By Reference" explain (p. vi):

> The legal effect of the incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 522(a)). This material, like any other properly issued regulation, has the force of law.

(Emphasis added.) While "incorporation by reference," as provided in section 300.13, may be helpful in making the Technical Guidelines available to stakeholders and the general public, we question whether it is necessary and appropriate in the context of this voluntary program and the provisions of 1605(b) that these technical guidelines should have the "legal effect" of having the "force of law" just "like any other properly issued

In the case of the term "**Anthropogenic,**" note that EPA's final Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2003 (April 15, 2005) (p. ES-1 n. 1) defines this term as referring to GHG "emissions and removals that are a direct result of human activities or are the result of natural processes that have been affected by human activities (IPCC/UNEP/OECD/IEA 1997)." While there may be a good reason for the brief Glossary definition of this term to differ from that of EPA's, we are not aware of it. In addition, in light of the fact that the 1605(b) reporting program is to apply to Climate Leaders, it would seem prudent to ensure, in consultation with EPA as required by EPAct section 1605(c), that all definitions work for both Climate Leaders and Climate VISION.

The preamble discussion of the interim final guidelines states that once the General Guidelines and Technical Guidelines "take effect, the 1605(b) program will serve as the primary public emission and emission reduction reporting mechanism for participants in EPA's Climate Leaders Program and in DOE's Climate VISION Program." 70 *Fed. Reg.* 15171. However, the definition of the Climate VISION Program in the Glossary (p. 277) is not in accord with the Climate VISION MOU signed by DOE and seven power sector groups, including EEI, on December 13, 2004. That MOU specifically provides that it "establishes a voluntary framework for reducing the greenhouse gas (GHG) emission intensity of the power sector," that the "overall goal of this MOU is to support the President in his efforts to reduce GHG emission intensity of the U.S. by 18 percent by the

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regulation" of DOE under the provisions of EPAct. See also our comments in II.D.1 above.

end of 2012" and that trade association member companies and the Tennessee Valley Authority "are encouraged to use the 1605(b) program for reporting and registering GHG emissions intensity reductions achieved under company-specific plan and this voluntary program." Unlike the Climate Leaders definition, the word "voluntary" is omitted from the Climate VISION definition. Most importantly, the word "agreements" and all that follows does not reflect the provisions of the MOU. The MOU expressly states that it "is not a binding contract." Rather, it is a document that "states the Parties' basic understandings of voluntary tasks and methods for performing the tasks stated" in the MOU, and it "shall not be construed to create any legal obligation on the Party" or anyone.

Furthermore, the Power Partners[SM] MOU (p. 5) clearly indicates that reporting under 1605(b) is "encouraged," not required. If the revised guidelines were modified in accordance with EEI comments, this point would be unnecessary, but in the absence of significant policy changes to the guidelines by DOE, it is pertinent. In sum, EEI does not see any need for a definition of either Climate VISION or Climate Leaders in the Glossary, particularly one that does not fully reflect the above provisions of the MOU. **We recommend deletion of both.**

The Glossary includes a definition of the "**Intergovernmental Panel on Climate Change**" (IPCC). However, that definition is not in accord with the IPCC's "Principles Governing IPCC Work" approved at its 14th session in 1998 and amended at its 21st

session in 2003. **Therefore, we recommend that the Glossary definition be amended by deleting all after the word "understanding" and inserting the following words: "of the scientific basis of the risk of human-induced climate change, its potential impacts and options for adaptation and mitigation,"** which is taken *verbatim* from the IPCC "Principles."

The interim final guidelines frequently utilize the terms "**registration**" and "**reporting**." However, section 300.2 does not define either term. On the other hand, the Glossary provides a definition of both terms (p. 283), which is again contrary to the Glossary preamble. However, neither definition is adequate.

In the case of the term "**Registration**," the Glossary states that an "entity may have entity-wide emissions and emissions reductions registered by conforming to the requirements of §§ 300.1, 300.6 and 300.7," suggesting that for registration an entity need only comply with those provisions of the General Guidelines. However, that obviously is not true. In the case of "**Reporting**," the Glossary provides that if the entity does not conform with the "registration requirements, including those set forth in §§ 300.6 and 300.7," the entity "may choose to report. . .by complying with other requirements of Part 300 of these Guidelines." However, the purported definition fails to identify those "other requirements" in the case of such "reporting," one of which is section 300.5(f), titled "Entity statements for reporters not registering reductions." Moreover, the "Registration" definition is inconsistent with the "Reporting" definition in

identifying registration "requirements," in that the former definition refers to three sections (*i.e.*, sections 300.1, 300.6 and 300.7), while the latter definition only refers to two sections (*i.e.*, sections 300.6 and 300.7).

A more accurate and complete definition of each of these terms is needed. However, they belong in section 300.2, not in the Glossary. We would not presume to recommend definitions, because, as with the definitions in the Glossary, we are uncertain which sections and parts thereof DOE intends to apply to reporting only, registration only or both reporting and registration. We presume that in the case of registration, all sections of the General Guidelines (other than section 300.5(f)) apply to reporting entities that choose to register (except for small-emitting entities).

Alternatively, section 300.5(f) should be expanded to state expressly what provisions and sections of the General Guidelines apply to "reporting" by entities that do not choose to register. Since it is presumed that the majority of the requirements in the interim final guidelines pertain to registering reductions, reporting-only requirements should be separated out and clearly identified as such in each area. **The best course is for DOE to create a separate section on reporting that includes section 300.5(f) and a reference to all other applicable provisions on reporting only.**[62]

[62] The preamble includes "Figure 1: Checklist for Registering Emissions Reductions," which is a brief overview of some of the provisions of the interim final guidelines. 70 *Fed. Reg.* 15173. This could be a useful beginning guide and probably should be retained when the guidelines are finalized. However, it is somewhat cryptic and could

**We recommend** that the definition in the Glossary for "**Carbon dioxide ($CO_2$) equivalent**" (p. 277) be included in section 300.2.

The term "**Emissions, Indirect**" is defined on p. 279, and the term "**Indirect Emissions**" refers to the definition in section 300.2 (p. 281). **We recommend** that the definition of "**Emissions, Indirect**," which is identical to the definition of "***Indirect emissions***" in section 300.2, be deleted. In addition, in light of the definition of "***Reporting entity***" in section 300.2, there is no reason for defining a similar term, "Entity-level reporting" (p. 279). Further, **in light of the number of detailed requirements for "entity statements" in sections 300.5(d) and (e), the definition of that term in the Glossary (pp. 279-80) is inadequate and should be deleted**. If it is retained, it should be revised and added to section 300.2.

In several parts of the Technical Guidelines, excerpts of the interim final guidelines are included in italics or otherwise (*e.g.*, pp. 12-13, 14 and 238-41). While we can understand that such excerpts might be helpful to some, we question the wisdom of selecting portions of the General Guidelines for inclusion, out-of-context, in the Technical Guidelines, particularly when the entire General Guidelines are going to be published in the *Code of Federal Regulations*. In fact, such publication of excerpts may be inconsistent with the policy of "incorporation by reference." **A better approach – if**

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not be relied upon as being complete. Moreover, there is no similar checklist for reporting only. Yet if Figure 1 is included, there should be.

**indeed any such referencing is necessary – is a system of cross-referencing applicable sections and subsections of the General Guidelines.**

Page 29 of the Technical Guidelines discusses the reporting of $CO_2$ emissions, asserts that "[b]ecause greenhouse gas emissions are not currently subject to Federal regulation, there are no requirements to report them as such," and states in the context of requirements under the Clean Air Act that facilities in the U.S. are required "to report" $CO_2$ emissions for "calibration and verification purposes." See also pp. 36, 38 of the Technical Guidelines.

Section 821 was enacted in 1990 as part of Public Law Number 101-549, which also enacted the Clean Air Act Amendments of 1990. It directs EPA to "require that all affected sources subject to title V of the Clean Air Act" monitor $CO_2$ emissions and report data to EPA annually. However, it was not codified as an amendment to the Clean Air Act.[63] Thus, the above statement about "no requirements" is inaccurate. In addition, the references to such $CO_2$ reporting being "required" in the context of reporting under the Clean Air Act is misleading. At a minimum, the relevant discussion of $CO_2$ reporting should be revised.

[63] See "Compilation of Selected Acts Within the Jurisdiction of the Commerce Committee," Comm. Print 104-5, 1st Sess. (1995), which includes the Clean Air Act and Appendix B thereof titled "Provisions of the Clean Air Act Amendments of 1990 (Public Law 101-549) that did not amend the Clean Air Act," pp. 431, 448. Incidentally, the Committee explains that the reference to title V probably should be to title IV.

Furthermore, the word "currently" in the above sentence (p. 29) should be deleted, as it leaves the impression that at some point greenhouse gas emissions will be "subject to Federal regulation." That is not DOE's or the Administration's position.

The "***Simplified Emission Inventory Tool***" defined in section 300.2 is misidentified in the Glossary as the "**Simplified Inventory Estimation Tool**" (p. 284).

7. <u>The three-year review timetable for the guidelines is unrealistic, creates uncertainty and is a deterrent to participation.</u>

The preamble to the interim final guidelines explains that DOE has "added" to section 300.1 a "new paragraph (f). . .to indicate that DOE intends to periodically review and update" both the General Guidelines and Technical Guidelines. 70 *Fed. Reg*. 15177. While 1605(b) is silent on requiring DOE to review and, subject to "an opportunity for after public comment," revise the "procedures" for the voluntary submission of "information" to the EIA "data base," we agree that the section authorizes such review and possible revision and generally support DOE's call for periodic review. Indeed, for a period of eight years after the 1605(b) guidelines were first issued in 1994, there was no subsequent review by DOE even though EEI had urged such review at the turn of the century. To his credit, in February 2002 President Bush "directed" DOE, in consultation with the EPA Administrator and other agencies, to "propose improvements to the current section 1605(b) Voluntary Reporting of Greenhouse Gases Program." 70 *Fed. Reg*. 15170. However, after more than three years since the President's directive, the guidelines still are undergoing extensive revision that, when ultimately finalized, will significantly change how participants in the 1605(b) program will voluntarily provide

"information" to the EIA "data base." Unfortunately, based on our analysis of the interim final guidelines and draft Technical Guidelines, we reiterate that those changes could lead to less participation in both voluntary climate activities and voluntary reporting of those activities under 1605(b). .

While it is reasonable for DOE to indicate an intent to review more frequently this more detailed, comprehensive and complex set of "procedures" for voluntary reporting, it is neither reasonable nor consistent with the statute for DOE to state in section 300.1(f) that it "anticipates these reviews will occur approximately once every three years" and also to prejudge the results of the review by listing, at a minimum, four very specific "changes" that "could" be proposed by DOE as early as in the next three years. 70 *Fed. Reg*. 15183. In addition, while the preamble states that DOE "intends to coordinate any changes to the Guidelines in order to minimize the number of time such changes are made and to ensure that such changes are made only after a thorough, public review by DOE and interested stakeholders," that intention is not even alluded to in section 300.1(f).

Including in section 300.1(f) a commitment to a specific timetable of "approximately once every three years" for review and changes does not recognize that experience with the new General Guidelines and Technical Guidelines may show a need for revision sooner rather than later if they prove to be unworkable or problematic. However, it is more likely that implementation of the revised guidelines will utilize significant resources

by DOE and EIA and would not permit DOE to meet a three-year review commitment.[64] Moreover, there is a need for stability and certainty for the potential participants in the 1605(b) voluntary program in order to gain experience with the guidelines and confidence in their application. Scheduling a review of the revised guidelines as early as three years after their adoption would stand in opposition to that need, which is crucial.

Furthermore, it is premature and inappropriate for section 300.1(f) to set forth what the "reviews will consider" "every three years" and to list expressly what "[p]ossible changes could" be included as a result of such "reviews." It is as though DOE already has decided the nature, substance, process and extent of the "reviews" and that they not only will result in "changes" but that DOE now knows with clarity the nature of those changes. That appears to be contrary to the statutory requirement regarding such "procedures."

In the context of the President's directive, in May 2002 DOE began with a "Notice of Inquiry" seeking written comments "on how best to improve" the 1994 voluntary guidelines. It and several other agencies then addressed a letter to the President in July 2002, listing several recommendations for changes. In November 2002, DOE and the Agriculture Department scheduled several workshops, all as a prelude to later proposing a revision of the General Guidelines, with a delay of more than a year in proposing Technical Guidelines. At a minimum, DOE should begin any review with some

[64] Note that section 300.12(a) includes the phrase "[s]ubject to the availability of adequate resources" and that at the April 26 DOE workshop EIA expressed concern about resources to implement the revised 1605(b) "procedures." DOE Workshop Transcript, p. 165.

mechanism such as a notice of inquiry before even contemplating whether changes are needed, let alone deciding what changes could or should result from the review.

Therefore, **we recommend that section 300.1(f) be either deleted or revised as follows:**

> ***(f) Periodic review and revision of General and Technical Guidelines.*** **DOE intends, consistent with section 1605(b) of the Energy Policy Act of 1992, to review periodically, as appropriate, the content, workability and scope of the General Guidelines, Technical Guidelines and related forms for the accurate voluntary reporting of information to the EIA-established data base, taking into consideration the extent of participation in the program for registration and reporting as well as any substantive and procedural issues identified by DOE, EIA, reporting entities and others to determine whether revisions, if any, are warranted. Such review and revision shall be subject to an opportunity for public participation as provided in section 1605(b).**

E. Miscellaneous Technical Guidelines Issues

There are some inconsistencies in the draft Technical Guidelines in the use of terms and other drafting problems. In general, switching back and forth from carbon dioxide emissions coefficients and factors to those for carbon is confusing. DOE should try to stay consistent where possible in the use of these terms. Another inconsistency is the use of "command-like" words, for which **we recommend the following**:

- Page 6, last paragraph, first sentence, change "shall divide his" to "should divide its" and in the second and third sentences, change "shall" to "should."
- Page 7, first full paragraph and second paragraph, change "shall" to "should" wherever it appears.
- Page 8 and elsewhere, consistent with our above recommendations to define and use the term "small-emitting entities," change the words "small emitters" and "small entity" wherever they appear to "small-emitting entities."
- Page 8 and elsewhere, change "must" to "should" wherever it appears, *e.g.*, pages 27, 137, 241, 242, 244, 246, 247, 266 and 270.

- Page 9, the last two paragraphs preceding Table 1.A.2, titled "100-Year Global Warming Potentials for Greenhouse Gases," states that although 1605(b) "permits reporting of all greenhouse gases, and specifically chlorofluorocarbons (CFCs)," reporting entities "wishing to register their reductions" nevertheless "must limit them to gases listed in the General Guidelines and shown in Table 1.A.2.," and DOE "may add or subtract gases from this list, pursuant to the provisions" thereto. The list in the table appears to include sub-categories of some of the generic categories of gases listed in section 300.2, namely, "hydrofluorocarbons" and perfluorocarbons." However, there is no mention or cross-reference in the section 300.2 definition of the term "greenhouse gases" to this table or to such limitation.

Moreover, section 300.6(a) states:

> (a) *General*. The objective of an emission inventory is to provide a full accounting of an entity's emissions for a particular year, including direct emissions of all six categories of greenhouse gases identified in § 300.2.

(Emphasis added.) Again, there is no cross-reference to the draft Technical Guidelines or to the above table indicating any "limit" for registration or other purposes.

In addition, the second sentence of section 300.6(i) states:

> Entities may report other greenhouse gases, but such gases must be reported separately and emission reductions, if any, asserted with such other gases are not eligible for registration.

(Emphasis added.) However, the term "greenhouse gases," as defined in section 300.2, covers only six generic categories of gases and no more. (As discussed in section II.D.6 above, the seventh item is not a gas.) The word "other," coupled with the defined term "greenhouse gases," does not expand the defined list of "gases" allowed to be reported for non-registration purposes.

Further, unlike section 300.2, 1605(b) does not define the term "greenhouse gases" and permits reporting of all such gases, not just the six. In fact, since 1994, the current

guidelines have allowed reporting of all "radiatively enhancing gases," including halogenated substances, such as CFCs. General Guidelines, section GG-4.1, p. 4. Neither the 2003 version of the General Guidelines nor the preamble to the interim final guidelines explains why DOE apparently now seeks to retrench, for registration purposes, the scope of gases permitted to be reported under 1605(b) and the current guidelines.

In the case of reporting only, DOE apparently intends by section 300.6(i) to allow reporting of all gases as authorized by 1605(b) and the current guidelines, but, as noted above, it did not succeed because the definition of the term "greenhouse gases" in section 300.2 does not include all gases. No "other" gases are included.[65]

In seeking to allow reporting of more gases, section 300.6(i) provides that they must be reported "separately." However, there is no explanation as to what such separate reporting entails for the reporting entity, and how that separate reporting relates to the application of sections 300.9 on reporting and recordkeeping and 300.12 on acceptance of reports and on inclusion of such reporting in the data base. In addition, there is no indication of which other sections of the interim general guidelines apply to those "other" 1605(b) gases. Query whether EIA plans a special form for such separate reporting. In short, the word "separately" is vague and uncertain in the context of the interim final guidelines.

[65] The Climate VISION MOU with the power sector provides that the program "may cover any GHG."

**Consistent with the more narrow definition in the interim final guidelines of the term "greenhouse gases," we recommend that section 300.6(a) be amended by inserting before the period ", subject to Table 1.A.2 of the Technical Guidelines in the case of registration" and that section 300.6(i) be amended to read as follows:**

> **(i) *Covered gases.* Entity-wide emissions inventories should include all emissions of generic greenhouse gases defined in § 300.2, subject, in the case of the registration of reductions, to Table 1.A.2 of the Technical Guidelines, which limits some of the generic gases to named sub-categories thereof. Reporting entities may also report other radiatively enhancing gases in addition to the greenhouse gases defined in § 300.2 and emission reductions thereof, if any, associated with such other gases, except such other emissions of gases and reductions thereof are not eligible for registration.**

**In addition, the last two paragraphs before Table 1.A.2 of the draft Technical Guidelines should be amended to read as follows:**

> **Section 1605(b) of the Energy Policy Act of 1992 does not define the term "greenhouse gases." However, since 1994, the current guidelines (see section GG-4.1) enabled reporters to report all "radiatively enhancing gases," including halogenated substances, such as specifically chlorofluorocarbons (CFCs). Reporting entities wishing to register reductions, however, are limited by § 300.6(i) of the revised General Guidelines to report only the gases listed in Table 1.A.2 below.**
>
> **DOE may revise the definition of greenhouse gases in accordance with section 1605(b).**

- Page 12, first paragraph, change "shall" in the first and second sentences to "should," which is consistent with section 300.6(a) of the revised General Guidelines wherein it speaks in terms of the "objective of an emission inventory" and not in command-like terms.

- Pages 12-13, delete sections 1.B.2.1 and 1.B.2.2 since they merely repeat provisions in the interim final guidelines.

- Page 14, delete the fourth paragraph, which purports to be the definition of the term "Indirect emissions" in section 300.2 of the interim final guidelines, and on page 20,

last paragraph, delete ", as defined above,", which is a reference back to this purported definition.

- Page 15, footnote 1, states, "Indirect emissions from electricity use, however, may be considerably larger than direct emissions from fossil fuel consumption." This footnote should be changed to reflect the fact that indirect emissions from electricity consumption may be much smaller than direct emissions when the customer is receiving power from zero- or lesser-emitting sources of generation.

- Page 21, reference to "vendor" in third paragraph should be changed to "supplier."

- Page 22, paragraph 1.B.3.7, "Other Indirect Emissions" should be deleted as it merely restates section 300.6(e)(2).

- Page 39, Table 1.C.3 should either substitute or also show emission factors based on units that may be easier for reporting entities, such as kg of $CO_2$ per pound or ton (or kg or metric ton) of coal burned.

- Pages 40-41, in discussing natural gas, DOE should discuss the composition of liquefied natural gas (LNG) that is imported and then converted into gaseous form for use in domestic applications. There are issues of interchangeability and Btu content with imported LNG, and they could have an impact for some end-use customers.

- Page 41, Table 1.C.6 column designation should say Emissions Coefficient/metric tons $CO_2$ per billion Btu.

- Page 45, Table 1.C.12 should show emission factors based on common units associated with the fuel source (such as pounds or tons of coal, gallons or barrels of petroleum, therms or million Btu of natural gas, and cords or pounds of wood).

- Page 49, Table 1.C.16 where question marks are present, should add a footnote indicating when information will be provided.

- Page 61, Table 1.D.1 should change the carbon content coefficients to units that are more reporter friendly, such as kg of carbon or $CO_2$ per gallon of gas or oil, therm of natural gas, or gallon of propane. In addition, there should be a value or values shown for electricity, based on tailpipe or electric generation factors.

This section of the report should show examples of emission savings when switching from one fuel (*e.g.*, gasoline or diesel) to another fuel (electricity) or new technology (gasoline or diesel-electric hybrids).

The guidelines for vehicles also should discuss emissions in various modes (such as trucks at truck stops and motor vehicles in traffic jams) and the use of new technologies (such as electric motors and truck stop electrification) in reducing emissions.

- Page 67, Table 1.D.2 is useful, but it should also include examples of the kinds of vehicles that have the various emission factors (such as passenger cars built before 1995 meet EPA Tier 0 guidelines and vehicles built before 1970 are non-catalyst type). This type of information can help reporting entities with their calculations of emission reductions.

- Pages 71-72 discuss electric, fuel cell and bio-fueled vehicles and provide an accurate description of the "upstream" emissions. However, it would be helpful to reporters to show an example of emissions reductions when switching from gasoline or diesel-fueled vehicles to electric, fuel cell or bio-fueled vehicles.

- Page 132, paragraph 1.E.4.4.5 is reference to sodium hexafluoride correct?

- Page 137, footnote 2, should include the fact that nuclear generation and hydroelectric power emit no greenhouse gases. This section also ignores indirect emissions from the production or interstate transportation of natural gas. If natural gas imports in the form of LNG increase at a dramatic pace, as projected by many sources, there will be indirect emissions associated with the liquefying the gas, transporting the LNG, and "re-gasifying" the LNG for use in domestic pipelines.

- Page 139, Table 1.F.1 also should show emission intensity in the form of pounds or kg of $CO_2$ emitted per KWH.

- Page 145, last sentence should clarify that this provision does not apply to electric utilities.

- Page 147, Table 1.F.5 should be modified to be more reporter friendly. Emission factors should be shown in more common units, such as kg of $CO_2$ emitted per pound or ton of coal, therm or dekatherm of natural gas, or gallon or barrel of oil. The values for heat rate should be shown as Btu per KWH rather than MMBtu per KWH. In terms of heat rates, the table shows assumptions, rather than ranges or actual values from statistical analysis. Some of the values are questionable from a technical point of view. For example, the table shows fuel cells having a heat rate of 7,500 Btu/KWH (0.0075 MMBtu/KWH), for a fuel-to-electric efficiency of 45.51 percent. The vast majority of fuel cells that are in actual operation have higher heat rates, in the 8,500 to 9,700 Btu/KWH range. The table should reflect real values achieved in the field. For another example, advance gas-fired combined cycle power plants have

proven efficiencies in the range of 6,000 to 6,205 Btu/KWH, rather than 7,000 Btu/KWH as shown in the table. The values shown for distributed generation (DG) appear to be consistent with diesel generator sets that are used for backup power purposes at commercial and industrial facilities. However, other DG technologies, such as microturbines, have baseload heat rates of 12,640 Btu/KWH (0.0126 MMBtu/KWH) and peak heat rates of 15,510 Btu/KWH – significantly higher than the values shown.

- Page 150, Table 1.F.6 should be updated to reflect actual chillers that are used in the field, based on their age. For example, the baseline absorption chiller will have a COP of 0.6 or 0.7 based on ASHRAE 90.1 equipment efficiency standards. A unit rated at 0.8 COP is a "high efficiency" unit, as is an engine-driven gas chiller with a 1.2 COP rating. In contrast, an electric-driven chiller with a COP of 4.2 is equivalent to 0.84 kW/ton of capacity. This type of peakload efficiency was typical for units manufactured in the late 1970s. Typical electric chillers manufactured after 1999 have efficiency ratings of 6.0 to 7.3 COP. Therefore, there are significant differences depending on the type of chiller and age of chiller that are used to make this calculation.

- Pages 238-41, delete section 2.2.1 since it merely restates section 300.8.

- Page 258, footnote 6 shows an estimate of 0.63 kg of $CO_2$ per ton hour of cooling for gas cooling systems (which do not account for gas production and transportation losses). The draft Technical Guidelines do not show if this is an average value for absorption chillers and engine-driven chillers, or just the value for one of these cases. In any event, the Technical Guidelines should show that for a 1970s electric chiller with a peakload efficiency of 4.2 COP (as shown earlier in the report) or 0.84 KW/ton, the emissions per ton-hour (using a national average of 0.59 kg of $CO_2$ per KWH generated) is as follows:

0.84 KW/ton * 0.59 kg $CO_2$/KWH = 0.4956 kg $CO_2$ per ton-hour

For a newer chiller with a peak efficiency of 0.58 kW/ton (6.06 COP), the calculation is:

0.58 KW/ton * 0.59 kg $CO_2$/KWH = 0.3422 kg $CO_2$ per ton-hour

These values are significantly lower than the emissions associated with large gas cooling systems. The emissions per ton-hour are even lower for customers receiving electricity generated by renewable or nuclear power plant systems.

- Page 266, section 2.4.5.5, titled "Continuous Reporting," provides that "entities registering reductions from specific actions must continue to report annually."

However, section 300.8(g) on "[c]ontinuous reporting" does not appear to limit this requirement to the "entities registering reductions." Similarly, the definition of the terms "Registration" and "Reporting" in the Glossary, which are discussed elsewhere, do not refer to section 300.8 as being applicable solely to registration. DOE needs to clarify whether the concept of "continuous reporting" applies to reporting entities, whether they register or not. Indeed, EPAct section 1605(b)(1)(B) refers to "annual reductions" and does not distinguish between "registration" and "reporting."

- Pages 273-74 discuss estimating emission reductions from cogeneration (or combined heat and power (CHP)) systems. The draft Technical Guidelines only show the best-case scenarios in terms of CHP efficiency, operation and utilization of outputs. They neglect to discuss other, real world scenarios that will have a dramatic impact on emissions from CHP systems. For example, the draft Technical Guidelines show calculations where all of the thermal and electrical outputs are utilized, either on-site or off-site. This is rarely the case. In the real world, there are almost always thermal losses, and in some cases, not all of the electricity produced is actually used. In addition, if the on-site system has older boilers that operate on oil or gas, the emissions from the boilers, in terms of making electricity, may be significantly higher than the emissions associated with a regional electric grid that uses hydroelectric, nuclear, wind, solar or combined-cycle gas turbine systems.

In addition, in terms of sample calculations, the guide should show separate calculations for thermal and electric efficiency. The electric efficiency of the CHP system can be calculated as a heat rate, in terms of the ratio of electrical output to thermal input (*e.g.*, 10 KW output out of 100,000 Btu thermal input = 34,130 Btu output/100,000 Btu input = 34.13 percent fuel-to-electric efficiency). This efficiency can be compared to the efficiency of the local grid or competitive electric supplier that the customer is purchasing electricity from.

On the thermal output side, the calculation should be thermal output actually used on-site on an annual (or annual average) basis divided by the thermal input (*e.g.*, 40,000 Btu output used divided by 100,000 Btu input = 40 percent thermal efficiency) and compared

to stand-alone systems that just provide thermal energy (*e.g.*, a stand-alone boiler with a thermal efficiency of 80 percent).

- Page 275, section 2.5, second paragraph, second sentence should change "following" to "followed."

- Page 275, section 2.6, titled "Revising Previously Accepted Reports of Emission Reductions" appears to be inconsistent with section 300.9(b), titled "Revisions to Reports Submitted Under the Guidelines." For example, section 300.9(b) appears to apply to all reports submitted and accepted under section 300.12(a), not just those reports on "emission reductions" that have been accepted as stated in the draft Technical Guidelines. In addition, section 300.9(b)(1)(i) authorizes a revision of reports in order to "correct errors that have a <u>significant</u> <u>effect</u> on previously estimated emissions or emission reductions." The second sentence of this section of the draft Technical Guidelines allows revisions "only to correct <u>significant errors or omissions</u>" (emphasis added). These provisions are inconsistent.