



January 20, 2004

Raymond A. Mosley
Director
Office of the Federal Register
National Archives and Records Administration
800 North Capitol Street, N.W.
Washington, D.C. 20408

Re: Inappropriate Designation of Proposed Guidelines as Proposed Rule by the Department of Energy, 68 Fed. Reg. 68204 (December 5, 2003)

Dear Mr. Mosley:

The Edison Electric Institute (EEI) writes to you, as Administrator of Chapter 1 of the Code of Federal Regulations (CFR) and Chapter 15 of Title 44 of the United States Code, to question the authority and appropriateness under 1 CFR, Parts 5 and 8 of a document published in the *Federal Register* at the request of the Department of Energy (DOE) on December 5, 2003 (68 *Fed. Reg.* 68204) being designated a "Proposed Rule" and a proposed amendment to Chapter II of Title 10 of the CFR. It is a revision of a prior document that is a set of guidelines and not a rule. Moreover, the statute authorizing guidelines does not provide for such designation or codification. In addition, the preamble to the document includes no explanation by DOE for this designation.

EEI is the association of U.S. shareholder-owned electric companies, international affiliates and industry associations worldwide. Our U.S. members serve 90 percent of all customers served by the investor-owned segment of the industry. They generate more than 70 percent of all of the electricity generated by the electric utilities in the U.S. and serve nearly 70 percent of all ultimate customers of electricity in the nation. EEI is also one of seven electric power groups, known as the Electric Power Industry Climate Initiative (EPICI), formed to coordinate the power sector's response to President Bush's Global Climate Initiative and, through the President's Climate VISION Program, support his efforts to reduce the greenhouse gas (GHG) emissions intensity of the U.S. by 18 percent by the end of 2012.

EEI and other EPICI members collectively and individually have been major voluntary reporters of GHG emission reductions to the data base of the Energy Information Administration (EIA) under guidelines made final and available to the public in October 1994 by DOE in a *Federal Register* notice (59 *Fed. Reg.* 52769) issued pursuant to section 1605(b) of the Energy Policy Act of 1992 (EPAAct), 42 U.S.C. § 13385(b). For example, in 2001 EEI and other EPICI members reduced, avoided or sequestered more than 275 million metric tons of carbon dioxide (CO₂) equivalent (MMT_{CO₂e}) GHGs of

the total reported reductions of 352 MMTCO_{2e}, or 78 percent of all reported reductions under the current 1605(b) voluntary guidelines. Accordingly, EEI and EPICI have a significant interest in the procedural, as well as the substantive, development of any proposal to revise the 1605(b) guidelines.

In February 2002, the President directed that the current guidelines be revised by the Secretary of Energy. In May 2002, DOE initiated the revision process by a notice of inquiry (67 *Fed. Reg.* 30370). After nearly 18 months, DOE proposed such a revision as a *Federal Register* document on December 5, 2003, for public comment. While the current guidelines were not published in 1994 as a *Federal Register* document, EEI has no objection to the revision being published as such a document in accordance with 1 CFR §§ 5.3 and 5.9(d). Indeed, this is a better approach than merely issuing a notice of availability of the revised guidelines for public “distribution” pursuant to a telephone call or written request, as was done in 1994. Publication in the *Federal Register* makes the guidelines more accessible to the public and affords them recognition as a federal document for many purposes, including applicability of 18 U.S.C. § 1001.

However, in addition to designating the revision as a “Proposed Rule” and referring to the revision in the preamble under Part I.B. (“Process for Finalizing and Implementing Guidelines”) as a “rulemaking,” the December 5 notice states that “DOE proposes to amend Chapter II of Title 10 of the Code of Federal Regulations by adding a new “Subchapter B - Climate Change.” Moreover, under the heading “IV. Regulatory Review and Procedural Requirements,” the preamble provides a proposed Executive Order No. 12866 determination that this “action ‘is’ a significant regulatory action ... subject to review” under that order by the Office of Information and Regulatory Affairs. Further, as part of a review under the Regulatory Flexibility Act, DOE proposes to state that “the proposed guideline provisions are policy statements and procedural rules ... and are not substantive regulatory requirements” and that “DOE has not prepared a regulatory flexibility analysis for this rulemaking.”

For the reasons discussed below, the proposed revision may not be construed to be either “procedural rules” or a “regulatory requirement” under section 1605(b) of EPAct. Rather, pursuant to section 1605(b), they are guidelines that establish procedures that have substantive effect for those persons or entities that may voluntarily follow them in reporting their GHG emissions and emissions reduction actions.

The statutory authority cited in the December 5 notice (namely, 42 U.S.C. § 7101 *et seq.* and 42 U.S.C. § 13385(b)) neither requires nor authorizes DOE to either 1) designate the revised guidelines as a “Proposed Rule” pursuant to 44 U.S.C. § 1505 and 1 CFR § 5.9(c) or 2) codify them pursuant to 44 U.S.C. § 1510 and 1 CFR, Part 8. The first is DOE’s general organic statute. The second, which is directly relevant, is section 1605(b) of EPAct, which directs the DOE to “issue guidelines for the voluntary collection and reporting of information on sources” of GHGs. The guidelines are to “establish procedures for the accurate voluntary reporting” of such information. Pursuant to section

1605(b), the current voluntary guidelines document was noticed as a proposal in June 1994 (59 *Fed. Reg.* 28345). That document stated that the guidelines are:

separate from the national aggregate inventory established and updated under section 1605(a) of EPA Act. Because submission of data under 1605(b) is **voluntary**, this database cannot be designed for use as a comprehensive national ghg accounting system, and they may not serve to provide a statistically accurate representation of aggregate U.S. ghg emissions or their reductions.

(Emphasis in original.) In addition, the notice said:

The language of section 1605(b)(1)(C) provides that the guidelines are to address **reporting** reductions achieved as a result of plant closings, and Federal and state requirements, in addition to those which result from **voluntary** actions. Thus, the guidelines do not limit submissions based on either the motivation of the parties involved or on the reason for the activity.

(Emphasis in original.)

On October 19, 1994, the *Federal Register* document stated that the guidelines were finalized and available at DOE for “distribution on or before October 31, 1994” by persons asking for them by telephone or in writing (59 *Fed. Reg.* 52769). The guidelines were not designated in 1994 as a “Proposed Rule,” and there was no reference to the Regulatory Flexibility Act. In fact, they were not even a *Federal Register* document. As to Executive Order No. 12866, the final version said that the document was “not a significant regulatory action” because it does “not meet the criteria which defines such action” under that order.

The preamble to the December 5 notice provides that DOE “is proposing revised General Guidelines,” which together with “subsequently” proposed Technical Guidelines “will modify and replace” the October 1994 voluntary guidelines and will “continue to provide procedures for entities to report” GHG emissions and reduction actions. EEI supports the President’s and DOE’s efforts to revise the guidelines, although we have serious substantive concerns with the December 5 proposal in addition to the procedural concerns discussed herein.

We are aware that 44 U.S.C. § 1505 and 1 CFR § 5.2(c) provide for the publication in the *Federal Register* of documents that are determined to “have general applicability and legal effect” and that 44 U.S.C. § 1510 provides for the codification of such documents. However, 1 CFR § 1.1 provides that 1 CFR § 5.2(c) documents are those that prescribe a penalty or course of conduct; confer a right, privilege, authority or immunity; or impose an obligation. Clearly, the DOE proposed revision does not provide or prescribe a course of conduct or a penalty; confer a right, privilege or immunity; or impose an obligation. While the proposed revision might be construed as providing procedural “authority” for

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entities to submit information to EIA and DOE, so do the current guidelines, which have never been designated or construed as a rule within the categories maintained in 1 CFR § 5.9(b), either by DOE or by the Congress in enacting section 1605(b) of EPAct. In fact, in September 25, 2002, Supplemental Comments to DOE on the May 2002 notice of inquiry, EPICI explained (under the heading “Legislative History of Section 1605(b) of EPAct”) that the EPAct House and Senate conferees expressly eliminated any mandate or provision for rulemaking in the House version of section 1605(b) of the 1992 Act in favor of guidelines.

As to the proposed codification, we note that the “Explanation” of Title 10 of the CFR provides that the CFR “is a codification of general and permanent rules published in the Federal Register.” There is no statutory basis for DOE to treat a revision of the current guidelines as a “general or permanent rule” merely because it is published in the *Federal Register*.

Therefore, there is no basis in either the 1992 statute or 1 CFR, Parts 5 and 8 for designating the DOE proposed revision of the voluntary 1605(b) guidelines as a rule of any kind (*i.e.*, substantive or procedural). Such a designation is unauthorized and inappropriate. At the same time, we reiterate our support for DOE’s publication of the revision as a *Federal Register* document pursuant to 1 CFR §§ 5.3 and 5.9(d).

We would greatly appreciate an early response to our concerns.

Sincerely,

William L. Fang
Deputy General Counsel and
Climate Issue Director

WLF:hm

cc:

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