

112th CONGRESS

1st Session

**S. 228**

To preempt regulation of, action relating to, or consideration of greenhouse gases under Federal and common law on enactment of a Federal policy to mitigate climate change.

**IN THE SENATE OF THE UNITED STATES**

**January 31, 2011**

Mr. BARRASSO (for himself, Mr. INHOFE, Mr. BLUNT, Mr. ENZI, Mr. VITTER, Mr. ROBERTS, Mr. MORAN, Mr. THUNE, Mr. CORNYN, Mr. HATCH, and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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**A BILL**

To preempt regulation of, action relating to, or consideration of greenhouse gases under Federal and common law on enactment of a Federal policy to mitigate climate change.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Defending America's Affordable Energy and Jobs Act'.

**SEC. 2. FINDINGS AND PURPOSES.**

(a) Findings- Congress finds that--

(1) the climate of the Earth is dynamic, and changes in climate are caused by a complex combination of factors;

(2) greenhouse gases are globally dispersed, and any attempt by a country to reduce the greenhouse gas emissions of the country must be undertaken in coordination with the international community, including the developing world, in order to have any significant impact;

(3) regulating the emission of greenhouse gases under Federal regulatory mechanisms in existence as of the date of enactment of this Act is divorced from any intent expressed by the Congress during the enactment of the authorizing statutes governing those mechanisms;

(4) any action to control emissions of greenhouse gases in the United States would result in substantial impacts to major sectors of the economy of the United States and interstate commerce and should therefore be explicitly authorized and prescribed by Congress;

(5) the consequences of poorly designed Federal or State regulation of greenhouse gases--

(A) are well-documented; and

(B) consist of lower economic growth, reductions in new and existing employment, and reduced economic competitiveness; and

(6) substantial policy options, short of regulatory authority, exist to spur technology innovation to promote energy security and produce cleaner energy sources.

(b) Purposes- The purposes of this Act are--

(1) to ensure that the consequences of ill-suited regulations are not imposed on the economy of the United States; and

(2) to allow sufficient time for Congress to develop and authorize an appropriate mechanism to address the energy needs of the United States and the potential global challenges posed by a changing climate.

### **SEC. 3. DEFINITIONS.**

In this Act:

(1) ADMINISTRATOR- The term `Administrator' means the Administrator of the Environmental Protection Agency.

(2) GREENHOUSE GAS- The term `greenhouse gas' means any of the following:

(A) Carbon dioxide.

(B) Methane.

(C) Nitrous oxide.

(D) Sulfur hexafluoride.

(E) Any hydrofluorocarbon.

(F) Any perfluorocarbon.

(G) Nitrogen trifluoride.

(H) Any other substance subject to regulation, action, or consideration due to the contribution of the substance to climate change.

(3) STATIONARY SOURCE- The term `stationary source' has the meaning given the term in section 302 of the Clean Air Act (42 U.S.C. 7602).

## **SEC. 4. REGULATION OF GREENHOUSE GASES.**

(a) Regulation, Action, and Consideration for Effects Other Than Climate Change-

(1) IN GENERAL- Except as provided in paragraph (2), the President or the head of a Federal department or agency may not promulgate regulations providing for the control of emissions of a greenhouse gas, enforce or implement any law (including a regulation) enacted or promulgated as of the date of enactment of this Act that provides for the control of emissions of a greenhouse gas, take action relating to or take into consideration the climate effects of emissions of a greenhouse gas, consider climate effects in implementing or enforcing any law (including a regulation), or condition or deny any approval based on climate effects unless the law, regulation, action, or consideration is--

(A) determined by the President or head of a Federal department or agency, as applicable, after notice and opportunity for comment, to be necessary to protect the public health from imminent and substantial harm caused by direct human exposure to the relevant greenhouse gas in a concentration that is substantially greater than current and projected future average concentrations of that greenhouse gas in the global atmosphere; and

(B) based solely on effects other than effects relating to atmospheric concentrations of greenhouse gases, including climate change.

(2) EXCEPTION- The limitation under paragraph (1) does not prohibit--

(A) regulation of, action with respect to, or consideration of a greenhouse gas under title VI of the Clean Air Act (42 U.S.C. 7671 et seq.) other than for the potential or actual effect of the greenhouse gas on climate change; or

(B) voluntary incentive programs to promote the development or deployment of technologies that reduce greenhouse gas emissions.

(3) EXCLUSIVE AUTHORITY; CAFE REGULATIONS; CHALLENGES TO RULES-

(A) EXCLUSIVE AUTHORITY- The authority of the Secretary of Transportation under chapter 329 of title 49, United States Code--

(i) does not include any authority with respect to greenhouse gases; and

(ii) is unaffected by this section.

(B) CAFE REGULATIONS- Notwithstanding any provision to the contrary in this Act, the requirements set forth in the final rule entitled 'Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule' (75 Fed. Reg. 25324 (May 7, 2010)), shall remain in effect without further modification or revision.

(C) CHALLENGES TO RULES- Nothing in this subsection affects--

(i) any challenge to the final rule described in subparagraph (B) that--

(I) as of the date of enactment of this Act, is pending in court; or

(II) is filed after that date of enactment; or

(ii) any pending or future challenge to any current or future rules promulgated under the authority referred to in subparagraph (A).

(4) CERTAIN PRIOR AGENCY ACTIONS-

(A) IN GENERAL- Except as provided in paragraph (3), each rule promulgated and action taken by the Administrator before the date of enactment of this Act to regulate greenhouse gases for effects relating to atmospheric concentrations of greenhouse gases (including climate change), including each rule and action referred to in subparagraph (B), shall have no force or effect.

(B) RULES AND ACTIONS- The rules and actions referred to in subparagraph (A) include--

(i) the final rule entitled 'Endangerment and Cause or Contribute Findings for Greenhouse Gases under section 202(a) of the Clean Air Act' (74 Fed. Reg. 66496 (Dec. 15, 2009));

(ii)(I) the memorandum from Stephen Johnson, Administrator of the Environmental Protection Agency, to Regional Administrators of the Environmental Protection Agency, with the subject line stating 'EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program' and dated Dec. 18, 2008; and

(II) the final action on reconsideration of that memorandum entitled 'Reconsideration of the Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs' (75 Fed. Reg. 17004 (April 2, 2010));

(iii) the final rule entitled 'Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule' (75 Fed. Reg. 31514 (June 3, 2010));

(iv) the final rule entitled 'Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call' (75 Fed. Reg. 77698 (December 13, 2010));

(v) the final rule entitled 'Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan' (75 Fed. Reg. 82246 (December 30, 2010));

(vi) the interim final rule entitled 'Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program' (75 Fed. Reg. 82430 (December 30, 2010));

(vii) the final rule entitled 'Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule' (75 Fed. Reg. 82536 (December 30, 2010));

(viii) the final rule entitled 'Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule' (75 Fed. Reg. 82254 (December 30, 2010));

(ix) the final rule entitled 'Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to

Submit State Implementation Plan Revisions Required for Greenhouse Gases' (75 Fed. Reg. 81874 (December 30, 2010));

(x) the final rule entitled 'Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program' (75 Fed. Reg. 82365 (December 30, 2010));

(xi) any final rule providing for a waiver under section 209 of the Clean Air Act (42 U.S.C. 7543) with respect to greenhouse gases or establishing any other requirements with respect to greenhouse gases pursuant to section 177 of that Act (42 U.S.C. 7507);

(xii) the final rule entitled 'Mandatory Reporting of Greenhouse Gases' (74 Fed. Reg. 56260 (October 30, 2009)) and the definition of the term 'emissions data' in section 2.301 of title 40, Code of Federal Regulations (or a successor regulation);

(xiii) any final action taken by the Administrator with respect to State implementation plans, Federal implementation plans, and policy guidance regarding construction or operating permits or permit requirements for stationary sources emitting greenhouse gases that is issued or taken before, on, or after the date of enactment of this Act; and

(xiv) any guidance, regulations, interpretive regulations, or policy regarding the emissions of greenhouse gases or climate change impacts of greenhouse gases promulgated or issued by the Administrator under any Federal law (including a regulation).

#### (5) REGULATION UNDER OTHER PROVISIONS-

(A) IN GENERAL- Neither the regulation referred to in paragraph (3)(B) nor any other provision of law (including a regulation) or action relating to greenhouse gases shall--

(i) have any impact on the regulation of stationary sources under title I of the Clean Air Act (42 U.S.C. 7401 et seq.); or

(ii) be considered to be the regulation of pollutants under that Act (42 U.S.C. 7401 et seq.) for any purpose (other than for the regulation of greenhouse gas emissions for light-duty motor vehicles from model years 2012 through 2016, as required by the rule described in paragraph (3)(B)), including for the purpose of issuing permits or establishing regulatory standards.

(B) REQUESTS FOR WAIVERS- Section 209(b) of the Clean Air Act (42 U.S.C. 7543(b)) is amended by adding at the end the following:

`(4) REQUESTS FOR WAIVERS- Notwithstanding any other provision of this Act or any other law--

`(A) no request for a waiver of the application of this section by any State for standards to control emissions of any air pollutant that is a greenhouse gas (as defined in section 3 of the Defending America's Affordable Energy and Jobs Act) from new motor vehicles or new motor vehicle engines of model year 2017 or later may be granted by the Administrator; and

`(B) no grant of any waiver by the Administrator before the date of enactment of this paragraph shall be considered by the Administrator, the requesting State, or any court as waiving the application of subsection (a), or any other provision of this section, to standards adopted by the State for control of

emissions of any air pollutant that is a greenhouse gas (as defined in section 3 of the Defending America's Affordable Energy and Jobs Act) from new motor vehicles or new motor vehicle engines of model year 2017 or later.'.

(6) IMPACTS ON STATE LAWS-

(A) IN GENERAL- Any provision of a State implementation plan designating greenhouse gases as pollutants that are subject to regulation or as regulated pollutants, or otherwise authorizing or requiring limitations on the emission of greenhouse gases under State law--

(i) shall not be federally enforceable;

(ii) shall not be deemed to be Federal law; and

(iii) shall be deemed to be stricken from the State implementation plan.

(B) AUTHORITY OF STATES-

(i) IN GENERAL- Subject to clause (ii), nothing in this section affects any State law (including a regulation) or the authority of any State to adopt a law or promulgate a regulation.

(ii) AUTHORITY OF ADMINISTRATOR- Notwithstanding clause (i), the Administrator shall have no authority to approve or make federally enforceable any provision of a State implementation plan requiring the control of greenhouse gas emissions.

(iii) AMENDMENT OF EXISTING LAWS- If, as a result of the regulations referred to in paragraph (4), a State adopted any law (including a regulation) designating greenhouse gases as pollutants that are subject to regulation or as regulated pollutants, or authorizing or requiring limitations on the emission of greenhouse gases under State law, the State may amend the adopted law to remove any restrictions on greenhouse gas emissions.

(C) FEDERALIZATION OF SIP REQUIREMENTS- The Administrator shall have no authority to approve or make federally enforceable any provision of a State implementation plan requiring the control of greenhouse gas emissions.

(7) PRESIDENTIAL FINDINGS AND CONCLUSIONS- Except as authorized by this subsection or another Act of Congress, the President or the head of a Federal department or agency may not examine or make findings or conclusions, such as those contained in the final rule referred to in paragraph (4)(B)(i), for purposes of promulgating or issuing policy, guidance, or regulations to address the impacts of greenhouse gas emissions on climate change.

(8) JUDICIAL REVIEW-

(A) IN GENERAL- In addition to any other remedies available, any person affected by a regulation, action, or consideration concerning the control of emissions of a greenhouse gas that fails to meet the criteria described in paragraph (1) may challenge the regulation, action, or consideration.

(B) JURISDICTION- The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any review of any Federal, State, or other regulation, action, or consideration challenged under subparagraph (A).

(b) Actions at Law- No cause of action, whether based on common law or civil tort (including nuisance) or any other legal or equitable theory, may be brought or maintained, and no liability, money damages, or injunctive relief arising from such an action may be imposed, for--

(1) any potential or actual contribution of a greenhouse gas to climate change; or

(2) any direct or indirect effect of potential or actual atmospheric concentrations of a greenhouse gas.

(c) Allowances- No State shall have authority--

(1) to require any entity to procure, hold, or surrender allowances for the emission of greenhouse gases that takes place outside of the State; or

(2) to otherwise--

(A) regulate or tax, directly or indirectly, greenhouse gas emissions produced outside of the State; or

(B) to otherwise limit the importation of products or electricity into the State based on greenhouse gas emissions occurring outside the State.

*END*