

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HM 1375 Greenhouse Gases

SPONSOR(S): Fresen and others

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Federal Affairs Subcommittee	9 Y, 4 N, As CS	Cyphers	Cyphers
2) State Affairs Committee		Cyphers	Hamby

SUMMARY ANALYSIS

In 2008, the United States Supreme Court ruled in *Massachusetts v. EPA* that if the agency found that Greenhouse Gases (GHGs) emissions from motor vehicles could be reasonably expected to cause harm to public safety and welfare, then the Environmental Protection Agency (EPA) had a duty to regulate the emissions under the Clean Air Act (CAA). Since the Court's direction in *Massachusetts v. EPA* and the agency's subsequent "endangerment finding" in 2009, the agency has moved to regulate both mobile and stationary sources of GHG emissions.

While legislation has been introduced in the 111th and 112th Congresses to limit the EPA's ability to regulate GHGs under the CAA, none has made it through the legislative process to become law so far. Without legislative direction to the contradict the agency's duty as articulated in *Massachusetts v. EPA*, the agency's first rules governing stationary sources of GHGs went into effect on January 2, 2011.

If passed, this Memorial will urge Congress to take action to clarify EPA's specific regulatory authority regarding the limitation of GHGs.

The House Memorial does not amend, create, or repeal any provisions of the Florida Statutes.

The House Memorial has no fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In 1999, a large group of organizations petitioned the United States Environmental Protection Agency (EPA) to regulate emissions of Greenhouse Gases (GHG) from new automobiles.¹ The groups cited the duty of the EPA to regulate “pollutants” under the Clean Air Act (CAA).² Provisions of the CAA direct the EPA Administrator to develop standards to regulate the emission of air pollutants from any class or classes of new motor vehicles that could cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. After receiving thousands of comments from interested parties until 2003, the EPA denied the Section 202 petition. The rationale for the denial by the agency was largely captured in a memorandum issued on the same day the agency action took place. The memorandum concluded that the CAA does not grant EPA authority to regulate Carbon Dioxide (CO₂) and other GHG emissions based on their potential to impact climate.³

Massachusetts v. EPA

EPA’s denial of the Section 202 petition led to a lawsuit (*Massachusetts v. EPA*) in the United States Court of Appeal for the District of Columbia Circuit (D.C. Circuit). The petitioners in the case included twelve states: California, Connecticut, Illinois, Massachusetts, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; three cities: New York, Baltimore, and Washington, D.C.; two U.S. territories: American Samoa and Northern Mariana Islands; and several environmental groups. Opposing the challenge, besides EPA, were ten states: Alaska, Idaho, Kansas, Michigan, North Dakota, Nebraska, Ohio, South Dakota, Texas, and Utah. Groups representing the automobile industry also opposed the challenge.⁴

In 2005, a three judge panel rejected the suit in a split decision. The rejection, according to one of the judges (Randolph), was that the EPA had properly exercised its discretion in choosing not to wield its Section 202 authority. Judge Randolph held that CAA, Section 202(a)(1), directs the EPA Administrator to prescribe standards for any motor vehicle emissions that “in his judgment” cause harmful air pollution. Judge Randolph read “in his judgment” broadly to allow EPA consideration of not only scientific uncertainty about the effects of GHGs but also policy considerations that justify not regulating. Thus, EPA in his view was entitled to rely, as it had, on policy factors for GHG control measures. The other judge to reject the suit, Judge Sentelle, found that the petitioners lacked standing to bring the suit.⁵

Even though the D.C. Circuit decision did not cover the question of whether Section 202 of the CAA authorized the regulation of GHG, the U.S. Supreme Court decided to take up *Massachusetts v. EPA*. On April 2, 2007, the Supreme Court handed down their decision based on a 5-4 margin. The Court found that GHGs constituted “air pollution”, as found in the CAA and that the EPA acted improperly by denying the 1999 petition seeking regulation of GHGs for new automobiles.⁶ The decision rejected EPA’s contention that it did not have the authority to regulation GHGs in automobiles.

¹ Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons

² CAA Section 202(a)(1)

³ EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (September 8, 2003).

⁴ Congressional Research Service – The Supreme Court’s Climate Change Decision: *Massachusetts v. EPA*

⁵ *Id.*

⁶ *Id.*

The result of the Court's findings was that the EPA was only to consider whether the pollutant, CO₂ in this case, "may reasonably be anticipated to endanger public health or welfare." While the Court did not directly compel EPA to regulate GHG emissions from new motor vehicles directly, it said that if the EPA made a finding of endangerment, then they would have to act.

North Carolina v. EPA

Following the U.S. Supreme Court's decision in *Massachusetts v. EPA*, a separate case affected EPA's ability to enact regulatory schemes. In 2005, EPA announced that it would use existing CAA authority to promulgate final regulations similar to legislation ("Clear Skies") proposed to limit utility emissions of Sulfur dioxide (SO₂) and Nitrous oxide (NO_x) in 28 eastern states and the District of Columbia.⁷

The result of the new regulatory scheme was the Clean Air Interstate Rule (CAIR), which established cap-and-trade provisions that mimicked those of Clear Skies, but the regulations were for the eastern half of the U.S. only. Under CAIR, the EPA sought to decrease emissions of SO₂ by 53% and NO_x emissions 48% by 2015.⁸ The regulatory program was consequently challenged, and on July 11, 2008, the D.C. Circuit reached a unanimous decision bringing CAIR to a halt. In *North Carolina v. EPA*, the court found that EPA lacked authority to promulgate a regional cap-and-trade rule under Section 110 of the CAA.

"Endangerment Finding" and EPA Rulemaking

Under a new administration, and as a result of *North Carolina v. EPA* and *Massachusetts v. EPA* two years earlier, the EPA made an "endangerment finding" based on their conclusion that GHG emissions endanger public health and welfare through the potential effects of climate change. The finding was finalized on December 15, 2009. Consequently, EPA's determination required the agency to take action under the CAA to reduce the amount of "pollution" which can cause the harm.

On April 1, 2010, the EPA Administrator signed final regulations requiring auto manufacturers to limit emissions of GHGs from new cars and light trucks. Those regulations will subsequently trigger at least two other CAA provisions affecting stationary sources of "air pollution", such as electric power plants. First, according to EPA, effective January 2, 2011, new or modified major stationary sources will have to undergo New Source Review (NSR) with respect to their GHG emissions in addition to any other pollutants subject to regulation under the Clean Air Act that they emit. This review will require affected sources to install Best Available Control Technology (BACT) to address their GHG emissions. In the later years of implementation, existing sources, in addition to new ones will have to obtain permits under Title V of the Clean Air Act or modify their existing permits.⁹

Congressional Reaction to EPA Rulemaking

The potential for EPA to regulate GHG emissions mobile and stationary sources has led some in Congress to suggest that federal action is needed to stop the agency from proceeding. During the 111th Congress, legislation was introduced in both the U.S. House and Senate to achieve such results. Four resolutions were filed seeking disapproval of the endangerment finding under the CAA through use of the Congressional Review Act.¹⁰ Five other bills were filed to hinder EPA rulemaking authority by: requiring the reevaluation of the endangerment finding; providing that GHGs are not subject to the CAA; limiting EPA's

⁷ *Federal Register*, May 12, 2005 (70 FR 25162).

⁸ U.S. EPA, Office of Air and Radiation: "Clean Air Interstate Rule - Basic Information"

<http://www.epa.gov/interstateairquality/basic.html>.

⁹ <http://www.epa.gov/nsr/documents/20100413fs.pdf>

¹⁰ From Congressional Research Service: Clean Air Issues in 112th Congress, January 4, 2011. Senate Resolution 26 and House Resolutions 66, 76, and 77

ability to regulate GHG emissions from motor vehicles; and temporarily suspending the Agency's ability to regulate some stationary sources of GHG emissions.¹¹

Since the 112th Congress has taken office, additional measures have been filed in Congress to address EPA's responsibility to regulate GHGs under the CAA, but it is unclear whether legislation will pass. The Obama administration has indicated that efforts to undo EPA's regulatory authority will likely face the President's veto.¹² The following bills have already been identified as potential platforms for opposition to the current regulatory climate:¹³

HR 97 - Introduced by Rep. Blackburn (R-TN)

Amends CAA to exclude carbon dioxide, water vapor, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride from the definition of "pollutant," and it prohibits the use of the CAA for regulations related to climate change.

HR 153 - Rep. Poe (R-TX)

Prohibits the use of EPA funds to enact a cap and trade program or regulate of GHGs from stationary sources.

HR 199 - Rep. Capito (R-WV)

Delays the regulation of carbon dioxide and methane from stationary sources for two years from enactment.

HR 279 - Rep. Fortenberry (R-NE)

Prohibits the regulation of methane from livestock using the CAA.

HR 910 - Reps. Upton (R-MI) and Whitfield (R-KY)

This proposal questions human-caused climate change, amends the CAA to prohibit EPA from issuing regulations concerning greenhouse gases for the purposes of addressing climate change, and excludes GHGs from the definition of "air pollutant." The bill exempts rulemakings for emissions standards and Corporate Average Fuel Economy (CAFE) standards for light-duty vehicles (May 2010) and medium- and heavy-duty vehicles (November 2010) and statutorily authorized programs addressing climate change.

S 228 - Sen. Barrasso (R-WY)

Prohibits the President or any Federal agency from promulgating regulations to control GHGs, or considering climate effects of GHGs in any rule, or take other actions unless controls of the gas are related to non-climate effects. Exemption for this prohibition is made for the joint rulemakings for emissions standards and CAFE standards for light-duty vehicles (May 2010).

S 231 - Sen. Rockefeller (D-WV)

Delays EPA GHG regulations for stationary sources for two years, and exempts light-duty and medium/heavy -duty vehicle standards from that delay.

S 482 - Sen. Inhofe (R-OK)

Senate version of HR 910

¹¹ From Congressional Research Service: Clean Air Issues in 112th Congress, January 4, 2011. House Resolutions 974, 4396, and 4753; and Senate Bills 1622 and 3072

¹² <http://dailycaller.com/2011/03/16/legislation-to-block-epa-regulations-make-significant-gains-in-congress/>

¹³ <http://www.pewclimate.org/federal/congress>

Effects of Proposed Changes

This memorial urges Congress to take action to clarify the EP's specific regulatory authority regarding GHGs.

Copies of the memorial are to be sent to the President of the United States, the President of the United States Senate, the Speaker of the House of Representatives, and to each member of the Florida delegation to the United States Congress.

The legislation also includes whereas clauses in order to support the memorial. The whereas clauses include:

WHEREAS, the Environmental Protection Agency has released an Advance Notice of Proposed Rulemaking that describes a nationwide plan to regulate greenhouse gases under the Clean Air Act, and

WHEREAS, the Environmental Protection Agency's plan to regulate greenhouse gases is very expansive in scope, envisioning a nationwide cap and trade program for greenhouse gases, additional motor vehicle regulations, and economy-wide restrictions impacting a wide range of industries, including dairy and beef operations, office buildings, hospitals, schools, large homes, and houses of worship, and even regulating the greenhouse gas emissions from lawnmowers, and

WHEREAS, the United States Court of Appeals for the District of Columbia Circuit has recently ruled that the Environmental Protection Agency does not have authority to carry out a cap and trade plan under the Clean Air Act, and

WHEREAS, the Environmental Protection Agency's plan represents policymaking that is the prerogative of the legislative branch, and

WHEREAS, even committed proponents of ambitious greenhouse gas regulation have expressed doubts about the Advance Notice of Proposed Rulemaking approach, and

WHEREAS, climate change is a global issue, not a local or regional pollution issue, which the Clean Air Act was designed to address, and

WHEREAS, the Environmental Protection Agency's plan would impose a massive economic burden on America without appreciably reducing worldwide concentrations of greenhouse gases

B. SECTION DIRECTORY:

Not Applicable

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable

2. Other:

None

B. RULE-MAKING AUTHORITY:

Not Applicable

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Amendment 03-23-11: The amendment removed an outdated “whereas” clause that referred to Advanced Notice of Proposed Rulemaking.