

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.

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## 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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Defending America’s  
5 Affordable Energy and Jobs Act”.

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

7 (a) FINDINGS.—Congress finds that—

1           (1) the climate of the Earth is dynamic, and  
2 changes in climate are caused by a complex com-  
3 bination of factors;

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

10          (3) regulating the emission of greenhouse gases  
11 under Federal regulatory mechanisms in existence as  
12 of the date of enactment of this Act is divorced from  
13 any intent expressed by the Congress during the en-  
14 actment of the authorizing statutes governing those  
15 mechanisms;

16          (4) any action to control emissions of green-  
17 house gases in the United States would result in  
18 substantial impacts to major sectors of the economy  
19 of the United States and interstate commerce and  
20 should therefore be explicitly authorized and pre-  
21 scribed by Congress;

22          (5) the consequences of poorly designed Federal  
23 or State regulation of greenhouse gases—

24               (A) are well-documented; and

1 (B) consist of lower economic growth, re-  
2 ductions in new and existing employment, and  
3 reduced economic competitiveness; and

4 (6) substantial policy options, short of regu-  
5 latory authority, exist to spur technology innovation  
6 to promote energy security and produce cleaner en-  
7 ergy sources.

8 (b) PURPOSES.—The purposes of this Act are—

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

12 (2) to allow sufficient time for Congress to de-  
13 velop and authorize an appropriate mechanism to  
14 address the energy needs of the United States and  
15 the potential global challenges posed by a changing  
16 climate.

17 **SEC. 3. DEFINITIONS.**

18 In this Act:

19 (1) ADMINISTRATOR.—The term “Adminis-  
20 trator” means the Administrator of the Environ-  
21 mental Protection Agency.

22 (2) GREENHOUSE GAS.—The term “greenhouse  
23 gas” means any of the following:

24 (A) Carbon dioxide.

25 (B) Methane.

1 (C) Nitrous oxide.

2 (D) Sulfur hexafluoride.

3 (E) Any hydrofluorocarbon.

4 (F) Any perfluorocarbon.

5 (G) Nitrogen trifluoride.

6 (H) Any other substance subject to regula-  
7 tion, action, or consideration due to the con-  
8 tribution of the substance to climate change.

9 (3) STATIONARY SOURCE.—The term “sta-  
10 tionary source” has the meaning given the term in  
11 section 302 of the Clean Air Act (42 U.S.C. 7602).

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

13 (a) REGULATION, ACTION, AND CONSIDERATION FOR  
14 EFFECTS OTHER THAN CLIMATE CHANGE.—

15 (1) IN GENERAL.—Except as provided in para-  
16 graph (2), the President or the head of a Federal  
17 department or agency may not promulgate regula-  
18 tions providing for the control of emissions of a  
19 greenhouse gas, enforce or implement any law (in-  
20 cluding a regulation) enacted or promulgated as of  
21 the date of enactment of this Act that provides for  
22 the control of emissions of a greenhouse gas, take  
23 action relating to or take into consideration the cli-  
24 mate effects of emissions of a greenhouse gas, con-  
25 sider climate effects in implementing or enforcing

1 any law (including a regulation), or condition or  
2 deny any approval based on climate effects unless  
3 the law, regulation, action, or consideration is—

4 (A) determined by the President or head of  
5 a Federal department or agency, as applicable,  
6 after notice and opportunity for comment, to be  
7 necessary to protect the public health from im-  
8 minent and substantial harm caused by direct  
9 human exposure to the relevant greenhouse gas  
10 in a concentration that is substantially greater  
11 than current and projected future average con-  
12 centrations of that greenhouse gas in the global  
13 atmosphere; and

14 (B) based solely on effects other than ef-  
15 fects relating to atmospheric concentrations of  
16 greenhouse gases, including climate change.

17 (2) EXCEPTION.—The limitation under para-  
18 graph (1) does not prohibit—

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

1 (B) voluntary incentive programs to pro-  
 2 mote the development or deployment of tech-  
 3 nologies that reduce greenhouse gas emissions.

4 (3) EXCLUSIVE AUTHORITY; CAFE REGULA-  
 5 TIONS; CHALLENGES TO RULES.—

6 (A) EXCLUSIVE AUTHORITY.—The author-  
 7 ity of the Secretary of Transportation under  
 8 chapter 329 of title 49, United States Code—

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

11 (ii) is unaffected by this section.

12 (B) CAFE REGULATIONS.—Notwith-  
 13 standing any provision to the contrary in this  
 14 Act, the requirements set forth in the final rule  
 15 entitled “Light-Duty Vehicle Greenhouse Gas  
 16 Emission Standards and Corporate Average  
 17 Fuel Economy Standards; Final Rule” (75 Fed.  
 18 Reg. 25324 (May 7, 2010)), shall remain in ef-  
 19 fect without further modification or revision.

20 (C) CHALLENGES TO RULES.—Nothing in  
 21 this subsection affects—

22 (i) any challenge to the final rule de-  
 23 scribed in subparagraph (B) that—

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

1 (II) is filed after that date of en-  
2 actment; or

3 (ii) any pending or future challenge to  
4 any current or future rules promulgated  
5 under the authority referred to in subpara-  
6 graph (A).

7 (4) CERTAIN PRIOR AGENCY ACTIONS.—

8 (A) IN GENERAL.—Except as provided in  
9 paragraph (3), each rule promulgated and ac-  
10 tion taken by the Administrator before the date  
11 of enactment of this Act to regulate greenhouse  
12 gases for effects relating to atmospheric con-  
13 centrations of greenhouse gases (including cli-  
14 mate change), including each rule and action  
15 referred to in subparagraph (B), shall have no  
16 force or effect.

17 (B) RULES AND ACTIONS.—The rules and  
18 actions referred to in subparagraph (A) in-  
19 clude—

20 (i) the final rule entitled  
21 “Endangerment and Cause or Contribute  
22 Findings for Greenhouse Gases under sec-  
23 tion 202(a) of the Clean Air Act” (74 Fed.  
24 Reg. 66496 (Dec. 15, 2009));

1           (ii)(I) the memorandum from Stephen  
2 Johnson, Administrator of the Environ-  
3 mental Protection Agency, to Regional Ad-  
4 ministrators of the Environmental Protec-  
5 tion Agency, with the subject line stating  
6 “EPA’s Interpretation of Regulations that  
7 Determine Pollutants Covered by Federal  
8 Prevention of Significant Deterioration  
9 (PSD) Permit Program” and dated Dec.  
10 18, 2008; and

11           (II) the final action on reconsideration  
12 of that memorandum entitled “Reconsider-  
13 ation of the Interpretation of Regulations  
14 That Determine Pollutants Covered by  
15 Clean Air Act Permitting Programs” (75  
16 Fed. Reg. 17004 (April 2, 2010));

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

21           (iv) the final rule entitled “Action To  
22 Ensure Authority To Issue Permits Under  
23 the Prevention of Significant Deterioration  
24 Program to Sources of Greenhouse Gas  
25 Emissions: Finding of Substantial Inad-

1 equacy and SIP Call” (75 Fed. Reg.  
2 77698 (December 13, 2010));

3 (v) the final rule entitled “Action To  
4 Ensure Authority To Issue Permits Under  
5 the Prevention of Significant Deterioration  
6 Program to Sources of Greenhouse Gas  
7 Emissions: Federal Implementation Plan”  
8 (75 Fed. Reg. 82246 (December 30,  
9 2010));

10 (vi) the interim final rule entitled  
11 “Determinations Concerning Need for  
12 Error Correction, Partial Approval and  
13 Partial Disapproval, and Federal Imple-  
14 mentation Plan Regarding Texas Preven-  
15 tion of Significant Deterioration Program”  
16 (75 Fed. Reg. 82430 (December 30,  
17 2010));

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

24 (viii) the final rule entitled “Action To  
25 Ensure Authority To Implement Title V

1 Permitting Programs Under the Green-  
2 house Gas Tailoring Rule” (75 Fed. Reg.  
3 82254 (December 30, 2010));

4 (ix) the final rule entitled “Action to  
5 Ensure Authority to Issue Permits Under  
6 the Prevention of Significant Deterioration  
7 Program to Sources of Greenhouse Gas  
8 Emissions: Finding of Failure to Submit  
9 State Implementation Plan Revisions Re-  
10 quired for Greenhouse Gases” (75 Fed.  
11 Reg. 81874 (December 30, 2010));

12 (x) the final rule entitled “Determina-  
13 tions Concerning Need for Error Correc-  
14 tion, Partial Approval and Partial Dis-  
15 approval, and Federal Implementation  
16 Plan Regarding Texas Prevention of Sig-  
17 nificant Deterioration Program” (75 Fed.  
18 Reg. 82365 (December 30, 2010));

19 (xi) any final rule providing for a  
20 waiver under section 209 of the Clean Air  
21 Act (42 U.S.C. 7543) with respect to  
22 greenhouse gases or establishing any other  
23 requirements with respect to greenhouse  
24 gases pursuant to section 177 of that Act  
25 (42 U.S.C. 7507);

1 (xii) the final rule entitled “Manda-  
2 tory Reporting of Greenhouse Gases” (74  
3 Fed. Reg. 56260 (October 30, 2009)) and  
4 the definition of the term “emissions data”  
5 in section 2.301 of title 40, Code of Fed-  
6 eral Regulations (or a successor regula-  
7 tion);

8 (xiii) any final action taken by the  
9 Administrator with respect to State imple-  
10 mentation plans, Federal implementation  
11 plans, and policy guidance regarding con-  
12 struction or operating permits or permit  
13 requirements for stationary sources emit-  
14 ting greenhouse gases that is issued or  
15 taken before, on, or after the date of en-  
16 actment of this Act; and

17 (xiv) any guidance, regulations, inter-  
18 pretive regulations, or policy regarding the  
19 emissions of greenhouse gases or climate  
20 change impacts of greenhouse gases pro-  
21 mulgated or issued by the Administrator  
22 under any Federal law (including a regula-  
23 tion).

24 (5) REGULATION UNDER OTHER PROVISIONS.—

1 (A) IN GENERAL.—Neither the regulation  
2 referred to in paragraph (3)(B) nor any other  
3 provision of law (including a regulation) or ac-  
4 tion relating to greenhouse gases shall—

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

8 (ii) be considered to be the regulation  
9 of pollutants under that Act (42 U.S.C.  
10 7401 et seq.) for any purpose (other than  
11 for the regulation of greenhouse gas emis-  
12 sions for light-duty motor vehicles from  
13 model years 2012 through 2016, as re-  
14 quired by the rule described in paragraph  
15 (3)(B)), including for the purpose of  
16 issuing permits or establishing regulatory  
17 standards.

18 (B) REQUESTS FOR WAIVERS.—Section  
19 209(b) of the Clean Air Act (42 U.S.C.  
20 7543(b)) is amended by adding at the end the  
21 following:

22 “(4) REQUESTS FOR WAIVERS.—Notwith-  
23 standing any other provision of this Act or any other  
24 law—

1           “(A) no request for a waiver of the appli-  
2 cation of this section by any State for stand-  
3 ards to control emissions of any air pollutant  
4 that is a greenhouse gas (as defined in section  
5 3 of the Defending America’s Affordable En-  
6 ergy and Jobs Act) from new motor vehicles or  
7 new motor vehicle engines of model year 2017  
8 or later may be granted by the Administrator;  
9 and

10           “(B) no grant of any waiver by the Admin-  
11 istrator before the date of enactment of this  
12 paragraph shall be considered by the Adminis-  
13 trator, the requesting State, or any court as  
14 waiving the application of subsection (a), or any  
15 other provision of this section, to standards  
16 adopted by the State for control of emissions of  
17 any air pollutant that is a greenhouse gas (as  
18 defined in section 3 of the Defending America’s  
19 Affordable Energy and Jobs Act) from new  
20 motor vehicles or new motor vehicle engines of  
21 model year 2017 or later.”.

22 (6) IMPACTS ON STATE LAWS.—

23           (A) IN GENERAL.—Any provision of a  
24 State implementation plan designating green-  
25 house gases as pollutants that are subject to

1 regulation or as regulated pollutants, or other-  
2 wise authorizing or requiring limitations on the  
3 emission of greenhouse gases under State law—

4 (i) shall not be federally enforceable;

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

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

9 (B) AUTHORITY OF STATES.—

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

15 (ii) AUTHORITY OF ADMINIS-  
16 TRATOR.—Notwithstanding clause (i), the  
17 Administrator shall have no authority to  
18 approve or make federally enforceable any  
19 provision of a State implementation plan  
20 requiring the control of greenhouse gas  
21 emissions.

22 (iii) AMENDMENT OF EXISTING  
23 LAWS.—If, as a result of the regulations  
24 referred to in paragraph (4), a State  
25 adopted any law (including a regulation)

1           designating greenhouse gases as pollutants  
2           that are subject to regulation or as regu-  
3           lated pollutants, or authorizing or requir-  
4           ing limitations on the emission of green-  
5           house gases under State law, the State  
6           may amend the adopted law to remove any  
7           restrictions on greenhouse gas emissions.

8           (C) FEDERALIZATION OF SIP REQUIRE-  
9           MENTS.—The Administrator shall have no au-  
10          thority to approve or make federally enforceable  
11          any provision of a State implementation plan  
12          requiring the control of greenhouse gas emis-  
13          sions.

14          (7) PRESIDENTIAL FINDINGS AND CONCLU-  
15          SIONS.—Except as authorized by this subsection or  
16          another Act of Congress, the President or the head  
17          of a Federal department or agency may not examine  
18          or make findings or conclusions, such as those con-  
19          tained in the final rule referred to in paragraph  
20          (4)(B)(i), for purposes of promulgating or issuing  
21          policy, guidance, or regulations to address the im-  
22          pacts of greenhouse gas emissions on climate  
23          change.

24          (8) JUDICIAL REVIEW.—

1           (A) IN GENERAL.—In addition to any  
2 other remedies available, any person affected by  
3 a regulation, action, or consideration concerning  
4 the control of emissions of a greenhouse gas  
5 that fails to meet the criteria described in para-  
6 graph (1) may challenge the regulation, action,  
7 or consideration.

8           (B) JURISDICTION.—The United States  
9 Court of Appeals for the District of Columbia  
10 Circuit shall have exclusive jurisdiction over any  
11 review of any Federal, State, or other regula-  
12 tion, action, or consideration challenged under  
13 subparagraph (A).

14       (b) ACTIONS AT LAW.—No cause of action, whether  
15 based on common law or civil tort (including nuisance)  
16 or any other legal or equitable theory, may be brought or  
17 maintained, and no liability, money damages, or injunctive  
18 relief arising from such an action may be imposed, for—

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

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

24       (c) ALLOWANCES.—No State shall have authority—

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

4           (2) to otherwise—

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

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

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