

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

SUPPLEMENTAL MEMORANDUM

March 10, 2011

To: Democratic Members of the Subcommittee on Energy and Power

Fr: Henry A. Waxman, Ranking Member, and Bobby L. Rush, Subcommittee Ranking Member

Re: Analysis of H.R. 910, the Upton-Inhofe Energy Tax Prevention Act

On March 3, 2011, Chairman Fred Upton, Subcommittee Chairman Ed Whitfield, and Senator James Inhofe introduced legislation to amend the Clean Air Act.¹ A markup of the bill has been scheduled for March 10, 2011. This memorandum provides a brief analysis of the effects of enacting this legislative proposal.

The bill is entitled “The Energy Tax Prevention Act of 2011” and, according to its sponsors, has a primary purpose of stopping the Environmental Protection Agency (EPA) from “imposing a backdoor cap-and-trade tax.”² However, EPA does not have taxing authority, nor has EPA proposed to establish a cap and trade program. In fact, EPA officials have recently stated that they will not establish a cap on carbon pollution.³

The Upton-Inhofe bill would broadly eliminate EPA’s authority to address emissions of greenhouse gases and the danger of climate change. It would:

¹ H.R. 910, S. 482, the Energy Tax Prevention Act of 2011. The House bill has nine original co-sponsors.

² House Committee on Energy and Commerce, Press Release, *Upton, Whitfield, Inhofe Unveil Energy Tax Prevention Act to Protect America’s Jobs & Families* (Feb. 7, 2011) (online at <http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8178>).

³ *EPA Promises to Avoid Cap, But Some Utilities Want Trade*, E&E News (Feb. 4, 2011).

- Overturn the Supreme Court’s opinion finding that EPA has the authority to regulate greenhouse gases under the Clean Air Act.
- Overturn EPA’s scientific determination that greenhouse gases endanger human health and the environment.
- Prohibit EPA from requiring stationary sources to reduce greenhouse gas emissions.
- Prohibit EPA from requiring additional reductions of greenhouse gas emissions from motor vehicles and repeal California’s authority to regulate greenhouse gas emissions from motor vehicles.
- Prohibit EPA from requiring reductions of greenhouse gas emissions from other mobile sources, such as planes, trains, boats, and large construction equipment.
- Prohibit EPA from enforcing existing greenhouse gas reporting requirements.
- Interfere with EPA’s implementation of Title VI of the Clean Air Act, which addresses ozone-depleting chemicals and substitutes for such chemicals, as well as undermine Administration negotiating positions under the Montreal Protocol on Substances that Deplete the Ozone Layer.
- Create legal uncertainty about the status of the recent motor vehicle standards adopted by EPA.
- Call into question EPA’s authority to implement voluntary programs to reduce greenhouse gas emissions.
- Create new litigation opportunities for opponents of regulation of conventional pollutants.

I. Upton-Inhofe Overturns *Massachusetts v. EPA*

The Upton-Inhofe bill overturns the landmark Supreme Court case *Massachusetts v. EPA*, which held that greenhouse gases, including carbon dioxide, are “air pollutants” under the Clean Air Act that EPA must regulate if they endanger public health or welfare.⁴ The bill adds a new section 330(b)(1)(B) to the Clean Air Act that provides that the term “‘air pollutant’ ... does not include a greenhouse gas.” Additionally, new section 330(b)(1)(A) would amend the Clean Air Act to state that EPA may not take action on carbon pollution or even “take into consideration” carbon pollution in the future regardless of the danger it poses to public health or welfare.

⁴ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

II. Upton-Inhofe Repeals EPA's Endangerment Finding

New section 330(b)(4)(B) of the Clean Air Act would legislatively repeal EPA's scientific determination that greenhouse gases threaten public health and welfare, commonly known as the endangerment finding. This determination was made in 2009, when the EPA Administrator found that the current and projected concentrations of the six key greenhouse gases — carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) — in the atmosphere threaten the public health and welfare of current and future generations.⁵

Legislatively repealing the scientific determination directly conflicts with the consensus of climate scientists and the world's most authoritative scientific organizations, including:

- The National Academy of Sciences, which reported in 2010: “Climate change is occurring, is caused largely by human activities, and poses significant risks for—and in many cases is already affecting—a broad range of human and natural systems.”⁶
- The premier scientific institutions of all of the world's major economies (including the United States, the United Kingdom, France, Germany, Russia, Japan, China, Brazil, and India), which have warned that “[t]he need for urgent action to address climate change is now indisputable.”⁷
- The American Association for the Advancement of Science, the American Geophysical Union, and the American Meteorological Society, along with 15 other leading scientific organizations, which have stated: “If we are to avoid the most severe impacts of climate change, emissions of greenhouse gases must be dramatically reduced.”⁸

⁵ Environmental Protection Agency, *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).

⁶ National Research Council, *Advancing the Science of Climate Change* (2010) (online at http://www.nap.edu/catalog.php?record_id=12782).

⁷ G8+5 Academies' joint statement: *Climate change and the transformation of energy technologies for a low carbon future*, Academia Brasileira de Ciências, Brazil, Indian National Science Academy, India, Academy of Science of South Africa, South Africa, Royal Society of Canada, Canada, Accademia Nazionale dei Lincei, Italy, Royal Society, United Kingdom, Chinese Academy of Sciences, China, Science Council of Japan, Japan, National Academy of Sciences, United States of America, Académie des Sciences, France, Academia Mexicana de Ciencias, Mexico, Deutsche Akademie der Naturforscher Leopoldina, Germany, Russian Academy of Sciences, Russia (online at <http://www.nationalacademies.org/includes/G8+5energy-climate09.pdf>).

⁸ Letter to the U.S. Senate from the Presidents and Executive Directors of American Association for the Advancement of Science, American Chemical Society, American Geophysical Union, American Institute of Biological Sciences, American Meteorological

- Thirteen federal departments and agencies, including NASA, the National Science Foundation, and the Department of Defense, which reported in 2009 that global warming is “unequivocal and primarily human-induced” and that “widespread climate-related impacts are occurring now and are expected to increase.”⁹
- The Intergovernmental Panel on Climate Change (IPCC), which has reported: “Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.”¹⁰

On March 8, 2011, the Committee on Energy and Commerce, Subcommittee on Energy and Power held a hearing on climate science at the request of Ranking Members Waxman and Rush.¹¹ Witnesses at that hearing presented testimony about the impacts of climate change that are already occurring, as well as future impacts that are likely as the planet warms.¹²

Society, American Society of Agronomy, American Society of Plant Biologists, American Statistical Association, Association of Ecosystem Research Centers, Botanical Society of America, Crop Science Society of America, Ecological Society of America, Natural Science Collections, Alliance Organization of Biological Field Stations, Society for Industrial and Applied Mathematics, Society of Systematic Biologists, Soil Science Society of America, University Corporation for Atmospheric Research (Oct. 21, 2009) (online at http://www.aaas.org/news/releases/2009/media/1021climate_letter.pdf).

⁹ Global Climate Change Impacts in the United States, U.S. Global Change Research Program (2009) (online at <http://globalchange.gov/publications/reports/scientific-assessments/us-impacts>). These agencies participate in the U.S. Global Change Research Program (USGCRP). The USGCRP began as a presidential initiative in 1989 and was mandated by Congress in the [Global Change Research Act of 1990](#) (P.L. 101-606), which called for “a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change.”

¹⁰ Climate Change 2007: Synthesis Report, Intergovernmental Panel on Climate Change (2007) (online at http://www.ipcc.ch/publications_and_data/ar4/syr/en/spm.html). The IPCC is the leading international body for the assessment of climate change. It was established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) to assess the “risk of human-induced climate change.” The Panel is open to all members of the WMO and UNEP, and includes more than 2500 scientists from around the world.

¹¹ Energy and Commerce Committee, Hearing on Climate Science and EPA’s Greenhouse Gas Regulations (Mar. 8, 2011).

¹² *Id.* (testimony online at: <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8304>).

III. Upton-Inhofe Prohibits EPA from Regulating Stationary Sources

New section 330(b)(1)(A) provides that EPA may not take action on carbon pollution or even “take into consideration” carbon pollution in the future. It states:

The Administrator may not, under [the Clean Air Act], promulgate any regulation concerning, take action relating to, or take into consideration the emission of a greenhouse gas to address climate change.

This section has two primary effects on EPA authority to reduce emissions of greenhouse gases from stationary sources. First, it prohibits EPA from requiring permits to address greenhouse gases under its “prevention of significant deterioration” (PSD) program.¹³ Second, it blocks EPA from setting minimum control requirements for major new and existing sources under the “new source performance standards” (NSPS) provisions.¹⁴

A. Impact on the PSD Program.

Once EPA regulated greenhouse gases from motor vehicles, the PSD permit review requirement applied automatically beginning January 2, 2011. It requires that major new facilities or existing facilities making major modifications that significantly increase emissions undergo a review of options to minimize increases in emissions.¹⁵ In May 2010, EPA finalized a “tailoring rule” to limit the permit review requirements to only the largest sources.¹⁶ Until June 30, 2011, only sources subject to PSD for other pollutants will be required to consider greenhouse gases in their permits.¹⁷ From July 1, 2011, to June 30, 2013, only new sources that emit at least 100,000 tons of greenhouse gases per year or existing sources that modify and seek to increase pollution by at least 75,000 tons per year will be required to obtain PSD permits.¹⁸ EPA has committed to undertake an additional rulemaking that will be completed before July 1, 2012, which would consider whether to lower the threshold further, but would not consider any level below 50,000 tons per year.¹⁹

¹³ CAA section 165.

¹⁴ CAA section 111.

¹⁵ See CAA sections 165, 169.

¹⁶ U.S. Environmental Protection Agency, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Final Rule*, 75 Fed. Reg. 31514 (June 3, 2010).

¹⁷ *Id.* at 31516.

¹⁸ *Id.*

¹⁹ *Id.*; U.S. Environmental Protection Agency, *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Fact Sheet* (online at: <http://www.epa.gov/nsr/documents/20100413fs.pdf>).

PSD permit review is done on a case-by-case basis, taking into account the design and function of the specific facility undergoing review. The review is carried out by the permitting authorities, which are typically state or local pollution control agencies. The process requires consideration of all options for limiting emissions, followed by the elimination of those options that are too costly or technically infeasible, and the selection of the remaining option that permitting authorities consider to be “best available control technology” (BACT).

In November 2010, EPA issued guidance to state agencies on implementing the review requirements for greenhouse gases.²⁰ The guidance emphasized that the well-established process and precedents used for other pollutants would also apply to greenhouse gases. The guidance also clarified what is likely to be required of sources. It indicated that energy efficiency improvements should in most cases constitute BACT for greenhouse gases.²¹ The guidance suggested that carbon capture and sequestration would likely be eliminated as an option for BACT because of high costs.²² The guidance further stated that fuel switching that would fundamentally redefine a source (such as switching from coal to natural gas) would not need to be considered as an option.²³ In addition, EPA has announced that it intends to modify its policies to provide that certain permit applications that have been pending with the agency for a substantial period of time will not need to be modified to comply with subsequently applicable air quality requirements, including the greenhouse gas PSD requirements.²⁴

Forty-nine states have taken actions to ensure that permit applications could go forward when the greenhouse gas review requirements went into effect on January 2, 2011.²⁵ Only Texas failed to take the necessary actions. To ensure that applicants in Texas could receive the necessary pre-construction permits, EPA issued an interim final rule on December 23, 2010, to

²⁰ U.S. Environmental Protection Agency, *PSD and Title V Permitting Guidance For Greenhouse Gases* (hereinafter *Guidance*) (Nov. 2010) (online at <http://www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf>); U.S. Environmental Protection Agency, *Greenhouse Gas Permitting Guidance, Summary Slides* (hereinafter *Summary*) (Fall 2010) (online at: http://epa.gov/air/oaqps/eog/video/pdfs/GHGPermittingGuidance_Nov18&19Webinars.pdf).

²¹ *Guidance* at 46; *Summary* at 17.

²² *Guidance* at 36-38; *Summary* at 24.

²³ *Guidance* at 29; *Summary* at 19.

²⁴ See Declaration of Regina McCarthy, *Avenal Power Center, LLC v. U.S. EPA* (Case No.: 1:10-cv-00383-RJL) (Jan. 31, 2011).

²⁵ National Association of Clean Air Agencies, *GHG Permitting Programs Ready to Go by January 2nd* (Oct. 28, 2010).

partially disapprove Texas's permitting program and authorize EPA to issue permits with respect to greenhouse gases.²⁶

The Upton-Inhofe bill would eliminate this requirement that large new or modified sources of greenhouse gases take, or even consider, any steps to minimize the pollution they will add to the atmosphere.

B. Impact on the NSPS Program.

In December 2010, EPA announced a schedule to establish New Source Performance Standards (NSPS) for greenhouse gases for two categories of sources – fossil fuel-fired power plants and refineries – pursuant to two proposed settlement agreements. Under the agreements, EPA will propose standards for utilities and refineries in July 2011 and December 2011 and will finalize the standards in May 2012 and November 2012, respectively.²⁷

Under an NSPS, EPA establishes performance standards for new facilities (and modified facilities that significantly increase emissions) reflecting best demonstrated technology taking costs into account.²⁸ In practice, these standards are generally less stringent than limits based on best available control technology. In addition, states must submit plans to EPA to reduce emissions at existing facilities.²⁹ Under these provisions, states have the flexibility to apply less stringent standards or longer compliance schedules for various reasons including costs, remaining useful life of the facility, and physical impossibility.

EPA is in the process of conducting five listening sessions to give stakeholders extensive opportunities to provide their views to the agency even prior to any NSPS proposal.³⁰ Nothing in EPA's history of issuing NSPS or its approach to date on greenhouse gases suggests that the agency plans to establish costly or onerous requirements for new sources under these provisions.

The Upton-Inhofe bill would eliminate this EPA authority to set minimum emissions standards for large fossil-fuel fired power plants and oil refineries, which are the first and second largest stationary sources of greenhouse gases respectively.

²⁶ U.S. Environmental Protection Agency, *Clean Air Act Permitting for Greenhouse Gas Emissions- Final Rules Fact Sheet* (online at: <http://www.epa.gov/nsr/ghgdocs/20101223factsheet.pdf>).

²⁷ U.S. Environmental Protection Agency, *Settlement Agreements To Address Greenhouse Gas Emissions From Electric Generating Units and Refineries, Fact Sheet* (online at: www.epa.gov/airquality/pdfs/settlementfactsheet.pdf).

²⁸ CAA section 111.

²⁹ CAA section 111(d).

³⁰ U.S. Environmental Protection Agency, *Listening Sessions on Greenhouse Gas Standards for Fossil Fuel Fired Power Plants and Petroleum Refineries, Webpage*, (online at <http://www.epa.gov/airquality/listen.html>).

IV. Upton-Inhofe Prohibits EPA and California from Establishing New Tailpipe Standards

The Upton-Inhofe bill changes the manner in which motor vehicles have been regulated in the United States for 40 years. The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. The Upton-Inhofe bill would terminate both federal and state authority to establish tailpipe standards for greenhouse gases after vehicle model year 2016.

A. Impact on EPA Authority.

New section 330(b)(2)(A) prevents “further revision” of the 2010 greenhouse gas tailpipe standards. Those standards apply to vehicle model years 2012 to 2016. This national program for fuel economy and greenhouse gas emissions was supported by the automobile industry, the states, and environmental advocacy groups.³¹ If the Upton-Inhofe bill is enacted, there will be no federal greenhouse gas tailpipe standards for cars and trucks after model year 2016.

EPA and the National Highway Traffic Safety Administration have recently evaluated scenarios representing 3%, 4%, 5%, and 6% annual increases in overall average stringency in tailpipe standards after model year 2016. These scenarios are roughly equivalent to 47 to 62 mpg in 2025, if all improvements were made using fuel economy-improving technology.³² Under the Upton-Inhofe bill, EPA would lose its authority to adopt standards that promote these technologies.

NHTSA, acting alone, is highly unlikely to achieve comparable levels of oil savings and emissions reductions. Of the benefits achieved by the 2012 to 2016 national standards, fully one-quarter of the fuel savings and one-third of the greenhouse gas emissions reductions are produced solely by the EPA tailpipe standards.³³ These differences stem in large part from differences in the underlying statutory authorities of the two agencies. For example, some manufacturers have routinely paid civil penalties rather than complying with NHTSA fuel economy requirements, while this option is not available as a practical matter under the Clean Air Act.

³¹ See U.S. Environmental Protection Agency, U.S. Department of Transportation, National Highway Traffic Safety Administration, *Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25324 (May 7, 2010).

³² U.S. Environmental Protection Agency and U.S. National Highway Traffic Safety Administration, *Interim Joint Technical Assessment Report* (Oct. 2010) (online at <http://www.epa.gov/otaq/climate/regulations/420f10051.htm>).

³³ See U.S. Environmental Protection Agency, U.S. Department of Transportation, National Highway Traffic Safety Administration, *Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 Fed. Reg. 25324, 25343-4, 25347 (May 7, 2010).

B. Impact on California Authority.

Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. It also provides that other states have the option of electing to apply California's standards. In practice, this has allowed California to set vehicle standards that are more protective of public health than the federal standard and has allowed other states to follow California's example. However, section 3 of the Upton-Inhofe bill strips the EPA of authority to waive federal preemption, thereby blocking any state tailpipe standards for greenhouse gases for model years 2017 or later.

V. Upton-Inhofe Prohibits EPA from Establishing Standards for Other Mobile Sources

The Upton-Inhofe bill bars EPA from using its existing authority under Title II of the Clean Air Act to establish greenhouse gas emissions standards for other mobile sources such as planes, trains, boats, and heavy construction equipment.³⁴ NHTSA does not have authority to establish efficiency standards for these sources, which consume over 2 million barrels of oil per day.³⁵ Under the Upton-Inhofe bill, the potential for substantial oil savings and greenhouse gas emissions reductions from these sources would be forfeited.

VI. Upton-Inhofe Prohibits EPA from Enforcing Greenhouse Gas Reporting Requirements

Congress included provisions in the Clean Air Act Amendments of 1990 that required power plants to report carbon dioxide emissions.³⁶ In 2007, Congress extended this reporting requirement to apply to other large sources, as well as other greenhouse gases, and EPA issued implementing regulations in 2009.³⁷ New section 330(b)(4)(A), however, would overturn the recently adopted greenhouse gas reporting requirements for all sources. Power plants would be the only sources subject to any reporting requirements, and they would not have to report greenhouse gas emissions other than carbon dioxide.

In addition, EPA prepares the inventory of U.S. greenhouse gas emissions, which is submitted by the United States pursuant to its treaty obligations under the U.N. Framework Convention on Climate Change. Section 330(b)(1) may prevent EPA from conducting this technical work and thus could impair the United States' ability to carry out its obligations under

³⁴ See CAA sections 213, 231.

³⁵ See U.S. Energy Information Administration, *Annual Energy Outlook 2011* (online at: <http://www.eia.doe.gov/oiaf/aeo/tablebrowser/#release=AEO2011&subject=0-AEO2011&table=45-AEO2011®ion=0-0&cases=ref2011-d120810c>).

³⁶ Clean Air Act Amendments of 1990, section 821 (Public Law 101-549).

³⁷ Consolidated Appropriations Act, 2008 (H.R. 2764; Public Law 110-161); U.S. Environmental Protection Agency, *Mandatory Reporting of Greenhouse Gases; Final Rule*, 74 Fed. Reg. 56260 (Oct. 30, 2009).

this international treaty, which was signed by President George H. W. Bush and ratified by the U.S. Senate.

VII. Upton-Inhofe Undermines EPA Programs Related to Substitutes for Ozone-Depleting Chemicals

Under section 612 of the Clean Air Act, companies that wish to market a new substitute for ozone depleting substances must apply to EPA for approval. In determining whether to approve a substitute, EPA compares the overall risk to human health and the environment posed by the original substance with that of the potential substitute. The global warming potential of a substitute can be a significant factor in this analysis. In fact, a number of U.S. companies, including Dupont, Honeywell, and GE, have expended significant resources developing substitutes with very low global warming potential.

New section 330(b)(1) would block EPA from considering global warming impacts when approving substitutes. While section 330(b)(2)(D) excepts implementation and enforcement of Title VI, that exception applies only to the extent that the implementation or enforcement only involves class I or class II substances (i.e., ozone depleting substances). However, recently approved and pending substitutes are not class I or class II substances. As a result, EPA would appear to be unable to consider climate change effects in deciding whether to approve applications for substitutes.

There are other ways in which the Upton-Inhofe bill interferes with the ozone-depletion provisions of the Clean Air Act. For the last two years, the United States, in partnership with Canada and Mexico, has advocated for an amendment to the Montreal Protocol that would control the global production of HFCs, which are substitutes for ozone-depleting chemicals that have high global warming potentials. HFCs are not class I or class II substances. New section 330(b)(1) would prevent EPA from implementing such a treaty amendment through the Clean Air Act. As a result, it would undermine the Administration's ability to pursue established treaty negotiating positions that dozens of countries now support.

VIII. Upton-Inhofe Creates Legal Uncertainty for the 2010 Motor Vehicle Standards

A summary of the Upton-Inhofe bill states that the Act would allow EPA to implement the light-duty vehicle tailpipe standards for 2012-2016.³⁸ However, the language of the Upton-Inhofe bill may not effectuate this stated goal.

As discussed above, section 330(d)(4)(B) repeals the endangerment finding. An endangerment finding is an essential precondition for light-duty tailpipe standards under section 202(a) of the Clean Air Act. Section 330(b)(2)(A) states that notwithstanding the repeal of the endangerment finding, section 330(b)(1) does not prohibit EPA from implementing and enforcing the light-duty vehicle tailpipe standards adopted in May 2010. But the bill does nothing to satisfy or remove the independent legal requirement for an endangerment finding

³⁸ Energy and Commerce Committee Staff, *Subcommittee Markup of H.R. 910, the Energy Tax Prevention Act of 2011* (internal memorandum) (Mar. 8, 2011).

under section 202(a). Therefore, repeal of the endangerment finding will provide opponents of the light-duty vehicle greenhouse gas rule a new legal argument that the rules are unlawful.

IX. Upton-Inhofe Calls Voluntary Programs into Question

It is unclear whether the Upton-Inhofe bill preserves EPA's authority under the Clean Air Act to implement many voluntary programs to reduce greenhouse gases. Clean Air Act section 103 is a primary authority for many of these programs. While section 330(b)(2)(C) excepts "research, development and demonstration programs" from the prohibition in section 330(b)(1), this language is narrower than the language in section 103 of the Clean Air Act, which specifically authorizes "nonregulatory strategies." Thus, it is unclear whether the language of the exception encompasses voluntary programs. Moreover, EPA could be blocked from relying on section 103, which authorizes EPA activities with respect to "air pollution" and "air pollutants," as authority for these voluntary programs because new section 330(b)(1)(B) excludes greenhouse gases from the definition of "air pollutant." These provisions in the Upton-Inhofe bill call into question many successful voluntary programs, such as EPA's SmartWay program, which works with the trucking industry to reduce emissions, or EPA's participation in the Global Methane Initiative, an international effort to implement methane emissions reduction projects and technologies.

X. Upton-Inhofe Creates Litigation Opportunities for Opponents of Regulation of Conventional Pollutants

The Upton-Inhofe bill appears to create numerous new litigation opportunities over the regulation of conventional air pollutants due to legal ambiguities created by drafting peculiarities. For instance, although ozone is regulated for its conventional impacts on public health and welfare, it is also greenhouse gas. Under the Bush Administration, EPA considered the climate effects of ozone when establishing a national ambient air quality standard for ozone.³⁹ Similarly, implementation of the existing landfill gas regulations, which encompass methane and other gases, might be barred as those regulations were justified at least in part based on climate change. It is unclear what impact the Upton-Inhofe bill would have on many clean air actions that address conventional air pollutants like ozone and landfill gas that also have climate change impacts.

³⁹ EPA, Air Quality Criteria for Ozone and Related Photochemical Oxidants, Vol. I (Feb. 2006).