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Regarding HB 2545: Regional Air Quality Compact

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The EPA's bid to regulate greenhouse gases is one of the most audacious and dangerous power-grabs in the history of the executive branch. It violates the constitutional prerogatives of Congress, and of the States—and threatens devastating economic losses that will be felt by working families throughout the country.

According to some estimates, just in the next two years the new greenhouse regulations could cost 1.4 million jobs and decrease U.S. business investment by 15 percent. One study concluded that the cost of gasoline will rise by 50 percent, electricity by 50 percent, and natural gas by 75 percent over the next 20 years. Transportation costs are the primary variable in food prices—so food prices will also be affected. Low income Texans, who are particularly vulnerable to spikes in energy and food prices, will be hardest hit.

Yesterday, EPA survived four votes in the U.S. Senate to either delay or prohibit EPA's greenhouse gas regulations. But the writing is on the wall: 64 U.S. Senators, including 17 Democrats, voted for one or more of the anti-EPA measures. Part of the reason the EPA is running into so much trouble in Congress is that Congress likes to be the one that writes laws. And Congress doesn't like it when administrative agencies write their own laws, and it especially doesn't like it when agencies rewrite or ignore laws that Congress has passed.

Congress never intended to give EPA the power to regulate economic activity in order to counteract climate change. In order to find the power to regulate greenhouse gases in the Clean Air Act, EPA had to devise a fiendishly convoluted series of rule-makings. HB 2545 addresses a specific element of those regulations—namely the federal takeover of state implementation programs under the Clean Air Act.

But let's take a step back and look at how the different actions EPA has taken over the past year fit together.

EPA started with a pair of rules that made greenhouse gases a pollutant for purposes of regulating stationary sources such as restaurants and power plants. According to EPA's own estimates, applying the Clean Air Act to greenhouse gas emissions would in effect have forced millions of restaurants and apartment buildings to shut down. That would have been totally absurd, as EPA noted, so under the "absurd results" doctrine, it simply rewrote the Clean Air Act so that only large facilities are subject to the greenhouse gas regulations—for now.

Designating a component of the air we breathe a pollutant under the Clean Air Act was bad enough. But if this Tailoring Rule is allowed to stand, any federal agency that wants to rewrite its enabling statute only has to adopt a regulation that would have absurd results under the statute, and then it can rewrite the statute to say whatever wants. EPA is arrogating enormous legislative authority to itself, in violation of the Constitution. That is why there are huge majorities in Congress in favor of either delaying or killing the EPA greenhouse gas regulations.

What EPA did next after the Tailoring Rule is what most violates the States' constitutional and statutory authorities and what HB 2545 is meant to address.

Towards the end of last year, with most state legislatures in adjournment, EPA suddenly gave states just a few weeks (rather than several years as provided by the Clean Air Act) to rewrite their laws and regulations in order to implement the new federal standards, which went into effect on January 2, 2011. Many states simply could not comply. At least 13 are now subject to a moratorium on all new industrial construction or expansion of existing facilities. Now EPA is imposing federal implementation plans on

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states that can't or won't delegate the constitutional authority of their legislatures to the EPA. Here again, EPA is violating its enabling statute—the Clean Air Act clearly leaves implementation of national standards to the states.

The requirement that states revise their laws and regulations to "automatically update" for all pollutants designated by EPA now or in the future, is the basis for EPA's invalidation of multiple state implementation plans. The action constitutes an unconstitutional commandeering of the states. The Supreme Court ruled in *U.S. v. Printz* (1997) that "the Federal Government may not compel the State to implement, by legislation or executive action, federal regulatory programs." The Court noted that it "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." Yet that is in effect what EPA did when it required states to change their laws in a matter of weeks if they wanted to avoid a construction moratorium on industrial facilities. The Supreme Court has held that when the federal government induces State action under threat of some economic penalty, "pressure turns into compulsion."

The Court has also indicated that states cannot be coerced into implementing federal policy as a condition of being allowed to regulate in a federally preempted area, because that makes the states accountable and liable for the implementation of federal policy, which is unconstitutional under the reasoning in *Printz*.

Interstate Compacts and the Balance of State and Federal Authority

EPA is defending itself in federal court from dozens of lawsuits that have been brought by states that desperate to protect their industries constitutional prerogatives. There are many strong arguments on the side of the states, but the federal courts have become rubber-stamps for every expansion of federal power, so there's no telling which way the lawsuits will go.

In the meantime, there is one way that states can initiate changes in federal law—through interstate compacts consented to by Congress. Under our Constitution, interstate compacts that affect federal authority require congressional consent. Once Congress consents to an interstate compact, the compact carries the force of federal law, trumping all prior federal and state law.

More than 200 interstate compacts are currently in force. After studying those compacts carefully, we at TPPF concluded that the potential of the interstate compact as a device for strengthening federalism remains largely unexploited.

One way is for Congress to consent to letting the state in the compact regulate in a particular area. If Congress does that, then you've created a sort of "shield" over state authority, to protect it from federal intrusion. That's the idea behind HB 2545.

Under the Obama administration, the EPA has abused its authority to approve and disapprove state implementation plans (SIPs) in order to take over traditional state functions. HB 2545 suspends EPA's SIP-approval authority within the member states, and replaces it with a Regional Air Quality Commission.

By creating a mechanism for state cooperation and collaboration on air quality issues, the Regional Air Quality Commission will promote both state compliance with the Clean Air Act and competitive best practices among the member states in attaining air quality. The Commission would also take over EPA's current function of providing guidance for compliance with the Clean Air Act, which EPA has also abused in violation of statute, the U.S. Constitution, and the express wishes of Congress.

For the foregoing reasons, TPPF strongly endorses HB 2545. ★