



TO: Editorial Page Editors and Writers
FROM: Rena Steinzor, President, Center for Progressive Reform
RE: Senate Consideration of Provision to Preempt State and Local Climate Change Laws and Measures
DATE: June 2, 2008

As you may know, the U.S. Senate is preparing, at long last, to consider competing climate change measures this week. The centerpiece of the legislation will be a federal program that imposes a “cap” on total carbon emissions and allows polluting industries to buy and sell “allowances” in order to keep all emissions under that numerical limit. One likely subject of controversy during floor consideration is whether this limited plan should explicitly preempt existing state and local laws and initiatives on climate change, essentially repealing programs adopted in recent years by state and local governments eager to move ahead on this important issue. Preemption is a top priority for carbon-producing industries, which hope for a not particularly aggressive federal program, and at the same time, the elimination of more rigorous state and local controls on their emissions.

It’s no secret that the U.S. response to climate change has been sluggish. Initially, the Bush Administration’s approach to this most serious of problems was to deny it. More recently, some in the Administration have acknowledged the plain reality of climate change, while essentially doing nothing to prevent it. All the while, state and local governments have led the way. According to the National Association of Clean Air Agencies, “As of January 2008, 33 states and many more localities, representing a majority of U.S. GHG [greenhouse gas] emissions, have either completed climate change action plans or will complete them within the year.” In adopting these measures, the states have carefully tailored their planning to the specific needs of their state economies, as well as to the pollution sources within their borders.

As Congress prepares to consider climate change legislation, a disturbing political dynamic has taken root. After years of denial and delay, polluting industries and their defenders on Capitol Hill are resigned to the inevitability of federal climate change legislation. But they hope to use federal legislation as a vehicle to get out from under more demanding state and local laws. So they are pushing for a provision in whatever bill emerges that would preempt state and local climate change laws and initiatives. This effort has support from powerful quarters, most notably Rep. John Dingell (D-MI), the chair of the House Committee on Energy and Commerce.

The debate over preempting state and local climate change laws is distinct from the ongoing furor over the Bush Administration’s use of *agency* preemption, in which regulatory agencies have repeatedly presumed – without statutory basis – to preempt state laws protecting health, safety and the environment. In this case, the central question is whether preemption makes for

good policy. I believe it does not. While it is long past time for federal action, a preemption provision would undercut years of innovation and progress – practically all the progress made by U.S. governments to date. Preemption would also contradict 40 years of precedent, including virtually all of the major environmental statutes now on the books, which allow states to adopt tougher approaches to their particular circumstances, making federal law the “floor” upon which more stringent state regulations are built.

The United States and, for that matter, the world have a long way to go in reducing carbon emissions to the point that will avert catastrophic climate change. We will never get to these goals without the active involvement of state and local governments that have the best ability to change zoning laws, control sprawl, regulate utilities, require accessible renewable energy portfolios, etc. Moreover, state and local governments are far better suited to drive the type of lifestyle changes among their citizens that will prove essential over the long run – encouraging the use of compact fluorescent light bulbs, for example, or establishing mass transit policies that affect consumer choices.

All of these measures can have an important effect on emissions. To wipe them out for the sake of a single, limited federal “cap and trade” program would push climate change policy one step ahead and three steps back.

The principal argument in favor of preemption is that it would end what is dismissively described as a state and local “patchwork” of policies, which is said to impose an unacceptable burden on interstate commerce. That argument is not supported by the facts on the ground or by the history of U.S. environmental policies. States have always played a critical role in the nation’s efforts to protect public health. Most industries, including the ones seeking climate change preemption, have systems in place to ensure their compliance with different legal regimes at the international, federal, state, and local levels. Notably, the “patchwork” argument is almost always raised in response to state requirements that are tougher than federal law. It is not efficiency and clarity that polluters seek; it is weak laws and lax enforcement. Right now, they hope the federal government will arrange that for them.

This week, I joined with three fellow Member Scholars of the Center for Progressive Reform Member Scholars – William Andreen of the University of Alabama Law School, Robert Glicksman of the University of Kansas Law School, and Nina Mendelson of the University of Michigan Law School – in issuing a White Paper analyzing the potential impact of federal preemption of these measures. The white paper is available on CPR’s website at <http://www.progressivereform.org/articles/federalismClimateChange.pdf>.

I hope you’ll have an opportunity to editorialize on this important and timely issue. If you’d like to discuss the issue, I’d be happy to speak with you. Please contact Matthew Freeman in our media office, if you’d like to set something up, at mfreeman@progressivereform.org or at 301.762.8980. Thanks very much for your time.

The Center for Progressive Reform is a nonprofit research and educational organization whose network of scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary. For more information, contact Matthew Freeman at 301-762-8980 or at mfreeman@progressivereform.org. Visit CPR on the web at www.progressivereform.org.