

HOUSE BILL REPORT

HB 2892

As Reported by House Committee On: Environment & Energy

Title: An act relating to authorizing the department of ecology to regulate greenhouse gas emissions associated with persons who produce or distribute fossil fuel products that emit greenhouse gases in Washington.

Brief Description: Authorizing the department of ecology to regulate greenhouse gas emissions associated with persons who produce or distribute fossil fuel products that emit greenhouse gases in Washington.

Sponsors: Representatives Fitzgibbon, Doglio, Ramel and Pollet; by request of Office of the Governor.

Brief History:

Committee Activity:

Environment & Energy: 2/3/20, 2/6/20 [DPS].

Brief Summary of Substitute Bill

- Revises the state Clean Air Act's (state CAA) definition of "emission" and "emission standard" to include both direct and indirect emissions, and defines indirect emissions for purposes of the greenhouse gas (GHG) regulation under the state CAA.
- Authorizes the Department of Ecology (Ecology) and local air authorities to require persons who produce or distribute fossil fuels or other products that emit GHGs in Washington to comply with air quality standards, emission standards, or emission limits on GHGs under the state CAA.
- Directs Ecology to adopt a rule under state CAA authority to regulate GHGs and authorizes Ecology to collect fees, rely on market-based mechanisms to achieve emission reductions, and provide special consideration for energy-intensive and trade-exposed industries to address leakage.
- Makes the state CAA authority newly provided to Ecology and local air authorities null and void upon the enactment of a more comprehensive GHG emission reduction program that puts a price on GHG emissions and is designed and forecasted to achieve statutory statewide GHG emission-reduction limits.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Fitzgibbon, Chair; Lekanoff, Vice Chair; Doglio, Fey, Mead, Robinson and Shewmake.

Minority Report: Do not pass. Signed by 4 members: Representatives DeBolt, Ranking Minority Member; Dye, Assistant Ranking Minority Member; Boehnke and Goehner.

Staff: Jacob Lipson (786-7196).

Background:

State and Federal Clean Air Acts.

Under the federal Clean Air Act (federal CAA), the United States Environmental Protection Agency (EPA) is responsible for establishing and enforcing standards and limits on air pollutants. Individual states and tribes may receive delegated authority to implement the federal program and may adopt their own rules and regulations at least as stringent as those set by the EPA. In Washington, the Department of Ecology (Ecology) and seven local air pollution control authorities (local air authorities) have each received approval from the EPA to administer aspects of the federal CAA in Washington. Local air authorities have primary responsibility for administering the state Clean Air Act (state CAA) and federal CAA in counties which have elected to activate a local air authority or to form a multicounty air authority. In other areas of the state, Ecology is responsible for administering state and federal CAA programs.

The state CAA directs Ecology to adopt air quality standards and emission standards for the control of air contaminants. Air quality standards and emission standards must be based upon a system of classification by types of emissions or types of sources of emissions.

- Air quality standards are defined as an established concentration, exposure time, and frequency of occurrence of an air contaminant or contaminants in the ambient air which must not be exceeded. Ecology has adopted air quality standards for lead, sulfur oxides, and ozone, among other contaminants.
- Emission is defined as a release of air contaminants into the ambient air, and emission standards and emission limits refer to requirements that limit the quantity, rate, or concentration of emissions of air contaminants on a continuous basis. Ecology has adopted a variety of emission standards, including gasoline vapor control requirements applicable to gasoline storage tanks, emission standards for sources of volatile organic compounds, and emission standards for combustion and incineration units.

The state CAA establishes an Air Pollution Control Account (Account) for use by Ecology in carrying out certain responsibilities under the state CAA. The Account is funded by certain fees and other receipts authorized under the state CAA.

Violations of state CAA requirements are punishable by a variety of criminal and civil penalties. Civil penalties of up to \$10,000 per violation are authorized by the state CAA.

Penalties recovered by Ecology (rather than by a local air authority) are paid into the Account in the State Treasury and may be used by Ecology to implement the state CAA.

Federal and State Regulation of Greenhouse Gases.

The EPA and Ecology identify carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride as greenhouse gases (GHGs) because of their capacity to trap heat in the Earth's atmosphere. According to the EPA, the global warming potential (GWP) of each GHG is a function of how much of the gas is concentrated in the atmosphere, how long the gas stays in the atmosphere, and how strongly the particular gas affects global atmospheric temperatures.

Under state law, the GWP of a gas is measured in terms of the equivalence to the emission of an identical volume of carbon dioxide over a 100-year timeframe (carbon dioxide equivalent or CO₂e). Under the federal CAA, GHGs are regulated as an air pollutant and are subject to several air regulations administered by the EPA. These federal CAA regulations include a requirement that facilities and fuel suppliers whose associated annual emissions exceed 25,000 metric tons of carbon dioxide equivalent report their emissions to the EPA. At the state level, GHGs are regulated by Ecology under the state CAA. This state law requires facilities, sources, and sites whose emissions exceed 10,000 metric tons of carbon dioxide equivalent each year to report their annual emissions to Ecology. Ecology has adopted rules governing the reporting of GHG emissions that specify the GHG emissions calculation methodology for covered facilities. Fuel suppliers must submit GHG emissions data to Ecology that relates to emissions from the fuel reported to the Department of Licensing for fuel tax purposes.

State Emission Limits.

In 2008 state limits were established for the emission of GHGs as follows:

- By 2020, overall GHG emissions in the state must be reduced to 1990 levels.
- By 2035, overall GHG emissions in the state must be reduced to 25 percent below 1990 levels.
- By 2050, overall GHG emissions in the state must be reduced to 50 percent below 1990 levels or 70 percent below the state's expected emissions for that year.

Clean Air Rule.

In September 2016 Ecology adopted a rule under state CAA authority (the Clean Air Rule) to limit emissions of GHGs from certain stationary emission sources and from fuel supplied by petroleum product producers and importers and natural gas distributors. For purposes of meeting compliance obligations under the Clean Air Rule, parties that are required to reduce GHG emissions may directly reduce their own emissions or earn or acquire emission reduction units, which represent the emission of one metric ton of CO₂e. With the exception of certain designated "EITE Covered parties," which are assigned alternative emission reduction requirements based on an efficiency improvement rate, parties subject to the Clean Air Rule must reduce their GHG emissions relative to baseline emission levels by 1.7 percent per year. Entities that emit more than 100,000 metric tons per year were subject to emission reduction requirements at the program's outset, with progressively smaller emitters being brought into the program over time until 2035.

After adoption, the Clean Air Rule was challenged in both state (Thurston County Superior Court) and federal court (United States District Court for the Eastern District of Washington). The federal court challenge was paused, pending resolution of the state court case. Implementation of the Clean Air Rule was also suspended while the court challenges proceeded.

In December 2017 the Thurston County Superior Court invalidated the Clean Air Rule on the basis that it exceeded Ecology's statutory authority by regulating petroleum product producers and importers and natural gas distributors. Ecology appealed that decision directly to the Washington Supreme Court, which issued a decision on January 16, 2020, that affirmed in part, and reversed in part, the Thurston County Court's decision. The Washington Supreme Court invalidated the rule to the extent that it regulated indirect emitters or nonemitters via an emission standard. However, in determining that the Clean Air Rule was severable, the Washington Supreme Court invalidated only the part of the rule that the court determined had exceeded Ecology's statutory authority and remanded the case to Thurston County Superior Court.

Summary of Substitute Bill:

For purposes of the state Clean Air Act (state CAA), "emission" and "emission standards" include both direct or indirect releases of air contaminants. The Department of Ecology (Ecology) or local air authorities may require persons who produce or distribute fossil fuels or other products that emit greenhouse gases (GHGs) in Washington to comply with air quality standards, emission standards, or emission limits on GHGs. Indirect emissions are defined, for purposes of GHG emissions, as emissions from the production or distribution of fuels, including electricity, where the release of contaminants in the ambient air occurs during the consumption, use, combustion, or oxidation of the fuels.

Ecology must adopt a rule under state CAA authority to regulate GHGs. The rule must take effect no earlier than July 1, 2021. Under the rule, Ecology may:

- collect annual fees from regulated parties to cover Ecology's cost of administering and enforcing rule requirements;
- rely on market-based mechanisms to achieve GHG emission reductions but may not auction or sell credits or other market-based mechanisms; and
- identify and give special consideration to energy-intensive and trade-exposed facilities to the extent necessary to address leakage where reductions in in-state GHG emissions are offset by an increase in GHG emissions outside of Washington.

The Air Pollution Control Account used for Ecology's general state CAA activities also receives any fees implemented by Ecology to reduce GHG emissions and may be used to implement GHG emission reduction rules.

The GHG reporting protocols under the state CAA are amended, including by:

- making annual emission reports due to Ecology in March 31 of each year, rather than October 31;

- authorizing Ecology to, by rule, modify federal GHG emission reporting methodologies;
- authorizing Ecology to require persons to use federal GHG emission reporting methods applicable to specific emission source types;
- removing the prohibition on GHG reporting rules considering aircraft fuel purchased in Washington to be equivalent to aircraft fuel combusted in Washington;
- authorizing Ecology to require persons to have a third party verify their GHG reports to Ecology; and
- authorizing Ecology to adopt rules that amend Environmental Protection Agency GHG reporting definitions to address differences in state and federal boundaries.

The authority granted to Ecology under the state CAA in the bill is null and void upon the enactment of a more comprehensive greenhouse gas emission reduction program that:

- puts a price on direct and indirect GHG emissions, including but not limited to a cap and trade system or a tax; and
- is designed and forecasted by state agencies with subject-matter expertise to achieve the statutory statewide GHG emission reduction limits.

Notice that the state CAA authority under the bill is null and void must be published by Ecology in the Washington State Register.

A severability clause is included.

Substitute Bill Compared to Original Bill:

The substitute version of the bill makes the following changes to the original house bill:

- defines indirect emissions for purposes of greenhouse gas emissions under the state Clean Air Act (state CAA);
- authorizes local air authorities, in addition to the Department of Ecology (Ecology), to require persons who produce or distribute fossil fuels or other products that emit greenhouse gases (GHGs) in Washington to comply with air quality standards, emission standards, or emission limits on GHG emissions;
- amends GHG emission reporting under the state CAA, including by moving the reporting deadline from October 31 to March 31 of each year and by authorizing Ecology to adopt rules to modify GHG emission reporting methodologies established by the United States Environmental Protection Agency;
- requires Ecology to adopt a rule to reduce GHGs under state CAA authority that take effect no earlier than July 1, 2021;
- authorizes Ecology to collect annual fees from persons subject to GHG emission reduction rules;
- authorizes Ecology to rely upon market-based mechanisms for GHG emission reduction rules, including credits or emission reduction units, so long as the state does not sell or auction the credits;
- authorizes Ecology to identify and give special consideration to energy-intensive and trade-exposed industries under GHG emission reduction rules in order to address leakage;
- makes the authority granted to Ecology under the act null and void upon the enactment of a more comprehensive GHG emission program that puts a price on

- fossil fuel emissions and that is designed and forecasted to achieve statutory emission reduction limits;
- adds an intent section referencing an intent to provide authority to establish emission standards for producers and distributors of fossil fuels in response to the Washington Supreme Court decision in *Association of Washington Business v. Department of Ecology* (no. 95885-8, January 16, 2020); and
 - adds a severability clause.
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Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 7, 2020.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill comes in response to a recent Washington Supreme Court decision that stated clearly that it is the Legislature's responsibility, if it wants, to provide authority for the Department of Ecology (Ecology) to regulate greenhouse gas (GHG) emissions from indirect sources. The Legislature has the power to fix the problems caused by the recent court decision. The Legislature has been trying for years to establish a comprehensive GHG emission program, and it is time it finally did so. The recent court decision could also have unintended consequences for longstanding regulation of conventional air pollutants under the state Clean Air Act (state CAA). The outcome of the recent Washington Supreme Court decision is illogical, which allows Ecology the authority to regulate stationary sources of emissions but not the cumulatively much larger sources of indirect GHG emissions from petroleum and natural gas products. The outcome of the current decision is also inequitable, by placing the state's burden of emission reductions solely on stationary sources. Transportation emissions are the largest source of emissions in Washington. With the authority it has under the state CAA, Ecology can and will regulate direct emissions from stationary sources. A clear and precise definition of indirect emissions is needed in the bill. Local air authorities should be given the same ability to enforce state CAA standards as Ecology is given in the bill. Cities that have established climate goals or goals of becoming carbon neutral need the state Legislature to provide them the legal tools needed to achieve those goals. The science on climate change is becoming clearer by the day, and the negative impacts are being experienced more profoundly through floods, wildfires, and other threats to human health. The authority to regulate GHG emissions is needed in order to keep species from going extinct. Ocean acidification is impacting shellfish businesses and forest management. Be careful in crafting legislation, but do not let the perfect be the enemy of the good, as climate action is urgently needed.

(Opposed) This bill provides broad regulatory authority and needs sideboards. The Legislature should provide specific and narrow direction to Ecology. The administrative procedures associated with the adoption of the Clean Air Rule were flawed. The Clean Air Rule was also poorly designed from a policy perspective, and had numerous legal concerns.

The methods for accounting for GHG emissions under the Clean Air Rule were unworkable for regulated entities. Greenhouse gas emission reporting from fuels should take place at the same point where fuels are taxed. The Clean Air Rule did not provide a sufficient opportunity for regulated entities to earn the emission reduction units that would be needed for compliance. Carbon reduction programs should be designed to be complementary and avoid overlap. Washington has recently passed a number of carbon reduction laws, including last year's law to reduce GHGs from electricity. Utilities have a duty to provide reliable service to customers, which the Clean Air Rule did not consider. Utilities have limited ability to reduce the emissions associated with the product that they supply to customers. The Clean Air Rule did not adequately consider the unique considerations applicable to the waste management industry. A carbon tax would be easier to administer and send a price signal to customers. Other carbon reduction policies would be preferable to the Clean Air Rule. Washington should better study the potential unintended consequences of the Clean Air Rule before the rule is put in place. Meeting Washington's emission reduction goals will take great sacrifice from all sources and people.

(Other) Stationary sources remain covered by the Clean Air Rule under the recent Washington Supreme Court decision. The bill is primarily concerned with indirect emissions and does not include a broader grant of authority to the Department of Ecology to regulate direct emissions.

Persons Testifying: (In support) Representative Fitzgibbon, prime sponsor; Chris Davis, Office of the Governor; Jay Manning, City of Seattle; Craig Kenworthy, Puget Sound Clean Air Agency; Cliff Traisman, Washington Conservation Voters; Kate White Tudor, Natural Resources Defense Council; Ben Silesky, Audubon Washington; Phyllis Farrel, League of Women Voters; Diani Taylor Eckerson, Taylor Shellfish Farms; Scott Richards, The Nature Conservancy; Joe Hiss; and Rhonda Hunter.

(Opposed) Greg Hanon, Western States Petroleum Association; Brandon Houskeeper, Puget Sound Energy; Peter Godlewski, Association of Washington Business; Vicki Christophersen, Washington Refuse and Recycling Association; Charlie Brown, Cascade Natural Gas; and John Rothlin, Avista.

(Other) Tim Boyd, Alliance of Western Energy Consumers.

Persons Signed In To Testify But Not Testifying: None.