



## THE FORUM

# Is This Short Provision in the Clean Air Act the Best Means to Regulate Greenhouse Gases?

Ever since the 2007 decision in *Massachusetts v. EPA*, the agency's administrator has been acting to regulate various sectors' greenhouse gas emissions under the Clean Air Act after finding that the emissions endanger public health and welfare. To date, most of the focus has been dedicated to mobile sources, Prevention of Significant Deterioration, and Title V permits, and, recently regulation under Section 111's New Source Performance Standards program — all command and control regulation made more difficult by the lack of a conventional and currently viable control technology.

In an article published in *BNA Daily Environment Report* at the beginning of the Obama administration, Roger Martella and Matthew Paulson urged the administrator to avoid a "cascade effect," in which a single endangerment finding could trigger a broad array of unintended measures under various parts of the act, regulating sources that will have no important emissions reductions when

seen from a global perspective. Instead, they urged the administrator to make the finding under Section 115, a short bit of prose granting broad powers to EPA to address the international effects of emissions, which language they believe is distinct enough to avoid this cascade effect.

In addition, because of the international reciprocity provisions in Section 115, there would be a way of matching emissions from U.S. states with actions by those foreign countries affected by U.S. emissions. Only Section 115, they say, has the means to create a flexible, economically reasonable, and innovative and truly global program.

Is using Section 115 as a response to *Massachusetts v. EPA* a potential panacea for the difficult area of climate change policy? Can a section without the traditional regulatory tools of air pollution control work to constrain emissions? What would a regulatory program under Section 115 look like? Or is using Section 115 a fantasy that will never be realized, something perhaps too little or too late?



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*“A comprehensive regime that limits costs, achieves meaningful reductions, and engages the international community.”*

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RESOURCES FOR THE FUTURE

## United States Has the Authority to Do Its Part

DAVID G. HAWKINS

Nearly two years ago, representatives of the United States, China, India, and other parties to the UN Framework Convention on Climate Change agreed in Durban, South Africa, that much more action was needed to protect against damaging climate disruption. They are now negotiating to reach an agreement by December 2015 on the additional emission reduction commitments that the world's big greenhouse gas-polluting nations will make. The United States, as the world's current number two GHG emitter and the historic number one emitter, will need to commit to do its share. Many observers have assumed that the administration will be unable to make such commitments because the Congress is unlikely to enact new legislation in this timeframe authorizing broader limits on GHG pollution.

But Congress long ago provided the executive branch with the authority to take serious steps to address this international pollution threat. Little discussed and never fully implemented, the "International Air Pollution" section of the Clean Air Act, Section 115, could allow this and future administrations to create a virtuous circle of commitments for GHG cuts from the world's major emitting countries.

Section 115 provides a platform for the United States and other countries to act cooperatively to reduce international pollution. Based on a foundation of reciprocal action by other countries, Section 115 empowers the U.S. government, acting under the Clean Air Act, to call on states to reduce emissions in order to abate U.S. pollution that endangers health or welfare in other countries.

Under Section 115, the Environmental Protection Agency may make a finding of endangerment to health and welfare in another country if the international pollution problem has been documented by a recognized international body or upon request of the secretary of state. Such a finding may be made only respecting countries that have provided the essentially the same rights to the United States. Regarding the GHG pollution that drives climate change, the predicates for both findings can be satisfied.

The reports of the Intergovernmental Panel on Climate Change certainly satisfy the first condition. Its studies have thoroughly documented the harm that is already being caused by man-made climate disruption and have identified the much more sweeping threats that lie ahead.

Section 115's requirement for reciprocity sets up a useful dynamic for the international negotiations prior to 2015. A fair reading of Section 115 is that it authorizes the United States to take domestic action at a scope and pace of action that is commensurate with commitments made by other countries that significantly contribute to the climate change problem.

Thus, Section 115 provides a basis for the United States to say to other large emitters, "We are prepared to act, but our authority to act and the scope and pace of our actions depend on the commitments and actions of the other major emitting countries." The administration also could take the position that, while EPA could make the required initial finding based on the IPCC reports alone, as a matter of national policy the United States will pursue action under Section 115 only if the secretary of state requests it, and that request will depend on the progress that is made in negotiations among major emitting nations. Such an approach would demonstrate that the actions under Section 115 were

an undertaking of the U.S. executive branch as a whole.

Section 115 authorizes emission reductions of sufficient scope that the United States could fully participate in a serious international effort to cut global warming pollution. Adherence to the reciprocity requirement of Section 115 would pay a dividend of securing commensurate actions from other countries. Used in this fashion, Section 115 could allow the United States to resume a leadership role that would encourage other countries to respond in kind.

In their 2009 article in *BNA Daily Environment Report*, Roger Martella and Matthew Paulson argued that Section 115 should be used instead of the several other authorities EPA has under the Clean Air Act to address GHG pollution. But that is neither a necessary nor wise approach. Setting economically justified emission limits for particularly important pollution sources, such as motor vehicles, power plants, and other large industries, will help create and deploy the modern, low-carbon technologies that will be the foundation of our future competitiveness. Quite apart from legal requirements that EPA set such limits, they are sensible steps independent of the actions of other countries. Section 115, however, authorizes actions in addition to those included in the specific emission standard sections of the act, based on the impact of U.S. emissions on other countries. Accordingly, it is reasonable to ground the scope of action under that section on the extent of commitments from other major emitters.

The world desperately needs a meaningful agreement for serious cuts in GHG pollution. Fortunately, the United States possesses, in Section 115, the legal authority to do its part.

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## All the Authority the Agency Needs to Regulate GHGs

MICHAEL A. LIVERMORE

Comprehensive domestic legislation, coupled with a binding international agreement, would be the preferred mechanism to address climate change. This outcome is unlikely in the near term, to put it gently. It would be foolhardy to delay second-best approaches that can achieve emission cuts in the meantime. Among all of the currently available options, EPA regulation under Section 115 of the Clean Air Act is the most attractive.

Section 115 provides the agency with the discretion to develop a comprehensive regime that limits economic costs, achieves meaningful reductions, and engages the international community. It also has the advantage of being mandatory. If the agency drags its feet too long, a court can require the agency to act.

EPA is already moving forward with New Source Performance Standards for new fossil fuel-fired power plants under Section 111 of the act. It will have to follow up sometime soon with standards for existing sources under Sub-section 111(d). But although Sub-section 111(d) provides the agency with considerable flexibility, and emissions cuts at existing coal-fired power plants will be a good start, these regulations are unlikely to be the final word on U.S. climate change policy. The agency may not act aggressively enough; 111(d) only applies to stationary sources, which are addressed category by category rather than comprehensively; and a host of flexibility tools, including offsets, are likely to be off the table.

Section 115 makes up for the shortcomings of Sub-section 111(d). Because it is likely to come after 111(d) regulation, it can pick up

the slack if the first round of rules is too easy on industry. Section 115 is also comprehensive, addressing all emissions in the United States, not just stationary sources; nor is it limited to a category-by-category approach. Perhaps most important, Section 115 gives the agency and states maximum flexibility to design a cost-effective program. This is especially important in the context of greenhouse gas emissions, which pose far more difficult regulatory challenges than any the agency has tackled so far.

In fact, under Section 115, there is no statutory prohibition on EPA and the states developing the most efficient and fair possible regime to reduce greenhouse gas emissions: a comprehensive nationwide cap-and-auction approach. After EPA makes a finding that U.S. based emissions are a threat to foreign health and welfare, states must “eliminate or prevent” that threat through the State Implementation Plan process. States have broad powers in structuring their SIPs, including the explicit ability to adopt “economic incentives such as fees, marketable permits, and auctions of emissions rights.” Working together, EPA and the states can develop a national marketplace where EPA sets state-level emission budgets and states conform to those budgets through an interstate trading market. States would be free to auction allowances and distribute the revenue in a way that avoids any regressive effects of the new carbon price. If states wanted to opt out of this market, they could, so long as they achieve emission reductions through some other way.

Section 115 does not just create a path for the agency to create a low-cost, economically efficient greenhouse gas-control regime. The provision is mandatory. If three specific criteria are met, the agency must act. First, the agency has to receive a report from a “duly constituted international agency” calling attention to the pollution problem.

Second, EPA must have reason to believe that U.S. emissions “cause or contribute” to pollution that “endanger[s] public health or welfare in a foreign country.” Finally, the agency must determine that another country has “given the United States essentially the same rights” generated by Section 115 with respect to international pollution. If these conditions are met, EPA must require states to “prevent or eliminate” the danger to foreign welfare.

A petition to the agency by the Institute for Policy Integrity at NYU School of Law explains how these criteria have been met. EPA has received, and will continue to receive, reports from the Intergovernmental Panel on Climate Change attesting to the threat. EPA has already determined, based on science that is summarized in that report, that greenhouse gas emissions constitute a threat to public health and welfare, a finding that is just as applicable to other countries as to the United States. Statutes in Canada and South Africa create reciprocal rights and the signatories to the Kyoto Protocol, most notably the European states, have taken significant steps to curb emissions. Each of these individually, and certainly all of them collectively, indicate that the reciprocity requirement has been met.

Using Section 115 will not be uncontroversial or painless. Any move to cut greenhouse gas emissions will raise considerable political opposition. But as a matter of policy, Section 115 provides for a flexible, efficient system. And as a matter of law, Section 115 creates a non-discretionary duty to regulate. Those are two powerful reasons for the agency to move forward, political resistance notwithstanding.

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## Provision Almost Preordained to Address Warming

ROGER MARTELLA

There was a time in the infancy of the great debate on greenhouse gas regulations when the most peculiar, arcane, and inconspicuous Clean Air Act provision of all stood ready to tackle one of the world's greatest challenges after four decades of dormancy. The year was 2009. The challenge was addressing global climate change. And the statutory provision was CAA Section 115, a provision simply and modestly titled "International Air Pollution."

Back in that day, the Environmental Protection Agency, emboldened by the landmark decision *Massachusetts v. EPA* and the new leadership of President Barack Obama and Administrator Lisa Jackson, was grappling with how to take action using existing CAA mechanisms to reduce greenhouse gas emissions. EPA looked far and wide at its existing authorities, and chose its current CAA path, which Representative John Dingell (D-MI) labeled a "glorious mess." First, the agency determined that GHG emissions from cars endanger public health and welfare. Second, it concluded that as a result it was compelled to find that even small amounts of GHG emissions could trigger complex pre-construction permitting requirements for millions of buildings never before regulated. Third, EPA famously rewrote the permitting thresholds in the CAA to temporarily defer the second consequence.

Unfortunately, in this rush to regulate, the agency neglected if not cast aside Section 115, a provision untouched since the 1970s that seemed almost preordained to address climate change. Section 115 is simple enough — both in title and in operation. It contains only four subsections, doesn't require a Ph.D. in addition to a law degree to understand, and, perhaps

most unusual of all, makes sense. In short, Section 115 says that if air emissions from the United States are endangering another country, EPA can mitigate that cross-border air pollution, so long as the receiving country agrees to reciprocal action to lessen pollution it causes here.

In almost every way, Section 115 was the ideal and better solution EPA was looking for to address global climate change. Let's start with the obvious. If one point is settled, it is that climate change is an international challenge that mandates an international solution to work. So by necessity the starting point should be the sole provision Congress specifically enacted to address international air pollution instead of provisions focused on emissions from cars on U.S. highways and pre-construction permits for petroleum refineries in the Midwest.

On the international front, Section 115 is arguably the only general CAA provision that authorizes EPA to take action when pollution from the United States is impacting other nations. And Congress also authorized the agency to engage in reciprocal agreements regarding other nations' actions. So EPA simultaneously could have demonstrated to the world its intention to take serious action at home while spurring other nations toward bilateral agreements with the agency on their efforts to reduce GHGs. Instead, despite the regulatory CAA push, since 2009, the United States has not entered into any binding GHG agreements.

But beyond addressing global climate change, proceeding under Section 115 would have solved problems at home too. The endangerment determination under Section 115 is distinctly different than under any other CAA provision. First, it allows EPA to adopt credible studies as opposed to making its own independent determination. Second, it focuses on international as opposed to domestic endangerment.

Thus, for these reasons, if EPA had chosen to proceed under Section 115

it would have avoided the cascade effect of the endangerment determination on the Prevention of Significant Deterioration permitting program, the need to promulgate the much-maligned Tailoring Rule, and the diminished role it has played on the international stage.

One can only speculate about EPA's dug-in resistance to even engage in a debate about Section 115 at the time. Presumably it would have countered that the provision, in its admittedly fuzzy and vague approach to international negotiations, reciprocity agreements, and state involvement, lacked sufficient teeth to impose true limits and command-and-control requirements on GHG-spewing tailpipes and industrial stacks. But it is regrettable that in the rush to fit the square of CAA pegs into the roundest of holes, EPA did not pause further on Section 115 and the opportunity it offered to develop an orderly approach reflecting the true international nature of climate change, bringing global solutions to the table, and avoiding the regulatory and economic impacts of the existing approach.

Recently, there has been something of a Section 115 renaissance as reflected on these pages, petitions to EPA, and elsewhere. But this opportunity has come and gone. EPA has committed to an exclusively domestic approach to addressing global climate change with little consideration for the need for other nations to take similar — if not reciprocal — actions. Given the agency's path, there is no room for an additional regulatory regime, and Section 115 thus should continue to rest dormant after its briefest moment in the sun.

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## You Can't Hide an Elephant in a Mousehole

NATHAN RICHARDSON

President Obama's EPA is moving quickly (by its standards) to regulate carbon emissions using the venerable Clean Air Act. The Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gases are within the reach of the act, and Congress has since failed to either replace EPA authority with new climate legislation or to strip that authority outright.

EPA's approach so far has been fairly conservative, updating well-established tools like fleet fuel economy standards for vehicles and case-by-case permitting of new large stationary sources to include limits on GHG emissions. But finding effective tools to reduce emissions from the large number of existing sources — factories, refineries, and above all power plants — isn't so straightforward.

EPA has three basic options. First, it could regulate GHGs the same way it does other major pollutants — like smog-causing ozone or acid rain-causing sulfur dioxide — and establish National Ambient Air Quality Standards that states must meet. But this is probably unworkable for a globally mixed gas like carbon, since individual states could do little to affect atmospheric concentrations.

A second approach is to use a different part of the act, Section 111(d), to create performance standards for existing sources in each sector of the economy, subject to EPA guidelines but written and enforced by states. This has long appeared to be EPA's most likely choice, and was confirmed as such by the president in June of this year. The agency is now set to propose guidelines in June 2014 for coal and gas power plants, with regulation to be in place by 2016.

This policy path has important

advantages — above all that regulation can probably be flexible (some kind of trading among sources) and that it can accommodate states that are already leading the way on climate policy. But there are legal risks — the state-EPA process is complex, prospects for flexibility are legally untested, and the section of the act has been used only rarely, for small-scale programs. More fundamentally, it — like much of the act — is aimed at preventing environmental harms in the United States alone. This might make it legally difficult for EPA to defend regulation whose stringency is based on the administration's calculated social cost of carbon, which estimates global damages from each ton of emissions.

When EPA first began considering climate regulation under the act, these and other limitations of performance standards led some to look for alternatives elsewhere in the statute. A few found one, Section 115, particularly appealing. This section is specifically aimed at international emissions (i.e., U.S. emissions that cause harm elsewhere). It can be triggered any time an international agency or the secretary of state identifies such harms and the victim country(ies) give the U.S. reciprocal rights (in short, when they limit their own emissions). GHG emissions appear to satisfy these conditions — the UN-sanctioned Intergovernmental Panel on Climate Change reports clearly establish the dangers of GHG emissions, and others, notably the EU, limit their emissions. Once triggered, the extremely short section (about 300 words) imposes no real limits on EPA's authority — it can direct states to revise their regulations as necessary to “prevent or eliminate” international harms.

Proponents claim that Section 115's implied breadth and explicit targeting of international emissions make it an ideal vehicle for GHG regulation, perhaps even allowing EPA to create a carbon cap-and-trade program. It is also argued that Sec-

tion 115 regulation would directly connect the act's carbon regulation to international climate negotiations.

I have long been skeptical of the wisdom of using Section 115 as the primary vehicle for the agency's GHG regulation. The same brevity that appears to give EPA expansive authority also creates legal vulnerability. Courts may take a dim view of attempts by agencies to use short, vague statutory language to justify sweeping regulatory programs, especially in the context of a statute as detailed as the Clean Air Act. As Justice Antonin Scalia has put it, “Congress does not . . . hide elephants in mouseholes.” Section 115 is also almost wholly untested — it lacks even the limited track record of existing-source performance standards. Relying on Section 115 is therefore risky. If EPA were to make it the centerpiece of its climate program by using it to regulate emissions from the power sector, then a setback in the D.C. Circuit or Supreme Court could cripple federal climate policy for the better part of a decade. While performance standards carry their own risks, none appear to be as existential.

However, now that it appears certain that performance standards will be EPA's primary tool, I do think it's worth looking at Section 115 again. While moving ahead with performance standards for existing power plants, the agency could float a proposal to use Section 115 to regulate emitters in another sector, or to give states additional authority to regulate flexibly. The agency's resources are limited, but a small-scale proposal is probably worth the investment. Rejection by the courts would have little impact on EPA's core regulatory tool. Success would create a legal foundation to support broad, flexible regulation under Section 115 — unless, of course, Congress has finally created a modern federal climate policy by then.

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