

MJB&A Issue Brief ■ June 6, 2016

## Potential Use of Section 115 of the Clean Air Act to Fulfill U.S. Paris Commitments

In recent years, the Obama Administration has worked to expand commitments to reduce greenhouse gas (GHG) emissions to address the threat of climate change, both domestically and internationally. As a part of international climate negotiations, the U.S. took a leading role in developing the unanimously adopted Paris Agreement, which was signed on April 22, 2016 by 174 nations and the European Union, and now awaits ratification.<sup>1</sup> The Agreement resolves to strengthen the global response to the threat of climate change and creates a framework under which countries committed to implement GHG emission reductions beyond 2020.

In light of the Paris Agreement, stakeholders in the U.S. are exploring regulatory tools to achieve the necessary emission reductions. One tool that legal experts and others are exploring is section 115 of the Clean Air Act (CAA). Section 115 addresses international air pollutants and may provide a mechanism to drive economy-wide greenhouse gas emission reductions beyond existing regulatory programs.

---

### Key Takeaways

- To meet the 2025 emission reduction targets the Obama Administration committed to as part of the Paris Agreement, the U.S. will have to make GHG emission reductions beyond those expected through rules that are already on the books. Section 115 of the CAA could be used by a future administration to achieve GHG reductions through an economy-wide GHG regulatory program that incorporates or complements existing GHG reduction programs.
- Recent international commitments to addressing climate change, such as the Paris Agreement and the U.S. bilateral negotiations with China, could potentially be used to satisfy section 115's requirement for reciprocity. This was a hurdle to using section 115 when the Bush and Obama Administrations evaluated the regulatory tools to address GHG emissions in response to the Supreme Court's decision in *Massachusetts v. EPA*.
- The broad statutory language of section 115 would give EPA significant discretion to explore the regulatory tools that would be most appropriate to reduce GHG emissions. However, opposition to any regulation of GHG emissions is likely to continue, and we would expect there to be stakeholders who would challenge any regulation in the courts. Opinions in the Clean Power Plan litigation will be an important indicator of how much discretion the court is willing to grant EPA.

---

<sup>1</sup> United Nations Framework Convention on Climate Change. "Paris Agreement – Status of Ratification." Accessed June 6, 2016. [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php)

## Background

As a part of the Paris Agreement, the U.S. has committed to reduce GHG emissions between 26 and 28 percent from 2005 levels by 2025. The Obama Administration's domestic climate policies, including the Clean Power Plan, motor vehicle rules, and regulations for the oil and gas sector are critical components to meeting the commitment. However, State Department and independent projections indicate that the U.S. will likely need programs that achieve additional emission reductions.<sup>2</sup>

As part of the initial regulatory steps for reducing U.S. GHG emissions, EPA under President George W. Bush published an Advance Notice of Proposed Rulemaking (ANPR), which sought comment on how to respond to the U.S. Supreme Court's decision in *Massachusetts v. EPA*. In the ANPR, EPA noted that section 115 of the CAA creates a mechanism through which EPA can require states to address international air emission transport issues.

The goal of section 115 is to protect public health and welfare in another country from air pollution emitted in the U.S., provided that the other country grants reciprocal rights to the U.S.:

International Air Pollution Sec. 115. (a) Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

(b) The notice of the Administrator shall be deemed to be a finding under section 110(a)(2)(H)(ii) which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a). Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.

(c) This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.

(d) Recommendations issued following any abatement conference conducted prior to the enactment of the Clean Air Act Amendments of 1977 shall remain in effect with respect to any pollutant for which no national ambient air quality standard has been established under section 109 of this Act

---

<sup>2</sup> According to the *2016 Second Biennial Report Climate Action Report* the State Department projects current policies implemented through mid-2015, including the Clean Power Plan, give substantial movement toward the 2020 and 2025 goals, but do not reach the 26 to 28 percent reduction below 2005 levels target. Similarly, in a January 2016 report, the Rhodium Group reviewed the existing policies and also found that while the target is within reach, the U.S. will not meet the Paris pledge without additional action. See, e.g., *Taking Stock: Progress Toward Meeting US Climate Goals*, available at: [http://rhg.com/wp-content/uploads/2016/01/RHG\\_Taking\\_Stock\\_of\\_US\\_Climate\\_Goals\\_Jan28\\_2016.pdf](http://rhg.com/wp-content/uploads/2016/01/RHG_Taking_Stock_of_US_Climate_Goals_Jan28_2016.pdf)

unless the Administrator, after consultation with all agencies which were party to the conference, rescinds any such recommendation on grounds of obsolescence.

Section 115 is the only section of the CAA that specifically addresses international air pollution. The current language was adopted 1977, when Congress gave EPA the authority to require states to revise their state implementation plans (SIPs) to address international air pollution. The 2008 ANPR noted that addressing GHGs under section 115, could “allow some flexibility in program design, subject to the limitations of the SIP development process.”

Section 115 requires EPA to regulate international air pollutants upon receipt of “reports, surveys or studies” from an international agency that indicate that air pollutants emitted in the U.S. could “reasonably be anticipated to endanger public health or welfare in a foreign country.” EPA explored using section 115 in the 1980s as a means to address acid rain pollution in the U.S. and Canada. However, the Regan Administration decided not to take further action under section 115. Although a group of states and the Canadian province of Ontario challenged this decision, the courts deferred to EPA and did not find that the Agency was required to act under section 115. While the courts did not take a hard look at EPA’s authority under section 115, the decisions suggest that the courts were willing to defer to EPA’s interpretation of its authority under that section.

### **Implementation Steps and Hurdles**

As a first step, section 115 requires EPA to issue an endangerment finding that GHGs are endangering other nations and that such nations have provided reciprocal protections for the U.S. The endangerment finding language under section 115 is similar to that of section 202(a). Given that EPA has issued a 2009 endangerment finding under section 202(a), EPA could likely rely on similar evidence to issue an endangerment finding under section 115. For example, EPA noted in its 2009 endangerment finding that U.S. emissions have “climatic effects not only in the United States but in all parts of the world.”<sup>3</sup> Further, the Assessment Reports issued by the Intergovernmental Panel on Climate Change (IPCC) could fulfill the requirement to have a report from an international agency to trigger regulation under section 115.

With respect to the reciprocity determination, one of the key questions will be what other nations are providing benefits comparable to those the U.S. would be providing. The parties to the Paris Agreement, could be the basis of such a determination after ratification process is final, given that 177 nations have signed the agreement to date.<sup>4</sup> Alternatively, the U.S. could work to establish reciprocal actions through bilateral agreements with other countries, potentially building on agreements with China, the EU, or Canada, for example. Given the level of emissions from these countries and current collaborations related to climate change with these countries, there is likely a sufficient basis for EPA to make the required reciprocity determinations.

As a basis for implementing section 115, one challenge EPA would need to consider is whether section 115 would require EPA to first establish a national ambient air quality standard (NAAQS). In the 2008 ANPR, EPA took the

---

<sup>3</sup> U.S. Environmental Protection Agency. “Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act.” (December 7, 2009).

[https://www3.epa.gov/climatechange/Downloads/endangerment/Endangerment\\_TSD.pdf](https://www3.epa.gov/climatechange/Downloads/endangerment/Endangerment_TSD.pdf)

<sup>4</sup> UNFCCC. “Paris Agreement – Status of Ratification.” Accessed June 6, 2016.

[http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php)

position that in order to utilize section 115, EPA would need to establish a GHG NAAQS.<sup>5</sup> Developing a NAAQS would be particularly challenging given the global nature of CO<sub>2</sub> making it hard to achieve “attainment” as a result of actions implemented in a particular state. However, some legal experts have since argued that the section 115 makes a reference to “any air pollutant” that is implicated in air emissions transport concerns and can apply to GHGs whether or not those emissions are regulated as a NAAQS.<sup>6</sup> Further, the Supreme Court confirmed EPA’s authority to require states to regulate GHGs from some sources through their SIPs, if the source is already triggering a requirement under the PSD program.<sup>7</sup> Thus, there is precedent for EPA using SIPs to regulate GHGs without the establishment of a GHG NAAQS.

Regardless of EPA’s decision on the NAAQS issues, EPA would need to determine the aggregate emission reduction levels. One option would be for EPA to base the reductions on the U.S. Intended Nationally Determined Contribution (INDC) submitted to the UNFCCC.<sup>8</sup> EPA then would need to decide how to apportion the aggregate emission reductions among states. This process would involve determining whether all states must achieve a consistent level of emission reduction or whether each state would have a different target based on its sources and reduction opportunities. Those decisions have regulatory, legal, and political considerations, as the determinations would need to be based on a technically sound record, would likely be challenged in the court, and would face political resistance ranging from opposing any regulation of GHGs to state specific challenges if some states are required to reduce more than others. However, depending on the Courts’ discussion regarding EPA’s discretion to implement section 111 through the Clean Power Plan, EPA may have significant discretion to implement section 115.

Once the state targets are established, section 110 requires state air agencies to develop SIPs as a collection of emission reduction regulations, policies, and programs to enable the states to meet the standards set by EPA. A SIP process may be advantageous for implementation of a national GHG emissions reduction program because the process can be flexible and allow states to develop cost-effective reduction measures based each state’s unique situation.

Under the Act, EPA must set “reasonable deadlines” for states to submit SIP revisions, not to exceed 18 months.<sup>9</sup> If a state fails to submit a SIP revision by the deadline, the CAA requires EPA to promulgate a federal implementation plan (FIP) within two years. For prior regulations, such as the 1998 NO<sub>x</sub> SIP call, EPA established model rules, which are presumptively approval, for states that choose not to implement their own plans, or that prefer to adopt a national rule. EPA is also using a model rules approach for the Clean Power Plan.

One advantage of regulating GHG emissions under section 115 is the opportunity to coordinate existing and future GHG emission regulations under one regulatory framework. However, how best to recognize existing programs and capture the benefits of an economy-wide program would be an important consideration for EPA. Current GHG regulations that could be integrated include: (1) the Clean Power Plan for existing power plants and the NSPS regulations for new, modified and reconstructed power plants, (2) the fuel efficiency and CAFE standards for the

---

<sup>5</sup> U.S. Environmental Protection Agency. “Regulating Greenhouse Gas Emissions Under the Clean Air Act”, 73 Fed. Reg. 44354, at 44483 (Jul. 30, 2008).

<sup>6</sup> Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions under Section 115 of the Clean Air Act* (January 2016).

<sup>7</sup> *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. at 2448 (2014).

<sup>8</sup> United Nations Framework CCC. “U.S. Cover Note, INDC and Accompanying Information”, Accessed on June 6, 2016. (August 31, 2015).

<sup>9</sup> See 42 U.S. Code §7410(k)(5)

automobile industry, and (3) methane regulations for the oil and gas industry. Other industrial sources of domestic GHG emissions could also be captured under a comprehensive program under section 115. For example, for the power sector, EPA could decide to retain the Clean Power Plan as finalized but allow a state to encourage another sector to achieve additional reductions from the electric sector, or EPA could allow a state to reflect the Clean Power Plan reductions as part of its SIP. However, it is important to recognize that the Clean Power Plan, as finalized, requires that the electric sector achieve the reductions required under section 111. EPA could also consider a similar approach to allow state to reflect the emission reductions associated with the section 111 regulations for the oil and gas industry. Additionally, if EPA were to pursue regulations under section 115, states could explore economy-wide market-based regulations such as a multi-sector cap-and-trade program or a carbon tax.

## Conclusion

Currently, GHG emissions are regulated under different sections of the CAA for different industries. For example, EPA regulates new motor vehicle emissions under Title II of the Act, and GHG emissions from power plants under the Prevention of Significant Deterioration/Title V programs and under section 111 with the Clean Power Plan. Section 115 could provide EPA with a mechanism to expand GHG regulations to other industries while increasing compliance flexibility.

Regulating each sector with industry-specific standards and regulatory processes may not lead to the most cost-effective emission reductions overall. While, EPA noted in the final Clean Power Plan that the rule is an “important step in a series of long-term actions” to reduce climate change, the U.S. has not undertaken a comprehensive approach to the reduction of GHG emissions from all GHG emitting sectors. One of the reasons legal experts believe section 115 is an attractive regulatory option is the opportunity to establish an overall GHG emission reduction target capturing economy-wide GHG emissions, which can potentially result in a more effective method to reduce those emissions.

Given the commitment under the Paris Agreement, the next Administration may look to additional regulatory tools to achieve greater and more economy-wide GHG reductions. While any GHG regulation will pose design and implementation challenges and litigation risks, section 115 is likely to be a key provision explored. The statutory language provides significant discretion for EPA and states to develop cost-effective means to achieve emission reductions, and the current international commitment to climate change can provide the basis for reciprocity required under section 115.

## Contacts

For more information on this topic, please contact:

Carrie Jenks  
Senior Vice President  
[cjenks@mjbradley.com](mailto:cjenks@mjbradley.com)  
(978) 369-5533

Tom Curry  
Vice President  
[tcurry@mjbradley.com](mailto:tcurry@mjbradley.com)  
(978) 369-5533

Kaley Bangston  
Policy Analyst  
[kbangston@mjbradley.com](mailto:kbangston@mjbradley.com)  
(978) 369-5533

## About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, [www.mjbradley.com](http://www.mjbradley.com).