

A largely-untapped provision of the Clean Air Act authorizes the U.S. Environmental Protection Agency to develop and implement an economy-wide, market-based program to reduce domestic greenhouse gas emissions and achieve the Obama Administration's Paris Agreement pledge, according to a report released today by several coordinating law school centers, including the Emmett Institute at UCLA. See [here](#) for the paper. Fellow blogger and UCLA Law professor Ann Carlson authored the report along with scholars from Columbia Law School's Sabin Center for Climate Change Law and NYU's Institute for Policy Integrity.

Section 115 of the Clean Air Act is titled "International Air Pollution" and gives the executive branch authority to target pollutants that cross international boundaries and threaten foreign countries, so long as those foreign countries provide reciprocal protections to the U.S. According to the report,

The provision authorizes EPA to require states to address emissions that contribute to air pollution endangering public health or welfare in other countries, if the other countries provide the U.S. with reciprocal protections. The language of the provision does not limit the agency to regulating a particular source-type, or a given industrial or economic sector. Rather, it grants EPA and the states broad latitude to address international air pollution through the Clean Air Act's state implementation plan (SIP) process. Notably, EPA and the states could use the provision to establish an economy-wide, cross-sectoral GHG emissions trading program that incorporates both stationary and mobile sources.

In other words, the EPA can now initiate, without further Congressional action, the sort of economy-wide cap on U.S. emissions that has been elusive ever since the failed Waxman-Markey bill in 2009. States would play a decisive role in determining their paths to compliance with the cap.

The report is a fascinating read for climate-law geeks. Among other interesting questions addressed are the following:

- One prerequisite for a U.S. program under this provision is the existence of "reciprocity" by other countries, which exists when another country "has given the U.S. essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country" by 115. What constitutes reciprocity? The authors suggest that the Paris climate agreement could be

determined to create the required reciprocity, looking, for example, at the pledges of China and the E.U. (see pages 38-42 of the report). So the Paris agreement provides both the political impetus and one legal justification for turning to 115 now.

- How would this program relate to the EPA's Clean Power Plan and other existing Clean Air Act climate programs? The programs could exist side by side. "These are mutually supportive provisions, and nothing in either provision suggests that overlapping air pollution problems must or even should be treated independently, or that Congress intended for an "either/or" choice as between them." (p.65)

As the D.C. circuit considers a request for a stay of the Clean Power Plan, the authors also note the important "backstop" role that Sec. 115 might play, serving as an independent source of authority for requiring emissions reductions at or above the scale delivered by the CPP:

The Clean Power Plan, the rule developed by EPA to reduce GHGs from existing power plants, along with EPA's other regulatory initiatives, have been the subject of relentless litigation, casting a shadow of doubt over their implementation. Though the authors of this paper are of the view that the Clean Power Plan and EPA's other regulations represent reasonable interpretations of ambiguous provisions of the Clean Air Act and therefore should withstand legal challenge, Section 115 provides a potential backstop should any or all of these measures fail in court.

Lastly, from my perch in Los Angeles I'll note that California provides one model for what a state-run, economy-wide program to reduce GHG emissions might look like. Under AB 32 and a couple of gubernatorial executive orders, California has created and implemented programs to achieve statewide emission-reduction goals, employing a mixture of market mechanisms and direct regulations targeting certain sectors. Its cap-and-trade program is designed to be expanded and linked with those of other jurisdictions and has been joined with Quebec's. In developing its program, California drew from the expertise of one of the most sophisticated air-pollution-control agencies in the world, the state Air Resources Board. If the U.S. chooses to pursue the 115 approach, I expect that California will be in a position to share lessons learned with other states.