

The Clean Air Act is a formidably technical and complex statute — I often tell my students that it's like the Internal Revenue Code except not as clearly written. But even those who know the statute may have been surprised by a couple of provisions that EPA is using to address greenhouse gases.

The first provision is buried in the section governing pollution requirements for new stationary sources like power plants. Mostly, these requirements involve pollutants that are already regulated in the case of existing plants. But section 111 actually allows new source standards whenever a category of sources “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” So the pollutant does *not* have to be on the list of “criterion pollutants” like SO₂ or particulates that are the main targets of regulation. And under section 111(d), if a pollutant is not on that list, EPA can also issue regulations governing *existing* plants. The Supreme Court's opinion in *Massachusetts v EPA* says definitively that greenhouse gases are air pollutants, so the only other requirement for regulation under this section is the endangerment standard.

The second provision is in the so-called PSD (Prevention of Significant Deterioration) portion of the statute. PSD is designed to ensure that clean air is protected in areas that meet the national standards for the listed (criterion) pollutants like SO₂. Thus, the main focus is on controlling those listed pollutants. One of the key protections is a requirement that new plants emitting those pollutants in areas with clean air use BACT (Best Available Control Technology).

But there's a kicker — if a plant will emit one of the listed pollutants, it must also use BACT for “each pollutant subject to regulation under this chapter.” “This chapter” is the entire Clean Air Act, which is Chapter 85 of 42 U.S.C. So if greenhouse gas emissions are regulated under the special provisions in the statute dealing with vehicles, new plants subject to PSD requirements are also required to use BACT to control them — even if there are no other specific regulations dealing with greenhouse gas emissions from stationary sources. The language of the statute is absolutely unambiguous on this point.

To use these provisions, all EPA has to do is to make a finding under some relevant provision of the statute that greenhouse gases endanger public health or welfare. If it makes such a finding, the courts will uphold the finding unless it is “arbitrary or capricious,” meaning that the agency has failed to give a reasoned explanation for its conclusion. EPA is also imposing restrictions on mobile sources, following the Supreme Court's directive that it must do so if it finds that greenhouse gases endanger human health or welfare.

Ironically, the only point where EPA is on shaky ground legally is its effort to avoid imposing permit requirements on small sources of greenhouse gases. Opponents of climate regulation should be applauding that effort to limit the burden of regulation, but they are attacking it, hoping that imposing paperwork requirements on thousands of small sources will wreck the whole regulatory effort. But EPA has a fairly good chance of winning on this issue anyway or of coming up with some other work-around if this one fails.