

## *Climate Regulation*

### **EPA's Regulatory Options Unfold After Clean Power Plan Stay**

**T**he U.S. Supreme Court's unexpected decision to halt the Environmental Protection Agency's Clean Power Plan could revive debate over whether other provisions of the Clean Air Act are better suited to curbing greenhouse gas emissions.

Rather than attempting to regulate greenhouse gas emissions on a sector-by-sector basis, the EPA could achieve quicker and more cost-effective emissions reductions using its authority under the obscure Section 115 of the Clean Air Act, which covers international air pollution, legal scholars and some industry attorneys have argued. The Supreme Court on Feb. 9 stayed the Clean Power Plan (RIN 2060-AR33), which set carbon dioxide limits for the power sector in each state, suggesting the rule is in danger of being overturned, and Section 115 could provide a viable alternative, attorneys say.

"The language is pretty broad and much clearer than what they're doing now," Brian Potts, a partner at Foley & Lardner LLP, told Bloomberg BNA Feb. 10. Potts argued in favor of pursuing greenhouse gas regulations under Section 115 in a recent Politico column.

Under Section 115, the EPA can require states to take steps to reduce air pollution emissions that cross international borders provided other countries are taking reciprocal action. Advocates of the approach argue the reciprocity trigger is met by the international agreement on climate change reached in Paris in December 2015. Additionally, states would be free to pursue greenhouse gas emission reductions from a variety of industrial and transportation sectors quickly, rather than the EPA's approach under the Clean Power Plan of regulating each industrial sector individually.

The EPA previously said it is not considering using its Section 115 authority, preferring instead to focus on the Clean Power Plan. However, the Supreme Court has stayed implementation of that rule until it has been fully litigated, which means the required carbon dioxide reductions from the power sector will be delayed by years even if the rule survives judicial scrutiny (*West Virginia v. EPA*, U.S., No. 15A773, order issued 2/9/16; 27 DEN A-1, 2/10/16).

**A Chance for 'Comprehensive' Regulations.** The same argument was made in a recent report on the EPA's Section 115 authority by several legal scholars from the Sabin Center for Climate Change Law at Columbia Law School, the Center on Global Energy Policy at the Columbia University School of International and Public Affairs, the Institute for Policy Integrity at New York University School of Law, and the Emmett Institute on Climate Change and the Environment at the University of California, Los Angeles School of Law (10 DEN A-1, 1/15/16).

Jessica Wentz, associate director of the Sabin Center, said the Supreme Court's decision could put the spotlight back on the EPA's Section 115 authorities. "And it can be used to create an even more comprehensive regulatory program to control [greenhouse gas] emissions in the United States," she told Bloomberg BNA in an e-mail Feb. 10.

**Industry Also Sees Benefits.** Industry attorneys also have argued the EPA's Section 115 authorities would be preferable and less burdensome for regulating greenhouse gases than sector-by-sector regulations or the complicated permitting process. Roger Martella, a partner at Sidley Austin LLP, and Matt Paulson, now a partner at Bracewell LLP, argued in a 2009 article for Bloomberg BNA that Section 115 presented a better avenue for addressing a global pollutant such as greenhouse gases than other Clean Air Act programs (43 DEN B-1, 3/9/09).

The discussion came as the EPA took its first steps toward regulating greenhouse gases through permitting requirements and emissions limits for passenger vehicles. The EPA attempted to use its Section 115 authority to regulate ozone-depleting substances, but Congress intervened, leading to the adoption of the Montreal Protocol requirements.

"Section 115 is the only provision of the act currently available that expressly addresses international air pollution and potentially could be effective to address the reduction of greenhouse gas emissions," they argued. "Admittedly, to date Section 115 has not been used by EPA to regulate U.S.-based emissions that are connected to international air pollution. However, this is only because each time its use was considered previously, Congress enacted specific legislation to address the international pollution at issue."

**Moment May Have Passed.** However, Paulson now says Section 115 standards may face the same challenges as the Clean Power Plan after the Supreme Court cautioned the EPA against searching out new regulatory powers in long-existing statutes.

In a 2014 decision limiting the scope of the EPA's greenhouse gas permitting program, Justice Antonin Scalia said that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy' . . . we typically greet its announcement with a measure of skepticism" (*Util. Air Regulatory Grp. v. EPA*, 2014 BL 172973, 78 ERC 1585, 134 S. Ct. 2427 (2014)).

That same language has been used by opponents of the Clean Power Plan to attack the EPA's carbon dioxide standards, issued under Section 111(d) of the Clean Air Act.

"That's the bigger impediment, and UARG is a problem," Paulson told Bloomberg BNA Feb. 10. "Back in 2009, had they gone down this path, that would have been different."

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