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Comment
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***1001 JAMMING THE SQUARE PEG THROUGH THE ROUND HOLE: EPA'S OPTIONS FOR IMPLEMENTING EFFICIENT CLIMATE CHANGE REGULATION UNDER THE CLEAN AIR ACT**

INTRODUCTION

Hurricanes in New York City and record droughts scalding the American breadbasket--last year might go down in history as the year when the United States woke up to the fact that climate change is here, for real. Ask nearly any policy guru how to address the climate problem and she will tell you that a market-based approach is essential to reach emission targets efficiently. We know the problem. We know the solution. But with multiple interests tugging in different directions, political paralysis, and an American public addicted to consumption, getting from point A to point B is daunting, and the chances of Congress passing legislation anytime soon specifically targeted toward climate change, at least one with teeth, is near zero. The challenge then is to use the legal framework already in place to address the problem, even if that means "jamming a square peg through a round hole."¹

The 2007 Supreme Court decision *Massachusetts v. EPA*² marked the beginning of a new frontier for domestic climate change regulation in the United States. The Court held green house gases (GHGs) are covered under the U.S. Clean Air Act (CAA),³ giving the U.S. Environmental Protection Agency (EPA) the authority to regulate climate change under the CAA.⁴ As with most new regulations, things have moved slowly since then. In the interim criticisms of the idea of regulating climate under the CAA have persisted.⁵

Few would argue that Congress's intention in enacting the CAA was to address a global problem like climate change. Congress was addressing extreme local air pollution *1002 problems,⁶ like smog cover in Los Angeles, when it enacted the CAA. Even members of this Journal have commented on the inappropriateness of an unaltered application of the CAA to climate change.⁷ This comment noted that a strict reading of the CAA's requirements would be unworkable as applied to GHGs, necessitating the adoption of the then proposed tailoring rule.⁸

Ideally, an enforceable global compact where all nations participate in a non-voluntary system would be initiated to address climate change. Congress, acknowledging the overwhelming scientific evidence in favor of climate change, would implement legislation specifically addressing the United State's commitment to the international treaty.

Things have not developed this way, and in all likelihood will not for some time. Even though the CAA is not an ideal structure for addressing climate change, it is the most feasible option currently available domestically for making serious progress in reducing GHG emissions.

In light of the recent D.C. Circuit Court decision, *Coalition for Responsible Regulation v. EPA*,⁹ which approved the EPA's

tailoring rule, it is now appropriate to reexamine the CAA as applied to domestic regulation of climate change and weigh options available for market-based regulation of GHGs. This Comment argues that *Responsible Regulation* opens the door for the United States to gradually implement a national cap-and-trade system, which can eventually be incorporated into a global cap-and-trade system.

I. THE COALITION FOR RESPONSIBLE REGULATION CASE

In *Responsible Regulation*, the D.C. Circuit rejected industry and industry-friendly states' challenges to the EPA's proposed tailpipe and tailoring rules.¹⁰ The court gave the go-ahead for EPA to regulate mobile as well as stationary sources under the CAA and to tailor these regulations to address the elements of GHGs that make them unique as compared to traditionally regulated air pollutants--namely that GHGs are emitted in much larger quantities.¹¹

II. CAP-AND-TRADE OPTIONS UNDER THE CAA

An issue still to be addressed, however, is that the CAA is built on a cooperative federalism foundation. Under both major portions of the CAA regulating stationary ***1003** sources--ambient air quality standards and point source emissions¹²--the federal government sets national minimum standards, but it is up to individual states to determine ... how they want to meet or go beyond these standards.¹³ This is a great setup when addressing the problems the CAA was designed to address--localized air pollutants. When, however, a unit of emissions released in Trenton, New Jersey has the same effects on the residents living right next door to the source as it does on people in Tucson as well as Tokyo, cooperative federalism does not make as much sense.¹⁴ Consider the assertion that a national cap-and-trade system is needed to efficiently achieve emission reduction targets, and the idea of using cooperative federalism to address climate change and the CAA's structure becomes even more problematic.

There are, however, pathways available to for implementing market-based mechanisms.

The relevant sections of the CAA for purposes of designing a cap-and-trade system within the confines of the Act are Section 110 and, especially, Section 111.¹⁵

A. Section 111

Section 111 provides the more workable regulatory mechanism for addressing climate change in the short term.¹⁶ Under Section 111 the EPA defines performance standards for categories of emitters, which the EPA determines.¹⁷ The EPA then sets standards for these categories.¹⁸ These standards reflect those achievable under "the best system of emission reduction which ... the Administrator determines has been adequately demonstrated," taking into account, among other factors, costs.¹⁹ Because GHGs are an air pollutant regulated under the CAA (motor vehicles) but one for which stationary sources are not regulated under other CAA regulations, EPA is authorized to regulate GHGs with performance standard under Section 111(d).²⁰ The EPA provides a lower limit and sets guidelines for these standards, but it is the states that are given the responsibility of ***1004** implementing the standards.²¹ EPA does, however, retain approval power and the ability to step in and regulate if a state fails on the minimum requirements.²²

Scholars are in near unanimous agreement that some form of a national cap-and-trade can be implemented for GHGs within the framework of Section 111 for existing emission sources.²³ This consensus is based on the section's broad language declaring standards should be based on "the best system of emission reduction ... taking into account the cost."²⁴ The outlook is better described as cautiously optimistic for implementing a cap-and-trade system for new sources because a cap-and-trade scheme for meeting emissions requirements must fit the less flexible definition of "performance standard."²⁵ It is still probable that new sources could be incorporated into a single cap-and-trade system along with existing sources.²⁶

Under Section 111, EPA can outline how states should implement a cap-and-trade scheme in its guidelines.²⁷ It cannot, however, reject a state implementation plan solely because it failed to adopt a suggested cap-and-trade scheme.²⁸ States likely will even have the option to team up and submit joint state implementation plans to allow interstate trading.²⁹ This strategy would enable regional cap-and-trade systems that have already developed around the country to continue under the authority of the CAA.³⁰ Again, though, the EPA could not reject a regional SIP solely because it failed to adopt the EPA's suggested

cap-and-trade scheme.³¹

The components described above could be used in establishing a semi-national cap-and-trade scheme in which many states would undoubtedly adhere to the EPA's *1005 guidelines for establishing the scheme, but others may not. This scenario would represent an improvement over the status quo, but mainly because the status quo is so low. A robust cap-and-trade scheme requires full participation by all states.

B. Section 110

Section 110 governs the EPA's authority to control "criteria pollutants."³² So, the EPA would first need to list GHGs as criteria pollutants to establish a cap-and-trade under Section 110.³³ The EPA making this move is a real possibility--either from EPA voluntarily choosing to do so or from someone suing to force the move.³⁴ Listing GHGs would face some considerable hurdles were it to be attempted.³⁵ The EPA is required to regulate criteria pollutants according to National Ambient Air Quality Standards (NAAQS), which must be set at levels "requisite to protect the public health" with an "adequate margin of safety," without consideration of costs.³⁶ NAAQS would conceivably, in accordance with the CAA's statutory requirements, be set at such a level that all emitters would be noncompliant with the standards.³⁷ Given the extended lifetimes of GHG pollutants, even if NAAQS were set to zero the effects of climate change would continue to impact humanity for decades to come, and SIPs under Section 110 would be pointless.³⁸ Because of the global nature of climate change no action an individual state takes will affect the GHG concentration in that state.³⁹ No state would be able to fulfill its SIP.⁴⁰ The EPA could, declaring all fifty SIPs inadequate, then conceivably impose its own regulations--a national cap-and-trade system.⁴¹ Even if a Section 110 cap-and-trade system were eventually implemented, it is worthwhile to implement an alternative system in the interim, as the procedure for establishing NAAQS for GHGs would take years.⁴²

CONCLUSION

The issue of fitting the round peg (climate change) into the square hole (the CAA) is daunting. But it is workable. Multiple regional interstate cap-and-trade agreements are *1006 already in place in the United States.⁴³ These existing agreements can be included as part of multi-state implementation plans under Section 111 of the CAA.⁴⁴ Hopefully other states will be convinced to join in on this market-based approach as well. In the mean time, the EPA should get to work on listing GHGs as a single criteria pollutant (measured in CO2 equivalent units), which will open the door for a truly national cap-and-trade system, picking up any straggler states into the system. GHG NAAQs based on human health considerations and disregarding costs will represent a dramatic change in the American economy where fossil fuel based energy consumption is ubiquitous. With a national cap-and-trade system already in place under Section 111, however, the United States will be prepared for the transition.⁴⁵ With the most politically influential country in the world on board for a comprehensive cap-and-trade system, the ideal solution of a global cap-and-trade agreement will finally be within reach, and the worst of climate change's impacts might just be avoided.

Footnotes

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¹ JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 87-88 (3d ed. 2010).

² 549 U.S. 497 (2007).

³ 42 U.S.C. §§ 7401-31 (West).

⁴ *Massachusetts*, 549 U.S. at 528.

5 *See, e.g.*, Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions under the Clean Air Act*, 84 NOTRE DAME L. REV. 1 (2008), Christopher Burt, *CO2 and Regulation Authority: The Legal and Policy Implications of California's Proposed Cap-and-Trade Program and Clean Air Act National Ambient Air Quality Greenhouse Gas Regulation*, 44 URB. LAW. 429 (2012), Teal Jordan White, *Clean Air Act Mayhem: EPA's Tailoring Rule Stitches Greenhouse Gas Emissions into the Wrong Regulatory Fitting*, 18 TEX. WESLEYAN L. REV. 407 (2011).

6 SALZMAN & THOMPSON, *supra* note 1, at 87-88.

7 Ashley Gomez, Comment, *The Necessity of The Tailoring Rule: Regulation of Greenhouse Gas Emissions Under The Clean Air Act*, ARIZ. J. ENVTL. J. L. & POL'Y (May 19, 2011), <http://www.ajelp.com/comments/the-necessity-of-the-tailoring-rule-regulation-of-greenhouse-gasemissions-under-the-clean-air-act/>.

8 *Id.*

9 684 F.3d 102 (D.C. Cir. 2012).

10 *See id.* at 113-14.

11 *See id.* at 133-34.

12 SALZMAN & THOMPSON, *supra* note 1, at 96.

13 Clean Air Act §§ 110(a)(1)-(3), 111(d), 42 U.S.C.A. §§ 7410-11 (West).

14 *See* SALZMAN & THOMPSON, *supra* note 1, at 139-40.

15 *See, e.g.*, SALZMAN & THOMPSON, *supra* note 1, at 140, GREGORY E. WANNIER ET AL., PREVAILING ACADEMIC VIEW ON COMPLIANCE FLEXIBILITY UNDER § 111 OF THE CLEAN AIR ACT (2011), M. Rhead Enion, *Using Section 111 of the Clean Air Act for Cap-and-Trade of Greenhouse Gas Emissions: Obstacles and Solutions*, 30 UCLA J. ENVTL. L. & POL'Y 1 (2012).

16 *See* Enion, *supra* note 15, at 8.

17 Clean Air Act § 111(b)(1)(A). Wannier et al. provide a useful summary of the portions of Section 111 relevant to the implementation of a cap-and-trade scheme. WANNIER ET AL., *supra* note 15, at 3.

18 Clean Air Act § 111(b)(1)(B).

19 *Id.* § 111(a)(1).

20 *See id.* § 111(d)(1).

21 *Id.*

22 *Id.* § 111(d)(2).

23 WANNIER ET AL., *supra* note 15, at 4; Enion, *supra* note 15, at 7.

24 WANNIER ET AL., *supra* note 15, at 4.

25 *Id.* at 6-7. This cautiousness is, however, not shared by all; one recent law journal article, for instance, asserted, “While there may be practical difficulties, there is no significant statutory difference between new and existing sources with regard to trading for greenhouse gas emissions.” Enion, *supra* note 15, at 12. As section 111(a)(1) of the Clean Air Act states:
The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.
Clean Air Act § 111(a)(1).

26 WANNIER ET AL., *supra* note 15, at 7.

27 *Id.* at 4.

28 *Id.*

29 *Id.* at 5.

30 *Id.*

31 *Id.* at 6.

32 SALZMAN & THOMPSON, *supra* note 1, at 91.

33 *See id.* at 91, 138-40.

34 *See* WANNIER ET AL., *supra* note 15, at 6; Enion, *supra* note 15, at 14.

35 *See* WANNIER ET AL., *supra* note 15.

36 SALZMAN & THOMPSON, *supra* note 1, at 91; *see also* *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1154 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980).

37 Enion, *supra* note 15, at 9.

38 *See* SALZMAN & THOMPSON, *supra* note 1, at 140.

39 *Id.*

40 *Id.*

41 *See id.*

42 Enion, *supra* note 15, at 16; WANNIER ET AL., *supra* note 15, at 6.

43 The World Resource Institute provides a list and summary of the currently operating U.S. regional GHG cap-and-trade programs. WORLD RESOURCES INSTITUTE, ISSUE 13, THE BOTTOM LINE ON ... REGIONAL CAP-AND-TRADE PROGRAMS (2009), available at <http://www.wri.org/publication/bottom-line-regional-cap-and-trade-programs>.

44 WANNIER ET AL., *supra* note 15, at 5.

45 Enion, *supra* note 15, at 16.