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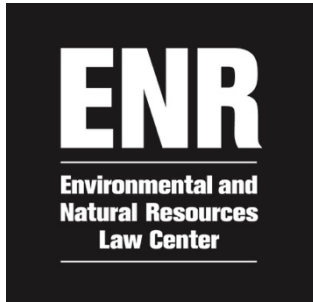
Environmental and Natural  
Resources Law Center



## **State Authority to Implement the Clean Air Act's International Air Pollution Provision**

**A White Paper of the University of Oregon School of Law  
Environmental and Natural Resources Law Center  
Energy Law and Policy Project**

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The Environmental & Natural Resources Law Center

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## **About this Paper**

This white paper was created through the University of Oregon Environmental and Natural Resources Law (ENR) Center's Energy Law and Policy Project, an interdisciplinary research project focused on exploring innovative law and policy that promote a green energy future.

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## Table of Contents

|  |                  |
|--|------------------|
| <b><i>I. STATE AUTHORITY TO IMPLEMENT THE CLEAN AIR ACT'S INTERNATIONAL AIR POLLUTION PROVISION.....</i></b> | <b><i>1</i></b>  |
| <b><i>II. TYPES OF STATE LAWS AUTHORIZING STATE AIR POLLUTION REGULATION.....</i></b>                        | <b><i>3</i></b>  |
| A. Broad Authority to Control Air Pollution .....  | 3                |
| B. State Authority Explicitly Tied to the Federal Clean Air Act.....   | 3                |
| C. Authority Limited to National Ambient Air Quality Standards or Types of Sources.....                      | 4                |
| D. Limitations on State Authority Tied to the Stringency of the Federal CAA. ....                            | 4                |
| <b><i>III. THE RELATIONSHIP BETWEEN STATE AUTHORITY AND SECTION 115.....</i></b>                             | <b><i>6</i></b>  |
| A. State Agencies With Broad Authority And No Stringency Limitation .....                                    | 6                |
| B. States With Authority That Would Be Enhanced By Section 115.....  | 7                |
| <i>i. States With Authority To Implement Federal Clean Air Act Requirements .....</i>                        | <i>7</i>         |
| <i>ii. State Agencies With Stringency Limitations Linked To The Federal Clean Air Act .....</i>              | <i>8</i>         |
| C. States With Narrow Air Pollution Authority.....   | 8                |
| <b><i>IV. EXAMPLES OF STATE EXPERIENCE WITH PSD FOR GREENHOUSE GASES.....</i></b>                            | <b><i>9</i></b>  |
| A. Broad Authority States .....  | 10               |
| B. Enhanced Authority States .....   | 10               |
| C. Limited Authority States .....  | 11               |
| <b><i>V. CONCLUSION.....</i></b>   | <b><i>11</i></b> |
| <b><i>VI. APPENDIX.....</i></b>  | <b><i>13</i></b> |

## I. STATE AUTHORITY TO IMPLEMENT THE CLEAN AIR ACT'S INTERNATIONAL AIR POLLUTION PROVISION

An unutilized tool for addressing climate change is Section 115 of the CAA,<sup>1</sup> which allows the President of the United States to direct the Environmental Protection Agency to require states to revise their CAA implementation plans to address transboundary air pollution. Section 115 would allow the United States to work with other nations to address transboundary air pollution. Under Section 115, the EPA can reduce domestic emissions that affect other countries, assuming that the endangered foreign country gives the United States the “same rights with respect to the prevention or control of air pollution in that country.”<sup>2</sup> Once triggered by EPA, each state would be required to develop and implement a greenhouse gas reduction plan using the proven tools of the Clean Air Act to control and reduce air pollution. This approach does not require congressional action and would instead bolster state efforts to address climate change.

This paper examines the kinds of authority states have to implement the goals and programs of the federal Clean Air Act (CAA), and explores the question of whether states could be expected to implement the requirements of the CAA’s Section 115 International Air Pollution

provisions under their existing authorities. This paper finds that states fall into three main categories. First, there are seventeen states whose air pollution control agencies already have broad authority to address air pollution, including greenhouse gases. These states could implement Section 115 under this existing authority. Second, the analysis finds that twenty-three states would have their state authority to address climate change significantly enhanced by a Section 115 rule. These states have (1) authority that is tied to the federal CAA or (2) broad air pollution control authority that is limited because the state action can be no more stringent than the CAA. Third, there are ten states whose existing laws limit the authority of their air pollution control agencies. These remaining ten states may also be able to implement Section 115 without additional state legislative action, just as all but one of them (Arizona) were able to implement EPA’s requirement that new major sources adopt the best available technology to reduce greenhouse gas emissions under the “prevent significant deterioration” (PSD) provisions of the Clean Air Act. However, this depends on the specific restrictions in their existing state laws, an analysis of which is beyond the scope of this paper. The following table indicates the category for each state:

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<sup>1</sup> Clean Air Act 42 U.S.C. § 7415 (2020) [hereinafter *Section 115*]. While the President is likely to initiate such action, the EPA could also act on their own “upon receipt of reports, surveys or studies from any duly constituted international agency.” Burger, et. al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 359 (2016)

(stating that there are adequate reports and studies to take action). In the alternative, the Secretary of State can also request EPA action under Section 115. *Id.*

<sup>2</sup> *Id.* § 7415(c). For a comprehensive treatment of Section 115, see COMBATING CLIMATE CHANGE WITH SECTION 115 OF THE CLEAN AIR ACT (Michael Burger ed., 2020).

|   |   |
|---|---|
| <b>States With Broad Air Pollution Authority (17 states)</b>                                    | Alabama, California, Delaware, Georgia, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, South Carolina, Tennessee, Texas, Vermont, and Virginia  |
| <b>States Whose Authority Would Be Enhanced By Federal Action Under Section 115 (23 states)</b> | Alaska, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, West Virginia, Wisconsin, and Wyoming |
| <b>States With Narrow Air Pollution Authority (10 states)</b>                                   | Arizona, Arkansas, Illinois, Kentucky, Maine, Montana, Ohio, New Mexico, South Dakota, and Utah   |

This paper is organized as follows. Part I of this paper describes the existing authorities that states have to regulate air pollution. These authorities can be divided into three types: (1) broad authority to regulate air pollution; (2) authority to carry out all requirements of the federal Clean Air Act; and (3) authority that is limited to certain provisions of the federal Clean Air

Act or certain sources. These state authorities can be subject to three levels of stringency limitations: (a) a complete prohibition on state regulation being more stringent than federal regulation; (b) a conditional prohibition on state regulation being more stringent than federal regulation; and (c) no restrictions on state regulation being more stringent than federal regulation.

For purposes of analyzing state authority to implement Section 115, Part II places the states into three categories: (1) states with broad authority to regulate air pollution with no stringency restrictions; (2) states with constrained authority to regulate air pollution that would be enhanced by federal action under Section 115; and (3) states with constrained authority to regulate air pollution that is not affected by federal action under Section 115. The seventeen states in the first category and the twenty-three states in the second category should both be able to implement a Section 115 rule. Whether the ten states in the third category could implement a Section 115 rule under their existing authorities depends on the details of their existing authorities.

Part III considers the experience of state implementation of the greenhouse gas provisions of EPA's prevention of significant deterioration (PSD) program, which provides a real-world example of how states responded to an EPA rule requiring state action to reduce emissions of greenhouse gases. There was only one state that was unable to implement these requirements (due to a statutory prohibition on GHG regulation).

An Appendix contains a table with details of each state's existing authorities.

## **II. TYPES OF STATE LAWS AUTHORIZING STATE AIR POLLUTION REGULATION**

State legislatures have taken varied approaches in authorizing state air pollution control agencies to establish rules and regulations pertaining to state implementation of the federal CAA. This section categorizes these approaches into three groups: broad authority to control pollution, broad authority explicitly tied to the federal CAA, and more narrow authority limited to national ambient air quality standards or types of air pollution sources. The section then describes how some states have limited the authority of state air regulators to adopt regulations more stringent than federal requirements.

### **A. Broad Authority to Control Air Pollution**

Some state legislatures have provided their air pollution control agencies with broad grants of authority to address air pollution, independently of the federal CAA. For example, Nevada law grants the State Environmental Commission the authority to “adopt regulations . . . to prevent, abate and control air pollution, subject to public notice requirements and consistent with the general intent and purposes of NRS 445B.100 [declaration of public policy] to 445B.640.”<sup>3</sup> The referenced declaration of public policy states that “It is the public policy of the State of Nevada and the purpose of [the state’s clean air law] to achieve and maintain levels of air quality which will protect human health and safety, prevent injury to plant and animal life,

prevent damage to property, and preserve visibility and scenic, esthetic and historic values of the State” and to “[f]acilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within a single jurisdiction.”<sup>4</sup>

Similarly, New Jersey Department of Environmental Protection has broad authority to “formulate and promulgate, amend and repeal codes and rules and regulations preventing, controlling and prohibiting air pollution throughout the State . . . .”<sup>5</sup> Likewise, the Massachusetts Department of Environmental Protection “may from time to time adopt regulations . . . to prevent pollution or contamination of the atmosphere.”<sup>6</sup>

In these states that grant their agencies general and broad air pollution control, it appears that agencies would have the autonomy to enact regulations to implement a federal Section 115 rule without the need for state legislative action.

### **B. State Authority Explicitly Tied to the Federal Clean Air Act**

In contrast to the broad air pollution control authority discussed in the preceding section, some states grant authority to their air pollution control agency specifically to implement the federal CAA. For example, Connecticut law provides the commissioner of the State Department of Energy and Environmental Protection “the power to formulate, adopt, amend and repeal regulations to control and prohibit air pollution throughout the state” in a manner “consistent with the

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<sup>3</sup> NEV. REV. STAT. § 445B.210 (2020).

<sup>4</sup> NEV. REV. STAT. § 445B.100(1), (2)(c) (2020).

<sup>5</sup> N.J. STAT. ANN. § 26:2C-8 (West 2021).

<sup>6</sup> MASS. GEN. LAWS ch. 111, § 142A (2021).



[federal CAA].”<sup>7</sup> Pennsylvania law grants authority to the State Department of Environmental Protection to “[i]mplement the provisions of the [federal] Clean Air Act in the Commonwealth.”<sup>8</sup> Colorado’s Air Quality Control Commission is “specifically authorized and directed to develop a program to apply and enforce every relevant provision of the state implementation plan and every relevant emission control strategy to minimize emissions . . . .”<sup>9</sup>

In Michigan, the state’s Department of Environment, Great Lakes, and Energy is authorized to “Issue permits for the construction and operation of sources, processes, and process equipment, subject to enforceable emission limitations and standards and other conditions reasonably necessary to assure compliance with all applicable requirements of this part, rules promulgated under this part, and the Clean Air Act.”<sup>10</sup> Likewise, the State of Washington’s Clean Air Act provides “[n]otwithstanding any provision of the law to the contrary, . . . the Department of Ecology, upon its approval of any plan [or part thereof] required or permitted under the federal Clean Air Act, shall have the authority to enforce all regulatory provisions within such plan [or part thereof].”<sup>11</sup> These clear grants of authority and alignments with the federal CAA make it apparent that where there is a program under the federal CAA, state agencies may take action without the need for state legislative action.

### **C. Authority Limited to National Ambient Air Quality Standards or Types of Sources**

Some states restrict agency authority to specific pollution sources or provisions of the federal CAA. For example, New Mexico’s Environmental Improvement Board may adopt rules specifically “to achieve national ambient air quality standards. . . [and] prescribe standards of performance for sources and emission standards for hazardous air pollutants.”<sup>12</sup> Similarly, Illinois law provides that Sections 111 and 112 of the CAA are “applicable in this State and are enforceable under [state law].”<sup>13</sup> Montana’s Department of Environmental Quality may “adopt, amend, and repeal rules for the administration, implementation, and enforcement [of the air quality chapter],” but may not adopt “any other rule” relating to specific agricultural activities, commercial operations, or forestry equipment.<sup>14</sup> These provisions demonstrate the variations in state law that require a more detailed examination of each state’s authorities.

### **D. Limitations on State Authority Tied to the Stringency of the Federal CAA.**

Regardless of a state’s statutory authority, every state also falls into one of the three categories in terms of its stringency in implementing regulations. A survey of forty-three states conducted by

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<sup>7</sup> CONN. GEN. STAT. § 22a-174(a) (2020).

<sup>8</sup> 35 PA. STAT. AND CONS. STAT. ANN. § 4004(1) (West 2021).

<sup>9</sup> COLO. REV. STAT. § 25-7-106(7)(a) (2020).

<sup>10</sup> MICH. COMP. LAWS § 324.5503(b) (2020).

<sup>11</sup> WASH. REV. CODE § 70A.15.6050 (2020).

<sup>12</sup> N.M. STAT. ANN. § 74-2-5(C)(1), (C)(2) (West 2021).

<sup>13</sup> 415 ILL. COMP. STAT. 5/9.1(b) (2020).

<sup>14</sup> MONT. CODE ANN. § 75-2-111 (2019).

the National Association of Clean Air Agencies (NACAA) classified state limitations on stringency as: (1) no more stringent than the federal CAA; (2) no more stringent than the federal CAA, with some exceptions; and (3) no preclusions for higher stringency than the federal CAA.<sup>15</sup>

Some states are always precluded from being more stringent than federal programs, i.e., their implementation of the federal CAA may be only as strict as required by the Act and may not be stricter than required by the Act. For example, South Dakota provides that “[n]o rule that has been promulgated pursuant to [state air pollution laws] may be more stringent than any corresponding federal law, rule or regulation governing an essentially similar subject or issue.”<sup>16</sup> Likewise, Idaho, Mississippi, and Indiana are similarly precluded.

Both New Mexico and North Carolina fall under the category of states with environmental statutes precluding more stringent standards, but with some exceptions. The approach to these exceptions differs between states, with New Mexico and North Carolina providing examples of two common methods.

New Mexico law separates and specifies stringency limitations for specific provisions and categories of pollutants. For example, rules pertaining to visibility and PSD new source review may be “no more stringent than but at least as stringent as required by the federal act and federal regulations.”<sup>17</sup> Whereas, emissions from

solid waste incinerators “shall be at least as stringent as, and may be more stringent than, any applicable federal emission limitations.”<sup>18</sup>

In a different approach, North Carolina’s Department of Environmental Quality may not adopt more stringent standards than those imposed by federal law, unless adoption is required by certain uncommon developments, such as “serious and unforeseen threat[s] serious and unforeseen threat to the public health, safety, or welfare.”<sup>19</sup>

Maryland law provides another variation. It contains a manufacturing-sector exception to state climate measures unless federal law requires state action with regard to this sector. Its law generally provides that the state’s Department of the Environment “[m]ay adopt rules and regulations for the control of air pollution in this State, including testing, monitoring, record keeping, and reporting requirements.”<sup>20</sup> However, Maryland has also enacted the Greenhouse Gas Emissions Reduction Act, a climate change-specific law, which directs the state to develop plans, adopt regulations, and implement programs that reduce statewide greenhouse gas emissions by 40% by the year 2030.<sup>21</sup> This law states that “[u]nless required by federal law or regulations or existing State law, regulations . . . may not . . . [r]equire greenhouse gas emissions reductions from the State’s manufacturing sector . . . .”<sup>22</sup>

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<sup>15</sup> NAT’L ASS’N OF CLEAN AIR AGENCIES, RESTRICTIONS ON THE STRINGENCY OF STATE AND LOCAL AIR QUALITY PROGRAMS 5 (2014).

<sup>16</sup> S.D. CODIFIED LAWS § 1-40-4.1 (2021).

<sup>17</sup> N.M. STAT. ANN. § 74-2-5(C)(1)(a) (West 2021).

<sup>18</sup> *Id.* § 74-2-5(C)(3).

<sup>19</sup> N.C. GEN. STAT. § 150B-19.3(a)(1) (2021).

<sup>20</sup> MD. CODE ANN., ENV’T. § 2-301 (West 2021).

<sup>21</sup> Maryland Dep’t of the Env’t, The Greenhouse Gas Emissions Reduction Act, I (Feb. 19, 2021), <https://mde.maryland.gov/programs/Air/ClimateChange/Documents/2030%20GGRA%20Plan/2030%20MD%20Greenhouse%20Gas%20Reduction%20Act%20Plan.pdf>.

<sup>22</sup> MD. CODE ANN., ENV’T § 2-1205(f)(1) (West 2021).

Maryland is currently examining whether this limitation remains appropriate.<sup>23</sup>

Finally, according to the NACAA report, nearly half of the states do not expressly preclude their state agencies from being more stringent than a federal program or the federal CAA. The vast majority of the states without stringency limitations are “broad authority” states.

### **III. THE RELATIONSHIP BETWEEN STATE AUTHORITY AND SECTION 115**

The impact that a federal Section 115 rule will have on state authority depends on the type of existing air pollution authority the state has. States that have broad authority to regulate air pollution and no stringency limitation would presumably be able to regulate greenhouse gases under their existing broad authority and would be able to use this broad authority to implement Section 115. States that have their authority tied in some manner to the federal Clean Air Act would see their authority to address greenhouse gases expanded by a Section 115 rule and would be able use this expanded authority to implement the Section 115 rule. States with other limitations on their air pollution authority may not see their authority changed by a federal Section 115 rule. Whether they could implement the Section 115 rule depends on the specific restrictions in their state laws.

#### **A. State Agencies With Broad Authority And No Stringency Limitation**

Seventeen states with broad authority and no limitation on stringency have the legal authority to implement Section 115 of the CAA in the wake of federal action without any state legislative action. Each of these states has granted its air pollution regulatory agency “Broad Authority to Control Air Pollution.”<sup>24</sup> Thus, their authority to act is not limited to specific provisions of the CAA. Furthermore, these states do not have preclusions on stringency, which gives them maximum latitude. Eleven of these states are members of the U.S. Climate Alliance: California, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Vermont, and Virginia. Additionally, six non-Climate Alliance states have such authority: Alabama, Georgia, New Hampshire, South Carolina, Tennessee, and Texas.

For example, New Jersey falls under the categories of “Broad Authority to Control Air Pollution” and “No Preclusion on Stringency.” These two affirmative grants of power allow the state’s air pollution control agency, the New Jersey Department of Environmental Protection, to “formulate and promulgate, amend and repeal codes and rules and regulations preventing, controlling and prohibiting air pollution throughout the State . . . .”<sup>25</sup>

While these states’ agencies could in theory take action on air pollution absent a federal program under Section 115, these states may face opposition to taking action. For example, Oregon governor Kate Brown has faced challenges getting her

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<sup>23</sup> Maryland Dep’t of the Env’t, *supra* note 34 (discussing current and upcoming studies specifically regarding the manufacturing sector).

<sup>24</sup> *See infra* Appendix.

<sup>25</sup> N.J. STAT. ANN. § 26:2C-8 (West 2021).

climate change policies through the state legislature. In 2019, eleven GOP senators went to Idaho to avoid a vote on a climate bill.<sup>26</sup> This was not a one-off stunt, with Oregon Republicans disappearing for another climate vote in 2020.<sup>27</sup> Despite a Democratic majority in the house, Oregon Republicans' theatrics successfully prevent voting by thwarting quorum requirements. While the Oregon Department of Environmental Quality has existing broad authority, CAA Section 115 action would provide a mandate to use those authorities. As a result, a state like Oregon could still benefit from federal action pursuant to Section 115.

## **B. States With Authority That Would Be Enhanced By Section 115**

Twenty-three states have air pollution authority that is linked to the federal Clean Air Act, such as authority to implement the requirements of the Clean Air Act or a prohibition on being more stringent than the Clean Air Act. These states would be the most immediate beneficiaries of federal Section 115 regulations because their state authority would be enhanced. These include nine states in the U.S. Climate Alliance: Colorado, Connecticut, Maryland, Michigan, North Carolina, Pennsylvania, Rhode Island, Washington, and Wisconsin. Federal action under Section 115 would similarly expand the authority of fourteen non-Climate

Alliance states: Alaska, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, West Virginia, and Wyoming.

### ***i. States With Authority To Implement Federal Clean Air Act Requirements***

Nineteen states have authority "Explicitly Tied to the Federal Clean Air Act": Alaska, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nebraska, North Carolina, North Dakota, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. With authority tied to the federal CAA, the state agencies are permitted to revise and enforce their respective state implementation plans (SIPs) to be in accordance with federal regulations under Section 115 of the CAA.

For some states, this could be a much-needed enhancement of authority to reduce greenhouse gases. For example, Pennsylvania's Governor Tom Wolf has expressed, via executive order, a commitment to protecting Pennsylvania's citizens, economy, and environment from the impacts of climate change.<sup>28</sup> Executive Order 2019-1 set GHG reduction targets for Pennsylvania and included specific clean energy and energy efficiency goals. However, Pennsylvania's environmental ambitions have met opposition from the Commonwealth's legislature. For instance, in September of 2020 the Pennsylvania

<sup>26</sup> Julie Turkewitz, *Oregon Climate Walkout Left Republicans in Hiding, Statehouse in Disarray*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/oregon-climate-fight.html>.

<sup>27</sup> Mike Baker, *Oregon Republicans Disappear for Another Climate Vote*, N.Y. TIMES (Feb. 24, 2020),

<https://www.nytimes.com/2020/02/24/us/republicans-oregon-climate.html>.

<sup>28</sup> Pa. Exec. Order No. 2019-1 (Jan. 8, 2019); *Climate Change*, DEPT. ENV'T PROT., <https://www.dep.pa.gov/Citizens/climate/Pages/default.aspx> (last visited Mar. 10, 2021).

Senate voted on House Bill 2025, which prohibited Governor Wolf from joining the Regional Greenhouse Gas Initiative and from imposing carbon taxes without the approval of the Pennsylvania General Assembly.<sup>29</sup> EPA action under Section 115 would enhance Governor Wolf's authority because Pennsylvania law grants its State Department of Environmental Protection authority to implement provisions of the federal Clean Air Act. Thus, action pursuant to Section 115 would not require approval from the Commonwealth's legislature, and would instead require state executive action that would presumably support the commitment made by EO 2019-1.

Even a state like Colorado, which in 2019 passed a comprehensive law authorizing state action to reduce greenhouse gases, could potentially see its authority enhanced by federal action under Section 115. Under the new Colorado law, state regulators have authority to reduce greenhouse gas emissions by 50% below 2005 levels by 2030 and 90% by 2050.<sup>30</sup> Colorado's Air Quality Control Commission is "specifically authorized and directed to develop a program to apply and enforce every relevant provision of the state implementation plan and every relevant emission control strategy to minimize emissions . . . ."<sup>31</sup> If a Section 115 regulation required additional reductions beyond what the Colorado law requires, the state air regulators would appear to have the authority to implement it.

## ***ii. State Agencies With Stringency Limitations Linked To The Federal Clean Air Act***

Four states have limitations that in some form preclude their air pollution agencies from adopting regulations more stringent than the federal Clean Air Act: Maryland, Mississippi, Oklahoma, and Wyoming. Federal action under Section 115 would remove this limitation on state action to reduce greenhouse gas emissions. For example, Maryland's Department of the Environment has broad authority to "adopt rules and regulations for the control of air pollution in this State."<sup>32</sup> However, Maryland has enacted a law precluding the state from more stringent regulation of Maryland's manufacturing sector "[u]nless required by federal law or regulations."<sup>33</sup> Therefore, with a federal regulation pursuant to Section 115, though Maryland's manufacturing sector stringency limitation would remain in play, the agency's authority would nonetheless be expanded by virtue of the new federal requirements, and the legal need for the state to meet these new requirements. Maryland would need to impose greenhouse gas emissions reductions from the state's manufacturing sector to the extent that federal requirements under Section 115 call for such reductions.

## **C. States With Narrow Air Pollution Authority**

Ten states fall into neither the category of having broad authority to

<sup>29</sup> H.B. 2025, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

<sup>30</sup> COLO. REV. STAT § 25-7-102(2)(g).

<sup>31</sup> *Id.* § 25-7-106(7)(a) (2020).

<sup>32</sup> MD. CODE ANN., ENV'T § 2-301 (West 2021).

<sup>33</sup> MD. CODE ANN., ENV'T. § 2-1205(f)(1) (West 2021).

control air pollution nor the category of having authority that would be enhanced by Section 115: Arizona, Arkansas, Illinois, Kentucky, Maine, Montana, Ohio, New Mexico, South Dakota, and Utah. For example, as discussed above, New Mexico's Environmental Improvement Board may adopt rules specifically "to achieve national ambient air quality standards. . . [and] prescribe standards of performance for sources and emission standards for hazardous air pollutants."<sup>34</sup> Because a Section 115 rule would not involve setting a national ambient air quality standard and greenhouse gases are not hazardous air pollutants, these authorities would not appear to be affected by a Section 115 rule. Similarly, Maine's Department of Environmental Protection has authority limited to NAAQS or other types of sources. The department "shall implement ambient air quality standards as required by the federal Clean Air Act . . . [and n]othing in this section may be construed to limit the authority of the department to adopt emission standards designed to achieve and maintain ambient air quality standards."<sup>35</sup> Similarly, relating to emission of new motor vehicles and engines, "the board may adopt and enforce standards that meet the requirements of the federal Clean Air Act."<sup>36</sup>

An analysis of what these ten states could do under their existing laws to implement a Section 115 rule is beyond the scope of this paper. As the next section explains, many of these states were able to implement the greenhouse gas requirements for new major sources required by the federal EPA under President Obama. It is possible that they could similarly find authority to implement

Section 115. Assessing this, however, would require a detailed investigation into the specifics of each state's laws.

#### **IV. EXAMPLES OF STATE EXPERIENCE WITH PSD FOR GREENHOUSE GASES**

After EPA established greenhouse gas emissions standards for cars and trucks, greenhouse gases became "subject to regulation" pursuant to the Clean Air Act's prevention of significant deterioration provisions.<sup>37</sup> Accordingly, when states performed PSD new source review, they became obligated to impose best available control technology for GHGs on stationary sources. This was a new obligation for states and required some of them to confront the challenge of controlling GHGs for the first time.

As would be the case with EPA CAA Section 115 International Air Pollution action, these PSD changes were implemented by states with PSD permitting authority via state implementation plans. At the time that EPA broadened PSD coverage to encompass GHG emissions, twenty-nine states' existing PSD programs were already structured so as to implement EPA's PSD coverage of GHG emissions (i.e., without the need to update

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<sup>34</sup> N.M. STAT. ANN. §§ 74-2-5(C)(1), (C)(2) (West 2021).

<sup>35</sup> ME. REV. STAT. ANN. tit. 38 § 584-A (West 2020).

<sup>36</sup> *Id.* § Tit. 38 § 585-D.

<sup>37</sup> Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

SIPs).<sup>38</sup> EPA issued “SIP calls”<sup>39</sup> to eleven states (as well as a four local programs) whose SIPs were inadequate because they did not apply PSD requirements to GHG-emitting sources,<sup>40</sup> and eight of these states subsequently became subject to a federal implementation plan (FIP).<sup>41</sup> Because the eleven SIP call and FIP states needed to revise the PSD provisions in their SIPs to encompass GHGs, their example is potentially instructive for state implementation of a federal CAA Section 115 rule. The eleven SIP call and FIP states were distributed among the three categories discussed in this paper as follows:

- states with broad air pollution authority: Oregon and Texas
- states with authority that is enhanced by federal action under the Clean Air Act: Connecticut, Florida, Idaho, Kansas, Nebraska, and Wyoming
- states with narrow air pollution authority: Arizona, Arkansas, and Kentucky

It appears that all of these states except Arizona and Wyoming were able to

incorporate PSD GHG provisions in their SIPs via exercise of existing statutory authority, showing that states in all three of these categories were able to modify their SIPs utilizing existing authority. Examples of states in each category follow below.

## A. Broad Authority States

As noted above, Oregon was subject to EPA’s PSD FIP. Oregon made the necessary changes to its SIP, and EPA rescinded FIP coverage as to Oregon within a year of the issuance of the FIP.<sup>42</sup> Oregon’s SIP revisions took place pursuant to existing statutory authority.

## B. Enhanced Authority States

Of the “enhanced authority” category of states subject to PSD SIP calls or FIPs, Wyoming is the only one that required legislative action in order to implement the new PSD GHG requirements, due a statutory provision prohibiting “regulation[s] intended in whole or in part to reduce emissions as called for

<sup>38</sup> Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698, 77,703 (Dec. 13, 2010) (Table III–2).

<sup>39</sup> 42 U.S.C. § 7410(k)(5) (2020).

<sup>40</sup> Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (issuing SIP call to Arizona, Arkansas, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Oregon, Texas, and Wyoming).

<sup>41</sup> Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal

Implementation Plan, 75 Fed. Reg. 82,246 (Dec. 30, 2010) (establishing FIP applying to Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming); Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas’s Prevention of Significant Deterioration Program 76 Fed. Reg. 25,178 (May 3, 2011) (applying PSD GHG FIP to Texas).

<sup>42</sup> Approval and Promulgation of Implementation Plans; Oregon: New Source Review/Prevention of Significant Deterioration Rule Revisions and Air Quality Permit Streamlining Rule Revisions 76 Fed. Reg. [Dec. 27, 2011] (indicating that Oregon submitted revisions on May 5, 2011).

by the Kyoto Protocol”<sup>43</sup> It appears, however, that this statutory provision may not restrict Wyoming’s implementation of a federal CAA Section 115 rule as long as the rule isn’t specifically tied to the Kyoto Protocol.

Another “enhanced authority” state, Kansas, revised its SIP pursuant to existing authority almost two months prior to becoming subject to the FIP, and was the first of the FIP states to have FIP coverage rescinded when the FIP was rescinded as to Kansas less than two months after the issuance of the FIP.<sup>44</sup>

Connecticut, Florida, Idaho, and Nebraska each were subject to federal SIP calls. They each then revised their SIPs to encompass GHG emissions, apparently pursuant to existing authority, with EPA approving their revised SIPs between March of 2011 (Nebraska) and May of 2014 (Florida).

### C. Limited Authority States

Kentucky was the first of the SIP call states to submit a revised SIP and have it approved by EPA, having submitted its revised SIP to EPA on August 5, 2010, and receiving EPA approval on December 29,

2010.<sup>45</sup> This illustrates that a “limited authority” state nonetheless had sufficient authority to enable it to have a revised SIP approved by EPA. While Arkansas took a longer time to revise its SIP (which resulted in it being subject to the FIP), it too revised its SIP pursuant to existing authority and had its coverage under the FIP rescinded by EPA.<sup>46</sup> Arizona, on the other hand stands alone as the only state not to revise its PSD provisions to encompass GHG emissions, and therefore is the only state still subject to the FIP.<sup>47</sup> This is due to an Arizona statutory provision prohibiting state agency regulation of GHGs.<sup>48</sup> This provision appears to be unique among the states (as noted above, Wyoming’s somewhat analogous provision does not appear to have continued viability as long as state executive action is not tied to implementation of the Kyoto Protocol).

## V. CONCLUSION

At least forty states appear to have the authority to implement a federal regulation under Section 115 under their existing laws. This includes seventeen states that have broad authority to regulate air pollution and twenty-three

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<sup>43</sup> WYO. STAT. ANN. § 35-11-213(a) (2021). The Wyoming Legislature passed legislation allowing Wyoming to implement PSD GHG regulation notwithstanding this provision. 2013 Wyoming Laws Ch. 39 (H.B. 63) (2013).

<sup>44</sup> Approval and Promulgation of Implementation Plans; Kansas: Prevention of Significant Deterioration; Greenhouse Gas (GHG) Permitting Authority and Tailoring Rule Revision; Withdrawal of Federal GHG Implementation Plan for Kansas, 76 Fed. Reg. 9,658 (Feb. 22, 2011).

<sup>45</sup> Approval and Promulgation of Implementation Plans; Kentucky: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule Revision 75 Fed. Reg. 81,868 (Dec. 29, 2010).

<sup>46</sup> Approval and Promulgation of Air Quality Implementation Plans; Arkansas: Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions, 78 Fed. Reg. 19,596 (April 2, 2013).

<sup>47</sup> See 40 CFR § 52.144(c).

<sup>48</sup> ARIZ. REV. STAT. ANN. § 49-191.A. (2021) (“Notwithstanding any other law, a state agency established under this title or title 411 shall not adopt or enforce a state or regional program to regulate the emission of greenhouse gas for the purposes of addressing changes in atmospheric temperature without express legislative authorization.”).



states that have authority that would be enhanced by federal action under Section 115. Whether the remaining ten states that have narrow air pollution can implement a Section 115 rule under their existing laws is unclear, however if states' PSD GHG implementation experience is any indication, at least some of these states have sufficient existing authority to implement a federal Section 115 rule. Every state with PSD authority except one has revised its SIP to encompass GHG emissions in their PSD programs.

## VI. APPENDIX

| STATE              | Broad Authority to Control Air Pollution | Authority Explicitly Tied to the Federal CAA | Authority Limited to NAAQS or Other Types of Sources | No More Stringent | No more stringent w/ exceptions | No preclusions on stringency | Relevant Statutes  | Climate Alliance State |
|--------------------|--|--|--|-------------------|---------------------------------|------------------------------|--|------------------------|
| <i>Alabama</i>     | X  |  |  |                   |                                 | X                            | ALA. CODE § 22-28-14 (2021)  | No                     |
| <i>Alaska</i>      |  | X  |  |                   | X                               |                              | ALASKA STAT. §§ 46.14.010, 46.14.015 (2020)  | No                     |
| <i>Arizona</i>     |  |  | X  | X                 |                                 |                              | ARIZ. REV. STAT. ANN. §§ 49-104, 49-191.A. (2021)  | No                     |
| <i>Arkansas</i>    |  |  | X  |                   |                                 | X                            | ARK. CODE ANN. §§ 8-3-203, 8-4-102, 8-4-318 (2021)   | No                     |
| <i>California</i>  | X  |  |  |                   |                                 | X                            | CAL. HEALTH & SAFETY §§ 39003, 39600, 39602, 39602.5, 43013, 57007 (West 2021); <i>see</i> CAL. HEALTH & SAFETY Div. 26, Part 1, Ch. 2 (West 2021) | Yes                    |
| <i>Colorado</i>    |  | X  |  |                   |                                 | X                            | COLO. REV. STAT. §§ 25-7-106(7)(a), 25-7-108 (2020)  | Yes                    |
| <i>Connecticut</i> |  | X  |  | X                 |                                 |                              | CONN. GEN. STAT. § 22a-174(a) (2020)   | Yes                    |
| <i>Delaware</i>    | X  |  |  |                   |                                 | X                            | DEL. CODE ANN. tit. 7, §§ 6010, 1620 (2021)  | Yes                    |

| STATE            | Broad Authority to Control Air Pollution | Authority Explicitly Tied to the Federal CAA | Authority Limited to NAAQS or Other Types of Sources | No More Stringent | No more stringent w/ exceptions | No preclusions on stringency | Relevant Statutes  | Climate Alliance State |
|------------------|--|--|--|-------------------|---------------------------------|------------------------------|--|------------------------|
| <i>Florida</i>   |  | X  |  |                   | X                               |                              | FLA. STAT. ANN. §§ 402.061(7), 403.061, 403.804 (2020)   | No                     |
| <i>Georgia</i>   | X  |  |  |                   |                                 | X                            | GA. CODE ANN. § 12-9-5 (2020)                            | No                     |
| <i>Hawaii</i>    | X  |  |  |                   |                                 | X                            | HAW. REV. STAT. §§ 342B-3, 342B-12 (2021)                | Yes                    |
| <i>Idaho</i>     |  | X  |  |                   | X                               |                              | IDAHO CODE § 39-118B (2021)                              | No                     |
| <i>Illinois</i>  |  |  | X  |                   |                                 | X                            | 415 ILL. COMP. STAT. 5/9.1(b)-(c) (2020)                 | Yes                    |
| <i>Indiana</i>   |  | X  |  | X                 |                                 |                              | IND. CODE § 13-17-3-4 (2020)                             | No                     |
| <i>Iowa</i>      |  | X  |  |                   | X                               |                              | IOWA CODE 455B.133 (2021)                                | No                     |
| <i>Kansas</i>    |  | X  |  | X                 |                                 |                              | KAN. STAT. ANN. § 65-3005 (2020)                         | No                     |
| <i>Kentucky</i>  |  |  | X  | X                 |                                 |                              | KY. REV. STAT. ANN. § 224.10-100 (2021)                  | No                     |
| <i>Louisiana</i> |  | X  |  | X                 |                                 |                              | LA. STAT. ANN. § 30:2054 (2020)                          | No                     |
| <i>Maine</i>     |  |  | X  |                   | X                               |                              | ME. REV. STAT. ANN. tit. 38 §§ 584-A; 585-D (West 2020)  | Yes                    |
| <i>Maryland</i>  | X  |  |  |                   | X                               |                              | MD. CODE ANN., ENV'T. §§ 2-301, 2-1205(f)(1) (West 2021) | Yes                    |

| STATE                | Broad Authority to Control Air Pollution | Authority Explicitly Tied to the Federal CAA | Authority Limited to NAAQS or Other Types of Sources | No More Stringent | No more stringent w/ exceptions | No preclusions on stringency | Relevant Statutes   | Climate Alliance State |
|----------------------|--|--|--|-------------------|---------------------------------|------------------------------|---|------------------------|
| <i>Massachusetts</i> | X  |  |  |                   |                                 | X                            | MASS. GEN. LAWS ch. 111, § 142A (2021) & Self-Reporting     | Yes                    |
| <i>Michigan</i>      |  | X  |  |                   |                                 | X                            | MICH. COMP. LAWS § 324.5503 (2020)                          | Yes                    |
| <i>Minnesota</i>     | X  |  |  |                   |                                 | X                            | MINN. STAT. § 116.07 (West 2021)                            | Yes                    |
| <i>Mississippi</i>   | X  |  |  | X                 |                                 |                              | MISS. CODE ANN. § 49-17-17 (2021) & Self-Reporting          | No                     |
| <i>Missouri</i>      |  | X  |  |                   | X                               |                              | MO. REV. STAT. §§ 643.050, 643.190 (2020)                   | No                     |
| <i>Montana</i>       |  |  | X  |                   | X                               |                              | MONT. CODE ANN. §§ 75-2-111, 75-2-207 (2019)                | Yes                    |
| <i>Nebraska</i>      |  | X  |  |                   | X                               |                              | NEB. REV. STAT. § 81-1504 (2021) & Self-Reporting           | No                     |
| <i>Nevada</i>        | X  |  |  |                   |                                 | X                            | NEV. REV. STAT. §§ 445B.210, 445B.100(1), (2)(c) (2020)     | Yes                    |
| <i>New Hampshire</i> | X  |  |  |                   |                                 | X                            | N.H. REV. STAT. ANN. § 125-C:4 (2020)                       | No                     |
| <i>New Jersey</i>    | X  |  |  |                   |                                 | X                            | N.J. STAT. ANN. §§ 26:2C-8, 26:2C-8.15 (West 2021)          | Yes                    |
| <i>New Mexico</i>    |  |  | X  |                   | X                               |                              | N.M. STAT. ANN. §§ 74-2-5(C), (C)(1)(a), (C)(3) (West 2021) | Yes                    |
| <i>New York</i>      | X  |  |  |                   |                                 | X                            | N.Y. ENV'T CONSERV. LAW § 19-0301 (McKinney 2021)           | Yes                    |

| STATE                 | Broad Authority to Control Air Pollution | Authority Explicitly Tied to the Federal CAA | Authority Limited to NAAQS or Other Types of Sources | No More Stringent | No more stringent w/ exceptions | No preclusions on stringency | Relevant Statutes   | Climate Alliance State |
|-----------------------|--|--|--|-------------------|---------------------------------|------------------------------|---|------------------------|
| <i>North Carolina</i> |  | X  |  |                   | X                               |                              | N.C. GEN. STAT. §§ 143-215.111, 150B-19.3 (2021)  | Yes                    |
| <i>North Dakota</i>   |  | X  |  |                   | X                               |                              | N.D. CENT. CODE §§ 23.1-06-04, 23.1-06-06, 23.1-06-07 (2019)  | No                     |
| <i>Ohio</i>           |  |  | X  |                   | X                               |                              | OHIO REV. CODE ANN. § 3704.02, 3704.03 (2020)   | No                     |
| <i>Oklahoma</i>       | X  |  |  |                   | X                               |                              | OKLA. STAT. tit. 27A, § 2-5-105, 2-5-107 (2021) & Self-Reporting  | No                     |
| <i>Oregon</i>         | X  |  |  |                   |                                 | X                            | OR. REV. STAT. §§ 468A.025, 468A.035 (2021)   | Yes                    |
| <i>Pennsylvania</i>   |  | X  |  |                   | X                               |                              | 35 PA. STAT. AND CONS. STAT. ANN. §§ 4004(1), 4004.2(a) (West 2021)   | Yes                    |
| <i>Rhode Island</i>   |  | X  |  |                   | X                               |                              | 23 R.I. GEN. LAWS §§ 23-23-2, 23-23-4, 23-23-5 (2021)   | Yes                    |
| <i>South Carolina</i> | X  |  |  |                   |                                 | X                            | S.C. CODE ANN. § 48-1-310 (2021)  | No                     |
| <i>South Dakota</i>   |  |  | X  | X                 |                                 |                              | S.D. CODIFIED LAWS §§ 1-40-4.1, 34-A-1-6 (2021)   | No                     |
| <i>Tennessee</i>      | X  |  |  |                   |                                 | X                            | TENN. CODE ANN. § 68-201-105 (2021) & Self-Reporting  | No                     |
| <i>Texas</i>          | X  |  |  |                   |                                 | X                            | TEX. WATER CODE ANN. § 5.102 (West 2019); TEX. HEALTH & SAFETY CODE ANN. §§ 382.002, 382.011, 382.017, 382.023, 382.05102 (West 2019) | No                     |

| STATE                | Broad Authority to Control Air Pollution | Authority Explicitly Tied to the Federal CAA | Authority Limited to NAAQS or Other Types of Sources | No More Stringent | No more stringent w/ exceptions | No preclusions on stringency | Relevant Statutes   | Climate Alliance State |
|----------------------|--|--|--|-------------------|---------------------------------|------------------------------|---|------------------------|
| <i>Utah</i>          |  |  | X  |                   | X                               |                              | UTAH CODE ANN. §§ 19-2-104, 19-2-106 (2021)                 | No                     |
| <i>Vermont</i>       | X  |  |  |                   |                                 | X                            | VT. STAT. ANN. tit. 10, §§ 554, 558 (2021) & Self-Reporting | Yes                    |
| <i>Virginia</i>      | X  |  |  |                   |                                 | X                            | VA. CODE ANN. § 10.1-1308 (2021) & Self-Reporting           | Yes                    |
| <i>Washington</i>    |  | X  |  |                   |                                 | X                            | WASH. REV. CODE § 70A.15.6050 (2020) & Self-Reporting       | Yes                    |
| <i>West Virginia</i> |  | X  |  |                   | X                               |                              | W. VA. CODE § 22-5-4 (2020) & Self-Reporting                | No                     |
| <i>Wisconsin</i>     |  | X  |  |                   | X                               |                              | WIS. STAT. §§ 285.11, 285.13 (2020)                         | Yes                    |
| <i>Wyoming</i>       | X  |  |  | X                 |                                 |                              | WYO. STAT. ANN. § 35-11-204 (2021) & Self-Reporting         | No                     |
| <i>Totals</i>        | 21                                       | 19   | 10   | 9                 | 19                              | 22                           |   | No - 26<br>Yes - 24    |

\*Self-reported data comes from the National Association of Clean Air Agencies (NACAA) 2014 survey “Restriction on the Stringency of State and Local Air Quality Programs.”