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Van Carson

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The American Legislative Position

by Van Carson*

Good afternoon, ladies and gentlemen. In my segment of today’s program, I would like to review a provision of the U.S. Clean Air Act which is proving to be of central importance to the acid rain issue. Section 115 of the Act is entitled “International Air Pollution.” Incidentally, when I first decided to speak on that section of the Act under which no regulations have been promulgated, I wrote a long introduction trying to explain why I thought it might be of importance. As you have heard today, recent developments have brought this section into play. To give you an idea of its importance, the March 27th issue of INSIDE EPA, which is a weekly report, focused two out of its seven articles on Section 115. Time permitting, I also hope to comment briefly on the Acid Precipitation Act of 1980.

On January 16, 1981, prior to leaving office, Douglas Costle, the Administrator of the United States Environmental Protection Agency, announced that based on an International Joint Commission report and recent action by the Canadian Government the U.S. EPA might be justified in requiring certain American States to reduce air pollution contributing to the Canadian acid rain problem. In his press release, Costle said, “In summary, my conclusions are adequate to warrant the initiation of Section 115.” Obviously, such a statement sent a number of people back to the books to learn about Section 115 since this was the first time that it had been cited.

Before I examine other portions of Costle’s remarks, I will briefly review the provisions of Section 115, entitled “International Air Pollution.” This section of the Clean Air Act has existed in its present form since 1977. It provides that once a determination is made that air pollutants in the United States are endangering the health or welfare of citizens of a foreign country the state in which the source of those emissions is located will be required to revise its implementation plan or its regulations to control those emissions.

For example, assume that the Smith Steel Company in Niagara Falls is emitting particulate matter to such an extent that albeit in compliance with the New York air regulations, there is a substantial health problem across the river in Canada. The concept would be that New York could be required to modify its regulations to cause the steel company to reduce emissions sufficiently so that the Canadian citizens would no longer be endangered.

* Attorney, Squire, Sanders & Dempsey. Cleveland, Ohio.
Two principle conditions must be met, however, before EPA can take action: 1) The EPA Administrator must conclude, based on a report from a “duly constituted” international agency, that U.S. pollution is endangering a foreign country or he must have received a request to initiate action by the U.S. Secretary of State; and 2) the Administrator must determine that the foreign country provides the U.S. with the same rights regarding international air pollution control as are provided by Section 115 — in other words, a foreign country must have the legal ability to cut any pollution from its own sources that causes problems in the U.S.

Once the Administrator has satisfied himself that the two conditions have been met, he then formally notifies the Governor of the State. The notice under the statute is deemed to be a finding under Section 110(A)(2)(H)(ii) of the Clean Air Act requiring a plan revision with respect to that part of the Implementation Plan that is considered inadequate to prevent or eliminate the endangerment. Finally, the foreign country so affected by the air pollution is invited to appear at any public hearing associated with the revision of the applicable state implementation plan.

Now, let's again direct our attention to Costle's January 16th press release. You will recall that he said that his findings were adequate to warrant the initiation of Section 115. He went on to say that he had instructed his staff to examine the issues and to recommend what States should be formally notified, because he was satisfied that the two conditions had been met. As to the second condition, you have heard today that the Canadian Parliament amended the Clean Air Act on December 17th, after only 48 hours of consideration. But, is it enough?

At issue in any Section 115 proceeding will be the degree to which Canada’s law is reciprocal. Costle apparently concluded that Canadian legislation provides Canada with ample authority to give the United States equal rights. He did point out in his press release, however, that his statement did not represent a permanently binding determination because under Section 115 the EPA must also determine that Canada is exercising or interpreting the authority in a manner that gives equal rights to the United States.

On the first (condition that there must be a finding that air pollutants emitted in the United States cause air pollution which may reasonably be anticipated to endanger the public health of the citizens of Canada) the Administrator relied on the 1980, Seventh Annual Report on Great Lakes Water Quality of the International Joint Commission. The IJC report states that virtually all of Eastern Canada and portions of Northeastern United States experience rains with acidity equal to or exceeding that which can adversely affect lakes and vegetation. According to the report, all parts of the Great Lakes Watershed are now receiving precipitation containing five to 40 times more acid than would occur in the absence of atmospheric emissions. The IJC report recommends that the United States and Canada undertake further actions to reduce atmo-
spheric emissions of the oxides of sulphur and nitrogen from existing as well as new sources.

Since the press release in January, there have been three significant developments. First, on March 17th, the Cincinnati Gas and Electric Company (CG&E), Ohio Edison Company and the State of Ohio filed petitions in the United States Court of Appeals for the District of Columbia asking the Court to review and set aside Costle's purported final action disclosed in the press release. The petitions of Ohio Edison and CG&E indicated that the petitioners were filing the notice as a protective appeal because of the uncertain legal significance of the press release, which was attached to the petition.

The second significant development was the filing of a petition by the Province of Ontario with the EPA opposing relaxation of 17 power plant SO2 emission limits, in part relying on Section 115 of our Clean Air Act.

The third significant item was the recent release of the interim report on the U.S./Canada negotiations on acid rain. Examination of the February, 1981, interim report discloses that it does not call for quick action to control acid rain pollutant loadings in advance of a formal agreement on acid rain. According to the executive summary, interim action could be sought in the near term. Short-term mitigating measures also could be considered. Now while the report indicates that near-term controls could be implemented, rather than should be implemented, it does look to Phase II of the negotiations to develop specific amounts of reduced pollutant loadings and specific candidate regions where controls could achieve those reductions.

Why, you may ask, did the Commission stop short of recommending that interim control measures should be implemented? In addition to scientific uncertainty over the extent to which local sources contribute to the problem and uncertainty over the atmospheric conditions that produce acid rain, another reason is the problem associated with linking emission sources with acid precipitation. Transboundary air pollution covers issues ranging from local situations where emissions from an identified facility on one side of a border can adversely affect human health or welfare on the other side of the border, to regional and long-range transport situations where many sources in one or both countries can in combination produce a regional air pollution problem that crosses the border, for example, acid rain. It is in the last mentioned situation where the scientific tools for linking source and receptor, long-range transport models, need further development.

Assuming that there is an uncertainty in linking emissions from, as an example, power plants in the State of Ohio to acid rain in Canada, or at least making the direct link, what impact does that have on proceedings under Section 115? I think to better understand that issue one must go back and review the legislative history behind this statute.

The first Clean Air Act adopted by Congress in 1955, did not contain any provision for either interstate or international pollution problems. It
 wasn't until 1963 that the question of interstate pollution was even addressed. In the December, 1963 amendments, Congress provided a procedure for the initiation of an enforcement conference to control or abate interstate air pollution.

In the case of interstate air pollution, the Act authorized the Secretary to call a conference of the affected state and air pollution agencies. Following the conference, if the Secretary believed that effective progress was not being made toward abatement, he could recommend appropriate remedial action. If, after six months, action has not been taken, the Secretary could call a public hearing before an ad hoc board of five persons appointed by him. The majority of the Board were persons other than officers and employees of the Secretary's Department of Health, Education and Welfare. The Board would make findings as to whether pollution was occurring, whether effective progress was being made, and, if necessary, would recommend control measures to the Secretary. The recommendations of the Board would then be sent to the source causing the pollution and the control agencies concerned with issuing notice for abatement.

If proper action were not taken within the specified time, the Secretary would then have been authorized to request the Attorney General to bring suit against the polluter. It is clear that the Secretary did not have any power to establish emission standards. Recommendations could be made by the hearing board, but under the system the final determinations were left to the courts.

In 1965 Congress for the first time addressed the question of international air pollution. The new international section contained almost identical language to the present Section 115, except the method by which abatement would be finally achieved. The provision for abatement of international air pollution under this Act was included in the general abatement conference I have just described and included the ultimate power to bring an abatement action against the polluter.

An examination of the provision clearly indicates an approach that would be applicable to those known sources of pollution having a direct impact. After all, the action was against the polluter, not the state. While the statute did not specifically provide the procedures that were required to implement the abatement conference, the hearing board procedure and the suit against the polluter by the Attorney General certainly suggested the statute was intended, or at least would only have been operable, in a situation where one could identify the pollution source.

The Clean Air Act Amendments of 1970 substantially changed prior law, requiring specific emission limitations for every source of air pollution, so that National Ambient Air Quality Standards could be met within the statutory deadlines. The basic tool of enforcement became the state implementation plan with its enforceable requirements for every source. This replaced the abatement conference which had turned out to be a lengthy and uncertain process in which all of the parties, typically
the state, local and Federal agencies and the polluter were convened to negotiate a schedule for control of the emissions alleged to have caused the problem. The 1970 Amendments, however, retained in Section 115 the conference procedure for the abatement of both interstate and international air pollution.

In 1977, Congress deleted the interstate abatement portions of Section 115 and adopted Section 126, which directly addresses the interstate pollution abatement. This is the section that the State of New York and Pennsylvania have relied on in their petitions. This revision left Section 115 to address only international air pollution.

Congress also deleted the abatement conference concept from Section 115 and substituted the implementation plan approach which I described earlier. The revised Section 115 was reported to be noncontroversial in the legislative history. Nothing in the legislative history suggests an intent to expand coverage beyond the identified polluter, nor does it give an indication to the contrary. I believe that an examination of the legislative history and the language of Section 115, discloses, when read in the context of the entire Clean Air Act, an intent to apply abatement or control where the source can be identified, that is where the source and receptor can be linked. This is not the case, however, with respect to acid precipitation. If action is to be taken, it should be done through new legislation specifically directed toward the problem. Such new legislation might address problems including who should bear the cost and how it could be spread among the electric consumers.

I had planned to remark on Section 126, but instead, one of the speakers in the next panel will discuss that issue.

A comment should be made regarding the Acid Precipitation Act of 1980. In light of the perceived scientific uncertainty surrounding acid rain, Congress determined in 1980, that substantial research must be conducted to fully explore the problem. The Acid Precipitation Act of 1980 established a comprehensive research program to examine the issue under the direction of an inter-agency task force.

The Act reflects Congress’ awareness that acid deposition has not yet been adequately investigated. Congress also emphasized that the Act was not intended to sanction any expansion of regulatory authority, nor was it authorized to impose additional emission controls.

The legislative history shows an understanding by some members of Congress that there are alarming uncertainties surrounding acid precipitation. Representative Stanton, commenting on the Act’s research oriented approach, said, “As the Act is now written we can hope for an objective study which is what we need regarding a subject about which we presently know so little.”

In sponsoring the legislation which formed the basis for the Act, Senator Moynihan recognized that research should precede regulatory initiative, saying: “The Senate is proposing to learn something about the subject before it mandates solutions. It will be possible to make profoundly
gross mistakes here if we do not do some research first, mistakes that would cost billions.”

In conclusion, I believe that the uncertainties associated with acid rain would counsel against the immediate imposition of any additional emission control requirements through Sections 115 and 126 of the Clean Air Act. Congress, in 1980, had the opportunity to address the need for additional control measures for alleviating the claimed acid rain problem. Rather than opting for additional controls, Congress chose to authorize the creation of a task force to study the problem and to develop appropriate methods for resolving source to receptor questions.

The continuing study position also has been tacitly endorsed by the United States/Canada Transboundary Air Pollution Interim Report, which I mentioned earlier. Imposition of additional controls at this time might cost the affected sources large amounts of money without accomplishing the desired results.

Before I close, ladies and gentlemen, I will say that there was some speculation among the speakers at dinner last evening as to whether I would represent fairly the legislation or whether I would advocate the industry position. I hope that I have represented fairly the industry view of this legislation.