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EPA wants to regulate emissions with Clean Air Act -- but can they?

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With the U.S. Senate taking a pass on climate and energy legislation before the election, all eyes are on the U.S. Environmental Protection Agency's (EPA) efforts to regulate greenhouse gas emissions. Besides the question of how regulation will broadside the U.S. economy, EPA's proposed regulations also raise an important legal question.

EPA has concluded that requiring power plants and other industrial sources to get permits for greenhouse gas emissions leads to "absurd results" and "administrative impossibility." Why, then, is EPA asserting Congress intended it to do this?

EPA's endangerment finding and decision to regulate greenhouse gases (GHGs) under the Clean Air Act have been challenged in court by industries, states, members of Congress and others. It's high stakes for EPA and the Obama administration.

In considering whether to issue a tailpipe emissions rule in response to a Supreme Court decision, the agency found a "scientific consensus" in the United Nation's Intergovernmental Panel on Climate Change (IPCC) reports that GHG emissions will "endanger" human health and the environment. So EPA said the Clean Air Act as interpreted by the Supreme Court required it to regulate GHGs in car and truck emissions to save the world.

Challengers to the endangerment finding - including dozens of organizations like ours representing millions of American jobs - say there was blatant manipulation of the "science" by the authors of the reports upon which EPA relied. And they predict that GHG regulation as now proposed by EPA will paralyze the American economy, and

simply send our manufacturing jobs to China, Brazil and India, where the resulting GHG emissions will be higher than they would have been in our more efficient factories.

EPA Administrator Lisa Jackson may feel like she's got good options in court. The courts generally defer to EPA on disputed environmental science questions. And once she declared that "science" leads her to find that GHGs endanger human health and the environment, and that GHGs from tailpipes contribute to that endangerment, then the Clean Air Act's provisions for automobile and truck emissions provisions say she "shall" make auto manufacturers reduce GHG emissions from vehicle tailpipes. This she has done, in two separate rules.

But she did a lot more, too, and that may have gotten her into legal trouble.

Politically, the EPA Administrator had to put Mr. Obama in a position to tell the world in Copenhagen that even if Congress failed to act on GHG emissions, his Administration would be taking steps to reduce them.

But EPA faced a big legal problem if it went beyond tailpipes. Congress gave EPA the tools for regulating non-tailpipe pollutants in the Clean Air Act's stationary source permit programs. These programs cover "major" sources of regulated pollutants.

When Congress developed the stationary source programs, it made political and practical judgments as to the size of operations that should be required to go through the necessary procedures to get permits. It decided these programs should apply to all "major" sources of pollutants, including petroleum refineries, steel mills and paper mills.

EPA knew that if it applied the permit programs to GHGs in the way Congress had written them, including an apartment house furnace or a bakery's oven, there would be thousands more "major" sources that would be required to get permits, setting off a political firestorm that would put the Clean Air Act permit programs in political jeopardy.

So rather than limiting regulation to mobile sources (the "tailpipe rule"), EPA decided on a bold move and a creative legal theory: It would "tailor" Congress's permit program and substitute its own political judgments about who should have to get permits, and when.

EPA issued a "tailoring rule," acknowledging that regulating GHGs under the permit programs (as Congress surely intended EPA to do) would lead to "absurd results" and "administrative impossibility." EPA finalized the endangerment finding in time for Copenhagen. The final tailoring rule raised the permit threshold from 250 tons to 75,000 tons for GHGs.

The challengers say this is an unconstitutional step beyond EPA's statutory bounds. Under the rule, states will be compelled to force small businesses to obtain costly permits - something the EPA itself has described as "absurd," creating an "administrative impossibility."

At stake are hundreds of billions of dollars, hundreds of thousands of jobs, and the constitutional question whether the administration can take liberties with authority granted by Congress.

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