

Argus Q&A: Shannon Goessling

Shannon Goessling is the executive director of the Southeastern Legal Foundation (SLF), a Marietta, Georgia-based conservative law firm and policy center. The SLF is one of several organizations and businesses suing the Environmental Protection Agency (EPA) to block implementation of several efforts to regulate greenhouse gases, including the endangerment finding, automobile emissions standards, tailoring rule for stationary source permits and the finding that GHGs are subject to Prevention of Significant Deterioration (PSD) requirements starting in January 2011. SLF is representing more than a dozen Republican House members and several companies based in the Southeast. The group recently filed motions to stay implementation of EPA's decisions while the court hears the cases. In this interview, edited for length and clarity, Goessling talked to Argus about the SLF's lawsuits.

Argus: Why did you ask the court for the stay and why do you think it will be granted?

Goessling: It is our position that we are going to win on the merits in all four cases, and the cases are interrelated. The staying of the effect of the rules at this point has no negative impact on the Environmental Protection Agency or its convoluted plan, but has pure positive effects for the public. Staying the rules does not have a negative effect on the environment and has a positive effect on the economy. And it does not affect the single regulation that we are saying can stay in effect, which is the tailpipe rule as it is applicable to National Highway Traffic Safety Administration (NHTSA) and its ability to regulate under the Corporate Average Fuel Economy (CAFE) standard. We believe that in the end we have demonstrated in the motion and the briefing to the court that we are going to win on the merits because there are so many legal defects in how the EPA has proceeded thus far.

Argus: Could you touch on the main legal defects you see in each of the rules?

Goessling: In terms of the endangerment finding, EPA improperly delegated its statutory judgment to other agencies, including the United Nations Intergovernmental Panel on Climate Change (IPCC). It failed to use its own judgment. It basically created the problem and ignored the multitude of issues that arise from any allegation of greenhouse gases and global warming – if there is global warming, who is responsible and what positive steps could be taken if you buy into the concept of an anthropogenic basis for global warming.

The tailpipe rule also suffers from fundamental defects in that the administrative record fails to establish any non-trivial benefit for having the tailpipe rule. EPA is trying to infringe on what NHTSA is already able to do. NHTSA can already address emissions and will be doing so regardless of the interpretation by the EPA.

As far as what we will call the triggering rule or the reinterpretation of the PSD memo, that is a reinterpretation of an original memo on when rules would take effect and when they can be challenged. That reinterpretation is extremely creative and attempts to modify and alter how affected parties can challenge and when things take effect. For example, we are seeing an effect right now on the industrial community, the manufacturing community, the political community and the government community across the board. When rules are announced and they go through the public comment period it puts the country on notice that there is something coming unless information is provided to the agency that would cause it to go in a different direction. That automatically has an effect, which means chief executive officers and chief financial officers have to make decisions about regulations that will be coming. So to suggest that 2 January is the day that a manufacturer here in Georgia is affected by EPA's actions is exceedingly disingenuous and certainly not true. Manufacturers are making their decisions now and they are deciding not to build. It is basically putting a ban on industrial construction and definitely having an effect on manufacturing right now.

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The tailoring rule is probably the clearest violation of case precedent and the clearest violation of law. At no time did Congress or the Clean Air Act give EPA the authority to amend the Clean Air Act. That is exactly what it has done. In order to solve the problem that EPA created itself, it will have to rewrite the Clean Air Act or end up with what they would call absurd results. Well, absurd is in the eye of the beholder. If EPA followed the law, then it likely would not be making the decisions it is making. Instead it is going to make political decisions rather than good policy and scientific decisions. And it is worse than that. EPA is going to do it knowing that it is contrary to congressional intent and the law, and then it is going to claim that it has a right to change the law. That is where as a citizen it becomes exceedingly offensive that an administrative agency would act so far outside the bounds of reasonableness and lawfulness.

Argus: You said EPA had not demonstrated a non-trivial benefit for the tailpipe rule. Do you mean that the emissions reductions would not be significant? Should it have demonstrated that a certain level of reductions needed to be achieved?

Goessling: That is correct. This goes to the tailpipe rule and the other rules. If the EPA staff had looked at the full record, not the record they produced but the record that resulted from the public comment, it is replete with information, documentation, published studies, and analyses coming from a multitude of sources showing that the claimed benefit is not going to happen. But let us just assume for a moment that EPA is right and we are wrong, that there is going to be a benefit. As a regulatory body, EPA has a duty to tell us at what level greenhouse gases are dangerous, what reduction is necessary to reduce that danger and how to accomplish those reductions through a regulatory scheme that only affects the US. Basically what EPA did is to say a huge problem

had been identified, we are responsible for it and now we are going to give you a regulatory scheme that addresses it but does not tell you how. It does not tell you what benefit there will be. It does not talk about how a regulatory scheme exclusive to the US is going to have a global impact. If it is a global issue that means it is an international community issue and goes well outside what a federal administrative agency should be doing. This should be deferred to Congress and the president.

Argus: How does EPA's use of the IPCC report differ from other rulemakings, such as for ozone standards, where EPA cites studies and reports by outside groups?

Goessling: In the past administrative agencies looked at outside reports to evaluate their credibility, checked for accuracy and looked into the entire record of a report. EPA is an administrative agency that is required to do a scientific analysis, not default to a body that was not premised on science but was premised on politics. All agencies of the federal government have a certain standard by which they must conduct themselves, including their scientific analyses. They cannot adopt wholesale the reports or conclusions of any other entity, including in this case the IPCC, without going through the process to check whether it abides by the standards set out for federal agency rulemaking. That was not done. The record was not requested. It did not do a check. It did not get the individual reports and it did not get the data from the IPCC. As a result you cannot use it. EPA has to do its own analysis.

Argus: One of the issues you raise with EPA's use of the IPCC report is the "climategate" scandal. But several recent reviews largely cleared the scientists involved. Why should the court disagree with the findings of those reviews?

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Goessling: We have filed two published reports with EPA that reach contrary results. It is our opinion that the “climategate” scandal demonstrated that there is potentially fraud involved, there is financial benefit involved, and there are motivation questions. If scientists are cleared that does not mean they did not do anything wrong in terms of whether they followed scientific protocol. There has been a strong position generally in the US by scientists and in the international community that there was wrongdoing. Now whether it rose to the level of fraud or whether they will be held accountable, that is a different question. But does it call into question the results of those reports? The answer has to be yes. So rather than rely on questionable authority and questionable conduct by scientists, the real question is why EPA is digging its heels in when these scandals have been brought forth quite publicly. If you have read the e-mails in “climategate,” they can make explanations but the written word speaks for itself. The answer is going to be politics, not good policy or good science. What it should do is withdraw all four of these rules and voluntarily, without a court order, start over so that there can be a full public record. There should be a full public hearing so that the presentations can be made by the scientific community, with proper analysis and open and honest dialogue, instead of decisions being made behind closed doors. If EPA cannot muster that then it should withdraw everything and defer to Congress.

Argus: You said that Congress did not intend for GHGs to

be regulated under the Clean Air Act. Was that question not settled by the Supreme Court in *Massachusetts v EPA* when it said GHGs could be considered a pollutant and EPA should make an endangerment finding?

Goessling: The agency’s view on *Massachusetts v. EPA* now is much broader than the actual ruling. That was a very narrow ruling. It just said you must go through a process. It did not say you have to regulate. If EPA had done a proper analysis it would have realized that even if you agreed with their finding they should have deferred to Congress. One of the reasons why you know this is for Congress is that the American Clean Energy and Security Act passed the House last year but [its counterpart] failed in the Senate. That tells you this is an issue for Congress, especially because for the EPA scheme to work it has to avoid the law, rewrite the law, and avoid all of the deadlines and policy-making plans set out in the Clean Air Act.

For example, Congress expressly provides five years for new pollutants to be integrated into the PSD program, from the time that the rulemaking went into the Federal Register. But EPA says it is so urgent we have to do it right now to have any effect. But again what effect is it referring to? EPA still has not told us what the standards are, what the state plans are supposed to be, what the best available control technology is for greenhouse gases. How can 50 states be expected to sign their allegiance to a plan that EPA has not yet developed, for standards it has not yet written, with a program that has no scientific basis or practical effect at this point.

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