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*Regulating by Litigation: The EPA's Regulation of Heavy-Duty Diesel Engines*

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Abstract by Melissa Sutton

The author provides a case study of heavy-duty diesel engine regulation under the Clean Air Act, which reveals how the Environmental Protection Agency (EPA) chooses various means of regulation at different times. The article begins with a look at regulatory activity and how agencies issue regulations through a process in which the regulated entities and other interest groups have the opportunity to comment on proposals, to seek judicial review of the agencies' procedures and compliance with the statutory framework created by the legislature, and to seek action by the political branches to alter the agencies' actions.

The article looks at regulation-by-litigation, which is increasingly replacing traditional notice-and-comment rulemaking procedures. The authors find that regulation-by-litigation is a means of imposing substantive regulatory provisions on regulated entities without the public participation and the checks and balances of the rulemaking process.

The first part of the article sets the stage for the authors' case study by examining how the Clean Air Act and administrative law constrained the EPA's regulation of heavy-duty diesel engines. It then describes the incentives the Clean Air Act provides for the agency to act in particular ways. The second part of the article examines how diesel technology affects regulatory choices. The third part of the article explains the regulatory history of heavy duty diesel engines. The article concludes that regulation-by-litigation is a major new form of government action that offers significant advantages to politicians and regulators, but that is outweighed by its disadvantages to the public and regulated entities.