

Ch. 5: Air Pollution Control

Pages 553-556: EPA CLEAN POWER PLAN LITIGATION

As discussed in the casebook, lawsuits challenging the legality of the Obama administration's Clean Power Plan, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), were argued before the D.C. Circuit. After the D.C. Circuit denied a stay of the rule on January 21, 2016, the petitioners sought a stay from the U.S. Supreme Court. In an unprecedented action, on February 9, 2016 the Supreme Court by a 5-4 vote stayed the regulations. The legal challenges to the Clean Power Plan then were argued before the D.C. Circuit sitting en banc on September 27, 2016. The court decided to take the case en banc on its own motion. Ten of the court's eleven judges in regular service (all but then Supreme Court nominee Merrick Garland) heard the arguments. Before the Court could issue its decision, the Trump administration took office and asked the court to hold the case in abeyance to give EPA time to repeal the rule. On April 28, 2017, the D.C. Circuit agreed to EPA's request.

On October 10, 2017, EPA issued a Federal Register notice proposing to repeal the Clean Power Plan on the grounds that it exceeds EPA's statutory authority under a proposed change in the Agency's interpretation of section 111 of the Clean Air Act. On December 18, 2017, EPA issued an advance notice of proposed rulemaking seeking comment on an alternative regulatory approach to the Clean Power Plan that would be consistent with the agency's new legal interpretation of section 111. In August 2018, EPA issued its proposed rule to replace the Clean Power Plan that will largely leave it up to states to determine permissible emissions.

Pages 569-571: EPA PROPOSES TO ROLL BACK FUEL ECONOMY STANDARDS AND TO PREEMPT CALIFORNIA'S

On August 2, 2018 the Trump administration proposed to roll back fuel economy standards that had been a centerpiece of the Obama administration plan to control greenhouse gas (GHG) emissions. The joint EPA/NHTSA proposal would freeze the standards at 2020 levels for six years rather than substantially increasing them as required under existing regulations. The unusual rationale offered by EPA and NHTSA is that because more fuel efficient cars cost more, fewer people will buy them, causing more deaths in auto accidents as older cars with fewer safety features are driven longer. This rationale has been rejected by many experts who maintain that the administration manipulated the cost-benefit analysis used to support its proposal.

The EPA/NHTSA proposal also would bar California from adopting more stringent auto emission controls than other states, a move that gives lie to the administration's claim that it wants to give states more authority over environmental policy. The 1970 Clean Air Act expressly authorizes California to apply stricter standards and it did so for decades until 2009 when the Obama administration essentially brought the national standards up to the level sought by California. California and other states that have adopted the California standards are challenging the legality of EPA preemption and they appear to have a very strong legal case. Acting EPA Administrator Andrew Wheeler reportedly was skeptical about the agency preempting California regulations, but Trump DOT officials prevailed by arguing that if Brett Kavanaugh is confirmed the Supreme Court likely will rule for the administration, a further sign of the politicization of the Court.

Pages 651-656: JUDGE BRETT KAVANAUGH & THE EME HOMER CITY DECISION

New Supreme Court Justice Brett Kavanaugh was the author of the 2-1 decision by the D.C. Circuit that was reversed by the U.S. Supreme Court in the EME Homer City decision by a 6-2 vote.