

Fuel Content Regulations (pages 472-474)

SUPREME COURT ALLOWS HARDSHIP EXEMPTIONS FOR SMALL REFINERIES WHOSE EXEMPTIONS PREVIOUSLY EXPIRED

As mentioned on page 474, when this edition of the casebook went to press the Supreme Court was reviewing a decision by the Tenth Circuit holding that EPA could not give a small refiner an “extension” of an economic hardship exemption from renewable fuel blending requirements if the refiner’s previous exemption had expired. On June 25, 2021, the Court reversed the Tenth Circuit in *HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Ass’n*, 141 S.Ct. 2172 (2021). In an opinion by Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito and Kavanaugh, the Court held that a small refinery that previously received a hardship exemption may obtain an “extension” under §7545(o)(9)(B)(i) even if it saw a lapse in exemption coverage in a previous year. The majority argued that the term “extension” does not require unbroken continuity particularly where there are no modifiers like “successive” or “consecutive” and nothing else in the statute indicates that a lapse in coverage precludes an extension. In a dissenting opinion Justice Barrett, joined by Justices Sotomayor and Kagan, interpreted the word “extension” to mean that EPA cannot “extend” an exemption that a refinery no longer has.

Alternative Vehicles and Fuel Economy Standards (pages 474-480)

BIDEN SETS 50% ALTERNATIVE VEHICLE GOAL BY 2030, EPA PROPOSES INCREASE IN FUEL ECONOMY STANDARD CUT BY TRUMP

On August 5, 2021, President Biden signed an executive order establishing a target for electric vehicles, hydrogen-fuel cell and plug-in hybrid vehicles to make up 50 percent of U.S. auto sales by 2030. The Biden administration plans to achieve this goal by providing federal support for charging stations for electric vehicles and further tax incentives for consumers to purchase them. This is a very ambitious goal because sales of electric vehicles accounted for only 3 percent of U.S. auto sales in May and June 2021.

On the same day EPA proposed new fuel economy regulations that would require auto manufacturers to meet a 52 miles per gallon (mpg) fleetwide average fuel economy by the year 2026. This would significantly increase the current national fuel economy standard of 43.3 mpg, but restore only about 67% of the fuel saving forecast under the Obama administration rule that was repealed by the Trump administration. Katy Stech Ferek and Ben Foldy, *Biden Toughens Fuel-Efficiency Standards, Challenges Auto Makers to Sell More EVs*, Wall Street Journal, Aug. 5, 2021.

The Obama EPA’s Clean Power Plan and the Trump EPA’s Affordable Clean Energy Rule (pages 537-548)

WILL THE SUPREME COURT REVIEW *AMERICAN LUNG ASS’N*?

On pages 540-547 of the casebook we include a lengthy excerpt from *American Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). As noted in the casebook, the Trump administration EPA replaced the Obama administration's Clean Power Plan (CPP) to limit emissions of greenhouse gases with its Affordable Clean Energy (ACE) rule. On January 19, 2021, a DC Circuit panel by a 2-1 vote ruled that repeal of the CPP and its replacement with the ACE Rule was illegal because it was founded on a fundamental misinterpretation of §111(d) of the Clean Air Act. Accepting the Obama EPA's interpretation of §111(d) of the Clean Air Act, the panel majority ruled that the CPP was legal and that the Trump administration's ACE rule was not consistent with EPA's obligation to control greenhouse gas emissions. Judge Justin Walker dissented, arguing that the "major questions" doctrine required Congress to enact new legislation before EPA could adopt such a far-reaching regulation as the CPP.

Although the Biden EPA is not seeking Supreme Court review, several intervenors who supported the Trump EPA in the court below have filed petitions for certiorari. These include: North Dakota, No. 20-1780 (raising issues involving the major questions doctrine, federalism and the clear statement doctrines), West Virginia, No. 20-1530 (major questions doctrine), Westmoreland Mining Holdings (asserting that CAA §112 regulation bars regulation under §111(d)), No. 20-1778, and the North American Coal Corporation, No. 20-1531 (statutory interpretation of §111(d)). They maintain that even though the Biden administration does not plan to reinstate the Clean Power Plan, it would be helpful for the Court to tell EPA what it can and cannot do in regulating GHG emissions under the Clean Air Act. It is not expected that the Court will agree to hear the case since the Biden administration has indicated that it does not intend to revive the Clean Power Plan.