

REGULATION WARS

RECENT DEVELOPMENTS

ARKANSAS ENVIRONMENTAL FEDERATION

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REGULATORY TAKINGS

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REGULATORY TAKINGS

Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (June 21, 2019)

“private property may not be taken for public use without just compensation”

lawsuit under 42 USC §1983

Town – all cemeteries open to the public even on private land

Town’s ordinance violated the 5th Amend takings clause

Federal case dismissed for not pursuing state law remedy

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REGULATORY TAKINGS

Knick v. Township of Scott, Pennsylvania

- Court reversed Williamson – can bring suit in federal court immediately
- Claim for taking arises as soon as government takes property
- state law condemnation remedy does not affect federal right
- Takings claims against gov't handled just like other civil rights claims
- If gov't pays just compensation for, it does not have to worry about its regulatory program being invalidated

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JUDICIAL REVIEW

MYERS V. YAMATO KOGYO COMPANY, LTD.,

2020 Ark. 135 (April 9, 2020)

Who gets to decide what a statute means? Agency or court?

Does the appellant have to show that the agency's interpretation was "clearly wrong?"

Answer: No.

Separation of powers – court decides what the law means

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GUIDANCE DOCUMENTS

E.O. 13891, Oct. 9, 2019 – “Promoting the Rule of Law through Improved Guidance Documents”

Guidance (non-binding) or regulation (binding)

1. agencies must treat guidance as non-binding
2. must take public input into account when appropriate
3. must make guidance documents available to public
4. may only impose legally binding requirements through rule-making or adjudication

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GUIDANCE DOCUMENTS

E.O. 13981, Oct. 9, 2019 (cont.)

- all agencies to review all GD
- rescind all GD no longer in effect
- list all GD still in effect on agency website
- may not cite GD that are rescinded
- create public process to withdraw or modify existing GD

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GUIDANCE DOCUMENTS

E.O. 13982, Oct. 9, 2019 – “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication”

“Regulated parties must know in advance the rules by which the Federal Government will judge their actions.”

1. GD may not be used to impose new standards of conduct
2. Agency must establish violation of law by application of the statute or a regulation – not a GD
3. Noncompliance with GD does not by itself establish a violation

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GUIDANCE DOCUMENTS

Proposed Rule, EPA Guidance: Administrative Procedures for Issuance and Public Petitions, May 22, 2020 (85 F.R. 31104)

- implements EO 13891
- process for modification or withdrawal of GD
- review process for GD and availability
- public participation for significant guidance documents
- all active GD now available at <https://www.epa.gov/guidance>

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BENEFIT-COST ANALYSIS

Proposed Rule: Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 F.R. 35612, June 11, 2020

comments due July 27, 2020

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BENEFIT-COST ANALYSIS

- EPA to prepare BCA for all significant CAA regs
- developed using “best practices” from economic, engineering, physical and biological sciences
 - “Guidelines for Preparing Economic Analyses”
- transparency
 - separate reporting of health and welfare benefits *specific to the objective* of the applicable CAA provision

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BENEFIT – COST ANALYSIS

Questions

How would EPA take into consideration the results of a BCA under specific CAA provisions?

How should EPA weigh the results of a BCA in future regulatory decisions?

Big Issue – what to do about co-benefits???

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BEGIN ACTUAL CONSTRUCTION

Interpretation of “Begin Actual Construction” under the New Source Review Preconstruction Permitting Regulation – Draft EPA Guidance, March 25, 2020

no NSR major source may “begin actual construction” without a permit – 40 CFR 52.21(a)(2)(iii)

“begin actual construction” means “physical on-site construction activities *on an emissions unit* which are of a permanent nature” 40 CFR 52.21(b)(11)

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BEGIN ACTUAL CONSTRUCTION

Emissions unit – “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant”
40 CFR 52.21(b)(7)

New interpretation –

may undertake physical, permanent activities prior to obtaining a permit if it is not “physical construction on an emissions unit”

includes “installation necessary to accommodate” the unit

interpretive rule not subject to notice and comment

But EPA took comment through May 11

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BEGIN ACTUAL CONSTRUCTION

Texas – SIP Amendment

Proposed SIP revision that would allow construction on a **minor** NSR source after draft permit issued

would be at applicant's own risk

only after agency technical review draft permit issued

implements new Texas statute

EPA notice of intent to approve –

85 F.R. 22701, April 23, 2020

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COVID-19 Fx

March 26, 2020 – “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program”

EPA will exercise enforcement discretion for noncompliance

Temporary policy

Retroactive to March 13, 2020

Worker shortages and travel restrictions

Does not apply to criminal violations, Superfund and RCRA Corrective Action, or imports

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COVID-19 Fx

- Make every effort to comply
- If compliance is not reasonably practicable
 - Act responsibly to minimize effects and duration
 - Identify nature and dates of noncompliance
 - Identify how COVID-19 was the cause
 - Return to compliance ASAP
 - Document the information and actions
 - Notify implementing authority if failure of equipment may result in exceedances

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COVID-19 Fx

April 1, 2020 - NRDC petitioned EPA to issue emergency rule

(a) to require facilities to report and justify their failure to monitor and report, and

(b) for EPA to publish that information

April 16, 2020 – NRDC files suit to compel EPA to respond to rulemaking petition, NRDC v. Bodine, Docket 20-cv-3058 S.D.N.Y

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COVID-19 Fx

E.O. 13924 – “Regulatory Relief to Support Economic Recovery” (May 19, 2020)

address economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery

- regulation rescission and waiver
- accelerated pre-enforcement review (E.O. 13892)
- fairness in adjudication – gov’t bears burden of proof of violation of statute or regulation

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COVID-19 Fx

ADEQ Enforcement Guidance

email address to request regulatory flexibility and assistance with alternative approaches to compliance

extending reporting deadlines

waiver of late fees

enforcement discretion requests

COVID19EE@adeq.state.ar.us

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COVID-19 Fx

Arkansas E.O. 20-33 – “Protecting Arkansas Businesses from Liability Related to COVID-19”

all persons in the State of Arkansas and the person’s employees, agents, and officers **shall be immune from civil liability** for damages or injuries **caused by or resulting from exposure of an individual to COVID-19 on the premises** owned or operated by those persons or during any activity managed by those persons

Ark. Code Ann. § 12-75-114 (Emergency Services Act of 1973)

- The Governor may issue executive orders, proclamations, and rules and amend or rescind them.
- Executive orders, proclamations, and regulations have the force and effect of law.

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WOTUS LITIGATION

Rapanos v. United States, 547 U.S. 715 (2006) – significant nexus test

2015 WOTUS Rule, 80 F.R. 37054, June 29, 2015

North Dakota v. EPA, 127 F.Supp.3d 1047 (August 28, 2015)

stayed 2015 WOTUS Rule in 13 states

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WOTUS LITIGATION

E. O. 13778, Feb. 28, 2017

“Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule

Step One Rule (eff. Dec. 23, 2019)

Repealed 2015 Rule

Interim codification of previous rule

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WOTUS LITIGATION

Step Two Rule

FINAL WOTUS RULE

“The Navigable Waters Protection Rule”, 85 F.R. 22250, April 21, 2020

Effective Date – June 22, 2020

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WOTUS LITIGATION

California v. Wheeler, N. D. Cal. 3:20-cv-03005, May 1, 2020

18 states

Suit under Administrative Procedures Act

Navigable Waters Protection Rule is arbitrary and not in accordance with law

Seeks Nationwide injunction

Arkansas and 22 other states intervene

Argument on Motion for Stay, June 18, 2020 at 1:30 PM Pacific

REGULATION WARS

QUESTIONS?

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