



The Federal Landscape – How the View is Looking

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Topics

- Dual v. Cooperative Federalism
- Environmental Cooperative Federalism
- West Virginia v. EPA
- Ozone NAAQS
- Environmental Justice
- Department of Justice

Dual v. Cooperative Federalism

- Dual Federalism (a.k.a., Divided Sovereignty) - 1:
 - Divides legal authority and power between different levels of government
 - Example – Federal & State governments have separate functions
 - Situations where State government conducts operations without input from Federal government, e.g., conducting elections

Dual v. Cooperative Federalism

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- Cooperative Federalism - 2:
 - Federal & State governments collaborate on policy, rulemaking, compliance, & enforcement activities.
 - Recognizes overlapping functions of the Federal & State governments
 - Federal & State governments share power – Agencies at the Federal & State level often carry out governmental programs jointly
 - Responsibilities are split between many levels of government – thus citizens and organized interests have many access points to influence government function
 - The term “cooperative federalism” originated in the 1930’s, but the concept dates back to the administration of Thomas Jefferson

Environmental Cooperative Federalism

- Policy:
 - National v. Regional
 - Administration swings
- Rulemaking:
 - Typically – Feds write rules with input from States and industry participants
 - Previously – States often created a corresponding rule, now most Incorporate By Reference
 - State entities may still create more stringent rules
 - Inconsistent application by Federal administrations

Environmental Cooperative Federalism

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- Air Program administration
 - EPA & ODEQ share responsibilities & jurisdiction
 - ODEQ handles most of the day-to-day legwork
- Permitting
 - ODEQ handles majority of permitting responsibility
 - EPA reviews Major Source permits
- Compliance/Enforcement
 - ODEQ handles majority of compliance/enforcement responsibility

Environmental Cooperative Federalism

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- Unfunded Mandates (Un-Cooperative Federalism)
 - Statute or regulation that requires state, local and/or tribal entities to perform actions without corresponding funding
 - Examples:
 - Regional Haze Program
 - Oil & Gas Methane Rule (new & existing sites)
 - Power Plan Rule (pending Act 3)

West Virginia v. EPA

- Supreme Court confirmed that EPA can regulate power plant Green House Gas (GHG) emissions at individual power plants.
- EPA can not regulate GHGs beyond the fence-line to create “generation shifting” to less carbon-intensive sources
- EPA can regulate GHGs in a way that may indirectly create generation shifting
- Major Questions Doctrine – Did Congress clearly give authority to EPA to enact regulation with extraordinary economic and political significance, i.e., resetting the grid’s generation mix?

West Virginia v. EPA

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- New regulation anticipated in 2023
- Inflation Reduction Act – amended Clean Air Act to confirm GHGs are “air pollutants”
- Generation shifting away from coal has been occurring for years and new requirements that increase costs will likely accelerate that shift
- Generation shifting away from natural gas could also occur and/or accelerate
- Will Major Questions Doctrine come into play in other areas?

Ozone NAAQS

- Shockingly (s/), late last year EPA elected to reconsider the former administration's 2020 decision to retain 2015 Ozone standards
- Will be interesting to see how the science has changed from 2020 until the next proposal
- Oklahoma has endured another hot summer and Ozone Alert days continued into this past week
- In state non-attainment designations would be detrimental to existing facilities and any planned facilities

Ozone NAAQS

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- In related news ...
- In August 2018, ODEQ provided demonstration of compliance with “Good Neighbor” requirements for the 2015 Ozone standards
- In April 2022, EPA proposed a Federal Implementation Plan (FIP) for numerous states including Oklahoma relative to the 2015 Ozone standard
- This is different than the usual SIP call approach

Environmental Justice

- Dramatic budgetary increase
- September 2022 – EPA announced it was merging three internal programs to create the Office of Environmental Justice & External Civil Rights (OEJECR)
- OEJECR will oversee 3 billion dollar climate & environmental justice block grant program in Inflation Reduction Act
- February 2022 – Biden Administration announced release of:
 - Climate & Economic Justice Screening Tool
 - EPA's EJSCREEN 2.0
- ODEQ's Air Quality Division now running EPA EJSCREEN 2.0 as part of major source air permit application process; "enhanced outreach" may be utilized as needed

Environmental Justice

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- EJ being organized out of White House and has been included in numerous programs beyond EPA including:
 - Department of Justice
 - Department of Health & Human Services
 - Department of Agriculture
 - Department of Transportation

Department of Justice

- September 2022 – New Corporate Crime initiative announced
 - Greater individual accountability
 - Require disclosure of non-privileged information
 - Reduce corporate cooperation credit if delay in producing information
 - Charges may be brought against individuals before or concurrent to corporate entities
- Self-disclosure policy being developed

Resources

1. Lawrina, <https://lawrina.com/blog/dual-federalism/>
2. The Center for the Study of Federalism,
http://encyclopedia.federalism.org/index.php/Cooperative_Federalism

Questions?

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