

GMU 218
ENVIRONMENTAL LAW:
Interpreting Statutes and Applying the Constitution
SPRING SEMESTER 2009
PROFESSORS CLARK AND RUDOFSKY
(Tuesdays and Thursdays, 8:00 - 9:15 pm)

General Information

Jeffrey Bossert Clark and Lee Philip Rudofsky are the professors for this class. Professor Clark is an adjunct, whose full-time job is as a partner at the D.C. office of the Chicago-based law firm, Kirkland & Ellis. Professor Rudofsky is also an adjunct. He is a mid-level associate at Kirkland & Ellis and works closely with Professor Clark on environmental and administrative law matters.

Professor Clark was the Deputy Assistant Attorney General of the United States Department of Justice's Environment and Natural Resources Division from 2001-2005. In that capacity, he led the Appellate and Indian Resources Sections. Many of the newer cases we will study, Professor Clark has worked on personally either when he was at the Justice Department or in private practice at Kirkland & Ellis.¹ Professor Clark was a law clerk to the Hon. Danny Boggs of the United States Court of Appeals for the Sixth Circuit.

Professor Rudofsky has served as a law clerk in the Office of Counsel to the President, and the Office of Counsel to the Governor of Massachusetts. He has also served as a law clerk to the Hon. Robert Cordy of the Massachusetts Supreme Judicial Court, and the Hon. Andrew Kleinfeld of the United States Court of Appeals for the Ninth Circuit. In these positions -- particularly as a law clerk in the Ninth Circuit -- and now in private practice at Kirkland & Ellis, Mr. Rudofsky has garnered significant expertise in environmental and administrative law litigation.

Professors Clark and Rudofsky will not hold regular office hours, but can be reached with questions or comments after every class and by phone. They are happy to arrange a mutually convenient time to discuss any matter. Professor Clark's office number is (202) 879-5960 and his e-mail address is jlark@kirkland.com. Professor Rudofsky's office number is (202) 879-5253 and his e-mail address is lrudofsky@kirkland.com.

From time to time, this class will host guest lecturers on an ad hoc basis.

The exam date is April 19, 2009 (6:00 pm). Professors Clark and Rudofsky have not yet determined whether the exam will be in-class, take-home, or a paper option.

¹ Professor Clark's remarks and oral communications, for instance via e-mail, are not to be recorded or cited (even with attribution) without prior permission.

Materials

Casebook: Craig N. Johnston, William F. Funk, Victor B. Flatt, Legal Protection of the Environment (2d Ed.) (2007); Richard L. Revesz, Environmental Law and Policy Statutory and Regulatory Supplement (Foundation Press) (2008-2009 Ed.); other materials distributed in class.

You will see that we begin the class by reading material concerning the constitutional law bearing on environmental law, then statutory interpretation, and finally administrative law. (We also begin by reading some secondary source material as overview, and in the future, when you are a practicing lawyer, depending on your level of familiarity with a particular topic, you should either consult such material first, or read it after you have understand the constitutional principles bearing on the case, have read the statute and the regulations, and understand how administrative law will come into play.) This is not accidental, but is a deliberate organizational scheme. Thinking in terms of this kind of logical and legal hierarchy will help you in practice and train you to see the forest for the trees in environmental law.

Attached please find a syllabus for the first six classes.

Class One:

January 8, 2009

INTRODUCTION

We will spend this class reviewing administrivia, introducing one another, and discussing the goals and structure of the class. But in addition, we will consider the following readings:

Johnston, Funk, Flatt, pp. 1-35 (stopping just before III. The Constitution and Environmental Law)

Questions

1. Can sustainability really be identified with the historical preservationist approach of Gifford Pinchot or Teddy Roosevelt?
2. What do you make of the fact that the Nixon Administration saw the introduction of the major modern environmental laws?
3. Do environmental laws always need heavy punitive enforcement regimes or sometimes does an informational approach work better?
4. Who says the 1887 Allotment Act or the 1872 General Mining Acts were disasters?
5. Who's right about cost-benefit analysis in the environmental context, Ackerman/Heinzerling or Sunstein?
6. Is siting industrial facilities in poorer neighborhoods better or worse for the residents of such neighborhoods than siting them in remote suburban areas?

Class Two:

January 13, 2009

**SOME APPLICABLE
CONSTITUTIONAL
PROVISIONS**

Johnston, Funk, Flatt, pp. 35-79 (stopping just before IV. Administrative Law Issues)

Questions

1. Suppose your professor had the authority to tax you. And suppose further he used portions of his tax revenue to pay you to do things. Are the things you choose to do for such pay truly voluntary? Is this notion reflected in Spending Clause jurisprudence?
2. What do you make of the notion that the Treaty Power can be used to expand Congress's power beyond enumerated limits in Article I?
3. Is there any limit to what the aggregation principle of Commerce Clause fame can be used to authorize?
4. Where is the authorization for creating tiered standards of review in the Constitution?
5. Suppose the textbook authors are correct in suggesting that protecting the environment and hewing to a strict interpretation of constitutional limits is impossible, does that imply that courts should be empowered to violate the Constitution, that protecting the environment is just off-limits, a little bit of both, or neither? If judges are to be empowered to violate the Constitution to allow the political branches to solve important problems, what is your theory about when Constitutional amendment should be used to that end as opposed to the process of judicial interpretation?
6. Why is a district court decision being reviewed in Hodel I? And what do you think of the district court's means-ends fit theory?

7. What's the difference between an effect and a substantial effect? Are there any supporting examples in case law?
8. Why don't all regulatory takings subject to a balancing analysis need to meet the "essential nexus" and "rough proportionality" tests instead of just "exactions"?
9. Why should or shouldn't there be a presumption against preemption?
10. Why should procedural injuries be treated differently from substantive injuries and how is the difference rooted, if at all, in Article III?
11. What does the Take Care Clause have to do with citizen suits?
12. How can Mass. v. EPA and Lujan be reconciled, if they can? Does Mass. v. EPA represent a new and unique test for standing in environmental cases?

Class Three:

January 15, 2007

**STATUTORY
INTERPRETATION AND
ADMINISTRATIVE LAW**

Johnston, Funk, Flatt, pp. 79-91

Also read ahead the Babbitt v. Sweet Home case on pages 649-661. (We'll re-read it from an Endangered Species Act, and not a statutory interpretation standpoint, when we get to the ESA later in the class)

Questions

1. Is NEPA really modeled on the APA? (If you don't have a view on that now, return to this question after next class.)
2. Why shouldn't all adjudications be conducted by members of the third branch?
3. The theory of the unitary executive garnered a lot of press in connection with the Alito confirmation hearings. Under that theory, is there anything wrong with OIRA review of EPA regulations?
4. Why shouldn't the notion of whether Congress sought to protect a particular class of people be the only factor in the zone of interests test?
5. Where did the Supreme Court get off in Norton v. Southern Utah Wilderness Alliance on imposing a requirement of "legally discrete required action" -- is that in the APA?
6. If agencies have no constraints on when they can issue guidance documents, why would they go through the more onerous process of promulgating regulations?
7. Is ripeness exclusively a matter of federal common law or does it have another legal grounding?
8. In the Honeywell case in the D.C. Circuit (mid-2004 to start of 2005), the court at first held that if an agency rule is invalid it was mandatory for the court to order its *vacatur*, then the D.C. Circuit panel reversed course and decided that it would order *vacatur* on the facts of the case, but not rule that it was always mandatory. What do you think about a rule that *vacatur*s are mandatory? Does Section 706 of the APA (look it up in the Revesz) grant a power to remand invalid rules rather than vacate them?
9. Why should agencies get more deference when they interpret their own regulations? And then turn the question around -- why is giving agencies more deference when they interpret their own regulations problematic?

Class Four:

January 20, 2007

NEPA I

Johnston, Funk, Flatt, pp. 91-120 (stopping just before IV. Is the EIS Adequate?)
Revesz, I-3 to I-21 (NEPA statute) (read)

Questions

1. The volume of NEPA litigation is immense. If a statute spurs a lot of litigation should one consider it a failure or a success?
2. NEPA doesn't explicitly grant rulemaking authority to CEQ to be sure. Hence, at times, there has been a controversy about whether the statute truly intended to authorize CEQ to issue regulations interpreting the statute. That issue is probably not a live one based on statements in the Public Citizen (Mexican Trucks) NEPA case that CEQ has such authority. Was such a delegation of authority to an administrative agency really necessary for NEPA?
3. Should the existence of a significant environmental impact depend to any degree on whether there is a controversy about the environmental impacts of a federal decision or project?
4. Why should CEQ be able to delegate its authority to promulgate NEPA regulations to other agencies?
5. Does giving agencies the power to scope out their own projects allow them to circumvent NEPA's intent?
6. Do you think it is an oversight that NEPA is not self-enforcing?
7. Why should recommendations from the Executive to Congress be burdened with NEPA obligations? Is Congress's attempt in NEPA to constrain the form of Executive Branch communications with the legislature lawful?
8. Why doesn't Kleppe ground its holding in the APA?
9. What does Kleppe show about the level and nature of thought Congress and NEPA's drafter (Professor Lynton Caldwell) put into NEPA functioning in a practical way within the confines of our judicial system?
10. Is Justice Marshall correct in the Kleppe dissent that the majority is authorizing post hoc rationalization by the Interior Department in reversing?
11. The dissent seems to be on solid ground in arguing that the intention of NEPA was to require federal decisionmakers to look at the environmental consequences of their actions as early as possible. Why doesn't that argument appear to carry any weight with the majority?
12. Do you agree with the Winnebago Tribe case that the scope of its legal authority should be one factor considered in the scope of the environmental effects a federal agency must consider under NEPA? If you do agree, would you have gone farther and held that the scope of legal authority is the only variable that should determine the scope of environmental effects an agency should be required to analyze under NEPA? [Note that the Winnebago Tribe case's statement of the applicable standard of review was later overtaken by Supreme Court precedent.]
13. What's the Eighth Circuit's authority in Winnebago Tribe for creating the "veto" vs. "enablement" distinction in measuring whether action is federal or state/private/local?
14. Do you think the Friends of the Earth decision by the District Court for the District of Columbia is consistent with Winnebago Tribe?

Class Five:

January 22, 2009

NEPA II

Johnston, Funk, Flatt, pp. 120-137

Revesz, I-22 to I-57 (NEPA regulations) (skim)

Questions

1. What do you think of what might be called Volpe's "zoning"-like test that existing uses have to be considered as the baseline from which "significant" effects are measured?
2. What's a "no-action alternative" and why is that analyzed under NEPA?
3. Look at the text of NEPA concerning CEQ. Should that be read implicitly to grant interpretive authority to CEQ of NEPA under Chevron?
4. Past actions by an agency are relevant to analyzing cumulative impacts, so CEQ states in its regulations. Is that test entirely consistent with the Volpe "zoning"-like test? Is there no point at which a past approved agency action becomes part of the baseline?
5. In the Grand Canyon Trust case, the EA was put out for public comment. But this is not required. It's optional for the agencies to do so, although CEQ regulations encourage it. Suppose the FAA had not put the draft EA out for public comment, would the result in the case have changed? Should it have changed?
6. Suppose in Grand Canyon Trust the National Park Service (part of the Interior Department) had lodged comments with the FAA arguing that there should mitigation of noise impacts. Do you find that unseemly or as an expression that NEPA is working as intended?
7. What role does the "controversy" analysis play in the relief ordered in Grand Canyon Trust?
8. Is it proper that environmental justice issues should be included in EISs?
9. The casebook correctly notes that most EISs err on the side of overinclusiveness, rather than underinclusiveness. Does this suggest that the arbitrary and capricious standard is being properly applied?
10. Should it matter to the outcome in Methow Valley that Congress told the agencies to look into the possibility of skiing next to the North Cascades National Park?
11. Why should NEPA require consideration of off-site impacts?
12. What do you think of the validity of the Ninth Circuit's "worst-case scenario" approach?
13. Why is there so much pressure to take NEPA substantive, as it were?
14. Is the notion that there are "gaps" in the application of NEPA at the state level consistent with the theory of federalism?
15. What do you think of Professor Flatt's proposal that there would be less NEPA litigation if NEPA required, in addition to everything else it requires be analyzed, an analysis of psychological impacts and philosophical impacts?

Class Six:

January 27, 2009

CLEAN WATER ACT I

Johnston, Funk, Flatt, pp. 138-172 (stopping just before C. Substantive Standards)

Revesz -- the following Sections of the Clean Water Act: 101, 209, 301, 308, 309, 402, 502

Questions

1. Do you think that Gorsuch and Consumers Power as reported in the Catskill case were correctly decided?
2. Be able to articulate the textual basis for the unitary waters theory.
3. EPA has promulgated various exemptions from the CWA, for instance, one for certain silvicultural activities (ignored in Forsgren), another for certain pesticide applications, another

for discharges from ocean-going vessels. What do you generally make of those kinds of exemptions?

4. What provision of 40 C.F.R. 122.2 do you think is the most controversial?
5. Do you think the Founders could have imagined that discharges to groundwater contained in the several States would be a regulable subject matter under the Commerce Clause? What's wrong with leaving regulating groundwater regulation to the States?
6. How is legislative history to be handled under Chevron? How about canons of statutory interpretation? Are they Chevron step one or step two matters?
7. Be able to provide an example of using structure to interpret a statute.
8. Why weren't the vials clearly point sources in Plaza Health?
9. How does the rule of lenity interact with Chevron? Compare the logic of Chevron to FN18 as reported from Babbitt v. Sweet Home.
10. Why should Congress not have regulated point sources equally stringently?
11. What do you make of the fact that Indian tribes can be treated as States for CWA purposes? Is that consistent with the Constitution? What provisions in Article I Section 8 and Article IV might such an assertion of power violate?
12. What constitutional issue (be specific) do citizen suits raise?
13. Under the environmentalists' litigating position in NRDC v. EPA, what would be the utility of involving the States in enforcing the CWA as opposed to simply leaving enforcement exclusively to EPA and not having any ability by EPA to delegate CWA NPDES programs to the States?
14. Should agencies be required to issue rules that provide *ex ante* standards for conduct or can they proceed based on a more ad hoc/post hoc approach to standard-setting?