

2019 Environmental Law Forum

State Law Implications of Federal Regulatory Change



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April 3, 2019

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Pennsylvania Regulatory Basics Initiative



Federal Administrative Procedure Act

The New York Times

For Trump Administration, It Has Been Hard to Follow the Rules on Rules

An arcane 1946 law has proved a roadblock. By one count, 30 big regulations have been challenged, and the administration has lost 28 times.

By Margot Sanger-Katz

Jan. 22, 2019

3

Regulatory Basics Initiative

- Implemented by Governor Ridge in 1995.
- DEP to review regulations and guidance to streamline and meet a list of requirements.
- Executive Order 1996-1 imposed similar requirements on all executive agencies.

4

DEP to review its regulations and guidance documents to ensure that they were not:

- More Stringent Than Federal Law, Without Good Reason
- Imposing Disproportionate Economic Costs Without Significant Benefit
- Experiencing Significant Noncompliance
- Too Prescriptive or Technology Specific
- Inhibitors to the Application of New Green Technologies
- Discouraging a Pollution Prevention Approach
- Obsolete or Redundant
- Lacking In Clarity

5

Results

The Regulatory Basics Initiative

Twelve thousand pages of regulations – some outdated (or not even in English, some said) – were formally reviewed to update, clarify, repeal and streamline them under DEP's Regulatory Basics Initiative.

Through an extensive process of public review and comment, review by advisory committees and DEP staff stretching over three years, the RBI process resulted in proposing 24 packages of regulatory changes that eliminated over 4,500 pages of guidance and regulations without weakening environmental standards.

It is estimated these changes resulted in saving the individuals, local governments and businesses regulated by DEP \$672 million in costs since 1995.

The same approach was used to "clean up" and redraft hundreds of form letters used by the Department, so that DEP can speak more concisely, politely and helpfully to those with whom it corresponds. This sounds rather mundane, but it's the kind of effort that adds up to effective government.

Pennsylvania Environmental Digest, May 14, 2012

6

Results

- 12,000 pages of regulations formally reviewed
- Extensive process of public review and comment, review by advisory committees and DEP staff
- 24 packages of regulatory packages
- Eliminated 4,500 pages of regulations and guidance
 - without weakening environmental standards

7

PA Environmental Regulations

- Environmental Quality Board (EQB)
- Independent Regulatory Review Commission (IRRC)
- Senate and House Environmental Resources and Energy Committees
- Courts

8

pec

about programs policy what's new events media

Former Governor Tom Ridge to Receive Lifetime Achievement Award from PEC

PRESENTATION JUNE 28, 2012 AT WESTERN PENNSYLVANIA ENVIRONMENTAL AWARDS DINNER AND CEREMONY

May 7, 2012

PRESS RELEASES

Tom Ridge, the 43rd governor of Pennsylvania and first-ever Secretary of Homeland Security, will be honored for his achievements as a champion of the environment by the Pennsylvania Environmental Council.

Ridge will receive a Lifetime Achievement Award at the Western Pennsylvania Environmental Awards Dinner and Awards Ceremony on Thursday, June 28, 2012 at the Westin Convention Center Hotel in downtown Pittsburgh.

Among Ridge's many achievements, both as governor and as a member of the U.S. House of Representatives, he championed the idea that the economy and environment can prosper in harmony and that sustainability should be part of government. Under his leadership, Ridge and the Pennsylvania General Assembly created the Growing Greener program, which continues to be the largest single investment in cleaning up and restoring the environment in Pennsylvania's history.

Pennsylvania Clean Streams Law

ENVIRONMENTAL LAW FORUM 2019

November 2019

10

PA Clean Streams Law

- Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq.
- Applies to “Waters of the Commonwealth,” broadly defined

11

PA Clean Streams Law

“Waters of the Commonwealth” shall be construed to include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.

35 P.S. § 691.1

12

Federal Clean Water Act

- Federal Water Pollution Control Act (Clean Water Act), adopted in 1972, 33 U.S.C. § 1251 et seq.
- Applies to “navigable waters.”
- “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”

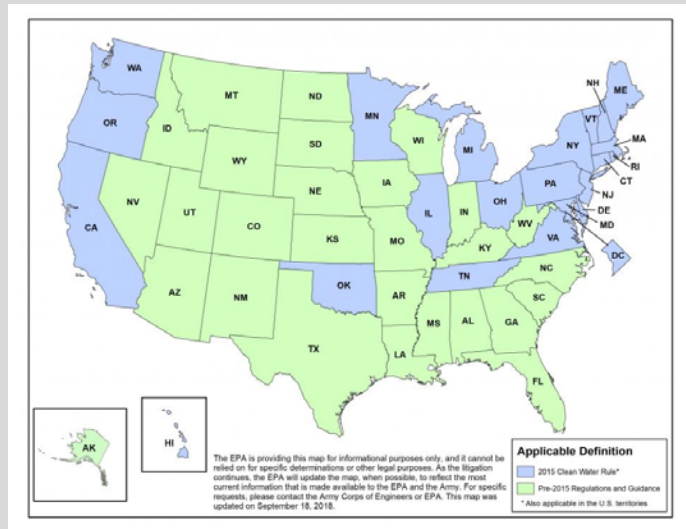
13

WOTUS

- 2015 COE/EPA Clean Water Rule (broad definition of WOTUS)
- 2017 COE/EPA Notice of Intent to Review and Rescind or Revise
- 2018 COE/EPA Addition of Applicability Date – Feb. 6, 2020
- 2019 COE/EPA Clean Water Proposed Rule (narrower definition of WOTUS)

14

WOTUS



Source: EPA

15

An Example: Former Metal Processing Plant



16

Former Metals Processing Plant

- Metals in soil and groundwater
- MGP tar in soil, stream, and wetlands
- Naturally Occurring Radioactive Materials (NORM) (TNORM)
 - disposal area + soil
- NRC Source Materials License
- Background radiation

17

Former Metals Processing Plant

- Decommissioning Plan (NRC)
- Act 2 Cleanup Plan (DEP)
- One Cleanup Program (EPA / DEP)
CERCLA + RCRA
- Before March 31, 2008
(PA became an agreement state)

18

Former Metals Processing Plant

- Wastewater treatment plant for remediation
 - NPDES Permit
 - NRC Preemption
- Wetlands
- Stream encroachment

19

Authority to Regulate Health and Safety

- Exclusive to NRC
- NRC – EPA – FDA - DOE
- State authority (by agreement)



20

*Train v.
Colorado Public Interest Research Group*
426 U.S. 1 (1976)

(EPA has no authority under the Federal Water Pollution Control Act to regulate discharges of radioactive nuclear waste materials; the Atomic Energy Commission has exclusive authority to regulate radioactive waste materials under the Atomic Energy Act, 42 U.S.C. § 2011 et seq. (1970)).

21

*Pacific Gas & Electric v. State Energy
Resources Conservation and
Development Commission*
461 U.S. 190 (1983)

(state laws regulating the “construction and operation” of nuclear power plants and laws motivated by radiological safety concerns are broadly preempted by the Atomic Energy Act)

22

U.S. NRC
United States Nuclear Regulatory Commission
Protecting People and the Environment

Home > NRC Library > Document Collections > NRC Regulations (10 CFR) > Part Index > § 8.4 Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act.

§ 8.4 Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act.

(a) By virtue of the Atomic Energy Act of 1954, as amended,¹¹ the individual States may not, in the absence of an agreement with the Atomic Energy Commission, regulate the materials described in the Act from the standpoint of radiological health and safety. Even States which have entered into agreements with the AEC lack authority to regulate the facilities described in the Act, including nuclear power plants and the discharge of effluents from such facilities, from the standpoint of radiological health and safety.

(b) The Atomic Energy Act of 1954 sets out a pattern for licensing and regulation of certain nuclear materials and facilities on the basis of the common defense and security and radiological health and safety. The regulatory pattern requires, in general, that the construction and operation of production facilities (nuclear reactors used for production and separation of plutonium or uranium-233 or fuel reprocessing plants) and utilization facilities (nuclear reactors used for production of power, medical therapy, research, and testing) and the possession and use of byproduct material (radioisotopes), source material (thorium and uranium ores), and special nuclear material (enriched uranium and plutonium, used as fuel in nuclear reactors), be licensed and regulated by the Commission.¹² In carrying out its statutory responsibilities for the protection of the public health and safety from radiation hazards and for the promotion of the common defense and security, the AEC has promulgated regulations which establish requirements for the issuance of licenses (Parts 30-36, 40, 50, 70, 71, and 100 of this chapter) and specify standards for radiation protection (Part 20 of this chapter).

(c) The Atomic Energy Act of 1954 had the effect of preempting to the Federal Government the field of regulation of nuclear facilities and byproduct, source, and special nuclear material. Whatever doubts may have existed as to that preemption were settled by the passage of the Federal-State amendment to the Atomic Energy Act of 1954 in 1959.¹³

(d) Prior to 1954, all nuclear facilities and the special nuclear material produced by or used in them were owned by the AEC.¹⁴ This Federal monopoly of atomic energy activities was due in large part to the use of atomic energy materials and facilities in our national weapons program, and the large capital investment required for their development. The Atomic Energy Act of 1954 permitted private ownership of nuclear facilities for the first time, but only under a comprehensive, pervasive system of Federal regulation and licensing. That Act recognized no State responsibility or authority over such facilities and materials except the States' traditional regulatory authority over generation, sale, and transmission of electric power produced through the use of nuclear facilities.¹⁵ As interest grew in the private construction of facilities and the use of atomic energy materials, and the numbers of persons qualified in the field increased, questions arose as to the role State authorities should play with regard to the public health and safety aspects of such activities. Several bills were introduced with respect to Federal-State cooperation in 1956 and 1957.¹⁶ An AEC proposed bill which would have authorized concurrent radiation safety standards to be enforced by the States was forwarded to the Joint Committee on Atomic Energy in 1957, but was never reported out. Finally, in 1959, legislation was enacted whose purpose was to promote an orderly regulatory pattern between the Federal and State governments with respect to regulation of byproduct, source, and special nuclear material, while avoiding dual regulation (see section 274a). That legislation added section 274, the so-called Federal-State amendment, to the Atomic Energy Act.

23

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24


Virginia Uranium, Inc. v. Warren
848 F.3rd 590 (4th Cir. 2017)

(the Atomic Energy Act does not preempt state regulation of conventional uranium mining)

(on appeal to the U.S. Supreme Court, argued on November 5, 2018)





25

The screenshot shows the EPA website's "Radiation Protection" page. At the top left is the EPA logo with the text "United States Environmental Protection Agency". Below the logo is a navigation bar with "Environmental Topics", "Laws & Regulations", and "About EPA". A search bar on the right contains "Search EPA.gov". To the right of the navigation bar are links for "CONTACT US", "SHARE", and social media icons for Facebook, Twitter, and Pinterest. The main heading is "Radiation Protection". On the left is a sidebar menu with links: "Radiation Protection Home", "Radiation Basics", "Radiation Regulations & Laws", "Federal Guidance for Radiation Protection", "Radiological Emergency Response", "TENORM", "Radiation Protection Document Library", "Frequent Questions", and "Glossary". The main content area features two articles. The first is titled "40 CFR Part 192: Proposed Rulemaking and Background Documents" and includes a summary: "Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings (40 CFR 192) establish standards for protection of the public health, safety, and environment from radiological and non-radiological hazards associated with uranium and thorium ore processing, and their associated wastes." The second article is titled "Withdrawal of January 2017 Notice of Proposed Rulemaking" and includes a summary: "EPA is withdrawing its January 19, 2017 proposed revisions to the Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings (40 CFR part 192). EPA had proposed standards to regulate byproduct materials produced by uranium in-situ recovery (ISR) activities, with a primary focus on groundwater protection and restoration." The page number "26" is visible in the bottom right corner.

 United States Environmental Protection Agency

Environmental Topics Laws & Regulations About EPA Search EPA.gov

Radiation Protection

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“[S]takeholders including the Nuclear Regulatory Commission, raised significant concerns regarding the EPA’s legal authority to propose these standards under the Uranium Mill Tailings Radiation Control Act (UMTRCA).”

Radiation Protection Document Library **Withdrawal of January 2017 Notice of Proposed Rulemaking**

Frequent Questions Glossary

83 Fed. Reg. 54543 (Oct. 30, 2018)

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27

Questions

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28