Federal Administrative Law

Posters from the WPA 1936-43
The Federal Process

The Secretary of the Interior shall make and publish such general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property in it.

(1) The Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter. When used in this subchapter, the term "regulations" includes the rules and guidelines by which the Secretary of the Treasury controls the payment of claims under the National Park Service Centennial Savings Bond Program.

On December 16, 2003, the Center for Science in the Public Interest (CSPI), the National Consumers League (NCL), 67 other organizations, and eight individuals, including four deans of schools of public health, petitioned TTB to change the alcohol beverage labeling regulations. Hereinafter, we refer to this rulemaking as being among the most important and far-reaching for the public health and safety....
OIRA & Unified Agenda

- Office of Information and Regulatory Affairs is a key AND controversial player in the rulemaking process - major mechanism for Presidential control.

- OMB tracks rules inside the separate rulemaking agencies in semi-annual Unified Agenda.
  - Executive Order 12,866 as modified is key order governing process.
  - Executive Order 13,771 (repeal two for every one new regulation)
The Unified Agenda and Regulatory Plan provide uniform reporting of data on regulatory and deregulatory actions under development throughout the Federal government, covering over 60 departments, agencies, and commissions.

- Regulations under EO 12866 Review
- Regulatory Reviews Completed in Last 30 Days
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The Federal Process

Continues with notices and proposed rules which appear in the Federal Register first…
Federal Register

- Created in 1935 by the Federal Register Act
- Response to Panama Refining Co v. Ryan, 293 U.S. 388 (1935)

“Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist.”
Federal Register

- Published daily except legal holidays and weekends
- Contains information supplied by the agencies
Federal Register Components

- Proposed Rules, Amendments to Existing Rules and Repeals
- Final Rules
- Presidential Documents, like Executive Orders
- Notices of other Agency Actions
- Statements of Agency Policy – few
- Some Guidance Memorandums
Finding the Federal Register

- HeinOnline, Lexis, and Westlaw, and Government have complete Register coverage back to 1936.
Proposed Rules

- **Notice of Proposed Rulemaking** [NPRM] contains text of proposed rule and preamble explaining basis and purpose for the regulation.
- NPRM asks the public for comments on the proposal, normally within 60 days.
Rule (Final Rule)

- Agency next reviews comments and promulgates the final rule.
- Preamble addresses major comments and other rulemaking requirements.

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

50 CFR Part 17

[Docket No. FWS-R3-ES-2012-0080; 4500030113]

RIN 1018-AY18

**Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Taylor’s Checkerspot Butterfly and Threatened Status for the Streaked Horned Lark**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine endangered status for the Taylor’s checkerspot butterfly (*Euphydryas editha taylori*) and threatened status for the streaked horned lark (*Eremophila alpestris strigata*) under the Endangered Species Act of 1973 (Act), as amended. This final rule adds these species to the List of Endangered and Threatened Wildlife and implements the Federal protections provided by the Act for...

**Peer Review and Public Comment**

We sought comments from independent specialists to ensure that our determination is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all comments and information we received during the comment periods and the public hearing.
Proposed Regulations

- Online Rulemaking Advantages
  - See other comments/agency materials
  - Explain rulemaking in more detail
  - Broaden participation
- Some agencies better than others
The Research Process

Begins with the Code of Federal Regulations...
Code of Federal Regulations

- First published in 1938 and contained the regulations in force as of June 1, 1938.
- This was the first compilation of regulations.
- Published annually in four parts (updated more frequently online).
Code of Federal Regulations

9 C.F.R. Part 78

9 C.F.R. § 78.41
Finding the CFR

- GPO publishes the set in print and in 2 electronic formats.
- First online version is mirror of print set.
- GPO’s e-CFR updates the Code more quickly - within 2 or 3 days.
- Complete CFR in Hein goes back to beginning in 1938.
- CFR in Lexis and in Westlaw goes back to the early 80s.
Administrative Materials

- Use the C.F.R. Index.
- From Tables by Statute
- Notes in annotated statutes
Title 38: Pensions, Bonuses, and Veterans' Relief
PART 21—VOCATIONAL REHABILITATION AND EDUCATION
Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

§21.1 Training and rehabilitation for veterans with service-connected disabilities.

(a) *Purposes.* The purposes of this program are to provide to eligible veterans with compensable service-connected disabilities all services and assistance necessary to enable them to achieve maximum independence in daily living and, to the maximum extent feasible, to become employable and to obtain and maintain suitable employment.

(Authority: 38 U.S.C. 3100)
How to update

- Start with the C.F.R.
- Check the Federal Register, or parts affected
- Federal Register for explanations
Finding Related Cases

- “Annotated” regulations, like annotated statutes
- Citator
  - Shepard’s Code of Federal Regulations Citations
  - KeyCite
§ 251.56 Terms and conditions.

Code of Federal Regulations - Title 36. Parks, Forests, and Public Property (Approx. 9 pages)

Document Notes of Decisions (39)

History (3) Citing References (238) Context & Analysis (20)

Notes of Decisions (39)

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1. Constitutional issues

Regulation that allowed Forest Service officer issuing special-use permit to large noncommercial group to attach "[s]uch terms and conditions as ... officer deems necessary to ... otherwise protect the public interest" was not facially overbroad and thus comported with First Amendment, regulation did not confer substantial power to discriminate based on content or viewpoint, given consistent Forest Service interpretation that "public interest" referred only to public health and safety, preservation of National Forest lands and space allocation, not discrimination with regard to expressive conduct. U.S.C.A. Const.Amend. 1; 16 U.S.C.A. § 551; 36 C.F.R. § 261.10(k); 36 C.F.R. § 251.56(a)(2)(vii) (1997). U.S. v. Nenninger, C.A.8 (Mo.)2003, 351 F.3d 340, rehearing and rehearing en banc denied. Constitutional Law == 1761; Woods And Forests == 8

Regulation requirement that a special use permit be obtained for noncommercial group use or occupancy of National Forest land by groups of 75 or more persons was not unconstitutionally overbroad on its face under the First Amendment in authorizing the Forest Service to attach terms and conditions to the grant of a permit "to protect the public interest," and in any event, the regulation, as interpreted by the National Forest Service, specifically limits the discretion of the Forest Service to impose conditions directed at curtailing or censoring expression. U.S.C.A. Const.Amend. 1; 36 C.F.R. § 251.56. U.S. v. Kalb, C.A.3 (Pa.)2000, 234 F.3d 827, certiorari denied 122 S.Ct. 918, 534 U.S. 1113, 151 L.Ed.2d 884. Constitutional Law == 1761; Woods And Forests == 8
LexisNexis Notes

Case Notes Applicable to Entire Part
- Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview
- Constitutional Law: Equal Protection: Permanence
- Environmental Law: Natural Resources & Public Lands: Forest Management
- Environmental Law: Emission & Land Use: Judicial Review
- Governments: Federal Government: Property
- Governments: Legislation: Overbreadth
- Governments: Public Lands: Forest Lands
- Real Property Law: Zoning & Land Use: Special Permits & Variances
- Case Notes Applicable to Entire Part

Part Note
- Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

Overview: Dismissal affirmed of information filed against permitless noncommercial group users of national forest land. Regulation's language unconstitutionally overbroad as letting government attach any terms and conditions to permit.

- The fact that 36 C.F.R. § 251.56(a)(2)(vii) is facially invalid does not end the inquiry. In evaluating the constitutionality of a regulatory scheme, courts should presume any narrowing construction to which the law is fairly susceptible. In particular, administrative interpretation of a regulation is highly relevant to the analysis. When an administrative agency offers a narrowing construction to a facially overbroad regulation, the narrowing construction can render constitutional an otherwise unconstitutional regulation because the construction can constrain the ability of officials to enforce the regulation in an illegitimate manner. Go To Headnote

Overview: A release from liability that the customer signed in favor of the tour operator was valid and was not rendered void by a permit that the tour operator had with the federal government that charged it with responsibility for customer safety.

- 36 C.F.R. § 251.56(a)(2)(iv) (1994) provides that each special use authorization shall contain such terms and conditions as the authorized officer deems necessary to protect lives and property. Go To Headnote