

Using Local Ordinances to Stop Polluters

Sustainable Development Law & Policy
Symposium on Environmental Justice
March 27, 2013

Mike Ewall, Esq.
Founder/Director
Energy Justice Network
215-436-9511
mike@energyjustice.net
www.energyjustice.net

For information on local air ordinances we've developed and used to stop polluters in Pennsylvania, see www.actionpa.org/ordinances/

Further information on continuous emissions monitoring (CEM) capability (one of our favored tactics with local air ordinances), see www.ejnet.org/toxics/cems/

Please contact me for (1) further details about rights to pass local environmental ordinances in your state, (2) to help research some of the states for which we have not yet determined whether there is local authority to pass such laws, or (3) to get assistance fighting local polluters and to connect with our national grassroots networks fighting dirty energy and waste industries.

Preemption and Savings Clauses in Federal Environmental Laws¹

Savings Clauses (federal laws set floor, but not ceiling)

Clean Air Act	42 U.S.C. § 7416
Clean Water Act	33 U.S.C. § 1370
Resource Conservation and Recovery Act	42 U.S.C. § 6929

Express Preemption (federal laws set floor *and* ceiling)

Federal Insecticide, Fungicide, and Rodenticide Act	7 U.S.C. § 136v(b)
Clean Air Act (motor vehicle emissions section)	42 U.S.C. § 7543(a)

Implied Preemption (courts interpret federal laws to set floor *and* ceiling)

Atomic Energy Act of 1954	42 U.S.C. §§ 2011-2296
Hazardous Materials Transportation Act	49 U.S.C. §§ 1801-1812 ²

In-between (preempting states in some areas, but not others)

Toxic Substances Control Act	15 U.S.C. § 2617
Endangered Species Act	16 U.S.C. § 1535(f)
Surface Mining Control and Reclamation Act	30 U.S.C. § 1254(g)

¹ The savings clauses mentioned here are compiled neatly, and described more fully, in: Paul S. Weiland, "Federal and State Preemption of Environmental Law: A Critical Analysis," 24 Harv. Env'tl. L. Rev. 237 (2000).

² The preemptive effect of the Atomic Energy Act of 1954 and the Hazardous Materials Transportation Act were found to be implied in *Jersey Central Power & Light Co. v. Lacey*, 772 F.2d 1103 (1985).

Clean Air Act and State/Local Government Authority:

§ 7416. Retention of State authority

Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) **nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution;** except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

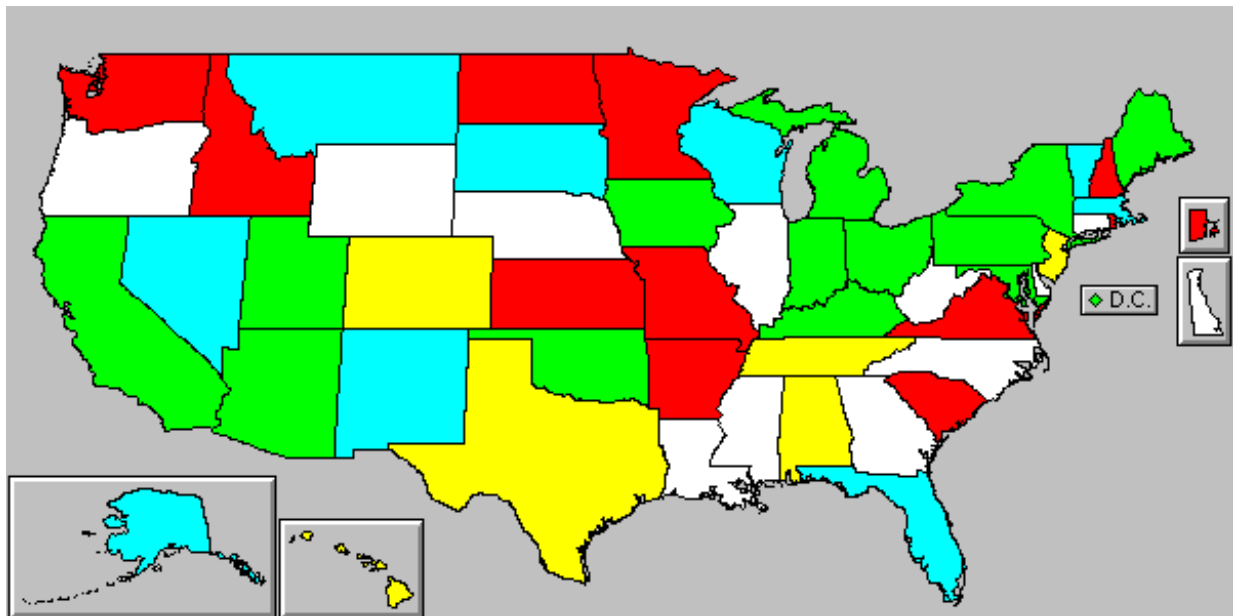
U.S. District Court, in *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828, 833 n.11 (1990):

[T]he congressional finding that state and local governments should have primary responsibility for controlling air pollution (42 U.S.C. § 7401(a)), is not a grant of power to local governments. Local governments are subordinate to the states; any grants of authority must come from the state legislatures, not from Congress. Thus, this Court does not need to examine the federal law for the purposes of this decision, and will concentrate on Rhode Island's laws and regulations governing air pollution. If the state has preempted East Providence's Ordinance, its validity cannot be saved by a grant of authority from Congress.

This unfortunate conclusion was reaffirmed in the 6th Circuit in 1993, when they stated that “nowhere does the CAA affirmatively grant local governments the independent power to regulate air pollution.”³

³ *Southeastern Oakland County Resource Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (1993).

Local Air Pollution Law Preemption



- Green = Local laws allowed
- Yellow = In-between (allowed only in certain areas or subject to state approval)
- Red = Local laws preempted
- Blue = Local air regulation *programs* allowed

Local laws allowed

Arizona:	A.R.S. § 49-479
California:	Cal Health & Saf Code §§ 41508, 42708
Indiana:	Ind. Code Ann. § 13-17-12-1
Iowa:	Iowa Code §§ 455B.144, 455B.145
Kentucky:	KRS § 77.170
Maine:	38 M.R.S. § 597
Maryland:	Md. Environment Code § 2-104
Michigan:	MCLS § 324.5542
New York:	NY CLS ECL § 19-0709
Ohio:	Ohio Rev. Code § 3704.11
Oklahoma:	27A Okl. St. § 2-5-103
Pennsylvania:	35 P.S. 4012(a)
Tennessee:	Tenn. Code § 68-201-202
Utah:	Utah Code § 19-2-121

In-Between

Alabama:	Code of Ala. § 22-28-23
Colorado:	Colo. Rev. Stat. § 25-7-128
Hawaii:	HRS § 342B-5
New Jersey:	N.J. Stat. § 26:2C-22
Texas:	Tex. Health & Safety Code § 382.113

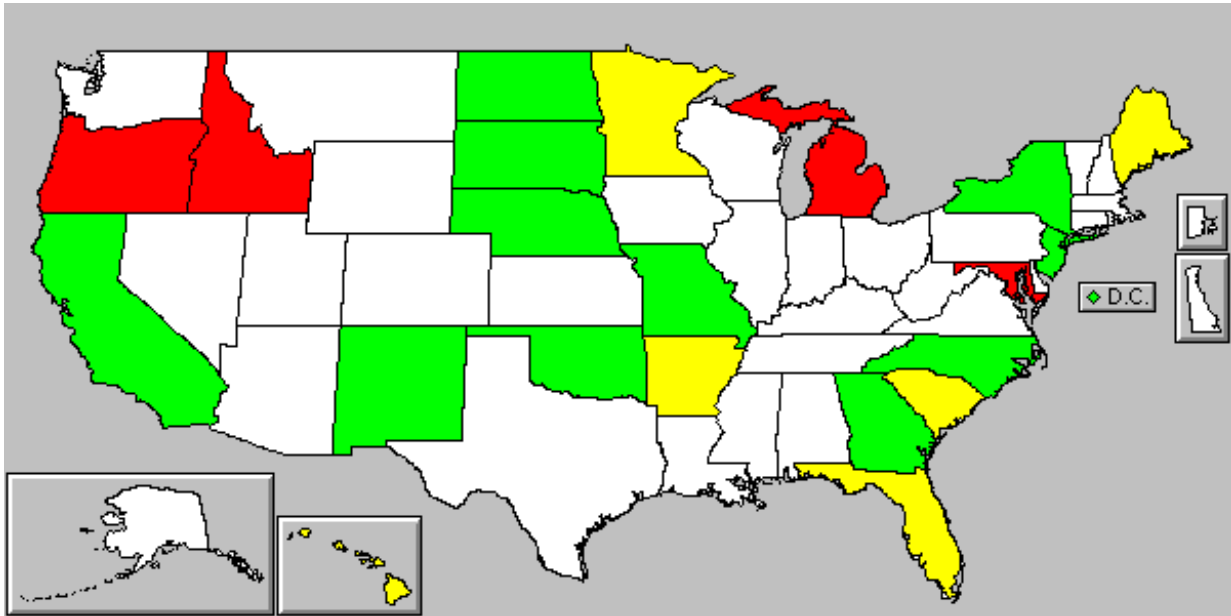
Preempted:

Arkansas:	A.C.A. § 8-4-306
Idaho:	Idaho Code § 39-118B
Kansas:	K.S. §§ 65-3005 and 65-3010
Minnesota:	Minn. Stat. § 116.07(2)
New Hampshire:	<i>Bio Energy, LLC v. Town of Hopkinton</i> , 153 N.H. 145 (2005).
North Dakota:	N.D. Cent. Code, § 23-25-03.3
Rhode Island:	<i>Rhode Island Cogeneration Associates v. East Providence</i> , 728 F. Supp. 828 (1990).
South Carolina:	S.C. Code § 48-1-310
Virginia:	Va. Code § 10.1-1321
Washington:	Rev. Code Wash. § 70.94.230

Undetermined:

- Connecticut
- Delaware
- Georgia
- Illinois
- Louisiana
- Mississippi
- Nebraska
- North Carolina
- Oregon
- West Virginia
- Wyoming

Local Municipal Solid Waste Law Preemption



Green = Local laws allowed
 Yellow = In-between (allowed only in certain areas or subject to state approval)
 Red = Local laws preempted

Local laws allowed

Arkansas: A.C.A. § 8-6-209
 California: Cal Pub Resources Code § 42963
 Georgia: O.C.G.A. § 12-8-30.9
 Missouri: MO. Rev. Stat. 260.215(2)
 Nebraska: R.R.S. Neb. § 81-1516
 New Jersey: N.J. Stat. § 26:1A-9
 New Mexico: N.M. Stat. Ann. § 74-9-42
 New York: NY CLS ECL § 27-0711
 North Carolina: N.C. Gen. Stat. § 130A-309.09C
 North Dakota: N.D. Cent. Code, § 23-29-05
 Oklahoma: 27A Okl. St. § 2-10-202
 South Dakota: S.D. Codified Laws § 34A-6-41

Preempted:

Idaho: Idaho Code § 39-7404
 Maryland: *Mayor and City Council of Baltimore v. The New Pulaski Company Limited Partnership*, 112 Md. App. 218 (1996).
 Michigan: Mich. Comp. Laws § 299.430(4)
 Oregon: ORS § 459.09

In-Between

Florida: Fla. Stat. § 403.182
 Hawaii: HRS § 342H-19
 Maine: ME. Rev. Stat. Ann. tit. 38, § 1310-U
 Minnesota: Minn. Stat. §§ 115A.914, 116.82
 South Carolina: S.C. Code Ann. § 44-96-290