Local Regulation of Solid Waste Disposal Facilities

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Mike Ewall, Esq.
Founder & Director
Energy Justice Network
mike@energyjustice.net
www.energyjustice.net

Can a state, county, or local government ban the siting of a waste disposal, recycling, or waste storage facility based upon the application of stricter public health or environmental protection standards than are required under federal law? In other words, can the facility be sited and permitted if it meets all federal requirements but cannot meet certain stricter state requirements?

This is a question of preemption – whether federal environmental laws preempt the states and, in turn, whether state environmental laws preempt county or local governmental regulation of waste industry facilities. To thoroughly answer this question, one must examine preemption at both the federal and state levels, but also the various areas of law that could be applied to effect either an outright ban or a *de facto* ban via strict regulations.

Clauses in laws that explicitly preserve the rights of lower levels of government to enact stricter regulations are known as "savings" clauses. The major federal environmental laws have savings clauses that enable states to have stricter laws of their own – effectively setting a national regulatory "floor." This is true for the Clean Air Act,[1] the Clean Water Act,[2] and the Resource Conservation and Recovery Act.[3] Other environmental laws (and parts of the aforementioned laws) explicitly preempt state and

[1] 42 U.S.C. § 7416.
[2] 33 U.S.C. § 1370.
[3] 42 U.S.C. § 6929.

local laws, setting standards that are both a "floor" and a "ceiling." Examples include the labeling section of the Federal Insecticide, Fungicide, and Rodenticide Act,[4] the motor vehicle emissions section of the Clean Air Act.[5] Other federal laws have been found to preempt state and local law through implied field preemption, such as the Atomic Energy Act of 1954[6] and the Hazardous Materials Transportation Act.[7,8] Finally, some federal laws fall in the middle, preempting states to some degree, while permitting stricter regulations in certain areas. This is true for the Toxic Substances Control Act,[9] the Endangered Species Act,[10] and the Surface Mining Control and Reclamation Act.[11,12]

While many of these laws can be used to regulate waste facilities of various sorts, the most applicable laws for regulating waste facilities are the Resource Conservation and Recovery Act (RCRA) and – especially in the case of incinerators – the Clean Air Act (CAA). This paper will focus primarily on RCRA and state solid and hazardous waste laws. Clean Air Act preemption issues will be dealt with in more detail in a separate paper. Zoning and land use tactics are also popular ways to combat proposed waste facilities. These and some newer anti-corporate "ban" type of ordinances will be discussed below.

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[4] 7 U.S.C. § 136v(b).
[5] 42 U.S.C. § 7543(a).
[6] 42 U.S.C. §§ 2011-2296.
[7] 49 U.S.C. §§ 1801-1812.
[8] 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).
[9] 15 U.S.C. § 2617.
[10] 16 U.S.C. § 1535(f).
[11] 30 U.S.C. § 1254(g).
[12] The aforementioned savings clauses are compiled neatly, and described more fully, in: Paul S. Weiland, "Federal and State Preemption of Environmental Law: A Critical Analysis," 24 Harv. Envtl. L. Rev. 237 (2000).

RCRA grants broad authority to states, allowing them to have stricter laws regarding solid and hazardous wastes. 42 U.S.C. § 6929, the section titled "retention of State authority" states:

> "[N]o State or political subdivision may impose any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by such regulations… Nothing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations…."

States vary quite a bit in the strictness of their waste facility regulations, but generally don't tend to come anywhere near a "ban" – except in the case of incinerators in a handful of states – notably Delaware, Rhode Island, Maryland and West Virginia.[13]

In Rhode Island, a state small enough for the state to have a public waste management system served by a single central landfill, they set forth a strongly worded anti-incineration policy[14] and, in 1992, commanded their waste authority, the Rhode Island Resource Recovery Corporation, to follow a plan that "shall not include incineration of solid waste."[15] This first state-wide incinerator ban seems easier to do, as the state is the sole market participant. As other states took the step to limit private incinerator development, they "banned" them in ways that leave slight exceptions.

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[13] According to the Global Anti-Incinerator Alliance (GAIA), Iowa, Louisiana and Massachusetts also have incinerator bans or moratoria, though I could not locate them. They claim the following:

- Iowa, 1993: state enacted a moratorium on commercial medical waste incinerators. Moratorium still in place. Moratorium does not extend to incinerators operated by a hospital or consortium of hospitals.
- Louisiana, 2000: state revised its statute Title 33, which prohibits municipalities of more than 500,000 from owning, operating or contracting garbage incinerators in areas zoned for residential or commercial use.
- Massachusetts, 1991: state enacted a moratorium on new construction or expansion of solid waste incinerators. Moratorium still in place.

[14] R.I. Gen. Laws § 23-19-3 states:

(14) That due to the myriad of over four hundred (400) toxic pollutants including lead, mercury, dioxins, and acid gasses known to be emitted by solid waste incinerators, the known and unknown threats posed by solid waste incinerators to the health and safety of Rhode Islanders, particularly children, along with the known and unknown threats to the environment are unacceptable.

(15) That despite the use of state of the art landfill liner systems and leachate collection systems, landfills, and particularly incinerator ash landfills, release toxic leachate into ground and surface waters which poses an unacceptable threat to public health, the environment, and the state's limited ground and surface water resources.

(16) That incineration of solid waste is the most costly method of waste disposal with known and unknown escalating costs that would place substantial and unreasonable burdens on both state and municipal budgets to the point of seriously jeopardizing the public's interest.

[15] R.I. Gen. Laws § 23-19-11(7).

In 1994, West Virginia was the second state to ban incinerators, making it "unlawful to install, establish or construct a new municipal or commercial solid waste facility utilizing incineration technology for the purpose of solid waste incineration," though leaving an exception for pilot tire incineration projects.[16]

In 1997, Maryland banned the construct or operation – or state permitting of – a municipal solid waste incinerator within one mile of a public or private elementary or secondary school.[17] This limited ban does not apply to the "operation, construction, reconstruction, replacement, expansion, and material alteration or extension of an incinerator that was operating as a resource recovery facility on January 1, 1997."

In 2000, Delaware banned the permitting of any incinerator unless it is located within an area zoned for heavy industrial activity and every point on the property boundary line of the property on which the incinerator is or would be located must be at least 3 miles from every point on the property boundary line of any residence, residential community, church, school, park or hospital.[18] In a state as small as Delaware, this effectively banned incinerators statewide.

Beyond these rare instances in smaller states where grassroots anti-incinerator activists managed to achieve state policies banning an entire industry, most of the efforts to ban polluting waste facilities has been at the local level, where people power can more readily overcome corporate lobbying efforts. The ultimate success of local (county or municipal) ordinances to ban or strictly regulate waste facilities depends on whether such ordinances are preempted by a higher level of government.

[16] W. Va. Code § 22-15-19.
[17] Md. Environment Code Ann. § 9-204(k).
[18] 7 Del. C. § 6003.

In most cases, it's a matter of state preemption of local ordinances, but where a county ordinance went so far as to outright ban the storage, treatment, or disposal of "acute" hazardous waste, the Eighth Circuit held that RCRA – even though it explicitly allows for more stringent local regulation of hazardous waste – preempts such a ban because outright banning the waste incineration in question was deemed a conflict with RCRA's goal of meeting the "need for safe disposal and treatment of hazardous waste" (as if incineration constitutes safe disposal).[19] The court stated: "[a] county cannot, by attaching the label 'more stringent requirements' or 'site selection' to an ordinance that in language and history defies such description, arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste."[20]

Several state waste laws have savings clauses, permitting stricter local laws, while some expressly preempt such ordinances. For municipal solid waste, at least eleven states (AR,[21] CA,[22] GA,[23] MO,[24] NC,[25] ND,[26] NE,[27] NJ,[28] NM,[29] NY,[30] OK[31] and SD[32]) have savings clauses, at least three states (ID,[33] MI[34] and OR[35]) expressly preempt local

[19] *Ensco, Inc. v. Dumas*, 807 F.2d 743 (1986).
[20] *Id*. at 745.
[21] A.C.A. § 8-6-209.
[22] Cal Pub Resources Code § 42963.
[23] O.C.G.A. § 12-8-30.9.
[24] MO. Rev. Stat. 260.215(2).
[25] N.C. Gen. Stat. § 130A-309.09C.
[26] N.D. Cent. Code, § 23-29-05.
[27] R.R.S. Neb. § 81-1516.
[28] N.J. Stat. § 26:1A-9.
[29] N.M. Stat. Ann. § 74-9-42.
[30] NY CLS ECL § 27-0711.
[31] 27A Okl. St. § 2-10-202.
[32] S.D. Codified Laws § 34A-6-41.
[33] Idaho Code § 39-7404.
[34] Mich. Comp. Laws § 299.430(4).
[35] ORS § 459.095.

waste regulation, and at least five states (FL,[36] HI,[37] ME,[38] MN[39] and SC[40]) fall somewhere in the middle.[41] For hazardous waste, at least one state (ND[42]) has a savings clauses, at least six states (ID[43], IN,[44] NC,[45] NJ,[46] TX[47] and WA[48]) expressly preempt local regulation, and at least four states (CA,[49] FL,[50] HI[51] and LA[52]) fall somewhere in the middle.

Of the municipal waste savings clauses, most are pretty straight forward, such as this one from North Carolina:

> Nothing in this Part shall be construed to prevent the governing board of any county or municipality from providing by ordinance or regulation for solid waste management standards which are stricter or more extensive than those imposed by the State solid waste management program and rules and orders issued to implement the State program.[53]

Some, however, are more conditional, such as Arkansas' savings clause, which states that no municipality or county may adopt stricter waste facility standards "unless

[36] Fla. Stat. § 403.182.
[37] HRS § 342H-19.
[38] ME. Rev. Stat. Ann. tit. 38, § 1310-U
[39] Minn. Stat. § 115A.914; Minn. Stat. § 116.82.
[40] S.C. Code Ann. § 44-96-290.
[41] These totals are based largely on keyword searches of the tables of contents of each of the 50 states' codes. Some savings and preemption clauses – which didn't contain the common keywords used – were found by other means, through law review articles or otherwise, so it's likely that these totals are underestimates, and that additional clauses may exist, but escaped notice so far.
[42] N.D. Cent. Code, § 23-20.3-05.2.
[43] Idaho Code § 39-5816.
[44] Ind. Code Ann. 13-22-10-23.
[45] N.C. GEN. STAT. § 130A-293(a).
[46] N.J. Stat. § 13:1E-63.
[47] Tex. Nat. Res. Code § 211.002.
[48] Rev. Code Wash. (ARCW) § 70.105.240.
[49] Cal. Pub. Res. Code § 43208.
[50] Fla. Stat. § 403.182.
[51] HRS § 342J-20.
[52] La. R.S. 30:2199.
[53] N.C. Gen. Stat. § 130A-309.09C(c).

there exists a fully implemented comprehensive area-wide zoning plan, and corresponding laws or ordinances, covering the entire municipality or county."[54]

Those that fall in the middle do so in a variety of ways. Florida allows local pollution control programs, but subjects them to state approval, requires that they use the same definitions as any terms defined in state statutes, and requires that the local government fully staff the program, providing for enforcement and appropriate administrative and judicial process.[55] Hawaii preempts all local solid and hazardous waste regulation unless such ordinances regulate something other than what the state already regulates, which thankfully leaves plenty of room for filling in gaps where the state isn't regulating some aspect of the industry.[56] Maine prohibits municipalities from enacting stricter solid waste management standards relating to "hydrogeological criteria for siting or designing solid waste disposal facilities or governing the engineering criteria related to waste handling and disposal areas of a solid waste disposal facility," but seems to leave the door open to other possibilities.[57] Minnesota allows stricter local ordinances relating to waste tires,[58] but local ordinances about medical waste can not have difference definitions or management requirements.[59] South Carolina, as other states also do, gives local governments some say in waste permitting by requiring that local ordinances and waste management plans must be met before a state permit will be issued.[60]

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[54] A.C.A. § 8-6-209(a)(1).
[55] Fla. Stat. § 403.182.
[56] HRS §§ 342H-19 and HRS § 342J-20.
[57] ME. Rev. Stat. Ann. tit. 38, § 1310-U.
[58] Minn. Stat. § 115A.914.
[59] Minn. Stat. § 116.82.
[60] S.C. Code Ann. § 44-96-290(F).

Of the states that expressly preempt local waste ordinances, most do so for hazardous waste more than municipal waste. California does so at any landfill accepting both hazardous and other solid wastes:

> No local governing body may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to a facility that accepts both hazardous wastes and other solid wastes and which meets any of the criteria enumerated in subdivision (a) of Section 25148 of the Health and Safety Code, and was operating as of May 1, 1981, pursuant to a valid solid waste facility permit, so as to prohibit or unreasonably regulate the operation of, or the disposal, treatment, or recovery of resources from solid wastes at any such facility.[61]

California's concept of "reasonably" regulating waste facilities (reasonableness is also reflected in their saving clause for local municipal waste regulation) is an important one, as ordinances may be attacked on constitutional grounds. Even where an ordinance is passed in a state that expressly authorizes such an ordinance, this "does not necessarily prevent the court from declaring it void because it is unreasonable."[62]

Ordinances may also be invalidated if a court finds implied preemption because the ordinance conflicts with state statutes or if the state statute "occupies the field."

In 1987, the Idaho Supreme Court struck down a county ordinance regulating hazardous and non-hazardous waste because RCRA, TSCA and the state's Hazardous Waste Management Act occupy the field, even though the statutes lack express preemption clauses.[63] Georgia's Supreme Court did the same in 1998 with a county ordinance regulating industrial, hazardous, and medical waste disposal.[64]

A few states have saved local governments from facing implied preemption in the courts, however. New Mexico, has a constitutional provision requiring that preemption

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[61] Cal. Pub. Res. Code § 43208
[62] Am Jur 2d Municipal Corp., Counties, Other Political Subdivision § 329.
[63] *Envirosafe Services of Idaho, Inc. v. County of Owyhee*, 735 P.2d 998 (1987).
[64] *Franklin County v. Fieldale Farms Corp.*, 507 S.E.2d 460 (1998).

be express.[65] The Supreme Court of Montana has interpreted its Constitution – even though its Constitution does not require express preemption – to bar implied preemption as applied to local governments that have adopted charters, stating:[66]

> The only way the doctrine of pre-emption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments with self-government powers from acting in a certain area. The doctrine of implied pre-emption, by definition, cannot apply to local governments with self-government powers.[67]

In Ohio, their Supreme Court overturned the implied preemption doctrine in 1998, stating in a case related to municipal taxing power that "there is no constitutional provision that directly prohibits both the state and municipalities from occupying the same area of taxation at the same time."[68] The court went on to state that "there is no constitutional basis that supports the continued application of the doctrine of implied preemption."[69]

Local bans and moratoria have generally not survived preemption. One notable exception is in Tennessee, where Shelby County imposed a 3-month moratorium on issuance of permits for the construction of hazardous waste treatment facilities in the county.[70] The lawsuit, resolved in June 1982, was over a moratorium that ran from October 1980 to January 1981, an important time-window as a new zoning regime was coming into effect and the hazardous waste company was racing to get approved before the new zoning rules came into effect with more stringent requirements. In this case, the

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[65] N.M. CONST. art. X, § 6(D)
[66] *D & F Sanitation Serv. v. City of Billings*, 713 P.2d 977 (1986).
[67] *Id.* at 982.
[68] *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212 (1998).
[69] *Id.* at 218.
[70] *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430 (1982).

court upheld the moratorium, but in other contexts, moratoria have not survived challenge.

In 1992, Baltimore City passed a law that prohibited the "construction, reconstruction, replacement, and expansion of incinerators within Baltimore City for a period of at least five years."[71] The moratorium would stay in place if the city failed to reach its 40% recycling goal by 1997, becoming automatically renewed for another five years or until the City reaches its recycling goal.[72] The court found that Maryland's environmental statutory schemes impliedly preempted the field, invalidating the moratorium.[73]

Outright bans have suffered a similar fate. In Alsace Township, Berks County, Pennsylvania, a nearby lead smelter seeking to dump its waste on its property in the township was blocked by a zoning ordinance that totally excluded industrial waste disposal facilities in the township.[74] The Commonwealth Court of Pennsylvania affirmed a judgment that the ordinance was invalid based on the state's Solid Waste Management Act preempting the field of solid waste regulation and concluding that since the state is authorized to protect water quality, "waste disposal facilities do not have the obvious potential for polluting air or water or otherwise creating uncontrollable health or safety hazards."[75] This absurd conclusion – especially absurd in light of the extensive lead contamination suffered by that community for years to come – was used to override the township's power's to protect its residents based on nuisance and public health grounds.

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[71] *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. Pshp.*, 112 Md. App. 218, 222 (1996).
[72] *Id.*
[73] *Id.* at 227.
[74] *General Battery Corp. v. Zoning Hearing Bd.*, 29 Pa. Commw. 498 (1977).
[75] *Id.* at 502.

Fed up with the limited rights of people and nature under environmental regulatory regimes, the Pennsylvania-based Community Environmental Legal Defense Fund (CELDF)[76] has taken to writing ordinances that take away corporate personhood, adopt a rights-based approach, and declare that corporations may not engage in certain activities within a given municipality. As Pennsylvania is one of the most polluted stated by nearly every measure, and has over 2,500 municipal governments (there are no unincorporated areas of the state), making it a good laboratory for local ordinance work. To date, CELDF has had over 120 ordinances passed – mostly in Pennsylvania communities. They have been used to ban corporate animal factories (CAFOs), sewage sludge dumping, mining and numerous other threats. Like any law, the ordinances are legal until they're challenged in court. They have been very successful for over a decade, as corporations have chosen not to challenge them for much of that time. However, the attorney general, and corporate polluters themselves, have started to push back in recent years, causing ordinances to be repealed to avoid setting bad precedent. Nonetheless, the U.S. District Court for the Western District of Pennsylvania ruled that only the U.S. Supreme Court may overturn its long-held position that corporations have the rights of persons in the First, Fourth, Fifth and Fourteenth Amendments and under the Commerce and Contracts Clauses.[77] Among a package of ordinances passed in order to stop mining and gas drilling in the township was a "Disclosure Ordinance" that required extensive disclosure of corporate activities, subcontractors and violations and had a "bad actor" clause prohibits a corporation from doing business in the township if it "has a history of

[76] See www.celdf.org.
[77] *Range Res. - Appalachia, LLC v. Blaine Twp.*, 649 F. Supp. 2d 412 at 417-18 (2009).

consistent violations of the law" (very broadly defined).[78] The District Court held that this did not violate the state's Limited Liability Company Law, but that it was preempted by a broad preemption clause in the state's Oil and Gas Act.[79] This is somewhat hopeful in that the disclosure aspects survived challenge, and the "bad actor" clause might hold up if applied to waste facilities in Pennsylvania (where no such preemption clause exists) or other states that don't have preemption clauses as broad as Pennsylvania's Oil and Gas Act.

More common local ordinance strategies to block waste facilities use zoning-like set-back distances, much like the Maryland and Delaware incinerator "ban" statutes. In a battle against a hazardous waste landfill proposed in Lancaster County, Pennsylvania, a North Codorus Township used a zoning ordinance to prohibit the facility from locating within 500 yards of any structure occupied by humans. The Commonwealth Court held that the township could not set geological or engineering standards stricter than those established by the state's waste regulations, it was not prohibited from enacting restrictions relating to aesthetics, population density, and accessibility.[80] Since the township has a "substantial interest in protecting and promoting the public health, property values and aesthetics of the community," the waste company failed to meet its burden of showing that the 500-yard setback requirement "was not substantially related to the public health, safety, and welfare of the community."[81] The ordinance was upheld.

Similarly, in an Arkansas case, an ordinance prohibiting hazardous or other solid waste disposal facilities within two miles of main water sources was found to be related

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[78] *Range Res. - Appalachia, LLC v. Blaine Twp.*, 2009 U.S. Dist. LEXIS 100932 at 8 (2009).
[79] *Id.* at 16-24.
[80] *Sunny Farms, Ltd. v. North Codorus Township*, 81 Pa. Commw. 371 (1984).
[81] *Id.*

to governmental purposes and was not arbitrary or a violation of due process, even though no studies or analyses of subsurface geology in the area were conducted.[82]

[82] *Johnson v Sunray Services, Inc*. 306 Ark 497 (1991).