

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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*PREEMPTION LANGUAGE IN FEDERAL
ENVIRONMENTAL STATUTES*

Robert Meltz, American Law Division

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Abstract. This report compiles the provisions in federal environmental statutes that explicitly state whether Congress intended to preempt state law. The provisions are arranged in four categories, from least preemption to greatest.

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Preemption Language in Federal Environmental Statutes

Robert Meltz
Legislative Attorney
American Law Division

Summary

This report compiles the provisions in federal environmental statutes that explicitly state whether Congress intended to preempt state law. The provisions are arranged in four categories, from least preemption to greatest: (1) rights/jurisdiction of state generally unaffected; (2) if a federal standard exists, the state standard must be the same or more stringent; (3) state regulation different from the federal scheme is preempted, but a waiver may be available; and (4) state regulation different from the federal scheme is preempted, and no waiver is available.

This report compiles the provisions in federal environmental statutes that explicitly state whether Congress intended to preempt state law. The provisions are arranged in four categories, from least preemption to greatest. Note that several statutes appear under more than one category.

Rights/jurisdiction of state generally unaffected¹

Clean Air Act

“Nothing in this part [dealing with mobile-source pollution] shall preclude ... to any State ... the right otherwise to control ... the use, operation, or movement of ... motor vehicles.” CAA § 209(d); 42 U.S.C. § 7543(d).

¹ The no-preemption provisions in this section are not necessarily part of statutes that generally take a no-preemption approach. Several of these provisions seem merely intended to make clear that a statute’s explicit preemption of state law as to certain matters does not impliedly preempt other areas loosely related to such matters. Thus, the first-listed provision states unequivocally that the Clean Air Act’s explicit preemption of most state regulation of automobile *emissions* should not be construed to mean that the Act preempts state regulation of automobile *use*.

Clean Water Act

“[N]othing in this Act shall ... impair[] ... any right or jurisdiction of the States with respect to the waters ... of such States.” CWA § 510; 33 U.S.C. § 1370.

Comprehensive Environmental Response, Compensation and Liability Act

“Nothing in this Act shall be construed ... as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.” CERCLA § 114(a); 42 U.S.C. § 9614(a).

Emergency Planning and Community Right to Know Act

“Nothing in this Act shall ... preempt any State ... law” or otherwise affect any state authority to adopt or enforce any state law (with exception for state laws requiring submission of material safety data sheets). EPCRA § 321; 42 U.S.C. § 11041.

Noise Control Act

Nothing in NCA section 5 (new products) shall affect a state’s rights to regulate levels of environmental noise (with exceptions noted on page 5). NCA § 5(e)(2); 42 U.S.C. § 4905(e)(2).

Ocean Dumping Act

“[N]othing in this title [federal regulation of ocean dumping] shall preclude or deny the right of any State to adopt or enforce any requirements respecting dumping of materials into ocean waters within the jurisdiction of the State.” ODA § 106(d); 33 U.S.C. § 1416(d).

Oil Pollution Act

Liability/requirements as to oil discharge/removal, and under State law generally. “Nothing in this Act or the Act of March 3, 1851 shall — (1) affect ... the authority of any State ... from imposing any additional liability or requirements with respect to ... the discharge of oil ... within such State; or ... any removal activities in connection with such a discharge; or (2) affect ... the obligations or liability of any person under ... State law, including common law.” OPA § 1018; 33 U.S.C. § 2718.

Funds to pay for oil pollution costs. “Nothing in this Act ... shall ... affect ... the authority of any State — (1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of ... oil pollution ... ; or (2) to require any person to contribute to such a fund.” *Id.*

Additional liability/requirements; fines and penalties. “Nothing in this Act [or] the Act of March 3, 1851 ... shall ... affect ... the authority of ... any State ... — (1) to impose additional liability or additional requirements; or (2) to impose ... any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge ... of oil.” *Id.*

Resource Conservation and Recovery Act

“Nothing in this title [governing underground storage tanks] shall preclude or deny any right of any State ... to impose any additional liability with respect to the release of regulated substances” RCRA § 9008; 42 U.S.C. § 6991g.

Safe Drinking Water Act

“Nothing in this [Act] shall diminish any authority of a State ... to adopt or enforce any law ... respecting drinking water regulations or public water systems, but no such law

shall relieve any person of any requirement otherwise applicable under this [Act].” SDWA § 1414(e); 42 U.S.C. § 300g-3(e)

**If no federal standard, state has free hand;
if federal standard exists, state standard permitted
if the same or more stringent**

Clean Air Act

Except as to certain regulation of moving sources of air pollution, “nothing in this Act shall preclude or deny the right of any State ... 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 specified provisions of the Act] such State ... may not adopt or enforce any emission standard or limitation which is less stringent than [under those provisions].” CAA § 116; 42 U.S.C. § 7416.

Clean Water Act

Discharge standards, and requirements respecting water pollution control. “[N]othing in this Act shall (1) preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an emission limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this act, such State ... may not adopt or enforce any [such requirement] which is less stringent than [the federal requirement]. CWA § 510; 33 U.S.C. § 1370.

Marine sanitation devices on houseboats. “A State may adopt and enforce a statute ... with respect to the design, manufacture, or installation or use of any marine sanitation device on a houseboat, if such statute ... is more stringent than the standards ... promulgated under this section.” CWA § 312(f)(1)(B); 33 U.S.C. § 1322(f)(1)(B).

Endangered Species Act

Any state law on commerce in endangered and threatened species is void to the extent it permits what is prohibited by the ESA, or prohibits what is authorized under the ESA. The ESA shall not otherwise void any state law intended to conserve wildlife or fish, or permit or prohibit the sale of wildlife or fish. Any state law respecting the taking of an endangered or threatened species may be more restrictive than the ESA, but not less. ESA § 6(f); 16 U.S.C. § 1535(f).

Federal Insecticide, Fungicide and Rodenticide Act

“A State may regulate the sale or use of any federally registered pesticide or device ... , but only if ... the regulation does not permit any sale or use prohibited by this Act.” FIFRA § 24(a); 7 U.S.C. § 136v(a).²

² Several narrow provisions of FIFRA’s preemption section, those in subsection (c), are not included here. FIFRA § 24(c); 7 U.S.C. § 136v(c).

Ports and Waterways Safety Act

“Nothing contained in this section, with respect to structures [on, in, or adjacent to waters], prohibits a State ... from prescribing higher safety equipment requirements or safety standards” PWSA § 6(b); 33 U.S.C. § 1225(b).

Resource Conservation and Recovery Act

Hazardous waste regulation. “Upon the effective date of regulations under this title [governing hazardous waste regulation] no State ... may impose any requirement less stringent than those authorized under this title respecting the same matter as governed by such regulations, except that if application of a regulation ... is postponed or enjoined by ... a court, no State ... shall be prohibited from acting ... until such time as such regulation takes effect. Nothing in this act ... shall be construed to prohibit any State ... from imposing any requirements ... which are more stringent than such regulations.” RCRA § 3009; 42 U.S.C. § 6929.

Underground storage tanks. “Nothing in this title shall preclude or deny any right of any State ... to adopt or enforce any regulation ... respecting underground storage tanks that is more stringent than ... under this title” RCRA § 9008; 42 U.S.C. § 6991g.

Surface Mining Control and Reclamation Act

No state law shall be “superseded” except insofar as it is “inconsistent” with SMCRA. Not to be construed as inconsistent are state laws that provide for (1) land use and environmental controls and regulations of surface coal mining and reclamation operations stricter than does SMCRA, or (2) the control of surface mining and reclamation operations for which no provision is contained in SMCRA. SMCRA § 505; 30 U.S.C. § 1255.

State law is preempted whether less or more stringent than the federal standard, but waiver may be available

Clean Air Act

Motor vehicle emission standards and requirements. “No State ... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle ... as condition precedent to the initial retail sale ... of such motor vehicle” CAA § 209(a); 42 U.S.C. § 7543(a). Whenever EPA certification regulations are in effect as to motor vehicle parts or engines, no state shall adopt or enforce “any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part.” CAA § 209(c); 42 U.S.C. § 7543(c).

EPA shall waive application of section 209 to states that adopted emission standards before March 30, 1966 (i.e., California), if the state determines that its standards are at least as protective as federal standards. CAA § 209(b); 42 U.S.C. § 7543(b).

A state with an approved nonattainment plan may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles, and take other actions referred to in section 209(a), if its standards are identical to the California standards for which a waiver has been granted for that model year. CAA § 177; 42 U.S.C. § 7507.

Nonroad vehicle emission standards or other requirements. For nonroad vehicles and engines other than those referred to in CAA section 209(e)(1) (page 6), EPA shall authorize California to adopt standards and other requirements relating to emissions control, if California finds they will be at least as protective as federal standards. Any other state having an approved nonattainment plan may adopt standards identical to California's. CAA § 209(e)(2); 42 U.S.C. § 7543(e)(2).

Fuels and fuel additives. “[N]o State ... may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control ... respecting any characteristic or component of a fuel or fuel additive” if EPA finds that no such control is necessary, or has prescribed such a control (unless the state control is identical). However, any state for which section 209(a) has been waived (see page 4) may so prescribe.

“A State may prescribe and enforce, for purposes of motor vehicle emission control, a control ... respecting the use of a fuel or fuel additive” if the state's implementation plan so provides. EPA may approve such a provision in a state implementation plan only under specified conditions. CAA § 211(c)(4); 42 U.S.C. § 7545(c)(4).

Clean Water Act

“[A]fter the effective date of ... regulations promulgated under this section, no State ... shall adopt or enforce any statute ... with respect to the design, manufacture, installation or use of any marine sanitation device on any vessel subject to the provisions of this section.” (See page 3 for CWA treatment of houseboats.)

“[I]f any State determines that [water quality] requires greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage ... [once EPA] determines that adequate facilities for the ... removal and treatment of sewage ... are reasonably available” CWA §§ 312(f)(1)(A), (f)(3); 33 U.S.C. §§ 1322(f)(1)(A), (f)(3).

Hazardous Materials Transportation Act

The general rule is that, unless authorized by another law of the United States, a state law is preempted if (1) complying with both it and the HMTA is impossible, or (2) it is an obstacle to carrying out the HMTA. In addition, state laws dealing with five specified topics are preempted unless “substantively the same” as the HMTA and authorized by another law of the United States. Also, a state may establish a highway routing designation over which hazardous material may or may not be transported only if it complies with the Secretary of Transportation's regulations.

The Secretary may waive preemption if the state requirement offers “at least as much protection” as the HMTA and is “not an unreasonable burden on commerce.” 49 U.S.C. § 5125.

Noise Control Act

Railroad noise emissions. A State may regulate levels of environmental noise or the use, operation or movement of any product if EPA determines that such regulation is necessitated by special local conditions and is not in conflict with regulations under this section. NCA § 17(c)(2); 42 U.S.C. § 4916(c)(2).

Motor carrier noise emissions. A State may regulate levels of environmental noise or the use, operation or movement of any product if EPA determines that such regulation is necessitated by special local conditions and is not in conflict with regulations under this section. NCA § 18(c)(2); 42 U.S.C. § 4917(c)(2).

Toxic Substances Control Act

“[N]othing in this Act shall affect the authority of any State ... to establish or continue in effect regulation of any chemical substance” However, “if the [EPA] requires by a rule ... the testing of a chemical substance ..., no State ... may ... establish or continue in effect a requirement for the testing of such substance ... for purposes similar to those for which testing is required under such rule.” Similarly, preemption is triggered when there is an EPA substance rule designed to protect health or the environment, though in this instance with exceptions (as when the state/local rule is identical to the EPA rule).

Upon application of a State, EPA may exempt a requirement designed to protect health or the environment if compliance with the requirement (1) would not cause the manufacturing or use of the substance to violate requirements under TSCA, and (2) it provides a “significantly higher degree of protection” than the requirement under TSCA, and does not “unduly burden interstate commerce.” TSCA § 18; 15 U.S.C. § 2617.

State law is preempted whether less or more stringent than the federal standard — no waiver available

Clean Air Act

Nonroad vehicle emission standards or other requirements. No State may adopt or attempt to enforce any standard or other requirement relating to the control of emissions from two specified categories of new nonroad vehicles or engines. CAA § 209(e)(1); 42 U.S.C. 7543(e)(1).

Aircraft emissions. “No State ... may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.” CAA § 233; 42 U.S.C. § 7573.

Federal Insecticide, Fungicide and Rodenticide Act

“[A] State shall not impose ... any requirements for labelling or packaging in addition to or different from those required under this Act.” FIFRA § 24(b); 7 U.S.C. § 136v(b).

Lead-Based Paint Poisoning Prevention Act

“It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States ... insofar as they ... provide for a requirement, prohibition, or standard relating to the lead content in paints ... which differs from ... this Act” LPPPA § 504; 42 U.S.C. § 4846.

Toxic Substances Control Act

“[I]f [EPA] requires ... the testing of a chemical substance ... , no State ... may ... establish or continue in effect a requirement for the testing of such substance ... for purposes similar to those for which testing is required [by EPA].” TSCA § 18(a)(2)(A); 15 U.S.C. § 2617(a)(2)(A).