

# Local Regulation of Air Polluting Facilities

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“Think globally, act locally.” So goes the famous environmental maxim.

Unfortunately, it’s not legal to “act locally” everywhere in the United States. In many states, county and municipal governments are prohibited from passing their own environmental laws.

Since it’s easiest for people power to overcome corporate power at the local level, the strongest policies of various sorts are often passed in smaller levels of government, sometimes percolating up to influence larger level policy as momentum builds. The nation’s strongest mercury and dioxin air pollution laws have been passed in two tiny boroughs in Pennsylvania – via ordinances drafted by this author – setting what are likely also the first local standards for continuous emissions monitoring and real-time public disclosure of toxic chemicals. These ordinances were initially drafted to go after proposed waste coal burning and waste coal-to-oil refining industries, they ended up being used first in municipalities where crematoria were proposed, stopping both when the companies involved decided that they did not want to locate in the boroughs if they’d be subject to such strict regulation. It is the hope of this author that these ordinances will be just the beginning of a movement to subject existing and proposed air polluters to a high level of public accountability so that the true toxic emissions from these industries

are known and that those unwilling to comply with the strongest possible regulations shut down or never start up in the first place.

These local laws in Pennsylvania are only possible because federal law allows the states to have stricter air pollution laws, and Pennsylvania's state air pollution law, in turn, allows local governments to have their own – even stricter – laws. Most federal environmental laws have clauses that enable states to have stricter laws of their own – effectively setting a national regulatory “floor.” The Clean Air Act (CAA), at 42 U.S.C. § 7416, allows states to have stricter air pollution laws than the federal floor:

§ 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.

This statute and case law flowing from it have made it clear that the federal Clean Air Act does not prevent states or local governments from adopting and enforcing air pollution laws that are stricter than federal laws and regulations. In *Union Electric Co. v. Environmental Protection Agency*, the 8th Circuit stated that “States may adopt and enforce emission standards and control strategies even more stringent than the federal [air standards]”<sup>1</sup> and concluded that “the States are free to adopt limitations even stricter than the federal, and it cannot be contended that the States are limited in their implementation plans to doing no more than assuring that the national standards are to be met and

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<sup>1</sup> *Union Electric Co. v. Environmental Protection Agency*, 515 F.2d 206, 213 (1975).

maintained.”<sup>2</sup> This unambiguous conclusion was affirmed a year later by the U.S. Supreme Court, which concluded that “the States may submit implementation plans more stringent than federal law.”<sup>3</sup>

The Clean Air Act does not give local governments a right to have stricter laws, however. Even though it plainly speaks of “the *right* of any State *or political subdivision thereof* to adopt or enforce” air pollution laws (emphasis added), political subdivisions of states are creatures of each state and only have this right if the state allows them to. This was addressed in 1990, when East Providence, Rhode Island had tried to block a proposed coal-burning power plant with a local law banning the commercial use of coal anywhere in the city. The U.S. District Court found that Rhode Island’s state laws preempted the ordinance and that the Clean Air Act did nothing to save the city’s ordinance:

[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.<sup>4</sup>

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.”<sup>5</sup> In that case, the city of Madison Heights, Michigan tried to stop a trash incinerator from being built in their city by passing a local

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<sup>2</sup> *Id.* at 220.

<sup>3</sup> *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 265 (1976).

<sup>4</sup> *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828, 833 n.11 (1990).

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

ordinance. The city noted that the proposed incinerator would be within 100 feet of a community park, 300 feet of a school, 550 feet of a residential subdivision, and 700 feet of a senior citizens center.<sup>6</sup> Due to concerns for public health, the city passed an ordinance in 1990 to regulate the location of air pollution sources, including solid waste incinerators.<sup>7</sup> The court concluded that the ordinance was invalid because it was preempted by the state's solid waste management law and that the federal Clean Air Act did not give the city a right to have stricter air pollution laws.<sup>8</sup> Thus, the "right" that the Clean Air Act speaks of is not a right unless the state gives their local governments that right.

Clauses in laws that explicitly preserve the rights of lower levels of government to enact stricter regulations are known as "savings" clauses. Like the Clean Air Act's savings clause described above – allowing states (and possibly, local governments) to have stricter air pollution laws – at least 14 states have these "savings" clauses in their own statewide air pollution laws, allowing their local governments to have stricter laws. Not all states are as lucky, though. At least ten have explicit preemption clauses or court decisions that found that their state air laws impliedly preempt any local laws by occupying the field of air pollution control, forbidding stronger local air pollution laws in those states. Most other states fall somewhere in-between or are fairly silent on the topic. Toward one side, there are states that preempt their local governments, but allow some wiggle room, such as allowing local laws that regulate pollutants not regulated by the state, or allowing stronger local laws as long as they follow certain state-established guidelines or receive state approval. In the middle are states that allow local adoption

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<sup>6</sup> *Id.* at 167.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 169.

and enforcement of the state's standards, so that they're not stricter or weaker but perhaps could be enforced more passionately if local officials were so inclined. Often, this is found where there are state policies allowing for local or regional air pollution *programs*, with far more rigorous requirements than local ordinances – essentially creating mini-versions of the state air pollution regulatory program. Usually, these programs must be approved by the state. They sometimes they take the place of the state, delegating air pollution permitting and enforcement duties to the local/regional program, but some states allow overlapping, concurrent jurisdiction between state and local/regional air pollution programs. Some states allow these programs to have stricter standards while others forbid it. On the other extreme, there are some states who essentially handcuff themselves with statutes that forbid their state environmental agencies from being any more strict than federal minimums – or make it very difficult for them to do so.

In evaluating the 50 U.S. states for this paper, 14 states with savings clauses have been identified, 10 states with preemption have been identified, five states fall somewhere in-between, and 21 remain undetermined, many requiring further research.<sup>9</sup> Overlapping with these categories are at least 22 states identified so far that provide for local or regional air pollution regulatory programs of one sort or another – many of which allow stronger air pollution regulation, but are not counted here in the “savings” column unless it's clear that local governments may adopt stricter laws without having to set up an entire regulatory program or seek state approval. Nine of those in the “undetermined”

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<sup>9</sup> These totals are based largely on keyword searches of each of the 50 states' codes, searching the tables of contents (for “local or govern! or subdivisio! or ordinanc!” in Lexis), text searching the body of the code for the word “stringent,” and scanning the key air statutes for related case law. Some savings and preemption clauses, and relevant case law were found by other means, through law review articles or otherwise. It's possible that the savings and preemption clause totals are underestimates, and that additional clauses may exist, but have escaped notice so far. However, it's most likely that the remaining “undetermined” states will require deeper research into case law.

category allow for local or regional programs, but don't have clear savings or preemption clauses regarding local laws outside of such programs.

### **States with Savings Clauses**

At least 14 states give their local governments a right to “act locally” on air pollution. The states are Arizona,<sup>10</sup> California,<sup>11</sup> Indiana,<sup>12</sup> Iowa,<sup>13</sup> Kentucky,<sup>14</sup> Maine,<sup>15</sup> Maryland,<sup>16</sup> Michigan,<sup>17</sup> New York,<sup>18</sup> Ohio,<sup>19</sup> Oklahoma,<sup>20</sup> Pennsylvania,<sup>21</sup> Tennessee<sup>22</sup> and Utah.<sup>23</sup>

Arizona – the “don't tread on me” state<sup>24</sup> – has one of the more novel approaches to the state/local power dynamic. In the general provisions of their state environmental code, A.R.S. § 49-112(A) provides:

When authorized by law, a county may adopt a rule, ordinance or other regulation that is more stringent than or in addition to a provision of this title or rule adopted by the director or any board or commission authorized to adopt rules pursuant to this title if all of the following conditions are met:

1. The rule, ordinance or other regulation is necessary to address a peculiar local condition.
2. There is credible evidence that the rule, ordinance or other regulation is either:

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<sup>10</sup> A.R.S. § 49-479.

<sup>11</sup> Cal Health & Saf Code §§ 41508 & 42708.

<sup>12</sup> Ind. Code § 13-17-12-1.

<sup>13</sup> Iowa Code § 455B.145.

<sup>14</sup> KRS § 77.170.

<sup>15</sup> 38 M.R.S. § 597.

<sup>16</sup> Md. Environment Code § 2-104.

<sup>17</sup> MCLS § 324.5542.

<sup>18</sup> NY CLS ECL § 19-0709.

<sup>19</sup> Ohio Rev. Code § 3704.11.

<sup>20</sup> 27A Okl. St. § 2-5-103.

<sup>21</sup> 35 P.S. 4012(a).

<sup>22</sup> Tenn. Code § 68-201-202.

<sup>23</sup> Utah Code § 19-2-121.

<sup>24</sup> As of this writing, Arizona is considering proudly proclaiming its “Tea Party” affection by introducing a “Don't Tread on Me” license plate design. See “Brewer mulls ‘Don't Tread On Me’ license plate,” Associated Press, April 20, 2011, <http://azcapitoltimes.com/news/2011/04/20/brewer-mulls-dont-tread-on-me-license-plate/> (last visited Apr. 28, 2011).

(a) Necessary to prevent a significant threat to public health or the environment that results from a peculiar local condition and is technically and economically feasible.

(b) Required under a federal statute or regulation, or authorized pursuant to an intergovernmental agreement with the federal government to enforce federal statutes or regulations if the county rule, ordinance or other regulation is equivalent to federal statutes or regulations.

This seems to provide broad latitude for county-level environmental laws of all sorts in Arizona, perhaps one of the last places one might expect such forward-thinking policy. It would depend, however, on how a judge interprets what is “necessary to address a peculiar local condition.” No case law citing this statute is available in Lexis, so it may be that it is untested to date. On top of this broad local environmental authority, Arizona has a savings clause specific to air pollution. A.R.S. § 49-479 allows counties to adopt air pollution rules, so long as they consider the latest scientific knowledge in identifying air pollution’s effects on health and welfare, including combinations of pollutants and chemical interactions. The statute also requires a 20 days notice and a public hearing before adoption or amendment of such a rule. Aside from the drawback that this all empowers counties, but not cities and towns (the only types of municipalities that Arizona has), to adopt stricter laws, this is one of the nation’s best savings clauses.

California has its air regulation broken out into 35 fairly autonomous regional air management districts,<sup>25</sup> that are generally empowered to adopt standards stricter than state law. For example, the state code for the California Air Resources Board’s program on toxic air contaminants allows districts to “adopt and enforce equally effective or more stringent airborne toxic control measures than the airborne toxic control measures

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<sup>25</sup> California Map for Local Air District Websites, California Air Resources Board, <http://www.arb.ca.gov/capcoa/dismap.htm> (last visited Apr. 28, 2011).

adopted by the state board.”<sup>26</sup> Some of these 35 air districts are larger than some small to medium-sized eastern U.S. states, making them hard for community activists to influence. California community leaders may find some reassurance in a tiny provision in the state code that seems to allow stricter local air laws. In the general provisions of the state’s air resources code is a provision for “additional standards” providing that “...any local or regional authority may establish additional, stricter standards than those set forth by law or by the state board for nonvehicular sources.”<sup>27</sup> Surprisingly, there isn’t much case law citing this provision and the handful of cases are almost exclusively focused on air management districts, with no cases addressing this provision’s impact on county and municipal government rights. Another provision in California’s air resources code, in a chapter on monitoring devices, provides that “[t]his chapter shall not prevent any local or regional authority from adopting monitoring requirements more stringent than those set forth in this chapter....”<sup>28</sup> The introduction to this chapter on air monitoring practically begs for local leadership requiring continuous monitoring, stating, “[t]he Legislature further finds and declares that public complaints about excessive emissions from stationary sources are difficult or impossible to evaluate in the absence of adequate means of monitoring emissions on a continuing basis.”<sup>29</sup>

Indiana has a very straight forward savings clause, providing that “[a]ir pollution control laws do not prevent towns, cities, or counties from: (1) enforcing local air pollution ordinances consistent with air pollution control laws; or (2) adopting or

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<sup>26</sup> Cal Health & Saf Code § 39666(d).

<sup>27</sup> Cal Health & Saf Code § 41508.

<sup>28</sup> Cal Health & Saf Code § 42708.

<sup>29</sup> Cal Health & Saf Code § 42700(b).



enforcing more restrictive ordinances to further the expressed purposes of air pollution control laws.”<sup>30</sup>

Iowa has a provision about local air pollution programs that seems to indicate that the state allows stricter local air laws, but doesn’t have a clear savings clause. Its air quality code, in discussing acceptance of local air programs, states that “[i]n evaluating an air pollution control program, consideration shall be given to whether such program provides for... [o]rdinances, rules and standards establishing requirements consistent with, or more strict than, those imposed by [state air laws and regulations].”<sup>31</sup>

Kentucky, while providing for local air quality districts that are empowered to adopt stricter air laws,<sup>32</sup> also has a savings clause preserving the right of local governments to adopt air ordinances as well, stating that: “the General Assembly does not, by the provisions of this chapter, intend to occupy the field...” and that “the provisions of this chapter do not prohibit the enactment or enforcement of any local ordinance stricter than the provisions of [the state’s air laws and regulations], which local ordinance prohibits, regulates, or controls air pollution.”<sup>33</sup>

Maine has a strong savings clause that was put to the test by Big Paper. It states:

Nothing in this chapter shall be construed as a preemption of the field of air pollution study and control on the part of the State. Municipalities may study air pollution and adopt and enforce air pollution control and abatement ordinances, to the extent that these ordinances are not less stringent than this chapter or than any standard, order or other action promulgated pursuant to this chapter. Local ordinance provisions which touch on matters not dealt with by this chapter or which are more stringent than this chapter shall bind persons residing in the municipality.<sup>34</sup>

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<sup>30</sup> Ind. Code § 13-17-12-1.

<sup>31</sup> Iowa Code § 455B.145(1).

<sup>32</sup> KRS § 77.180. The state has concurrent jurisdiction with the air pollution control districts (KRS § 224.20-130), even while the districts may have stricter air standards (OAG 70-610).

<sup>33</sup> KRS § 77.170(1).

<sup>34</sup> 38 M.R.S. § 597.

In May 1988, the town of Jay, Maine passed the Jay Environmental Control and Improvement Ordinance, requiring local air polluters to obtain permits from the town's planning board if they wish to continue to pollute.<sup>35</sup> International Paper Company (IP) operated a polluting paper mill in the town, which the town permitted in 1991, then fined when they would exceed the town's stricter-than-state pollution limits.<sup>36</sup> IP sued the town, challenging the ordinance and claiming that the town's ordinance both frustrated state law enforcement by imposing local penalties and that it was double jeopardy for the company to be subject to enforcement at both the local and state levels.<sup>37</sup> The state's savings clause held up the town's right to enforce the ordinance with penalties for violations and the court further found that the stricter local laws do not frustrate state law, but when they share the same purposes and concerns expressed by state law, they advance the same purpose.<sup>38</sup>

Maryland's savings clause is pretty basic and untested. It states:

(a) Adopting ordinances, rules, or regulations. –

(1) Except as provided in this section, this title does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards.

(2) A political subdivision may not adopt any ordinance, rule, or regulation that sets an emission standard or ambient air quality standard less stringent than the standards set by the Department under this title.<sup>39</sup>

Michigan has a good air pollution savings clause even though it didn't seem to matter (and wasn't even brought up) in the unfortunate Madison Heights case discussed above, where the case turned on the fact that Michigan's *solid waste* law preempted the

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<sup>35</sup> *International Paper Co. v. Town of Jay*, 665 A.2d 998, 1000 (1995).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1003 n.8.

<sup>38</sup> *Id.* at 1002.

<sup>39</sup> Md. Environment Code § 2-104.

ordinance. The savings clause, which includes an unusual provision allowing the state to step in and enforce the local ordinance,<sup>40</sup> states:

(1) Nothing in this part or in any rule promulgated under this part invalidates any existing ordinance or regulation having requirements equal to or greater than the minimum applicable requirements of this part or prevents any political subdivision from adopting similar provisions if their requirements are equal to or greater than the minimum applicable requirements of this part.

(2) When a political subdivision or enforcing official of a political subdivision fails to enforce properly the provisions of the political subdivision's ordinances, laws, or regulations that afford equal protection to the public as provided in this part, the department, after consultation with the local official or governing body of the political subdivision, may take such appropriate action as may be necessary for enforcement of the applicable provisions of this part.<sup>41</sup>

Michigan local government power to adopt air pollution control ordinances may be limited to townships, cities, villages and charter counties – leaving “noncharter” counties out of the game, according to a 1998 opinion by the Michigan Attorney General, affirming the right of local air ordinances to ban incinerators. This allowance of a ban is also unusual, as most regulatory frameworks – especially when granted to local governments – allow “reasonable” regulation but not outright bans. The AG opinion stated that these ordinances could be used to ban “construction or operation of any other combustion source, including a wood-fired power plant, provided that the ordinance is reasonably related to public health, safety, or welfare and does not contravene state or federal law.”<sup>42</sup>

New York’s saving clause states, in part:

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<sup>40</sup> In deliberations over a local air pollution ordinance considered by the City of Erie, Pennsylvania, the state’s Department of Environmental Protection representative told the city that even if the city required installation of continuous emissions monitors for pollutants regulated under the state-granted permit but for which the state permit only requires annual stack tests, the state would not even be allowed to use the city’s better test data to enforce the state permit’s limits. Indeed, having a state willing to step in and enforce a city’s stronger ordinance is profound and unusual.

<sup>41</sup> MCLS § 324.5542.

<sup>42</sup> 1998 Mich. AG LEXIS 32 (1998).

Any local laws, ordinances or regulations of any governing body of a county, city, town or village which are not inconsistent with this article... shall not be superseded by it, and nothing in this article... shall preclude the right of any governing body of a county, city, town or village to adopt local laws, ordinances or regulations which are not inconsistent with this article.... Any local laws, ordinances or regulations of a county, city, town or village which comply with at least the minimum applicable requirements set forth in any code, rule or regulation promulgated pursuant to this article shall be deemed consistent with this article or with any such code, rule or regulation.<sup>43</sup>

This clause codified what the courts in Maine found – that stricter equals “not inconsistent” – an important interpretation that other states don’t necessarily share (note New Jersey below). An additional part of the New York clause (left out of the above excerpt) is unique in that if a county and a municipality within that county both have their own air laws, then the county’s law covers all parts of the county except the municipality that has its own air law, for as long as the municipality’s law is in effect.

Ohio’s saving clause is another untested, but good one – one of the rare ones to explicitly signal to local governments that they may regulate air contaminants that the state fails to regulate. It reads:

[Ohio’s air code provisions] do not limit the authority a political subdivision of the state has to adopt and enforce ordinances or regulations relative to the prevention, control, and abatement of air pollution, except that every such local ordinance or regulation shall be consistent with [the state air code], and shall include emission standards and other regulations which are not less stringent than the [state’s regulations]. Nothing in this section shall prohibit any such local law from controlling any air contaminant or source of air contamination which is not subject to control under regulations of the director of environmental protection.<sup>44</sup>

Oklahoma’s savings clause – also untested – states that:

Nothing in the Oklahoma Clean Air Act... shall prevent cities, towns and counties from enacting ordinances or codes with respect to air pollution which will not conflict with the provisions of the Oklahoma Clean Air Act

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<sup>43</sup> NY CLS ECL § 19-0709.

<sup>44</sup> Ohio Rev. Code § 3704.11.

and which contain provisions more stringent than those fixed by the operation of the Oklahoma Clean Air Act; provided, however, that any city or town which has a population of less than three hundred thousand (300,000) persons according to the most current census shall not enforce any ordinance or code regarding air pollution containing more stringent provisions unless and until such ordinance or code is reviewed by the Council and approved as to its reasonableness and technical feasibility.<sup>45</sup>

The population criteria empowers only Oklahoma City, the City of Tulsa and the counties they sit in (Oklahoma and Tulsa Counties) to pass laws without requiring state approval, however.

Pennsylvania has both a savings clause and a provision for local air programs, applicable to the counties covering the state's two largest cities – which run their own air programs in place of the state. The provisions do not conflict with one another, so a county or municipality overlapping with one of the two county air programs may use their authority to adopt more stringent laws. The saving provision states:

Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act or the rules and regulations promulgated under either this act or the Clean Air Act.<sup>46</sup>

A further provision in the code specifies that, for purposes of uniformity, the “the civil and criminal penalties and equitable remedies for air pollution violations” in any local ordinance must be the same penalties and remedies as the state law provides, and that if they are inconsistent, the state's provisions shall apply.<sup>47</sup> Similar to Maine, the state allows, and encourages, the “double-jeopardy” effect of polluters being fined twice – once by the state and again by the local government – spelling this out in the penalty provision, saying that “the purpose of this act is to provide additional and cumulative

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<sup>45</sup> 27A Okl. St. § 2-5-103.

<sup>46</sup> 35 P.S. § 4012(a).

<sup>47</sup> 35 P.S. § 4012(g).

remedies to abate the pollution of the air of this Commonwealth.”<sup>48</sup> In order to determine whether an ordinance is not less stringent than state law, the ordinance must establish emissions standards that can be compared with the state Air Pollution Control Act.<sup>49</sup>

Tennessee has a savings clause, but it’s not quite fair to consider it as such, since it only applies to a city, town or county with more than 600,000 population – which is essentially just the City of Memphis, Shelby County (which includes Memphis) or Davidson County (where Nashville is). Knox County (home to Knoxville) doesn’t quite measure up. These few governments are entitled “to enact, by its chief legislative body, ordinances or regulations not less stringent” than state air laws.<sup>50</sup> Any other county or municipality in the state may adopt an air pollution *program*, but that requires a much more rigorous process and state approval.<sup>51</sup> It seems Tennessee got it backwards when prioritizing where to place its size criteria.

Utah’s Air Conservation Act contains the shortest savings clause yet, stating that “[a]ny political subdivision of the state may enact and enforce ordinances to control air pollution that are consistent with this chapter.”<sup>52</sup> Like so many other savings clauses, there is no case law spelling out what else this means, so it’s unclear whether “consistent” includes “stricter.”

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<sup>48</sup> *Id.*

<sup>49</sup> *Ridgeway Zoning Hearing Bd. v. Buehler Lumber Co.*, 19 Pa. D. & C.3d 780 (1981).

<sup>50</sup> Tenn. Code § 68-201-202.

<sup>51</sup> Tenn. Code § 68-201-115.

<sup>52</sup> Utah Code § 19-2-121.

## The “In-Between” States

There are a handful of states in an “in-between” area where local governments aren’t very empowered, but aren’t preempted, either. States falling in this realm include Alabama,<sup>53</sup> Colorado,<sup>54</sup> Hawaii,<sup>55</sup> New Jersey<sup>56</sup> and Texas.<sup>57</sup>

Alabama’s “not-quite-savings” clause starts off in the opposite direction, with an intent to preempt the field of air pollution law, stating: “[e]xcept as provided in this section, it is the intention of this chapter to occupy by preemption the field of air pollution control within all areas of the State of Alabama.”<sup>58</sup> After providing for local air pollution control programs, this section of the state code, titled “conflict of laws,” sets out a fairly empowering savings clause of sorts. It allows “[a]ny municipal governing body and each county board of health” to “adopt and enforce any ordinance, regulation, or resolution requiring the control or prevention of air pollution” so long as the ordinance is “identical in substance” to the state’s air regulations or it regulates “classes or types of sources or classes or types of air contaminants” that the state does not regulate.<sup>59</sup> If the local air law regulates a source or type of pollution that the state *does* regulate, and does so more strictly, the ordinance may only be enforced if the state environmental commission finds within 60 days that the local law is compatible with state law and the state’s comprehensive plan.<sup>60</sup>

Colorado authorizes “[h]ome rule cities, cities, towns, counties, and cities and counties [sic]” to “enact local air pollution resolutions or ordinances.” It requires that

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<sup>53</sup> Code of Ala. § 22-28-23.

<sup>54</sup> Colo. Rev. Stat. § 25-7-128.

<sup>55</sup> HRS § 342B-5.

<sup>56</sup> N.J. Stat. § 26:2C-22.

<sup>57</sup> Tex. Health & Safety Code § 382.113.

<sup>58</sup> Code of Ala. § 22-28-23(a).

<sup>59</sup> Code of Ala. § 22-28-23(d).

<sup>60</sup> *Id.*

such resolution or ordinance “provide for hearings, judicial review, and injunctions” and permits them to be the same as, or more restrictive than the state’s air regulations. It also specifically empowers these local governments to control “any air pollution or air pollution source which is not subject to control” by the state.<sup>61</sup>

While not requiring state approval, Colorado’s savings clause seeks local government coordination with the state, encouraging the local governments to “submit their adopted plans and regulations as revisions to the state implementation plan for Colorado.” Local standards that are “submitted and approved as revisions to the state implementation plan shall be enforced as such by the [state environmental agency].”<sup>62</sup> The savings clause requires local governments to transmit to the state a copy of any enforcement order or permit granted as they are issued, so that the state environmental agency is aware.<sup>63</sup> It also requires that the state and local officials confer and review each other’s records at least semiannually.<sup>64</sup>

Colorado also accounts for conflicts between overlapping county and municipal air ordinances, as New York does, but instead of carving one out from another, Colorado specifies that where there are inconsistencies and the municipal law is weaker than the county law, the county law applies to the extent of the inconsistency.<sup>65</sup>

Finally, Colorado places certain specific limits on what can be done with a local air law, barring any local rules that are more stringent than state law regarding ozone-depleting chemicals, hazardous air pollutants, or asphalt and concrete plants and crushing

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<sup>61</sup> C.R.S. 25-7-128(1).

<sup>62</sup> *Id.*

<sup>63</sup> C.R.S. 25-7-128(4).

<sup>64</sup> C.R.S. 25-7-128(6).

<sup>65</sup> C.R.S. 25-7-128(3).



equipment.<sup>66</sup> This broad preemption on stricter local laws relating to hazardous air pollutants takes away a lot of what might be done in a local air law, thus placing Colorado in an “in-between” category. Furthermore, local governments may not impose less restrictive requirements on their own stationary sources than their ordinance imposes on “similar nongovernmental sources” – which is only fair, but may discourage local governments that manage their own polluting facilities.<sup>67</sup> Finally, Colorado sets a limit of \$300 per day on the civil penalties for noncompliance with a local air ordinance that has not been submitted for adoption in the state implementation plan.<sup>68</sup> Worded as that is, it seems designed to encourage local governments to submit their rules for state adoption in order to be able to levy more serious penalties.

Hawaii has a state air pollution clause addressing local ordinances in a way that is both a savings clause and preemption. It preempts local laws covering the same air pollutant or air pollution control matter, but permits local air laws on pollutants or controls not covered by the state. It reads:

**(a)** All laws, ordinances, and rules inconsistent with this chapter shall be void and of no effect.

**(b)** Any county may adopt ordinances and rules governing any matter relating to air pollutant and air pollution control which is not governed by a rule of the department adopted pursuant to this chapter; provided that any county ordinance or rule relating to air pollution control shall be void and of no effect as to any matter regulated by a rule of the department upon the adoption thereof.<sup>69</sup>

New Jersey – notorious for its industrial pollution – has a convoluted set of policies regarding local control which has morphed over time, making it hard to understand by following either the statutory language or the case law. Last revised in

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<sup>66</sup> C.R.S. 25-7-128(7).

<sup>67</sup> *Id.*

<sup>68</sup> C.R.S. 25-7-128(8).

<sup>69</sup> HRS § 342B-5.

1995, the main state statute addressing the matter of local regulatory authority over air pollution<sup>70</sup> preempts the field,<sup>71</sup> yet allows local governments to adopt ordinances as strong as the state air laws, but not stronger unless the local government obtains state approval from the state.<sup>72</sup>

Earlier versions of the state’s statute regarding “relation of local ordinances or regulations to state law” used the term “inconsistent” to describe what is not allowed in a local ordinance. It stated:

Nothing in this act or in any code, rules or regulations promulgated pursuant thereto shall preclude the right of any governing body of a municipality or county or board of health to adopt ordinances or regulations not inconsistent with this act or any code, rules or regulations promulgated pursuant thereto.<sup>73</sup>

Unlike Maine and New York, however, New Jersey courts have found that a stricter local air ordinance is “inconsistent” and thus invalid.<sup>74</sup> Though the statute has since been revised three times, the basic view on inconsistency has remained.

New Jersey courts have also prohibited municipalities from enacting minimum fines, since a state statute regarding “penalties for violations of municipal ordinances”<sup>75</sup> specifies “[t]he court before which any person is convicted of violating any ordinance of a municipality shall have power to impose any fine....” Adopting a minimum fine for an air pollution violation would thus “deprive judges of their statutory discretion to impose ‘any fine.’”<sup>76</sup> Currently, local governments may not regulate or collect fees from

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<sup>70</sup> N.J. Stat. § 26:2C-22.

<sup>71</sup> *Middlesex County Health Dept. v. Middlesex County Utilities Authority*, 260 N.J. Super. 588, 590 (1992).

<sup>72</sup> *State v. McCormack Terminal, Inc.*, 191 N.J. Super. 48, 50 n.2 (1992).

<sup>73</sup> N.J. Stat. § 26:2C-22 (1966).

<sup>74</sup> *Verona v. Shalit*, 92 N.J. Super. 65, 68-69 (1966), *aff’d*, 232 A.2d 431 (1967).

<sup>75</sup> N.J. Stat. § 40:49-5.

<sup>76</sup> *State v. McCormack Terminal, Inc.*, 191 N.J. Super. 48, 51 (1992).

research or development facilities or facilities that require air pollution operating permits.<sup>77</sup>

Furthermore, another New Jersey statute exempts from local regulation any facility owned by a municipal authority.<sup>78</sup> In 1992, New Jersey courts struck down a local ordinance intended to regulate air pollution from a local landfill operated by a utility authority.<sup>79</sup> After the health department charged the authority with violating the air ordinance by emitting landfill gas odors, the utility authority sued and won. Not only did the case affirm that municipal authorities are exempt from local regulation, but it found that the ordinance was invalid because it was *not* stricter than state law, interpreting the law at the time to preempt local ordinances unless they were more stringent than state air regulations.<sup>80</sup>

Texas' Health and Safety Code authorizes municipalities to “enact and enforce an ordinance for the control and abatement of air pollution” and “any other ordinance, not inconsistent with” the state’s Clean Air Act or the state environmental agency’s rules or orders.<sup>81</sup> It further states that a municipal ordinance “may not make unlawful a condition or act approved or authorized under this chapter or the commission’s rules or orders.”<sup>82</sup> This makes it difficult to have an ordinance more stringent than state law, as such an ordinance would likely make unlawful an activity that the state would permit.

This local authority was put to the test in Houston, in a dispute that started in 2003 and was resolved in 2010.<sup>83</sup> In 2003, Southern Crushed Concrete, LLC sought to

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<sup>77</sup> NJ Environmental Law § 2.27.

<sup>78</sup> N.J.S.A. 40:14B-19(b).

<sup>79</sup> *Middlesex County Health Dept. v. Middlesex County Utilities Authority*, 260 N.J. Super. 588, 590 (1992).

<sup>80</sup> *Id.* at 590 n.2.

<sup>81</sup> Tex. Health & Safety Code § 382.113(a)(2).

<sup>82</sup> Tex. Health & Safety Code § 382.113(b).

<sup>83</sup> *S. Crushed Concrete, LLC v. City of Houston*, 2010 Tex. App. LEXIS 9124 (2010).

build a portable concrete crushing facility in Houston and applied for a state permit. Before the permit was granted, the Presbyterian School Outdoor Education Center located in the area where the concrete crusher would be located. In 2007 – also before the permit was granted – Houston passed an ordinance “prohibiting concrete-crushing operations at a site on which the property line is within 1500 feet of a residential area or a tract on which ‘a child care facility, hospital, nursing home, place of worship, public park, school’ or another concrete-crushing site is located.”<sup>84</sup>

Texas state law prohibits such facilities within 440 yards (1320 feet) of a single or multifamily residence, school, or place of worship. The school is beyond 1,320 feet, but within 1,500 feet of where the concrete crusher would have located and thus its location was acceptable under state law, but unacceptable under Houston’s new ordinance. The state granted the facility a permit in 2008.<sup>85</sup>

When the Court of Appeals ruled on the case, they made two incredible findings that saved the community from the concrete crusher, upholding Houston’s ordinance, and setting a broad view on what it means to be consistent with state air laws. First, when the court looked at what it meant to be “inconsistent” with state law, the court observed:

When the legislature has stated the purpose of a state law and specified the criteria for evaluating compliance with it, then a local ordinance imposing different requirements is inconsistent with the state statute.... But if the state and local provisions serve different purposes, then different methods of determining compliance do not render the two provisions inconsistent.... Thus, to determine if an ordinance is inconsistent with state legislation, a court begins by comparing the purpose of each.... In ascertaining these purposes, the court relies on the statements of the body that enacted the provision.<sup>86</sup>

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<sup>84</sup> *Id.* at 2-4.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *Id.* at 12-14.

The court found that the ordinances served different purposes, as the Houston ordinance was not primarily an air pollution ordinance, but one looking to protect property values, in a zoning sense. It came to this conclusion because there was “no mention of air quality, pollution, emissions, or contaminants” but language about the negative effect on residential property values was contained in the ordinance’s preamble.<sup>87</sup> As the dissenting opinion points out, this isn’t a great argument, as any local government could save their ordinance from preemption by framing it differently while having the same effect. Judge Brown’s dissent states, “[a]llowing municipalities to draft ordinances that conflict with statutes on the pretense that the purpose of the local regulation differs from that of the statute would largely put an end to state-law preemption.”<sup>88</sup> He has a good point, but perhaps the majority agreed that putting an end to such preemption wasn’t a bad thing.

The court’s further findings were even more encouraging. In striving to resolve the conflict, they stated that: “a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction.”<sup>89</sup> They found that “[t]he legislature has imposed only these two restrictions under Tex. Health & Safety Code Ann. § 382.113(b): an ordinance must be consistent with the Texas Clean Air Act and the rules and orders of the Texas Commission on Environmental Quality and may not make unlawful a condition or act approved or authorized under the act or the Commission’s rules or orders.”<sup>90</sup> To

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<sup>87</sup> *Id.* at 15.

<sup>88</sup> *Id.* at 27.

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 12.

reconcile this, the court concluded that – even though the state granted an operating permit to the concrete crushing facility – the state regulations *prohibit* certain activities in certain area, but do not *allow* them elsewhere. Therefore, Houston’s ordinance does not “make unlawful” an act approved by the state’s rules or orders.<sup>91</sup> This delicate distinction saved a Houston neighborhood and may save an untold number of other Texas communities should they use local laws to stop industrial polluters.

### **States Preempting Local Air Laws**

At least ten states preempt local air laws pretty completely. They are Arkansas,<sup>92</sup> Idaho,<sup>93</sup> Kansas,<sup>94</sup> Minnesota,<sup>95</sup> New Hampshire, North Dakota,<sup>96</sup> Rhode Island, South Carolina,<sup>97</sup> Virginia<sup>98</sup> and Washington.<sup>99</sup> New Hampshire and Rhode Island don’t have preemption statutes *per se*, but their courts have found that preemption is implied.

New Hampshire has no preemption statute, but in an appalling 2005 decision by the New Hampshire Supreme Court,<sup>100</sup> the court decided that the state’s air pollution regulations preempted the field. The case before the court was that of Hopkinton, New Hampshire – a community that had been fighting against a plan to burn construction and demolition wood waste in a “biomass” incinerator. The state had granted the applicant, Bio Energy, LLC, a permit that allowed them to annually release 64 tons of regulated air

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<sup>91</sup> *Id.* at 18-19.

<sup>92</sup> A.C.A. § 8-4-306.

<sup>93</sup> Idaho Code § 39-118B.

<sup>94</sup> K.S. §§ 65-3005 and 65-3010.

<sup>95</sup> Minn. Stat. § 116.07(2).

<sup>96</sup> N.D. Cent. Code, § 23-25-03.3.

<sup>97</sup> S.C. Code § 48-1-310.

<sup>98</sup> Va. Code § 10.1-1321.

<sup>99</sup> Rev. Code Wash. § 70.94.230.

<sup>100</sup> *Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145 (2005).

pollutants, including 2.67 tons of lead and 31 pounds of mercury. There are five grade schools and a college within a 5-mile radius of the plant.<sup>101</sup>

Hopkinton had issued a cease and desist order to Bio Energy in 2003, ordering the company not to burn any construction and demolition wood waste at their facility. They based this on their zoning ordinance, which does not permit such waste to be burned in any zone in the city.<sup>102</sup> The court viewed this zoning ordinance as having air pollution objectives and looked at the fact that the state has a “comprehensive” air pollution regulatory program to determine that the state’s program preempts the entire field of air pollution regulation, to the point of forbidding Hopkinton from adopting the sort of land use decisions that Texas courts found were harmonious with state regulatory efforts.

Rhode Island’s court finding of field preemption came out of the case discussed in the opening of this paper,<sup>103</sup> where the East Providence ordinance banning coal burning was found to be preempted by the state’s air pollution regulation. The court stated:

To uphold the City of East Providence’s Ordinance would be to say that the state may not license Newbay’s planned facility to do business in East Providence. ...[B]ecause the state of Rhode Island has adequately evinced its intention to occupy the field of air pollution control and because the East Providence Ordinance may seriously inhibit the regulatory scheme developed by the state, the City of East Providence, R.I., Revised Ordinances, Chapter 10, Article IV, section 10-54, is hereby declared null and void. The future of Newbay’s planned Facility must be determined under the environmental laws and regulations of the state of Rhode Island.<sup>104</sup>

Most of the states with explicit preemption clauses have fairly similar ways of expressing it in their statutes. Many allow exceptions for grandfathering in existing local

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<sup>101</sup> “The Facts About Bio Energy and Solid Waste,” Residents Environmental Action Committee for Health, <http://www.leadfreeordie.com/thefacts.htm> (last visited Apr. 28, 2011).

<sup>102</sup> *Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145, 149 (2005).

<sup>103</sup> *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828 (1990).

<sup>104</sup> *Id.* at 839.

air laws if they're not weaker than state regulation, and allow exemptions for local ordinances to ban open burning. As an example, this is how Arkansas's preemption clause is worded:

A.C.A. § 8-4-306. Political subdivisions preempted – Exception.

(a) In order to avoid conflicting and overlapping jurisdiction, it is the intention of this chapter to occupy, by preemption, the field of control and abatement of air pollution and contamination and no political subdivision of this state shall enact or enforce laws, ordinances, resolutions, rules, or regulations in this field.

(b) Notwithstanding subsection (a) of this section, any political subdivision of this state may enact and enforce laws, ordinances, resolutions, rules, or regulations for the purpose of prohibiting burning in the open or in a receptacle having no means for significantly controlling the fuel/air ratio.

(c) Nothing in this chapter shall be construed to prevent private actions under existing laws.<sup>105</sup>

Some states have exemptions relating to issues that have been politically controversial, like factory farms and feedlots in Minnesota. Minnesota's preemption of local air ordinances (“[n]o local government unit shall set standards of air quality which are more stringent than those set by the Pollution Control Agency”<sup>106</sup>) has been found by the courts to allow an exception for local ordinances to control odors.<sup>107</sup>

One of the clearest signs that a state is captive to corporate interests is that, in at least a handful of states, the states place handcuffs on themselves, barring their own environmental agencies from having regulations any stricter than federal minimums. Such language can be found in Idaho, Illinois, Kansas, Mississippi, Missouri and North Dakota.

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<sup>105</sup> A.C.A. § 8-4-306.

<sup>106</sup> Minn. Stat. § 116.07(2).

<sup>107</sup> *Canadian Connection v. New Prairie Twp.*, 581 N.W.2d 391 (1998) (“we cannot say the state has expressly or impliedly occupied the field of addressing concerns regarding odor from feedlots”).



Idaho is somewhat restrained and only states that stricter-than-federal air pollution regulations “shall not become effective until specifically approved by statute.”<sup>108</sup>

Illinois statutes bar the Illinois Pollution Control Board from imposing “any condition or requirement more stringent than required by the Clean Air Act.”<sup>109</sup>

Kansas requires that its air standards “shall not be any more stringent, restrictive or expansive than those required under the federal clean air act” and requires that “the emission control requirements of any local program to be consistent with such standards.”<sup>110</sup>

Mississippi requires that “[a]ll rules, regulations and standards relating to air quality, water quality or air emissions or water discharge standards... shall be consistent with and shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance relating to air quality, water quality or air emission or water discharge standards.”<sup>111</sup> However, they go on to allow their agencies to regulate air or water emissions where the federal government does not have any standards and the state “determines that such regulations are necessary to protect human health, welfare or the environment.”<sup>112</sup>

Missouri gets protectionist about it, stating that “[t]he Department of Natural Resources or any division thereof shall not adopt any rules with regard to emissions of power plants fired by Missouri coal which are more stringent than any federal law or regulation.”<sup>113</sup>

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<sup>108</sup> Idaho Code § 39-118B.

<sup>109</sup> 415 ILCS 5/9.3.

<sup>110</sup> K.S. §§ 65-3005 and 65-3010.

<sup>111</sup> Miss. Code § 49-17-34(2).

<sup>112</sup> Miss. Code § 49-17-34(3).

<sup>113</sup> R.S.Mo. § 640.033.

North Dakota bars itself from adopting “air quality rules or standards affecting coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities which are more strict than federal.”<sup>114</sup>

### **Most states have local air pollution control powers**

All told, there are at least 19 states where it is possible to enact stricter local air pollution laws without needing state approval – with qualified exceptions in Oklahoma and Tennessee where such power doesn’t extend beyond certain urban areas.

Since the point of this paper was to focus on what is possible to do with local ordinances without needing state approval, states allowing local air pollution control *programs* weren’t closely examined. However, with at least 22 states allowing such programs – many of which allow the programs to have stricter regulations, there are at least 31 states where some form of local air pollution regulatory control is possible. This isn’t counting Washington, DC (where it’s also possible) or Native American tribes, (which are treated as states and where stronger-than-federal laws are also possible) because of a lack of state/local distinction.

Consequently, most of the states – and most of the nation’s most populated states – have local remedies available to them should concerned residents organize to combat air polluters where their people power is strongest: in their own town or county.

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<sup>114</sup> N.D. Cent. Code, § 23-25-03.3.