

Energy Justice Network



...helping communities protect themselves from polluting energy and waste technologies

ENERGYJUSTICE.net

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Lawyers in Grassroots Facility Fighting Battles

- How to Lose
- How to Win



Why Local Ordinances?

- smaller level more easily influenced
 - best in municipalities; many states don't have them
- keeps the fight where the community people power is
 - keeps it political
- play by own rules
- inexpensive
- legal bills socialized
 - legal liability insurance

Preemption vs. Savings Clauses

- Preemption
 - Express
 - Implied
 - Field preemption
 - Conflict preemption
- Savings clauses

Federal Preemption Clauses

- **Express Preemption**
(federal laws set floor *and* ceiling)
 - Federal Insecticide, Fungicide, and Rodenticide Act
7 U.S.C. § 136v(b)
 - Clean Air Act (motor vehicle emissions section)
42 U.S.C. § 7543(a)
- **Implied Preemption**
(courts interpret federal laws to set floor *and* ceiling)
 - Atomic Energy Act of 1954
42 U.S.C. §§ 2011-2296
 - Hazardous Materials Transportation Act
49 U.S.C. §§ 1801-1812

Federal Savings Clauses

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

Federal Semi-Preemptive Clauses

(preempting states in some areas, but not others)

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

Clean Air Act and State/Local Government Authority

§ 7416. Retention of State authority

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

Clean Air Act and State/Local Government Authority

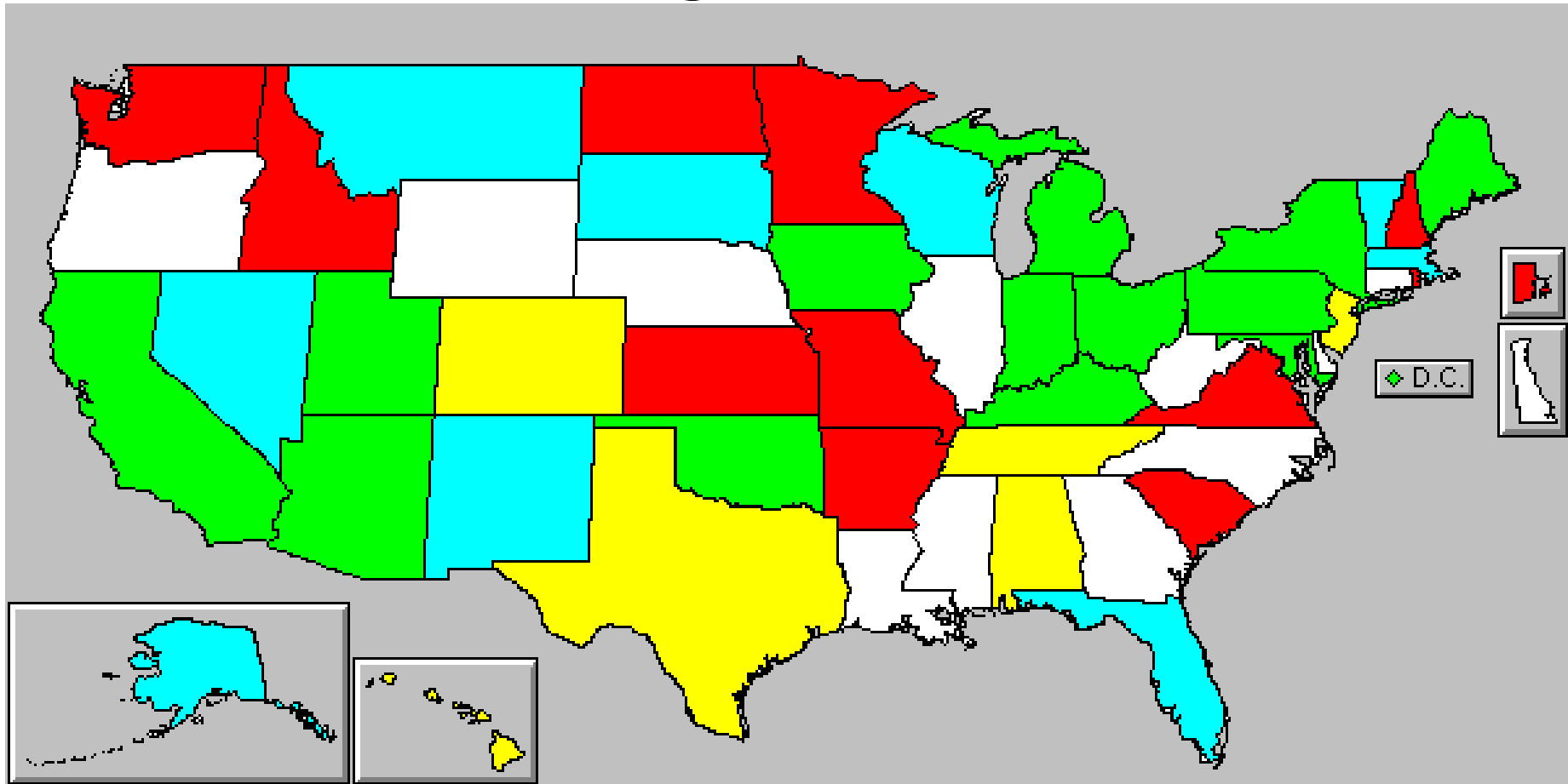
U.S. District Court, in *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828, 833 n.11 (1990):

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

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

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

State-to-Local Air Pollution Savings Clauses



Green = Local laws allowed

Yellow = In-between (allowed only in certain areas or subject to state approval)

Red = Local laws preempted

Blue = Local air regulation *programs* allowed

State-to-Local Air Pollution Savings Clauses

Local laws allowed

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

In-Between

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

State-to-Local Air Pollution Preemption Clauses

Preempted:

Arkansas: A.C.A. § 8-4-306

Idaho: Idaho Code § 39-118B

Kansas: K.S. §§ 65-3005 and 65-3010

Minnesota: Minn. Stat. § 116.07(2)

New Hampshire: *Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145 (2005).

North Dakota: N.D. Cent. Code, § 23-25-03.3

Rhode Island: *Rhode Island Cogeneration Associates v. East Providence*, 728 F. Supp. 828 (1990).

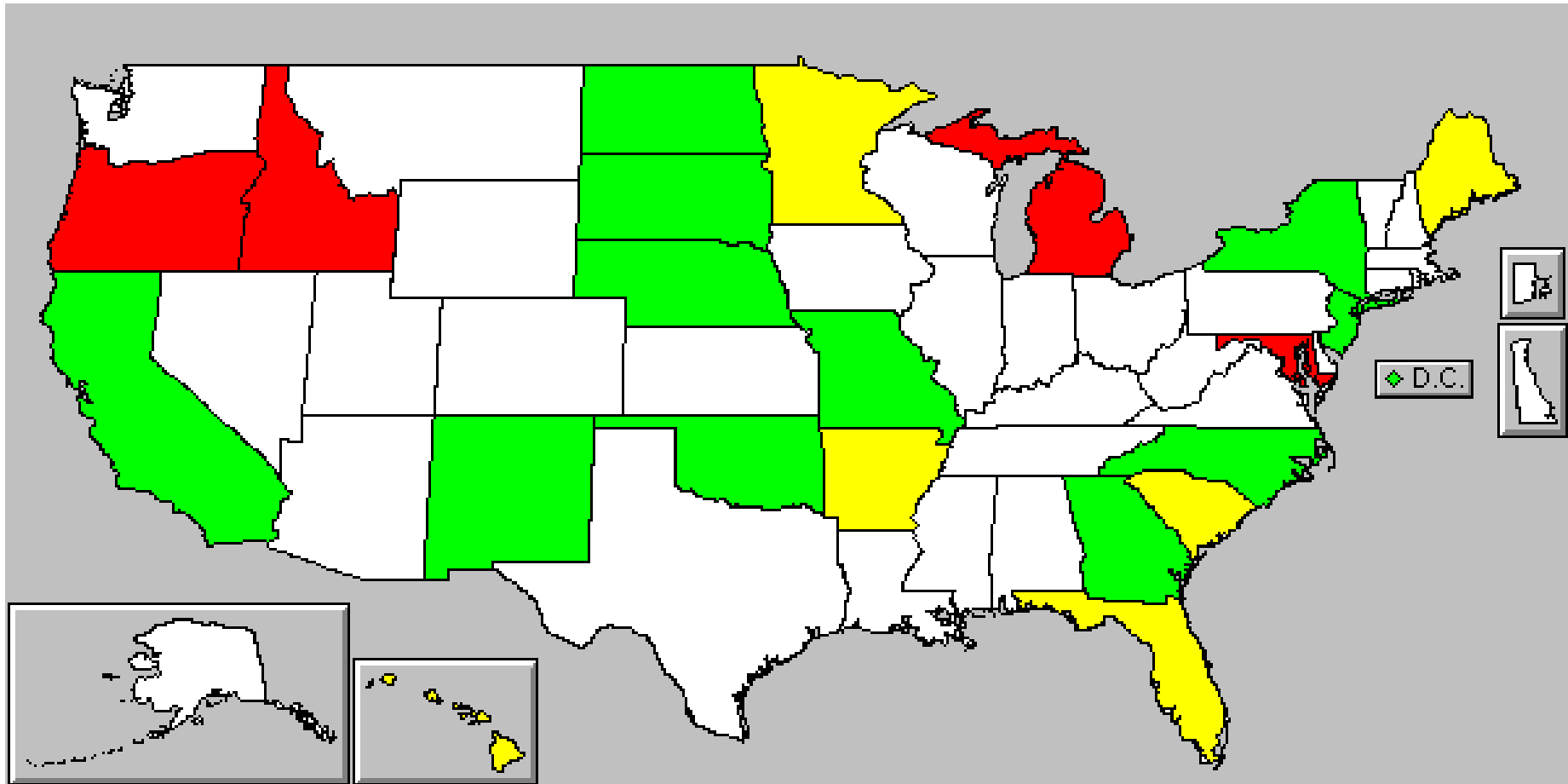
South Carolina: S.C. Code § 48-1-310

Virginia: Va. Code § 10.1-1321

Washington: Rev. Code Wash. § 70.94.230

Undetermined: CT, DE, GA, IL, LA, MS, NE, NC, OR, WV, WY

State-to-Local Municipal Solid Waste (MSW) Savings Clauses



Green = Local laws allowed

Red = Local laws preempted

Yellow = In-between (allowed only in certain areas or subject to state approval)

State-to-Local Municipal Solid Waste (MSW) Savings Clauses

Local laws allowed

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

In-Between

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

State-to-Local Municipal Solid Waste (MSW) Preemption Clauses

Preempted:

Idaho: Idaho Code § 39-7404

Maryland: *Mayor and City Council of Baltimore v. The New Pulaski Company Limited Partnership*, 112 Md. App. 218 (1996).

Michigan: Mich. Comp. Laws § 299.430(4)

Oregon: ORS § 459.09

Kulpmont Borough, Pennsylvania



Kulpmont Borough, Pennsylvania

- 35 P.S. 4012 – State air pollution savings clause
- 2007: passed the nation's strictest mercury and dioxin air pollution law
 - Continuous emissions monitoring required
 - Real-time disclosure on a website
 - Strict emissions standards
 - Set-back distance from anywhere people reside
- Survived attack in federal court
 - 5 constitutional claims thrown out on summary judgment

Dillon's Rule vs. Cooley Doctrine

- Dillon's Rule – local government can't act unless state grants that power
- Cooley Doctrine – inherent but constitutionally-permitted right to local self-determination
- Home Rule – local government can get extra rights and powers by breaking out of state's pre-determined municipal powers and adopting their own local government structure
 - 37 states have some form of home rule
 - Home rule “charters” are strongest – serving as a local “constitution”

HOME RULE STATES

State	Charter	Home Rule/ Optional Forms
Alabama		
Alaska	X	
Arizona	X	
Arkansas		X
California	X	
Colorado	X	
Delaware		
Florida	X	
Georgia		X
Hawaii	X	
Idaho	X	X
Illinois		X
Indiana		X
Iowa	X	X
Kansas		X
Kentucky		X
Louisiana	X	
Maine	X	
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota	X	X
Mississippi		
Missouri	X	
Montana	X	
Nebraska		
Nevada		
New Hampshire	X	
New Jersey	X	
New Mexico		
New York	X	
North Carolina		X
North Dakota	X	
Ohio	X	
Oklahoma		
Oregon	X	
Pennsylvania	X	
South Carolina		X
South Dakota	X	
Tennessee	X	
Texas		
Utah		X
Vermont		
Virginia	X	
Washington	X	
West Virginia		
Wisconsin		X
Wyoming		

DILLON'S RULE STATES

State	Dillon's Rule State	Comments
Alabama	YES	Counties Only
Alaska	NO	
Arizona	YES	
Arkansas	YES	
California	YES	Except Charter Cities
Colorado	YES	
Connecticut	YES	
Delaware	YES	
Florida	UNCLEAR	Conflicting statutes
Georgia	YES	
Hawaii	YES	
Idaho	YES	
Illinois	YES	Non-home rule municipalities only
Indiana	YES	Townships only
Iowa	NO	
Kansas	YES	Not for cities and counties
Kentucky	YES	
Louisiana	YES	For pre-1974 charter municipalities
Maine	YES	
Maryland	YES	
Massachusetts	NO	
Michigan	YES	
Minnesota	YES	
Mississippi	YES	
Missouri	YES	
Montana	NO	
Nebraska	YES	
Nevada	YES	
New Hampshire	YES	
New Jersey	NO	
New Mexico	NO	
New York	YES	
North Carolina	YES	
North Dakota	YES	
Ohio	NO	
Oklahoma	YES	
Oregon	NO	
Pennsylvania	YES	
Rhode Island	YES	
South Carolina	NO	
South Dakota	YES	Strict construction, but no specific reference to the language of Dillon's Rule.
Tennessee	YES	Only non-home rule municipalities
Texas	YES	
Utah	NO	
Vermont	YES	
Virginia	YES	
Washington	YES	
West Virginia	YES	
Wisconsin	YES	
Wyoming	YES	

Local Ordinance Ideas

- Zoning
- Setback distances from residences
- Weight limits on local roads
- LNG bridge tactic
- Noise
- Open Burning
- Pollution Taxes
- Continuous Emissions Monitoring (CEMs) and Real-time emissions disclosure
- Stricter air standards for pollutants
- Right-to-Act: right to enforce state/fed laws at local level / right to shut down a power plant if it's violating any laws
- Risk Management Plan requirements (and local hearings)
- Toxic Trespass
- “Bad Boy” Laws: Corporate “Three Strikes and You’re Out”
- Township Ownership and Control Disclosure
- Water Usage
- Local Environmental Impact Statement
- Corporate personhood / rights-of-nature (CELDF)

For more information...

local air ordinances we've developed and used to
stop polluters in Pennsylvania:

www.actionpa.org/ordinances/

Further information on continuous emissions
monitoring (CEM) capability (one of our favored
tactics with local air ordinances):

www.ejnet.org/toxics/cems/

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