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# Environmental Protection in the Trump Era

Spring 2018



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Environmental Protection in the Trump Era.

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## CHAPTER 11: Preventing States From Enacting and Enforcing Their Own Laws

The Republican Party Platform for the 2016 election “encourage[d] states to reinvigorate their traditional role as the laboratories of democracy, propelling the nation forward through local and state innovation.” Even so, **the emphasis** of the Trump Administration and Congress **on deregulation raises questions about federal action that could preempt state environmental policies.** (Not discussed in this chapter is the issue of state preemption of *local* environmental regulations, which is governed by state constitutions and laws.)

### Background.

Federal preemption of state law, displacing or barring state authority, has its foundation in constitutional provisions that establish our system of shared powers.

*The Spheres of Federal and State Authority.* The Tenth Amendment to the Constitution, which reserves to the states all powers not delegated to the federal government or specifically prohibited to the states, confirms states’ general “police power” to protect health, safety, and welfare. In contrast, the federal government may only act within the powers enumerated in the Constitution. The **primary source of the federal government’s broad authority over environmental matters is the Commerce Clause** (Article I, Section 8, clause 3), which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Thus, **both the federal government and the states have authority to protect the environment.**

*The Supremacy of Federal Law.* The Constitution’s Supremacy Clause (Article VI, clause 2) addresses the relationship between federal and state laws in areas of shared authority such as environmental protection: “The Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme law of the land . . .” Thus, **federal law may displace state (and local) law where Congress is acting within the sphere of its enumerated powers.** Preemption occurs in three ways:

- First, “express” preemption exists when a federal statute includes provisions that explicitly preempt state law.
- Second, where a federal law does not explicitly address preemption, “conflict preemption” may be implied if the state law conflicts with (or impedes implementation of) the federal law.

### Areas to Watch

*Agency Denial of State Preemption Waivers.* The most highly publicized preemption issue involves Clean Air Act (CAA) emissions standards for new motor vehicles. The CAA generally preempts states from establishing their own standards, but the Act specifically allows California to request a waiver to enforce its own more stringent standards. When the waiver is granted, as it typically has been, other states also may adopt California’s standards. California has been granted a waiver for the vehicle emissions standards it adopted through model year 2025; those standards are consistent with national standards that were adopted by the Obama Administration following negotiations with California and automakers. EPA is currently reconsidering the national standards.

*Federal Agency Regulations and Weak Preemption.* Actions by the Administration to delay or weaken new regulations could result in “weak preemption” if the relevant authorizing statute

- Third, “field preemption” is another form of implied preemption that may arise where federal law seeks to occupy a given field to the exclusion of state law.

## Process.

The enactment of a federal law is the starting point for preemption analysis. Federal agencies may also address preemption through their regulations applying federal laws. Ultimately, it is the **courts that determine whether a specific state law is preempted.**

*Legislation.* Congress can act to preempt state law by addressing preemption in a new federal law or by amending an existing law to include a preemption provision. Express preemption provisions are of three general types:

- First are provisions that preempt states from establishing requirements that are weaker than federal standards, but do allow states to establish more-stringent laws and regulations. The Clean Water Act and RCRA (the federal solid waste law) are prominent examples of this “cooperative federalism” approach.
- A second type of express provision—sometimes called “ceiling preemption”—simply prohibits states from adopting their own laws and regulations on the subject (unless identical to federal law), with or without an exemption for state laws already in place. For example, the federal GMO labeling law enacted in July 2016 establishes a national labeling requirement, but in the process it preempts state laws, including Vermont’s landmark law that went into effect earlier that month.
- Finally, where Congress enacts a broad preemption provision, it may allow states to apply to a federal agency for a waiver of preemption and approval to regulate. The Toxic Substances Control Act (TSCA) legislation enacted in 2016 establishes a detailed framework for preempting state law where EPA has acted to regulate chemicals, but also provides for certain mandatory and discretionary EPA waivers to allow states to regulate in certain situations.

*Regulations and Executive Actions.* The executive branch might seek to advance preemption in a number of ways. Where there is an express statutory preemption provision that authorizes states to seek waivers and approvals to regulate, agencies might deny such requests; those decisions typically are governed by statutory criteria and subject to notice-and-comment requirements. In addition, the president **might guide**

## Areas to Watch

also preempts additional state regulation. Examples include required rulemaking still pending on appliance energy efficiency standards (DOE) and GMO labeling (USDA), as well as EPA rulemaking to implement new TSCA requirements for the prioritization, evaluation, and management of chemicals. A similar result might follow agency repeal or weakening of existing regulations ([see Chapter 8](#)) or congressional rejection of recently-adopted agency rules through the Congressional Review Act ([see Chapter 3](#)).

*New Federal Legislation.* As the 2016 debates over TSCA and federal GMO labeling showed, industry often turns to Congress for relief from potentially stronger state standards. Preemption provisions could emerge in new federal legislation in any number of areas. A House bill introduced in January 2017, the Energy Efficiency Free Market Act of 2017, would repeal existing federal appliance efficiency standards and add a blanket state preemption provision.

*Revoking or Revising Executive Orders and Memoranda.* The president might seek to establish a new approach to preemption by repealing or revising existing executive orders addressing preemption ([see Chapter 1](#)).

**the executive branch’s approach to preemption by revoking, modifying, or issuing executive orders and presidential memoranda**, both of which have the force of law if they exercise presidential powers granted by the Constitution or delegated by Congress. ([see Chapter 1.](#))

Federal **agencies have in the past sought to advance preemption even in the absence of express statutory provisions**, for example as part of a regulation’s preamble, a descriptive statement that is not subject to notice and comment. Concerns over such practices led Congress in 2008 to prohibit the Consumer Product Safety Commission from attempting to limit, expand, or modify the preemption provisions of the laws it administers.

President Obama’s 2009 Presidential Memorandum titled “Preemption” was also a response to prior agency actions taken “without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” The Memorandum stated the Obama Administration’s policy that “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption,” and specifically eliminated the process of preemption by regulatory preamble.

*Court Challenges to State Laws and Regulation.* It is ultimately up to the **courts to decide whether a state statute or regulation (or common-law tort scheme) is partially or wholly preempted**. Litigation raising preemption claims may arise in a number of ways: where the federal government sues a state to challenge a particular state law; where a private party affected by a state law sues the state, claiming that the law is preempted; or where preemption is offered as a defense by a regulated entity in a private suit. In cases brought by private plaintiffs, federal agencies (via the Department of Justice) might choose to weigh in on the preemption issue by filing an amicus brief.

In deciding preemption claims, courts generally apply a presumption *against* preemption where the federal law addresses an area that historically has been subject to states’ police power. There is no single test or formula for this inquiry, and courts’ decisions have been neither uniform nor entirely predictable. In general, **courts focus on the statutory language and scheme in deciding whether and to what extent Congress intended to preempt the state law** in question.

## Discussion.

The extent to which actions of the Trump Administration and Congress will impede state efforts to fill in gaps in federal protections remains to be seen. Though broad displacement of state environmental authority may be unlikely given the history of state primacy in environmental protection, Congress, the president, and federal agencies might nonetheless attempt **preemption of state action as part of a strategy for advancing certain environmental priorities**.

New or amended federal laws that are enacted under Congress’ broad commerce authority and that include express preemption provisions would pose a considerable obstacle to state regulation. Such laws would be especially problematic were they to create weak federal standards and requirements (“weak preemption”). Congressional action might also result in “field preemption” if laws are enacted without express preemption provisions, but are nonetheless seen as “displacing” state regulations. The extent to which **a state policy is preempted or displaced by a new or amended federal law would likely be tested in court** and subject to judicial interpretation.

## Opportunities for Public Engagement.

On the legislative front, the primary opportunity for action by citizens, environmental organizations, or others is through advocacy related to preemption provisions in new or amended federal laws that would impinge on states' traditional authority to protect health, safety, and welfare. **Notice-and-comment periods for federal rulemaking provide an opportunity for stakeholders to respond** to agency efforts to include preemption language in new rules (especially in the absence of express statutory preemption provisions) or to deny state waiver requests. Litigation over preemption could involve cases brought by states challenging a federal statute, regulation, policy or action, or state defense of lawsuits challenging state regulation as preempted by federal law.

**Action Areas to Watch.** State product regulation policies have been common targets of preemption challenges, based on claims that they create a “patchwork of regulations” that impedes interstate commerce; but legislative, executive, and private-sector preemption challenges to state regulation have arisen on a broad array of other environmental issues as well. Following are prominent examples of potential federal actions that could raise preemption questions in the near term.

*Agency Denial of State Preemption Waivers.* The most highly publicized **preemption issue involves Clean Air Act (CAA) emissions standards for new motor vehicles.** The CAA generally preempts states from establishing their own standards, but the Act specifically allows California to request a waiver to enforce its own more stringent standards. When the waiver is granted, as it typically has been, other states also may adopt California's standards. California has been granted a waiver for the vehicle emissions standards it adopted through model year 2025; those standards are consistent with national standards adopted by the Obama Administration following negotiations with California and automakers.

On March 15, 2017, EPA [announced](#) that it “will **revisit the previous administration's rule that finalized standards to increase fuel economy** to the equivalent of 54.5 mpg for cars and light-duty trucks by Model Year 2025.” On August 10, EPA and the Department of Transportation published a joint [notice](#) requesting comments on reconsideration of those rules, as well as comments on whether the standards for model year 2021 “remain appropriate.” According to the notice, “EPA intends to make a Final Determination regarding the appropriateness of the model year 2022–2025 greenhouse gas standards, and potentially the model year 2021 greenhouse gas standard, no later than April 1, 2018.”

If the federal vehicle emissions standards are weakened, California could enforce its own standards, as could the dozen or so other states—covering around one-third of the U.S. population—that have adopted the California standards.

It is unclear whether EPA will pursue any action to revoke California's current waiver. At his Senate confirmation hearing, EPA Administrator Pruitt suggested that the waiver would be reviewed by the new Administration. During his June 15, 2017, testimony before a House Appropriations subcommittee, the Administrator stated: “The waiver is not currently being reviewed by the EPA.”

The CAA does not explicitly address revocation of an existing waiver. The Act requires that the waiver be granted unless EPA finds that California does not need the standards to meet “compelling and extraordinary conditions,” that its standards and enforcement scheme are inconsistent with the Act, or that California was arbitrary and capricious in determining that its standards are at least as protective as federal standards. Before making a waiver decision, EPA must publish a notice for

a public hearing and written comments. **If EPA does act to withdraw the waiver or deny future waiver requests, California (and other states) can be expected to challenge the decision in court.**

Examples of other laws under which federal agencies may exercise discretion to approve or deny state requests for preemption waivers in coming years include:

- TSCA (regulation of individual chemicals);
- the Consumer Product Safety Act (limits on chemicals in products and other safety standards);
- the Energy Policy and Conservation Act (requirements for energy use, energy efficiency, or water use of residential appliances).

Each statute establishes criteria that agencies must use in deciding state waiver requests.

*New Federal Legislation.* As the 2016 debates over TSCA and federal GMO labeling showed, **industry often turns to Congress for relief from potentially stronger state standards.** Preemption provisions could emerge in new federal legislation in any number of areas. For example, a House bill introduced in January 2017, the Energy Efficiency Free Market Act of 2017 (H.R. 117), would repeal existing federal appliance efficiency standards and add a blanket state preemption provision: “No State or Federal agency may adopt or continue in effect any requirement to comply with a standard for energy conservation or water efficiency with respect to a product.”

*Federal Agency Regulations and Weak Preemption.* Actions by the Administration to **delay or weaken new regulations could result in “weak preemption”** if the relevant authorizing statute also preempts additional state regulation. Examples include required rulemaking that is still pending on appliance energy efficiency standards (DOE) and GMO labeling (USDA), as well as EPA rulemaking governing the agency’s prioritization, evaluation, and management of chemicals pursuant to new TSCA requirements. A similar “weak preemption” result might follow agency repeal or weakening of existing regulations ([see Chapter 8](#)) or congressional rejection of recently-adopted agency rules through the Congressional Review Act ([see Chapter 3](#)).

Anticipating such actions and their potential effects, the California Senate **passed legislation (SB 49) in May that would “ensure no backsliding”** in the event that federal environmental standards are weakened; the bill, which is being considered in the state Assembly, would require state agencies to adopt standards that are at least as stringent as federal standards under an array of federal statutes as of January 1, 2016, or January 1, 2017. Similarly, in May 2017, Vermont enacted H. 411 (Act 42) adopting the federal lighting and appliance energy efficiency standards as of January 19, 2017, if those federal standards are repealed or voided.

*Revoking or Revising Executive Orders and Memoranda.* The president might seek to establish a **new approach to preemption by repealing or revising existing executive orders addressing preemption** ([see Chapter 1](#)). For example, President Clinton’s Executive Order on Federalism (Executive Order 13132, from 1999) establishes policies and criteria agencies must apply when taking action that may involve state preemption. The president might advance preemption by revising that Order to remove existing safeguards or procedural checks on preemption. In addition, the president could revoke and/or replace President Obama’s 2009 Preemption Memorandum.