

Preemption of Local Laws

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I have worked with many communities across New York State over the past ten years. Several of these communities have been interested in using their municipal powers afforded to them under the Municipal Home Law to protect their physical environment, including their drinking water resources.

This desire is partially rooted in the fact that there are gaps in state and federal regulations regarding potential sources of contamination. Secondly, the wish to pass local protection laws is also due to the perception that state and federal agencies are not able to adequately monitor and enforce regulations. Third, local authorities often believe that they know what is best for their community.

Despite the best intentions of local communities, passing local protection laws is not as easy as it sounds due to a legal principle called preemption. Preemption refers to the ability of laws at one level of government to negate laws at a lower level. There are three basic levels of government. The highest level of government is of course the federal government, followed by the state, and then local government. The U.S. Constitution declares that federal laws are the "supreme law of the land" and supersede any conflicting state law. Thus, federal laws can "preempt" or invalidate conflicting state laws. Similarly, state laws can preempt or negate local laws. Preemption is a factor that must be carefully considered when enacting local drinking water protection laws.

Local laws can be preempted in two different ways: either expressly or implicitly. Express preemption occurs when state law specifically prohibits localities from regulating in a particular area. An example of express preemption is New York's Mined Land Reclamation Law (MLRL) passed in 1991. It expressly states that New York State's MLRL supercedes all local laws for mining and reclamation. Another example is that the State has declared that the jurisdiction in all matters pertaining to the distribution, sale, use, and transportation of pesticides resides with the NYSDEC.

Implied preemption occurs when state laws within a given subject matter suggests an intention by the state legislature to "occupy the field" of regulation in that subject, thus excluding local laws. Implied preemption also occurs when a local law would contradict a state law or would hinder the state law's objectives. As you can tell, implied preemption is open to interpretation and is based upon a legal finding by a judge. Examples of implied preemption are rulings by the Orange County and Suffolk County Supreme Courts involving the regulation of fuel oil storage tanks of less than 1,100 gallon capacity by local Towns. The courts ruled that although the State had not expressly preempted these types of tanks, "its enactment of a comprehensive and detailed scheme with

regard to fuel storage tanks would permit the finding that local laws in the same field were impliedly preempted." In other words, even though the State did not pass regulations for smaller fuel oil tanks, the intent of the state legislature to "occupy the field" of petroleum storage regulation excluded the local laws.

Preemption means that local governments must proceed very cautiously in passing local drinking water protection laws involving the regulation of potential contaminant sources. If New York State and/or the Federal government already regulate a particular potential contaminant source category, locals should probably not pass local laws regulating them as well. Does that mean that local protection laws cannot be enacted? The answer is no. For example, local governments can still pass overlay zoning regulations that restrict or prohibit sources of contamination in critical drinking water protection areas. In addition, the reality is that there are several potential contaminant sources that are not currently regulated by the state or federal government. I am in the process of inventorying current regulations and identifying regulatory gaps that local governments may wish to fill.

If you have any questions regarding local laws and drinking water protection, please give me a call at 1-888-NYRURAL ext. 17 or send me an email at Winkley@nyruralwater.org. ♪