

State Preemption Law

The battle for local control of democracy

By Matthew Porter

This past July the Takoma Park, Maryland City Council unanimously passed the *Safe Grow Act of 2013*, which generally restricts the use of cosmetic lawn pesticides on both private and public property within the city's jurisdiction. This landmark victory was the first time that a local jurisdiction of this size in the U.S. has used its authority to restrict pesticide use. While this type of local law has taken hold in provinces across Canada over the last seven years,¹ its adoption in the U.S. is a watershed moment for public health and environmental advocates, raising the larger question as to why it hasn't happened sooner and more widely across the country. The answer –state laws that preempt, or take away, local authority to restrict pesticide use. Currently, 43 states have some form of state law that preempts local governments' ability to regulate the use of pesticides. In fact, state environmental preemption law often applies more broadly to local restrictions on genetically engineered crops and the use of synthetic fertilizers.

What is State Preemption?

Preemption is the ability of one level of government to override laws of a lower level. While local governments once had the ability to restrict the use of pesticides on all land within their jurisdictions, pressure from the chemical industry led many states to pass legislation that prohibits municipalities from adopting local pesticide ordinances affecting the use of pesticides on private property that are more restrictive than state policy.

A U.S. Supreme Court decision in 1991 upheld the rights of localities to restrict pesticides under federal

pesticide law. Chemlawn Services Corporation, now TruGreen, went to bat that same year, lobbying state legislatures with the argument, "The lawn care industry is besieged by misinformation regarding industry's use of pesticides and fertilizers and the effect these chemicals have on the environment and the public health." According to Allen James, former president of the Responsible Industry for a Sound Environment (RISE), a pro-pesticide trade group, "Local communities generally do not have the expertise on issues about pesticides to make responsible decisions."² Beyond Pesticides argued that the basic rights of local governments to protect public health and the environment must be preserved, especially in a climate where federal and state government are not adequately protective. Local grassroots organizations have effectively mobilized against the use of lawn pesticides, armed with the knowledge of the hazards and the viability of management practices that, without pesticides, focus on building a soil environment rich in microbiology that will produce strong, healthy turf that is able to withstand many of the stresses that affect turfgrass.

State preemption laws effectively deny local residents and decision makers their democratic right to better protection when a community decides that minimum standards set by state and federal law are insufficient. Given this restriction, local jurisdictions nationwide have passed ordinances that restrict pesticide use on the towns public property, or school districts have limited pesticides on its land. As pesticide pollution and concerns over the effects of GE foods on human and environmental

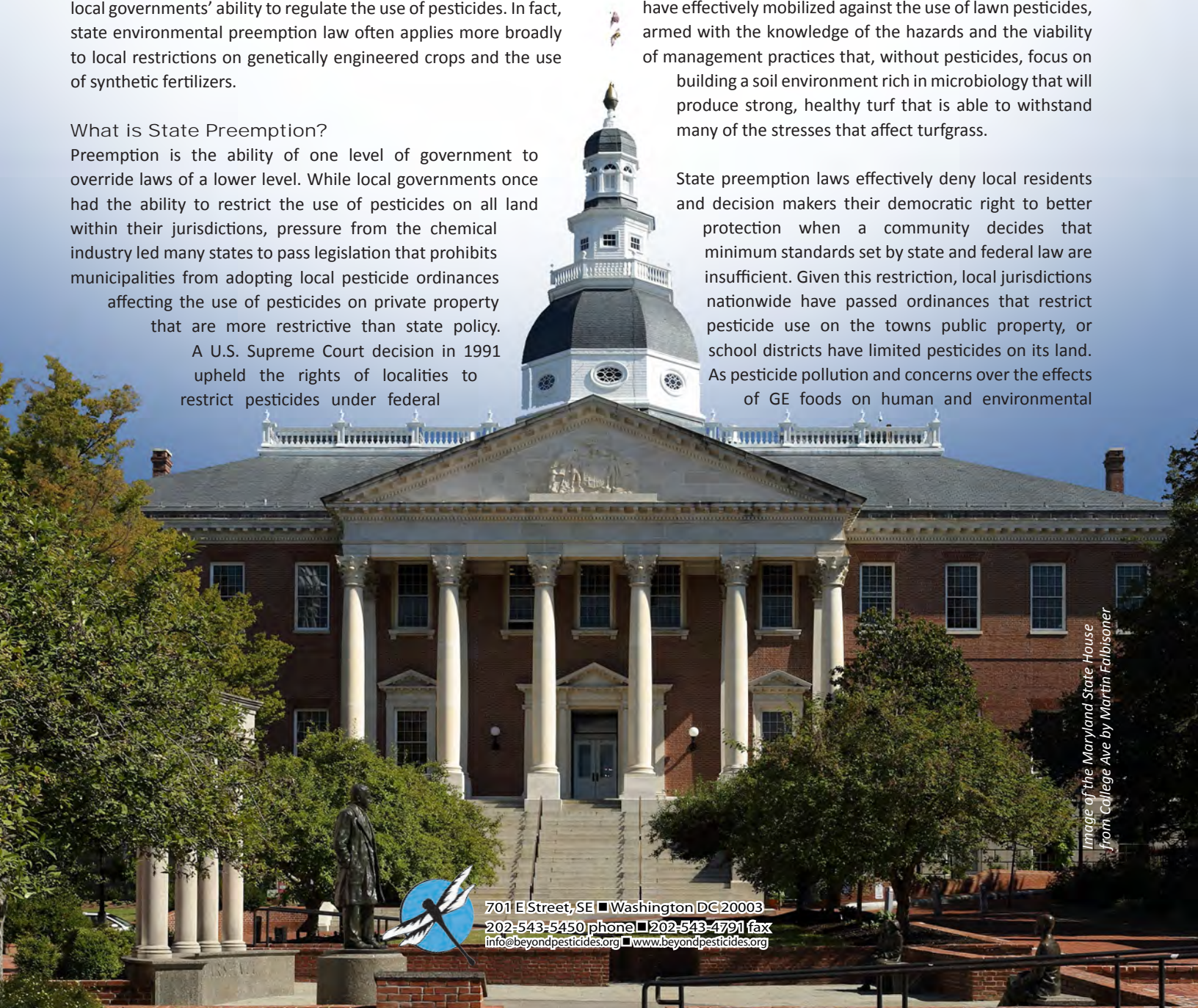


Image of the Maryland State House from College Ave by Martin Falbisoner

health mount, many are fighting to overturn preemption laws and return the power back to localities, enabling them to adopt more stringent protective standards throughout their communities.

History of Preemption

In 1979, Mendocino County, California was one of the first local jurisdictions in the country to pass a pesticide ordinance, in this case prohibiting the aerial application of phenoxy herbicides, such as 2,4,5-T. The measure was passed after an incident in 1977 that resulted in herbicide drift on school buses nearly three miles away from the application site. A California State Supreme Court decision upheld the right of citizens to adopt more protective standards than the state and federal government. (*The People v. County of Mendocino, 1984*) The California legislature then adopted legislation to preempt that right. The issue of federal preemption of local ordinances made its way to the U.S. Supreme Court, which ruled in 1991 that federal law (the *Federal Insecticide, Fungicide and Rodenticide Act, FIFRA*) does not preempt local jurisdictions from restricting the use of pesticides more stringently than the federal government. (*Wisconsin Public Intervenor v. Ralph Mortier*) However, the ability of states to take away local authority was left in place. The pesticide lobby immediately formed a coalition, called the Coalition for Sensible Pesticide Policy, and developed model legislation that would restrict local municipalities from passing ordinances regarding the use or sale of pesticides on private property. The Coalition lobbyists descended upon states across the country, seeking and passing, in most cases, preemption legislation that was often identical to the Coalition’s wording.

Variations in Pesticide Preemption Language

Explicit Preemption. Twenty-nine states have nearly identical preemption language that explicitly preempts localities from adopting stricter legislation that would regulate the use of pesticides. Most states’ preemption clauses read similar to the American Legislative Exchange Council’s (ALEC) *Model State Pesticide Preemption Act*, which states,

“No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.”

Limited preemption. Fourteen states do not have explicit preemption language. However, they delegate all of the authority to regulate pesticide law to a commissioner or pesticide board. This implies

that localities seeking more restrictive pesticide regulations could petition the commissioner for a variance from the states pesticide law. For example, in New York, “Jurisdiction in all matters pertaining to the distribution, sale, use, and transportation of pesticide, is by this article vested exclusively in the commissioner.” (33-0303)

Five states that vest exclusive regulatory authority in their commissioner specify that localities can petition the commissioner for exemptions to these pesticide regulations. For example, in Louisiana, “The governing authorities of parishes and municipalities may request that the rules applicable to the distribution, sale or application of pesticides be amended to provide for specific problems encountered in the parish or municipality.” (R.S 3:224B)

No preemption. Seven states do not preempt local authorities’ ability to restrict the use of pesticides on any land within their jurisdiction. Some of these states have no regulations that would preempt local authority and others have specific language written in that reaffirms localities’ authority, such as in Maine, which states, “These regulations are minimum standards and are not meant to preempt any local ordinances which may be more stringent.” (01-026 Chapter 24. Section 6)

Explicit Preemption				
Alabama	Arizona	Arkansas	California	Colorado
Florida	Georgia	Idaho	Illinois*	Iowa
Kansas	Kentucky	Minnesota	Missouri	Montana
Nebraska	New Hampshire	New Mexico	North Carolina	North Dakota
Ohio	Oklahoma	Oregon	Pennsylvania	South Dakota
Tennessee	Texas	West Virginia	Wisconsin	Wyoming
*Except Chicago				
Exclusive Authority				
Connecticut	Delaware	Massachusetts	Mississippi	New York
		Rhode Island	South Carolina	Virginia
Explicit Right to Petition				
Indiana	Louisiana	Michigan	New Jersey	Washington
Not Preempted				
Alaska	Hawaii	Maine	Maryland	Nevada
			Utah	Vermont

Preemption of Local Laws on GE Crops

In 2005, agricultural lobby groups worked to pass state preemption legislation that prevents towns, counties, or cities from passing any ordinance, regulation, or resolution to restrict GE crops or any other plants. These laws seek to stop laws that have been adopted by nearly 100 towns in New England³ that limit the growing of genetically modified seeds and livestock.⁴ So far, 16 states have passed legislation that limits the ability of localities to regulate GE crops. These preemption regulations often amend state seed law. For example, in Arizona, “The regulation and use of seeds are of statewide concern. The regulation of seeds pursuant to this article and their use is not subject to further regulation by a county, city, town, or other political subdivision of this state.” (3-243)

Oregon recently joined this list of 16 states after Gov. John Kitzhaber signed Senate Bill 863 into law on October 8, 2013. The bill, which preempts localities’ ability to regulate seeds used for commercial agriculture, contains an emergency clause that allows it to take immediate effect. The law however, does not affect measures in Benton and Lane counties that already restrict GE planting.⁵ This legislation comes after unapproved GE wheat was found growing in an Oregon wheat field, which led to Japan temporarily halting its importation of U.S. western white wheat

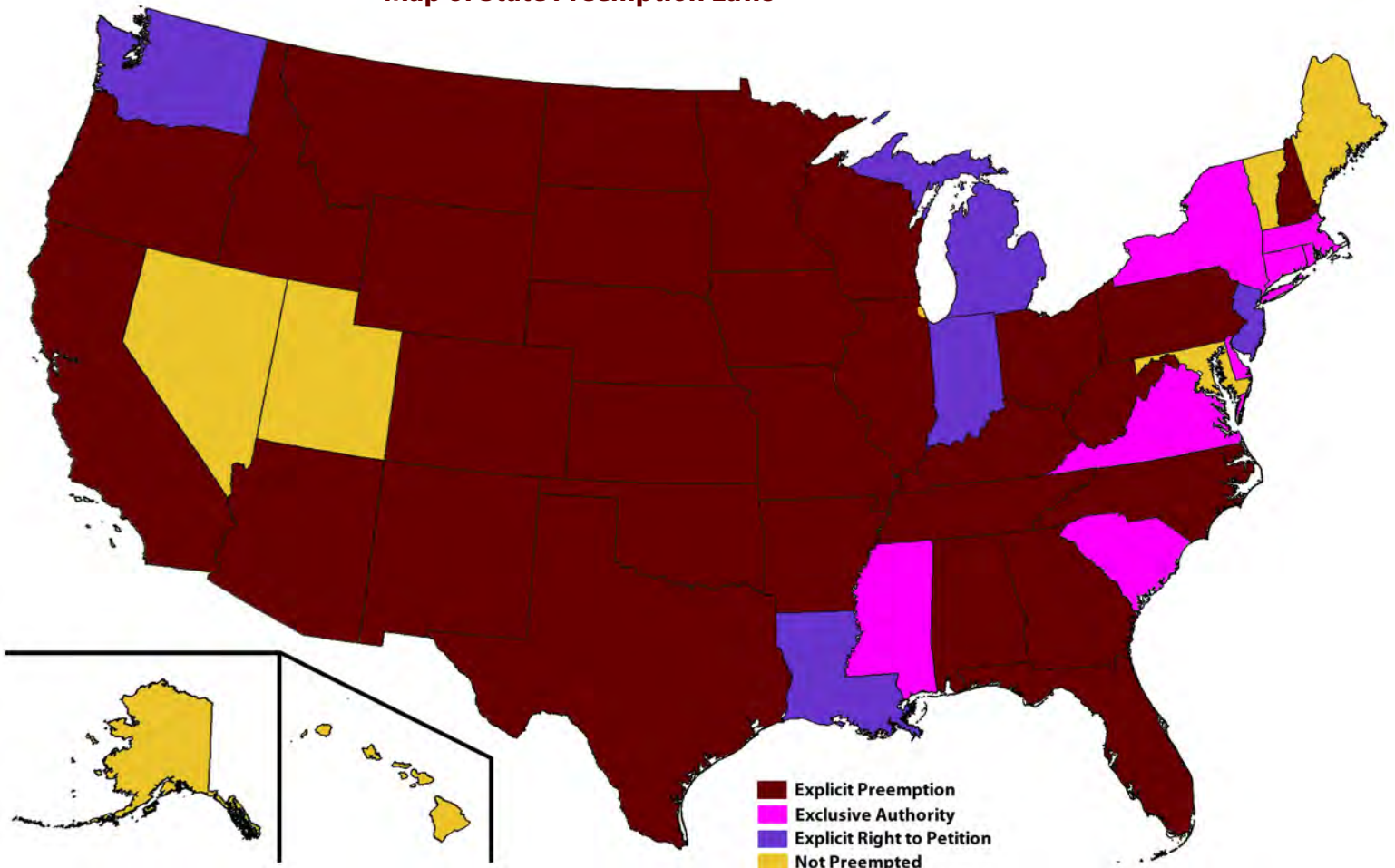
from the Pacific Northwest.⁶

Even more troubling, an amendment added to the House of Representatives version of the 2013 Farm Bill by Rep. Steven King (R-IA) would set a federal standard that preempts any state’s or locality’s ability to impose conditions on the production of any agricultural product offered for sale in interstate commerce. This amendment would prohibit locality’s from restricting the sale or use of GE seeds. This amendment would also undo state laws in Maine and Connecticut, regarding the labeling of GE ingredients.⁷

Recent Preemption Struggles and Victories

On April 15, 2004, Dane County, Wisconsin officials, who oversee 61 municipalities including Madison, passed a local county-wide ban on the use of synthetic lawn fertilizers that contain phosphorus due to its pollution of local lakes. This directly restricted the use of ‘weed and feed’ products that combine synthetic fertilizers and herbicides. The chemical industry trade group RISE sued the County citing preemption law. The U.S. 6th Circuit Court of Appeals upheld Dane County’s ordinance in December 2005, finding that the law does not preempt local authority to regulate fertilizers. Jurisdictions in states that preempt local authority to restrict pesticides can in most cases institute synthetic fertilizer

Map of State Preemption Laws



restrictions that limit ‘weed and feed’ products with pesticides.

State activists have worked to overturn preemption law. In 2008, California State Assemblywomen Fiona Ma introduced AB977 to overturn the California state law that prohibits the restriction of pesticides by local jurisdictions. In 2011, Connecticut State Senator Edward Meyer introduced S.B. 244, which would have overturned Connecticut’s preemption law. In 2012, a similar bill, HB 5121, was introduced in the State House and passed through the Joint Committee on Environment, however the bill was not brought to the floor for a vote.

Bill 2491, which would establish provisions governing the use of pesticides and GE crops in Kauai, Hawaii, was introduced by county council member Gary Hoosier in 2013 over concerns about the use of pesticides on GE test fields and genetic drift. The bill calls for buffer zones between fields where pesticides are applied and areas that are used by sensitive populations, such as schools and hospitals. The bill would also force seed companies to conduct an Environmental and Public Health Impact Study (EPHIS) as a prerequisite for the further planting of GE seed. As this fight over GE regulation in Hawaii has grown, Gov. Neil Abercrombie argued that regulation of GE crops should come from the state and promised that the state will increase oversight of seed companies’ use of pesticides. Despite these efforts by the Governor, the Kauai county council passed the bill by a 6-1 margin. After the bill was vetoed by Kauai Mayor Bernard Carvalho,⁸ the County Council overturned the veto by a vote of 5-2.⁹

The most important achievement under state law that upholds local authority to restrict pesticides has been the passage of the *Safe Grow Act of 2013*, which generally restricts the use of cosmetic lawn pesticides on both private and public property throughout Takoma Park, Maryland. This landmark legislation stops involuntary poisoning and non-target contamination from pesticide drift and volatility that occurs, resulting in these toxic chemicals moving off of treated private yards. The new law fits into the city’s strategic plan to lead community efforts in environmental sustainability, protection, and restoration, and secures Takoma Park’s role as a leader in sustainability in the state of Maryland and the nation.

What Can I Do?

Residents in one of seven states (Alaska, Hawaii, Maine, Maryland, Nevada, Utah, and Vermont) without preemption, can consider

using local authority to adopt pesticide restrictions that are protective of health and the environment.

Residents in 14 states (Connecticut, Delaware, Indiana, Louisiana, Massachusetts, Michigan, Mississippi, New Jersey, New York, South Carolina, Rhode Island, Virginia, and Washington) with limited preemption, can petition the state to authorize the adoption of local pesticide restrictions. Within the five states that explicitly provide for local petitions (Indiana, Louisiana, Michigan, New Jersey, and Washington), this mechanism can be used to move a policy recommendation forward.

Those who live in states that explicitly preempt local authority can mount an effort in the state legislature to reverse preemption and advance principles of local democratic governance.

The *Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA) has established a partnership between local state, and federal governments. This partnership has resulted in a variety of important solutions to pesticide problems. When the Supreme Court ruled in 1991 to uphold the historic FIFRA partnership, it affirmed an authority that has been a part of FIFRA since its original enactment. Preemption denies citizens the right to protect health and the environment. Numerous studies by the U.S. Government Accountability Office and scientific studies indicate that federal and state governments alone are not adequately protective of health and the environment. There is no evidence

that the prospect of local democratic decision making is a threat to agriculture or other business interest in local communities. In fact, those closely aligned with these interest are well-represented in local decision making bodies.

Finally, local legislators know that restricting pesticides is no different from other environmental and neighborhood stewardship laws, including restrictions on littering, recycling, noise, picking up after pets, and smoking. These local laws

all act on values associated with living in a community where contaminant-free air, water, and land are shared resources.

Beyond Pesticides has available on its website model ordinances that you can use to begin discussion in your community on local policies that restrict pesticides and advance sustainable land practices. See www.beyondpesticides.org for more information.

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Endnotes

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