"Clean Water Act"
Federal Water Pollution Control Act

Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
33 U.S.C. § 1370	Anti-Preemption Provision	Somewhat – litigation is centered around determining if a type of claim, such as federal common law or state common law, is preempted.

Methodology

The statutory text overwhelmingly contains express preemption and various savings clauses. Express preemption is directly related to statutory text, and it is the only form of preemption with this quality. The remaining types of preemption – field, impossibility, and obstacle – are forms of *implied* preemption. As the name suggests, these preemption categories are implicit in every statute and consequently do not rely on statutory text. (However, sometimes a statute will explicitly address an implied preemption principle, such as 42 U.S.C. § 2000h-4.) Instead, implied preemption principles appear exclusively in case law. Case law that relies on a theory of implied preemption are appropriately notated.

Legend:

Express Preemption
Field Preemption
Impossibility Preemption
Obstacle Preemption
Floor Preemption

Anti-Preemption Provision
Compliance Savings Clause
Remedies Savings Clause
Sunset Provision
Ceiling Preemption

Statutory Text

33 U.S.C. § 1370
State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment

standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Summary

Though not addressing preemption, two Supreme Court cases – *Milwaukee v. Illinois*, 451 U.S. 304 (1981) and *Ark. v. Okla.*, 503 U.S. 91 (1991) – provide important background information about the Clean Water Act. Another Supreme Court case – *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) – does address preemption. Referred to as *Ouellette*, the Court held that preemption of a state common law claim by the Clean Water Act turned on the location of the source. If a federal District Court was hearing the case under the source state's law, it would be allowed to proceed. If it was hearing the case under the injury state's law, it would be preempted.

Based on 33 U.S.C. §1370, courts have held that state common law tort actions are not preempted by the Clean Water Act.

Given the "materially indistinguishable" state law savings clauses found in the Clean Water Act and the Clean Air Act, some courts have used *Ouellette* as precedent when handling the question of federal preemption in the Clean Air Act.

Case Law

Milwaukee v. Illinois, 451 U.S. 304 (1981)

Facts: Occasionally, Milwaukee's sewer system will overflow, resulting in sewage discharging directly into Lake Michigan. Illinois complains that the discharges into Lake Michigan are a health threat, as the lake currents transport the discharges – and its pathogens, viruses, and bacteria – into Illinois waters. Additionally, Illinois and Michigan allege the sewage accelerates the aging of Lake Michigan.

Procedural History: When this case originated in the early months of 1972, the Supreme Court declined to exercise original jurisdiction because the suit was not between two states, and Illinois could appeal to the federal common law of nuisance. Later, Congress passed the Federal Water Pollution Control Act Amendments of 1972, which made the discharge of pollutants into waters without a permit illegal. The District Court heard the case in 1977. In 1979, the Seventh Circuit held the 1972 Amendments did not preempt the federal common law of nuisance.

Rule: "[W]hen Congress addresses a question previously governed by a decision rested on federal common law then need for such an unusual exercise of lawmaking by the federal government disappears." When considering federal common law and Congressional statutes, start with the assumption that Congress is to articulate the appropriate standards of federal law.

Holding: No federal common law of nuisance is available in this case because the Federal Water Pollution Control Act Amendments of 1972 addresses this issue.

Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)

Facts: Lake Champlain sit between Vermont and New York. Int'l Paper Co. (IPC) operates its mill on the New York side of the lake, discharging into the lake through a diffusion pipe. Plaintiffs are property owners on the Vermont side, alleging the discharge constituted a common-law "continuing nuisance."

Plurality Holding: The Clean Water Act preempts a private water pollution suit for nuisance in the state the injury occurred when the injury's alleged source was in another state. The suit would not be preempted if it were based on the law of the alleged source's state. A federal District Court sitting in the injury-state may hear the case under the source-state's law, if jurisdiction otherwise allows.

Ark. v. Okla., 503 U.S. 91 (1991)

Facts: The EPA issued a discharge permit in Arkansas, allowing a city's sewage treatment plant to dump half of its waste in an unnamed stream. The permit was issued pursuant to the National Pollution Discharge Elimination System (NPDES). However, that water flows into the Illinois River. The site is 29 miles upstream from the Oklahoma state line. Oklahoma challenged the permit, argued that it violates Oklahoma water quality standards.

Issue: Does the EPA have statutory authority to mandate compliance with water quality standards of downstream states?

Rule: The EPA sets "effluent limitations," and state governments create "water quality standards." The NPDES allows the choice between permitting regimes – state program or federal EPA regulation – both of which have the same requirements. The EPA has interpreted the permit program to require compliance with §401(a) of the Act, of which §401(a)(2) prevents federal permits when an affected State objects and the EPA cannot ensure compliance with its applicable water quality requirements.

Application: Interstate water pollution is controlled by federal law. Congress gave the Administrator broad authority to oversee state permit programs; the regulation is a reasonable exercise of statutory discretion. The Oklahoma law is also reasonable and consistent with the Clean Water Act.

Holding: The EPA can mandate compliance.

American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011)

Facts: Plaintiffs filed suit under federal common-law public nuisance claims against defendants, allegedly the "five largest emitters of carbon dioxide." The lawsuit asserted the emissions created a "substantial and unreasonable interference with public rights," violating either federal common law or state tort law.

Procedural History: The Second Circuit held the CAA did not displace federal common law, and the plaintiffs successfully stated such a claim.

Application: In *Milwaukee*, Congress created an "all-encompassing regulatory program." The Second Circuit thought it dispositive that the EPA hasn't yet created any rule regulating greenhouse gases. The Court disagrees; it thinks the Act "speaks directly" to emissions.

Holding: The Clean Air Act displaced federal common law. The Court leaves the issue of whether the Clean Air Act preempts a state lawsuit open for consideration on remand because neither party brief preemption of a claim under state nuisance law.

Mianus River Preservation Committee v. Administrator, Environmental Protection Agency, 541 F.2d 899 (2d Cir. 1976)

Facts: The EPA delegated permit authority to the Connecticut Department of Environmental Protection (DEP). DEP modified a permit, and the EPA didn't object. Petitioners filed a suit in federal court to review the modification; but the suit was dismissed for lack of jurisdiction. Section 509(b)(1)(F) of the Federal Water Pollution Control Act Amendments of 1972 allows for review of "Administrator's action," specifically defined as the Administrator of the EPA.
Issue: Do DEP's actions serve as "Administrator's action" by acting as Administrator's agent through a delegation of authority?
Application: Congress did not desire to do field preemption.
Holding: Since the EPA delegated permit authority to state agencies, the state agency's action isn't reviewable by the federal court without further federal action.

In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 725 F.3d 65 (2d Cir. 2013)

Facts: MTBE is an organic chemical compound that is used as a fuel oxygenate that, unfortunately, spreads easily into groundwater supplies. Water contaminated with MTBE, even at low levels, can make drinking water "unacceptable for consumption." Exxon, and others, engaged in intensive use of MTBE from 1980s through the mid-2000s. Since January 1st, 2004, MTBE has been banned in New York State. New York City brought this suit against Exxon for harm caused when gasoline with MTBE was introducts to a system of water wells in Queens.
Issue: Are the City's claims preempted by the Reformulated Gasoline Program from the Clean Air Act Amendments of 1990?
Holding: There is no express preemption. There is no field preemption. There is no obstacle preemption. There is no impossibility preemption.

Bell v. Cheswick Generating Station, 734 F.3d 188 (3d Cir. 2013)

Facts: This class action suit is brought by over 1,500 individuals who own property or live within one mile of GenOn's Cheswick Generating Station. The station is a 570-megawatt coal-fired electrical generation facility in Pennsylvania. The suit alleges Defendant's ash and contaminants were in violation of the Clean Air Act. Defendant argued that since it was subject to the Clean Air Act, state tort law was preempted.
Rule: The Court finds "no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in *Ouellette* controls this case."
Holding: *The state common law claims, based on the laws of the source state, seeking compensatory and punitive damages are not preempted.*[1]

North Carolina, ex rel. Cooper v. TVA, 615 F.3d 291 (4th Cir. 2010)

[1] Plaintiffs also sought injunction relief to the extent that the plant operators should remove the contaminants that fell onto others private property. Plaintiffs did not seek further injunctive relief, instead admitting that injunctive relief would not be able to change the plant's operations. Nate Bishop, Merrick v. Diageo Americas Supply, Inc., 40 HARV. ENVT. L. REV. 383, 387 n. 43 (2016).

Facts: After establishing nationwide emissions levels, the EPA required each state to draft a State Implementation Plain (SIP) for implementing the regulations. SIPs must be consistent with EPA regulations. States are prohibited from exporting emissions or otherwise interfering with another state's ability to meet its requirements – such as strategically placing plants on a state border. North Carolina, dissatisfied with Alabama's and Tennessee's approaches, wants the federal courts to impose different standards under a theory of public nuisance.
Holding: The state-law public nuisance claim is preempted.

S. Appalachian Mt. Stewards v. Red River Coal Co., 992 F.3d 306 (4th Cir. 2021)
Facts: Red River's permit requires compliance with the Clean Water Act and Virginia's water-quality standards under the federal Surface Mining Control and Reclamation Act (SMCRA). The regulations are essentially the same. Compliance with the Clean Water Act shields operators from liability for some violations. Additionally, the SMCRA has a savings clause that prevents superseding, amending, or modifying the Clean Water Act.
Issue: When given liability under the CWA, can the operator still be held liable under the equivalent SMA standards?
Holding: SMCRA's savings clause prevents liability when the conduct is within the Clean Water Act's liability shield.

Merrick v. Diageo Ams. Supply, Inc., 805 F.3d 685 (6th Cir. 2015)
Facts: Diageo Americas Supply, Inc. distills and ages whiskey, which results in ethanol emissions. The emissions are regulated by the Clean Air Act. Plaintiffs sued Diageo under theories of nuisance, negligence, and trespass relating to the proliferation of "whiskey fungus" on nearby properties. The fungus, a "black, sooty substance coving … everything exposed to the outdoors," was an air pollutant originating at Diageo's warehouse.
Rule: The Clean Water Act states' rights savings clause is "materially indistinguishable" from the parallel clause in the Clean Air Act. Provisions in the Clean Water Act were "modeled on" the Clean Air Act. The two are often "*in pari materia*."
Holding: *The state common law claim is not preempted.*

In re Surface Mining Regul. Litig., 627 F.2d 1346 (D.C. Cir. 1980)
Facts: The Surface Mining Act contains two tiers of regulations: interim regulations created within 90 days, and permanent regulations written within one year. Numerous complaints were filed regarding the interim regulations, which were consolidated at the District Court. The lower court held the interim regulations did not "supersede, amend, modify, or repeal" the Clean Water Act.
Procedural History: The miners allege three elements of the EPA's regulatory framework – a variance mechanism and two exemptions – are violated. The District Court ruled that the Clean Water Act had "a regulatory gap," which the Secretary can fill.
Holding: The variances are substantive elements and cannot be altered with more stringent provisions.

Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014)

Facts: The suit alleges torts of trespass and negligence under common law, and common law and statutory nuisance. Plaintiffs are eight individuals residing within 1.5 miles of GPC's corn wet milling facility in Muscatine, Iowa. They allege GPC operations unreasonably interfered with the reasonable use their properties, failed to exercise reasonable care when releasing hazardous substances, and constituted a past and continuing trespass.
Holding: There is no express preemption. There is no field preemption. There is no conflict preempt in application to "a private lawsuit seeking damages anchored in ownership of real property."

Further Readings

Stephen M. Johnson, *Article: From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 S.M.U. L. REV. 359 (2021)

Rachel Rothschild, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENVT. L.J. 412 (2019)

Nate Bishop, *Merrick v. Diageo Americas Supply, Inc.*, 40 HARV. ENVT. L. REV. 383 (2016)

Caroline Wick, *Bell v. Cheswick Generating Station: Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 TUL. ENVT. L.J. 107 (2013)

Scott Gallisdorfer, *Note: Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claim After* AEP v. Connecticut, 99 VA. L. REV. 131 (2013)

J.J. England, *Saving Preemption in the Clean Air Act: Climate Change, State Common Law, and Plaintiffs Without a Remedy*, 43 ENVT. L. 701 (2012)