

Natural Gas 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?
15 U.S.C. § 717b(d)	Anti-Preemption Provision	Yes
15 U.S.C. § 717b(e)	Ceiling Preemption	Yes
15 U.S.C. § 717b(e)(3)(C)	Sunset Provision	Not litigated

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.

Since courts have not addressed every issue, there may be areas that are marked as “Not litigated.”

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

15 U.S.C. §717b(e)

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b-1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)

(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find [1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

Summary

“Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction” cited this provision as an example of unitary federal choice ceiling preemption.¹ Though the scope is narrow, it is quite consequential. Before the amendment, the siting decisions of liquified natural gas (LNG) terminals were controlled by state and local governments. There has not been much debate nor discussion about how to apply the statute's preemptive effect.

Case Law

¹ 82 N.Y.U. L. Rev. 1547, 1569 (2007).

AES Sparrows Point Lng, LLC v. Smith, 527 F.3d 120 (4th Cir. 2008)

Facts: AES wanted to build an LNG terminal in Baltimore County, Maryland. Local groups opposed the plan, and the Baltimore County Council amended Section 256.4 of the Baltimore County Zoning Regulations, effectively prohibiting Plaintiff's construction. This is a suit for declaratory and injunctive relief. Plaintiffs argue the regulation is preempted by the Natural Gas Act, as amended by the Energy Policy Act of 2005.

Defendants argue the regulation is exempted under the NGA's savings clause, 15 U.S.C. § 717b(d)(1), as an amendment of Maryland's Coastal Zone Management Plan.

Rule: The NGA exempts the Coastal Zone Management Plan (CZMP) from preemption. The CZMP allows states to create coastal management plans (CMPs), which are approved by the National Oceanic and Atmospheric Administration. Once approved, states with CMPs can receive federal grants and can conditionally veto federally permitted projects when inconsistent with the CMP.

Application: The CZMP has a specific procedure when states wish to amend their CMP. Maryland did not follow the process with the regulations; therefore, it is not a part of the CMP.

Holding: *The local regulation is preempted because it is not exempt under the NGA's savings clause.*

Wash. Gas Light Co. v. Prince George's County Council, 711 F.3d 412 (4th Cir. 2013)

Facts: Prince George's County denied Washington Gas's proposed addition of a liquefied natural gas (LNG) storage tank. Plaintiffs filed a federal action seeking a declaration that NGA preempts the County Zoning Plan. The NGA only regulates the interstate natural gas industry. Washington Gas operates pursuant to a service area designation; this designation treats the company as a local distribution company, which is outside the NGA's scope.

Holding: **The NGA does not preempt the County Zoning Plans because Washington Gas is a local distribution company, which is not governed by the NGA.**

Learjet, Inc. v. Oneok, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 715 F.3d 716 (9th Cir. 2013)

Facts: Plaintiffs allege Defendants manipulated the price of natural gas, which served as the basis for state law antitrust claims.

Issue: Has federal regulation preempted the field of natural gas regulation?

Holding: **The NGA does not preempt the state antitrust claims.**

Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council, 583 F. Supp. 2d 259 (D.R.I. 2008)

Facts: Weaver's Cove was approved by the FERC to site, construct, and operate an LNG terminal, on the condition that it obtain the Coastal Resources Management Council's concurrence that the project is consistent with Rhode Island's coastal management plan. The CRMC did not concur or object. Weaver sought Category B Assent with the CRMC, which was also neither concurrence or objection. Under this lawsuit, Weaver's Cove argues that the Category B Assent process is preempted by the NGA.

Holding: The NGA preempts Rhode Island's Category B Assent process through express preemption, field preemption, and conflict preemption.