

In the Trump era, what avenues are open to state and local governments to use self-help to protect the environment?

I've posted before about the opportunities for state and local governments taking action to protect their own environments. ([here](#) and [here](#)). Perhaps the most important recent development is the extension of California's cap-and-trade program to 2030, which Cara has blogged about. ([here](#)) That's an exciting milestone, and a great example of what states can do. But a host of other states have taken actions: a longstanding cap-and-trade program among the Northeast states, renewable portfolio standards to encourage wind and solar in many states, and state laws limiting air and water pollution or toxic chemicals. Massachusetts decided just a few days ago to tighten its own regulatory scheme. The list could be much longer, and I'm planning to do some posts about some of the individual states in the next few weeks. But that's enough to give you the idea.

Rather than extend the list, I'd like to discuss some of the potential legal barriers that these kinds of actions may encounter. Basically, they all involve the division between federal and state authority. In the case of cities, there are also questions about the division of authority between their governments and those of the state, but the rules governing those disputes vary a lot between states.

The first issue relates to federal activities taking place within a state or local jurisdiction. The rule is that the Feds are immune from state or local regulation unless Congress has consented. That being said, there are some situations where Congress has waived this immunity, including application of state water quality standards to federal projects. Moreover, states can generally regulate private activities that take place on public lands, unless doing so interferes with federal law.

The second issue involves interference with interstate commerce. State laws can't discriminate against out-of-state firms. Defining discrimination can be tricky, and it's an issue that has come up repeatedly in lawsuits by energy companies against state regulations. Even if a state law doesn't discriminate, it can still be struck down if it imposes an undue burden on interstate commerce. This is a fact-intensive issue that may require a trial, but states typically win cases that get to that point.

A less common issue is whether a state is invading the federal government's primacy in foreign affairs. This argument has been raised several times but so far states have fended off the challenges. The Supreme Court precedents dealing with this issue are a mess, so it's hard to have a lot of confidence about how this issue

might evolve.

A final issue is whether a state law directly or indirectly conflicts with a law passed by Congress. This can be a very tricky issue because every federal statute is different. The Federal Power Act gives federal regulators exclusive jurisdiction over wholesale electricity markets and interstate transmission, but it also gives states exclusive jurisdiction over the production and retail sale of electricity. But regulations in one sphere inevitably affect the other one, so the courts find it difficult to draw the boundaries.

It's inevitable that state and local regulations will be challenged on these grounds, as well as any other ground that industry can come up with. But in most situations, careful lawyering in the design of state and local laws can do a lot to control the litigation risks.

Overall, state and local action remains one of the most promising areas for progress while the federal government is largely in the hands of anti-environmentalists. One limitation is that so many states are currently under partial or complete control of conservative Republicans. But the 2018 elections could shift the balance substantially.