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State Implementation of Federal Environmental Laws

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STATE IMPLEMENTATION OF FEDERAL ENVIRONMENTAL LAWS

Doug Farquhar, Jessika M. Douglas & Brian A. Smith†

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INTRODUCTION

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The

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powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.¹

– James Madison

The federal government’s ability to address environmental health, those threats to public health that stem from environmental causes, is limited. Neither the term ‘environment’ nor ‘public health’ is found in the U.S. Constitution, there is no federal environmental health statute, and federal agencies struggle to protect the public from environmental threats through a myriad of statutes and policies.

For the state and local governments, the authorities under their police powers provide great latitude to respond to environmental health threats. The vast majority of environmental health practice occurs at the state and local levels, using a mix of statutory authority and police powers to ensure that the food system is safe, that water is drinkable, that consumer products do not poison, that particulates in the air do not harm the public, and that the public enjoys a healthy and safe environment.

This concept, where both the federal and state governments govern within their own spheres of influence, is known as federalism. The U.S. Constitution specifies the areas where the federal government may engage independent of the states, leaving the states with areas of policy that they govern exclusively.² In areas where federal and state authority overlap or conflict, the states must cede to the federal government, but where the federal government is silent, states have free reign.³

As for the division of state versus local authorities, the concept operates differently. Local governments do not have any express authority under the U.S. Constitution.⁴ Rather, these governments have

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1. THE FEDERALIST NO. 45 (James Madison).
 2. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
 3. See PUB. HEALTH L. CTR., STATE & LOCAL PUBLIC HEALTH: AN OVERVIEW OF REGULATORY AUTHORITY, (2015), https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-fs-state-local-reg-authority-publichealth-2015_0.pdf [<https://perma.cc/2CHD-AFY7>]; Jacob Gerson, *Good Laws, Good Food: Putting Local Food Policy to Work for Our Communities*, HARVARD L. SCH. FOOD L. & POL’Y CLINIC (Aug. 23, 2017), https://h2o.law.harvard.edu/text_blocks/30193 [<https://perma.cc/BS2E-G7KG>].
 4. Local governments have no inherent powers granted to them by the U.S. Constitution. The courts recognize this fact in the legal concepts of Home Rule or Dillon’s Rule. See *Cities 101 – Delegation of Power*, NAT’L

authority granted to them by their state constitution or statutes.⁵ There is no implicit or enabling authority for local governments to act. The division of authority between state and local governments is determined by each state, negotiating with their local institutions on what authorities to provide, leading to a diverse set of principles that govern state and local authority.⁶

The term “environmental health” does not have a single definition. For the most part, environmental health reflects the environmental factors that adversely impact or affect the public’s health. Or, as the Centers for Disease Control and Prevention (“CDC”) states, “the environment is everything around us: the air we breathe, the water we drink and use, and the food we eat . . . the chemicals, radiation, microbes, and physical forces with which we come into contact.”⁷

The World Health Organization (“WHO”) defines environment, as it relates to health, as “all the physical, chemical, and biological factors external to a person, and all the related behaviors.”⁸ The WHO estimates that 12.6 million deaths annually are attributable to preventable environmental causes.⁹ The organization asserts that 24%

LEAGUE OF CITIES, (Dec. 13, 2016) <https://www.nlc.org/resource/cities-101-delegation-of-power/> [<https://perma.cc/6L74-TQFN>]. Dillon’s Rule holds that local governments have only those powers that are expressly given to them by the state. *Id.* According to Dillon’s Rule, local governments only have those powers that are: (1) granted in the express words of the statute, private act, or charter creating the municipal corporation; (2) necessarily or fairly implied in, or incident to the powers expressly granted; or (3) one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as essential to the declared objects and purposes of the corporation. *Id.* *Home Rule*, on the other hand, is a broad grant of power from the state that allows municipalities to independently handle local matters without the need for special legislation by the state, as long as the municipal laws do not conflict with state laws. *Id.* This power to exercise certain functions is transferred from the state to local governments through the state’s constitution or state legislation. *Id.*

5. *Cities 101 – Delegation of Power*, NATIONAL LEAGUE OF CITIES, (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-delegation-of-power/#:~:text=%20Cities%20101%20%E2%80%94%20Delegation%20of%20Power%20,local%20governments%20to%20respond%20effectively%20to%20More> [<https://perma.cc/KP3G-GJEC>].
6. See Gerson, *supra* note 3.
7. *Nat’l Ctr. for Env’t Health: About NCEH*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nceh/information/about.htm> [<https://perma.cc/M8MD-7Z94>] (last visited July 21, 2020).
8. ANNETTE PRÜSS-ÜSTÜN & CARLOS F. CORVALÁN, PREVENTING DISEASE THROUGH HEALTHY ENVIRONMENTS: TOWARDS AN ESTIMATE OF THE ENVIRONMENTAL BURDEN OF DISEASE 22 (WORLD HEALTH ORG., 2012) [<https://perma.cc/G5KC-HQKB>].
9. *Id.* at 10.

of the global disease burden (healthy life years lost) and 22% of all deaths (premature mortality) are attributable to environmental factors.¹⁰

I. ENVIRONMENTAL CONCERNS AFFECTING HUMAN HEALTH

Governments need to protect the environment to ensure the public remains healthy. The contamination of the food and water supply, air quality, chemical exposure, quality of housing and surrounding built environment, climate change, and sanitation/phyto-sanitation threats all are environmental threats that affect the public's health.

The food supply faces contamination risks at every step of the production chain including production, processing, distribution, and preparation.¹¹ The watering of crops with waste-contaminated water, failing to clean storage containers for processed foods, allowing food to sit outside too long before transport, and using the same cutting board for raw meat and fresh vegetables all can contribute to food-borne disease outbreaks.¹²

Clean water and hygiene practices are critical to public health.¹³ Water sources can become contaminated in various ways, including environmental pollutants released into the water supply, other waste sources such as human feces, and construction or agricultural site runoff.¹⁴ More than 884 million people across the globe lack access to safe drinking water and 2.4 billion people across the globe lack sanitation facilities.¹⁵ Diarrhea, cholera, and typhoid fever are common illnesses in areas with unsafe water and poor sanitation.¹⁶

Air pollution, broadly defined as “a mix of hazardous substances from both human-made and natural sources,” is yet another environmental hazard that can greatly damage human and animal

10. *Id.* at 9.

11. *How Food Gets Contaminated - The Food Production Chain*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/foodsafety/production-chain.html> (last updated Sept. 5, 2017) [<https://perma.cc/7NFU-8N32>].

12. *Id.*

13. *See Disease Threats and Global WASH Killers: Cholera, Typhoid, and Other Waterborne Infections*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthywater/global/WASH.html> [<https://perma.cc/N538-P4QF>].

14. *See Drinking-Water*, WORLD HEALTH ORG. (June 14, 2019), <https://www.who.int/news-room/fact-sheets/detail/drinking-water> [<https://perma.cc/XQ4L-9TUT>].

15. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 11.

16. *Id.*

health.¹⁷ Exposure to air pollution, such as vehicle emissions and fumes from chemical or power production, can increase the risk of developing numerous health issues including respiratory diseases, cardiovascular disease, diabetes, obesity, and reproductive, neurological, and immune system disorders.¹⁸

According to the WHO, environmental chemical exposure has generally increased over time “due to the economic development in various sectors including industry, agriculture and transport.”¹⁹ The impact of environmental chemical exposure “may have immediate, acute effects, as well as chronic effects, often resulting from long-term exposures.”²⁰ Long-term chemical exposure can lead to adverse health outcomes such as “damage to the nervous and immune systems, impairment of reproductive function and development, [and] cancer and organ-specific damage.”²¹

Access to foods that support healthy eating patterns, less crime and violence, improved environmental conditions, and the quality of housing comprise the social determinants of health related to the built environment and neighborhoods.²² Finally, according to the World

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17. *Air Pollution and Your Health*, NAT’L INST. OF ENV’T HEALTH SCIS., <https://www.niehs.nih.gov/health/topics/agents/air-pollution/> [https://perma.cc/37SZ-SWWT] (last updated Aug. 12, 2020). Types of air pollution include traffic related, ozone, noxious gases, particulate matter, volatile organic compounds, and polycyclic aromatic carbons. *Id.*
 18. *Id.*
 19. *Children’s Environmental Health: Chemical Hazards*, WORLD HEALTH ORG., <https://www.who.int/ceh/risks/cehchemicals/en/> [https://perma.cc/4X7R-S464?type=image].
 20. *Id.*
 21. *Id.*
 22. Examples of threats to each of these areas include: no public transportation systems to reach grocery stores, increased weight gain due to fears of going outside to exercise in a violence prone neighborhood, increased cardiovascular disease rates in a community due to the area’s high ozone levels, and living in an apartment complex with a rodent infestation. See *Social Determinants of Health*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> [https://perma.cc/L4SR-53GZ]. See also *Access to Foods that Support Healthy Eating Patterns*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/access-to-foods-that-support-healthy-eating-patterns> [https://perma.cc/J3VW-YQHY]; *Crime and Violence*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/crime-and-violence> [https://perma.cc/8NJ8-WG2K]; *Environmental Conditions*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/social->

Health Organization, climate change threatens “clean air, safe drinking water, nutritious food supply, and safe shelter.”²³

II. GOVERNMENTAL POLICY

Policy consists of a formal set of plans and principles intended to address public problems. It is a tool to encourage or discourage an action or inaction in response to a public concern.²⁴ *Public* policy is made by governments on the behalf of their constituents, be they local, tribal, state, federal or international.²⁵ They seek to serve the public and improve the public’s welfare. A government’s response to the environment’s effect on the public’s health comes from public policy.

Public policy consists of laws, regulations, ordinances, orders, incentives and practices designed to serve and improve a community. Environmental health policy seeks to: regulate or moderate activities that impact the public’s health through the environment, or promote public health and improve the environment’s effect on humans.²⁶

In this article, the term “law” refers to the rights and responsibilities of individuals and governments within a society.²⁷ Law provides mechanisms to require persons creating pollution to compensate others for the damage caused by pollution. Because of the law, persons and entities releasing contamination into air, water, and

determinants-health/interventions-resources/environmental [https://perma.cc/5PGA-U9NR]; See *Social Determinants of Health*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health [https://perma.cc/5QFB-8DM2] (last visited Aug. 15, 2020).

23. *Climate Change*, WORLD HEALTH ORG., https://www.who.int/health-topics/climate-change#tab=tab_1 (last visited Aug. 15, 2020) [https://perma.cc/D3MZ-GJSG]. In the next 10-30 years, climate change is expected to cause approximately 250,000 additional deaths per year, from malnutrition, malaria, diarrhea, and heat stress. *Id.*
24. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 4 (1st ed. 2000) (“The legal powers and duties of the state to assure the conditions for people to be healthy, and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.”).
25. See generally, Paul A. Locke et al., *Environmental Health and Protection*, *LAW IN PUBLIC HEALTH PRACTICE* (Richard A. Goodman et al. eds., 2d ed. 2007).
26. *Id.* at 478.
27. See *CTRS. FOR DISEASE CONTROL & PREVENTION, PUBLIC HEALTH LAW 101: KEY CONCEPTS OF U.S. LAW IN PUBLIC HEALTH PRACTICE* (2012) [hereinafter *Public Health Law 101*], https://www.cdc.gov/php/publications/phl_101.html.

on land can be required to rectify their actions to persons who bear the health burdens of the wastes.²⁸

Governments develop and adopt policies to respond to environmental threats to the public's health. A government's ability to implement these approaches comes from the authority their constituents grant them to impose these policies. The public grants Congress, state legislatures, city, county and tribal councils, the authority to impose restrictions on its citizens and require certain businesses to act in specific ways that limit environmental emissions that harm human health.²⁹ This grant of authority comes through four mechanisms – Constitutions, statutes, regulations, and common law:³⁰

Constitutions (U.S. and State), which set forth the basic parameters of a government and its administration (including public health and the environment);

Statutes (Congress, State Legislatures), which determine the policies of a government and limitations on individuals for the overall good; limited by the rights and obligations set forth in the appropriate Constitution;

Regulations (Federal and State Agencies), the rules established by agencies in the executive branch to implement and administer statutes;

Common Law, those legal theories that have evolved via decisions by the courts.³¹

III. CONSTITUTIONS

Constitutions establish the framework of how a government intends to operate. A constitution determines how constituents will be governed, what rights will be granted, and how the government will enforce those rights. Constitutions describe the process for enacting laws, who may be subject to these laws, and how the laws are implemented.³²

The U.S. Constitution is the source for all legal authority for the federal government. The Congress, President, and Judiciary operate within the constraints of this document. However, neither the term

28. Locke et al., *supra* note 25.

29. *Id.*

30. *Id.* See also *Public Health Law 101*, *supra* note 27.

31. See Locke et al., *supra* note 25.

32. *Public Health Law 101*, *supra* note 27.

“public health” nor “environment” is mentioned in the Constitution.³³ Much of the federal authority to regulate environmental health emanates from its constitutional authority to regulate commerce between the states (Commerce Clause) and its authority to tax and spend. This leaves the primary responsibility for environmental health to the states and local governments (via the 10th amendment to the U.S. Constitution).³⁴

The 10th Amendment establishes the concept of federalism. Under the 10th Amendment, state and local governments retain all police powers not expressly granted by them to the federal government.³⁵ Police powers are powers exercised by the states and locals to enact legislation and regulations to protect the public health, welfare, and morals, and to promote the common good.³⁶

Police powers encompass the right of states to protect the country and its population from threats to the public health and safety.³⁷ The term “police power” is used to control nuisances, such as pollutants in the air and water, to prevent the sale of bad food, and to quarantine persons who were infected with communicable diseases.³⁸ Such powers reserve most environmental health activities to be carried out by the state and local governments.³⁹

The term is well-supported by the courts. In a case determining whether the fluoridation of the city’s water supply was constitutional, state courts have noted that:

The state, under its police power, has the right, and it is its duty, to protect its people in their health and general welfare. The very existence of government, as well as the security of the social order, depends upon this right. This is especially true as to the health

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33. Sections of the Constitution do enable federal public health-related activities, including, for example, provisions within Article I, Section 8, which address Congress’ powers to tax and spend, and to provide for the general Welfare. *Public Health Law 101*, *supra* note 27.
34. The 10th Amendment to the Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The Constitution’s enumerated powers to the federal government do not include public health. Through the 10th Amendment states retain responsibility for environmental health.
35. *Id.*
36. *See* *Brown v. Maryland*, 25 U.S. 419, 431, 442–44 (1827). *See also* *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905).
37. *See* Edward Richards, *The Police Power*, PUBLIC HEALTH LAW MAP – BETA 5.7, <https://biotech.law.lsu.edu/map/ThePolicePower.html> [https://perma.cc/Z2DS-DSME].
38. *Brown*, 25 U.S. at 442–44; *See generally*, *Jacobson*, 197 U.S. 11.
39. *See* Richards, *supra* note 37.

of the people, which affects every man, woman and child within the state.⁴⁰

The federal courts have reached the same conclusion. Chief Justice John Marshall affirmed that states had authority to legislate with respect to all matters within their geographic boundaries, or to police their internal affairs, which he referred to as their “police power.”⁴¹ In addition, the U.S. Supreme Court stated in 1902 that:

We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.⁴²

The federal government’s authority over environmental health is limited by the U.S. Constitution and federal statutes. Under the Constitution, the states retained much of their police power authority over environmental health, but occasionally share the right to regulate health and safety issues with the federal government. Examples of this sharing of police powers include food and drug regulations, environmental preservation laws, and workplace safety laws. States have companion laws in these areas and may act using their police

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40. *Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352, 354 (1954) (quoting *State v. Boren*, 36 Wash. 2d 522, 525 (1950)) (upholding broad public authority to fluoridate of water).
41. *See Gibbons v. Ogden*, 22 U.S. 1, 78–80 (1824); *Brown*, 25 U.S. at 444.
42. *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380, 388 (1902) (concluding the state may exclude persons from a locale to prevent the spread of disease). This line of reasoning has been extended to how state governments restrict public gatherings during pandemics. For example, the Supreme Court agreed that California’s restrictions of public gatherings—including religious gatherings—was a proper response to COVID-19. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (“Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’ *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials ‘undertake to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’ *Marshall v. United States*, 414 U.S. 417, 427 (1974).”). *But see Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ____ (2020), (“stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as “narrowly tailored.” “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”).

powers without federal authority.⁴³ Public health enforcement such as restaurant inspections, communicable disease control, and drinking water sanitation are examples of the use of police powers.

This limited federal authority provides state and local governments with broad authority to regulate public health and safety and to protect the environment. Most environmental public health activities are enacted and carried out by the state and local governments.⁴⁴

However, state and local governments are limited by their own constitutions, as well as the U.S. Constitution. These limitations range from how a state adopts tax policy to limitations on regulating private property. State constitutions can limit the extent a government may regulate individual rights, or they may expand the authority of the public (i.e., the government) over an individual. Each constitution provides for the establishment of state and local government powers. They set forth how the government is established and administered for that state.

As environmental health generally falls within public health, environmental health regulations thus fall within the responsibility of state and local governments. Although state and local authority to manage environmental health is implicitly evident in the 10th Amendment, several state constitutions explicitly reference their duty to protect both public health and the environment. For example, Hawaii's constitution declares that "[t]he State shall provide for the protection and promotion of the public health."⁴⁵ Meanwhile, Montana's constitution provides that "[t]he state . . . shall maintain and improve a clean and healthful environment . . . for present and future generations."⁴⁶

State public health agencies, the departments of health, environmental agencies or departments of agriculture for food safety, have restricted police powers.⁴⁷ The legislature of the state must delegate the police powers to the health department and other state

43. See U.S. CONST. amend. X.

44. See, e.g., Drew E. Altman & Douglas H. Morgan, *The Role of State and Local Government in Health*, 2 HEALTH AFFAIRS 7, 14–19 (1983).

45. Haw. Const. art. IX, § 1. Similar public health provisions are found in Alabama, Michigan, New York, and Texas. See ALA. CONST. art. 11, §§ 215.04, 219.06; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XVII, § 3; TEX. CONST. art. IX, § 13.

46. MONT. CONST. art. IX, § 1. Similar environment provisions are found in Georgia, Hawaii, Illinois, Louisiana, Minnesota, New Mexico, and Pennsylvania. See, e.g., Ga. Const. art. III, § 6, ¶ II; Haw. Const. art. XI, § 9; ILL. CONST. art. XI, § 2; LA. CONST. art. IX, § 1; MINN. CONST. art. XI, § 14; N.M. CONST. art. XX, § 21; PA. CONST. art. I, § 27.

47. See, e.g., *Public Health Law 101*, supra note 27. See also PUB. HEALTH L. CTR., supra note 3.

agencies before they can use them.⁴⁸ However, if state statutes are silent on emergency powers, then these agencies have broad powers to act under state's policy powers.⁴⁹

IV. STATUTES

Statutory laws are the laws adopted by the legislature (Congress, the state legislatures, the county commissioners, tribal or city council) on behalf of the public (e.g., Clean Air Act, Clean Water Act, Chemical Safety Act, Food Safety Modernization Act). Legislative bodies have the authority to determine the rights and responsibilities of actions on lands owned by the government and can act under authority of police powers or the U.S. Constitution when demanding a facility release less pollution.

Statutes are the laws and policies adopted by the people's branch of government – the legislatures. Legislatures include the U.S. Congress, the state legislatures, and to some extent, the city and tribal councils, and county commissioners. Their legitimacy to govern comes from the fact that they are elected by the people whom they govern; the same people who have the opportunity to vote them out if they disagree with the laws they propose and enact. This concept often makes elected bodies cautious and engaged in a constant balancing act: they do not want to limit freedoms or restrict their constituents unless its critical to the public's health or safety.⁵⁰

There is no single federal environmental health act that governs the federal response to environmental health. Before Congress enacted statutes on air and water quality (which began the federal government's intervention into the environment), the public had to witness several environmental crises:

Air pollution in Donora, Pennsylvania in October 1948 led to half the town becoming ill and 20 people dying.⁵¹

Smog alerts in New York City and Los Angeles in the 1950s and 1960s led to respiratory ailments.⁵²

48. *Id.*

49. *Id.*

50. *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). “The police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”

51. *See History of Air Pollution*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/air-research/history-air-pollution> [<https://perma.cc/AGK5-SRHK>].

52. *See id.*

People moving out of the inner cities into the suburbs where the air was cleaner.⁵³

Industries in Cleveland dumped so much flammable waste into the Cuyahoga River that it often caught fire. One fire in 1952 caused over \$1 million in damages to riverfront properties,⁵⁴ and another fire in 1969 catalyzed the creation of the Environmental Protection Agency (“EPA”).⁵⁵

These crises led the public to urge Congress to adopt the Clean Air Act and the Clean Water Act that became the cornerstones of environmental law. However, many environmental health hazards that impact the public have emerged slowly over time and are less obvious than threats to health from polluted air and water:

Particulates in the air that cause respiratory problems.⁵⁶

Pathogens in drinking water that lead to water-borne illnesses.⁵⁷

Chemicals in commerce that can adversely impact children or cause cancer.⁵⁸

These environmental issues and illnesses occur over time and often cannot be traced to a single event.

Enacting a statute is a lengthy and cumbersome process.⁵⁹ It begins with the introduction of legislation, which reflects the concerns and interests of many stakeholders – not only public health advocates but

53. *See id.*

54. *See* Tim Folger, *The Cuyahoga River Caught Fire 50 Years Ago. It Inspired a Movement*, NAT’L GEOGRAPHIC (June 21, 2019), <https://www.nationalgeographic.com/environment/2019/06/the-cuyahoga-river-caught-fire-it-inspired-a-movement/> [<https://perma.cc/AP9K-4QGD>].

55. *See id.*

56. *See Health and Environmental Effects of Particulate Matter*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm> [<https://perma.cc/CCN2-5CF4>].

57. *See, e.g., Water-Related Diseases and Contaminants in Public Water Systems*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 7, 2014), https://www.cdc.gov/healthywater/drinking/public/water_diseases.html [<https://perma.cc/26YV-385K>].

58. *See* Philip J. Landrigan & Lynn R. Goldman, *Children’s Vulnerability to Toxic Chemicals: A Challenge and Opportunity to Strengthen Health and Environmental Policy*, 30 HEALTH AFFAIRS 842, 843 (2011).

59. *See, e.g., Robert B. Dove, Enactment of a Law*, GOV’T PRINTING OFF. (1997), <https://www.congress.gov/help/learn-about-the-legislative-process/enactment-of-a-law> [<https://perma.cc/R3EN-PT5P>].

business interests, consumer groups, and agencies that must implement the law.⁶⁰ Each stakeholder has some specific interest in a bill that explains their support or their lack of support. If the legislation is passed by the legislature (in the states or Congress), the executive (governor or President) has the opportunity to veto the bill.⁶¹ The legislature often has an opportunity to override that veto, but if the overriding legislation fails, the bill dies.⁶² On the other hand, if the executive signs the bill passed by the legislature, it becomes a statute with the force of law.⁶³ Such a system leads to complicated and convoluted series of statutes responding to environmental health issues, regardless whether they have been enacted at the federal, state or local level.

Once a federal statute has been enacted, it is unlikely to be repealed or sunsetted (where the legislature determines its purpose is no longer justified).⁶⁴ Laws often are amended, however, in order to reflect changes in the regulated community.

Within state and local governments, laws tend to be easier to adopt, easier to amend and easier to repeal. Certain states mandate sunset provisions, requiring a legislative review and reauthorization for a law to remain in effect.⁶⁵

V. DELEGATION OF FEDERAL ENVIRONMENTAL HEALTH LAWS

For most major federal environmental laws, the concept of cooperative federalism, in which the federal government shares its authority with the state and local governments, encourages these laws be delegated to and administered by the states. This entails state legislatures enacting a law that meets the basic provisions of the federal act, allowing a state agency to administer and enforce the federal law in lieu of a federal agency. If the federal government agrees that the

60. *Id.*

61. *Id.*

62. *Id.*

63. See Brenda Erickson & Kae Warnock, *Separation of Powers—Executive Veto Powers*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx> [<https://perma.cc/AP9U-LS5K>].

64. According to the National Conference of State Legislatures, Colorado passed the first sunset law in 1976 and thirty-six other states passed similar laws during the 1980s. See Iris Hentze, *Improving Occupational Licensing with Sunrise and Sunset Reviews*, NAT'L CONF. STATE LEGS. (2018), <https://www.ncsl.org/research/labor-and-employment/improving-occupational-licensing-with-sunrise-and-sunset-reviews.aspx>. However, dissatisfaction with the sunset process left only fourteen states still using it by 2018. *Id.*

65. *Id.*

state law will be as protective as,⁶⁶ or no less stringent than⁶⁷ or at least as stringent as the federal law and provides adequate enforcement,⁶⁸ then the federal agency will authorize the state program. For that environmental law, the federal agency agrees not to administer and enforce the law within that state.⁶⁹

For other federal laws that are not delegated to the states, however, the federal agency administering the law may enter into a memorandum of understanding (MOU) with the states, which provides financial support for the relevant state agency to administer and enforce the federal requirements.⁷⁰ The difference between an MOU and delegation is that the federal government retains authority over administration of the law via the MOU, whereas when a program is delegated it is operated under the state's authority.⁷¹

The EPA oversees the majority of environmental health statutes that may be delegated to the states. The EPA's primary public health responsibilities have evolved to include the regulation of air quality, water quality, and chemicals in commerce; the development of regulatory criteria for the management and disposal of solid and hazardous wastes; and the cleanup of environmental contamination.⁷²

The implementation and enforcement of many federal environmental health laws have been delegated to the states.⁷³ Much of

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66. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 667 (allowing states to adopt their own plans to preempt OSHA standards).
67. See Clean Air Act of 1963, 42 U.S.C. § 7416 (describing the retention of state authority).
68. See Toxic Substances Control Act of 1976, 15 U.S.C. § 2684 (describing state lead exposure reduction program requirements).
69. See U.S. ENV'T PROT. AGENCY, EPA POLICY CONCERNING DELEGATION TO STATE AND LOCAL GOVERNMENTS.<https://nepis.epa.gov/Exe/tiff2png.cgi/900D0K00.PNG?-r+75+g+7+D%3A%5CZYFILES%5CINDEX%20DATA%5C81THRU85%5CTIFF%5C00001548%5C900D0K00.TIF> [<https://perma.cc/XB2D-E2P6>].
70. See, e.g., U.S. ENV'T PROT. AGENCY, TRIBAL NEW SOURCE REVIEW IMPLEMENTATION MANUAL 5 (2012), https://www.epa.gov/sites/production/files/2016-02/documents/tribal2_nsr_training_manualfinal05_16_12v7.pdf [<https://perma.cc/6RAB-9F7A>] (illustrating how EPA can enter MOUs with tribes to tailor enforcement of federal environmental laws).
71. See Sherri A. Berger, *Development and Execution of Memoranda of Understanding and Memoranda of Agreement*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 29, 2013), <https://www.cdc.gov/partners/pdf/policy597.pdf> [<https://perma.cc/LU4J-GJA8>].
72. See David M. Bearden et al., *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency* (2013), CONG. RES. SERV., RL30798, <https://fas.org/sgp/crs/misc/RL30798.pdf>.
73. *Id.*

this delegation of authority comes in the form of providing financial assistance to state and local governments to help them meet federal requirements, or in self-governance options that states can employ to meet or exceed federal standards. The Clean Air Act (“CAA”), for example, requires that emissions from major stationary sources and certain other sources meet federal standards to obtain CAA operating permits that contain and assure compliance with all their CAA requirements.⁷⁴ In most areas, state or local air agencies issue the permits (called “State Implementation Plans”).⁷⁵ In other areas, the EPA or a tribal government is the permitting authority.⁷⁶ In short, states have the option of adopting a program that provides for partial or complete delegation of EPA’s authority to implement and enforce toxic air emissions standards which are at least as stringent as the federal requirements.⁷⁷

Other laws similarly delegate federal authority to the states. The Clean Water Act (“CWA”), which “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters,”⁷⁸ allows for the EPA to delegate permit program authority to states.⁷⁹ The Safe Drinking Water Act (“SDWA”), which authorizes EPA to establish primary drinking water standards, allows for EPA to give states the authority to regulate underground injection disposal practices and administer groundwater control programs.⁸⁰ The Federal Food, Drug and Cosmetic Act of 1938 (“FDCA”),⁸¹ Food Safety Modernization Act

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74. *See Clean Air Act (CAA) and Federal Facilities*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/clean-air-act-cao-and-federal-facilities> [<https://perma.cc/VT6U-3HS5>].
75. *See id.*
76. *See id.*
77. 42 U.S.C. § 7412(l) (2018).
78. *Clean Water Laws, Regulations, and Executive Orders Related to Section 404*, ENV’T. PROT. AGENCY, <https://www.epa.gov/cwa-404/clean-water-laws-regulations-and-executive-orders-related-section-404> [<https://perma.cc/QDN7-NZ5M>].
79. *See, e.g.*, 33 U.S.C. § 1342(b) (2018) (describing how EPA can delegate National Pollutant Discharge Elimination System permits to states).
80. *See* Bearden et al., *supra* note 72, at 39.
81. *See* 21 U.S.C. § 337(b) (2018) (authorizing the states to enforce some of the FDCA’s food labeling requirements if certain criteria are met).

of 2011 (“FSMA”),⁸² Occupational Safety & Health Act,⁸³ Solid Waste Disposal Act,⁸⁴ and Federal Insecticide, Fungicide, and Rodenticide Act⁸⁵ are other examples of federal environmental laws that provide for delegating regulatory authority to states.

The FDCA⁸⁶ and its companion the FSMA rely on the states and local governments to implement these laws.⁸⁷ The FDCA allows a state to bring proceedings for civil enforcement or to restrain violators under its own name within its jurisdiction.⁸⁸ FSMA does not specifically provide for delegation, but relies heavily on existing state food safety programs to implement the law. FSMA requires the U.S. Food and Drug Administration (“FDA”) to provide outreach, education and training to state and local governments to build their food safety and food defense capabilities.⁸⁹

The Occupational Safety and Health Act⁹⁰ which created the Occupational Safety and Health Administration (“OSHA”) allows for state delegation. However, unlike the environmental statutes administered by the EPA under the concept of cooperative federalism, the OSHA law permits state administration of occupational health and safety requirements but not under the federal OSHA authority.⁹¹ States may assume responsibility for the development and enforcement by submitting a state plan to the federal OSHA, which provides the OSHA Secretary the option of letting the state administer OSHA standards instead of OSHA.⁹²

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82. See 21 U.S.C. § 2204(a)(1)(F) (2018). See also Dough Farquhar & Scott Hendrik, *Food Safety Modernization Act: Effect on States*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/agriculture-and-rural-development/food-safety-modernization-act.aspx> [https://perma.cc/375X-UC26].
83. See 29 U.S.C. § 667 (allowing states to adopt their own plans to preempt OSHA standards).
84. See 42 U.S.C. §§ 6904, 6929, 6941–6949a, 6991c, 6991g, 6992f (2018).
85. 7 U.S.C. § 136t (2018).
86. 21 U.S.C. § 337(b).
87. 21 U.S.C. § 2204(a)(1)(F) (2018).
88. 21 U.S.C. § 337(b)(1) (“A State may bring in its own name and within its jurisdiction proceedings for the civil enforcement, or to restrain violations, of section 341, 343(b), 343(c), 343(d), 343(e), 343(f), 343(g), 343(h), 343(i), 343(k), 343(q), or 343(r) of this title if the food that is the subject of the proceedings is located in the State.”).
89. 21 U.S.C. § 2204(a)(1)(F).
90. Occupational Safety and Health Act of 1970, 29 U.S.C. § 667.
91. *Id.*
92. *Id.* “Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or

The OSHA law allows for states to act on occupational health and safety issues where there is no federal standard.⁹³ However, where there is a standard and the state has not submitted or received authority to administer the OSHA law in that state, the federal standard must be followed.⁹⁴ The U.S. Supreme Court held that the Occupational Safety and Health Act pre-empts all state law that “constitutes, in a direct, clear and substantial way, regulation of worker health and safety,” unless the Secretary of Labor has explicitly approved the law pursuant to § 18 of the Act.⁹⁵

A. Legislatures Use Statutes to Authorize the Executive to Act Via Agencies

When a legislature, be it federal (Congress), state or local, enacts an environmental health law, it often grants to the Executive (either the governor, the local administration or the President) the power to implement and administer the provisions of the statute. A statute may establish an agency designed to execute the law enacted by the legislature. Establishing an agency allows the legislature to determine the parameters of that agency’s action, via the enabling act which establishes the agency.⁹⁶

More often, the legislature will designate parts of a statute to be implemented and administered by an agency.⁹⁷ This allows an agency the authority to administer and enforce provisions set forth in the law via the promulgation of regulations.

Executive agencies develop regulations based on their statutory authority to implement and administer environmental health statutes. In developing regulations, agencies are subject to many of the procedures that legislatures face in enacting statutes. Regulations must

health issue with respect to which no standard is in effect under section 655 of this title.” *Id.*

93. *Id.*

94. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 88 (1992) (“State law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the OSH Act regardless of whether it has another, nonoccupational purpose.”).

95. *Id.* at 107–08.

96. An enabling statute “permits what was previously prohibited or that creates new powers;” in United States law, the term most frequently refers to “a congressional statute conferring powers on an executive agency to carry out various delegated tasks.” *Statute*, BLACK’S LAW DICTIONARY (11th ed. 2019).

97. See Brenda Erickson & Kae Warnock, *Separation of Powers—Legislative Oversight*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx> [https://perma.cc/2T83-ZZPW].

be published in advance, provide the public the opportunity to comment (often through a public hearing), and require the agency to respond to the public's comments.⁹⁸ Agencies then publish a final rule, which may be challenged in the courts if it fails to meet the scope and authority of the statutes that the agency seeks to implement.⁹⁹

Both the executive and the legislative branches retain authority over agency regulations.¹⁰⁰ The executive (governor, mayor, or president) appoints the agency director, who is responsible for the agency's overall direction and the regulations it promulgates. The legislature controls the appropriations that either support or limit the agency's resources to implement a regulation.¹⁰¹ Federal grants have become a major source of funding for state agencies, however several state legislatures often retain the right to accept or reject federal funds.¹⁰²

An agency's decision carries great weight in the court, if it is found to follow proper procedure and provide due process. The U.S. Supreme Court, in the case of *Chevron, USA v. NRDC*,¹⁰³ set forth the judicial standard granting deference to an agency's decision, based on the belief that the agency has the most knowledge and insight regarding the regulation in question.¹⁰⁴ Unless the rule is considered "arbitrary and

98. *A Guide to the Rulemaking Process*, OFF. FED. REG., (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/F38N-S6NF>].

99. *Id.*

100. *See* Erickson & Warnock, *supra* note 97.

101. *See* Brenda Erickson & Kae Warnock, *Separation of Powers – Appropriation Powers*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx> [<https://perma.cc/5Z8R-EW7Q>].

102. *See* S.B. 2444, Reg. Sess. (Miss. 2016) (seeking to direct the state's department of health and department of agriculture and commerce to publish any agreements regarding the federal Food Safety Modernization Act (FSMA) for public comment, delaying annual contracts and prohibiting any state activities regarding FSMA).

103. The Supreme Court set forth a two-part test for determining a court to review an agency's interpretation of a statute. "First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

104. *Id.*

capricious,” meaning it randomly impacts one party with cruel intent, a court will likely let any agency final rule stand.¹⁰⁵

VI. REGULATIONS

The legislative branch can grant authority to agencies to make regulations that implement the provisions of a statute; regulations have same force of law that statutes do, limited by the authority provided by the legislature.¹⁰⁶ When a legislature enacts a statute it either explicitly or implicitly authorizes the executive to act via the state agencies. For environmental health statutes, most often these are administered by the state’s department of health or department of environment.¹⁰⁷ For statutes related to food safety, it may also include the state department of agriculture.¹⁰⁸

The legislature determines the scope and authority of the agencies that address environmental health; agencies cannot address issues outside of their scope. Agencies develop regulations in response to a statutory law, establishing the manner in which the law is administered and operated.¹⁰⁹

VII. EXECUTIVE AGENCIES

The federal government and state governments have an agency responsible for public health and the environment. These agencies may be an executive agency (a department) or a division within one.

Within the federal government, the primary regulatory environmental health agency is the EPA. The Department of Health and Human Services houses several agencies dedicated to environmental health, including the Agency for Toxic Substances and Disease Registry (“ATSDR”), the National Institute of Environmental Health Sciences (“NIEHS”), and the National Center for Environmental Health (“NCEH”) at the Centers for Disease Control and Prevention (“CDC”).

OSHA, within the U.S. Department of Labor, covers environmental health concerns within the occupational or workplace settings.

105. *Id.*

106. *See* Erickson & Warnock, *supra* note 97.

107. *See Health and Environmental Agencies of the U.S. States and Territories*, U.S. ENV’T. PROT. AGENCY, <https://www.epa.gov/home/health-and-environmental-agencies-us-states-and-territories> [<https://perma.cc/QDN7-NZ5M>].

108. *See* FDA, NAT’L RETAIL FOOD TEAM, ADOPTION OF THE FDA FOOD CODE BY STATE AND TERRITORIAL AGENCIES RESPONSIBLE FOR THE OVERSIGHT OF RESTAURANTS AND RETAIL FOOD STORES (2019), <https://www.fda.gov/media/107543/download> [<https://perma.cc/A395-X9T6>].

109. *See* Erickson & Warnock, *supra* note 97.

Food safety is overseen by several agencies, primarily the FDA and U.S. Department of Agriculture (“USDA”). USDA’s Food Safety Inspection Service (“FSIS”) ensures that meat, poultry, and processed egg products are safe for public consumption.¹¹⁰ FDA handles most other federal food safety activities.

State departments of health are created by state legislatures with broad authority to “protect, promote and improve public health.”¹¹¹ Many are subject to oversight from a state board of health. Similarly, most local health departments are overseen by a local board of health appointed by the mayor or city council. These acts establishing public health departments grant the agency’s director the responsibility to respond to public health emergencies without specific authorization by the legislature, granting the director broad authority to act.¹¹²

State public health authorities are granted their powers by state legislative bodies and serve to promote and protect the health of the state’s citizens. General services include disease reporting from local health departments, immunization registries, vital record collection including birth and death certificates, public health emergency response efforts, health equity efforts, volunteer medical services, and many core environment health services, such as the inspection of restaurants, retail food establishments, public pools, hotel health inspections, vector control, the regulation of body art, and ensuring housing is safe from health threats.¹¹³

Unlike health departments, environmental agencies have a regulatory focus, with most being created in order to implement federal environmental laws delegated to the states. These agencies primarily ensure the regulated community (industries that emit pollutants into the air, water and land) are permitted to release pollutants in specified amounts.¹¹⁴ The agency actions are overseen by their governor, the legislature and foremostly, the courts. Several are governed by an appointed board.¹¹⁵

110. *About FSIS*, U.S. DEP’T AGRIC., <http://www.fsis.usda.gov/aboutfsis> [<https://perma.cc/JFT8-ACRS>].

111. *See also* PUB. HEALTH L. CTR., *supra* note 3.

112. *Id.*

113. *See Program Activities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 29, 2020), <https://www.cdc.gov/nceh/ehs/activities/index.htm> [<https://perma.cc/UB94-QLE9>].

114. *See Pollution Prevention Law and Policies*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/p2/pollution-prevention-law-and-policies> [<https://perma.cc/2AT9-M8DT>].

115. *See, e.g., Boards and Commissions*, N.C. DEP’T ENV’T QUALITY, <https://deq.nc.gov/about/ncdeq-commissions> [<https://perma.cc/UDF5-QLZP>].

VIII. STATE DEPARTMENTS OF HEALTH ENVIRONMENTAL
SECTIONS – GEORGIA AND COLORADO

The Environmental Health Division of the Georgia Department of Public Health (“GDPH”) and the Colorado Department of Public Health and Environment (“CDPHE”) provide good examples of the types of issues related to environmental health that a state’s public health agency must address.

In Georgia, GDPH is the lead agency in the state for preventing disease, injury and disability; promoting health and wellness; and for preparing for and responding to public health emergencies in the state.¹¹⁶ It funds and collaborates with 159 county health departments and 18 public health districts in the state of Georgia.¹¹⁷ The department is governed by a nine-member board of public health composed of physicians, a hospital chief executive officer, and a major general.¹¹⁸

The Environmental Health Division of the GDPH regulates a wide variety of environmental health related activities including body art, chemical hazards, emergency preparedness, food service, healthy homes and lead poisoning, hotels, motels, and campgrounds, insects and vector borne diseases, public swimming pools, rabies, tanning facilities, wastewater, and well water services.¹¹⁹ The majority of these programs have no federal counterpart or any federal statutory requirements for states to engage in these efforts.

The Environmental Health Division responds to body art, such as tattooing, piercings, permanent makeup and subdermal implants.¹²⁰ Recent legislation was enacted requiring permits for body artists by the GDPH to operate.¹²¹ GDPH is responsible for promulgating regulations

116. *See About DPH*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/about-dph> [<https://perma.cc/9N4C-D5Y8>].

117. *Id.*

118. *See Board of Public Health*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/about-dph/board-public-health> [<https://perma.cc/5QSB-ZPJE>].

119. *See Environmental Health*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health> [<https://perma.cc/BZG8-6CRR>].

120. *See Body Art*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/body-art> [<https://perma.cc/9443-KMAQ>].

121. Governor Kemp signed into law Ga. Senate Bill 214 (Sess. 2019) which directs the Georgia Department of Public Health to adopt statewide Body Art regulations including the permitting of body artists. S.B. 214, 155th Gen. Assemb., Reg. Sess., at 6-7 (Ga. 2019).

to ensure that body art is practiced in a safe and healthy manner, limiting the chance of outbreaks from substandard service.¹²²

The division oversees the state's Chemical Hazards Program, which aims to “to prevent illness and promote quality of life through the reduction and elimination of exposures to hazardous chemicals in the environment.”¹²³ The program “provides public health assessments, health consultations, technical assistance, community education, staff training, and referrals for district and local health departments, residents, educators, healthcare professionals, and state and federal agencies.”¹²⁴ In terms of emergency preparedness, the division seeks to “prevent communicable disease and contamination of food and water, develop and monitor environmental health information, inspect and control sanitation measures, ensure safe water and wastewater disposal, control disease vectors and potential epidemics, facilitate laboratory testing of food and water, and inspect facilities and shelters.”¹²⁵

Like most states, the environmental health division within the department conducts food safety inspections for retail foods, issues food service permits, and enforces rules and regulations for running a food service establishment including breweries and distilleries.¹²⁶

In terms of healthy homes and lead poisoning prevention, the division fields mold complaints and inquiries, serves as a liaison for mold information and lead, conducts lead abatement and certification inspections and trainings, creates lead data and reports and conducts lead home investigations and screenings, controls the lead pre-1978 housing program, manages mold and lead case reports and lab submissions, reports and enforces lead safety guidelines, and conducts lead screening for children.¹²⁷ For hotels, motels, and campgrounds the division enforces regulations for owners, provides bedbug information and the handbook for the bedbug abatement and prevention, and handles Legionnaires' Disease reporting, information, and prevention.¹²⁸

122. See GA. DEP'T OF PUB. HEALTH, *supra* note 120. See also S.B. 214, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

123. *Chemical Hazards*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/chemical-hazards> [<https://perma.cc/78ZA-CYJG>].

124. *Id.*

125. *Emergency Preparedness*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/emergency-preparedness> [<https://perma.cc/4ULZ-Z5GC>].

126. See *Food Service*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/food-service> [<https://perma.cc/8GFA-9GTK>].

127. See *Healthy Homes and Lead Poisoning Prevention*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/healthy-homes-and-lead-poisoning-prevention> [<https://perma.cc/M82Y-RYBE>].

128. See *Hotels, Motels and Campgrounds*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/hotels-motels-and-campgrounds> [<https://perma.cc/RM2L-BX2X>].

The Environmental Health Division handles cases of animals with rabies, oversees tanning facilities, and public swimming pool safety.¹²⁹ The Zoonotic Disease Team investigates vector borne diseases and infestations in the state.¹³⁰ The Pool Department enforces rules and regulations on public swimming pool construction, permitting, and maintenance as well as provides fact sheets about pool safety and health to safely administer pool chemicals.¹³¹

For wastewater, the division enforces regulations for wastewater, provides application information for wastewater disposal, and provides information regarding septic tanks, portable toilets, and on-site sewage storage.¹³² Regarding well water, the Non-Public Well Program (NPW) aids and provides guidance on compliance with rules and regulations for non-public wells and also examines waterborne illnesses and outbreaks, assists state and local partners with waterborne disease outbreak investigations, and conducts “environmental assessments during outbreak investigations of small water supplies, restaurants, tourist courts, and swimming pools.”¹³³

Another approach is seen in Colorado, one of the few states that have their health activities and environmental programs (regulatory permitting activities under the CAA and CWA) within the same agency.¹³⁴ The mission of CDPHE is to “advance Colorado’s health and protect the areas where citizens live, learn, work, and play.”¹³⁵ CDPHE “is one of 16 cabinet-level departments whose executive directors are appointed by the governor The department serves Coloradans by providing high-quality, cost effective public health and environmental protection services that promote healthy people in healthy places.”¹³⁶

129. See GA. DEP’T OF PUB. HEALTH, *supra* note 119.

130. See *Insects and Diseases*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/insects-and-diseases> [<https://perma.cc/4FN8-N62F>].

131. See *Pools*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/pools> [<https://perma.cc/LK5D-JTLY>].

132. See *Wastewater Management*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/wastewater-management> [<https://perma.cc/S2LC-J56Q>].

133. *Well Water*, GA. DEP’T OF PUB. HEALTH, <https://dph.georgia.gov/environmental-health/well-water> [<https://perma.cc/7EAA-UP6J>].

134. See *Environment*, COLO. DEP’T OF PUB. HEALTH & ENV’T, <https://cdphe.colorado.gov/environment> [<https://perma.cc/TX4C-M2DD>].

135. See *About Us*, COLO. DEP’T OF PUB. HEALTH & ENV’T, <https://cdphe.colorado.gov/about> [<https://perma.cc/M8UG-YXCF>].

136. See *Public Health and Environment*, COLO. DEP’T OF PUB. HEALTH & ENV’T, <https://operations.colorado.gov/performance-management/department-performance-plans/public-health-environment> [<https://perma.cc/A2XK-K8ZD>].

The entire agency covers services including health services such as disease and condition reporting, environmental standards such as air quality and radon testing, the state's marijuana program, birth, death, and other vital records, public records, laboratory services, health equity programs, emergency preparedness and response activities, and lead testing and abatement.¹³⁷

Like in Georgia, the CDPHE Environment Branch oversees the monitoring of air quality such as pollution standards and permits, water quality services, waste management and recycling, asbestos certifications, radon testing and low-income mitigation assistance, environmental cleanup, radiation management, oil and gas related health concerns and permits, and sustainability projects such as animal and livestock feeding operation regulations.¹³⁸

The Environment Branch covers air emissions permitting, regulation, and enforcement, information, and small business assistance.¹³⁹ For water quality, the agency covers permitting and regulations for businesses, sewage systems, fish consumption, emergency spills, drinking water programs including private wells, clean water programs including swimming beach management, actions and public notices, and other records.¹⁴⁰

The branch also covers the hazardous waste program, solid waste program, residential waste program, the recycling program including recycling facilities, in addition to records and other data reports on waste management.¹⁴¹ It handles asbestos regulatory enforcement, laboratories, as well as radon testing and mitigation assistance.¹⁴²

For environmental cleanup, the branch enforces regulations, creates guidelines and policies for cleanup including methamphetamine-affected

137. See COLO. DEP'T OF PUB. HEALTH & ENV'T, *supra* note 134; *Health*, COLO. DEP'T OF PUB. HEALTH, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/health> [<https://perma.cc/TX4C-M2DD>].

138. See COLO. DEP'T OF PUB. HEALTH & ENV'T, *supra* note 134.

139. See *Air Quality*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/air-quality> [<https://perma.cc/TX4C-M2DD>].

140. *Water Quality*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/water-quality> [<https://perma.cc/7XFR-Z6CL>].

141. See *Waste Management and Recycling*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/waste-management-and-recycling> [<https://perma.cc/286P-BYWV>].

142. See *Radon*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/radon> [<https://perma.cc/N9X2-L3TZ>].

properties, and provides reports to the public.¹⁴³ Regarding radiation management, the branch handles regulation and enforcement regarding facilities with radiation mechanisms, emergency preparedness plans, X-ray facility registration, locations, and other forms, naturally occurring radioactive materials (NORM) and technologically enhanced naturally occurring radioactive materials (TENORM) regulation enforcement.¹⁴⁴

The oil and gas division of the branch of the CDPHE covers regulations and regulation enforcement by the Colorado Oil & Gas Conservation Commission and includes health reporting.¹⁴⁵

The public health agencies in both states demonstrate the expansive nature of the issues a state must respond to regarding environmental health. The majority of these programs, with the exception of the air programs, water quality, solid waste, and lead and asbestos efforts, have no federal counterpart delegating their authority or requiring the state to act.

A. Local Regulatory Agencies

Many counties and most major cities have their own health and/or departments of environment, acting independently but working closely with their state and federal counterparts.¹⁴⁶ A county board of health

143. See *Environmental Cleanup*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/environmental-cleanup> [https://perma.cc/J2ZC-PUE6].

144. See *Radiation Management*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/radiation-management> [https://perma.cc/AN2P-D8CX].

145. See *Oil and Gas*, COLO. DEP'T OF PUB. HEALTH & ENV'T, <https://www.colorado.gov/pacific/cdphe/categories/services-and-information/environment/oil-and-gas> [https://perma.cc/YZ5Z-XFH9].

146. The National Association of Local Boards of Health (NALBOH) serves local boards of health by being their common voice. *About NALBOH*, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, <https://www.nalboh.org/page/About> [https://perma.cc/WYU2-Q27R]. The NALBOH partnered with the Centers for Disease Control and Prevention (CDC) to create a model consisting of six functions for public health governance of boards of health. These six functions are policymaking, resource stewardship, legal authority, partner engagement, continuous improvement, and oversight. By combining these six functions, further defined in the NALBOH model state and local boards of health can continue to protect and promote public health. *Governance Resources*, NAT'L ASS'N. OF LOCAL BDS. OF HEALTH, <https://www.nalboh.org/page/GovernanceResources> [https://perma.cc/FY24-A3MH].

acts as the policymaking, rulemaking, and adjudicatory entity for public health in that county or counties of jurisdiction.¹⁴⁷

IX. STATE ENVIRONMENTAL HEALTH LAWS LACKING A FEDERAL COUNTERPART

States have acted on several environmental health issues that do not have any federal delegated authority or statutory counterpart. These laws are enacted in response to an environmental threat the public in that state faces. In response to the perceived threat, the state's elected officials propose a legislative response. Federal agencies may have guidelines or policies on the topic, but no legally-enforceable standard or statute. In each of these examples, states have determined to engage in such policy, independent of any federal efforts on the issue.

A. *California's Safe Drinking Water and Toxic Enforcement Act*

In California, the Safe Drinking Water and Toxic Enforcement Act,¹⁴⁸ better known as "Proposition 65," is a state law with no federal counterpart. Enacted in 1986, Proposition 65 "requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects or other reproductive harm."¹⁴⁹ The law also requires California to annually "publish a list of chemicals known to cause cancer, birth defects or other reproductive harm," which has over 900 chemicals listed.¹⁵⁰ In part because of California's size and economy, many of these warnings can be found on products sold and distributed throughout the U.S.¹⁵¹

147. See, e.g., N.C. GEN. STAT. ANN. § 130A-35(a) (West 2009) (county board of health); § 130A-37 (district board of health); § 130A-45.1 (public health authority board); § 153A-77(d)(4) (consolidated human services board).

148. Safe Drinking Water and Toxic Enforcement Act of 1986, Cal Code Regs. tit. 27, §§ 25102 *et seq.*

149. *About Proposition 65*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, <https://oehha.ca.gov/proposition-65/about-proposition-65> (last visited Aug. 12, 2020) [<https://perma.cc/64EC-WAT7>].

150. *Id.*

151. See, e.g., Ganda Suthivarakom, *What Is Prop 65? And Why Is There a Warning Label on This Thing I Bought?* N.Y. TIMES: WIRECUTTER (Mar. 10, 2020), <https://www.nytimes.com/wirecutter/blog/what-is-prop-65/> [<https://perma.cc/C3N9-C9ZA>]; Michael Waters, *Prop 65 Was Meant to Protect Residents From Toxic Water. How Did Warning Stickers End Up on Everything?* VOX: THE HIGHLIGHT (Oct. 31, 2019, 11:14 AM), <https://www.vox.com/the-highlight/2019/10/24/20918131/california-prop-65-toxic-water> [<https://perma.cc/22XT-TEFP>].

B. Massachusetts Toxics Use Reduction Act

Since the federal Toxic Substances Control Act is not delegable, states may adopt laws independent of federal efforts. The Massachusetts Toxics Use Reduction Act (“TURA”) imposes waste reduction objectives on businesses that use or generate toxic or hazardous wastes,¹⁵² with a key objective to “sustain, safeguard and promote the competitive advantage of Massachusetts businesses, large and small, while advancing innovation in toxics use reduction and management.”¹⁵³ Businesses subject to TURA regulations must provide an annual report, including completion of the EPA’s Federal Toxic Release Inventory Form, and must identify the quantity of toxic wastes released into the environment or transferred off of the business’s premises.¹⁵⁴ Companies must also “identify each production process and product that uses a listed chemical, [m]easure significant changes in use and byproduct generation from the previous year, and [p]ay an Annual Toxics Use Fee.”¹⁵⁵

C. State Laws regarding Carbon Monoxide Detectors

According to the CDC, over 10,000 people in the U.S. are poisoned and need medical treatment each year due to products releasing carbon monoxide (CO) gas.¹⁵⁶ More than 438 people die annually from carbon monoxide poisoning.¹⁵⁷ However, the federal government has no laws or standards regarding release of this CO gas from these products.

With the number of illnesses and death caused by high levels of CO in homes and buildings, state legislatures have enacted laws mandating the use of carbon monoxide detectors. These mandates vary from every enclosed room being required to have detectors, to every room that has a smoke alarm to have a detector, with only day-care centers and group homes needing detectors.¹⁵⁸

152. Toxics Use Reduction Act, 310 MASS. CODE REGS. sec. no. 50.55 (2007).

153. Heather Tenney, Rachel Massey & Liz Harriman, *History & Accomplishments*, TOXICS USE REDUCTION INST., https://www.turi.org/Our_Work/Policy/Toxics_Use_Reduction_Act/History_Accomplishments2 [<https://perma.cc/2KKV-U4B6>].

154. *MassDEP Toxics Use Reduction Program*, MASS. DEP’T OF ENV’T. PROT., <https://www.mass.gov/guides/massdep-toxics-use-reduction-program> [<https://perma.cc/5SJH-4HV4>].

155. *Id.*

156. *See Carbon Monoxide Poisoning*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/co/default.htm> [<https://perma.cc/4R6D-XELN>].

157. *Id.*

158. Jennifer Schultz, *Carbon Monoxide Detector Requirements, Laws and Regulations*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 27, 2018), <https://www.ncsl.org/research/environment-and-natural->

Twenty-seven states and the District of Columbia have enacted statutes regarding carbon monoxide (CO) detectors, and another eleven have promulgated regulations on CO detectors.¹⁵⁹ Alaska requires detectors approved by the state fire marshal be installed in all dwellings.¹⁶⁰ Connecticut requires them in all new construction, as does New Hampshire, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington and West Virginia.¹⁶¹ Florida also requires them in new constructions, and in every room with a boiler.¹⁶² Minnesota passed a law requiring detectors on motor boats.¹⁶³

California, Connecticut, Illinois, Maine, and Maryland require CO detectors in school buildings.¹⁶⁴ Fourteen states require the installation of carbon monoxide detectors in hotels and motels under state statute.¹⁶⁵

D. State Product Stewardship Laws

Product stewardship can be defined as “the act of making products safer for people and the planet, from design to disposal.”¹⁶⁶ This movement ensures companies are held responsible “for reducing impacts to the environment, economy, public health and safety.”¹⁶⁷ State product stewardship laws can be divided by the following products: paint, mattresses, carpet, pharmaceuticals, and electronics.¹⁶⁸

resources/carbon-monoxide-detectors-state-statutes.aspx
[<https://perma.cc/ZJ8J-NQU3>].

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* The states that require carbon monoxide detectors in private dwellings via state statute include: Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia (via adoption of the International Residential Code), Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia and Wisconsin. *Id.* In addition, some states “limit the installation to buildings with fossil-fuel burning devices,” while other states “only require the device be installed upon the sale of the property or unit.” *Id.*

164. *Id.*

165. *Id.*

166. Kim Tyrrell, *Product Stewardship*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 18, 2020), <https://www.ncsl.org/research/environment-and-natural-resources/product-stewardship.aspx> [https://perma.cc/R9RF-5YGA].

167. *Id.*

168. *Id.*

States with laws regarding paint stewardship include California, Colorado, Connecticut, Maine, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, as well as the District of Columbia.¹⁶⁹ These states require paint producers “to submit a plan for the establishment of a paint stewardship program. Each plan must include a paint stewardship assessment to cover the cost of collecting, transporting and processing post-consumer paint statewide. The assessment is charged to retailers and distributors, who then add that amount to the purchase price of each container of paint sold in the state. The assessment must be enough to recover, but not exceed, the cost of the paint stewardship program.”¹⁷⁰

States with laws regarding mattress product stewardship include California, Connecticut, and Rhode Island.¹⁷¹ In these states, mattress manufacturers are required to create statewide mattress recycling programs and the cost is passed on to the consumer, at a price ranging from \$9 to \$16.¹⁷²

California is the only state with product stewardship laws for carpet.¹⁷³ All carpet sold or shipped from the state is assessed at a 35 cent per square yard fee, with funds being used to support the program and inform stakeholders about the importance of keeping carpet out of landfills.¹⁷⁴

California, Massachusetts, and Washington have laws regarding pharmaceutical product stewardship.¹⁷⁵ California requires manufacturers, distributors, re-packagers, or the owner of a licensed product “to design and implement stewardship programs for proper handling and disposal of pharmaceuticals.”¹⁷⁶ Massachusetts “requires the product manufacturers or distributors of covered drugs to directly or through a wholesaler or retailer, operate a drug stewardship program approved by the U.S. Food and Drug Administration”¹⁷⁷ Washington’s pharmaceutical product stewardship program is called the “Secure Drug Take-Back Act,” which creates a free and environmentally responsible statewide medication return program.¹⁷⁸ The costs of this program are

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

borne by drug manufacturers and overseen by the Washington Department of Health.¹⁷⁹

E. Greenhouse Gas Reduction Laws

Several states have enacted greenhouse gas emission laws (carbon dioxide and other emissions related to climate change) distinct from any federal regulation. California enacted the “California Global Warming Solutions Act of 2016,” or “AB 32,” to reduce greenhouse gas emissions to 1990 levels by the end of 2020.¹⁸⁰ The law is funded by assessing fees to large sources of greenhouse gases, “including oil refineries, electricity power plants . . . cement plants and other industrial sources.”¹⁸¹ With these funds, the California Air Resources Board has developed a statewide “Scoping Plan” that lays out the strategy for meeting emission reduction goals.¹⁸² This plan has numerous measures to reduce greenhouse gases, such as achieving 50% renewable electricity levels and supporting cap-and-trade policies.¹⁸³ Further, these plans involve “virtually all sectors of the economy,” while specifically targeting emission reductions from “cars and trucks, electricity production, fuels, and other sources.”¹⁸⁴

Other states have followed suit. Several Mid-Atlantic and Northeastern states participate in the Regional Greenhouse Gas Initiative, “the first binding cap-and-trade program aimed at reducing [greenhouse gas] emissions from the power sector.”¹⁸⁵ This state-led initiative places caps on carbon dioxide emissions from power plants, with regional sealed-bid auctions occurring quarterly to determine the

179. *Id.*

180. Cal. Health & Safety Code §§ 38500 *et seq* (2020). As California has exceeded its goal of reducing emissions to 1990 levels by 2020, a new goal has been created to reduce emissions to 40% of 1990 levels by 2030. *See California’s 2017 Climate Change Scoping Plan*, CAL. AIR RES. BD. (2017), https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017.pdf [https://perma.cc/KSE9-3EN5].

181. *AB 32 Global Warming Solutions Act of 2006*, CAL. AIR RES. BD. (Sept. 28, 2018), <https://ww2.arb.ca.gov/resources/fact-sheets/ab-32-global-warming-solutions-act-2006> [https://perma.cc/4EJ5-95SK].

182. *Id.*

183. *See id.*

184. *Id.*

185. *See* Laura Shields, *Greenhouse Gas Emissions Reduction Targets and Market-based Policies*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/energy/greenhouse-gas-emissions-reduction-targets-and-market-based-policies.aspx> (last updated Dec. 17, 2019) [https://perma.cc/YQT5-PNEW].

clearing price for emission allowances.¹⁸⁶ Collectively, this group of states account for about 7% of U.S. carbon dioxide emissions and 16% of U.S. gross domestic product, but their impact in directly reducing the global accumulation of greenhouse gas emissions “is arguably negligible.”¹⁸⁷ Nevertheless, the Regional Greenhouse Gas Initiative “may stimulate action in other states or at the federal level,”¹⁸⁸ as industry stakeholders may “prefer a national policy.”¹⁸⁹

F. Recycling of Electronic Wastes

Electronic waste recycling is important because many electronics are made of metals, plastics, and glass that can be reused without having to mine or create more of these materials.¹⁹⁰ California adopted a system allowing manufacturers to impose a fee on sales to finance the recycling efforts.¹⁹¹ Maine enacted legislation to require recycling of used televisions and computer monitors.¹⁹² Hazardous substances including lead, mercury, and nickel are found in some electronics and can pollute water supplies and food sources, making electronic waste recycling of the utmost importance.¹⁹³ Twenty-five states and the District of Columbia have laws regarding electronic waste disposal.¹⁹⁴

Two models for electronic waste disposal are observed in state legislation, the first being the extended producer responsibility model.¹⁹⁵ This model is used in 24 states.¹⁹⁶ Manufacturers are responsible for collecting and recycling their electronic products.¹⁹⁷ Under the second model, legislation called the “advanced recycling fee model,” the

186. See *Elements of RGGI*, REG’L GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/program-overview-and-design/elements> [https://perma.cc/4R2T-3NVW].

187. JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R41836, THE REGIONAL GREENHOUSE GAS INITIATIVE: BACKGROUND, IMPACTS, AND SELECTED ISSUES 19 (2019), <https://fas.org/sgp/crs/misc/R41836.pdf> [https://perma.cc/K4DX-EBQA].

188. *Id.*

189. *Id.*

190. Jennifer Schultz, *Electronic Waste Recycling*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 17, 2018), <https://www.ncsl.org/research/environment-and-natural-resources/e-waste-recycling-legislation.aspx> [https://perma.cc/6AEX-7DEN].

191. *Id.*

192. ME. REV. STAT. ANN. tit. 38, § 1610 (West 2018).

193. Schultz, *supra* note 190.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

consumer bears the cost and pays a \$6 to \$10 fee when purchasing the electronic product.¹⁹⁸ The consumer fee is then deposited into a statewide recycling fund.¹⁹⁹ California adopted this method in 2003, becoming “the first state to establish an e-waste recycling program.”²⁰⁰

G. Laws on Body Art

Several states and local jurisdictions regulate body art. Body art is a term that encompasses tattooing, piercing, permanent makeup, and sub-dermal implants.²⁰¹ The federal government has no statutes nor regulatory authority to address the practice of body art, allowing the state and local governments to become the primary regulatory force over the industry.

Forty-nine states have laws pertaining to body art, with Nevada being the one exception.²⁰² Forty-five states prohibit tattooing for minors (younger than eighteen years old), and thirty-eight states prohibit body piercings for minors without parental consent.²⁰³ Thirty-three states and the District of Columbia have some form of regulation or licensing process for body artists.²⁰⁴

X. COURTS

Courts require public health and environmental agencies, like other government agencies, to follow the Constitution and statutes. When courts hear cases involving environmental health, they generally must balance the rights of the impacted individuals against the relevant state’s 10th Amendment police powers to protect the public’s health, safety, and general welfare.²⁰⁵ This balancing involves a close examination of the dangers posed by the disease or illness, with courts frequently giving great deference to public health agencies when the

198. *Id.*

199. *Id.*

200. *Id.*

201. *Subdermal Implants Come in All Shapes and Sizes*, MEDICALBAG, <https://www.medicalbag.com/home/features/body-modification/subdermal-implants-come-in-all-shapes-and-sizes/> [https://perma.cc/L3ZP-HSMJ] (the “practice of implanting ‘body jewelry’ beneath the skin’s surface, which results in a raised design.”).

202. Kate Bradford, *Tattooing and Body Piercing: State Laws, Statutes and Regulations*, NAT’L CONF. OF STATE LEG. (Mar. 13, 2019), <https://www.ncsl.org/research/health/tattooing-and-body-piercing.aspx> [https://perma.cc/A764-72BJ].

203. *Id.*

204. *Id.*

205. See GOSTIN, *supra* note 24.

disease or illness is particularly serious.²⁰⁶ Further, if an agency acts within its statutory authority, courts tend to defer to the agency's broad powers.²⁰⁷

Essentially, courts follow the "strict scrutiny" test: (1) whether the government could prove that the challenged law served a purpose so "compelling" (i.e., the protection of the public's health) that it was justified in taking action and (2) whether what the law required or forbade was "narrowly tailored" to achieve that purpose and did so with as little interference with individual liberty as possible.²⁰⁸

The seminal case regarding a government's authority to protect the public's health is *Jacobson v. Massachusetts*, where the U.S. Supreme Court upheld the Cambridge, Massachusetts Board of Health's authority to require vaccination against smallpox during a smallpox epidemic.²⁰⁹ In *Jacobson* the Court said: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."²¹⁰

Jacobson was one of the few Supreme Court cases before 1960 in which a citizen challenged the state's authority to impose mandatory restrictions on personal liberty for public health purposes.²¹¹ But the court made clear that a state's sovereign police powers were adequate authority to require the public be vaccinated to protect the public's health.²¹²

While environmental health policies better protect health and constitutional law better protects human rights since *Jacobson* was decided, the states' sovereign power to make laws to protect the public has not changed much since that time.²¹³ What has changed is how states regulate new and emerging public health threats and the courts' protections of individual rights.²¹⁴

Perhaps the most significant power a state health agency has is its ability to quarantine individuals. Even if quarantining an individual were to impact interstate commerce, this authority remains with the

206. *Id.* .

207. *Id.*

208. See Ozan O. Varol, *Strict in Theory, but Accommodating in Fact*, 75(4) MISS. L. REV. 1243, 1245-46 (2010).

209. See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

210. *Id.* at 27.

211. See *Public Health Law 101*, *supra* note 27.

212. *Id.*

213. See Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 581-82 (2005).

214. *Id.* at 582.

state.²¹⁵ As Justice Warren Burger opined in *O'Connor*, “[t]here can be little doubt that in the exercise of its police power a state may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.”²¹⁶

While courts are generally deferential to public health authority and reluctant to interfere with a state’s exercise of police powers, there are exceptions for when a regulation is arbitrary, oppressive or unreasonable.²¹⁷ Generally, the public must be granted substantive due process and procedural due process.²¹⁸ In these cases, the state must be able to meet the burden of proof in showing an individual’s potential danger to others or that a restriction is otherwise not unreasonable or oppressive.²¹⁹

The Supreme Court has recognized state police powers in cases of federal intrusion, saying the federal government’s constitutional authority to regulate interstate commerce is not without limits.²²⁰ But the Court has not expanded state power.²²¹

Within the realm of environmental health law, current constitutional law recognizes few limits on the states’ police power, except when it unjustifiably restricts personal liberties.²²²

CONCLUSION

Federalism frames the environmental health partnership between the federal and state governments. The federal government takes an active role in protecting the public’s health from environmental threats, but its efforts are limited by Constitutional and statutory authorities. States, and to a lesser extent local governments, have broad authorities through their sovereign police powers to protect the public’s health from environmental harms.

The general public sets environmental health policy through the election and advocacy of policy to their federal, state, and local officials.

215. *Oregon-Washington R. & Nav. Co. v. State of Washington*, 270 U.S. 87, 93 (1926).

216. *O’Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975).

217. *See People ex. rel. Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).

218. *See U.S. CONST.*, amends. V, XIV.

219. *See U.S. GOV’T PUBL’G OFF.*, S. Doc. 112-9, *FOURTEENTH AMENDMENT - RIGHTS GUARANTEED: PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS, AND EQUAL PROTECTION 2023-27* (2017) (discussing due process and the burden of proof in civil litigation).

220. *See United States v. Lopez*, 514 U.S. 549, 583 (1995); *United States v. Morrison*, 529 U.S. 598, 628 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

221. *See Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

222. *See Mariner et al.*, *supra* note 213, at 585.

These policies, if adopted, rely on the regulatory agencies to implement and administer them. The public health and environmental health authorities of the state and local officials and agencies are broad, allowing for the many diverse regulatory responses seen by state and local governments regarding environmental health, many which lack a federal counterpart.

The courts require environmental health agencies to abide by the U.S. and state constitutions and statutes, but the courts do not interfere with otherwise legal public health policy.

Under such a system, most of the authorities, laws, and programs regarding environmental health are left to the state and local governments, while the federal government's role, while important, is more limited.