

From: Jennifer Arguinzoni [Jennifer.arguinzoni@ncsl.org]  
Sent: Thu 10/28/2010 2:58 PM  
To: Comments@acus.gov  
Subject: Preemption Recommendation  
Attachment: Verkuil letter 10-10.doc (126 KB)

Attached please find NCSL Comments to “Federal Agency Preemption of State Law” for the Administrative Conference of the United States.

If you have any questions, please feel free to contact us. Thank you.

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NATIONAL CONFERENCE *of* STATE LEGISLATURES

*The Forum for America's Ideas*

October 27, 2010

Mr. Paul Verkuil  
Chairman, Administrative Conference of the United States  
1120 20<sup>th</sup> Street, NW, Suite 706 South  
Washington, DC 20036

**Richard Moore**  
*Senator  
Massachusetts Senate  
President, NCSL*

**Tim Rice**  
*Executive Director  
Illinois Legislative Information System  
Staff Chair, NCSL*

**William Pound**  
*Executive Director*

**RE:** NCSL Comments to “Federal Agency Preemption of State Law” for the Administrative Conference of the United States

Dear Chairman Verkuil:

On behalf of the National Conference of State Legislatures (NCSL), I write in overall support of the Preemption Recommendation prepared for the Administrative Conference of the United States (Conference) by Professor Catherine Sharkey. NCSL has long supported increased state involvement in the federal regulatory process in instances where agency regulations have a preemptive impact on state laws and policies. NCSL supports the strengthening of the Executive Order on Federalism (E.O. 13132) and offers any additional assistance needed to the Conference to make meaningful participation by state government in the federal regulatory process a reality.

NCSL agrees that there must be greater federal agency accountability for preemptive regulations. To this end, the recommendation that each agency develop internal E.O. 13132 compliance guidelines is sound and desirable. NCSL was involved in the development of the Environmental Protection Agency’s (EPA) internal guidance and was given the opportunity to contribute in meaningful ways to the development of this very important piece of internal agency guidance. The EPA’s internal guidance on E.O. 13132 is a living document and has been revisited on several occasions for fine-tuning. NCSL has been a part of that ongoing process. The result has been a strengthening of the ties between this agency and state government as well as an increased awareness of the state impact of proposed EPA regulations within the agency.

NCSL disagrees that state government may not always be representative of the state interest and therefore takes issue with the recommendation that the National Association of Attorneys General (NAAG) notification procedure would better identify stakeholders of state interests for a given federal regulation. States were very vocal in expressing their opposition to proposed regulations that sought to preempt state tort laws and NCSL has two policies which oppose federal intrusion into this area of state law. The reality is that preemption of state common law principles invariably leads to preemption of state positive laws. NCSL remains committed to preserving all areas of traditional state authority whether derived from common law or state statutes.

NCSL also maintains that the purpose of E.O. 13132 is to provide state and local government, i.e. elected officials, with the opportunity to engage in a direct relationship with federal agencies.

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While the opinions of consumer and advocacy groups are also important in shaping agency policy, expanding the scope of E.O. 13132 to these groups through a blanket notification process may serve only to make compliance with E.O. 13132 unattractive to federal agencies who are already not terribly motivated to recognize its importance. This expansion also undermines the very purpose of E.O. 13132 which expressly contemplates the federalism impact of agency regulations on state and local governments and establishes the enhanced consultation process.

Finally, NCSL is very much in agreement with the recommendation to incorporate elements of federalism review into the Office of Information and Regulatory Affairs' (OIRA) processes. NCSL believes that a more robust OIRA is greatly needed to give full effect to E.O. 13132. The proposed requirement that OIRA produce agency compliance reports is sound and would add a sorely needed element of accountability on federal agencies. The need for OIRA to act as the final gatekeeper for agency preemption would provide a valuable check on agency actions and decrease the number of preemptive regulations that make their way into the Federal Register.

NCSL is grateful for the leadership of the Conference in addressing the very important issue of regulatory preemption and appreciates the opportunity to comment on these comprehensive and well-thought out recommendations that are before you today. NCSL welcomes the opportunity to be a continued resource to you and to Professor Sharkey on this issue as you move forward with the adoption process. To that end, your contact at NCSL is Susan Parnas Frederick, Federal Affairs Counsel, (202)624-5400, [susan.frederick@ncsl.org](mailto:susan.frederick@ncsl.org). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'William Horne', with a large, stylized flourish at the end.

Assemblyman William Horne  
Nevada State Assembly  
Chair, NCSL Law and Criminal  
Justice Committee