EXHIBIT 1

LEGAL MEMORANDUM

To: International Code Council
From: Air Conditioning Heating and Refrigeration Institute
Date: May 8, 2020
Re: Applicable Law RE 126-19

The proposed code provisions in RE 126-19, if adopted by the states, will expressly violate the preemption provisions of the Energy Policy and Conservation Act (EPCA). RE 126-19 will require all water heaters to exceed the federal minimum. Water heaters are expressly defined in the statute as a covered product, and the Department of Energy has set an efficiency minimum requirement for these products. No state regulation, including building codes, can set energy efficiency minimums that exceed the Federal requirements.

The Energy Policy and Conservation Act (EPCA) governs energy efficiency and energy use regulations for covered products as defined at 42 U.S.C. § 6291. Residential water heaters are a federally regulated covered product. The Department of Energy (DOE) promulgates energy efficiency regulations pertaining to several categories of water heaters. DOE regulations categorize residential water heaters into several tranches, or product classes, each with unique energy conservation standards based on size, fuel, and other features. Federal regulation has identified and regulated: electric storage water heaters, gas-fired storage water heaters, gas instantaneous water heaters, oil-fired water heaters and grid-enabled water heaters. The proposed code language contemplates increasing the specific minimum that was set for gas-fired water heaters above the Federal minimum. Such action violates EPCA.

States are expressly preempted from setting energy use regulations for products that DOE regulates.[1] Under EPCA's preemption provision, state regulations "concerning" the "energy efficiency" or "energy use" of covered products "shall [not] be effective."[2] Courts have interpreted this preemption provision to be expansive, finding that the term "concerning" suggests Congress intended the provision to have a "broad preemptive purpose."[3] The purpose of preemption is to maintain a national approach to appliance regulation. The Energy Policy and Conservation Act was a bipartisan compromise that assured the continuous improvement of the energy use an energy efficiency of water heaters and other regulated product, but the Act specifies that regulation can only occur on a national scale—state-by-state and city-by-city regulation is prohibited by the Act. Consumers and the environment benefit from the Department's continuous review and regulation of appliances, while manufacturers and consumer benefit from the economies of scale that arise from a unified regulatory framework.

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[1] *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. 08-633, 2008 WL 5586316, No. 08-633 at *6 (D. N.M. Oct. 3, 2008); *Nat'l Elec. Mfrs. Ass'n v. Calif. Energy Comm'n*, No. 2:17-CV-01625-KJM-AC, 2017 WL 6558134 at *5 (E.D. Ca. Dec. 21, 2017).
[2] *See* 42 U.S.C. § 6297(b).
[3] *See id.*; *see also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Nat'l Elec. Mfrs. Ass'n*, 2017 WL 6558134 at *5.

In enacting EPCA, Congress noted that preemption applies to an "entire product type as listed in the coverage section" of EPCA.[4] In effect, Congress intended that 42 U.S.C. § 6297 would "preempt State law under most circumstances."[5] Congressional intent is clearly reflected in the legislative history: "There is no doubt that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards." H.R. Rep. No. 100–11 at 19.

The limited exception for building codes do not permit for states not set efficiency requirements above the Federal minimum. **Congress was deliberate that states could not set back-door energy efficiency standards through building codes that would "expressly or effectively require the installation of covered products whose efficiencies exceed . . . the applicable Federal standard."**[6] The limited building code exception to preemption in EPCA permits states to create performance based criteria, so long as the efficiency minimums promulgated by DOE are not exceeded. The law is unambiguous: "If a building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard … and the applicable standard of any State …that has been granted a waiver … such requirement of the building code shall not be applicable…." 42 U.S.C. 6297 (f)(4)(B).

RE 126-19 violates the preemption provisions of EPCA by proposing an energy use standard on a federally regulated product that exceed the federal minimum. The Act specifies that only the Department of Energy can set energy standards for covered products. While the goal of advancing energy efficiency is laudable, federal law prohibits any regulation of covered products that conflict with existing federal energy regulation. DOE has conducted extensive economic and energy-savings analysis on many kind of water heaters, including gas instantaneous, gas-storage, and grid-enabled and has adopted regulations that dictate the energy use of such products. RE 126-19 proposed requirement are far more stringent than federal law, and as such, are preempted.

It is patently incorrect to infer that a building code may violate preemption for a class of covered product simply because a different type of covered product is available. Taken to its extreme, the theory would permit a building code to exceed the Federal minimums on dishwashers because one can wash their dishes by hand. Congress expressly decried the use of building codes as a back door around a preempted national standard; and that is exactly what RE 126-19 is attempting to accomplish.

Preemption jurisprudence in other administrative areas supports this position. Under a similar federal preemption provision in the Food, Drug, and Cosmetic Act, courts have found that Food and Drug Administration (FDA) approval of a medical device covers approval of all its components, preempting any component-based state law.[7] Similarly, the Department of Agriculture's preemption authority

[4] H.R. Rep. No. 100–11, at 20 (1987). *See also* S. Rep. No. 93-526, at 46 (1973) (discussing "components" of a "climate-conditioning system").
[5] *Air Conditioning, Heating & Refrigeration Inst.*, 2008 WL 5586316, at *7
[6] *Id.* at 26.
[7] *See* 21 U.S.C. § 360k(a)(1) ("No State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement. . . which is different from, or in addition to, any requirement applicable under this chapter to the device."); *Hawkins v. Medtronic, Inc.*, No. 13-cv-0499, 2014 WL 346622, at *5 (E.D. Cal. Jan. 30, 2014) ("The requirements set forth in the premarket approval for the entire device are just as applicable to the components that together form the FDA approved device as the device itself."); *Riley v. Cordis Corp.*, 625 F.Supp.2d 769, 780 (D. Minn. 2009) ("It makes no sense—indeed, it would probably be impossible—to pick apart the components of a medical device and apply different preemption analyses to different components.").

under the Plant Pest Act preempts state laws that ban plants *created from* a federally regulated plant pest.[8] In other words, federal courts tend to read broad preemption statutes like EPCA as categorically preempting state regulations that could otherwise affect the federally-regulated item. EPCA's preemption provision does not preclude only energy efficiency standards that are more stringent—it also preempts state regulation "concerning" energy use or energy efficiency.[9]

Congress enacted the preemption provision of EPCA to eliminate the systems of separate state appliance standards that created a "growing patchwork of differing state regulations."[10] By attempting to regulate water heaters already regulated by the federal government, RE 126-19 would add a new layer of complexity to the regulatory "patchwork." Therefore, to align with the plain language of EPCA's preemption provision, and Congress' clear intent on its broad effect, we recommend that the proposed provision for water heaters is struck.

[8] "No State or political subdivision of a State may regulate the movement in interstate commerce of any ... plant, ... plant pest, noxious weed, or plant product . . . if the Secretary has issued a regulation or order to prevent the dissemination of the . . . plant pest, or noxious weed within the United States." 7 U.S.C. § 7756(b)(1). *See Atay v. Cty. of Maui*, 842 F.3d 688, 702 (9th Cir. 2016) ("What matters under the preemption clause . . . is whether a local law seeks to control, eradicate, or prevent the introduction or dissemination of plants that APHIS regulates as plant pests. APHIS deems nearly all GE plants to be plant pests because nearly all GE plants are created using Agrobacterium, which is a listed plant pest.").

[9] 42 U.S.C. § 6297(b).

[10] S. Rep. No. 100-6, at 4 (1987).