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Michael Pfieffer, P.E.
Senior Vice President, Technical Services
International Code Council
500 New Jersey Ave, NW, 6th Floor
Washington, DC 20001

Re: AHRI Appeal of the 2019 Proposed Change to International Energy Conservation Code (IECC) RE-126

Dear Mr. Pfieffer:

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) respectfully submits these comments in support of its appeal to the International Code Council Appeals Board in response to the 2019 Proposed Change to the 2018 Edition of the International Energy Conservation Code (IECC), RE 126-19.

AHRI's notice of appeal outlined several fundamental principles relating to the way energy efficiency is regulated in the United States. Federal law explicitly prohibits states and localities, including building codes, from setting minimum efficiency requirements for covered products that conflict with the federal energy conservation standards set by the Department of Energy (DOE). The substance of the proposal RE-126 conflicts with federal law in two respects: 1. The proposed minimum values for gas-fired water heaters are simultaneously too low and too high; and 2. The definitions for federally regulated appliances are inconsistent with definitions set by Congress and the Department of Energy. The Appeals Board should grant AHRI's appeal because the adoption of energy conservation requirements that conflict with federal law violates the ICC's purpose, scope, bylaws, and procedures as outlined below

**The International Code Council's purposes and policies dictate adherence to federal law.**

The highest purpose of the International Code Council is prominently set forth in its Bylaws: "With respect to buildings and structures: (a) the lessening of burdens of government through the development, maintenance and publication of model statutes and standards for the use by federal, state and local governments in connection with the administration of building laws and regulations, and (b) the lessening of the burdens of government through the performance of certain services for the benefit of federal, state and local governments in connection with the administration of building law and regulation." -- ICC Bylaws Section 1.2 "General Purposes."

The ICC's primary beneficiary is clear: government code bodies. The intent of developing the model code is to lessen the burden on code development agencies. However, the adoption of legally conflicted provisions achieves the opposite and undermines the value and purpose of the ICC to government agencies.

Federally conflicted provisions are de facto out of scope of the International Energy Conservation Code and should be struck as ultra-vires. Chapter 1 of the IECC, "Scope and Administration," specifies that "[t]his code is **intended to be adopted as a legally enforceable document** and it cannot be effective without adequate provisions or administration and enforcement." Suggestions that the IECC has alternative purposes that could support the incorporation of federally conflicted mandatory provisions is belied by the plain language of the code's scope. The code is intended to be legally enforceable. The scope of the document is not inclusive of guidance or informative literature. The language of the proposal (RE-126) has a clear requirement: "service water heating **shall be**…." and is intended to be enforced as a legal requirement; therefore, provisions in scope of the code must be legally enforceable. The Appeals Board should find that a provision that cannot be legally enforced is procedurally improper because it is outside the scope of the IECC.

Moreover, a code provision that conflicts with federal law contravenes the express intent of the IECC. Section C101.3, "Intent," affirms that "[t]his code is not intended to abridge safety, health or environmental requirements contained in other applicable codes or ordinances." Section C107.3 states that "the provisions of this code shall not be deemed to nullify any provisions of local, state, or federal law." These two provisions are revealing and align with the established legal principle of the "hierarchy of laws." Federal law takes precedence over state law; state law takes precedence over local law. A more specific law will be deemed to apply to the exclusion of a more general provision. (See also C101.4 Applicability. "Where there is conflict between a general requirement and a specific requirement, the specific requirement shall govern.")

If the IECC adopts RE-126, then Section C101.3 and 107.3 are triggered. The conflicting code provision will be deemed to have been abridged and nullified by existing federal laws. An excellent example of this principle as applied to RE-126 is the definition of "Grid enabled water heater." RE-126 includes a generalized definition of "grid enabled water heater," but Congress has already adopted and codified a precedential and more specific definition of "grid enabled water heater." The application of Section C101.3 requires that one of two things must occur—either the IECC's definition is fully abridged and nullified by a higher ranking, more specific law, or code officials are left in the confusing and daunting position of having to negotiate conflicting terms to their potential detriment. Creating unnecessary confusion and frustration for code officials surely conflicts with the core intent of the ICC as set forth in the Bylaws.

The Appeals Board should strike RE-126 because it is inconsistent to set forth an express intent not to abridge applicable laws, and then knowingly adopt provisions that facially conflict with existing law.

Some have argued that it is not the role of the ICC to consider federal preemption in the development of its code, but it is clearly not the intent of the ICC to adopt code provisions that conflict with federal law. A close review of RE-126 creates two different, but closely related problems for building officials trying to enforce the Code. The first is that for two categories of gas water heaters, the calculated energy efficient requirements exceed federal requirements. The national federal minimum is .62 UEF for "high" FHR products and .56 UEF for "medium" FHR products. RE-126 requires .64 UEF and .68 UEF, respectively. AHRI's notice of appeal included an in-depth description of federal preemption and why exceeding the federal minimum requirements violates federal law. It is important to note that for "very small" and "low" FHR gas storage water heaters, the IECC proposes requirements that are *below* the federal minimum. Any

code that includes RE-126 will approve and encourage the installation of small water heaters that are currently illegal to distribute in commerce and have been deemed less efficient than is economically justified by the DOE. The unusually low minimum for these categories of water heaters also raises the question of whether and if these provisions were fairly evaluated for economic impact. If DOE's stringent analysis has demonstrated that higher efficiency requirements for very small and low FHR gas water heaters are justified, the IECC analysis should have reached a comparable conclusion. Conversely, DOE has consistently found that high UEF values for medium and large water heaters are not economically justified, and therefore could not be adopted into law. For all of the above-stated grounds on which the Appeals Board should preclude provisions that contravene federal preemption for requiring efficiencies that are too high, the intent and scope of the IECC similarly preclude the adoption of energy conservation standards that are too low in violation of federal law.

Energy conservation improvements to encourage or require consumers and/or builders to install high-efficiency water heaters should at least start with the federal requirements. The proposal set forth in RE-126 appears as though it was created in a vacuum, without any regard or reference for a well-established federal framework for the efficiency, design, distribution, certification, and categorization of water heaters. The efficiency minimums put forth in RE-126 have no relation to existing UEF requirements for gas water heaters. It was as if the author did not know how to calculate the applicable minimum requirements and did not provide sufficient information for a reader to do so. The use of the term "grid enabled water heater" appears hastily drawn, as though the author was unaware of the existing federal definition, which is clearly and specifically set out in statute.

All provisions that relate to solar water heaters are similarly off-base. The Department of Energy has released a proposed rulemaking and test procedure, including definitions, for solar water heaters—but the author of the provisions appears to have completely ignored or overlooked the deliberative and well-researched findings of the DOE regarding solar water heaters. The Technical Committee, comprised of committed ICC members with deep knowledge of energy conservation frameworks, rejected the RE-126 proposal twice. Grounds for its rejection include RE-126's violation of federal law, but there are many reasons why this proposal will mar the quality of the IECC and create additional burden for code officials who are familiar with and have come to rely on the federal water heater regulatory framework to do their jobs.

Some have suggested that the consideration and application of federal law is outside of the purview of the ICC. The express language of the scope and intent provisions, described above, dispute that position. Moreover, the ICC is well equipped to incorporate the strictures of the federal efficiency framework into the code. First, the ICC places a prominent value on authorship of a code that meets all requirements of OMB Circular A-119. The goal of A-119 is for government agencies to incorporate by reference into federal law voluntary consensus standards and codes, such as those developed by the ICC. This valuable and important service allows government agencies to rely on the ICC to generate well-considered consensus codes. It should be evident to all parties that federal agencies cannot use A-119 to adopt standards or codes that contravene federal law. Second, the ICC is the expert body on building codes, and has multiple bodies that are dedicated to the work of (1) developing relationships with federal agencies that generate national efficiency requirements (Federal Advisory Committee); (2) engaging with industry that is disproportionately impacted by a patchwork of efficiency standards that NAECA was intended to

prohibit (Industry Advisory Committee); and (3) interpretations of codes to ensure that (a) the code can reasonably be enforced and applied in practice (Committee on Interpretations) and (b) amendments do not conflict with existing code requirements (Code Correlation Committee). AHRI is confident that the ICC has the knowledge, capacity, and interest to ensure that its code provisions comply with federal law.

Finally, some have suggested that the application of federal preemption is simply too complex and should be left to judges and juries. AHRI is surprised by this perspective.

First, it is in the interest of the ICC to have a legally compliant code and to exercise the due diligence to ensure that the IECC does not violate federal law and serves all parties, particularly local governments that rely on the ICC's expertise. Any decision ultimately made by a judge is the result of costly and time-consuming litigation. Second, it is clear that the IECC should not adopt energy conservation standards that violate federal law by being too low. That approach is axiomatically contrary to ICC scope and intent. If one can apply the requirements of energy standards to the IECC, then one also should be able to apply the inverse: preemption.

Preemption is less complex than many would have you believe. There are exactly two primary sources that can inform the ICC on the application of preemption:

1. The plain language of the statute:

> A building code for new construction concerning the energy efficiency and energy use of such covered product is not superseded if the code complies with [ ] the following: … (B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title;

and

2. Case law, as represented by only two relevant cases:

(a) *Air-Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*

> The prescriptive standards provisions of Volume I requiring the use of heating, ventilation, or air conditioning products more stringent than the federal standards are regulations that concern energy efficiency of covered products, therefore are preempted as a matter of law.
>
> Judge Vasquez, New Mexico

(b) *Buildings Industry Ass'n of Washington v. Washington State*

> States thus cannot, for example, require that any water heater sold or installed in the state meet energy-efficiency requirements more stringent than the federal requirements.
>
> Judge Schroeder, 9th Circuit.

Of course, even if the application of the law is daunting, and if it appears that the answer is ambiguous, then the ICC need only consider the confusion and potential liability it will pass on to adopting government agencies that incorporate IECC provisions that are even *allegedly* preempted. Agencies and governmental bodies may be less willing to adopt the IECC in the future if it requires substantial resources to ensure that the code does not contravene federal law.

Fortunately, the ICC does not bear the burden of adjudicating federal law; rather, the ICC merely must decide as a matter of policy and procedure whether it is willing to take the risk of asking its constituents to violate the law. Instead of placing government bodies in a precarious position of adopting code provisions that may result in legal liability, the ICC can stop short of that threat altogether. In furtherance of a workable solution, AHRI offers a simple "bright line" rule to avoid the inadvertent crossing of legal lines: **energy efficiency standards for covered products should be set by the Department of Energy**. This is a legal requirement and good policy. It is easy to apply.

As outlined in AHRI's initial submission, efficiency preemption represents a grand policy compromise and supports the shared goals of all stakeholders: efficiency and economy. AHRI intends to pursue all available avenues to protect and uphold these core principles upon which EPCA-covered products have been designed, manufactured, distributed, and regulated for 32 years. AHRI has been transparent in disclosing its intent if a governmental body adopts RE-126. AHRI and its members will expend significant resources to seek out and educate those adopting jurisdictions on the fact that RE-126 is preempted and encourage such jurisdictions to amend or rescind the substance of RE-126. And if encouragement is insufficient, then litigation will ensue.

The IECC has accomplished extensive and ambitious energy savings without violating federal preemption for over three decades. It simply does not make sense to suddenly abdicate that responsibility. If ambitious and risk-tolerant government bodies want to knowingly take on the litigation risks of adopting potentially violative code provision, then they can make those decisions deliberately, rather than by passively adopting the IECC.

In conclusion, AHRI appreciates the good work of the ICC in developing and maintaining model statues and standards. AHRI requests that the Appeals Board grant AHRI's appeal to strike RE-126 because the adoption of facially preempted energy conservation requirements violates the ICC's purpose, scope, bylaws, and procedures. AHRI's representatives during the appeals hearing will be Caroline Davidson-Hood, General Counsel, AHRI and Brian Cothrell, Vice President and Deputy General Counsel, A. O. Smith Corporation.

Sincerely,

Caroline Davidson-Hood
General Counsel