

Mike Pfeiffer

From: Jim Edelson <jim@newbuildings.org>
Sent: Monday, August 17, 2020 10:37 PM
To: Mike Pfeiffer; Greg Wheeler; Dominic Sims
Subject: appeals comment
Attachments: AHRI Comments to WSBC Final 17 Sept12.pdf

Dear Sirs,
One attachment and the text below comprise the filed appeal comment.
Thank you.

RE126-19
Residential Water Heating

With regards to RE-126-19, an appeal was filed by the American Gas Association and the American Public Gas Association (AGA/APGA), the National Association of Home Builders (NAHB), and the Air Conditioning, Heating, and Refrigeration Institute (AHRI). The appellants' appear to be concerned that ICC did not intervene so that RE126-19 would not be considered in this Code Cycle because they believed "a court is highly likely to find that RE126 is preempted by the Energy Policy and Conservation Act (EPCA) as amended by the National Appliance Energy Conservation Act (NAECA) and the Energy Policy Act of 1992 (hereinafter EPCA)."

This is not the first time that the appellants have misunderstood the role of the ICC under the framework of CP-01 and CP-28. In the development of the 2012 IECC, appellant AHRI made similar preemption allegations with regards to proposal EC147-10. We (NBI) were a co-proponent of that proposal with the American Institute of Architects and the U.S. Department of Energy. Fortunately, AHRI withdrew their opposition to the proposal during the Final Action Hearings and the proposal was approved by the voting membership.

However, in a subsequent proceeding for the state of Washington Residential Code, appellant AHRI made similar allegations with regards to preemption. Germane to this appeal, AHRI claimed in a letter to the Washington State Building Code Council on September 17, 2012 (attached) as follows:

When AHRI cautioned the International Code Council (ICC) that these provisions, if adopted by a state or local jurisdiction, would be preempted by EPCA, the ICC agreed to add compliance with the latest ASHRAE Standard 90.1 as a way to satisfy the 2012 IECC. AHRI was satisfied with this result.

This is factually incorrect and demonstrates the same error evidenced in the appeal of RE126-19. Under the framework of CP-01 and CP-28, the 'ICC' has no jurisdiction over whether ASHRAE 90.1 should be added "as a way to satisfy the 2021 IECC". ICC did not agree to 'add' that compliance pathway. In fact, the 90.1 compliance path was at that time already in the published 2009 IECC, and was in the text of EC147-10 for the entire 2012 IECC development cycle. NBI was the primary author of that portion of EC-147, and began work on that proposal long before we were contacted by AHRI. NBI did not add that compliance path because of an agreement with AHRI – we just carried it forward from the 2009 IECC.

The appeal of RE126-19 is based on a similar misunderstanding of which matters can be appealed under the framework of CP-01 and CP-28. The matter referenced in the appeal is a technical and legal subject, not a matter of process. As with the parallel arguments made by appellants for the 2012 IECC, there is no legal basis on which to claim the selection of high-efficiency equipment in a state or local energy code violates Title 42 of the Federal Code. RE126-19 was properly considered and approved by the voting members in accordance with that long-established precedent. But if appellants

still believe they have legal cause to challenge the matter in RE126-19, it would be ripe for a legal challenge only once it has been adopted by a state or local authority and only in a court of law, not before the ICC. This appeal should be rejected.

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September 17, 2012

Washington State Building Code Council
1500 Jefferson Avenue SE
Post Office Box 41449
Olympia, Washington 98504-1449

Re: Comments of AHRI Regarding Federal Preemption
of the Proposed 2012 Washington State Energy Code

Dear Members of the Council:

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) appreciates the opportunity to comment on the proposed 2012 Washington State Energy Code. AHRI is the national trade association of manufacturers of residential and commercial central air conditioners, heat pumps, furnaces, boilers and water heaters, as well as commercial refrigeration equipment. AHRI has long been a strong supporter of uniform national energy conservation standards for these products to save energy for the nation without unduly burdening interstate commerce. AHRI wishes to call the Council's attention to the fact that the proposed 2012 Washington State Energy Code, as it applies to commercial buildings, would be preempted by federal law and thus unenforceable because of certain requirements it would place on commercial heating, ventilating and air conditioning (HVAC) and water heating equipment.

The energy use of commercial HVAC equipment and water heaters is regulated on the national level by the Energy Policy and Conservation Act (EPCA). Federal energy conservation standards for commercial HVAC equipment and water heaters were first established via 1992 amendments to EPCA which adopted standards for these products contained in the then current edition of ASHRAE Standard 90.1. Federal energy conservation standards for additional types of commercial HVAC equipment were added to EPCA in 2005. Over time, the U.S. Department of Energy (DOE), pursuant to authority granted by EPCA, has periodically updated the federal standards for commercial HVAC equipment and water heaters.

The federal energy conservation standards for commercial HVAC equipment and water heaters supersede and preempt state and local regulations concerning the energy efficiency or energy use of these products. See EPCA section 345(b)(2)(A), 42 U.S.C. section 6316(b)(2)(A). EPCA

provides two basic exceptions to this very broad federal preemption rule: (1) DOE may grant a waiver of federal preemption in extreme circumstances (see EPCA section 345 (b)(2)(D), 42 U.S.C. section 6316(b)(2)(D)); and (2) a state or local jurisdiction may adopt the latest minimum efficiency standard for the product contained in ASHRAE Standard 90.1 if the standard applies only to new construction (see EPCA section 345(b)(2)(B), 42 U.S.C. section 6316(b)(2)(B)).

The EPCA federal preemption provisions for EPCA-covered commercial HVAC equipment and water heaters were first applied by a court in litigation which concluded this past January. In that case, AHRI et al. v. City of Albuquerque, the federal district court in New Mexico struck down the City's amended energy conservation code for commercial buildings as a regulation concerning the energy efficiency or energy use of EPCA-covered commercial HVAC equipment and water heaters. The Albuquerque Code established requirements for these products not found either in federal law or in the latest ASHRAE 90.1 standard. The court rejected the City's arguments that these requirements were saved from federal preemption by the availability of alternative code compliance paths.

The proposed 2012 Washington State Energy Code, as it applies to commercial buildings, contains many requirements that unmistakably are regulations "concerning" the energy efficiency or energy use of EPCA-covered commercial HVAC equipment and water heaters. Among these regulations are several requirements for these products that are not found in either federal law or the current ASHRAE Standard 90.1, and thus are preempted by EPCA. The offending provisions of the commercial building energy code include sections C403.2.3.3 (requiring electric package HVAC equipment to be heat pump), C403.2.4.6 (requiring commercial combustion heating equipment to have modulating or staged combustion controls), and C403.4.3 (design requirements for commercial boilers). These provisions appear to be mandatory requirements whether one chooses to comply with the code via the prescriptive path or the performance path.

Sections C406.2 through 406.5 of the commercial building code likewise are preempted by EPCA as regulations concerning the energy efficiency or energy use of EPCA-covered HVAC equipment and water heaters. These sections require either EPCA-covered HVAC equipment or EPCA-covered water heaters to be more efficient than what is required by federal law unless the building has installed high efficiency lighting or an on-site source of renewable energy. Similar provisions are contained in the 2012 International Energy Conservation Code (IECC). When AHRI cautioned the International Code Council (ICC) that these provisions, if adopted by a state or local jurisdiction, would be preempted by EPCA, the ICC agreed to add compliance with the latest ASHRAE Standard 90.1 as a way to satisfy the 2012 IECC. AHRI was satisfied with this result.

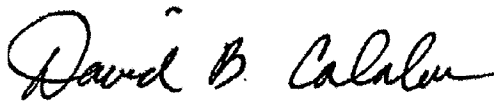
WSBCC

September 17, 2012

Page 3 of 3

AHRI urges the Washington State Building Code Council to remove the provisions of the proposed commercial building energy code identified above in order to ensure compliance with the federal preemption provisions of EPCA. Alternatively, the Council can resolve our concerns by amending the proposed code to make it clear that compliance with the latest ASHRAE Standard 90.1 will constitute full compliance with the commercial building energy code. We would be pleased to provide any further information or assistance the Council and its staff may request to insure that proposed code can move forward to final adoption free of any potential challenge on grounds of federal preemption.

Sincerely,

A handwritten signature in black ink that reads "David B. Calabrese". The signature is written in a cursive style with a large initial "D" and "C".

David B. Calabrese

AHRI Senior Vice President for Policy,
Secretary and General Counsel