ICC INTERNATIONAL CODE COUNCIL®

People Helping People Build a Safer World®

2019 Group B – Appeals

STAFF ANALYSIS MEMO

2019 – 2

August 21, 2020

STAFF ANALYSIS MEMO TO APPEALS BOARD
ON FEDERAL PREEMPTION APPEALS ON 2019 GROUP B CODE CHANGES
August 21, 2020

To: The Appeals Board regarding 2019 Group B Appeals

From: Mike Pfeiffer, P.E., Senior Vice President of Technical Services

---

Four entities have appealed certain changes to the 2021 International Energy Conservation Code (IECC), on the grounds that the changes are preempted by federal law. The code changes in question were approved by the 2019 Group B final action Online Governmental Consensus Vote in December 2019.

The American Gas Association (AGA) and the American Public Gas Association (APGA) have jointly appealed **RE107-19** (dealing with pilot lights on gas appliances) and **RE126-19** (dealing with efficiency ratings for gas-fired water heaters).

The Air Conditioning, Heating, and Refrigeration Institute (AHRI) and the National Association of Home Builders (NAHB) have each appealed **RE126-19**.

All of the appellants claim that the code changes in question are preempted by the Energy Policy and Conservation Act of 1975, as amended (EPCA).

THE ENERGY POLICY AND CONSERVATION ACT OF 1975 (EPCA)

The EPCA establishes nationwide energy efficiency standards for certain residential home appliances, including HVAC products and water heaters. Under the Act, responsibility for maintaining and amending these standards resides with the U.S. Department of Energy.

The EPCA contains a preemption provision that prohibits state regulation concerning the energy efficiency of products that are covered by the Act.

The Act also provides several exceptions from federal preemption, including one for building code regulations, provided that certain conditions are met.

THE APPEALS

I. AGA and APGA Appeal

The essence of these entities' appeal is that based on a previous court decision, the code change proposals in question should not have been allowed to move forward in the code development process:

> IECC requirements and their potential for conflict with EPCA have previously been argued in public proceedings and should be well understood by ICC staff. In particular, in the October 3, 2008, federal district court decision in the case of AHRI v. City of Albuquerque, the Court noted that "[t]here 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." This finding of federal preemption by the court resulted in an injunction of portions of a city's new code, which adopted and incorporated the 2006 IECC by reference, that conflicted with EPCA. Cases such as this help inform ICC staff of these issues and the need to avoid processing of proposals that would introduce similar conflicts. ICC staff should have either ruled that the RE107-19 proposal was out of order or referred the proposal to a cognizant ICC committee with the recommendation for ruling the proposal out of order. The Associations request that this provision not be included in the next edition of the IECC based on the Associations'

contention that the ICC staff improperly processed this proposal and the fact that, if included, any jurisdiction that adopts the 2021 IECC will be in violation of federal law.

II. NAHB Appeal

NAHB's appeal strikes a similar chord:

> RE126, "Water Heating Equipment," carries significant legal vulnerabilities for adopting jurisdictions. NAHB believes a court is highly likely to find that RE126 is preempted by the Energy Policy and Conservation Act (EPCA)…EPCA section 6297(b) provides that a state law "concerning the energy efficiency, energy use, or water use of the covered product" is preempted by federal promulgated energy conservation standards. In other words, a state cannot require certain products to meet energy conservation standards that are more stringent than those established by the federal government. While there are exemptions to this express preemption, those conditions are not satisfied here.
>
> Each water heater standard in RE126, except for tankless water heaters, are either set above the federal standard or requires additional modifications if the heater meets (but does not exceed) the federal standard. Thus, RE126 fails to satisfy the very purpose of the statute. State and local governments that choose to adopt the provisions contained within RE126 may find themselves the subject of litigation on the grounds that the requirements are prohibited by EPCA.

III. AHRI Appeal

In addition to its other contentions, AHRI's appeal provides some procedural context to the preemption issue and the proposals at issue:

> This letter is far from the first notice to ICC that the provisions about which we write run afoul of federal law. Indeed, the IECC Technical Committee twice rejected the provisions about which AHRI now appeals, at least once explicitly on the basis that the provisions were inconsistent with other legal requirements….
>
> Pursuant to ICC procedure, in November and December 2019, the rejected proposal was put forth for an online vote of government employees (OGCV), along with dozens of other complex revisions to various chapters and aspects of the IECC. These nameless voters, who bear no accountability to the ICC, and who bear no accountability to the state and local governments who face litigation if this revision is adopted, voted, by a slim margin, to overturn two unanimous disapprovals of the Technical Committee….
>
> RE-126 contravenes federal regulation in several different ways. The proposal mandates more stringent technology features than federal regulation; it creates definitions that are contrary to federal law, and it requires consumers and builders to select water heaters that exceed the federal efficiency minimum.
>
> RE-126 applies to residential water heaters which, as an EPCA-covered product, are exclusively regulated by the Department of Energy. States and localities are preempted from issuing regulations "concerning the energy use" or "energy efficiency" of residential water heaters. All of the water heaters impacted by RE-126 fall within the scope and definition of DOE-regulated water heaters, therefore each element of the proposal that deviates from federal law is preempted….[T]he narrow exception for building codes does not permit backdoor efficiency regulations of covered products, therefore the IECC must disapprove of the proposed amendments in RE-126.

AHRI further states in its supporting legal memorandum:

> RE 126-19 violates the preemption provisions of EPCA by proposing an energy use standard on a federally regulated product that exceeds 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.

RELEVANT COUNCIL POLICIES

Council Policy CP 1-03 sets forth the procedures for appeals of "any action or inaction," including matters related to code development. For purposes of the appeals at issue, two sections of this policy are of particular relevance.

- Section 6.3.7 provides:
  Review by the Appeals Board shall be limited to matters of process and procedure. The Board of Appeals shall not render decisions on the relative merits of technical matters.

- Section 6.3.8 provides:
  In order to sustain the appeal, or any part thereof, the Appeals Board must find that there was a material and significant irregularity of process or procedure.

DISCUSSION AND CONCLUSION

I. Process

As stated above in CP1-03, the authority of the Appeals Board extends only to matters of "process or procedure." The appellants in the present matter have not clearly identified an issue of process or procedure to support their preemption claims, other than their assertion that the proposals should have been cited as preempted at the initial stage of the process and not permitted to move forward. While the ICC mission is to develop a consistent coordinated set of model codes and standards, currently the Council does not have an explicit policy on preemption and thus ICC staff believes this issue is beyond the authority of the Appeals Board.

II. Preemption

If preemption were deemed to be within the Board of Appeals' scope of review, the issue of preemption under the EPCA, and the applicability to provisions such as those involved in these appeals, is not as clear-cut as the appellants claim. The two cases cited by the appellants, involving the City of Albuquerque and the State of Washington, reached different conclusions about whether certain regulations were preempted. Subsequently, those two cases (which involved similar, but not identical, facts) inspired a lengthy law review article in the Boston College Environmental Affairs Law Review entitled A Tale of Two Codes: The Influence of *Albuquerque* and *Washington* on Green Building, in which the author analyzed and attempted to reconcile the two cases. (And there is, in addition, an extensive body of law on the issue of federal preemption generally, in contexts other than the EPCA.)

In view of the intricacies of the law regarding preemption generally, and under the EPCA specifically, it is unclear as to whether the cited provisions would be preempted.

III. Spirit and Intent of CDP and the ICC Board of Directors

As we noted above, there is no explicit policy that prohibits the inclusion of preempted provisions in ICC Codes. That being said, it could be argued that that the spirit and intent of the codes is to avoid preempted provisions. See provision below for the Administrative Provisions of the ICC Codes:

> *"SECTION 102 APPLICABILITY [A] 102.1 General. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable. Where, in any specific case, different sections of this code specify different materials, methods of construction or other requirements, the most restrictive shall govern. [A] 102.2 Other laws. The provisions of this code shall not be deemed to nullify any provisions of local, state or federal law."*

Therefore, while the staff recommends that the appeals be denied based on the finding that no violation of "process or procedure" within the scope of the Board of Appeals' review authority was demonstrated, the ICC Board of Directors has broad authority over the code development process, and the ICC Board of Directors should determine whether any further analysis or investigation of the preemption issue raised in these appeals should be initiated and whether any remedial action should be taken.