NINTH CIRCUIT CANS BERKELEY GAS BAN UNDER FEDERAL LAW

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On 17 April 2023, in *California Restaurant Association v. City of Berkeley*,[1] the Ninth Circuit struck down a local ordinance banning natural gas piping in newly constructed buildings, concluding that federal law preempts the ordinance. This decision may have significant implications for similar state and local regulations, especially those in California and Washington. Building owners and operators, utilities, and other stakeholders impacted by natural gas "bans" or electrification mandates should consider whether their state or local regulation is affected.

CALIFORNIA RESTAURANT ASSOCIATION V. CITY OF BERKELEY

In July 2019, the City of Berkeley, California (Berkeley or the City) adopted Ordinance No. 7,672-N.S., titled "Prohibition of Natural Gas Infrastructure in New Buildings" (Ordinance). The Ordinance amends the Berkeley Municipal Code to prohibit natural gas infrastructure in new buildings.[2] Natural gas infrastructure is defined as "fuel gas piping, other than service pipe, in or in connection with a building, structure, or within the property lines of premises, extending from the point of delivery at the gas meter."[3] By prohibiting natural gas piping in newly constructed buildings, Berkeley sought to "eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas."[4]

In November 2019, the California Restaurant Association (CRA) sued Berkeley in the U.S. District Court for the Northern District of California, arguing among other things that the federal Energy Policy and Conservation Act (EPCA)[5] preempted the Ordinance. EPCA is a federal statute that regulates the energy efficiency of several consumer products, including water heaters; furnaces; stoves; and heating, ventilation, and air conditioning systems (together, covered products). EPCA does not cover piping, however. EPCA preempts state and local regulations concerning the energy efficiency, energy use, or water use of any covered product that has a federal energy conservation standard.[6]

The district court originally dismissed the CRA's challenge, concluding that EPCA must be "interpreted in a limited manner." According to the district court, broad federal preemption under EPCA would cause federal law to "sweep into areas that are historically the province of state and local regulation," including "local natural gas infrastructure."[7] Thus, EPCA could supersede only those state and local regulations that focus on a covered product, and directly require a particular energy use for that product.

The Ninth Circuit reversed the district court, holding that EPCA expressly preempts state and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant

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kitchens.[8] The Ninth Circuit held that EPCA's preemption clause supersedes state and local regulations that "relate" to the quantity of energy directly consumed by certain appliances at the place where those products are used.[9] A preemption clause that covers regulations on "energy use" "fairly encompasses an ordinance that effectively eliminates the 'use' of an energy source."[10] Critically, the panel reasoned that EPCA's purpose was to ensure that states and localities "could not prevent consumers from using covered products in their homes, kitchens, and businesses."[11] EPCA's preemption clause therefore extends to regulations that both (i) directly address the covered products and (ii) affect the on-site infrastructure related to the use of those products.[12] The Ninth Circuit concluded that EPCA preempted Berkeley's ban because it prohibited the onsite installation of natural gas infrastructure necessary to support covered natural gas appliances.[13]

IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION

Berkeley may seek en banc review by a larger panel of the Ninth Circuit or seek review by the U.S. Supreme Court.[*] As it stands now, the opinion's immediate effect is that it strikes down Berkeley's Ordinance. It may also spell the end for similar regulations banning natural gas in states and municipalities in the Ninth Circuit.[14] The decision may also have other wide-ranging effects.

Emphasis on the Use of Covered Products

First, the Ninth Circuit's focus on "use" puts in question state and local regulations prohibiting or affecting—even indirectly—the "use" of natural gas in homes and buildings. Since 2019, over 70 state and local jurisdictions around the country have passed provisions requiring or incentivizing all-electric or zero-emissions new buildings and new construction in existing buildings, including many in California and Washington state.[15]

EPCA Preemption of Local Building Codes

Second, the Ninth Circuit observed that EPCA can also preempt local building codes. Building codes may survive preemption, however, under two circumstances. First, EPCA would not preempt any state or local regulation enacted or prescribed before 8 January 1987. Second, a state or local building code can survive EPCA preemption if the following seven requirements are met:[16]

1. The code allows a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet that objective;
2. The code does not specifically require any Covered Products to exceed federal standards for energy efficiency (unless granted a waiver from the secretary of energy);
3. The code offers options for compliance on a "one-for-one equivalent energy use or equivalent cost basis";
4. The code bases any baseline building design used by the code on a building with covered products that do not exceed federal standards (unless granted a waiver from the secretary of energy);
5. The code offers at least one optional combination of energy consumption-related items that does not exceed federal standards for any covered product (assuming the code offers such combinations);
6. The code frames any energy target as total energy consumption for the entire building; and
7. The code uses test procedures specified in EPCA to determine the energy consumption of covered products.[17]

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According to the Ninth Circuit, Berkeley's natural gas ban was in a building code that failed to meet these requirements. The CRA Decision indicates that courts will look to the outcome of a state or local regulation and see if it affects the "use" of a product covered by EPCA. If so, under the Ninth Circuit's decision, EPCA preemption is likely triggered, and the state or local regulation is likely preempted, unless one of EPCA's exceptions applies. EPCA preemption could conceivably also cover a plethora of other state and local regulations related to testing and labeling requirements,[18] energy use,[19] energy efficiency standards,[20] and water use.[21]

WHERE GAS BANS GO FROM HERE

The Ninth Circuit may have struck down Berkeley's natural gas ban, but other state and local bans and electricity mandates could still stand if they are within a building code that meets EPCA's preemption exceptions. Other federal courts may also be ruling on similar cases in the future, which would affect state and local regulations in states outside of the Ninth Circuit and could create a conflict among the circuits.

Stakeholders now face uncertainty regarding assumptions and projections made with now potentially defunct gas bans in mind. For instance, building owners and operators may have invested in electric appliances or infrastructure to comply with a local prohibition or mandate. Gas and electric utilities serving local jurisdictions subject to a natural gas ban may have designed integrated resource plans or other long-term energy plans with certain assumptions on the rise of electric service and the decline of gas. Local jurisdictions that have experienced difficulty implementing electricity infrastructure may use the CRA Decision to justify continued reliance on natural gas. Moreover, providers of renewable natural gas and hydrogen may market their fuel as a legally compliant, low-carbon alternative to investing in all-electric infrastructure.

Furthermore, the CRA Decision may ease concerns by gas utilities faced with potential "stranded assets"—investments in infrastructure that have remaining useful life but have been retired early as a result of underutilization—due to state and local policies that are intended to reduce or wind-down consumption of natural gas. Such assets often give rise to thorny policy questions as to whether the utility or ratepayers should be responsible for these sunk costs, particularly when the investments were prudent when made. The Ninth Circuit's confirmation that EPCA requires in many cases continued access to natural gas infrastructure by new customers supports continued prudent investment by utilities to meet this additional demand—and, accordingly, bolsters the case for cost recovery for these investments in utility rates.

[*]Update: On 31 May 2023 Berkely filed a petition for an en banc rehearing

FOOTNOTES

[1] *Cal. Rest. Ass'n v. City of Berkeley*, No. 21-16278, 2023 WL 2962921 (Apr. 17, 2023) (*CRA Decision*).

[2] Ordinance § 12.80.040(A).

[3] *Id.* § 12.80.040(E).

[4] *Id.* § 12.80.010(H).

[5] 42 U.S.C. § 6201 *et seq*.

[6] 42 U.S.C. § 6297(c). This particular provision contains several exceptions, but the Ninth Circuit determined that

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none of the exceptions were applicable to this case. *CRA Decision*, 2023 WL 2962921 at *4.

[7] *Cal. Rest. Ass'n v. City of Berkeley*, 547 F. Supp. 3d 878, 891 (N.D. Cal. 2021).

[8] *CRA Decision*, 2023 WL 2962921 at *2.

[9] *Id.* at *4.

[10] *Id.* at *5.

[11] *Id.*

[12] *Id.*

[13] *Id.* at *4.

[14] The Ninth Circuit covers nine states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) and two territories (Guam and the Northern Mariana Islands).

[15] *See* Zero Emissions Building Ordinances, BUILDING DECARBONIZATION COALITION, https://buildingdecarb.org/zeb-ordinances.

[16] *CRA Decision*, 2023 WL 29662921 at *6 (citing 42 U.S.C. § 6297(f)(1)–(3)).

[17] 42 U.S.C. § 6297(f)(3)(A)–(G).

[18] 42 U.S.C. § 6297(a).

[19] *Id.* § 6297(b).

[20] *Id.*

[21] *Id.*

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