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Ninth Circuit U.S Court of Appeals Finds Federal Preemption of Berkeley, Calif. Gas Infrastructure Ban

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A decision this month by a federal appeals court determined that a California city's efforts to ban the installation of natural gas piping in newly constructed buildings ran afoul of a federal law that broadly establishes nation-wide energy conservation standards for consumer products, and could mark a potentially significant legal obstacle to the recent wave of local and state actions to limit the use of natural gas.

On April 17, 2023 a three-judge panel for the U.S. Court of Appeals for the Ninth Circuit held that the City of Berkeley's 2019 ordinance to ban new natural gas piping within buildings is preempted by the federal Energy Policy and Conservation Act, 42 U.S.C. § 6297(c) ("EPCA"). This is part of the same area of federal law that houses the federal Energy Star and WaterSense programs, and a host of others affecting a wide range of consumer products.

Significantly, the Ninth Circuit determined that the EPCA's preemption provisions are not limited to regulations explicitly targeting consumer products but rather those targeting any on-site infrastructure "for their use of natural gas."

In 2019, the City of Berkeley adopted an ordinance that primarily prohibited installation of non-utility-owned natural gas piping in certain newly constructed buildings. Effective in January 2020, the ordinance was aimed at environmental concerns. Shortly after the ordinance was adopted, the California Restaurant Association ("CRA") sued the city in federal court seeking declaratory action and to enjoin the city's enforcement of the new rules, claiming the ordinance was preempted by the EPCA and state law. The U.S. District Court for the Northern District of California dismissed the EPCA claim on grounds that there was no federal preemption and it dismissed the state claims on separate grounds.

The Ninth Circuit disagreed, reversed, and remanded the matter back to the district court. The court said that the EPCA's preemption clause establishes that, once a federal energy conservation standard becomes effective for a covered product, "no State regulation concerning energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product," unless the regulation meets one of several categories that was not relevant to its decision.

Looking then to what constitutes a "regulation concerning the … energy use" of a covered product, the court determined the EPCA preempts regulations that relate to the "quantity of [natural gas] directly consumed by" certain consumer appliances at the place where those products are used.

"So, by its plain language," the court wrote, "EPCA preempts Berkeley's regulation here because it prohibits installation of necessary natural gas infrastructure on premises where covered natural gas appliances" – such as the CRA members' commercial equipment – "are used."

The Ninth Circuit rejected various textual and non-textual arguments by the City of Berkeley and the United States (which filed an amicus brief and presented arguments), but also directly addressed the district court's holding, finding that "EPCA preemption is not limited to facial regulations of consumer products as the district court held," but the preemption provision under the EPCA in fact reached more broadly.

The court concluded that the Act's focus on "energy use" does not measure it "from where the products roll off the factory floor, but from where consumers *use* the products."

"Put simply," the court wrote, "by enacting EPCA, Congress ensured that States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses. So EPCA preemption extends to regulations that address the products themselves *and* the on-site infrastructure for their *use* of natural gas." The court found support in decisions by the Supreme Court and other provisions of the EPCA.

Two concurring opinions raised questions that may be relevant in potential further litigation with respect to preemption and standing. Circuit Judge Diarmuid F. O'Scannlain stated his agreement that the EPCA preempted Berkeley's ordinance rested only on his conclusion that a presumption against preemption did not apply to the EPCA, which he was "bound to hold" by Ninth Circuit precedent. Separately, Judge M. Miller Baker expressed his "reservations" that the CRA would have sufficient standing based on the facts pleaded below if the case had proceeded further (the case was dismissed before proceeding to discovery or trial stages); however, Judge Baker agreed there was sufficient standing for the CRA at the current point in the case. (As a means of limiting the number of cases courts take up, courts apply rules of standing that, among other things, establish a minimum relationship between plaintiffs and plaintiffs' groups and claims they bring into court.)

If you have questions or would like to discuss further, please feel free to contact Ken Maloney or Greg Simmons at 202-223-8890 or kmaloney@cullenllp.com or gsimmons@cullenllp.com.

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