Washington's Energy-Efficient Building Codes Not Preempted By EPCA

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A federal district court judge has ruled in favor of the State of Washington and several other proponents of a new Washington energy code. The ruling tentatively ends a lawsuit that was filed by the Building Industry Association of Washington (BIAW), back in May 2010, alleging that the code violated federal standards. So, what does this mean?

Well, for now this means that the State of Washington can safely promulgate and enforce its new code. District Court Judge Bryan's ruling, which can be read by following this link, opines that the court felt that the new codes are not preempted by the federal Energy Policy and Conservation Act, even though they require the use of HVAC, plumbing, and water heating equipment whose efficiency exceeds the federal standards.

To shed a bit of light on the procedural history of this dispute, I am outlining some of the key elements involved. At the end of the day, its a major win for energy efficiency proponents looking to move above and beyond federal minimum standards.

The New Code

In 2009, the State of Washington's Building Code Council passed a new code with the intention of reducing annual energy consumption. Of course, the code requires stricter guidelines for energy performance. The BIAW's suit had the effect of stalling the new code's effective date.

If you would like to understand how the new code works, you should closely read Pages 4-8 of Judge Bryan's opinion. In that section, Judge Bryan explains the multi-step format set forth in the 2006 code, and how the 2009 revisions to the code offer a choice between three alternative compliance paths.

The end goal of the 2009 code is to produce a fifteen percent reduction in annual net energy consumption. If you would like to read the more technical intent and specific statutory instruction, you can review WAC 51-11-0101. The entire Act is set forth in WAC 51-11.

The Lawsuit

Back in May 2010, the BIAW filed a suit against the Washington State Building Code Council, alleging that its new building code was preempted by EPCA, because it required a higher level of efficiency in installed appliances and products. The suit had the effect of delaying implementation of the code.

Later in the suit, several environmental groups intervened, including NW Energy Coalition, Sierra Club, Washington Environmental Council and NRDC. In November 20101, those groups moved for summary judgment. Their motion was based upon the argument that EPCA provides an exception for building codes. Stephen Del Percio wrote an excellent article summarizing this exception:

The [summary judgment] papers are an important read if you are interested in the mechanics of how the Energy Policy and Conservation Act's "building code exception" applies to local-level residential building codes. As you will recall, the building code exception is set forth in 42 U.S.C § 6297(f) and allows state and local governments to set energy

efficiency targets for new residential construction which can be reached with equipment or products whose efficiencies exceed federal standards, provided the enabling legislation also includes other means to achieve the targets with products that do not exceed the federal standards.

BIAW filed an opposition and the matter went to oral argument on February 3, 2011. Despite its on-going fight against the codes, the BIAW had been readying builders for the changes.

The Court's Ruling

The District Court found in favor of Washington, and the intervening groups, on the basis of the building code exception in EPCA.

The opinion provides an excellent "walk-through" of the building code and why Washington's code specifically meets the requirements of the exception. In short, the building code exception requires that the disputed code meet 7 prongs (See Page 13-14). The BIAW disputed that the Washington code could not meet 4 of those prongs. Justice Bryan does an excellent job slowly wading through subsections (B), (C), (E), and (F) of the exception, 42 U.S.C. § 6297 (f)(3).

The most interesting evaluation is of subsection (B), which requires an alternative compliance path using products that do not exceed the federal standards. The Court found that several sections of the new code permit the use of non-covered products. But, the most interesting piece here is that the court decided to touch on A*ir Conditioning Heating and Refrigeration Inst. v. City of Alburquerque,* a similar case decided last year. In that case, a judge ruled against a building code because it did not provide a suitable alternative path for products. Here, Judge Bryan simply stated that the BIAW failed to make substantial showing that the cases were similar:

Plaintiff cites to an unpublished decision of an order granting a preliminary injunction in a New Mexico case, Air Conditioning Heating and Refrigeration Inst. v. City of Alburquerque, No. 08-633 MV/RLP, 2008 WL 5586316 (D.N.M. Oct. 3, 2008). Dkt. 54. In that case, the District Court found, at that stage, that the plaintiff had shown that Alburquerque's code's "performance based alternatives, as a practical matter, cannot be met with products that meet, but do not exceed" the federal standards. Id., at 9. Plaintiffs here have not made any such showing. Further, there appear to be substantial differences in the Alburquerque code and Washington's code. (emphasis added)
I would have loved a bit more discussion on this topic, because it leaves some things to think about. Did the Judge believe that the Albuquerque code was different because it mandates performance and not the use of particular products? Did the Judge believe that the Washington code was simply better thought-out and fair to builders following EPCA standards? We may never know.

For now, the code will make it into law and we will wait to see what the BIAW does next.

What Does This Mean For Codes?

We now have two different rulings on a similar issue – whether mandatory green building codes can be preempted by federal law. But, the two cases are different for a big reason: WA does not require a level of performance.

The Albuquerque code specifically requires that buildings meet a level of performance, but they do not require the use of particular products to do so. The Washington code more directly takes on the specified EPCA standards, but safely provides alternatives for compliance using EPCA standard products.

While Washington took appears to have taken the EPCA standard head on, it appears to have taken the more safe route to meet its ends – reducing energy use. Codes promulgated in other jurisdictions might find success in following this pattern.

Do you have any thoughts about the Judge's decision to distinguish between the two codes?