GT GreenbergTraurig

Alert | Energy & Natural Resources

April 2023

9th Circuit Chills Municipal Government Efforts to Ban Natural Gas for Cooking, Heating

There have been a series of recent high-profile legislative actions and media articles concerning attempts to ban natural gas appliances or natural gas service to consumers over alleged safety and air pollution issues. On April 17, 2023, in *California Restaurant Association v. Berkeley*, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued an opinion that may chill many future gas-ban proposals.

The Ninth Circuit reversed the district court's dismissal of the California Restaurant Association's complaint alleging the Energy Policy and Conservation Act (EPCA) preempts a City of Berkeley ordinance that prohibits installation of natural gas piping within newly constructed buildings. This Ninth Circuit decision has potentially far-reaching implications for so-called REACH codes adopted or proposed by other municipalities and states to prevent natural gas use in new buildings where a natural gas distribution system already exists. A REACH code is a local building code that goes beyond or "reaches" past the state minimum requirements for energy use or greenhouse gas emissions in building design and construction. The decision is less likely to impact proposed state legislation and regulatory efforts to decommission existing intrastate natural gas pipelines, and it may not impact proposed bans on future expansions of existing utility distribution systems.

The primary substantive issue the Ninth Circuit opinion addresses is whether the scope of the EPCA's express preemption clause includes the Berkeley ordinance. While the City of Berkeley and the federal

government argued that the Berkeley ordinance does *not* come within the scope of the EPCA's preemption provisions, the Restaurant Association argued that the EPCA *does* preempt the Berkeley ordinance. Berkeley contended that EPCA preemption only covers regulations that impose standards on the design and manufacture of appliances, not regulations that impact the distribution and availability of energy sources like natural gas. Also opposing preemption was the federal government, which argued that the EPCA only preempts "energy conservation standards" that operate directly on the covered products themselves. The Restaurant Association disagreed, arguing that EPCA preemption extends to regulations that effectively prevent covered products from using available energy sources.

The Opinion adopts the Restaurant Association's position, finding that:

> 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. . . . a regulation that prohibits consumers from using appliances necessarily impacts the "quantity of energy directly consumed by [the appliances] at point of use." So, by its plain language, EPCA preempts Berkeley's regulation here because it prohibits the installation of necessary natural gas infrastructure on premises where covered natural gas appliances are used.

By itself, the foregoing language would imply that EPCA preemption could also extend to natural gas pipeline expansions to serve new customers. However, the Opinion notes that its conclusions only apply to buildings that already have physical access to existing utility infrastructure and do not address the city's obligation to maintain or expand the existing natural gas distribution system:

> Berkeley finally contends that preemption here would mean that the City must affirmatively make natural gas available everywhere. That does not follow from our decision today. We only hold that EPCA prevents Berkeley from banning new-building owners from "extending" fuel gas piping within their buildings "from the point of delivery at the gas meter." See BMC § 12.80.030(E). Our holding doesn't touch on whether the City has any obligation to maintain or expand the availability of a utility's delivery of gas to meters.

In addition, the Opinion rejects Berkeley's argument that "finding preemption would impliedly repeal the Natural Gas Act, 15 U.S.C. § 717 et seq. The Court observed that, in relevant part, the Natural Gas Act merely prohibits the Federal Energy Regulatory Commission (FERC) from regulating the local distribution of natural gas. According to the Court, the restriction on FERC's authority does not conflict with the decision of Congress, through the EPCA, "to supplant building codes that prevent the operation of natural gas appliances."

Finally, the Court made clear that federal law prevents states and municipalities from doing indirectly what they are barred from doing directly. The Court thus stated (citing a 2004 U.S. Supreme Court case):

> States and localities can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*. EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings. So Berkeley can't evade preemption by merely moving up one step in the energy chain and banning natural gas piping within those buildings. Otherwise, the ability to use covered products is "meaningless" if consumers can't access the natural gas available to them within the City of Berkeley.

While the overall reach of this decision is unclear, the Ninth Circuit affirms that the EPCA preempts state or municipal actions to ban natural gas use in new or existing buildings that are able to interconnect with an existing utility distribution system.

Authors

This GT Alert was prepared by:

- William Garner | +1 713.374.3549 | garnerw@gtlaw.com
- Kenneth M. Minesinger | +1 202.530.8572 | Kenneth.Minesinger@gtlaw.com
- Thomas R. Brill | +1 949.732.6537 | brillt@gtlaw.com