EARTHJUSTICE

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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

September 1, 2023

VIA EMAIL

Washington Building Code Council
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RE: *Washington Energy Code Proposals and EPCA Compliance*

To Whom It May Concern:

On behalf of Sierra Club and Washington Physicians for Public Responsibility, we submit the following comments for the public record regarding the proposed revisions to Washington's 2021 residential and commercial energy codes.[1] These organizations support the proposed amendments. The focus of these comments is to explain why the proposed revisions to the residential and commercial energy codes satisfy the Energy Policy and Conservation Act's building code exemptions, and therefore are not preempted by federal legislation.

I. BACKGROUND

The Energy Policy and Conservation Act ("EPCA" or "Act"), 42 U.S.C. §§ 6291–6317, is a federal statute that sets energy conservation standards for specified consumer and industrial appliances ("covered products") and authorizes the Department of Energy ("DOE") to establish and update standards.[2] To avoid manufacturers contending with different efficiency standards

[1] Specifically, Washington State Energy Code Proposal of Henry Odem, log no. 21-GP3-035 [hereinafter "Residential Code Proposal"] (June 10, 2023), https://sbcc.wa.gov/sites/default/files/2023-06/21-GP3-035_R406_Odem.pdf; Washington State Energy Code Proposal of Duane Jonlin, as amended by Jonny Kocher, log no. 21-GP3-037 [hereinafter "Commercial Code Prescriptive Pathway Proposal"] (revised Aug. 29, 2023), https://sbcc.wa.gov/sites/default/files/2023-08/21-GP3-037_TAGREC_REV3_5_WSEC_C_Kocher_082923.pdf; Washington State Energy Code Proposal of Jonny Kocher, log no. 21-GP3-036 Ver. 3 [hereinafter "Commercial Code Performance Pathway Proposal"] (revised Aug. 29, 2023), https://sbcc.wa.gov/sites/default/files/2023-08/21-GP3-036_TAGREC_REV3_WSEC_C_Kocher_082923.pdf. These are the most recent draft proposals as of September 1, 2023. We support these proposed revisions and any substantially similar future amendments to which the legal analysis below may apply.

[2] 42 U.S.C. § 6295.

among states and localities, appliance standards promulgated by DOE preempt subnational efficiency standards for covered products.[3] Following a recent decision by the U.S. Court of Appeals for the Ninth Circuit that altered longstanding interpretations of EPCA's preemptive scope,[4] the Washington State Building Code Council ("SBCC" or "Council") elected to delay the effective date of the state's 2021 building and energy codes and to consider revisions that would ensure its codes remain consistent with EPCA. The SBCC's Energy Code Technical Advisory Group has proposed revisions to the residential and commercial energy codes that would meet this objective.

II. THE REVISED RESIDENTIAL AND COMMERCIAL CODES MEET EPCA'S SEVEN-FACTOR PREEMPTION EXCEPTION FOR BUILDING CODES

Under EPCA, state regulations "concerning the energy efficiency, energy use, or water use of the covered product" are typically preempted by federal regulations, unless they meet certain requirements.[5] There are specific exceptions to preemption for state and local building codes if they meet the seven criteria enumerated at 42 U.S.C. § 6297(f)(3). We have reviewed the draft residential and commercial proposals from the technical committees carefully.[6] In our view, the proposed revisions satisfy these criteria for the reasons described below, and a federal court should uphold them in the face of any legal challenge concerning EPCA compliance.

In general, EPCA's seven-factor preemption exception permits state and local building codes designed to meet building-wide energy conservation objectives, even if some ways of complying with the codes involve the use of covered equipment that exceeds federal baseline efficiency standards, so long as the codes do not require such equipment or directly penalize compliance pathways that use federal baseline-efficiency equipment. This understanding was

[3] *Id.* at § 6297.

[4] *California Rest. Ass'n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023); *see, e.g.*, Brief for the United States in Support of Appellee, *California Rest. Ass'n v. City of Berkeley*, No. 21-16278 (filed June 12, 2023) (stating long-established DOE interpretation of EPCA as not preempting codes and ordinances that promote environmental or public health goals and which only incidentally affect use of covered products). This litigation has not concluded. The City of Berkeley is seeking rehearing of the court's decision, supported by DOE and a slew of states, localities, environmental and public health groups, and academics. A decision on this petition is expected soon.

[5] 42 U.S.C. § 6297(b)(1).

[6] *See supra*, n. 1.

confirmed in the Ninth Circuit's only prior decision to address EPCA's preemption exception for building codes.[7]

Here, the proposed revisions fit within the exception by requiring each building to meet a uniform net energy consumption target. A building meets the target by generating a number of efficiency credits that represents the difference between the energy use of a building with its characteristics (including size, occupancy group, and category of space and water heating equipment) and the target. The code revisions provide multiple options for buildings with all equipment types to generate the credits needed to comply, with each option providing an approximately equivalent per-credit reduction in building-wide energy use. The following sections detail how the proposed revisions satisfy each of Section 6297(f)(3)'s seven criteria, consistent with this general understanding of what those criteria collectively require.

A. <u>The codes allow builders to meet building energy goals by selecting a combination of products.</u>

Subsection 6297(f)(3)(A) requires that a code "permit[] a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective."

This is exactly how the code proposals work. The revised residential energy and commercial code prescriptive pathways allow builders to select from various options that accrue credits, with specific building sizes and purposes requiring a specific number of credits.[8] The commercial energy code performance pathway also allows builders choice in building design and products as long as the modeling meets site energy targets and certain performance factors.[9] There is no doubt the revised codes meet criterion (A).

B. <u>The codes do not require use of above-baseline efficiency products as the sole means of compliance.</u>

Subsection 6297(f)(3)(B) does not allow a building code to "require that the covered product have an energy efficiency exceeding the applicable [federal] energy conservation standard" unless the Secretary of Energy has granted the State a waiver. A code does not fail to

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[7] *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1145-46, 1148 (9th Cir. 2012) (upholding SBCC building standards by finding adherence to seven criteria); *see also Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, No. 3:10-cv-05373-RJB, 2011 WL 485895, at *8-9 (W.D. Wash. Feb. 8, 2011), *aff'd*, 683 F.3d 1144 (9th Cir. 2012) (providing detail on content of challenged codes and reasons they met each EPCA preemption exemption criterion).

[8] *See* Residential Code Proposal § R406.3; Commercial Code Prescriptive Pathway Proposal § C406.2.

[9] *See* Commercial Code Performance Pathway Proposal § C407.3.

meet this criterion merely because some compliance options that use certain equipment may end up being less expensive than other options that use federal baseline-efficiency equipment.[10]

The proposals satisfy this provision because the revised energy codes do not require builders to use any particular set of covered products. Instead, the credit-based prescriptive pathways for residential and commercial buildings allow builders to select from a variety of options for compliance. These options do not require installation of above-baseline efficiency products; builders can choose weatherization or renewable energy options if they wish to use baseline-efficiency covered products, and these options are available for both baseline-efficiency fossil fuel and baseline-efficiency heat pump equipment.[11] The Ninth Circuit confirmed that a similar menu-of-options approach in Washington's 2009 version of the building codes met this criterion.[12]

The performance pathway for commercial buildings that relies on modeling does not mandate the use or non-use of any specific product. Rather, it requires that the building as a whole meet certain performance factors, with flexibility on which appliances to choose in meeting this standard.[13] Thus, the proposals squarely meet the requirements of § 6297(f)(3)(B).

C. Credits are allocated on a one-for-one basis of energy use intensity.

Subsection 6297(f)(3)(C) requires that any credits awarded by a code for installing above-baseline covered products be "on a one-for-one equivalent energy use or equivalent cost basis." Codes meet this requirement if any credits they award for installing above-baseline equipment are proportional to the equipment's energy use savings, without favoring particular

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[10] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1151 ("The fact that certain options may end up being less costly to builders than others does not mean the state is, expressly or effectively, requiring those options.").

[11] *E.g.*, Commercial Code Prescriptive Pathway Proposal § C406.2(1) (table for heat pump pathway including enhanced building envelope performance and renewable energy installation as options to obtain credits); *id.* § C406.2(2) (table for fossil fuel pathways including similar options); *see* Jonny Kocher, 2021 Washington State Energy Code Commercial Proposals Presentation, at 3, 8, 10, 15 (Aug. 2023) (describing how buildings using federal baseline-efficiency fossil fuel equipment and federal baseline-efficiency heat pump equipment can comply with the Commercial Code Prescriptive Pathway Proposal), https://www.sbcc.wa.gov/sites/default/files/2023-08/Kocher_036_037_Presentation_082923.pdf.

[12] *See Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1145, 1151-52 (upholding Washington's approach, which "[did] not create any penalty or legal compulsion to use higher efficiency products," and distinguishing it from an Albuquerque ordinance that "required use of higher efficiency products by imposing a penalty through the code itself").

[13] Commercial Code Performance Pathway Proposal § C407.3(2).

product options.[14] Controlling case law has confirmed that the one-for-one equivalency need not be perfectly exact.[15]

The revised energy codes comply with this standard because they use a credit system based on the "energy use intensity" (EUI) resulting from a builder's choice of building products and methods.[16] The credit system methodology thus enables an equivalent energy-use comparison between appliances across different appliance types (*i.e.*, those using electricity or those using fossil fuel). The EUI approach thus satisfies criterion (C) of equivalent energy use without assigning preference to specific products.

The proposals require buildings with all equipment types to meet a uniform set of credit requirements based on the EUI reduction objective,[17] and apply a normalization factor based on the energy use of baseline-efficiency equipment of the type installed. Thus, the revised energy codes do not impose a "penalty" on a builder that uses fossil fuels for space or water heating. The normalization factor merely recognizes that fossil fuel space and water heating use more energy than heat pumps.[18] The credit tables allow builders to select options from the menu until they have generated the number of credits needed to meet the energy savings objective, no matter what type of equipment they install. This is precisely what EPCA contemplates. Whatever approach a builder uses, the resulting building must as a whole meet the energy savings objective with a reduction in net energy consumption compared to 2006 levels.[19] The revised energy codes enable design and product flexibility while meeting state statutory climate emission reduction goals.

D. <u>The revised codes do not use a single baseline building design that would require the use of covered products exceeding federal efficiency standards.</u>

Subsection (D) provides that if a code requires that all buildings be compared to a single baseline design, then that baseline design must not include above-baseline efficiency covered products.

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[14] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1153.

[15] *Id.* at 1146 (citing Senate Committee report on EPCA).

[16] *See* RCW 19.27A.200(13).

[17] Residential Code Proposal § R406.3 (setting forth uniform credit requirements for each dwelling size); Commercial Code Prescriptive Pathway Proposal Table C406.1 (setting forth uniform credit requirements for each building occupancy group).

[18] Residential Code Proposal § R406.2; Commercial Code Prescriptive Pathway Proposal §§ C406.1.3.1, C406.1.3.2.

[19] *See* RCW 19.27A.160.

Criterion (D) is not at issue for two reasons. First, the revised energy codes do not require the use of a single baseline building design,[20] but rather enable flexibility through modeling or a menu of credit-based product and building choices to meet an energy use objective. Second, to the extent the energy codes could be said to use a "baseline" to measure progress toward state statutory goals to reduce net energy consumption, that baseline is a 2006 WSEC-compliant building that does not require covered products exceeding baseline efficiency standards. Notably, this 2006 standard was expressly not found at issue in prior litigation challenging Washington building codes.[21]

E. Compared to the number of options based on higher-efficiency products, the revised energy codes provide as many or more options for compliance that use baseline-efficiency products.

Subsection (E) requires the code in question to provide as many or more options for compliance that do not require above-baseline efficiency products as it contains options that do rely on those products. The subsection reads:

> If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

As with the 2009 revisions to the Washington building code, the code proposals that use a prescriptive approach provide multiple options for compliance that do not require the use of products exceeding federal energy efficiency standards. Such options include enhanced building envelopes and the use of renewable energy to power the building in question.[22] Thus, the prescriptive pathway meets criterion (E). The performance pathway does not require the use of any specific products, and thus this criterion does not apply.

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[20] *Cf. Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, No. 3:10-cv-05373-RJB, 2011 WL 485895, at *9 (W.D. Wash. Feb. 8, 2011) (plaintiffs stated that factor (D) concerning baseline standards was not at issue).

[21] *Id.* at *5, *9; *see also Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1149.

[22] *E.g.*, Commercial Code Prescriptive Pathway Proposal § C406.2 (table for heat pump pathway including enhanced building envelope performance and renewable energy installation as options to obtain credits); *id.* § C406.2(2) (table for fossil fuel pathway including similar options); *cf. Bldg. Indus. Ass'n of Wash.*, 2011 WL 485895, at *13.

F. The revised codes' energy savings goal is measured in terms of energy use.

Subsection § 6297(f)(3)(F) requires that the "energy consumption or conservation objective is specified in terms of an estimated total consumption of energy…."

The revised energy code, like Washington's previous energy codes since 2006, is based on a statutory mandate that each building code cycle achieve incremental reductions in annual net energy consumption compared to the 2006 building code baseline year.[23] Like previous codes, the revised codes set an objective based on EUI reductions and measure progress toward that objective using efficiency measure credits.[24] And as with previous codes, the EUI and credit approach satisfies Subsection (F) for much the same reason that it satisfies Subsection (C).[25] Thus, no matter the pathway chosen by builders, the energy savings goal is the same and measured through energy use intensity.

G. The revised codes are based on federally-recognized energy use calculations.

Finally, subsection (G) requires that codes use applicable federal test procedures to measure covered products' energy use, with certain exceptions.

Washington's revised energy codes meet this requirement. Where testing procedures are specifically mentioned, the codes reference national standards for equipment efficiencies.[26] Otherwise, the codes do not mandate different test procedures than those established by federal regulation.[27]

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[23] RCW 19.27A.160.

[24] *See Bldg. Indus. Ass'n of Wash.*, 2011 WL 485895, at *15 (rejecting plaintiffs' arguments that the credit system used to measure progress toward the codes' objective was insufficiently related to energy savings).

[25] *Id.* (observing that plaintiffs applied the same arguments to factor (C) and factor (F), and failed to carry their burden with respect to both factors).

[26] *See, e.g.*, Residential Code Proposal Table R406.2 (referencing federal efficiency standards for heating equipment); Commercial Code Prescriptive Pathway Proposal § C403.1.4(2)(5) (using National Appliance Energy Conservation Act (NAECA) minimum standard for air-to-air heat pumps).

[27] *Cf. Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, No. 3:10-cv-05373-RJB, 2011 WL 485895, at *9 (W.D. Wash. Feb. 8, 2011) (plaintiffs stated that factor (G) was not at issue).

III. CONCLUSION

As detailed above, the energy code proposals before the Council comply with EPCA. We would be happy to discuss these conclusions further with Council representatives.

Sincerely,

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