REACH CODE NEWS BRIEF: SPECIAL EDITION

REACH CODES AND OTHER DECARBONIZATION APPROACHES FOR THE POST *CRA V BERKELEY* ERA

BACKGROUND

On Monday, April 17, 2023, a three-judge panel of the Ninth Circuit Court of Appeals issued a ruling in California Rest. Ass'n v. City of Berkeley[1] invalidating the City of Berkeley's ordinance No. 7,672-N.S.—"Prohibition of Natural Gas Infrastructure in New Buildings" ("Ordinance"), which would have prohibited natural gas infrastructure in new buildings. The Court found that the Ordinance was preempted by the federal Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6297(c), which states that "no State [or local] regulation concerning the energy efficiency, energy use, or water use, of [a] covered product shall be effective with respect to such covered product. "

The Court reasoned that "EPCA is concerned with the end-user's ability to use installed covered products at their intended final destinations," and thus "EPCA preempts Berkeley's regulation here because it prohibits the installation of necessary natural gas infrastructure on premises where covered appliances are used."[2] A dissent, signed by 11 judges, was also filed with the majority opinion.

In late May 2023, the City of Berkeley filed a petition for rehearing en banc, which, if granted, would have provided for a new review by a larger panel of Ninth Circuit judges. The Ninth Circuit ruling applies to states and jurisdictions throughout the West Coast that have adopted similar policies, including Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington as well as Guam and Northern Mariana Islands. However, on January 2, 2024, the petition for rehearing was denied – as a majority of the non-recused active judges in the Ninth Circuit did not vote in favor of rehearing the matter.[3] The City of Berkeley may file a petition seeking review by the United States Supreme Court within 90 days; however, the Supreme Court's review is discretionary, and in 2022 the Court granted 1.4% of requests.

REACH CODES AND OTHER DECARBONIZATION APPROACHES

The **CRA v Berkeley** ruling has not deterred jurisdictions from pursuing their decarbonization and emissions reductions goals. And as the state level policy continues to move toward zero emissions, local jurisdictions continue to prepare their communities for an all-electric future.

Some cities have chosen to pause enforcing their all-electric code efforts and focus on general electrification education and point building owners and residents towards incentives available for electric appliance installs or related electrification strategies.

Even with an enforcement pause, jurisdictions can still promote and encourage all-electric construction by educating stakeholders on the substantial benefits. For example, the city of San Rafael educates stakeholders on the benefits—such as lower costs of construction, reducing greenhouse gases (GHGs), and improving comfort and health – and encourages them to adopt all electric designs to avoid stranded assets as the State moves towards an all-electric future.

Three possible strategies include:

- Source energy metric approaches
- Zero GHG emissions standards
- Zero NOx emissions appliance rules

The source energy metric is a more traditional approach to reach codes, modifying the Energy Code, while the Zero NOx and Zero Emissions approaches reference different municipal authorities. Each approach is discussed in the following paragraphs.

SOURCE ENERGY METRIC APPROACHES

Local governments and reach code experts are also developing alternative model codes that regulate energy performance and provide pathways to compliance for both mixed fuel and all-electric buildings. One available strategy is to use source energy metrics;[4] there are two model ordinance language documents currently under development that share the same approach. One, the High-Performance Single Margin, applies to Single Family and Low-rise Multifamily New Construction buildings. The other, the Energy Performance Approach, applies to Single Family, Multifamily, and Nonresidential New Construction buildings. The Bay Area Reach Codes Program just released this Energy Performance Approach (Source Energy Margin) model code which is available for use in that region but could be modified for use elsewhere. The cities of San Jose, Santa Cruz, and San Luis Obispo adopted codes similar to this. Both approaches leverage a source energy metric that aligns with carbon emissions that is used to regulate energy performance and provides pathways to compliance for both mixed fuel and all-electric buildings. All-electric designs may result in up-front cost savings for construction as compared to the code-compliant mixed fuel baseline, despite the energy efficiency measures that must be added to achieve the source energy margin, while mixed-fuel designs will typically require added solar PV or battery storage to meet compliance which is more expensive. These

source energy approaches do not include cooking equipment and laundry as these end-uses are not included in the performance calculations under California's Building Energy Efficiency Standards.

EMISSIONS STANDARDS

State and local governments are also utilizing emissions-focused codes and regulations to advance decarbonization and air quality goals. A **Zero Emissions code** regulates appliance emissions rather than the type of fuel used, and may focus on GHG emissions generally or specifically on NOx emissions. The California Air Resources Board (CARB) recently recommended that the state adopt mandatory zero-emission residential new construction standards in the 2024 triennial CALGreen code cycle.[5] Additionally, a Zero Emissions model code, called the Air Quality Code, is being developed by TRC with Peninsula Clean Energy and Silicon Valley Clean Energy. It may be ready for jurisdictions to use in late March 2024 and may help prepare stakeholders for implementation of proposed codes focused on emissions.

APPLIANCE RULES

Additionally, CARB and the local air districts have adopted, or are in the process of developing, emissions standards that regulate appliances directly. The BAAQMD's Zero-NOx emissions standards phase out the sale of new furnaces and water heaters that emit NOx. Beginning in 2027, water heaters manufactured after that date and sold or installed in the Bay Area must be zero NOx, followed by furnaces in 2029, and large commercial water heaters in 2031. The South Coast AQMD is in the process of developing and proposing similar zero NOx emission standards for space heating, water heating, cooking, and other appliances installed for residential and commercial buildings. And CARB is exploring a state-wide Zero-Emission Appliance Standard for space and water heaters to support GHG and NOx emissions reductions.

OTHER REACH CODE OPPORTUNITIES

In addition to these approaches, other opportunities remain available. For instance, reach codes can be designed for other GHG-reducing strategies that address electric vehicle charging, embodied carbon in building materials, and water efficiency.

RESOURCES FOR ASSISTANCE

Jurisdictions seeking help in assessing available approaches may reach out to regional or statewide reach code programs.

Reach Code Technical Assistance programs and resources:

- Statewide Reach Codes Program
- Clean Power Alliance Reach Codes for Clean Power Alliance
- Bay Area Reach Codes for Peninsula Clean Energy and Silicon Valley Clean Energy
- Central Coast Reach Codes for Central Coast Community Energy
- What's Next After Berkeley? How to Avoid EPCA Preemption with Building Decarb Policies – Public Health Law Center at Mitchell Hamline School of Law (webinar)
- The Road Ahead: Building Electrification and the Berkeley Decision – Green Energy Institute at Lewis & Clark Law School (webinar)

[1] California Rest. Ass'n v. City of Berkeley, 65 F.4th 1045 (9th Cir. 2023) amended by 89 F.4th 1094 (9th Cir. 2024).

[2] California Rest. Ass'n, 89 F.4th at 1102.

[3] The Ninth Circuit's January 2, 2024, order also included an amended opinion by the original three-judge panel. California Rest. Ass'n v. City of Berkeley, 89 F.4th 1094, 1098 (9th Cir. 2024) https://cases.justia.com/federal/appellate-courts/ca9/21-16278/21-16278-2024-01-02.pdf?ts=1704214835

[4] Source energy is based on fuel used for power generation, assuming utilities meet all Renewable Portfolio Standard (RPS) goals and other obligations projected over a 15-year lifecycle. Nonresidential New Construction Reach Code Cost-Effectiveness Study, Rev. 1.3 (March 24, 2023).

[5] This is currently being considered via a Zero-Emission Residential New Construction Standard for residential buildings first in the 2025 standard, followed by a commercial proposal in the 2028 cycle.

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