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A TALE OF TWO CODES: THE INFLUENCE OF ALBUQUERQUE AND WASHINGTON ON GREEN BUILDING

JEFFREY PIKE*

Abstract: Green building has become an increasingly important piece of the American economy. Two cases from the past five years addressed this burgeoning field: *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* and *Building Industry Association of Washington v. Washington State Building Code Council*. As a result of these decisions, legislators would be wise to explicitly evidence their desires when updating or enacting local buildings codes to guard against the potential for severability in the event that the federal Energy Policy and Conservation Act preempts part of the code. So long as they do so, legislators should be able to include both performance- and prescriptive-based paths for compliance. If the state or municipality must choose a single path to compliance, however, it would be most beneficial to emphasize performance-based paths because a credit-based system provides a builder with more flexibility, which will benefit both the project and the environment.

INTRODUCTION

The stage was set: Following a hotly contested reelection campaign where each candidate spent nearly one billion dollars,¹ President Barack Obama approached the podium in the House Chamber on February 11, 2013 to deliver the first State of the Union address of his second term.² During the first four years of his tenure in office, environmentalists across the nation routinely expressed concern that the man who was elected on a platform of change was doing little to effect

* Senior Note Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2013–2014.

¹ Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited Nov. 7, 2013), available at <http://perma.cc/05c8Kyf4zSJ>.

² See *Remarks by the President in the State of the Union Address*, WHITEHOUSE.GOV (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> [hereinafter *2013 State of the Union*], available at <http://perma.cc/0ZtkFD8aAcK>.

that change regarding sustainable practices.³ Others remained hopeful that perhaps the president's second term at 1600 Pennsylvania Avenue would present an opportunity for him to alter course.⁴ About eighteen minutes into the speech, the president began to address these concerns by saying, "[a]fter years of talking about it, we are finally poised to control our own energy future."⁵

Criticisms of President Obama's first term with regard to environmental progress are perhaps undeserved.⁶ During Obama's first presidential campaign, the then-senator announced his goal of positioning the nation for an eighty percent reduction in carbon emissions by 2050.⁷ To reach this lofty figure, the Department of Energy (DOE) accelerated the process for finalizing new appliance performance standards and completed new rulemakings at a rate that outpaced the historical average.⁸ According to estimates, the Obama Administration's actions, through the DOE, might save consumers between \$250 billion and \$300 billion on their energy bills by 2030.⁹

Nevertheless, there is still much room for improvement.¹⁰ In 2010, the United States consumed 97.8 quads of energy.¹¹ Although this represents a 2.8% reduction from a 2008 baseline, the nation's energy use

³ See, e.g., Bryan Walsh, *Is Obama Bad for the Environment?*, TIME (Sept. 6, 2011), <http://www.time.com/time/health/article/0,8599,2091814,00.html>, available at <http://perma.cc/0GsbD067Jdw>; Jennifer Szweida Jordan, *Environmentalists Seeing Red over Cabinet Picks*, ALLEGHENY FRONT (Dec. 17, 2008), <http://www.allegHENYfront.org/story/environmentalists-seeing-red-over-cabinet-picks#transcript>, available at <http://perma.cc/0CUUAXsvG6i>.

⁴ See, e.g., Frank Regan, *Environmentalists Happy with Obama's Climate Change Mention in Inaugural Address*, EXAMINER.COM (Jan. 26, 2013), <http://www.examiner.com/article/environmentalists-happy-with-obama-s-climate-change-mention-inaugural-address>.

⁵ See *2013 State of the Union*, *supra* note 2.

⁶ See Beth Foulhy & Dina Cappiello, *Obama and Environmentalists Have a Complicated Relationship*, HUFFINGTON POST (Mar. 23, 2012, 11:33 AM), http://www.huffingtonpost.com/2012/03/23/obama-and-environmentalis_n_1374768.html, available at <http://perma.cc/0qWdsJQUEJU>.

⁷ U.S. DEP'T OF ENERGY, BUILDING REGULATORY PROGRAMS MULTI-YEAR PROGRAM PLAN 1, 15 (2010) [hereinafter 2010 DOE REPORT]; John M. Broder, *Obama Affirms Climate Change Goals*, N.Y. TIMES, Nov. 19, 2008, http://www.nytimes.com/2008/11/19/us/politics/19climate.html?_r=0, available at <http://perma.cc/0jQiNekNsQc>.

⁸ 2010 DOE REPORT, *supra* note 7, at 8.

⁹ *Id.* at 63–64.

¹⁰ See *infra* notes 26–35 and accompanying text.

¹¹ See U.S. DEP'T OF ENERGY, 2011 BUILDINGS ENERGY DATA BOOK 1–7 tbl.1.1.13 (2011) [hereinafter 2011 DOE REPORT]. A “quad” of energy refers to a quadrillion Btu (10¹⁵ Btu). *Id.* at xix. A British Thermal Unit (Btu) is “the amount of energy required to increase the temperature of one pound of water . . . by one degree Fahrenheit. This is roughly the heat produced from burning one match.” *How Is Energy Measured?*, UNION OF CONCERNED SCIENTISTS, http://www.ucsus.org/clean_energy/our-energy-choices/how-is-energy-measured.html, available at <http://perma.cc/0A2gKtMzC1g>.

totalled 18.7% of global consumption.¹² States and municipalities could play an integral role in reducing the nation's energy demands by implementing stricter building codes.¹³ The Obama Administration appears to have recognized this opportunity.¹⁴ In his 2013 State of the Union address, President Obama challenged the nation to reduce the energy that homes and businesses waste by fifty percent during the next twenty years.¹⁵ To reach that goal, the president suggested, "[t]he states with the best ideas to create jobs and lower energy bills by constructing more efficient buildings will receive federal support to help make it happen."¹⁶ Therefore, now might be an opportune time for states to consider revamping their building codes.¹⁷

Legislators wishing to take advantage of this opportunity must recognize, however, that municipal and state building codes are constrained by the potential for federal preemption.¹⁸ Under the framework of the Energy Policy and Conservation Act (EPCA), a local code must meet seven statutory conditions to be excepted from preemption.¹⁹

This Note discusses the concern of federal preemption in light of *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* and *Building Industry Ass'n of Washington v. Washington State Building Code Council*, the most prominent cases to address EPCA's preemption-exception provision. Part I provides an overview of green building codes and their growing importance in the United States.²⁰ Part II discusses EPCA and its impact on local building codes, specifically with regard to the use of performance- and prescriptive-based paths to code compliance.²¹ Part III examines the relevant case law involving EPCA's preemption-exception provision,²² and Part IV considers the courts' analysis of the provision and evaluates the implications of such deci-

¹² 2011 DOE REPORT, *supra* note 11, at 1–7 tbl. 1.1.13. Only China consumed more energy during that period. *Id.*

¹³ See *infra* notes 219–276 and accompanying text.

¹⁴ See 2013 State of the Union, *supra* note 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ See Energy Policy and Conservation Act, 42 U.S.C. § 6297(c) (2006); Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council ("*Washington II*"), 683 F.3d 1144, 1145 (9th Cir. 2012); Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque ("*Albuquerque I*"), No. 08–633, 2008 WL 5586316, at *1 (D.N.M. Oct. 3, 2008).

¹⁹ 42 U.S.C. § 6297(f) (3).

²⁰ See *infra* notes 26–95 and accompanying text.

²¹ See *infra* notes 96–152 and accompanying text.

²² See *infra* notes 153–218 and accompanying text.

sions.²³ This Note concludes that because of *Albuquerque* and *Washington*, legislators must carefully consider their desired outcome when drafting green building codes.²⁴ Though it would be preferable for legislators to include both performance- and prescriptive-based paths for compliance so as to provide developers with flexibility, this Note suggests that emphasizing performance-based paths might be prudent until Congress or the Supreme Court provides further guidance.²⁵

I. GREEN BUILDING: AN OVERVIEW

A. *Current State of Building in the United States*

Since the 1970s, green building has been on the rise, and for good reason.²⁶ In contrast to the building sector generally, which has been weak since the financial crash in 2008, investment in green projects has increased in recent years.²⁷ The building sector is the largest energy consumer in the United States, with residential and commercial buildings accounting for approximately 41.1% of the nation's energy consumption.²⁸ Of the energy used in the building sector, 77% is provided by fossil fuels, 16% from nuclear generation, and 9% from renewable sources.²⁹ The annual cost of such use totals in the hundreds of billions of dollars.³⁰ Specifically, the brunt of energy consumption in the commercial sector results from appliances and equipment.³¹

Although total energy consumption in the building sector has declined in recent years, albeit marginally, room for improvement exists.³²

²³ See *infra* notes 219–276 and accompanying text.

²⁴ See *infra* notes 219–276 and accompanying text.

²⁵ See *infra* notes 266–276 and accompanying text.

²⁶ See 2010 DOE REPORT, *supra* note 7, at 8; JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE U.S. HOUSING STOCK: READY FOR RENEWAL 8 (2013) [hereinafter HOUSING STOCK REPORT], available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_remodeling_report_2013.pdf and <http://perma.cc/0ahTzkgCxsS>. See generally Justin Sweet & Marc M. Schneier, “Green” or Sustainable Design: An Overview, 33 NO. 4 CONSTR. LITIG. REP. 1 (2012) (discussing the embrace of green building codes by local governments since the early 1970s).

²⁷ HOUSING STOCK REPORT, *supra* note 26, at 8.

²⁸ 2011 DOE REPORT, *supra* note 11, at 1–1 tbl. 1.1.3. By comparison, the industrial and transportation sectors account for 30.8% and 28.1% of the nation's energy consumption, respectively. *Id.*

²⁹ *Id.* at 1–5 tbl. 1.1.8.

³⁰ See 2010 DOE REPORT, *supra* note 7, at 7. The cost figure is calculated in 2006 dollars. *Id.*

³¹ *Id.* at 7–8. As of 2010, appliances and equipment accounted for 67% of commercial building energy consumption. *Id.*

³² See 2011 DOE REPORT, *supra* note 11, at 1–9 tbl. 1.2.3.

From 1980 to 2009, total energy consumption in the building sector increased forty-eight percent.³³ As a result, it is important that modern building codes attempt to reduce the large energy demand of buildings so as to mitigate the environmental impact of a necessary, but burdensome, piece of the national energy puzzle.³⁴ Green building, therefore, presents an important opportunity for the nation to progress toward a sustainable future.³⁵

B. *What Is Green Building?*

A term of art, green buildings are “high performance buildings that (1) use energy, water, and materials more efficiently and (2) use measures related to siting, design, construction, operation, maintenance, and removal to reduce the building’s impacts on human health and the environment.”³⁶ Architects design these structures in accordance with building codes implemented at the local level.³⁷ A city or state may elect to implement a “green” building code that goes beyond minimum federal requirements to emphasize sustainable practices.³⁸ Such local codes often address both commercial and residential development.³⁹ Additionally, building codes regulate both new construction and retrofits of existing buildings.⁴⁰ Estimates suggest that by 2035, sev-

³³ *Id.* at 1–1.

³⁴ See 2010 DOE REPORT, *supra* note 7, at 7. Although the Energy Information Association expects building primary energy consumption to remain stagnant until 2016 because of the recent recession, the association predicts a steady increase in energy consumption thereafter through 2035. 2011 DOE REPORT, *supra* note 11, at 1–1.

³⁵ See 2011 DOE Report, *supra* note 11, at 1-1; 2010 DOE Report, *supra* note 7, at 7.

³⁶ Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 8 (2008).

³⁷ Thomas Hutton, Note, *Toward Better and More Uniform Building Efficiency Codes*, 28 VA. ENVTL. L.J. 121, 127 (2010).

³⁸ See *Green Building Codes*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/development/green/codes> (last visited Nov. 7, 2013), available at <http://perma.cc/0vamYXCLXrw>.

³⁹ *Development*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/development> (last visited Nov. 7, 2013), available at <http://perma.cc/0bUXwsHoSAr>. “Residential buildings are classified as any site-built building that is a one- or two-family attached or detached home or a multi-family residential building that is not over three stories in height above grade.” *Id.* “Commercial buildings are classified as all buildings other than low-rise residential buildings, including multi-family high-rise residential buildings over three stories in height above grade.” *Id.*

⁴⁰ 2010 DOE REPORT, *supra* note 7, at 35.

enty-five percent of buildings in the United States will be either newly constructed or renovated.⁴¹

A building developer must work with existing codes and consider a variety of factors when assessing the overall environmental impact of a project.⁴² Many of these design choices affect the “building envelope,” a concept that describes the physical separation “between the interior of the building and the outdoor environment, including the walls, roof, and foundation.”⁴³ A vital piece to any building code, a properly designed building envelope reduces the building’s energy demand.⁴⁴ Thus, when evaluating a project’s potential energy and cost savings, developers should consider not only the appliances to be installed, but also the building materials and design more holistically.⁴⁵

C. Importance of Green Building

Green building construction provides owners and habitants opportunities for great cost-savings through energy efficiency.⁴⁶ In any given year, new construction in the United States accounts for “about 2% of the total building stock”⁴⁷ Although this figure might appear small, new construction might present the greatest opportunity in the lifecycle of a building for large-scale energy savings.⁴⁸ As a result, early investment can offer great long-term cost and efficiency yields for owners and occupants.⁴⁹ Moreover, mimicking these savings mechanisms through retrofitting is often impossible.⁵⁰ As such, focusing on new construction is important for local and state codes.⁵¹

⁴¹ *A Historic Opportunity*, ARCHITECTURE 2030, http://architecture2030.org/the-solution/buildings_solution_how (last visited Nov. 7, 2013), available at <http://perma.cc/0E5d4FkS6od>.

⁴² See Keith H. Hirokawa, *At Home with Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment*, 39 ENVTL. L. 507, 528 (2009).

⁴³ See PEW CTR. ON GLOBAL CLIMATE CHANGE, BUILDING ENVELOPE I (2011) [hereinafter BUILDING ENVELOPE], available at <http://www.c2es.org/docUploads/BuildingEnvelope.pdf> and <http://perma.cc/0zR6CjVUyLj>; see also Hutton, *supra* note 37, at 128.

⁴⁴ Hutton, *supra* note 37, at 128.

⁴⁵ See BUILDING ENVELOPE, *supra* note 43.

⁴⁶ See 2010 DOE REPORT, *supra* note 7, at 36.

⁴⁷ *Id.* at 35.

⁴⁸ Hutton, *supra* note 37, at 143.

⁴⁹ See *id.*; *About Building Energy Codes*, U.S. DEP’T OF ENERGY, <http://www.energy.codes.gov/about> (last visited Nov. 7, 2013), available at <http://perma.cc/09qBe2erTDx>.

⁵⁰ See 2010 DOE REPORT, *supra* note 7, at 35; MELISSA O’MARA & SHAN BATES, SCHNEIDER ELECTRIC, WHY INVEST IN HIGH-PERFORMANCE GREEN BUILDINGS? 10 (2012), available at <http://www2.schneider-electric.com/documents/support/white-papers/buildings/Why-Invest-in-High-Performance-Green-Buildings.pdf> and <http://perma.cc/0cBH16BHazE>

Building code policy has been described as a “low-hanging fruit” because developers can realize the cost savings provided by a green development project within a relatively short time frame with “familiar, non-onerous technology.”⁵² In California, a state that has often served as a pioneer and leader in the sustainability movement,⁵³ per capita energy use has remained constant from 1975 to 2005.⁵⁴ During the same period, the rest of the nation increased its per capita energy use by approximately fifty percent.⁵⁵ Commentators suggest that California succeeded while others floundered because of the state’s building efficiency codes, appliance efficiency standards, and utility efficiency measures.⁵⁶

Moreover, substantial proof for potential savings exists.⁵⁷ Developers might see a return on investment associated with green building within three to seven years in commercial projects and three to ten years in residential projects.⁵⁸ Builders often elect to use low-cost appliances, however, to maximize their profit.⁵⁹ Similarly, consumers, wary of higher upfront costs, might seek a quick return through other cheaper investments rather than pursue long-term gains through green products.⁶⁰ As a result, consumers may select a less expensive, less energy efficient option when purchasing appliances for a particular project.⁶¹

(“Operating costs decrease 13.6% for new construction and 8.5% for existing building projects.”).

⁵¹ See 2010 DOE REPORT, *supra* note 7, at 35; Hutton, *supra* note 37, at 143.

⁵² Hutton, *supra* note 37, at 133. Former Secretary of Energy Steven Chu expanded on this suggestion by noting that “energy efficiency isn’t just low hanging fruit; it’s fruit lying on the ground.” *Obama Administration Launches New Energy Efficiency Efforts*, U.S. DEP’T OF ENERGY (June 29, 2009, 12:00 AM), <http://www.energy.gov/articles/obama-administration-launches-new-energy-efficiency-efforts>, available at <http://perma.cc/0gbakLNPr68>.

⁵³ See Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335, 352 (2010). For example, California has elected to implement stricter standards than the Clean Air Act requires. *Id.* at 358. As of 2009, thirteen states had adopted California’s heightened standards. *Id.*

⁵⁴ ARTHUR H. ROSENFELD & PATRICK MCAULIFFE, CAL. ENERGY COMM’N, OPPORTUNITIES IN THE BUSINESS SECTOR: MANAGING CLIMATE CHANGE 4–5 (2008), available at <http://www.energy.ca.gov/2008publications/CEC-999-2008-016/CEC-999-2008-016.PDF> and <http://perma.cc/0RWdHFH5Lp7>.

⁵⁵ See *id.* at 5, fig. 3. National per capita electricity consumption increased from approximately 8500 kWh per year in 1975 to approximately 12,500 kWh per year in 2005. See *id.*

⁵⁶ Hutton, *supra* note 37, at 135.

⁵⁷ See O’MARA & BATES, *supra* note 50, at 10–11.

⁵⁸ Hutton, *supra* note 37, at 147.

⁵⁹ Klass, *supra* note 53, at 341.

⁶⁰ *Id.*

⁶¹ *Id.*

Therefore, without strict requirements imposed at the state or local level, the inherent potential of green building might go unrealized.⁶²

D. Developing Green Building Codes

Building codes have traditionally been based on model energy codes that are promulgated and enforced at the state and local level.⁶³ The International Code Council (ICC) and American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE), in conjunction with the Department of Energy (DOE), create and maintain modern model energy codes.⁶⁴ Understanding the role of each entity in the code creation process is therefore important.⁶⁵

1. American Society of Heating, Refrigerating and Air Conditioning Engineers

Founded in 1894, ASHRAE focuses on building technology and promotes “building systems, energy efficiency, indoor air quality and sustainability within the industry.”⁶⁶ The organization produces model building codes, including “ASHRAE Standard 90.1” which provides the minimum energy-efficiency design requirements for commercial and multi-family high-rise buildings.⁶⁷ Standard 90.1 is the flagship industry standard upon which the DOE relies for commercial buildings.⁶⁸

⁶² See *id.* (“These problems highlight the difficulty of allowing the market alone to dictate increases in appliance efficiency.”).

⁶³ 2010 DOE REPORT, *supra* note 7, at 11; see *Klass*, *supra* note 53, at 338.

⁶⁴ See U.S. DEP’T OF ENERGY, BUILDING ENERGY CODES 101: AN INTRODUCTION 5 (2010) [hereinafter BUILDING ENERGY CODES 101], available at <http://www.energycodes.gov/building-energy-codes-101-introduction> and <http://perma.cc/05pbagTboDu>; *Development*, *supra* note 39.

⁶⁵ See BUILDING ENERGY CODES 101, *supra* note 64, at 5; *Development*, *supra* note 39.

⁶⁶ About ASHRAE, ASHRAE, <https://www.ashrae.org/about-ashrae> (last visited Nov. 7, 2013), available at <http://perma.cc/0K7skL5WS3d>. In 2012, the organization began to do business exclusively by the acronym ASHRAE, versus using the organization’s full legal name. ASHRAE, 2011–12 ASHRAE ANNUAL REPORT 5 (2012).

⁶⁷ 2010 DOE REPORT, *supra* note 7, at 53; *Standards & Guidelines*, ASHRAE, <https://www.ashrae.org/standards-research—technology/standards—guidelines> (last visited Nov. 7, 2013), available at <http://perma.cc/08J1DSA1vQH>.

⁶⁸ See 2011–12 ASHRAE ANNUAL REPORT, *supra* note 66, at 5. ASHRAE also develops other standards, including Standard 189.1, which is a heightened standard for the design of high performance green buildings. *Standard 189.1: The Green Standard*, ASHRAE, www.ashrae.org/greenstandard (last visited Nov. 7, 2013), available at <http://perma.cc/0YFrLm3uHDb>. Compliance with Standard 189.1 is an option if a local jurisdiction has adopted the International Green Construction Code (IgCC). *Id.* As of October 2013, Florida, Maryland, North Carolina, Oregon, and Rhode Island had adopted the IgCC statewide. *International Codes: Adoption by State (October 2013)*, INT’L CODE COUNCIL, <http://www.iccs.org>.

Although created with lofty intentions, ASHRAE's commercial codes experienced a ten-year dead period between the publishing of Standard 90.1-1989 and Standard 90.1-1999.⁶⁹ In 2001, the organization committed to more frequent review and has since released updated standards on a three-year cycle,⁷⁰ with the current being Standard 90.1-2013.⁷¹ Thirty-four states are compliant with Standard 90.1-2007 or its equivalent.⁷² Furthermore, eight states are compliant with Standard 90.1-2010 or its equivalent.⁷³ In October 2013, ASHRAE released Standard 90.1-2013, which aims to create a 40-50% energy efficiency improvement compared to a Standard 90.1-2004 baseline.⁷⁴

2. International Code Council

Since its inception in 1994, the ICC works to form a single set of comprehensive construction codes, one of which is the International Energy Conservation Code (IECC).⁷⁵ The IECC is the basis for the DOE's model energy code for residential low-rise buildings.⁷⁶ Before adopting the IECC, states or local municipalities can change the provisions to reflect local building needs or meet efficiency goals.⁷⁷ Beginning in 2000, the ICC elected to submit the IECC to complete revision every three years, which mirrors the ASHRAE schedule.⁷⁸ The state or municipality that adopts the IECC is responsible for its enforcement.⁷⁹

www.iccsafe.org/gr/Documents/stateadoptions.pdf (last visited Nov. 8, 2013), available at <http://perma.cc/0UIGPuAaGG1>. Local governments in Arizona, New Hampshire, and Washington have adopted the IgCC, though the Code has not yet been accepted statewide. *Id.*

⁶⁹ 2010 DOE REPORT, *supra* note 7, at 26.

⁷⁰ *Id.*

⁷¹ See *Standards & Guidelines*, *supra* note 67.

⁷² *Status of State Energy Code Adoption*, U.S. DEP'T OF ENERGY, www.energycodes.gov/status-state-energy-code-adoption (last visited Sept. 26, 2013), available at <http://perma.cc/0UhgobcyRKP>.

⁷³ See *id.* The eight states are: Washington, Oregon, California, Illinois, Mississippi, Maryland, Rhode Island, and Massachusetts. *Id.*

⁷⁴ *Standards & Guidelines*, *supra* note 67; see *ASHRAE/IES Publish 2013 Energy Standard: Changes for Envelope, Lighting, Mechanical Sections*, ASHRAE (Oct. 9, 2013), <https://www.ashrae.org/news/2013/ashrae-ies-publish-2013-energy-standard-changes-for-envelope-lighting-mechanical-sections>, available at <http://perma.cc/0NAU5uqWkoR>.

⁷⁵ *About ICC*, INT'L CODE COUNCIL, <http://www.iccsafe.org/AboutICC/Pages/default.aspx> (last visited Nov. 7, 2013), available at <http://perma.cc/0FE6LJaS77Y>.

⁷⁶ 2010 DOE REPORT, *supra* note 7, at 53.

⁷⁷ BUILDING ENERGY CODES 101, *supra* note 64, at 5.

⁷⁸ 2010 DOE REPORT, *supra* note 7, at 26.

⁷⁹ BUILDING ENERGY CODES 101, *supra* note 64, at 17.

3. Department of Energy

Contemporaneous to the green building movement, the DOE Organization Act of 1977 activated the DOE in part as a governmental answer to the energy crises of the 1970s.⁸⁰ Since the inception of the Energy Policy and Conservation Act in 1975, the DOE has been responsible for reviewing applicable energy conservation standards and test procedures.⁸¹ In 1979, the DOE published proposed building energy performance standards (BEPS) applicable to new building designs.⁸² The BEPS set maximum levels of building energy consumption based on a “whole building” approach as opposed to a component-by-component evaluation.⁸³ New or amended standards must be designed to “achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified.”⁸⁴

Created in 1993, the Building Energy Codes Program (BECP) is tasked with the goal of increasing energy efficiency through regulation and the promotion of voluntary compliance.⁸⁵ The BECP exists as a generic term that covers ASHRAE 90.1 and IECC, among other building energy laws and guidelines adopted in the United States.⁸⁶ The DOE promotes energy efficiency through the BECP by advocating efficient building development practices; aiding state and local municipalities in adopting and implementing energy codes; supporting compliance with the various energy codes; and providing a plethora of resources for all interested stakeholders.⁸⁷ These resources include

⁸⁰ See *A Brief History of the Department of Energy*, U.S. DEP’T OF ENERGY, <http://energy.gov/management/history/brief-history-department-energy> (last visited Nov. 7, 2013), available at <http://perma.cc/0PTMZstup8p>. The Act consolidated the responsibilities and functions of the Federal Energy Administration, the Federal Energy Research and Development Administration, and the Federal Power Commission. 42 U.S.C. § 7151 (1982); see Richard L. Hughes, *Roadblocks to Judicial Review of Department of Energy and Federal Energy Regulatory Commission Administrative Actions*, 22 TULSA L.J. 601, 603 (1987).

⁸¹ 2010 DOE REPORT, *supra* note 7, at 18.

⁸² *Id.* at 24.

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 37.

⁸⁵ See *id.* at 16, 25.

⁸⁶ BUILDING ENERGY CODES 101, *supra* note 64, at ii. In 2010, the BECP, Appliance and Equipment Efficiency Standards Program, and ENERGY STAR Program were moved under the umbrella of a newly created entity, the Building Regulatory Programs. 2010 DOE REPORT, *supra* note 7, at 14.

⁸⁷ *About Building Energy Codes*, *supra* note 49. The DOE has issued the lofty goal of net-zero energy buildings as cost-effective alternatives by 2025. 2010 DOE Report, *supra* note 7, at 27. Similarly, the DOE hopes that the BECP will “produce 1.4 quads primary energy annually in 2030” and “3.3 quads annually in 2050.” *Achieving Results*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/about/results>, available at <http://perma.cc/021U1TbkWSx>.

“compliance tools, training materials, and technical assistance options,”⁸⁸ such as the free *REScheck* software for low-rise residential building energy code compliance and *COMcheck* for commercial buildings.⁸⁹ According to estimates, the BECP saves a cumulative \$2.5 billion per year in the United States; consumers alone have saved more than \$14 billion since the program’s inception.⁹⁰

Through the BECP, the DOE primarily influences green building by working with the ICC and ASHRAE to develop and promote residential and commercial building codes.⁹¹ The DOE works to “strengthen[] the code where cost-effective, and improv[e] the criteria to be more easily understood, applied, implemented and enforced.”⁹² Since 1997, the DOE has required states to adopt new commercial building codes comparable to ASHRAE 90.1–1989.⁹³ The 2005 Energy Policy Act permitted the DOE to incentivize green development by distributing twenty-five million dollars annually for the years 2006–2010, and “such sums as are necessary for fiscal year 2011 and each fiscal year thereafter.”⁹⁴ States or municipalities that have achieved a ninety percent compliance rate with either ASHRAE Standard 90.1–2004 for commercial buildings, or IECC 2004 for residential buildings, are eligible for assistance.⁹⁵

⁸⁸ *About Building Energy Codes*, *supra* note 49.

⁸⁹ 2010 DOE REPORT, *supra* note 7, at 26. Builders, designers, and contractors use *REScheck* software to check compliance with the requirements of the IECC and local state codes. *REScheck*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/rescheck> (last visited Nov. 7, 2013), available at <http://perma.cc/0MeL4ZpTytR>. Similarly, *COMcheck* provides architects, builders, designers, and contractors with a simple method to check compliance with the IECC, ASHRAE 90.1, and local codes. *COMcheck*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/comcheck> (last visited Nov. 7, 2013), available at <http://perma.cc/0hjHzsBDwdsd>. Both products are available for free download. *Software and Web Tools*, U.S. DEP’T OF ENERGY, <http://www.energycodes.gov/compliance/tools> (last visited Nov. 7, 2013), available at <http://perma.cc/0QYVb7itrGE>.

⁹⁰ 2010 DOE REPORT, *supra* note 7, at 36.

⁹¹ *See id.* at 52. For example, the DOE worked with ASHRAE to develop Standard 90.1–2010 as a 30% improvement over a Standard 90.1–2004 baseline. *Id.* at 26.

⁹² *Development*, *supra* note 39.

⁹³ 10 C.F.R. § 420.15(d)(3) (2006).

⁹⁴ 42 U.S.C. § 6833(e)(4)(A) (2006).

⁹⁵ *Id.* at § 6833(e)(2).

II. EPCA AND PREEMPTION

A. *The EPCA Framework*

In 1974, California enacted the first energy efficiency standards for appliances and equipment in the United States.⁹⁶ The federal government followed suit in 1975 with the passage of the Energy Policy and Conservation Act (EPCA).⁹⁷ Congress enacted EPCA to combat the devastating results of the oil embargo imposed on the United States by the Organization of Petroleum Exporting Countries (OPEC) in the early 1970s.⁹⁸ The Act, in an effort to promote energy conservation, outlines test procedures, conservation objectives, and labeling requirements for various household appliances.⁹⁹ At EPCA's inception, the Act "authorized, but did not require, DOE to establish mandatory efficiency standards"¹⁰⁰

Congress has updated and amended EPCA several times throughout the Act's existence.¹⁰¹ As a result of these amendments, federal energy efficiency standards for appliances are regulated under the purview of EPCA.¹⁰² In 1978, the National Energy Conservation Policy Act (NECPA) directed the Department of Energy (DOE) to set mandatory efficiency standards for thirteen household appliances and products, including refrigerators, air conditioners, heat pumps, ranges, and ovens.¹⁰³ In 1987, the National Appliance Energy Conservation Act (NAECA) again amended EPCA and established that federal law expressly preempted existing state requirements.¹⁰⁴ The Energy Policy Act of 1992 extended the purview of the statute to cover certain industrial

⁹⁶ *History and Impacts*, U.S. DEP'T OF ENERGY, http://www1.eere.energy.gov/buildings/appliance_standards/history_and_impact.html (last visited Nov. 7, 2013), available at <http://perma.cc/0YgxwZJJWZa>; see Klass, *supra* note 53, at 346.

⁹⁷ Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 (codified in 42 U.S.C. §§ 6291-6309).

⁹⁸ H.R. REP. 94-340, at 1-2 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, 1763 ("This legislation would equip the President with a full range of management tools to enable him to assure that the vital needs of this nation will be met in the event of another oil embargo or other major interruption in supplies."); see Klass, *supra* note 53, at 347.

⁹⁹ 2010 DOE REPORT, *supra* note 7, at 18.

¹⁰⁰ S. REP. NO. 100-6, at 3 (1987), reprinted in 1987 U.S.C.C.A.N. 52, 54.

¹⁰¹ 2010 DOE REPORT, *supra* note 7, at 18.

¹⁰² See *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation and Dev. Comm'n*, 410 F.3d 492, 499 (9th Cir. 2005).

¹⁰³ National Energy Conservation Policy Act, Pub. L. No. 95-619, § 422, 92 Stat. 3206 (1978) (codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁴ National Appliance Energy Conservation Act, Pub. L. No. 100-12, § 7, 101 Stat. 103 (1987) (codified as amended in scattered sections of 42 U.S.C.).

equipment, such as commercial heating and air conditioning equipment, water heaters, distribution transformers, and electric motors.¹⁰⁵ Moreover, in response to the 1992 update, the DOE established the Building Energy Codes Program (BECP), which requires the DOE to participate in the development of model national codes and to assist in state adoption and implementation.¹⁰⁶

The Energy Policy Act of 2005 expanded coverage of EPCA to a variety of residential and commercial products by imposing new prescriptive standards¹⁰⁷ along with the Energy Independence and Security Act of 2007.¹⁰⁸ Most recently, in December of 2012, the American Energy Manufacturing Technical Corrections Act made technical modifications to EPCA, most notably with regard to prescriptive standards.¹⁰⁹ As of 2010, EPCA-regulated products were responsible for 82% of energy consumption in residential buildings, and 67% in commercial buildings.¹¹⁰

B. Preemption Considerations

Developers may on their own volition hold themselves to heightened standards that go beyond the federal or state minimum.¹¹¹ Similarly, a state or municipality may want to go beyond the national standards to require more ambitious green building codes.¹¹² Such local desires implicate significant concern for federal preemption.¹¹³

¹⁰⁵ See, e.g., Energy Policy Act of 1992, Pub. L. 102–486, § 124, 106 Stat. 2776 (1992) (codified as amended in scattered sections of 42 U.S.C.); see also 2010 DOE REPORT, *supra* note 7, at 18. Specifically, the Act established a labeling program for commercial products. 2010 DOE REPORT, *supra* note 7, at 18.

¹⁰⁶ *Id.* at 25.

¹⁰⁷ See e.g., Energy Policy Act of 2005, Pub. L. 109–58, § 135, 119 Stat. 594 (2005) (codified as amended in scattered sections of 42 U.S.C.); 2010 DOE REPORT, *supra* note 7, at 19.

¹⁰⁸ See 2010 DOE REPORT, *supra* note 7, at 19; see, e.g., Energy Independence and Security Act of 2007, Pub. L. 110–140, 121, § 303, Stat. 1492 (2007) (codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁹ American Energy Manufacturing Technical Corrections Act, Pub. L. 112–210 (2012) (to be codified in scattered sections of 42 U.S.C.).

¹¹⁰ 2010 DOE REPORT, *supra* note 7, at 30.

¹¹¹ Hutton, *supra* note 37, at 129.

¹¹² *Id.* California, for example, has in many ways been forced to be environmentally progressive to compensate for the challenges imposed by its climate and geography. See Kameron M. Lawson, Note, *Washing Machines, Water Efficiency, and Federal Preemption: California's Quest to Regulate Water Consumption Under the EPCA*, 17 MO. ENVTL. L. & POL'Y REV. 536, 536 (2010).

¹¹³ Klass, *supra* note 53, at 346.

For several years, federal preemption has restricted heightened efficiency standards.¹¹⁴ Federal preemption generally exists in one of three forms: express, implied (field), or conflict.¹¹⁵ A state action is expressly preempted if Congress has made it explicitly clear that the federal regulation was intended to override any contrary state law.¹¹⁶ Alternatively, a state action can face implied preemption, even where there is no direct conflict between the federal and state law, if Congress has left no room for state action and has thereby “occupied the field” in that area of law.¹¹⁷ Finally, if a state action makes it impossible for a party to comply with both the state and federal law, the law is susceptible to conflict preemption.¹¹⁸ Though most federal environmental laws serve as a floor for environmental regulations, thereby providing states with flexibility to go beyond the federal standard,¹¹⁹ questions concerning the various forms of preemption abound throughout the field of green building.¹²⁰

EPCA expressly preempts contrary state law.¹²¹ The statute, as amended by the NAECA in 1987, provides that “[n]o State regulation, or revision thereof, concerning the energy efficiency or energy use of [a product covered by a federal efficiency standard] shall be effective with respect to such covered product”¹²² Nevertheless, the provision provides room for states and municipalities to avoid preemption.¹²³

¹¹⁴ *Id.* The concept of preemption derives from the Supremacy Clause of the U.S. Constitution, which states that the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” See U.S. CONST. art. VI.

¹¹⁵ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000); see Shari Shapiro, *Who Should Regulate? Federalism and Conflict in Regulation of Green Buildings*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 257, 266 (2009) (“Two types of preemption, express preemption and implied preemption, affect green building.”).

¹¹⁶ Nelson, *supra* note 115, at 226.

¹¹⁷ *Id.* at 227.

¹¹⁸ *Id.* at 228.

¹¹⁹ See 4 PATRICIA E. SALKIN, AM. L. ZONING § 36:3 (5th ed. 2012) (discussing the benefits of a cooperative federalism scheme); see also Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C.L. REV. 1283, 1287 (2013) (arguing that “absent clear evidence of a congressional purpose to adopt unitary standards or an obvious conflict or obstacle to a clearly defined regulatory program, courts and agencies should generally favor what is known as floor preemption over ceiling preemption in the context of energy statutes.”).

¹²⁰ See Klass, *supra* note 53, at 346; Shapiro, *supra* note 115, at 266.

¹²¹ 42 U.S.C. § 6297(c) (2006).

¹²² *Id.*

¹²³ See *Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council* (“*Washington II*”), 683 F.3d 1144, 1147 (9th Cir. 2012).

C. Exemptions and Exceptions from EPCA

As a basic matter, express preemption bars states from mandating appliance and equipment standards concerning energy efficiency that go beyond the federal standard.¹²⁴ States may, however, petition the DOE for a waiver to exempt the state as a whole from federal preemption.¹²⁵ Although this process is possible in theory, no state has received an exemption from preemption.¹²⁶

States and local governments may be excepted on a case-by-case basis from preemption, however, by developing codes that include multiple paths to compliance.¹²⁷ To be excepted from preemption, a state or local code concerning new construction must meet seven statutory conditions listed in § 6297(f) of EPCA.¹²⁸ First, the code must “permit[] a builder to meet an energy consumption or conservation objective . . . by selecting items whose combined energy efficiencies meet the objective.”¹²⁹ Second, absent a waiver, a code cannot require a builder to use products that have an energy efficiency in excess of the federal standards, which are defined in § 6295 for products covered under the statute.¹³⁰ Third, any credit system that includes products in excess of the federal standards prescribed by § 6295 must be given in a “one-for-one equivalent energy use or equivalent cost basis.”¹³¹ Fourth, if the code uses a baseline building design to evaluate proposed projects, that base-

¹²⁴ 42 U.S.C. § 6297(c).

¹²⁵ *Id.* § 6297(d).

¹²⁶ *Klass, supra* note 53, at 348. Under EPCA, the DOE must make three findings to grant a preemption waiver to a state. 42 U.S.C. § 6297(d). First, the state must have “unusual and compelling . . . interests” as compared to those of the United States generally. *Id.* § 6297(d)(1)(B). The DOE will consider “the cost, benefits, burdens, and reliability of energy or water savings” when deciding whether such regulation is appropriate. 2010 DOE REPORT, *supra* note 7, at 47. Second, the state action must not significantly burden manufacturers. 42 U.S.C. § 6297(d)(3). Such an interpretation might invoke a Commerce Clause analysis. *See Hutton, supra* note 37, at 165–66. Finally, the DOE must ensure that the state standard will not be so restrictive as to completely remove products covered by the statute from the marketplace. 42 U.S.C. § 6297(d)(4). California, the only state to have applied for a waiver, was denied its request pertaining to residential clothes washers. California Energy Commission Petition for Exemption from Federal Preemption of California’s Water Conservation Standards for Residential Clothes Washers, 71 Fed. Reg. 78,157, 78,157 (Dec. 28, 2006). The DOE found that the state failed to prove through sufficient data that it had an unusual or compelling water interest. *Id.* As of 2010, no state had been granted a waiver. *Klass, supra* note 53, at 348.

¹²⁷ *Klass, supra* note 53, at 348 n.82.

¹²⁸ 42 U.S.C. § 6297(f).

¹²⁹ *Id.* § 6297(f)(3)(A).

¹³⁰ *Id.* § 6297(f)(3)(B); *see id.* § 6295. Section 6295 covers, for example, room air conditioners, furnaces, dishwashers, and clothes washers. *Id.* at § 6295(c), (f), (g).

¹³¹ *Id.* § 6297(f)(3)(C); *see id.* § 6295.

line design must meet but not exceed the federal efficiency standard.¹³² Fifth, if the code provides one or more optional combinations of items that includes a product that exceeds the federal standard, the code must also include at least one combination using that same product that does not exceed the federal standard by more than five percent.¹³³ Additionally, one combination that includes that product must meet but not exceed the federal standard.¹³⁴ Sixth, the code must state energy consumption or conservation “in terms of an estimated total consumption of energy.”¹³⁵ Finally, any testing provisions must conform to those outlined in § 6293 of EPCA.¹³⁶

D. Performance Standards, Prescriptive Standards, and the Concern for Severability

Most modern regulatory systems utilize a variety of standards in an effort to achieve the most effective response to a particular problem.¹³⁷ Regulatory schemes often employ two standards—performance and prescriptive standards.¹³⁸ Because both performance- and prescriptive-based standards are integral to most green development codes, differentiating the two is important.¹³⁹

Traditionally, building codes often used prescriptive-based standards.¹⁴⁰ A prescriptive-based standard specifically defines the products that a developer must use through “specific actions, measurements, or other quantifiable means.”¹⁴¹ For example, a prescriptive code might dictate the type of insulation materials or the doorway dimensions that a builder must use.¹⁴² Under EPCA, a local code cannot require a builder to use a product that is more efficient than the applicable energy conservation standard for that product type as outlined in § 6295.¹⁴³

¹³² *Id.* § 6297(f)(3)(D).

¹³³ 42 U.S.C. § 6297(f)(3)(E).

¹³⁴ *Id.* § 6297(f)(3)(E).

¹³⁵ *Id.* § 6297(f)(3)(F).

¹³⁶ *Id.* § 6297(f)(3)(G).

¹³⁷ See Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 713–14 (2003).

¹³⁸ Hirokawa, *supra* note 42, at 520; see Coglianese et al., *supra* note 137, at 714.

¹³⁹ See Hirokawa, *supra* note 42, at 520.

¹⁴⁰ *Id.*

¹⁴¹ 2 LESLIE M. LARSEN ET AL., CALIFORNIA JURISPRUDENCE § 235 (3d ed. 2013).

¹⁴² Hirokawa, *supra* note 42, at 520. Section 6295 of EPCA provides federal conservation energy standards for covered products, including, for example, air conditioners, furnaces, and incandescent lamps. 42 U.S.C. § 6295(c), (f), (i).

¹⁴³ 42 U.S.C. § 6297(f)(3)(B).

Conversely, a performance-based standard “specifies the outcome required, but leaves the specific measures to achieve that outcome up to the discretion of the regulated entity.”¹⁴⁴ A performance-based path may, for example, provide a credit system where developers select products from a menu of options.¹⁴⁵ A developer is free to select a lower efficiency option that is afforded a minimal credit, but must in turn offset that low-value option by employing a higher efficiency option with a greater credit value elsewhere in the project.¹⁴⁶ Under EPCA, any performance-based credit system must provide credits on a “one-for-one” basis.¹⁴⁷

To provide flexibility, legislators may elect to include both prescriptive- and performance-based paths when drafting local codes.¹⁴⁸ Doing so, however, might invoke questions of severability if a court were to decide that federal law preempts one of the two paths.¹⁴⁹ To determine whether a statute is severable, a court will consider: (1) whether the legislature would have enacted the remaining sections of the statute without the invalid piece(s); and (2) whether the remaining sections can function without the invalid piece(s).¹⁵⁰ Therefore, a court must attempt to predict what the legislature would have done if the legislature had possessed the foresight to know that a piece of the law would be invalidated.¹⁵¹ Nevertheless, courts generally invalidate no more of a statute than is necessary.¹⁵²

¹⁴⁴ Coglianese et al., *supra* note 137, at 709.

¹⁴⁵ See Hirokawa, *supra* note 42, at 528 (“[G]reen standards are based on a complex point system under which credit is awarded for innovation in design, use of recycled construction materials, energy efficiency, indoor air quality (materials used), location, water use, and emissions.”).

¹⁴⁶ See *id.*

¹⁴⁷ 42 U.S.C. § 6297(f)(3)(B). The idea of a “one-for-one” credit is that if Product A and Product B both receive one credit, they both in fact reduce the energy demand of the building by an equivalent amount. See *infra* notes 240–245 and accompanying text.

¹⁴⁸ See Coglianese et al., *supra* note 137, at 713; see also Hirokawa, *supra* note 42, at 528 (explaining the importance of flexibility to green building programs).

¹⁴⁹ Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque (“*Albuquerque I*”), No. 08–633, 2008 WL 5586316, at *12 (D.N.M. Oct. 3, 2008).

¹⁵⁰ *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932) (“Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”); John C. Nagle, *Severability*, 72 N.C. L. Rev. 203, 215 (1993) (“[A] statute’s severability depends upon two factors: (1) legislative intent, and (2) the ability of the statute to function without the offending provision.”).

¹⁵¹ Nagle, *supra* note 150, at 215.

¹⁵² *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984); see *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

III. FROM ALBUQUERQUE TO WASHINGTON

Even amidst the increasing importance and relevance of green buildings in the United States, there exists a relative paucity of common law doctrine to guide legislators and developers.¹⁵³ As one commentator has noted, green building design and construction stands in contrast to what one might expect: whereas the law is often sparse and the litigation plentiful, there have been relatively few cases challenging green building codes.¹⁵⁴ Two cases from the past five years, however, have brought the previously unused Energy Policy and Conservation Act (EPCA) preemption-exception provision to the forefront of green building.¹⁵⁵

In 2007, the City of Albuquerque adopted a local building code that provided both performance and prescriptive paths to compliance.¹⁵⁶ In response, the Air Conditioning, Heating and Refrigerating Institute (AHRI) sued in federal district court and challenged all seven requirements of EPCA's preemption-exception provision.¹⁵⁷ Two years later, the Washington state legislature promulgated a progressive statewide building code that, like in Albuquerque, provided both performance- and prescriptive-based paths to compliance.¹⁵⁸ Several industry plaintiffs challenged the code, and following a federal district court grant of summary judgment in favor of the Washington State Building Code Council, the U.S. Court of Appeals for the Ninth Circuit considered two of the seven EPCA preemption-exception requirements, subsections (B) and (C).¹⁵⁹ As a result, in *Building Industry Ass'n of Washington v. Washington State Building Code Council* the Ninth Circuit was left to decide on similar facts to those in *Air Conditioning, Heating and Refrigerating Institute v. City of Albuquerque* whether the local code was preempted by the federal EPCA.¹⁶⁰

¹⁵³ Sweet & Schneier, *supra* note 26, at 1.

¹⁵⁴ *Id.*

¹⁵⁵ See *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council* ("Washington II"), 683 F.3d 1144 (9th Cir. 2012); *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque* ("Albuquerque I"), No. 08-633, 2008 WL 5586316 (D.N.M. Oct. 3, 2008).

¹⁵⁶ ALBUQUERQUE, N.M., ALBUQUERQUE ENERGY CONSERVATION CODE (2007), *invalidated in part by* Memorandum Opinion and Order at 7, *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, No. 08-633 (D.N.M. Jan. 25, 2012); see *Albuquerque I*, 2008 WL 5586316, at *2.

¹⁵⁷ *Albuquerque I*, 2008 WL 5586316, at *1, 9-11.

¹⁵⁸ *Washington II*, 683 F.3d at 1149.

¹⁵⁹ *Id.* at 1150-51.

¹⁶⁰ See *id.* at 1152.

A. *Strict Review: Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*

In 2007, the mayor of Albuquerque, New Mexico formed a Green Ribbon Task Force with the goal of reducing local greenhouse gas emissions through changes to the city's building regulations.¹⁶¹ Soon thereafter, the city adopted the task force's recommendations through the Albuquerque Energy Conservation Code ("Albuquerque Code").¹⁶²

The code was separated into two volumes.¹⁶³ Volume I applied to the construction of, additions to, and alterations of commercial and multi-family residential buildings, as well as the replacement of heating, ventilation, and air conditioning (HVAC) equipment in existing buildings.¹⁶⁴ The volume largely adopted American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Standard 90.1–2004.¹⁶⁵ There were three ways for builders to comply with Volume I of the Albuquerque Code.¹⁶⁶ A builder could follow one of two performance-based paths: receive certification from the Leadership in Energy and Environmental Design (LEED) at the "silver" level or reach thirty percent efficiency improvement as compared to a baseline building set forth in ASHRAE Standard 90.1–2004.¹⁶⁷ The baseline design in ASHRAE Standard 90.1–2004 utilizes HVAC and water heating designs that do not exceed federal standards.¹⁶⁸ Alternatively, a builder could follow the prescriptive-based path by meeting specific levels of compliance designated for individual components of a building.¹⁶⁹ This prescriptive option was only available for small retail and office buildings and "[m]any, if not all, of these prescriptive standards exceed[ed] the federal standards."¹⁷⁰

Volume II of the Albuquerque Code applied to "new construction, additions, alterations and renovations" of "one and two family detached

¹⁶¹ *Albuquerque I*, 2008 WL 5586316, at *2.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Albuquerque I*, 2008 WL 5586316, at *2. The LEED system "evaluates buildings in six areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process." *Id.* Based on a project's adherence to program goals, projects are awarded points that provide for one of four progressive levels of certification: certified, silver, gold, and platinum. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at *3.

¹⁷⁰ *Id.*

dwellings and townhouses.”¹⁷¹ The volume adopted the 2006 International Energy Conservation Code (IECC) standards for residential buildings.¹⁷² Like Volume I, Volume II provided both performance- and prescriptive-based options for compliance.¹⁷³ A builder could meet the performance-based path in one of four ways, by achieving: (1) LEED silver compliance; (2) a thirty percent efficiency improvement compared to ASHRAE Standard 90.1–2004; (3) compliance with standards set forth by a local non-profit building organization; or (4) compliance with a baseline modeled after § 404 of the 2006 International Energy Conservation Code (“IECC”).¹⁷⁴ Volume II also provided a prescriptive option where a builder had to meet specific energy efficiency standards for HVAC and water heating products.¹⁷⁵

In response to the code’s release, AHRI challenged the Albuquerque Code in the U.S. District Court for the District of New Mexico in *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*.¹⁷⁶ As an initial matter, AHRI alleged that the Albuquerque Code imposed minimum energy efficiency standards that were preempted by EPCA.¹⁷⁷ The trade association cited a potential for irreparable harm and sought a preliminary injunction to prevent the City of Albuquerque from enforcing the regulations pending the outcome of the case.¹⁷⁸

In holding that EPCA preempted the city code, the district court found in 2008 that the Albuquerque Code was a regulation concerning the energy efficiency, energy use, or water use of covered products and thus fell within the domain of the federal statute.¹⁷⁹ The court found Volume I to be automatically preempted because it was drafted based on standards that were not effective until 2010 and thus could not be imposed without a waiver.¹⁸⁰

Regarding Volume II, the court limited its review to new construction because EPCA’s preemption-exception provision only applied to new construction.¹⁸¹ The court held that within Volume II, every per-

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Albuquerque I*, 2008 WL 5586316, at *3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *1.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *1, 4.

¹⁷⁹ *Albuquerque I*, 2008 WL 5586316, at *8.

¹⁸⁰ *Id.* The prescriptive standards were based on the then most recent ASHRAE standards, which were to become federal standards on January 1, 2010. *Id.* at *3 n.1.

¹⁸¹ *Id.* at *9; see 42 U.S.C. § 6297(f)(3) (2006).

formance-based path failed at least one of the seven preemption-exception requirements.¹⁸² The court found that Volume II explicitly listed prescriptive standards for individual components of the building where “[m]any, if not all, of these prescriptive standards exceed[ed] the federal standards.”¹⁸³ With regard to performance-based standards, the court noted that Volume II effectively required use of higher efficiency products than federal standards permitted by imposing a penalty through the code itself.¹⁸⁴ The court explained by way of example that a homeowner who elected to replace an existing furnace with a federally-compliant furnace would be forced to make additional changes to the home as offsets to meet the more restrictive Albuquerque requirements.¹⁸⁵ As a result, the court found that the Albuquerque Code was not excepted from preemption under EPCA and therefore preliminarily enjoined the City of Albuquerque from enforcing both Volumes I and II of the Albuquerque Code.¹⁸⁶

In 2010, pursuant to a renewed motion and memorandum in support of partial summary judgment submitted by the AHRI, the district court granted in part and denied in part the plaintiff’s motion for summary judgment on Volumes I and II of the Albuquerque Code.¹⁸⁷ The court found the prescriptive paths of both Volumes I and II to exceed the federal standards and thus to be preempted.¹⁸⁸ The court denied the piece of the AHRI motion for summary judgment with regard to the performance paths, however, because the AHRI had failed to provide prima facie evidence that the performance paths of Volumes I or II did not present a genuine issue of material fact.¹⁸⁹ Therefore, both Volumes I and II were found to be partially invalid.¹⁹⁰ In lieu of ruling on the severability of the paths, the court denied the motions for summary judgment without prejudice.¹⁹¹

In 2011, the parties introduced a stipulation agreement that indicated that the Albuquerque legislature would not have enacted the Al-

¹⁸² *Id.* at *11.

¹⁸³ *Id.* at *3.

¹⁸⁴ *Id.* at *9.

¹⁸⁵ *Albuquerque I*, 2008 WL 5586316, at *8.

¹⁸⁶ *Id.* at *11–12.

¹⁸⁷ *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque (“Albuquerque II”)*, 835 F. Supp. 2d 1133, 1134 (D.N.M. 2010).

¹⁸⁸ *Id.* at 1137, 1140.

¹⁸⁹ *Id.* at 1138, 1140. Summary judgment is only appropriate if the court is satisfied that there is no issue as to any material fact. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986).

¹⁹⁰ *Albuquerque II*, 835 F. Supp. 2d at 1140.

¹⁹¹ *Id.*

buquerque Code without the prescriptive path.¹⁹² As a result, the district court held that the performance- and prescriptive-based paths were not severable, and therefore EPCA preempted all provisions of the Albuquerque Code relating to HVAC and water heating equipment.¹⁹³

B. *Broad Deference: Building Industry Ass'n of Washington v. Washington State Building Code Council*

In 2009, the Washington legislature, following recommendations from the Washington State Building Council, promulgated a statewide building code (“Washington Code”) with the goal of reaching zero fossil-fuel greenhouse gas emissions in homes and buildings by 2031.¹⁹⁴ Under the Washington Code, new buildings must achieve a fifteen percent energy efficiency gain as compared to a 2006 baseline.¹⁹⁵

The Washington Code provides developers with one of three “pathways” for energy reduction, codified in Chapters Four, Five, and Six of the Code.¹⁹⁶ Each of these three pathways reduces energy usage in buildings by approximately seven percent from the 2006 baseline.¹⁹⁷ A builder must then follow options provided in Chapter Nine to meet the required fifteen percent energy reduction.¹⁹⁸

A builder who elects to follow Chapter Four, a performance-based pathway, may also satisfy the requirements of Chapter Nine by “demonstrating that the proposed building energy use is eight percent less than the target building energy use.”¹⁹⁹ A builder who selects and complies with either Chapters Five or Six, however, will not fully achieve a fifteen

¹⁹² Stipulation Regarding Non-Severability of Prescriptive Paths at 1, Heating and Refrigeration Inst. v. City of Albuquerque, No. 08–633 (D.N.M. Mar. 9, 2011), 2008 WL 5586316.

¹⁹³ Memorandum Opinion and Order at 7, Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque, No. 08–633 (D.N.M. Jan. 25, 2012), 2008 WL 5586316. On September 20, 2012, following the court’s grant of summary judgment with regard to severability, the district court dismissed the action. Judgment at 1, Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque, No. 08–633 (D.N.M. Sept. 20, 2012).

¹⁹⁴ *Washington II*, 683 F.3d at 1148; see WASH. ADMIN. CODE §§ 51-11-0100 to -99904 (2009).

¹⁹⁵ *Washington II*, 683 F.3d at 1149.

¹⁹⁶ WASH. ADMIN. CODE §§ 51-11-0400, 51-11-0500, 51-11-0600; see *Washington II*, 683 F.3d at 1149.

¹⁹⁷ Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council (“*Washington F*”), No. 3:10-cv-05373, 2011 WL 485895, at *4 (W.D. Wash., Feb. 7, 2011).

¹⁹⁸ WASH. ADMIN. CODE § 51-11-0900; see *Washington I*, 2011 WL 485895, at *4.

¹⁹⁹ WASH. ADMIN. CODE §§ 51-11-0402.2, -0900; see *Washington I*, 2011 WL 485895, at *4.

percent reduction.²⁰⁰ Therefore, to meet the remaining eight percent required by the Washington Code, builders must select from options provided in Chapter Nine to make up for what would otherwise be a deficiency if they were to select options provided in Chapters Five or Six.²⁰¹ Although some of the products included in Chapter Nine are covered by § 6295 of EPCA, Chapter Nine also offered options not covered by the statute.²⁰² Additionally, some of the EPCA-covered products exceed the federal efficiency standard.²⁰³

In response to the code changes, multiple building associations sued in the U.S. District Court for the Western District of Washington in 2010 and alleged that their businesses would be harmed due to increased costs required by the 2009 revisions to the Washington Code, specifically with regard to Chapter Nine.²⁰⁴ The building associations sought declaratory and injunctive relief on the claim that EPCA preempted the Washington Code.²⁰⁵ In granting summary judgment to the defendants, the district court rejected the plaintiff's claim and held that the Washington Code satisfied the statutory conditions for protection from preemption.²⁰⁶

On appeal to the Ninth Circuit, petitioners challenged two of the seven statutory conditions that would provide safe harbor to the Washington Code from preemption under § 6297(f)(3)(B) and (C) of EPCA.²⁰⁷ In arguing that Chapter Nine of the Washington Code did not satisfy subsection (B), petitioners alleged that the chapter mandated the use of higher efficiency products because such products were less expensive than the alternative options.²⁰⁸ Affirming the district court's ruling, the Ninth Circuit explained that a builder is not required under the statute to utilize the higher efficiency option merely because there is economic incentive to do so.²⁰⁹ The court further explained that,

²⁰⁰ *Washington II*, 683 F.3d at 1149. Chapter Five is a performance-based path, whereas Chapter Six is prescriptive. *Id.*

²⁰¹ WASH. ADMIN. CODE. § 51-11-0901; *Washington II*, 683 F.3d at 1149 (“A builder must implement sufficient options in order both to cancel out the penalty, if applicable, and to earn one net credit.”).

²⁰² *Washington I*, 2011 WL 485895, at *9. For example, Option 4a of Chapter Nine, “Air Leakage Control and Efficient Ventilation,” does not require the use of EPCA-covered products. *Id.*

²⁰³ *Id.*

²⁰⁴ *Washington II*, 683 F.3d at 1150.

²⁰⁵ *Id.*

²⁰⁶ *Washington I*, 2011 WL 485895, at *15.

²⁰⁷ *Washington II*, 683 F.3d at 1150–51.

²⁰⁸ *Id.* at 1151.

²⁰⁹ *Id.*

“[a] requirement would have to be in the [Washington] Code” but the code “itself does not command, demand, or insist that builders select higher efficiency options.”²¹⁰

In arguing that Chapter Nine failed to meet the requirements of subsection (C), petitioners asserted that the Washington Code provided a credit system that was not designed on a one-for-one equivalent energy use basis because various options that provided an equal credit value did not reduce energy use by a proportionally equivalent amount.²¹¹ In support, petitioners relied on the declaration of an industry specialist to refute the credit system as relying on unsound methodology.²¹² The specialist alleged that in practice, the system provided for an inequivalent credit system.²¹³ The court, again affirming the district court’s finding, held that the Washington system sufficiently provided a one-for-one credit system as required by EPCA.²¹⁴ The Washington council established its baseline targets for the credit system based on an analysis using a computer simulation model, SEEM, to compare the use of each option in four different prototype homes in two different climate zones representative of those being constructed across Washington.²¹⁵ Furthermore, the petitioners had been unable to establish the qualifications of their so-called expert to challenge the state’s calculations.²¹⁶ Therefore, the Ninth Circuit held that Chapter Nine of the Washington Code satisfied subsection (C).²¹⁷ As a result, the court found that the Washington Code satisfied the preemption-exception provisions of EPCA and was thus not preempted.²¹⁸

IV. APPLYING THE LESSONS OF *WASHINGTON* AND *ALBUQUERQUE* AND THE FUTURE OF GREEN BUILDING CODES

Some commentators have suggested that the differing results of *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* and

²¹⁰ *Id.*

²¹¹ *See id.* at 1153.

²¹² *See id.*

²¹³ *Washington II*, 683 F.3d at 1153.

²¹⁴ *Id.* at 1155 (“The district court correctly ruled that the credit values in Chapter 9 are closely proportional to the average reduction in equivalent energy use across a variety of climatic and other environmental situations.”).

²¹⁵ *Washington I*, 2011 WL 485895, at *10. The software simulates the impact of proposed energy efficiency options on energy use by considering a range of home sizes and designs representative of the region. *Id.*

²¹⁶ *Id.* at *12.

²¹⁷ *Washington II*, 683 F.3d at 1155.

²¹⁸ *Id.*

Building Industry Ass'n of Washington v. Washington State Building Code Council constitute the emergence of a circuit split.²¹⁹ Perhaps surprisingly, these two cases appear to be the only to address the preemption-exception provision of the Energy Policy and Conservation Act (EPCA). The lessons learned from *Washington* and *Albuquerque* will therefore prove important to green building, a burgeoning field that is in many ways vital to the U.S. economy.²²⁰ The varying outcomes, however, do not necessarily represent novel approaches taken by different jurisdictions; the cases resulted from different facts, at different stages of litigation, and can be reconciled.²²¹ When viewed in tandem, the decisions in *Washington* and *Albuquerque* provide legislators and practitioners with a helpful, albeit limited, view into the future of green building regulations.²²²

A. Considering EPCA's Preemption-Exception Provision

When making its determination in *Washington*, the U.S. Court of Appeals for the Ninth Circuit directly compared the facts at hand to those before the U.S. District Court for the District of New Mexico in *Albuquerque*.²²³ Whereas the *Albuquerque* court had the opportunity to evaluate all seven preemption-exception provisions of § 6297(f) of EPCA,²²⁴ the *Washington* court was faced with a more limited review of subsections (B) and (C).²²⁵ Since the *Washington* analysis represents the first review of EPCA's preemption-exception provisions at the federal appellate level, comparing the courts' analyses of these two subsections is important.²²⁶

²¹⁹ See, e.g., Shari Shapiro, *Decision in BIA v. Washington Does Not Clarify When Energy Efficient Codes Are Preempted by Federal Law*, GREEN BLDG. L. BLOG (July 13, 2012, 9:22 AM), <http://www.greenbuildinglawblog.com/2012/07/articles/litigation/decision-in-bia-v-washington-does-not-clarify-when-energy-efficient-codes-are-preempted-by-federal-law/>, available at <http://perma.cc/0MzAV3eFauB>.

²²⁰ See 2010 DOE REPORT, *supra* note 7, at 63–64; *Green Building: Why Build Green?*, ENVTL. PROT. AGENCY, <http://www.epa.gov/greenbuilding/pubs/whybuild.htm> (last visited Nov. 7, 2013), available at <http://perma.cc/0BJyNxyi8Y>.

²²¹ See Tim Clayton, *Honest Disagreement on State and Local Building Codes?*, OHIO GREEN BLDG. L. (July 31, 2012), <http://ohiogreenbuildinglaw.com/2012/07/31/honest-disagreement-on-state-and-local-building-codes/>, available at <http://perma.cc/0rQ3HPey1ck>; *infra* notes 223–250 and accompanying text.

²²² See *infra* notes 223–276 and accompanying text.

²²³ *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council* (“*Washington II*”), 683 F.3d 1144, 1152 (9th Cir. 2012).

²²⁴ *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque* (“*Albuquerque I*”), No. 08–633, 2008 WL 5586316, at **9–11 (D.N.M. Oct. 3, 2008).

²²⁵ *Washington II*, 683 F.3d at 1150–51.

²²⁶ See *id.* at 1151–55; *Albuquerque I*, 2008 WL 5586316, at *9–11.

1. Requiring a Covered Product in Excess of the Federal Standard Is an Impermissible Penalty

Whereas the *Albuquerque* court found the local code to violate § 6297(f)(3)(B) of EPCA, the Ninth Circuit in *Washington* came to a contrary conclusion with regard to the Washington Administrative Code (“Washington Code”).²²⁷ Under subsection (B) of EPCA, a state or municipal code cannot require, as the only means of compliance, the use of a product that exceeds the federal standard as outlined by EPCA.²²⁸ The *Albuquerque* and *Washington* courts differed, however, in determining when a builder is “required” to use a particular product.²²⁹ In *Albuquerque*, the court relied in part on the notion that, though it may have been *possible* for a builder to comply with the Albuquerque Code without using EPCA-covered products in excess of the federal standard, for example by building to the Leadership in Energy and Environmental Design (LEED) silver standard, to do so would have been impractical.²³⁰ As a result, the Albuquerque Code was deemed to effectively force a builder to add to a project to reach the Code’s efficiency standard, which the court determined was a penalty.²³¹

Conversely, the *Washington* court disregarded plaintiff’s contention that the Washington Code effectively required a builder to use covered products in excess of the federal standard because the non-covered options were generally more expensive than their covered counterparts.²³² In holding that a builder is not *required* to select an option from the Washington Code merely because there is economic incentive to do so, the Ninth Circuit explained that the code provides multiple options to compliance—including cheaper products that are more efficient than the federal standard—but does not require the builder to use those options.²³³ Therefore, a builder may pick up the necessary net credit by selecting an option that is not covered by EPCA, even if to do so would be financially imprudent.²³⁴

It is thus evident that while *Albuquerque* turned on whether an option was “practical,” the *Washington* court would find such a distinction

²²⁷ See *Washington II*, 683 F.3d at 1152; *Albuquerque I*, 2008 WL 5586316, at *9.

²²⁸ 42 U.S.C. § 6297(f)(3)(B) (2006).

²²⁹ See *Washington II*, 683 F.3d at 1151; *Albuquerque I*, 2008 WL 5586316, at *9.

²³⁰ *Albuquerque I*, 2008 WL 5586316, at *9 n.7.

²³¹ See *id.* at *9.

²³² *Washington II*, 683 F.3d at 1151–52.

²³³ *Id.*

²³⁴ See *id.*

to be misguided.²³⁵ The Ninth Circuit looked to the Supreme Court for guidance in finding that a requirement is a “rule of law that must be obeyed.”²³⁶ According to the Ninth Circuit, the Washington Code did not constitute a requirement because builders are provided alternate means within the existing framework to comply with the code via the performance-based credit system that included products below the federal efficiency standard.²³⁷ Therefore, it would appear that a code will fail the subsection (B) requirement if it either creates a penalty or legally compels a party to use a covered product that exceeds the federal efficiency standard.²³⁸ Until and unless the Supreme Court or Congress provide further guidance, however, whether “effectively forcing” a developer to use a certain product constitutes an impermissible requirement is unclear, notwithstanding the *Washington* court’s attempt to distinguish the Washington Code from that at issue in *Albuquerque*.²³⁹

2. A Credit System Must Have, to the Greatest Degree Possible, a One-for-One Basis

Given the decisions in *Albuquerque* and *Washington*, it is evident that under § 6297(f)(3)(C), any credit system included in a local building code must have, *to the greatest degree possible*, a “one-for-one” basis.²⁴⁰ A state or municipal code must therefore proportionately allocate credits for any performance-based path to how much a potential conservation measure reduces energy use or cost, regardless of the method selected.²⁴¹ The Albuquerque Code failed the one-for-one requirement because two of the options—compliance with the plan of a local non-profit, Build Green New Mexico, or with LEED silver—did not include an energy consumption goal and thus it was impossible to calculate a one-for-one equivalent.²⁴² Conversely, the Washington district court relied on the legislative history of EPCA in deciding that the statute does not require identical energy savings for options that receive the same

²³⁵ See *id.*; *Albuquerque I*, 2008 WL 5586316, at *9 n.7.

²³⁶ *Washington II*, 683 F.3d at 1145 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005)).

²³⁷ *Id.* at 1152.

²³⁸ See *id.*

²³⁹ See *id.* at 1151–52; *Albuquerque I*, 2008 WL 5586316, at *9.

²⁴⁰ 42 U.S.C. § 6297(f)(3)(C) (2006); see *Washington II*, 683 F.3d at 1155; *Albuquerque I*, 2008 WL 5586316, at *10.

²⁴¹ See § 6297(f)(3)(C).

²⁴² *Albuquerque I*, 2008 WL 5586316, at *10.

credit.²⁴³ The court looked to congressional intent in drafting EPCA and noted that a perfect correlation between energy savings and credits was impossible, and thus the credits must be given “to the greatest degree possible” on a one-for-one basis.²⁴⁴ According to *Washington*, so long as a credit system is modeled based on reliable computer simulations that produce a near one-to-one ratio, the credit system is sufficient.²⁴⁵

Such a result is appropriate. The Ninth Circuit has previously stated that the “centerpiece of any preemption analysis is congressional purpose.”²⁴⁶ Congress provides states with flexibility in designing codes because of the potential for long-term energy savings that can only be realized during the construction phase of a project.²⁴⁷ The inclusion of the credit-based option in EPCA was designed to provide such flexibility through performance-based codes.²⁴⁸ By affirming, the Ninth Circuit properly followed Congress’s intention to provide a credit system that closely followed a one-for-one equivalent while recognizing that mathematical perfection might be impossible.²⁴⁹ Given the paucity of case law addressing the provision, deference to Congressional intent was appropriate.²⁵⁰

B. *Moving Forward: Until Further Instruction, Legislators Should Focus on Performance-Based Paths and Consider the Potential for Severability*

President Obama’s recent support for green building suggests that the next two to three years might prove to be an opportune time for state and local legislatures to revamp their building codes.²⁵¹ Although it is clear that the technology exists, developers and consumers need to

²⁴³ Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council (“*Washington I*”), No. 3:10-cv-05373, 2011 WL 485895, at *12 (W.D. Wash., Feb. 7, 2011).

²⁴⁴ *Id.* at *10. The Ninth Circuit affirmed this reasoning: “In requiring that credits be awarded on a one-for-one equivalent energy use basis, Congress intended not mathematical perfection, but rather preventing the building code from discriminating between products and building methods.” *Washington II*, 683 F.3d at 1155.

²⁴⁵ See *Washington I*, 2011 WL 485895, at *12.

²⁴⁶ *Pacific Gas & Elec. Co. v. California*, 350 F.3d 932, 942 (9th Cir. 2003); see *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone.”).

²⁴⁷ *Washington II*, 683 F.3d at 1148; 2010 DOE REPORT, *supra* note 7, at 35; O’MARA & BATES, *supra* note 50, at 10.

²⁴⁸ S. REP. NO. 100–6, at 10 (1987), *reprinted in* 1987 U.S.C.C.A.N. 52, 61.

²⁴⁹ *Id.* (“The Committee recognizes that in some cases, exact equivalency is not possible.”).

²⁵⁰ See *id.*

²⁵¹ See 2013 *State of the Union*, *supra* note 2.

use that technology, whether by voluntary adherence or mandated requirement, to unlock the inherent potential of green building.²⁵² The nation is ready for more stringent application of green building codes, but states, municipalities, developers, and consumers must be willing to sacrifice initial costs for long-term economic and environmental benefit.²⁵³ Furthermore, legislators must be mindful of the implications of *Washington* and *Albuquerque* because the area of law is developing without other guiding precedent.²⁵⁴

To truly effect change, the DOE should provide stronger incentives to states and municipalities to encourage adoption of the current American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) standards.²⁵⁵ Though states or municipalities that have achieved a ninety percent compliance rate with statutorily mandated commercial and residential building standards are eligible for assistance, such assistance alone does not appear to be a sufficient incentive.²⁵⁶ As of September 2013, six states had yet to adopt either a commercial or residential building energy code.²⁵⁷ Of course, a developer may on his or her own initiative choose to emphasize sustainable practices.²⁵⁸ To do so, however, would be strictly voluntary and thus without guarantee.²⁵⁹

Despite a lack of mandatory requirements or sufficient incentive from the Department of Energy (DOE), a state may nevertheless choose to emphasize sustainable practices by drafting a green building code.²⁶⁰ Where a code provides multiple alternatives to compliance through a credit system, builders have the freedom to select from a menu of options.²⁶¹ This flexibility allows developers to meet a code's

²⁵² See Klass, *supra* note 53, at 341.

²⁵³ See *id.*; see also Hirokawa, *supra* note 42, at 510 (suggesting that green building has been accepted as “some response” to the realized threat of climate change).

²⁵⁴ See *infra* notes 264–276 and accompanying text.

²⁵⁵ See, e.g., 42 U.S.C. § 6833(e)(4)(A) (2006) (authorizing the appropriation of \$25,000,000 per year for 2006–2010 and “such sums as are necessary for fiscal year 2011 and each fiscal year thereafter”).

²⁵⁶ See *id.* § 6833(e)(2)(A).

²⁵⁷ *Status of State Energy Code Adoption*, *supra* note 72. Alaska, Arizona, Wyoming, South Dakota, Kansas, and Missouri do not have in a place a statewide code for either commercial or residential buildings. *Id.* Additionally, Mississippi lacks a mandatory residential code. *Id.*

²⁵⁸ Hutton, *supra* note 37, at 129. One popular voluntarily framework pursued by developers is certification through the LEED program. LEED, U.S. GREEN BLDG. COUNCIL, www.usbc.org/leed (last visited Nov. 7, 2013), available at <http://perma.cc/06vrAdTqME9>.

²⁵⁹ See LEED, *supra* note 258.

²⁶⁰ See Hutton, *supra* note 37, at 129.

²⁶¹ Hirokawa, *supra* note 42, at 528; see Coglianese et al., *supra* note 137, at 709.

requirements efficiently and cost-effectively.²⁶² Moreover, the builder or developer has the flexibility to adapt to, and make use of, technological advances “in ways that prescriptive technology-based standards generally cannot.”²⁶³

As a result of the decision in *Washington*, it would appear that states and municipalities could continue to provide multiple paths to compliance by including both prescriptive- and performance-based standards in their building codes.²⁶⁴ Because the *Albuquerque* court found the performance and prescriptive paths to not be severable within the Albuquerque Code, however, legislators must be careful to explicitly consider the viability, and moreover the desirability, of each pathway as an independent means for compliance.²⁶⁵

Given that a severability analysis turns on legislative intent, the court in *Albuquerque* correctly found that the Albuquerque Code was not severable because of the submission of a stipulation agreement indicating that the local legislature would not have adopted the Code without the prescriptive path intact.²⁶⁶ Therefore, the *Albuquerque* decision provides important guidance to future legislatures: clearly evidence particular motivations when drafting a new green building code and consider the potential for severability.²⁶⁷ Without such evidence in the legislative record, a statute could be improperly severed and invalidated, or permitted to survive in part.²⁶⁸ As a result, the legislature might be forced to reconsider the statute, which could present an additional opportunity for opponents of green building to challenge the regulations.²⁶⁹

If forced to choose between the two types, legislatures would be wise to emphasize performance-based standards.²⁷⁰ In addition to providing room for innovation, performance-based codes are more effective than prescriptive-based codes.²⁷¹ Prescriptive standards are by

²⁶² Coglianese et al., *supra* note 137, at 711.

²⁶³ *Id.*

²⁶⁴ See *Washington II*, 683 F.3d at 1155.

²⁶⁵ See Memorandum Opinion and Order at 3, *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, No. 08–633 (D.N.M. Jan. 25, 2012), 2008 WL 5586316.

²⁶⁶ *See id.*

²⁶⁷ *See id.*

²⁶⁸ See Nagle, *supra* note 150, at 227.

²⁶⁹ *See id.*

²⁷⁰ See *infra* notes 271–275 and accompanying text.

²⁷¹ Coglianese et al., *supra* note 137, at 711 (“Performance standards . . . accommodate technological change and the emergence of new hazards in ways that prescriptive technology-based standards generally cannot.”).

their nature pre-defined and rigid.²⁷² Because of their carefully defined nature, prescriptive requirements leave little creativity to the developer.²⁷³ As a result, building officials tend to prefer prescriptive standards for their clarity and ease of use.²⁷⁴

Performance-based standards, however, can offer a viable means for legislatures to provide needed flexibility to builders in a time when the nation is looking for alternative means to energy efficiency in light of the challenges of limited resources.²⁷⁵ Such a result might be necessary until either § 6297 of EPCA is amended to lower the standard for preemption-exception, or until the courts provide further clarification that describes instances where an effective requirement constitutes an impermissible penalty, thus subjecting that piece to the potential for severability.²⁷⁶

CONCLUSION

Green building is an increasingly important piece of the American economy. Although the building sector as a whole has struggled since 2008, green building codes have increased in importance as developers look for cost-effective alternatives. Moreover, given President Obama's

²⁷² See Hirokawa, *supra* note 139, at 520.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See *id.* For example, the California legislature, a leader in green development, announced a preference for performance-based standards and has asked agencies to promote performance standards over prescriptive when possible. CAL. GOV. CODE. § 11340.1 (West 2005).

²⁷⁶ See *Albuquerque I*, 2008 WL 5586316, at *11. One point of criticism is that performance-based codes require precise calculations that usually mandate the use of software to calculate the total energy efficiency of a building, whereas prescriptive standards are easier to understand, implement, and maintain. See Hirokawa, *supra* note 139, at 521. The DOE has attempted to make the necessary software available and free to use. *Software and Web Tools*, *supra* note 89. COMcheck, however, is not a permitted means to prove compliance in several states, including Washington. *States That Can Use COMcheck to Show Compliance*, U.S. DEP'T OF ENERGY, <http://www.energycodes.gov/images/states-can-use-comcheck-show-compliance> (last visited Nov. 19, 2013), available at <http://perma.cc/0Dz6WuteiAA>. Therefore, developers and builders must have access to alternative software, such as SEEM. See *id.* Although this can present a costly challenge, particularly for small firms and developers, the challenge should not be seen as an insurmountable impediment. See Coglianesi et al., *supra* note 137, at 712. There might be support for such entities, at least in some settings, because "non-binding codes of practice have been developed by government, trade associations, or standards organizations to provide guidance to firms that lack the resources to determine how to meet regulatory requirements on their own." *Id.* Moreover, because SEEM has been described as the industry standard, at least in Washington, it would appear that this is not an impregnable hurdle when considering the system as a whole. See *Washington I*, 2011 WL 485895, at *10.

recent embrace of the movement in his 2013 State of the Union, states and municipalities appear to be well positioned to implement or update their building codes to emphasize sustainable practices.

Legislators who seek to take advantage of the opportunity, however, must be aware of the recent decisions in *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque* and *Building Industry Ass'n of Washington v. Washington State Building Code Council*. Specifically, legislators would be wise to explicitly evidence their desires in legislative materials to guard against the potential for severability in the event that the Energy Policy and Conservation Act preempts part of the code. So long as they do so, legislators should be able to include both performance- and prescriptive-based paths for compliance, which will allow builders the freedom to choose among several options. If the state or municipality must choose a single path to compliance, however, choosing performance-based paths would be most beneficial because a credit-based system provides a builder with more flexibility, which will ultimately benefit both the project and the environment.