

Last fall I wrote about [a strangely important case about boilers](#), in which the Ninth Circuit would decide whether a challenged zero-NOx air emission standard adopted by LA's air regulator was lawful. The case is important because it had the potential to significantly constrain the ability of air pollution regulators to do their jobs and implement the Clean Air Act using traditional air pollution control tools. **Good news:** The Ninth Circuit [just upheld the air pollution rule](#), and it did so in a way that continues to build momentum for efforts to move away from fossil-fuel-powered appliances.

The pollution standard, Rule 1146.2, was issued by the South Coast Air Quality Management District to eliminate nitrogen oxide (NOx) emissions from certain appliances, like boilers. The rule was issued because appliances that burn natural gas to heat water are, in aggregate, an incredibly significant source of NOx, an air pollutant that worsens smog and causes serious health harms. In fact, South Coast has concluded that without widespread adoption of zero-emission technologies like those at issue in this case, the District cannot come into compliance with federal ozone standards under the Clean Air Act.

Industry groups and others challenged the rule, arguing that it is preempted by another federal statute, the Energy Policy and Conservation Act (EPCA). EPCA governs federal energy efficiency standards for appliances (like boilers), standards meant to ensure that appliances don't waste energy. EPCA also preempts the ability of states and localities to regulate covered appliances in a way that concerns their energy consumption or energy use, with exceptions. Because Rule 1146.2 will, in practice, result in the adoption of more electric appliances in place of natural gas appliances, plaintiffs argue that the rule "concerns" energy use within the meaning of EPCA's preemption clause.

I served as lead counsel on [an amicus brief](#) in support of the rule filed on behalf of the Northeast States for Coordinated Air Use Management ("NESCAUM"), a coalition of state air agencies that works to reduce the adverse public health and environmental impacts of air pollution and climate change. (It filed the brief solely as an organization and not on behalf of its member states.) In this case, NESCAUM catalogued many low-, ultra-low, and zero-NOx emissions rules in place throughout the country, all exercises of traditional legal authority to control air pollution under the Clean Air Act. We emphasized that while many types of emission standards — ordinary, run-of-the-mill air pollution control measures adopted in states and regions across the country — can incidentally affect the energy use of appliances, nothing in EPCA suggests that such standards were meant to be preempted. We

noted the dangers posed to a range of air pollution rules if Rule 1146.2 were to be struck down on the theory advanced by plaintiffs.

The Ninth Circuit agreed. It failed to find any support for the idea that in enacting EPCA, Congress intended to constrain the ability of states and localities to tackle tough air pollution problems through the use of emissions standards authorized by the Clean Air Act. It noted the fact that “[f]or decades, state and local regulators have utilized appliance emissions regulations as an important tool to help achieve compliance with the NAAQS,” including “35 other jurisdictions ranging from Texas to Utah to Washington that have adopted similar low, ultra-low, and zero NOx emissions standards for appliances,” as compiled in our amicus brief. Importantly, the court disagreed that [its earlier decision in CRA v Berkeley](#) controls this case’s outcome, holding that “our ‘very narrow’ decision in that case did not consider the issue now before us: whether EPCA preempts state regulations enacted pursuant to another federal statute, like the CAA.”

Together with the Second Circuit case Dan [wrote about yesterday](#) upholding New York City’s limits on the use of natural gas in new buildings, this case marks a good week for cleaner air. Of course, the fight may not be over: Plaintiffs are likely to petition for a rehearing and perhaps appeal the ruling.