John C. Heintz
Direct Dial: +1.213.891.7395
John.Heintz@lw.com

355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

LATHAM & WATKINS LLP

April 11, 2025

Jen Vinh, Air Quality Specialist
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Regulatory Flexibility Group Comments on Proposed Amended Rules 1111 and 1121

Dear Ms. Vinh:

We write on behalf of our client the Regulatory Flexibility Group ("RFG") regarding Proposed Amended Rules 1111 ("PAR 1111") and 1121 ("PAR 1121" and together with PAR 1111, the "Rules"). The RFG is an industry coalition that includes companies in the refining, utility and aerospace sectors that operate facilities within the jurisdiction of the South Coast Air Quality Management District ("SCAQMD" or the "District").

As you are likely aware, RFG has consistently advocated that AQMD Rules should not pick winners and losers, but instead should allow technologies to compete against one another to maximize air quality benefits and provide products that meet residential, commercial, and industrial needs at reasonable cost. Technology and fuel neutrality promotes competition, which drives technologies to become cleaner and drives down prices. Importantly, technology and fuel neutrality also protect against price spikes and shortages, which can have devastating impacts on the economy.

We greatly appreciate Staff's proposed amendments to the Rules published in March 2025 to offer an alternative to the previously contemplated complete ban on natural-gas appliances. We further appreciate Staff's additional refinements and fee adjustments released in April 2025 and the public process that has been utilized for these rulemakings. While the Staff's creativity and continued refinement has made the Rules significantly better, given the continued high cost of the mitigation fees, the proposed alternative is unfortunately still not a true technology or fuel neutral approach, and we continue to have significant concern about the effect of this type of rule on RFG member operations and the broader impacts on the Southern California economy.[1]

[1] For the reasons set forth in the letter, we also believe that the District will not be able to take SIP credit for any emission reductions associated with the Rule. Clean Air Act § 110(a)(2) bars the United States Environmental Protection Agency ("USEPA") from approving the SIP revisions that are prohibited by "any provision of Federal … law." 42 USC § 7410(a)(2)(E). As RFG explained to USEPA in connection with its consideration of Bay Area Air Quality Management District ("BAAQMD") Rule 9-4 and Rule 9-6, USEPA must disapprove local district rules that

As proposed, the Rules require that manufacturers cease sales of NOx-emitting units (i.e., natural-gas fired units) by the applicable compliance date or, as an alternative, submit a compliance plan committing to increase sales of zero-emission ("ZE") units to achieve specified sales targets over time (restricting natural gas units to 10% of total sales by 2036). Under the alternative compliance option, manufacturers must pay a $50-100 fee for every natural gas-fired unit sold and an additional $250+ (for water heaters) or $500+ (for furnaces)[2] "mitigation fee" for each natural gas-fired unit sold above the applicable sales target. Manufacturers of natural gas-fired units therefore have two options: (1) eliminate or significantly reduce over time the availability of natural gas-fired units sold into the District, or (2) pay $250/500+ for each natural gas-fired unit sold over the applicable target.

Any forced prohibition on or reduction in the sale of natural gas-fired units—including under the alternative compliance option—is preempted by the Energy Policy and Conservation Act. Given this preemption, we are also concerned that the remaining compliance option—paying a $250/500+ mitigation fee to continue selling natural gas-fired units above the sales target—constitutes a tax beyond the District's authority to implement. We expand on each of these (and other) points below.

The Energy Policy and Conservation Act Preempts the Rules as Proposed

The Energy Policy and Conservation Act ("EPCA") preempts "State regulation concerning the energy efficiency, energy use, or water use of [an EPCA] covered product."[3] The Ninth Circuit in *California Restaurant Association v. City of Berkeley* ("*Berkeley*") examined ECPA's preemption provision and determined that "EPCA preempts regulations … that relate to the quantity of natural gas directly consumed by certain consumer appliances at the place where those products are used."[4] *Berkeley* clarifies that "a regulation on 'energy use' fairly encompasses an ordinance that effectively eliminates the 'use' of an energy source."[5]

The Rules implement control measures from the 2022 Air Quality Management Plan ("AQMP") that propose developing zero-NOx emission limits.[6] Despite the District's position that

---

violate EPCA. See Exhibit A (Regulatory Flexibility Group Comments on Proposed Conditional Approval of Bay Area Air Quality Management District Rules 9-4 and 9-6; EPA-R09-OAR-2024-0417). Because Rules 1111 and 1121 are preempted by EPCA (as detailed below), any SIP revision to include those Rules in the SIP would fail as a matter of law. And, as I am sure you are aware, CARB recently withdrew BAAQMD Rule 9-4 and Rule 9-6 from consideration for inclusion in the SIP. See Exhibit B. We would expect CARB to take a similar approach with Rules 1111 and 1121 as they are currently drafted (i.e. not submit them to USEPA for inclusion in the SIP).

[2] Draft rule language states the mitigation fees will begin at these amounts and increase with the Consumer Price Index.

[3] 42 U.S.C. § 6297(c).

[4] *California Restaurant Association v. City of Berkeley*, 89 F.4th 1094, 1101 (9th Cir. 2024).

[5] *Id*. at 1102. Even the federal district court in New York that disagreed with *Berkeley*'s interpretation of "energy use" (discussed below) stated that "'energy use' refers to a predetermined fixed value that measures the characteristics of a covered product as manufactured." *Ass'n of Contracting Plumbers of the City of New York v. City of New York*, Case 1:23-cv-11292-RA (S.D.N.Y. Mar. 18, 2025) at *11. The Rules regulate the predetermined fixed value of natural gas used by a covered product as manufactured, fixing that value at zero.

[6] SCAQMD, PAR 1111 and PAR 1121 Draft Staff Report (April 2025) pp. 1-2 (hereafter "Draft Staff Report").

"[e]quipment that meets the NOx emission limits, regardless of the energy source, is permitted under [the Rules],"[7] the only space and water heating technologies that currently achieve zero-NOx emissions use electricity as an energy source. Any rule that includes a zero-NOx emission limit therefore must seek to eliminate the use of natural gas as an energy source for the equipment governed by that rule. And where that equipment is a "covered product" under EPCA (as is the case with the Rules[8]), the zero-NOx emission limit is preempted.

The Rules propose a primary compliance option mandating that manufacturers sell only ZE units beginning January 1, 2027, for installation in new buildings and January 1, 2029, for installation in existing buildings. This ZE mandate eliminates the use of natural gas as an energy source for EPCA-covered appliances, a result that is plainly prohibited under *Berkeley*.

Again, while we do appreciate the District's creativity in the amended Rule approach, and while the alternative compliance option does not mandate a *complete 100%* transition to electric space and water heaters in the District, it will still unfortunately have the effect of significantly eliminating the use of natural gas as an energy source for space and water heaters throughout the South Coast Air Basin. Indeed, Staff's analysis appears to expect that manufacturers will comply with sales targets, resulting in reduced consumer choice over time.[9] Allowing 10% of total sales to be gas appliances without incurring a significant fee does not change the fact that it effectively acts as a ban prohibited under EPCA.[10]

That manufacturers can pay a mitigation fee and sell natural gas-fired units in excess of compliance targets such that consumers will purportedly "have the choice to purchase conventional NOx-emitting units"[11] does not save the Rules from EPCA preemption. Congress recognized that regulations "that would increase the price to a point that the product would become noncompetitive and that would result in minimal demand for the product" are the equivalent of making a product unavailable.[12] EPCA limits even federal standards that could cause the unavailability of covered product types or classes.[13] While *Berkeley's* specific holding, as the District points out, was limited to building codes, *Berkeley* also recognizes that EPCA's preemption provisions themselves are "broad", and that Congress intended EPCA to preempt even regulations that merely *concern* the energy use of covered products.[14] EPCA preemption therefore prohibits local regulations that

---

[7] Draft Staff Report, General Response to Comments, Appendix A-11.

[8] *See* 42 U.S.C. §§ 6292(a) (covered products include water heaters and furnaces).

[9] SCAQMD, Stationary Source Committee Meeting PARs 1111 and1121 Presentation (March 21, 2025), slide 12.

[10] There is little practical difference between restricting 90% and 100% of sales. *See Berkeley*, 89 F.4th at 1107.

[11] Draft Staff Report, General Response to Comments, Appendix A-11.

[12] S. Rpt. 100–6 at 8–9 (Jan. 30, 1987) (discussing new section 325(j)(4) which places restrictions on the department of Energy Secretary's standard setting authority).

[13] *See* 42 U.S.C. 6295(o)(4) ("The Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence ***that the standard is likely to result in the unavailability in the United States in any covered product type*** (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding.") (Empasis added.)

[14] *Berkeley*, 89 F.4th at 1103; see 42 U.S.C. § 6297(c).

produce a result that would be prohibited of even federal regulations. The Rules produce this prohibited result because, as discussed in depth below, the mitigation fee is a substantial increase on the retail price of natural gas-fired units that exceeds manufacturer's profit margins, making natural-gas fired units noncompetitive.

The Rules are not exempt from EPCA preemption just because they are "health- and safety-based emission limits on appliances."[15] *Berkeley* makes clear that the District can't do "indirectly what Congress says they can't do directly."[16] The Rules ban the result (emissions) of using an energy source (natural gas) in EPCA covered appliances, indirectly seeking a result that Congress says the District cannot mandate directly. Accordingly, EPCA preempts both the ZE mandate and the alternative compliance option, which seeks the same result as in *Berkeley* through an alternatively prescriptive means.

Staff also pointed to a recent decision by a New York federal court upholding New York City's enactment generally prohibiting natural gas use in newly constructed residential buildings.[17] The District, however, cannot rely on that case for one critical reason—the New York federal court adopted the position of a *dissenting opinion* in *Berkeley*.[18] A California federal court considering a District rule, on the other hand, is required to follow *Berkeley*'s understanding of EPCA's construction.

Further still, the *Berkeley* dissenting opinion and the New York court misconstrue EPCA's scope. Both opinions focus on the definition of "energy use" as "the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures under section 6293 of this title."[19] They contend that this definition renders "energy use" to be only a "performance standard" and thus limits the preemption provision's focus to manufacturing standards—not regulations affecting consumer use in general.[20] But as the controlling opinion in *Berkeley* explained, the definition of "energy use," which references consumption "at the point of use," must encompass "not only from where the products roll off the factory floor, but also from where consumers use the products."[21] Thus, any regulation that "prevent[s] consumers from using covered products in their homes, kitchens, and businesses" gets preempted.[22]

---

[15] Draft Staff Report, General Response to Comments, Appendix A-11.

[16] *Berkeley*, 89 F.4th at 1106.

[17] *See generally Ass'n of Contracting Plumbers v. City of New York*, 23-CV-11292 (S.D.N.Y. Mar. 18, 2025).

[18] *See id.* at Slip Op. 9 ("The Court therefore declines to adopt the interpretation of "energy use" employed by the Ninth Circuit in *California Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024), which, in this Court's view, rested on a flawed reading of the term 'point of use.'. . . [A]s Judge Friedland persuasively explained in dissent, 'EPCA is a technical statute,' and thus 'key terms' must be interpreted in accordance with their 'specialized meanings.'").

[19] *See Berkeley*, 89 F.4th at 1121 (Friedland, J., dissenting from denial of rehearing en banc) (quoting 42 U.S.C. § 6291(4)).

[20] *Id.* at 1122; *Ass'n of Contracting Plumbers*, slip op. 9-10.

[21] *Berkeley*, 89 F.4th at 1103.

[22] *Id.*

District Authority to Impose the Proposed Mitigation Fee

Article XIII C of the California Constitution prohibits a local government from imposing a tax unless the tax has been approved by a majority of the electorate for a general tax, or by two-thirds of the electorate for a special tax.[23] In 2010, "voters passed Proposition 26 [amending Article XIII C] and adopted a new definition of taxes to prevent state and local governments from evading the 'constitutional voting requirements' on new taxes by imposing new taxes disguised as fees or charges."[24] Under Article XIII C, a tax is "any levy, charge, or exaction of any kind imposed by a local government, except," as applicable here, "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege."[25]

The Constitution states that "[t]he local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[26] Therefore, the District must affirmatively demonstrate that any mitigation fee is not a tax subject to Article XIII C.

Under the alternative compliance option, the proposed Rules impose a "mitigation fee" on manufacturers for each natural gas unit sold within the District and an additional fee on every unit sold above the applicable sales target. The mitigation fee will not escape the definition of a tax just because it is one of two compliance options and not, on paper, strictly mandatory if a manufacturer meets the applicable compliance target.[27] Even though coercion is not necessary for an imposed charge to constitute a tax, manufacturers will nonetheless be coerced into paying mitigation fees. Because EPCA preempts both a prohibition on and a forced reduction of sales of natural gas-fired units, the only remaining option for manufacturers to comply with the Rules is to pay the $50-100 mitigation fee for all natural gas-fired units and the $250/500+mitigation fee for every unit in excess of the sales target. In short, manufacturers of natural gas-fired units thus have no choice but to pay mitigation fees.

To avoid the approval requirements as a tax, the District will need to demonstrate that the mitigation fee is a "charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs

---

[23] Cal. Const., art. 13C, § 2.

[24] *Boyd v. Cent. Coast Cmty. Energy*, 96 Cal. App. 5th 136, 145 (2023).

[25] Cal. Const., art. 13C, § 1(e).

[26] *Id*., § 1.

[27] See *Zolly v. City of Oakland*, 13 Cal.5th 780, 791 (2022) (holding a voluntarily assumed franchise fee is a tax, rejecting "the notion that a local government can only 'impose' a tax by means of coercion" because "the ordinary meaning of 'impose' is merely to 'establish'"); *Boyd*, 96 Cal. App. 5th at 145 (expressly rejecting that "the general definition of taxes [includes] a requirement that any charges established by a public entity leave open no alternative way to obtain the service or product provided in exchange for that charge."); *Howard Jarvis Taxpayers Ass'n v. Coachella Valley Water Dist.*, 108 Cal. App. 5th 485, 504 (2025) (the difference in rates paid by agricultural and non-agricultural water users is an exaction under Article XIII C).

to the local government of conferring the benefit or granting the privilege."[28] Staff has proposed that the manufacturer will be required to pay the fee directly, but the fee will undoubtedly be priced into natural gas-fired units and ultimately paid by the purchaser of those units. Further, because the compliance option of restricting sales of natural gas-fired units is preempted by EPCA, the mitigation fee confers no benefit or privilege because payment would be strictly necessary to comply with the Rule. Stated in another way, because the District has no power to prohibit the sales of these products, it arguably cannot grant the "benefit" or "privilege" of permitting their sale for a fee. Any effort to collect payment for their sale, hence, does not come within the California Constitution's safe harbor for fees granting a benefit or privilege.[29]

Even if the mitigation fee did confer a benefit or privilege, the District must meet its burden to establish that it is not a tax. "To qualify as a nontax 'fee' under article XIII C, as amended, a charge must satisfy both the requirement that it be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity,' and the requirement that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.'"[30] ***Here, the proposed $250/500+ fee is simply too high in relation to the cost of the units***. The sheer amount of this cost increase will reportedly exceed manufacturer's current profit margins on natural gas-fired units, causing the manufacturers to pass the cost directly to consumers who may have no viable choice but to use natural gas-fired units.[31] This makes it unlikely that its allocation can bear a fair or reasonable relationship to any purported benefits or burdens.[32]

Cost-Effectiveness Analysis

We appreciate that Staff updated the cost-effectiveness analysis in the Draft Staff Report. The updated analysis, however, leaves some questions as to how cost-effectiveness figures for PAR 1111 were reached and whether the District has met its obligations triggered when cost-effectiveness exceeds the screening threshold.

Regarding PAR 1111, Staff's cost-effectiveness values vary wildly depending on whether the new space heating unit is replacing a furnace and an air conditioner ("A/C") or is replacing just a furnace, ranging from a cost savings to a staggering $1,730,000 per ton of NOx when only a furnace is replaced.[33] For replacement of A/C and a furnace with a heat pump, Staff appears to rely on the assumption that both the furnace and A/C will reach the end of their useful life at the same time when in reality, a furnace may need to be replaced at a time when an air conditioner has

---

[28] Cal. Const., art. 13C, § 1(e).

[29] *See* Cal. Const., art. XIIIC, § 1(e)(1).

[30] *City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal.5th 1191, 1214 (2017).

[31] SCAQMD, Stationary Source Committee Meeting (March 21, 2025) Webcast at 1:51:44, available at https://youtu.be/2VHVwGoHUkE?t=6704.

[32] *Coachella Valley Water Dist.*, 108 Cal. App. 5th at 508 (holding that "by allocating the full cost [of the burden] to non-agricultural customers without demonstrating that agricultural customers [do not contribute to the burden], the Water District has not shown that its allocation bears a fair or reasonable relationship to non-agricultural customers' burdens on [the governmental activity].").

[33] Draft Staff Report, p. 2-19.

significant useful life remaining.[34] In both cases, it is not clear how Staff is accounting for the costs associated with replacing A/C units or whether Staff is including expected emission reductions associated with A/C replacements. We note that, because PAR 1111 applies to space heating equipment and not A/C units, it is not immediately clear that costs and emission reductions associated with A/C replacement is properly considered as part of PAR 1111's cost-effectiveness analysis. We ask that Staff update its cost-effectiveness analysis to clarify and explain these points. We also request that the updated cost-effectiveness analysis address increased costs associated with contractor availability, product scarcity, and permitting delays resulting from home rebuilding and region-wide preparations for the 2028 Olympics.

The cost-effectiveness analysis also discloses that the cost-effectiveness of PAR 1121, along with furnace only replacement under PAR 1111, exceeds the NOx cost-effectiveness threshold of $383,000 per ton of NOx reduced.[35] Staff acknowledges the 2022 AQMP requirement to "hold a public meeting to discuss other options at or below the proposed screening threshold" and asserts that the presentation of the alternative compliance option at various meeting satisfies this requirement.[36]

While we commend the District staff for the public process it has engaged in regarding these Rules, we feel strongly the prior meetings, held before the release of the Rule's updated cost-effectiveness analysis, does not meet the 2022 AQMP requirements, which RFG views as a critical safeguard in evaluating the impacts of rulemaking on businesses in the District. We believe the 2022 AQMP commitment to hold a public meeting when cost-effectiveness exceeds the screening threshold requires a dedicated meeting, and we respectfully request that Staff schedule that meeting prior to any consideration of the Rules by the Governing Board.

***

[34] See *Id.*

[35] *Id.*, at 2-16, 2-19, and 2-24.

[36] *Id.* at 2-20.

Conclusion

Again, we appreciate Staff's proposed amendments to the Rules and its thinking of alternative compliance options. However, the Rules as drafted still do not appropriately facilitate technology and fuel neutrality and are preempted under EPCA. Accordingly, we encourage the District to table the rulemaking at this time.

We greatly appreciate the opportunity to provide these comments on PARs 1111 and 1121. Please contact me at (213) 891-7395, or by email at john.heintz@lw.com if you have any questions.

Best regards,

John C. Heintz
of LATHAM & WATKINS LLP

Enc.

Cc: Emily Yen, SCAQMD
Yanrong Zhu, SCAQMD
Heather Farr, SCAQMD
Michael Krause, SCAQMD
RFG Members
Nick Cox, Latham & Watkins LLP

EXHIBIT A

355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

LATHAM & WATKINS LLP

January 29, 2025

Cheree Peterson, Acting Regional Administrator
Environmental Protection Agency, Region IX
75 Hawthorne St.
San Francisco, CA 94105

Re: Regulatory Flexibility Group Comments on Proposed Conditional Approval of Bay Area Air Quality Management District Rules 9-4 and 9-6; EPA-R09-OAR-2024-0417

Dear Ms. Peterson:

We write on behalf of our client the Regulatory Flexibility Group ("RFG") regarding the Environmental Protection Agency's ("EPA") Proposed Conditional Approval of Bay Area Air Quality Management District ("BAAQMD") Rules 9-4 and 9-6 (Docket number EPA-R09-OAR-2024-0417). The RFG is an industry coalition that includes companies in the refining, utility and aerospace sectors that operate facilities throughout California. The RFG is dedicated to advocating for a regulatory environment that balances important air quality goals with regional economic considerations. To further this mission, the RFG regularly engages with air districts during rulemakings that affect coalition members.

BAAQMD Rules 9-4 and 9-6 mandate a transition to zero-emission furnaces and water heaters, effectively prohibiting the installation of appliances that use natural gas after specified dates.[1] The effect of BAAQMD Rules 9-4 and 9-6 is to ban natural gas furnaces and water heating appliances. BAAQMD staff recognized this during the rulemaking, stating that "because electric heat pump technology is the only currently available technology that emits zero NOx in alignment with the proposed rules, staff assumes for purposes of the analysis presented in this Report that if the proposed rules are adopted, consumers will replace natural gas-fired appliances with electric appliances upon rule implementation."[2] Because BAAQMD Rules 9-4 and 9-6 effectuate a ban on

[1] Other California air districts have recently adopted similar, unlawful rules. For example, the South Coast AQMD ("SCAQMD") recently adopted zero-emission requirements in Rule 1146.2, Emissions of Oxides of Nitrogen From Large Water Heaters and Small Boilers and Process Heaters. RFG submitted a comment letter to SCAQMD raising many concerns with the rule that are also applicable to BAAQMD Rules 9-4 and 9-6 (available at https://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/rule-1146-1146.1-and-1146.2/comment-letter-from-regulatory-flexibility-group.pdf?sfvrsn=6).

[2] *See* BAAQMD, Proposed Amendments to Rules 9-4 and 9-6 Final Staff Report (March 2023) p. 3, available at https://www.baaqmd.gov/~/media/dotgov/files/rules/reg-9-rule-4-nitrogen-oxides-from-fan-type-residential-central-

natural gas appliances, the rules are preempted by the Federal Energy Policy and Conservation Act ("EPCA"), and EPA must disapprove the rules.[3]

EPCA Preempts Regulations That Effectively Ban Natural Gas Appliances

The Energy Policy and Conservation Act ("EPCA") preempts any "State regulation concerning the . . . energy use . . . of [a] covered product."[4] EPCA defines "energy use" as "the quantity of energy directly consumed by a consumer product at point of use."[5] The Ninth Circuit recently interpreted EPCA preemption in the context of a City of Berkeley building code ordinance that banned installation of natural gas piping in new construction, invalidating the ordinance as preempted by EPCA.[6] Seeking to avoid EPCA preemption, the City of Berkeley argued that EPCA was inapplicable because it was not attempting to regulate appliances—the focus of EPCA.[7] The challengers, however, contended that Berkeley had effectively banned gas appliances from new residences.[8] The court agreed with the challengers, finding the ordinance preempted.[9]

While the case concerned the legality of Berkeley's ordinance and the application of EPCA preemption to building codes,[10] the court indicated that EPCA preemption also applies to a ban on natural gas appliances, such as water heaters and furnaces that are "covered products" under EPCA.[11] The Ninth Circuit emphasized that "EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings," and that "States and localities can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*."[12] In reaching the conclusion that EPCA preempted Berkeley's ordinance, the Ninth Circuit reasoned:

> "EPCA preempts regulations... that relate to 'the quantity of [natural gas] directly consumed by' certain consumer appliances at the place where those products are used. . . . EPCA is concerned with the end-user's ability to *use* installed covered products at their intended final destinations, like restaurants. After all, a building

---

furnaces/2021-amendments/documents/20230307_fsr_rules0904and0906-pdf.pdf?rev=100de6caff2342e6b095b59acf2321d0&sc_lang=en.

[3] On December 5, 2025, a lawsuit was filed challenging SCAQMD Rule 1146.2 as preempted by the EPCA. *See* Compl., *Rinnai America Corp. et al v. SCAQMD*, Case No. 2:24-cv-10482 (C.D. Cal.). The lawsuit raises the same legal concerns with local air districts adopting regulations that prohibit use of natural gas in certain appliances we raise in this letter.

[4] 42 U.S.C. § 6297(c).

[5] *Id*. § 6291(4).

[6] *California Restaurant Association v. City of Berkeley*, 89 F.4th 1094, 1098 (9th Cir. 2024).

[7] *Id.* at 1100.

[8] *Id.* at 1101.

[9] *Id.*

[10] *Id*.

[11] *See* 42 U.S.C. §§ 6292(a) (covered products include water heaters and furnaces). EPCA preemption also extends to certain industrial equipment. 42 U.S.C. § 6316(a). Covered industrial equipment includes various types of water heaters and warm air furnaces. *Id*., § 6311; *see also* 88 Fed. Reg. 69686 (Oct. 6, 2023) (establishing standards for commercial water heating equipment).

[12] *California Restaurant Association*, 89 F.4th at 1107 [emphasis original].

> code that prohibits consumers from using natural gas-powered appliances in newly constructed buildings necessarily regulates the 'quantity of energy directly consumed by [the appliances] at point of use.' . . . ***In other words, a regulation on 'energy use' fairly encompasses an ordinance that effectively eliminates the 'use' of an energy source***."[13]

As BAAQMD staff admits, compliance with Rules 9-4 and 9-6 will require consumers to replace natural gas units with electric units.[14] These rules therefore eliminate the use of an energy source (natural gas) for these EPCA-covered appliances. Per the Ninth Circuit's decision in *California Restaurant Association*, that inescapable reality subjects BAAQMD Rules 9-4 and 9-6 to EPCA preemption. "Put simply, by enacting EPCA, Congress ensured that the States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses."[15]

While we recognize the Ninth Circuit's acknowledgement that EPCA preemption is "not unlimited," such acknowledgement does not save BAAQMD Rules 9-4 and 9-6. Read in context, the Ninth Circuit was simply explaining that its holding is not that localities "must affirmatively make natural gas available everywhere."[16] The opinion was not narrowly confining the reach of the statute's preemption provision.[17] The concurring opinion likewise explained that EPCA would be "unlikely to reach a host of state and local regulations that incidentally impact 'the quantity of [natural gas] directly consumed by a [covered] product at point of use.'"[18] But the concurrence followed up with specific examples, namely taxing authority that might reduce natural gas consumption, regulation of natural gas distribution by the utility, or, relatedly, regulations affecting use of water and electricity (also covered by EPCA) in emergency situations.[19] These truly incidental efforts were not preempted because they were not instances where the government was seeking to ban natural gas equipment by leaving a property owner with no real choice.[20] EPCA therefore preempts BAAQMD Rules 9-4 and 9-6.

BAAQMD Rules 9-4 and 9-6 are Not EPCA-Exempted State or Local Regulatory Activities

When a statute contains a specific preemption provision, generic conflict-preemption analysis first yields to the contours and dictates established by the statute.[21] As the Supreme Court reiterated just last year, statutes imposing specific preemption schemes must receive careful attention and

---

[13] *Id*. at 1101–02 [emphasis added].

[14] BAAQMD, Final Staff Report, *supra*, note 2, at p. 3.

[15] *California Restaurant Association*, 89 F.4th at 1103.

[16] *Id*. at 1106.

[17] *See id.* at 1107 (calling the preemption provision "broad").

[18] *Id*. at 1117 (Baker, J., concurring) (alterations in original).

[19] *Id*. & n.9.

[20] *See id.* at 1119; *accord Bldg. Indus. Ass'n of Wash. V. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1152 (9th Cir. 2012) (recognizing that EPCA preemption occurs when a local regulation "created a situation in which the builder had no choice").

[21] *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (looking to the statute's preemption provision).

application.[22] State and local governments cannot glide past preemption concerns by simply claiming that Congress did not seek to occupy the field or that the regulation only indirectly impacts the matters Congress sought to regulate.

Any assertion that there is no conflict between Rules 9-4 and 9-6 and EPCA because any impact from the rules will be "incidental" sidesteps EPCA's preemption provision and Congress's express intent to demarcate state-and-local regulations that are or are not preempted.[23] In that provision, Congress expressly exempted a host of state-and-local regulatory activities from preemption, a number of which benefit California by name.[24] There is no provision in EPCA's preemption section that sanctions regulations like Rules 9-4 and 9-6, suggesting they likely discord with Congress's carefully devised scheme for exempting certain regulatory activities from preemption.

Even assuming that some construction of EPCA might support regulation like Rules 9-4 and 9-6, the rules' impact would still lead to a conflict with EPCA. As the Ninth Circuit has explained, even if a statute's saving clause or express-preemption provision does not directly bar the state's action, courts can still find a conflict through "the application of ordinary implied preemption principles."[25] Here, a conflict would occur because, once the relevant provisions of Rules 9-4 and 9-6 are phased in, they would operate as a ban on purchasing and using new natural gas equipment. This is a result EPCA forbids.[26]

EPA Cannot Approve BAAQMD Rules 9-4 and 9-6

Clean Air Act § 110(a)(2) bars EPA from approving the SIP revision. Specifically, BAAQMD has failed in its SIP submission to provide the necessary assurances that the Rules are not prohibited by "any provision of Federal … law."[27] Nor can BAAQMD provide such assurance, given the Rules are preempted by EPCA (as detailed above). Accordingly, the SIP revision fails as a matter of law and cannot be approved by EPA.

Further, given Rules 9-4 and 9-6 are preempted by EPCA, it would be arbitrary and capricious for EPA to approve the BAAQMD's SIP submission. Courts will overturn agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that

[22] *See Cantero v. Bank of Am., N. A.*, 602 U.S. 205, 216-17 (2024) (faulting the court of appeals for engaging in a more generalized preemption analysis rather than applying the specific analysis prescribed by the statute); *see also e.g., Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324-25 (1997) (applying ERISA's preemption provision).

[23] *See generally* 42 U.S.C. § 6297.

[24] *See id.* § 6297(c), (f).

[25] *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 731 (9th Cir. 2016); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-70 (2000) (finding a conflict despite a savings clause).

[26] *See California Restaurant Association*, 89 F.4th at 1107 (explaining that the court could not adopt a construction of the statute's "broad preemption provisions by [allowing localities to do] *indirectly* what Congress says they can't do *directly*").

[27] 42 USC § 7410(a)(2)(E).

exceed EPA's statutory jurisdiction.[28] Agency action:

> "is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[29]

Here, it is clear that BAAQMD Rules 9-4 and 9-6 are preempted by EPCA. If EPA were to approve the rules, such action would fail to consider an important aspect of the problem (namely that BAAQMD cannot adopt the rules in the first instance) and run counter to evidence before EPA. Accordingly, approval of the rules would constitute an arbitrary and capricious action.

Further, EPA's approval of BAAQMD Rules 9-4 and 9-6 would result in a federally enforceable regulation that conflicts with a federal statute. "A federal regulation in conflict with a federal statute is invalid as a matter of law."[30] Because BAAQMD Rules 9-4 and 9-6 conflict with and are preempted by EPCA, EPA cannot approve the rules.

Conclusion

BAAQMD Rules 9-4 and 9-6, along with SCAQMD Rule 1146.2 and others that are likely to follow, effectively ban natural gas appliances that are covered products under EPCA. EPCA therefore preempts BAAQMD Rules 9-4 and 9-6 and the EPA must disapprove the rules.

Best regards,

/s/ John C. Heintz

John C. Heintz
of LATHAM & WATKINS LLP

Cc: Allison Kawasaki, EPA Region IX
RFG Members
Nick Cox, Latham & Watkins LLP

---

[28] 42 U.S.C. §§ 7607(d)(9)(A), (C); *see Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012) (providing that the standard of review of CAA actions tracks standards provided in the APA); *North Dakota v. U.S. E.P.A.*, 730 F.3d 750, 758 (8th Cir. 2013) (providing the same).

[29] *See, e.g., Texas v. United States Env't Prot. Agency*, 829 F.3d 405, 425 (5th Cir. 2016) (quoting *Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012)) (citing *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir.1998)).

[30] *Watson v. Proctor (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998).

EXHIBIT B

CALIFORNIA
AIR RESOURCES BOARD

Gavin Newsom, Governor
Yana Garcia, CalEPA Secretary
Liane M. Randolph, Chair

March 10, 2025

Cheree Peterson
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105
Peterson.Cheree@epa.gov

Dear Acting Administrator Peterson:

The California Air Resources Board coordinated with the Bay Area Air Quality Management District (District) to identify Rule 9-4, *Nitrogen Oxides from Natural Gas-Fired Furnaces*, and Rule 9-6, *Nitrogen Oxides from Natural Gas-Fired Boilers and Water Heaters*, as adopted by the District on March 15, 2023 and submitted by the California Air Resources Board to the U.S. Environmental Protection Agency on January 10, 2024, as appropriate for withdrawal from consideration for inclusion in the California State Implementation Plan.

The U.S. Environmental Protection Agency has not taken final action on these rules, and the withdrawal of these rules from consideration for inclusion in the California State Implementation Plan does not impact the local enforceability. Therefore, as the agency designated under State law to revise the California State Implementation Plan, the California Air Resources Board now formally withdraws the aforementioned rule submittals from consideration for inclusion in the California State Implementation Plan.

If you have any questions, please contact Sylvia Vanderspek, Chief of the Air Quality Planning Branch at (916) 324-7163.

Sincerely,

Michael T. Benjamin, D. Env., Division Chief

cc: See next page.

cc: Philip Fine, Ph.D., Air Pollution Control Officer, Bay Area Air Quality Management District
pfine@baaqmd.gov

Gregory Nudd, Deputy Air Pollution Control Officer, Bay Area Air Quality Management District
gnudd@baaqmd.gov

Lisa Beckham, Chief, Control Measures Office, U.S. Environmental Protection Agency, Region 9
beckham.lisa@epa.gov

Sylvia Vanderspek, Branch Chief, Air Quality Planning & Science Division