

Response to Comments: Submittal of Regulation 9: Inorganic Gaseous Pollutants, Rule 4: Nitrogen Oxides from Natural Gas-Fired Furnaces (Rule 9-4) and Regulation 9: Inorganic Gaseous Pollutants, Rule 6: Nitrogen Oxides Emissions from Natural Gas-Fired Boilers and Water Heaters (Rule 9-6) to State Implementation Plan (SIP)

Introduction:

On March 15, 2023, the Air District adopted amendments to Rules 9-4 and 9-6 after notice and consideration of robust public comment. Rule 9-4 applies to the natural gas-fired space-heating furnaces commonly found in single-family homes, and Rule 9-6 applies to natural gas-fired water heaters commonly found in residential and commercial applications. Space and water-heating appliances generate a large portion of nitrogen oxide (NO_x) emissions from sources in the Bay Area. NO_x is formed during natural gas combustion when ambient nitrogen and oxygen combine at high temperatures. The amendments will substantially reduce NO_x emissions from these appliances and therefore secondary particulate matter formation. Rule 9-4 has been included in the SIP since 1986. The Air District plans to submit the current versions of Rules 9-4 and Rule 9-6 in their entirety (as amended on March 15, 2023) for inclusion in the SIP to reduce emissions of NO_x to attain and maintain the national ambient air quality standards promulgated by EPA, and proposed to be strengthened by EPA, to protect public health and the environment.

On April 5, 2023, Air District staff released a public notice that the Board of Directors of the Bay Area Air Quality Management District will conduct a public hearing on June 21, 2023 to consider the submission of the current versions of Rule 9-4 and Rule 9-6 to the United States Environmental Protection Agency and the California Air Resources Board for inclusion in the State Implementation Plan (SIP). No changes to Rules 9-4 and 9-6 will be proposed by staff at the public hearing on June 21, 2023. Comments regarding the substance of Rules 9-4 and 9-6 will not be considered by staff at this time.

Comments and Responses:

I. Support of Submittal

Comment Summary: Commenters support the submission of Rules 9-4 and 9-6 into the SIP in order to continue supporting state and regional attainment of the National Ambient Air Quality Standards and to support the public health benefits associated with the amendments to Rules 9-4 and 9-6.

Commenters: Gary Trott, RMI et al.

Response: Air District staff acknowledge and appreciate comments in support of the submission of Rules 9-4 and 9-6 into the State Implementation Plan.

II. General Comments on Past Rule Development Proposal

Comment Summary: Commenters express their opinion that SIP submittal should be delayed due to concerns regarding emissions associated with the rule amendments including costs to consumers, the need for panel upgrades, installation concerns in existing spaces, appliance availability and functionality, infrastructure readiness, potential replacement before useful end of life, emergency replacement scenarios and environmental impacts.

Commenters: Lara Conte, Terry Houlihan, Michael Kapolnek, Bradford White

Response: Staff note that no changes to the rule amendments that were adopted by the Board of Directors on March 15, 2023 are being considered at this time. The following response is provided as a courtesy to commenters. Information related to the above summarized comments is included in the Final Staff Report, Environmental Impact Report, and Response to Comments associated with the amendments to Rules 9-4 and 9-6 that can be found on the [District webpage](#).

With regards to embodied carbon emissions, Staff note that the amendments do not require the preemptive replacement of gas appliances before the end of their useful life, nor do they impact the ability to repair existing gas systems at any point in time. As evaluated in the EIR, there are not significant additional air quality or greenhouse gas impacts associated with amendments in existing construction.

With regards to cost, Staff understand that new data is constantly being generated with regards to cost. Newly available data will be evaluated by staff as well as the Implementation Working Group (IWG) and will be presented to the board at a public meeting as appropriate (and as required by the interim reporting provision of the adopted amendments).

III. IWG Data Collection

Comment Summary: Commenter asserts that the District must collect detailed housing data for the Bay Area in order to determine applicability of available technologies for compliance and timelines for implementation of the adopted rule amendments prior to submitting Rules 9-4 and 9-6 into the SIP.

Commenters: Michael Kapolnek

Response: Staff appreciate the detailing of information that may be useful to the development of materials and recommendations through the Implementation Working Group. As described in Response V, Staff anticipate flexibility to delay the implementation dates of Rules 9-4 and/or 9-6, if necessary, under the District's current federal Clean Air Act requirements. This information will be shared with working group members and considered by the group to determine the necessity and appropriateness of such data collection as it relates to rule implementation.

IV. IWG Membership

Comment Summary: Commenters express need for Implementation Working Group (IWG) representation of merit shop plumbing and HVAC contractors, wholesalers, hosts of contractor apprenticeship programs and other segments of the industry.

Commenters: Bradford White, CAPHCC

Response: Staff note that this comment is unrelated to the submittal of Rules 9-4 and 9-6 to the SIP and is providing further response as a courtesy. Staff appreciate the comments and suggestions for IWG membership. The IWG currently includes multiple contractor associations and local unions. Staff are considering the suggestions that were provided and discussing appropriate representation for this segment, including with CAPHCC.

V. Need for Board Flexibility

Comment Summary: Commenters express concern for the ability of the Board of Directors to delay implementation of Rules 9-4 and 9-6 or otherwise modify the rules if they are submitted to the SIP due to requirements that delayed or reduced emissions reductions included in the SIP must be offset by other emissions reductions. Commenters cite discussions at the March 15, 2023 rule adoption hearing in which the desire for flexibility and consideration of input from the Implementation Working Group were highlighted.

Commenters: Michael Kapolnek, Bradford White

Response: As the decision making body of the Air District, the Board of Directors has the authority to direct staff to propose changes to adopted rules at any time. The interim reporting process included in Sections 9-4-405 and 9-6-404 of Rules 9-4 and 9-6 allows for the Board of Directors and the public to be informed of relevant updates to possible hurdles to implementation and will be informed by information gathered through the Implementation Working Group. The purpose of the Implementation Working Group is to bring together stakeholders to find solutions to equitable implementation of the amendments to Rules 9-4 and 9-6 that were adopted on March 15, 2023, including the compliance timelines therein.

Should the Board of Directors determine that changes should be made to Rules 9-4 and 9-6 as a result of the information brought forth through the Implementation Working Group, interim reporting process, or for any other reason, Air District staff would work with EPA to ensure that any changes to the Rules are approvable. Staff anticipate flexibility to delay the implementation dates of Rules 9-4 and/or 9-6, if necessary, under the District's current federal Clean Air Act obligations.

Staff agree that the District must consider further NO_x and particulate matter reductions, whether or not implementation delays are needed for Rules 9-4 and/or 9-6. The Air District currently does not attain all California and federal ambient air quality standards and must consider all reductions that are achievable.

The District anticipates drafting a particulate matter attainment plan in response to expected rulemaking from EPA lowering the fine particulate matter NAAQS. Staff expect that the timeline for preparation of a new particulate matter plan will coincide with the Board's consideration of the Rules 9-4 and 9-6 interim reports, allowing the District to account and plan for any delay in implementation of Rules 9-4 and/or 9-6 if necessary. The District will take into account any applicable information from the Implementation Working Group and the Board of Directors available at that time to ensure that potential rule amendments are considered with appropriate rule development lead time and will not be in conflict with the federal Clean Air Act.

VI. Recent Ninth Circuit Decision

Comment Summary: Commenter requests that the District reconsider submission of Rules 9-4 and 9-6 to the SIP in light of April 17, 2023 decision of the Ninth Circuit Court of Appeals in *California Restaurant Association v. City of Berkeley*.

Commenters: Terry Houlihan

Response: District staff appreciate the comment. The commenter opines that the Air District's amendments to Rules 9-4 and 9-6 are preempted by federal law, and cites a recent decision by the Ninth Circuit Court of Appeals in *California Restaurant Association v. City of Berkeley*. The commenter states that the case against the District's amendments is even more obvious than the case against Berkeley's law because water heaters and furnaces are explicitly listed as covered products subject to preemption in the Energy Policy and Conservation Act. District staff respectfully disagrees.

The federal Energy Policy and Conservation Act (known as "EPCA") prohibits states and local governments from adopting any "regulation concerning the energy efficiency, energy use, or water use" for certain appliances, including the types of furnaces and water heaters regulated under Rules 9-4 and 9-6. (42 U.S.C. § 6297(c).) On April 17, 2023, a 3-judge panel on the Ninth Circuit struck down Berkeley's natural gas ban in new construction ordinance as preempted by EPCA. The panel found that EPCA preempts a local building code that prevents the use of natural gas appliances covered by EPCA as such a code concerns the "energy use" of these appliances. In banning natural gas in new buildings, the panel found that Berkeley improperly regulated natural gas appliances within those buildings.

First, Staff note that the City of Berkeley has sought en banc reconsideration of the April 2023 panel decision. The City explains that the 3-judge panel's decision represents a "grievous misinterpretation of EPCA" that departs from the Ninth Circuit's statutory construction precedents. The panel vastly expanded the proper reach of EPCA's preemption provision, which Congress meant to apply to limit only local energy conservation standards for covered products. The 3-judge panel's decision may not stand upon scrutiny by the Ninth Circuit.

Regardless, the *Berkeley* case does not address whether the District's Building Appliance Rules are preempted. Whereas the panel in *Berkeley* considered an explicit ban on natural gas use in new buildings, the District's Rules do not ban natural gas appliances or otherwise regulate the amount of natural gas or energy used by appliances. Rather, the Rules regulate the oxides of nitrogen ("NOx") emissions of appliances, and are agnostic regarding the amount of energy used by those appliances. The Rules allow for appliances that use any amount of natural gas, so long as upon operation the appliances do not emit NOx. EPCA is not concerned with regulations that limit NOx emissions.

As Judge Baker explained in his concurrence in the *Berkeley* decision, EPCA preemption is "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." While the District's Rules may arguably have the potential to lead to some indirect impact on the amount of energy used by appliances depending on how any number of factors play out before the Rules are implemented, including how appliances are designed to control NOx emissions, any such potential impact would be

ancillary to the purpose of the Rules in improving air quality. Thus under Judge Baker's analysis, even if the Air District's Rules can be characterized as having an incidental impact on the quantity of natural gas used by covered appliances, because the Rules do not directly regulate the energy use of appliances, they withstand scrutiny under EPCA.