GOLDEN GATE UNIVERSITY
SCHOOL OF LAW
ENVIRONMENTAL LAW AND JUSTICE CLINIC

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By Email

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Re: Comments on Proposed Amendments to Rule 2

Dear Mr. Tang and the Bay Area Air Quality Management District:

The Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments on behalf of:

- First Generation Environmental Health & Economic Development
- Communities for a Better Environment
- West Oakland Environmental Indicators Project
- Greenaction for Health and Environmental Justice
- The Environmental Justice Committee of the National Lawyers Guild's San Francisco Chapter
- Dr. Raymond J. Tompkins
- All Positives Possible

We appreciate the opportunity to submit these comments on the Bay Area Air Quality Management District's (District) proposed amendments to Rule 2. We believe the presently proposed amendments improve protections for overburdened communities in certain respects. But the District has failed to address many of the concerns previously expressed by commenters who live in the Bay Area's overburdened communities. Accordingly, we respectfully request that the District amend Rule 2 to address the Bay Area's frontline communities' concerns as set forth below.[1]

I. The District Should Eliminate Rule 2's Exemptions for Polluting Industries and Equipment.

The District should revise its rules to eliminate permitting exemptions for sources that negatively impact overburdened communities. Rule 2 exempts numerous sources that emit

[1] We incorporate our previous comments submitted on May 28, 2021 herein by reference.

significant amounts of particulate matter and other toxic pollutants. *See* Rule 2-1, Section 115. These permitting exemptions facilitate the release of harmful toxins into already burdened communities by allowing unregulated, often unabated sources, to continue operation.

For example, the District's rules exempt metal finishing and plating operations that emit highly toxic metals such as hexavalent chromium. Rule 2-1, Section 127.3. This exemption appears to be contrary to the federal Clean Air Act's requirements for the metal finishing industry. *See* 40 C.F.R. § 63, Subpart XXXXXX. In addition, Rule 2 exempts concrete facilities that process up to 5,000 tons of materials per year. *See* Rule 2-1, Section 115.1, subd. (1.2). Under this particular exemption, Argent Materials Inc. in East Oakland has been allowed to continue its concrete crushing operations despite emitting over thirty-three pounds of PM10 into Oakland's air every day. *See* Argent Materials Application 29851 for Stockpiles (June 2019).

Another exemption that has harmed East Oakland residents is Rule 2-1, Section 112.1. That exemption allowed the pipe casting machines at AB&I Foundry to operate for decades unabated and without a permit. The District's own draft Health Risk Assessment for AB&I shows that the pipe casting machines are the primary source of hexavalent chromium from the facility, which in turn is responsible for 81% of the total cancer risk from the facility.[2]

These exemptions threaten public health in overburdened communities. Thus, the District should close Rule 2's permitting loopholes for these significant sources of pollution.

II. The Proposal to Expand Exemptions for Small Engines Are Contrary to the Purpose of Enhancing Protections for Overburdened Communities and Should Be Rejected

The proposed changes to Rule 2-1-114 would unacceptably expand the existing exemptions for small engines. This provision would not only relocate the existing exemption for small internal combustion engines (deleted Rule 2-5-113) but would also expand on current exemptions to include small boilers and combustion equipment (Rule 2-1-114.1.2) and portable engines (Rule 2-1-114.2.3). These exemptions are contrary to the purpose of enhancing protections for overburdened communities and should be rejected.

While the explanation of proposed changes to Rule 2-1-114 admits that small engines may exceed trigger levels for toxic air contaminants (such as toxic particulate from diesel engines), the Staff Report nevertheless concludes that these pollution sources "are not expected to present any significant health risk." Staff Report at 27-28, 41. This conclusion is unsupported. It also contradicts the Staff Report's key finding that overburdened communities require special consideration because they already face disproportionate exposure to health risks. Staff Report at 14-17. Expanding exemptions for small burners and engines will allow increased

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[2] Bhagavan Krishnaswamy & Robert Hull, Bay Area Air Quality Management District, "Draft Facility-Wide Health; *see also* Risk Assessment Facility # A0062 AB&I Foundry at 4 (Apr. 2021), https://www.baaqmd.gov/~/media/files/ab617-community-health/facility-risk-reduction/hra-facilities/fid_a0062/draft-hra-abi-foundry-p62-april_2021_approvedpdf.pdf?la=en.

emissions from these sources to go unregulated even though this will add to overall pollution burdens and corresponding health risks.

The Staff Report purports to justify this change to conserve staff resources for projects posing greater health risk but fails to provide any analysis of how many hours will be saved and at what cost in terms of increased pollution. There is also no discussion or analysis of the option of limiting exemptions for projects located within overburdened communities, which would correspond to the proposed changes for enhanced notice and more stringent cancer protections and toxic air contaminant (TAC) triggers.

The Staff Report also notes that the Districtc had previously required health risk assessments to verify exemptions under Rule 2-1-316 but then eliminated this requirement with respect to small engines in 2016 by adding Rule 2-5-113. Staff Report at 27-28. It did so despite finding that some small diesel engines typically exceed the TAC trigger levels for particulate matter. Staff Report at 27-28. Notably, the 2016 Staff Report explaining this rule change also notes that OEHHA recommends low cancer risk thresholds because "higher exposure over a short period of time may pose a greater risk than the same total exposure spread over a much longer period of time."[3] 2016 Staff Report at 15. These findings weigh in favor of eliminating exemptions for small and portable equipment, not expanding them.

In addition, the 2016 Staff Report offered just two reasons for adding the small engine exemption at 2-5-113: (1) agency preference concerning how to use staff hours ("The Air District prefers to focus staff resources on more significant sources of TAC emissions"); and (2) consistency with the state exemption for small engines from Air Toxic Control Measures (ATCMs), reflected in local Rule 09-08. 2016 Staff Report at 20.[4] Thus, in effect, this was a staffing decision justified by the state's exemption and did not examine the possible impact on overburdened communities. Even then the District acknowledged that emissions from small engines could exceed TAC trigger levels (such as diesel particulate) but nevertheless created the exemption because "[t]his could result in many small engines triggering HRA requirements to verify permit exemption applicability." 2016 Staff Report at 20. The current revisions to Rule 2-1-114 mirror this reasoning but fail to reconcile expanding exemptions with the present purpose of increasing protections for overburdened communities. As such, the analysis is deficient and contradicts the purpose of the proposed rules.

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[3] *See* BAAQMD, Staff Report, Proposed Amendments To: BAAQMD Regulation 2, Rule 5: New Source Review Of Toxic Air Contaminants (Sept. 2016), http://www.baaqmd.gov/~/media/files/planning-and-research/public-hearings/2016/reg-2-rule-5/0205_sr_102516-pdf.pdf.

[4] The current ATCMs exempt stationary compression engines and portable engines under 50bhp. *See* CARB, Final Regulation Order, Airborne Toxic Control Measure for Diesel Particulate Matter from Portable Engines Rated at 50 Horsepower and Greater (Nov. 30, 2018), https://ww2.arb.ca.gov/resources/documents/airborne-toxic-control-measures.

It is also notable that the lookback analysis discussed in Section VI of the Staff Report indicates that standby diesel engines were the most frequent type of application that would have exceeded the proposed cancer risk level of six-in-one million. Staff Report at 43. As the Report acknowledges, "diesel engines make up the largest share of applications that have cancer risk." SR at 44. While no details are provided as to the size of these engines, this nevertheless underscores the substantial health risks associated with diesel engines. An exemption for a modest number of small diesel engines could have an impact similar to a few larger engines and increase the cancer risk to overburdened communities. At a minimum, these exemptions should not be allowed within overburdened communities. For these reasons, the proposed revisions to Rule 2-1-114 should be rejected.

III. The 1,000 Foot Trigger for Notice and Health Risk Assessments Should Be Increased to 2,000 Feet.

The District should increase the 1,000 foot threshold in the definition of "Overburdened Communities" (Rule 2-1, Section 243) and for permit notification purposes (Rule, 2-1, Section 412) to 2,000 feet. The 1,000 foot trigger is arbitrary and not protective of public health.[5] For instance, the District acknowledges that a buffer distance of 1,000 feet may only reduce the impact of diesel particulate matter pollution by 56% for some sources. *See* Staff Report at 29. This is not sufficient to protect public health in overburdened communities given the highly toxic nature of diesel particulate matter. Thus, the 1,000 foot threshold should be increased to a minimum of 2,000 feet under Rule 2-1, Sections 243 and 412.

IV. Rule 2's Exemption for Permitting Decisions from CEQA Should Be Eliminated.

As we previously informed the District, Rule 2 does not comply with the California Environmental Quality Act. *See* May 28, 2021 Comments at 3. The current rules exempt nearly all of the District's permitting decisions from CEQA review on the ground that permit approvals are ministerial—as opposed to discretionary—decisions. *See* Rule 2-1, Section 311. However, the District's decisions to grant permits to facilities—particularly facilities located in overburdened communities—involve significant discretion and judgment concerning air pollution controls. The California Supreme Court's recent decision in *Protecting Our Water & Env't Res. v. Cty. of Stanislaus* (2020) 10 Cal. 5th 479, confirms that permitting decisions that allow agencies to determine appropriate mitigation of environmental impacts cannot be categorically classified as ministerial. Thus, Rule 2, Section 311 should be deleted, and Section 310 should be revised to omit the reference to Section 311.

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[5] Notably, the analysis and values provided for PMI and impact reduction at 1000 feet do not identify the methodology used; for example, it is unclear whether the measurements reflect averages taken over diverse seasons or times of day. There is also no information as to how the locations were selected, or whether distances were corrected for average wind speed and direction, or other weather conditions at the locations in question. *See* Staff Report at 28-29.

V. The Public Notice Requirement for New or Modified Facilities in Overburdened Communities Should Be Expanded.

The public notice requirement for new or modified facilities located in overburdened communities should be expanded. The District proposes to amend Rule 2-1, Section 412 to require notice of new permitting actions for facilities in overburdened communities. But the notice will be provided only when a project requires a health risk assessment. The notice requirement should not be limited to projects that trigger a health risk assessment. Overburdened communities are impacted not only by facilities that emit TACs but also by criteria pollutants including particulate matter. Indeed, the District acknowledges that "particulate matter is the most important health risk driver in Bay Area air quality, and that there is no known threshold for harmful health effects from particulate matter in the form of PM2.5." Staff Report at 12. Accordingly, all new projects that will increase emissions of criteria or TACs in overburdened communities should be subject to public notice. Thus, Rule 2-1, Section 412 should omit the reference to health risk assessments as a trigger for the public notice requirement.

VI. Rule 2 Should Be Revised to Improve the District's Transparency, Incorporate Environmental Justice Concerns in the Permitting Process, and Increase Enforcement Efforts.

The Staff Report acknowledges that community stakeholders have called on the District to increase transparency and states that proposed changes to the notice requirements to include notice to overburdened communities are intended to address this. Staff Report at 26-27. However, the notice provisions alone do not address broader community concerns for transparency and environmental justice in agency decision-making with respect to permit approvals, conditions, and enforcement.

The District must actively work to remedy the regulatory culture that lead to the District's failure to improve air quality in overburdened communities for many decades. To this end, we recommend that the District revise Rule 2 to incorporate an equity checklist in all permitting decisions.[6] We similarly recommend that health impacts assessments be part of the District's permitting process.[7] Another important resource for incorporating environmental justice in regulatory decisions is the Unites States EPA's *Technical Guidance for Assessing Environmental*

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[6] *See, e.g.,* Oakland Climate Action, Equity Checklist for the Priority Conservation Areas Section Process, available at http://oaklandclimateaction.org/wp-content/uploads/2015/06/Equity-Checklist_6_19_15.pdf.

[7] *See, e.g.,* Pew, HIAs and Other Resources to Advance Health-Informed Decisions: A toolkit to promote healthier communities through cross-sector collaboration (April 2018), available at https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2015/hia-map?sortBy=relevance&sortOrder=asc&page=1.

Justice in Regulatory Analysis.[8] We believe the District should hold an orientation workshop on EPA's Guidance and consider how the concepts related to permitting could be included as the District's policy. We believe these tools are necessary to ensure that equity, environmental justice, and community health are considered in every permit decision.

In addition, as noted above, the proposed amendments do not eliminate Rule 2's CEQA exemptions, which allow the District to avoid engaging the public in an open and transparent environmental review process when issuing permits to polluting sources that contribute to cumulative health risks. The proposed amendments also fail to address transparency with respect to the following:

- Selective and delayed enforcement
- Exemptions for polluting industries
- Determination of permit conditions and mitigation measures
- Failure to respond to public comments
- Failure to notify interested parties of comment periods and public meetings

Further, with respect to expanded notice, the proposed rule states that "applicants . . . will be required" to give notice (Staff Report at 32) – which raises questions as to whether the District intends to rely on applicants to provide notice, when the agency would be in a better position to track this and guarantee that the requirement is met. It is also unclear how this requirement would be enforced, or what happens if a project proponent fails to give adequate notice. Later, in discussing the impacts of the proposed amendments, the Staff Report suggests that the District will in fact charge a fee and process the notice requirements itself. The proposed amendment should be stated more clearly to avoid ambiguity.

Thus, while requiring notice of proposed projects in overburdened communities is an improvement, this will do little to increase transparency of BAAQMD decisions concerning approvals, enforcement, exemption findings, failure to respond to comments, failure to notify, and other issues raised by stakeholders and their advocates.

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[8] *Available at* https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis.

We look forward to the District's response to these comments.

Respectfully,

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