

***Bayview Hunters Point Mothers and Fathers Committee
First Generation Environmental Health & Economic Developments
Greenaction for Health and Environmental Justice***

June 17, 2021

By Email

Permit Ombudsman
Bay Area Air Quality Management District
375 Beale Street, Suite 600
San Francisco, CA 94105
PermitOmbudsman@baaqmd.gov

Re: Evaluation of Application #28001, Plant #17111 CEMEX Construction Materials, Application #28839, Plant #13407 Hanson Aggregates, and Application #27982, Plant #23564 Hanson Aggregates

The Bayview Hunters Point Mothers and Fathers Committee (“BVHPMFC”), First Generation Environmental Health and Economic Developments, and Greenaction for Health and Environmental Justice (“Greenaction”) jointly submit these comments to express our opposition to the proposed permits regarding the above referenced permit applications for the facilities operating at Piers 92 and 94 in San Francisco, which are currently under evaluation by the Bay Area Air Quality Management District.

We also formally object to BAAQMD’s violations of the requirement to conduct a legitimate permit process where decisions are not pre-determined and where comment from all members of the public are welcomed.

We are concerned about the lack of regulatory oversight of these facilities for years and your intention to issue permits to these polluting facilities, actions which demonstrate a disregard for the health of the Bayview Hunters Point community. We also are concerned about the general lack of procedural justice throughout the evaluation process.

We demand that the District **deny the permits in order to protect public health, and demonstrate and comply with the District’s claims of valuing environmental justice including meaningful civic engagement.**

I. Introduction

The Bayview Hunters Point Mothers and Fathers Committee is a neighborhood-wide, grassroots community organization composed entirely of residents working to protect and improve the well-being of their community in campaigns for environmental health and justice.

First Generation Environmental Health & Economic Developments (“First Generation EHED”) is a 501(c)(3) nonprofit that comes from the depth and soil of the Bayview Hunters Point community. First Generation EHED’s focus is on the people in the Bayview Hunters Point Community and the disadvantaged communities surrounding the Bay Area. The organization assists low-income communities of color when it comes to environmental injustice and health. First Generation EHED’s mission is to empower the people and to support their fight against environmental, economic and health injustices, including to engage directly with governmental agencies to reform unfair policies impacting frontline communities.

Greenaction is a multi-racial grassroots organization based in San Francisco with many members, constituents, and staff who live in Bayview Hunters Point and are directly impacted by the air pollution and other environmental and health burdens of these facilities.

Bayview Hunters Point (“BHVP”) is a low-income and working class community of color, located along the San Francisco Bay in southeast San Francisco. The residents and environment of BVHP are disproportionately impacted by many stationary and mobile pollution sources, including radioactive and toxic contamination at the Hunters Point Naval Shipyard Superfund site and dozens of other contaminated sites along the waterfront and throughout the community. Other pollution sources include the Southeast Sewage Treatment plant, under-regulated and unregulated dirty industries, diesel freight transport, the Port of San Francisco, and two freeways. BVHP residents are also at risk from climate change, especially rising sea levels that threaten to inundate parts of the neighborhood including the toxic and radioactive contaminated waterfront. Local, regional and state government agencies all acknowledge that BVHP residents suffer high rates of certain illnesses, suffer a disproportionate burden of pollution, and are highly vulnerable to pollution. BAAQMD has designated Southeast San Francisco as a CARE Community.

We appreciate that the Bay Area Air Quality Management District (“BAAQMD”) has finally taken a step in acknowledging the lack of considerations for these burdens by forming the Committee for Health, Equity and Justice (“CEHJ”). Agencies should be in service of the community; however, the Air District is only now taking incremental steps toward equity, health and justice through the formation of the CEHJ committee and proposing to include community advisors. While these are important efforts, they do not provide true remediation for the community members who have lost loved ones to the ongoing polluted conditions in their areas of residence. Having this Committee will be meaningless and merely public relations if the Air District keeps rubber-stamping permits for polluters, fails to enforce regulations and permit conditions, and holds permit processes where decisions are pre-determined as happened with these facilities. Allowing polluters to operate without proper permit processes and without proper

permits for years is environmental racism, and violates BAAQMD’s regulatory mandate to protect air quality and public health.

After BVHP residents and their community and environmental justice organizations pressed for months for meaningful community input and transparency in the evaluation of these above-referenced facilities, the Air District finally agreed to provide a comment period and to hold a virtual public workshop (the “Workshop”) “to present, discuss, and receive comments on Cemex Construction Materials Pacific, LLC, Hanson Aggregates Mid-Pacific, Inc. and other Bayview Hunters Point facilities located along Amador Street in Eastern San Francisco” on June 3. ([BAAQMD website](#)). Although BAAQMD finally agreed to hold a public comment period and workshop to take public comment, BAAQMD had already publicly and improperly stated its intention to issue permits. At the April meeting of the Bayview Hunters Point Environmental Justice Response Task Force, BAAQMD’s representative stated that the permits would be issued. At the June 3rd workshop, BAAQMD staff also stated that permits would be issued – even though public comment was still being taken.

II. BAAQMD permitting process does not adequately address cumulative impacts or potential harms and undermines the health of residents.

A. A Cumulative Impact Analysis is necessary to ensure the health of Bayview Hunters Point Residents.

The District has the authority to directly reduce air pollution from stationary sources and is charged with protecting public health, which includes the health of all residents in the Bay Area. Yet while the facilities contribute to the poor and unhealthy air quality in Bayview Hunters Point, BAAQMD does not consider the reality of cumulative impacts. BAAQMD must take into consideration cumulative impacts, including information from CalEnviroScreen in their permit decision. The Golden Gate Environmental Justice Clinic addressed that cumulative impacts analysis should be required by the BAAQMD (See section I of 5/28/21 letter). Additionally, community members have previously attempted to work with BAAQMD leadership and staff to address cumulative impacts, but the District never moved forward on their commitment.

The District’s own regulations require Cumulative Impact Summary for Priority Communities in which “The APCO shall publish and periodically update a cumulative impact summary report that describes the cumulative impacts of toxicity weighted emission increases and reductions in each priority community occurring after January 1, 2010.” (Regulation 2-5-405) As a priority community under AB 617, this summary report must be conducted at Bayview Hunters Point.

BAAQMD Regulations also require facilities to conduct area monitoring data examination as well as monthly summaries. (San Francisco Bay Area Air Quality Management

District (BAAQMD) Compiled Rules and Regulations: [General Provisions and Definitions](#)) See below:

Area Monitoring Data Examination: At **intervals of no greater than seven days**, data recorded by the instruments required pursuant to Section 1-510 **shall be examined** by the persons responsible for the instruments to determine compliance with District Regulations. (Regulation 1-540)

Monthly Summary: The person responsible for emissions being monitored pursuant to Section 1-510 shall provide in such form as prescribed by the APCO a **summary of data obtained during each calendar month**, as specified in the Manual of Procedures. (Regulation 1-544)

We expect these regulations are protective measures against ongoing possible issues. However, at the Workshop, what we didn't see was the *missing* data, from 2016 when violations were given to the facilities, and before then when they were illegally operating. BAAQMD has previously acknowledged retrospective analysis in their procedures, and must do so now. (See BAAQMD [publication](#) *Improving Air Quality & Health in Bay Area Communities: Community Air Risk Evaluation Program Retrospective & Path Forward (2004-2013)*) BAAQMD must account for the years of unpermitted operations, and in the meantime, given the violations deny the permits. There cannot be true measurement of the effects unless all of the years of violations are measured and reported to the community, nor can there be health equity or justice without active-- not just mitigation-- but active reduction and reparation for the community.

Further still, these health risks are exacerbated by the lack of adequate access to quality healthcare due to an overrepresentation of low-income households in the area, which became all the more apparent due to the COVID-19 pandemic. Studies show that long-term exposure to air pollution is correlated with adverse COVID-19 health outcomes¹. Given the added health considerations of coronavirus, a respiratory disease, BAAQMD's website is notably lacking in permitting guidance content that other air quality districts provided during the pandemic.²

BAAQMD must consider the impacts on health from COVID-19 as part of this evaluation process, as residents of Bayview Hunters Point were confined into areas with heightened pollution, susceptible to higher health risks, and indeed suffered higher infection rates

¹ Wu, X., Nethery, R. C., Sabath, M. B., Braun, D. and Dominici, F., 2020. [Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis. Science advances, 6\(45\), p.eabd4049.](#)

² See South Coast AQMD, COVID-19 Updates, <http://www.aqmd.gov/covid-19>.

than other areas of the region³. Rather than addressing the heightened responsibility and emphasis toward respiratory protection that the COVID-19 pandemic highlighted, BAAQMD proposes to issue permits that would violate its commitment to protect community health.

Multiple residents spoke at the Workshop as well as earlier in the day of June 3 at the CEHJ meeting about the family members they have lost due to the environmental concerns in Bayview Hunters Point. The continued re-traumatization of having community members speak on these horrific events that are, at worst, exacerbated by and, at least, ignored by the District itself is unconscionable.

A cumulative impact analysis must also include the significant harmful, ongoing and localized air pollution that the City’s own EIR concluded would result from the recently approved India Basin Mixed Use Project. BAAQMD not only expressed support for this project despite the EIR’s findings, but has failed to work with other agencies to try to identify ways to reduce the expected air pollution from that project.

BAAQMD must account for the combined effect of past, present, and reasonably foreseeable future projects or activities by conducting a cumulative impact analysis.

B. The permitting process involves improper health risk assessment which could have regional effects.

The District formerly proposed updates to its HRA Guidelines to incorporate the 2015 OEHHA guidelines for gasoline dispensing facilities. BAAQMD should not grant permits for facilities without accounting for the foreseeable health impacts through renewed Health Risk Assessment (HRA) Guidelines. BAAQMD’s CEQA Guidelines state that “In impacted communities identified under BAAQMD’s CARE program, lead agencies are encouraged to develop and adopt a plan based approach to evaluating and addressing risk and hazards.”⁴ This plan based approach must give the community a structural role in evaluating and addressing risk.

At the Workshop the engineer stated that CEMEX was found to be lower health risk and did not trigger HRA, and that they had implemented strict limits on materials and enhanced record-keeping. However, the above considerations of cumulative impacts beg the question of, where is the previous record-keeping? And how will CEMEX account for violations?

³ This S.F. neighborhood saw 10 times more coronavirus cases than one nearby it <https://www.sfchronicle.com/local/article/This-San-Francisco-neighborhood-saw-10x-more-16102296.php>

⁴ BAAQMD, CEQA Guidelines, https://www.baaqmd.gov/~media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines_final_may-2012.pdf.

Health impacts of pollutants have been well-documented both in comments from the public, news media outlets, and scientific study.⁵ However, as noted by community members at the Workshop, there are measurement considerations (e.g. visibility, claiming localized issue), and additional contaminants that BAAQMD’s Heath Risk Assessment did not take into account besides sand. As these decisions on assessing risk affect residents in all of the Bay Area, including and extending beyond Bayview Hunters Point, a pattern of selectivity in assessment that does not account for all of the potential health risks involved threatens the air quality of the entire region. As the Golden Gate University clinic reported in 2017, similarly unpermitted decisions have impacted facilities in Berkeley, Oakland, and Union City. This assessment process must be addressed before the District wrongfully approves more permits partnering with companies that allow continued air pollution in an already overburdened community.

A Toxic Air Contaminant (TAC) is “[a]n air pollutant that may cause or contribute to an increase in mortality or in serious illness or that may pose a present or potential hazard to human health.”⁶ The HRA conducted for the Hanson facilities state that for the Toxic air contaminants, Respirable crystalline silica is the “only contaminant in the analysis”. Advocates are concerned about the reference points of what is safe versus contaminated, and the District’s current rules exempt numerous sources that emit significant amounts of particulate matter and other pollutants. These exemptions should be removed.

As suggested by comments from May 28, 2021 by the Golden Gate EJ Clinic and Communities for a Better Environment, the community must provide feedback on locations for HRAs conducted in CARE communities prior to permitting decisions. Indeed, BAAQMD identifies Bayview-Hunters Point as a CARE Community, which is defined as a community that experiences higher pollution levels than others. In pursuit of true equity and justice, CARE community designation should be more than a performative or nominal title. BAAQMD should uphold commitments to CARE communities by involving them in the risk assessment process. Relatedly, AB 617 “requires community-focused action to reduce air pollution and improve public health in the State’s most impacted communities” with a goal to “strengthen the partnership between communities and agencies to better characterize the air quality, identify key emission sources, and take action to reduce emissions.”⁷

⁵ See also [Health effects for the population living near a cement plant: An epidemiological assessment \(can add to folder\); Cement plant emissions and health effects in the general population: a systematic review; It’s hard to breathe with a concrete plant in your backyard.](#)

⁶ BAAQMD, New source review of toxic air contaminants, https://www.baaqmd.gov/~media/dotgov/files/rules/reg-2-rule-5-new-source-review-of-toxic-air-contaminants/documents/rg0205_120716-pdf.pdf?la=en

⁷ AB 617 Community Air Grants, Summary of Proposed Projects, https://ww2.arb.ca.gov/sites/default/files/2018-05/Proposed%20Awardees%20Summaries_8.pdf.

The permitting process should incorporate cumulative impacts of polluting facilities in the area over time as well as community input to determine whether a facility located in a CARE community poses a health risk or cumulatively contributes to a health risk. Other pollution, health and socio-economic indicators must be considered in such an evaluation.

III. BAAQMD committed procedural injustices in their processes that violate the agency's internal policies and community participation.

A. BAAQMD improperly intends to renew permits that expand operations for three facilities against their own guidance and regulations and without public notice and comment.

BAAQMD's permitting procedure has not conformed with their own regulations approved by the EPA. The District's regulations detail:

Continuous Emission Monitoring and Recordkeeping Procedures: Persons responsible for installing continuous emission monitors pursuant to District regulations shall comply with the following: 522.1 Plans and specifications for monitoring selection and placement **shall be submitted to the APCO for prior approval.**⁸

What is not clear is what the metrics are for addressing the missing data examination for the duration of years the BAAQMD allowed the facilities to operate without complying with these regulations, nor the consequences for not doing so.

The Golden Gate EJ Clinic addressed that rules should require public notice and a public comment period for any facility that proposes to increase air emissions in a CARE community. (Golden Gate comments 5/28/21). Predetermined outcomes, such as when staff stated BAAQMD *will* issue permits at the April Task Force meeting are not only unjust, but violate the regulations prescribed to BAAQMD's process.

Yet again, should the District approve the permits, it would add to discriminatory and improper actions regarding the concrete plants only be the latest of its violations of environmental justice and civil rights in Bayview Hunters Point. While the District claimed that these particular permits don't legally require notice and comment-- however that is not correct. Over a decade ago BAAQMD – led by Air Pollution Control Officer Jack Broadbent – reached agreement with environmental justice and community groups to provide public comment periods on all draft permit decisions. In fact, the air district website states:

⁸ BAAQMD, Regulation 1-522.

“The Air District informs the public about certain projects, facilities, and permits that are under review by issuing a public notice... The Air District takes comments received by the public into account in making final decisions and responds back to all commenters.”⁹

The continuity of procedural injustice undermines the review process and public trust in the agency. The post-hoc decision to conduct a virtual workshop was insufficient to remedy BAAQMD’s initial oversight with regard to notice and public comment, especially given the fact that the workshop’s scope was broadened to include “other Bayview Point facilities” than the plant permits at issue. The District informed the public at the Workshop that they will be increasing inspections at the facilities in order to address compliance. This is a performative gesture that does not address the retroactive harms, nor does it clarify for the community what the inspectors will do, what the report back will change, what, if anything, will trigger reduction in pollution to account for the years of unpermitted emissions of the facilities (e.g., Recology being allowed to undertake a visible PM-generating crushing operation since 2009), or how the District will be addressing the violations of their own regulations.

Therefore, BAAQMD must reaffirm to the public that public comment is welcome on all draft permit decisions, and that permitting rules should be revised to ensure that robust efforts are made to provide notice to community members potentially affected by proposed sources and proposed modifications to sources that increase emissions.

B. BAAQMD does not appropriately address violations of the permitting process.

The permitting process includes violation notices which are insufficient to remedy environmental and health injustices committed by polluting facilities:

Violation Notice: A notice of violation or citation shall be issued by the District for all violations of District regulations and shall be delivered to persons alleged to be in violation of District regulations. The notice shall identify the nature of the violation, the rule or regulation violated, and the date or dates on which said violation occurred.¹⁰ (Regulation 1-401)

Circumvention Not Permitted: A person shall not undertake or authorize any practice intended or designed to evade or circumvent District Rules or Regulations.¹¹

⁹ BAAQMD Permit Applications on Public Notice <https://www.baaqmd.gov/permits/public-notices>

¹⁰ BAAQMD, Regulation 1-401.

¹¹ *Id.*

The Golden Gate 2017 report noted the following violation:

“Cemex-Oakland: The Oakland facility was inspected on April 24, 2012. BAAQMD issued one Notice of Violation for exceeding its total output of concrete; the limit was 150,000 cubic yards per year but output from March 2011 to March 2012 was 248,676.1 cubic yards. Cemex told the inspector the increase was because “Cemex had an increase in business and produced more concrete than the company’s permit allowed.” Cemex indicated in a letter of response to the Notice of Violation that it had exceeded its annual throughput as of January 2012. In March 2012, it applied for an increase in throughput to 300,000 cubic yards per year,²⁴ a request that was granted. Cemex was never penalized for exceeding its permit limit”

They noted “that BAAQMD routinely allows facilities to exceed the throughput limits in their permits. It also treated what should be considered “major” violations as “minor” ones, precluding sanctions.” (See also *Concrete Manufacturers and the Regulatory Role of the Bay Area Air Quality Management District*, May 2017) The District must address these ongoing violations.

In addition to denying permits, the California Air Resources Board website states that “The Board may **revoke a Permit** to Operate if it finds after a public hearing, that the developer-applicant has **violated any district rules and regulations.**” Indeed, without complying with the regulations above, there is more than enough information to indicate a violation and a rightful revocation of permits of facilities continuing the environmental and health degradation in Bayview Hunters Point.

C. The conduct of the June 3 BAAQMD workshop likely violates proper meeting protocols under the Brown Act.

BAAQMD is subject to holding meetings in accordance with the Brown Act as well as the Language Access Ordinance, both of which promote more equitable community engagement. At the June 3rd workshop, BAAQMD did not conduct procedures in accordance with these regulations, violating the public’s open engagement in the forum.

Ahead of the meeting, the agenda was not made available to the public as required by the Brown Act. The Act states that an “online posting of an agenda shall be posted on the primary Internet Web site homepage” of the agency, and “that [it] is accessible through a prominent, direct link.”¹² While there are “Meeting Details” listed on the general website (exhibit below) as well as a brief agenda included on the [Workshop presentation](#) (exhibit below), the lack of an adequate and detailed agenda in a prominent direct link does not comply with the Brown Act nor standards of community equity and inclusion.

¹² Cal. Gov. Code, § 54954.2 (a)(2).

UPDATED Virtual Workshop on CEMEX, Hanson Aggregates and other Bayview Point Facilities

Meeting Details

JUN 03 2021

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Workshop Agenda

- 1 Zoom Poll
- 2 Icebreaker
- 3 Opening Remarks
- 4 Staff Presentation
- 5 Comments and Questions
- 6 Closing and Next Steps

More egregious of a violation was the statement at the beginning of the workshop by BAAQMD Board Member Shamann Walton discouraging comments from non-residents of Bayview Hunters Point, despite the fact that all members of the public have a right to submit comments and have their comments evaluated in the permit process.

BAAQMD Board member Walton stated: “It’s going to go in one ear and out the other if it’s not coming from the people who are affected by what we’re talking about”

The Brown Act requires a local legislative body to provide an opportunity for members of the public to directly address the body concerning any item described in a notice of meeting.¹³ Contrary to the statement that the “[a]ir District staff want to ensure a fair and equitable virtual workshop experience and provide opportunities for all interested parties to ask questions and provide comments,” Director Walton stated on the record that he was not going to consider the comments of certain speakers based on their geographical location.¹⁴ This seems both discriminatory and also seems to indicate a predisposition. Under the Brown Act, decision-makers must keep an open mind and make their decision only after hearing all of the public comments - even those they disagree with.

The District has long since had testimony, comment as well as well-documented data on the issues that residents continue to raise with relatively little accountability from the District. For example, Golden Gate Clinic students were dismissed at hearings in the early 2000s, while the work of Clinic students and advocates has been used by the BAAQMD to point out flaws in their own processes. Residents should be able to reasonably expect for the Bay Area community

¹³ AB 1787 Open meetings: public comments: translation (Gomez), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1787

¹⁴ BAAQMD Virtual Workshop on CEMEX, Hanson Aggregates and other Bayview Hunters Point Facilities https://www.baaqmd.gov/~media/workshops/060221-bayview-point-facilities-workshop/bvhp-workshop-eblast_eng-pdf?la=en

to advocate against these injustices alongside them, as indeed this advocacy and action should be the role of an agency of regional representation such as the BAAQMD. Selectivity from the District in hearing comments violates public access to the meetings and undermines goals of community, justice or equity.

As BAAQMD continues to violate procedural justice, the environmental racism that the District readily acknowledges also continues, without mitigating the risks of the ongoing pollution in Bayview Hunters Point, nor addressing any protections. Communities outside of Bayview Hunters Point also expect adherence to due diligence in these designated procedures and regulations as the District’s decisions affect residents regionally. We all continue to expect BAAQMD to comply with its own public participation policy in good faith. If residents cannot reasonably expect for BAAQMD to abide by procedural regulations while addressing the unjust administering of permits, then BAAQMD has essentially cut off access to remedies to the compounding justice concerns. Therefore, BAAQMD must at the very minimum, abide by the regulations designated to public agencies in order to address community needs.

BAAQMD must set aside its recommendations to issue permits, must allow for reasonable notice and public comment; must consider and respond to all public comments received in connection with the Workshop; must correct BAAQMD Board member Walton’s statement regarding who in the public should comment; and hold a new workshop with a new public comment period prior to issuing its permit decision.

We do want to make it clear that we strongly agree with and support Board member Walton’s desire to hear from Bayview Hunters Point residents, and we also believe their comments are of utmost and primary importance. However, it is wrong and improper to exclude and discourage comment from other concerned members of the public.

IV. The BAAQMD’s conduct violates state environmental justice and civil rights laws.
A. BAAQMD failed to consider the environmental and health impacts to environmental justice communities proximate to the facilities receiving permit approvals.

BAAQMD is attempting to approve permits for three polluting facilities without considering the disproportionate impacts on nearby communities that are already overburdened by environmental pollution. The District disregarded the potential impacts to Bayview Hunters Points, a “disadvantaged community,” when approving the permits to renew operations for the Cemex, Pier 92, and Pier 94 facilities. Under California law, “disadvantaged communities” are those that reside in areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation.¹⁵

¹⁵ Cal. Health & Saf. Code § 39711.

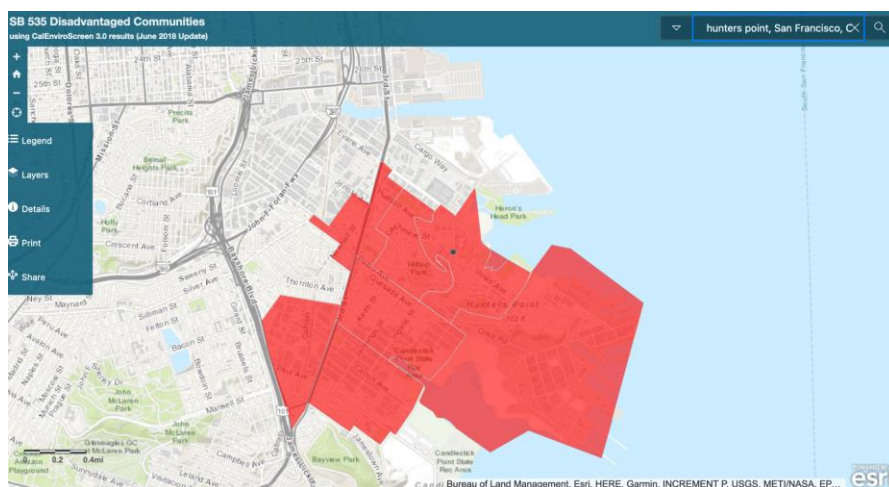
The California Environmental Protection Agency designates communities as “disadvantaged” using the Office of Environmental Health Hazard Assessment’s CalEnviroScreen 3.0 tool to rank all census tracts in the state using 20 environmental, socioeconomic, and health indicators, such as air and water quality, that measure the communities’ exposure to pollution and the communities’ vulnerability to the effects of pollution.¹⁶

Census tracts that are in the most burdened quartile in CalEnviroScreen 3.0 are considered “disadvantaged communities” under California law.¹⁷ The Cemex, Pier 92, and Pier 94 facilities are located within census tracts that are in the most burdened quartile overall on CalEnviroScreen, meaning that communities in Bayview Hunters Point are exposed to significantly more air, water, hazardous materials than communities in other parts of the state, and they are more vulnerable to the effects of such exposure.¹⁸

These results are unsurprising given the alarming concentration of industrial and hazardous activity in

Bayview Hunters Point.

During BAAQMD June 3rd workshop, staff presented a slide illustrating the proximity of the facilities slated for approval to each other as well as other polluting sources. Yet, BAAQMD neglected to assess the potential cumulative impact of granting permits to increase operating capacity for Cemex, Pier 92, and Pier 94 when staff recommended approving these permit applications.



¹⁶ California Office of Environmental Health Hazard Assessment, CalEnviroScreen 3.0 Report (Jan. 2017).

¹⁷ See California Environmental Protection Agency, Designation of Disadvantaged Communities Pursuant to Senate Bill 535 (De Leon) (Apr. 2017).

¹⁸ California Office of Environmental Health Hazard Assessment, Disadvantaged Communities (using CalEnviroScreen 3.0 results), <https://oehha.maps.arcgis.com/apps/View/index.html?appid=c3e4e4e1d115468390cf61d9db83efc4>.

CalEnviroScreen’s population characteristics results underscore the community’s susceptibility to and the effects of so many hazardous sources of pollution around neighborhoods. Bayview Hunters Point, which is a predominantly Black community, ranks worse than 98 and 96 percent of the state overall for asthma and low birth weight, respectively. Residents are more likely to be chronically under- or unemployed (96 percentile) and have the highest poverty rates in the state (99 percentile). BAAQMD’s proposed decisions to issue permits for Hanson Aggregates’ Pier 92 and Pier 94 sand terminal facilities and to increase Cemex’s operating capacity without assessing the potential public health and environmental impacts of added pollution in the communities and environment will only further exacerbate the deleterious public health and environmental conditions and disparities.



California law calls for “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁹ “Fairness” in this context means that everyone is entitled to the benefits of a healthy environment and that the “burdens of pollution should not be focused on sensitive populations or on communities that are already experiencing its adverse effects.”²⁰

Yet, BAAQMD circumvented state law by taking steps and announcing the intention to approve the permit applications for three facilities without first soliciting public participation through notice and comment, eliminating avenues for public oversight and input by ignoring the concerns and issues raised by community residents to oppose the permits and attempting to

¹⁹ Cal. Gov. Code, § 65040.12, subd. (e).

²⁰ Cal. Dep’t. of Justice, Office of the Att’y Gen., Environmental Justice at the Local and Regional Level: Legal Background (“AG Fact Sheet”), 1 (last updated July 10, 2012), http://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf.

silence the voices of concerned Bay Area residents and advocates acting at the request of residents.

B. BAAQMD violated California law prohibiting discrimination.

California Government Code section 11135, enacted in 1977, is California’s civil rights analogue to Title VI of the Federal Civil Rights Act. Section 11135 states that:

“[n]o person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that . . . is funded directly by the state, or receives any financial assistance from the state[.]”²¹

Section 11135’s implementing regulations further define discriminatory practices prohibited by the statute. Section 98101 of the regulations states that “[i]t is a discriminatory practice for a recipient, in carrying out any program or activity directly, or through . . . other arrangements . . . to utilize criteria or methods of administration that . . . have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification[.]”²²

“Program or activity” is defined “as any project, action or procedure undertaken directly by recipients of State support or indirectly by recipients through others by contracts, arrangements or agreements, with respect to the public generally or with respect to any private or public entity.”²³ “Recipient” is defined as “any contractor, local agency, or person, who regularly employs five or more persons and who receives State support . . . in an amount in excess of \$10,000 in the aggregate per State fiscal year or in an amount in excess of \$1000 per transaction, by grant, contract or otherwise, directly or through another recipient[.]”²⁴ Section 11139 provides a private right of action to enforce section 11135, stating: “This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies.”²⁵ Section 11139 also prohibits the statute from being “interpreted in a manner that would frustrate its purpose.” *Id.*

BAAQMD is a regional regulatory public agency established by the California Legislature pursuant to the Bay Area Air Pollution Control Law. BAAQMD receives financial

²¹ Cal. Gov. Code. § 11135(a).

²² Cal. Code Regs., tit. 22, § 98101 (i)(1).

²³ Cal. Code Regs., tit. 22, § 98010.

²⁴ *Id.*

²⁵ Cal. Gov. Code, § 11139.

assistance from the State of California in excess of the \$10,000 in aggregate per state fiscal year through the General Fund, grants, contracts, etc.²⁶ The agency is therefore subject to the antidiscrimination mandates of Government Code Section 11135. BAAQMD’s proposed decision to approve permits, increasing the processing capacity of the Cemex cement batch plant and Hanson Aggregates Pier 92 and Pier 94 sand terminals is emblematic of a pattern and practice of rubber-stamping permits in communities where the vast majority of residents are non-white.

If these facilities were located in communities where a significant percentage of residents identify as white, BAAQMD would require far more robust health risk assessment that takes into account the potential public health, environmental, and cumulative impacts of permitting several polluting sources in proximity to neighborhoods. Further, the agency would have provided sufficient public notice and comment and would likely have required more stringent environmental analysis, instead of relying on categorical exemptions to evade environmental review mandated by the California Environmental Quality Act, and permit conditions that take into consideration the operating history for each facility.

It is clear that BAAQMD’s violation of meaningful civic engagement, pre-determined decision, and failure to carry out its regulatory mandate to protect air quality and public health has a discriminatory and harmful impact on protected classes of people: the people of color residents of Bayview Hunters Point.

We demand: BAAQMD uphold the health and civil rights in the communities they should be serving and accountable to by denying the plant permits. Further, BAAQMD’s permitting rules should be revised to ensure public participation and input in the decision-making process, especially when regulatory action will affect overburdened, “disadvantaged communities” like Bayview Hunters Point from continued pollution.

C. Violation of Title VI of the United States Civil Rights Act

Title VI prohibits federally funded programs or activities from discriminating on the basis of race: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. A “program or activity” is defined as “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.” 42 U.S.C. § 2000d-4a(1)(A). Because BAAQMD is a

²⁶ See Bay Area Air Quality Management District, Annual Budget, available at: <https://www.baaqmd.gov/publications/annual-budget>.

special service district of the State and receives federal assistance, including EPA grants,²⁷ it is covered by the provisions of Title VI. *See Ass’n. of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-5 (9th Cir. 1999), *rev’d in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc) (“[I]f any part of a listed entity receives federal funds, the entire entity is covered by Title VI.”).

EPA’s Title VI implementing regulations likewise prohibit discrimination “under any program or activity receiving EPA assistance on the basis of race, color, national origin.” 40 C.F.R. § 7.30. Further, EPA’s implementing regulations specifically prohibit a recipient of EPA funds from administering its program or activities in a manner with racially disparate effects:

A recipient shall not use criteria or methods of administering its program or activity *which have the effect of subjecting individuals to discrimination* because of their race, color, national origin, or sex, *or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity* with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b) (emphasis added).

Here, BAAQMD’s permit approval process has used criteria or methods of administering its air pollution permitting program with the racially discriminatory effect of increasing pollution burdens in the Bayview Hunters Point community, a predominantly Black community. These practices have also had the effect of substantially impairing accomplishment of the objectives of protecting public health with respect to residents of this non-White community.

As described in the Golden Gate Environmental Justice Law Clinic’s 2017 and 2020 reports on the Cemex and Hanson facilities and in the National Lawyers Guild comments, BAAQMD’s enforcement and permitting process is structured and/or carried out in a manner that:

- maximizes BAAQMD’s enforcement discretion, which is rarely exercised, and allows polluters to violate permits and BAAQMD regulations for years without any consequences;
- avoids the consideration of cumulative impacts of proposed permits and their racially disparate impact;

²⁷ [1] https://www.baaqmd.gov/~media/files/finance/fye2021_approved_budget-pdf.pdf?la=en (BAAQMD budget showing federal grant revenues from the EPA totaling more than \$2.24 million in 2021 and more than \$1.7 million in 2020); *see also* https://www.usaspending.gov/award/ASST_NON_99T08001_6800 (noting grant awards totaling \$1.6 million from EPA to BAAQMD between 2014 and 2020).

- constrains BAAQMD’s discretion to deny pollution permits or impose pollution limits or mitigation measures to address cumulative and racially disparate impacts;
- relies on pollution “offsets” that do not have the actual effect of reducing pollution in the community;
- avoids or minimizes the consideration of the public’s input and avoids CEQA review of proposed permits;
- and accordingly leave little or no room for BAAQMD to remedy existing unequal pollution burdens borne by the community.

As a result, BAAQMD’s enforcement and permitting process maintains the status quo so that unequal pollution burdens are perpetuated and never actually remedied and allowed to worsen over time. BAAQMD’s proposal to approve *increases* in pollution limits at the Hanson and Cemex facilities, despite their long histories of illegal operations, are the latest examples of how BAAQMD’s practices perpetuate unequal pollution burdens, in violation of Title VI.

Consequently, these practices and their effect of worsening pollution burdens have the effect of impairing accomplishment of BAAQMD’s objectives to protect public health with respect to Bayview Hunters Point residents, in violation of Title VI.

V. Housing the “Unhoused” Next to these polluting facilities:

We call on BAAQMD to work with Supervisor Walton and community groups to find a safer location for the residents currently living in trailers next to these polluting facilities. Adding air filters is fine, but that should not be instead of moving these residents to a safer location and out of harm’s way.

VI. Conclusion

At its basic functioning, the BAAQMD and the CEHJ committee especially must commit to due diligence in pursuing environmental, procedural, and health justice for the community of Bayview Hunters Point. With the CEHJ professing transparency, equity, and respect for community input, BAAQMD must immediately cease furthering procedural injustice, while accounting for previous harms.

We demand that the District thoroughly analyze and consider the cumulative environmental and public health consequences of permitting expanded operations in a community already burdened by multiple sources of pollution, take meaningful steps to reduce pollution in the area by not issuing permits of facilities that have operated illegally for years—

including the three permit applications in question—and reform their process to allow comprehensive community engagement in all permit processes.

We look forward to receiving responses to our comments.

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