March 9, 2021

TO: Chair Marsh, Vice Chairs Brock-Davis & Helm, and Members of the House Energy & Environment Committee
FROM: Amelia Schlusser, Green Energy Institute & Mary Peveto, Founder and Executive Director, Neighbors for Clean Air
RE: Amended Comments in support of HB 2814

Based on testimony heard on March 8, 2021 in opposition to HB 2814, we respectfully submit amended comments to clarify our positions in support.

Thank you for your consideration of these additional comments.

1. **The Clean Air Act Expressly Authorizes States to Regulate Aggregate Emissions from Motor Vehicles and Non-Road Engines through Indirect Source Review Programs**

The federal Clean Air Act expressly allows states and local governments to adopt indirect source review programs that impose emissions standards and control requirements on indirect sources of air pollution.[1] Indirect source review programs are important mechanisms for controlling air pollution from mobile sources, because the Clean Air Act preempts most states (other than California) from adopting their own unique tailpipe emissions standards for new on-road motor vehicles and all new and existing nonroad vehicles and engines.[2] Opponents to HB 2814 argue that the Clean Air Act's preemption for tailpipe emissions standards also preempts states from adopting emissions standards for indirect sources, but this assertion is inaccurate and has been consistently rejected by federal courts.

For example, industry groups challenged San Joaquin Valley's indirect source rules, arguing that by imposing emissions restrictions on construction sites, the rules regulated direct emissions from construction equipment and were therefore preempted under the Clean Air Act. The U.S. Court of Appeals for the Ninth Circuit disagreed with industry's arguments and held that indirect source rules are not preempted under the Clean Air Act because the rules regulate *aggregate* emissions from mobile sources, rather than impose tailpipe emissions standards on individual mobile sources.[3] The court explained that indirect source rules must necessarily apply to direct emissions from mobile sources, like construction equipment, because indirect source emissions

[1] CAA § 110(a)(5), 42 U.S.C. § 7410(a)(5). The statute allows states to include indirect source review programs in their state implementation plans to prevent violations of national ambient air quality standards, but EPA may not require states to adopt indirect source rules.
[2] CAA § 209(a), (e), 42 U.S.C. § 7543(a), (e).
[3] Nat'l Ass'n of Homebuilders v. San Joaquin Valley Unified Air Pollution Control Dist., 627 F.3d 730 (9th Cir. 2010).

are comprised of tailpipe emissions from multiple mobile sources.[4] The Clean Air Act allows states to regulate these emissions through indirect source rules because the rules target the *aggregate* emissions from mobile sources, and do not restrict tailpipe emissions from any individual vehicles or engines.[5]

2. California Has Adopted Strict In-Use Performance Standards for Construction Engines and Equipment that Are Currently Unregulated in Oregon

Opponents to HB 2814 claim that the age and emissions profiles of Oregon's nonroad equipment is comparable to equipment operated in California, but this is extremely unlikely because California regulations require fleets to phase-out or retrofit older construction equipment. The California Air Resources Board (CARB) adopted in-use performance standards for off-road construction equipment that prohibited equipment owners and operators from adding older-tier engines to their fleets starting on January 1, 2014.[6] All equipment owners and operators in California have been prohibited from acquiring tier 0 and tier 1 equipment since January 1, 2016, and large and medium fleets have been prohibited from acquiring tier 2 engines since January 1, 2018. In addition, CARB's in-use performance standards require fleet owners to either meet fleet-average emissions targets or meet best available control technology (BACT) requirements on an annual basis.[7] BACT options include retiring or retrofitting a percentage of a fleet each year. As of March 2021, large fleets applying BACT have retired or installed emissions control systems on more than half of the engines in their fleets. Because CARB's BACT requirements direct fleets to retire or retrofit their oldest equipment first, any tier 0 or tier 1 diesel equipment currently operating in California almost certainly have pollution control systems that significantly reduce emissions. Moreover, because California fleets may no longer acquire tier 0 or tier 1 engines, fleets wishing to sell rather than retrofit their older equipment must turn to out-of-state buyers. Since Oregon currently does not have in-use performance standards or otherwise regulate emissions from nonroad construction equipment, Oregon contractors have an economic incentive to purchase discounted older-tier engines from California.

3. The Oregon EQC denied a petition to promulgate indirect source rules due to confusion regarding the agency's procedural obligations.

HB 2814, the bill that would direct Oregon to establish and implement an indirect source review program, differs in a subtle but significant way from the petition that was submitted to the EQC in December 2019.

While only asking the state to undergo rulemaking, the petitioners were required to present a whole cloth example of the final rule. EQC interpreted its responsibility as either granting the petition and therefore recommending that the sample rule move forward as is through a public comment period, or deny it. The EQC chose the latter, not because the agency didn't agree with the problem statement regarding risk of diesel emissions in Oregon, or the applicability of Indirect Source Rule. Instead, the agency denied the petition because it was uncomfortable with the existing rule as written by the petitioners absent stakeholder input, and unsure of the fiscal

[4] *Id.* at 736–37.
[5] *Id.*
[6] CAL. AIR RESOURCES BD., IN-USE OFF ROAD DIESEL-FUELED FLEET REGULATION OVERVIEW (2016), https://ww2.arb.ca.gov/sites/default/files/classic/msprog/ordiesel/faq/overview_fact_sheet_dec_2010-final.pdf.
[7] *Id.*

burden implementation would impose on the resource strapped agency. HB 2814 seeks to rectify that, by clearly stating the intention is that EQC should direct development of an indirect source rule from scratch through a transparent and balanced public process with all stakeholders involved. In addition, it asks the legislature to allocate funding to support this rule development and implementation.

4. **HB 2814 directs the EQC to establish and implement an indirect source review program to further the legislature's bipartisan efforts to reduce diesel pollution and address emissions from vehicles and engines that are not regulated by HB 2007.**

HB 2814 addresses the larger statewide non-road and on-road emissions that were not addressed in HB 2007. 74% of diesel PM emissions in the Portland Metro Region are attributed to non-road equipment such as that used at construction sites, railyards and shipping terminals. HB 2007, passed in 2019, will help reduce emissions from medium and heavy-duty diesel trucks (referred to as on-road) in the Portland metro area in the next decade. But the legislature lacked authority under federal law to apply HB 2007's phase-out requirements to *non-road* diesel vehicles and equipment, leaving the majority of diesel pm sources significantly under-reported and unregulated. HB 2007 left a significant amount of diesel emissions unchanged, including the non-road equipment contributing 32% of total diesel emissions state-wide, and the remainder of heavy and medium duty trucks - 48% of total diesel emissions in the state.

5. **Despite being extremely limited in scope and effect, Oregon's existing indirect source program rules have helped the state remain in compliance with national air quality standards for carbon monoxide.**

The Environmental Quality Commission (EQC) already has the tools and legal authority to adopt indirect source rules. The EQC exercised this authority several decades ago when it adopted indirect source rules for large parking lots in the Portland area to control carbon monoxide and demonstrate compliance with federal air quality standards. These rules are so limited in scope and effect that they've rarely been implemented (and have not been implemented at all in more than a decade) and have minimal to no impact on diesel pollution levels in the metro area.

6. **Diesel pollution is creating a public health crisis in Oregon, and HB 2814 would provide the state with an effective and flexible mechanism to reduce diesel pollution in at-risk communities.**

Oregon has made very little progress towards the directive given by the 2007 state legislature to reduce diesel emissions levels in the state to those which would not exceed the acceptable risk level of 1 in 1 million excess cancers, and diesel emission still pose a significant public health risk in Oregon.

Recent early results of EPA funded research in the Portland Metro area has confirmed that diesel PM remains at what the lead researchers, say are "**very elevated in Portland compared to health benchmarks. And that our measurements generally agree with Oregon DEQ**

modeling."[8] Additionally the non-road equipment survey published in April 2020, confirmed Oregon's equipment fleet is significantly older, with higher emissions rates, than those assumed by federal models.[9]

Diesel emissions have been shown to increase the risk of lung and bladder cancer, heart disease and stroke.[10] In children, it increases the risk of autism, ADHD, and other learning disabilities;[11] in older persons, it is associated with an increased risk of dementia and Parkinsonism.[12,13] It increases the risk and severity of asthma and exacerbates chronic lung diseases.[14] It increases the incidence of miscarriages and low birth weight babies.[15]
Federal and state emissions modeling has demonstrated that Oregon has dangerous levels of diesel particulate matter (DPM):

- DPM levels across the state put 90% of Oregonians at increased risk of cancer.
- 23 of 36 counties in Oregon exceed the state health benchmark
- Oregon's diesel problem is estimated to cause:
    - 400+ premature deaths
    - 140+ non-fatal heart attacks
    - 25,000+ lost work days
    - $3 Billion cost to public health

Residents in the Portland Metro Region are at the highest risk from breathing dirty air pollution:

- Multnomah County ranks in the 95th percentile nationally for levels of DPM.[16]
- Multnomah County areas with the highest concentrations of diesel exhaust have estimated cancer risks of 542-in-1,000,000, which is more than 500 times the additional cancer risk associated with the DEQ's benchmarks.[17]

[8] Fry, J; George, L: Diesel pollution from indirect sources creates substantial air pollution risk to Portlanders ; Testimony to House E& E Committee, March 3, 2021 https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/9923
[9] Oregon Nonroad Diesel Equipment Survey and Emissions Inventory https://www.oregon.gov/deq/aq/Documents/orNonroadDieselRep.pdf
[10] WHO 1—World Health Organization http://www.who.int/mediacentre/factsheets/fs313/en/#
[11] In children increases in ADHD, Autism, Learning Disabilities, and decreases in IQ documented related to PM 2.5 and associated toxicants like PAHs that they carry (Perera et al 2012)
[12] BC and other traffic related air pollution seen to be associated with dementia incidence and cognitive impairment (Oudin et al. 2016; Power et al. 2011; Chen et al. 2017);
[13] In older adults, BC associated with increases in Parkinson's Disease (Ritz et al 2016)
[14] Inhalation of BC creates inflammation that results in the start of, and exacerbation of asthma in children and adults. It also means increases in prevalence and severity of disease in people with emphysema, COPD, and pneumonia (Ristovski et al 2012)
[15] Increase in miscarriages, low birth weight babies, infertility and other pregnancy problems in women with exposure to high concentrations of traffic-related air pollution (Frutos et al 2015).
[16] Ensuring Health Air – Local Collaborative and Regulatory Options in the Portland Metro Area http://multnomah.granicus.com/MetaViewer.php?view_id=3&event_id=1198&meta_id=125609
[17] *Id.*

7. **HB 2814 would give DEQ a tool for reducing emissions from diesel pollution hotspots to protect public health and wellbeing in Oregon's communities**

Opponents to HB 2814 misleadingly claim the bill would regulate every location and facility in the state that can be accessed by vehicle. In reality, the bill would give DEQ a tool to address diesel emissions from large facilities and construction sites that create hotspots of toxic pollution in local communities. Many of Oregon's indirect sources are located within or adjacent to environmental justice communities that have been historically disadvantaged by state policy decisions and are disproportionately burdened by pollution from facilities owned and controlled by powerful corporate entities. The breadth of this corporate influence was evident in the industry-funded testimony provided in opposition to HB 2814. Lacking legitimate, evidence-based arguments for opposing the bill, industry representatives were forced to make misleading, irrational, and unjustified predictions of exceedingly unrealistic outcomes and impacts. HB 2814 does not create a pathway for rampant economic regulation in Oregon. In reality, the intended purpose of HB 2814 is to protect human health, particularly in vulnerable communities that have been unjustly burdened by decades of policy decisions that valued financial profit over public health and community wellbeing. HB 2814 gives the legislature an opportunity to prevent future harm to Oregon's vulnerable BIPOC, low-income, and historically disadvantaged communities by giving the state's environmental quality agency the direction and tools to address some of the Oregon's largest sources of diesel emissions.