



OFFICE OF THE  
HARRIS COUNTY ATTORNEY  
**CHRISTIAN D. MENELEE**

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*By email and certified mail*

August 9, 2021

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Re.: Complaint Against the Texas Department of Transportation Pursuant  
to Title VI of the Civil Rights Act of 1964

Dear Team Leader Nichole McWhorter and Deputy Chief Daria Neal:

The Office of the Harris County Attorney writes to inform you of its findings from a recent investigation into community impacts associated with the North Houston Highway Improvement Project (“NHHIP”). We believe that Texas Department of Transportation (“TxDOT”) has violated

Harris County residents' civil rights and that the facts and argument below establishes a *prima facie* case of discrimination based on race, color, and national origin. Consistent with President Joe Biden's directive to federal agencies, the Harris County Attorney requests that the U.S. Department of Transportation ("USDOT") and the Federal Highway Administration ("FHWA") accept this Complaint for investigation.<sup>1</sup> Further, we request that USDOT and FHWA rescind the certification given by TxDOT in support of the NHHIP to certify its compliance with Title VI of the Civil Rights Act of 1964 and other nondiscrimination laws, all of which are a requirement to qualify for federal funding. Our residents want a re-opening of the comment period because some of them were entirely excluded by TxDOT's public outreach efforts thus far. The Office of the Harris County Attorney appreciates USDOT and FHWA's investigation into this matter and looks forward to working with the agencies to resolve this Complaint.

At the outset, feedback received from our residents indicates that TxDOT wrongly found that the NHHIP will not have disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, or Indian tribes. As discussed below, the NHHIP, as proposed, will disproportionately impact low-income and minority communities. Without thorough analysis, TxDOT arbitrarily reversed the finding it made in the Draft Environmental Impact Statement ("D-EIS"), even as the Final Environmental Impact Statement ("F-EIS") proposes to increase the NHHIP's footprint and provide largely the same mitigation measures that TxDOT proposed in the D-EIS. By incorrectly making this finding, TxDOT arrogates authority to deprive low-income and minority communities of potential further mitigation measures and changes to the NHHIP. Further, TxDOT continues to exclude Limited English Proficient ("LEP") residents from public participation and relocation benefit programs that are in effect right now.

The NHHIP will affect low-resource and minority populations in life-altering ways. Public housing residents must now enter a competitive

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<sup>1</sup> Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

housing market and are frustrated by TxDOT's relocation services contractor to the point where some have stopped trying to use the services.<sup>2</sup> The Houston housing market is ripe with discrimination and some residents expressed a real fear of becoming unhoused, especially Black Americans who face heightened racial discrimination in housing. Concentrated LEP populations will see large stormwater detention ponds in the community without knowing whether the pond will worsen existing flooding risk. Further, unsheltered, unhoused, and low-resource populations will be without social service providers that they depend on for food. All Harris County residents will see poor air quality entrenched and worsened, even as the area continues to fail to meet health-protective federal air quality standards. Schools may not see the negative impacts of the NHHIP for years and history demonstrates that there is a real risk of future school closures. And all of these impacts and more sit on TxDOT's legacy of discrimination against low-resource and minority populations in the Houston area.

If the NHHIP proceeds as designed, TxDOT must be made to address serious concerns raised by the some of the most affected populations prior to proceeding with the project. To do so, TxDOT must be on the ground in the hardest hit communities and engage with individual residents. This is not an onerous task, as the Office of the Harris County Attorney learned through its own investigation. If TxDOT had done so, the agency would have found that these residents not only have serious concerns, but common-sense recommendations on how to make the NHHIP more equitable in locations where equity is sorely needed. But TxDOT will not achieve this clarity if it stubbornly adheres to outdated methods of public outreach. Federal law mandates that TxDOT innovate for the benefit of hard-to-reach populations—public housing residents, LEP persons, schoolchildren, and unsheltered and unhoused people—but TxDOT did not do so here. While the COVID-19 pandemic may have impacted TxDOT's most recent public outreach, TxDOT started this process in 2011 and has had a decade to conduct equitable public outreach.

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<sup>2</sup> Further, in Texas, landlords are allowed to reject housing vouchers and this adds another barrier for displaced low-resource residents.

Section I of this Complaint addresses jurisdiction and introduces Complainants and their concerns. Section II describes conditions in the impacted communities. Section III provides legal background. Section IV describes TxDOT's discriminatory acts and provides less discriminatory alternatives. Section V discusses issues regarding the stormwater detention ponds that will be built in Segment 1 as part of the NHHIP. Finally, Sections VI and VII seek specific forms of relief and conclude this Complaint.

Respectfully submitted,

/s/ Isabel Segarra

Isabel Segarra

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Harris County Attorney's Office

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/s/ Sarah Jane Utley

Sarah Jane Utley

Environmental Division Director

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## **I. Jurisdiction**

Title VI's prohibition on discrimination applies to all recipients of federal funds. "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."<sup>1</sup> Acceptance of federal funds from USDOT creates an obligation for the recipient to comply with Title VI and USDOT's implementing regulations.<sup>2</sup> As explained below, TxDOT is a "program" receiving federal financial assistance and is therefore subject to Title VI and USDOT's regulations. This Complaint satisfies all jurisdictional and prudential considerations established by Title VI, USDOT's regulations, and agency guidance.

### **A. Parties**

#### **1. Complainants**

##### **a) Unsheltered, Unhoused, and Low-Resource Populations**

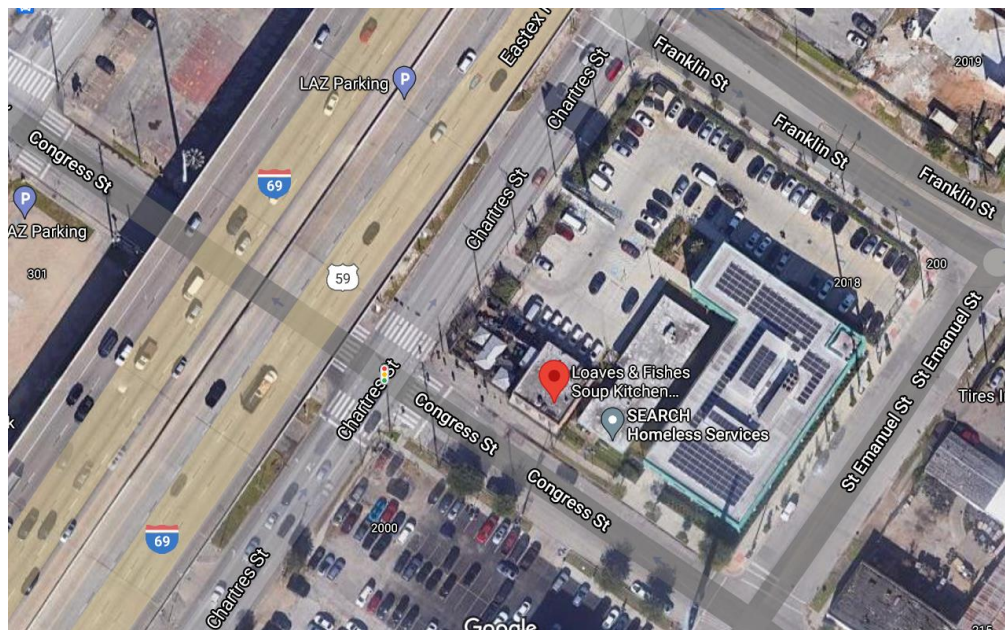
Since the publication of the Record of Decision ("ROD"), the Office of the Harris County Attorney has spoken with County residents who use social services providers located at the intersection of Congress and Chartres Streets in the Project Area, some of whom live in encampments in and around I-69 overpasses, and several neighboring communities, like Third, Second, and Fifth Wards. None of the people that the County Attorney's Office spoke with knew about the looming highway construction or the imminent closure of services they rely on for their essential needs. Below are maps showing the location of social services providers that will be displaced by the NHHIP in Segment 3.

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<sup>1</sup> 42 U.S.C. § 2000d.

<sup>2</sup> 49 CFR § 21.7(a)(1) (DOT regulations require applicants for federal agency funds to give "assurance" that they will comply with the agency's Title VI implementing regulations).

Location of Social Service Providers Near Chartres St. and Congress St.<sup>3</sup>



Jeremy, Tyeshia, Asberry, Jimmy, and Myles are all Black Americans. They live and rely on social service providers in and around the Project Area, including in Second, Third, and Fifth Ward, as well as downtown. These social service providers include Loaves & Fishes, Salvation Army, SEARCH Homeless Services, Star of Hope, and The Beacon.

<sup>3</sup> Above: F-EIS, App'x E, Biological Resources Technical Report, Figure 5u, Project Area Observed Vegetation Types (Feb. 2018); below: Google Maps (2021) (note location of several parking lots).



Jeremy and Tyeshia care for their two toddlers and the young family only recently secured housing. The family continues to rely on Loaves & Fishes – a soup kitchen located at Congress and Chartres Streets that provides free meals to 200 to 300 people six days a week - and other area providers to meet their essential needs as they complete their transition into permanent housing. The family has relied on these services for years including for food, clothing, referrals, and, most recently, furniture. They credit SEARCH, a nonprofit located at 2015 Congress Street that has provided services to Houston’s unsheltered and unhoused since 1989, for helping the family secure housing. Tyeshia lamented the loss of the providers stating, “they can’t take this away.”

“I need civility in care,” said Asberry, an elderly patron of Loaves & Fishes, SEARCH Homeless Services, and other area providers.<sup>4</sup> Asberry has received services from these providers since March of 1983. Religious counseling, COVID testing, access to phones to call his family – these are just some of the services that Asberry relies on from the service providers in his area. Asberry wishes that these providers offered family counseling. He considers Loaves & Fishes part of his community and worries about his ability to secure food once the building is gone.

Jimmy was very recently placed on a waiting list for housing. Though Jimmy has full-time employment, he does not have the resources to meet his essential needs and relies on Loaves & Fishes and other area providers. Jimmy has lived unhoused in and around US 59 and the Minute Maid Park area since prior to the construction of the major league ballpark in the late 1990s. According to Jimmy, housing for males is very difficult to obtain.<sup>5</sup> He fully utilizes the referral services offered by the social service providers and credits them for helping him get on the road to housing and securing the Harris Health Gold Card, a sliding-scale medical services program. Since 1996, Jimmy has relied on Salvation Army, Loaves & Fishes, Star of Hope (145 N. Hamilton St.), and The Beacon (1212 Prairie St.). When the Houston Astros play at Minute Maid Park, he and others are displaced to make room for gamegoers. Prior to its construction, Jimmy would sometimes

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<sup>4</sup> Handwritten note by Asberry, Attachment 1.

<sup>5</sup> Spellman, Brooke, *et al.*, HUD, Office of Policy Development and Research & Office of Special Needs Assistance Programs, Costs Associated With First-Time Homelessness for Families and Individuals, at 6-7 (March 2010) (national study finding that nearly three-quarters of first-time homeless individuals interviewed were male and that in all geographical sites but one, African-Americans are over-represented among first-time homeless individuals in comparison to the general population of people in poverty), Attachment 2.

stay on the land that is now Minute Maid Park. There are over 60 home games scheduled for the Houston Astros in 2021.<sup>6</sup>

Myles makes his way to downtown Houston from a distant suburban community to pick up food and receive other services from the impacted social service providers. He believes the NHHIP is blatant discrimination against low-resource people. Myles is aware of several abandoned buildings adjacent or close to the providers. He would like to see TxDOT exercise its eminent domain authority to turn the buildings into public housing developments as part of the NHHIP.

The County Attorney's Office also spoke with veterans, elders, Spanish-speakers, recently-arrived Central American immigrants, and those who only recently became unsheltered and unhoused. Most of these individuals did not want to be named in this Complaint. For example, an unsheltered elderly woman, who cared for an unsheltered and physically disabled elderly man, told the County Attorney that she recently qualified for housing. However, when she went to sign her paperwork she learned that the landowner raised the rent from \$375 to \$600. She could not afford this and so she remains unsheltered. She would like to apply for TxDOT's rental assistance program and would like to see the program prioritize seniors and work with senior housing developments. TxDOT must immediately clarify and provide clear written materials to residents outlining relocation programs including requirements and timelines.

The list below summarizes the services that these individuals receive from Loaves & Fishes, SEARCH, and other area social services providers:

1. Food;
2. Clothes;
3. Shelter;
4. Early childhood education;<sup>7</sup>
5. Donations from good Samaritans;
6. Hygiene services, like showers and hand washing stations;
7. Housing referrals (emergency, transitional, and permanent);
8. Referrals for counseling and recovery centers;
9. Furniture;
10. Assistance with applications, including for rental assistance, food stamps, veterans' benefits, disability, social security, and the Harris Health Gold Card;
11. Religious counseling;
12. Entertainment in a sheltered environment;

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<sup>6</sup> Major League Baseball, Houston Astros Scheduling Page, 2021 Regular Season Schedule, <https://www.mlb.com/astros/schedule/printable>.

<sup>7</sup> See SEACH Homeless Services, Services, <https://www.searchhomeless.org/services/>.

- 13. COVID testing, vaccines, personal protective equipment, and medical care;
- 14. Primary care, medical services, and medical testing, including

- HIV testing, routine care, and medication for diabetics;
- 15. Employment support, training, and help with applications; and
- 16. Use of phones and charging stations.

When asked what services they needed most, the residents listed:

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>1. Permanent and affordable housing;</li> <li>2. Employment and training opportunities;</li> <li>3. Secular shelters;</li> <li>4. Food;</li> <li>5. Identification and Social Security Card replacements;</li> <li>6. An address to receive mail at so that they can qualify for benefits</li> </ul> | <ul style="list-style-type: none"> <li>and receive packages from relatives;</li> <li>7. Better case management;</li> <li>8. Treat senior residents with priority;</li> <li>9. Travel backpacks and camping equipment;</li> <li>10. Shoes that fit;</li> <li>11. Charging stations;</li> <li>12. Grooming services; and</li> <li>13. Public restrooms and showers.</li> </ul> |
|---|--|

These residents would like the highway to benefit the community. Residents suggested tree-lined sidewalks leading up to and along the highway and better lighting under overpasses to keep them safe at night. Others would like this part of the Project Area to move across the highway, noting the number of parking lots on the downtown-facing sides of the highway. They would like to know why it is them that must suffer loss and not the owners of parking lots.

The impacted social service providers offer other services that people may not want to speak about because of associated social stigmas. These services include treatment for mental illness (including in-patient services), substance abuse, and HIV-positive status. The same providers also support survivors of domestic violence, run away youth, Central American youth and child arrivals, and members of LGBTQIA+ communities. In addition to these vital services, low-resourced people may find other sources of support in and around the social services providers, such as food and water, bus passes, legal services, and day labor recruitment.

## b) Public Housing Residents

Clayton Homes Apartments (1919 Runnels St.) is a public housing community where nearly every resident is a racial and ethnic minority. Clayton is one of two Houston Housing Authority (“HHA”) communities that will see NHHIP impacts: all of Clayton Homes and part of Kelly Village (3118 Green St.) are part of the Project Area ROW acquisition. TxDOT purchased the Clayton Homes property from HHA as an advanced acquisition of Project Area ROW. As a mitigation measure, TxDOT hired Del Richardson & Associates, Inc. (“DRA”) to assist public housing residents at Clayton Homes and Kelly Village with relocation.

HHA has itself been subject of Title VI complaints. In response to a 2017 civil rights complaint, the U.S. Department of Housing and Urban Development (“HUD”) found that the City of Houston, acting through HHA, was not in compliance with Title VI in part because there were no clear site approval guidelines for the city council to act upon.<sup>8</sup> HUD ordered the entities to resolve the matter expeditiously. With the NHHIP, Clayton Homes residents have been failed at least twice over by agencies that were supposed to protect them.

It is unclear how TxDOT was able to acquire the Clayton property. The original conveyance of the Clayton property restricted the use of the land to “clear existing substandard housing from the tract...[and to construct] a suitable and proper low cost housing development.”<sup>9</sup> This issue warrants investigation because TxDOT may be in violation of the original charitable conveyance. A similar issue arose with another conveyance from the same beneficiary that created parkland turned into golf courses. In that matter, the land was sold by the City of Houston to a developer that wanted to transform the land from parkland to residential or commercial use.<sup>10</sup> A Harris County jury found that this would be in violation of the original charitable conveyance.

Mayra is a resident of Clayton Homes Apartments. She is a mother of three children and an LEP person who needs Spanish-language assistance. It is the Harris

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<sup>8</sup> Complaint and Letter of Finding attached as Attachment 3.

<sup>9</sup> Harris County Clerk, Deed to Clayton Homes Apartment property from W. L. Clayton and Susan V. Clayton to The Housing Authority of Houston, Texas (recorded Jan. 19, 1951), Attachment 4.

<sup>10</sup> See The Houston Chronicle, Homeowners threaten plan to flip dead golf courses (May 9, 2010), <https://www.chron.com/news/houston-texas/article/Homeowners-threaten-plan-to-flip-dead-golf-courses-1607591.php>; see docket record for *Inwood Forest Community Improvement Association v. Inwood Forest Partners, L.P.; Caminata Holdings, LLC, its general partner; and Inwood Forest Golf and Country Club, Inc., jointly and severally* (157<sup>th</sup> Judicial District Court of Harris County, Texas) (filed Mar. 21, 2007), <https://inwoodforest.biz/wp-content/uploads/2014/02/LAWSUIT.pdf>.

County Attorney Office’s understanding that there are other LEP residents at Clayton and Kelly, including some that speak Swahili. Mayra became involved with the Clayton Homes relocation process early and has consistently requested that communication about the relocation be in Spanish. During a May 21, 2021 DRA on-site event, Mayra signed up for an intake interview and requested information and interpretation in Spanish. According to Mayra, the notices for this event and all of the prior resident relocation monthly calls were not made available in Spanish. However, DRA did not accommodate Mayra’s language needs. Despite Mayra’s prior request, DRA failed to provide a Spanish-speaking interpreter for Mayra during her intake meeting at Clayton Homes in June 2021. At the intake, Mayra was asked to sign documents in English with no Spanish translation provided by DRA. Mayra was only able to access this information through assistance from a community organizer who attended this meeting at Mayra’s request.<sup>11</sup> When Mayra asked to receive a copy of the documents, DRA’s intake worker told Mayra that he would need permission from TxDOT to give her copies of the documents she signed. Other resident expressed a similar experience when they requested copies of the documents. Mayra believes that she is missing out on important information about the relocation. Mayra took photos of the completed forms. It should be noted that DRA photographed and videorecorded Mayra prior to signing a consent form shown below.

**Headings of DRA Intake Forms**



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<sup>11</sup> Complainants attach a memorandum from Yvette Arellano, a Harris County Attorney community organizer, documenting the intake experience with attached email correspondence with DRA and a meeting notice (“Arellano July 28, 2021 Memo”), Attachment 5.

**dra**  
DEL RICHARDSON & ASSOCIATES, INC.  
LAWRENCE SOLUTIONS

**NORTH HOUSTON HIGHWAY  
IMPROVEMENT PROJECT**  
The Greater Fifth Ward  
SPECIALTY RELOCATION ASSISTANCE SERVICES

**Texas  
Department  
of Transportation**

**INTAKE ASSESSMENT**

Today's Date: [REDACTED]  
Parcel Number: [REDACTED]  
Name of Head of Household (HOH): [REDACTED]  
Address and Unit #: [REDACTED]  
Race: [REDACTED] Ethnicity: [REDACTED]

**dra**  
DEL RICHARDSON & ASSOCIATES, INC.  
LAWRENCE SOLUTIONS

**NORTH HOUSTON HIGHWAY  
IMPROVEMENT PROJECT**  
The Greater Fifth Ward  
SPECIALTY RELOCATION ASSISTANCE SERVICES

**Texas  
Department  
of Transportation**

I (We) certify that the above information is correct to the best of my (our) knowledge and hereby grant my (our) consent to DRA Inc. to use the above information solely in connection with the Specialty Relocation Assistance Services it is offering in partnership with the Texas Department of Transportation and to share such information with the Texas Department of Transportation. I (We) further acknowledge that I (we) am (are) aware that the use of the above information by the Texas Department of Transportation is subject to the Texas Department of Transportation's data usage policies, and I (we) have reviewed and agree to such policies.

**dra**  
DEL RICHARDSON & ASSOCIATES, INC.  
LAWRENCE SOLUTIONS

**NORTH HOUSTON HIGHWAY  
IMPROVEMENT PROJECT**  
The Greater Fifth Ward  
SPECIALTY RELOCATION ASSISTANCE SERVICES

**Texas  
Department  
of Transportation**

**General Image/Photography, Video, and Media Release Form**

At the intake, Mayra asked to be placed with a Spanish-speaking relocation assistant, which DRA calls a “Navigator.” Since the date of her intake interview, however, Mayra has not heard from her Navigator and does not know whether she was assigned to a Spanish-speaker. According to Mayra, she only received accommodations once: at an HHA monthly call, held in English, for Clayton Homes residents to update them on the NHHIP relocation process. Mayra asked questions in Spanish and a HHA employee translated. However, this translation was poor and Mayra could not understand the employee and does not feel like her questions were answered. Spanish-speaking Harris County Attorney’s Office staff listened to this call and concur with Mayra’s assessment. Mayra is worried about the relocation. Notices and other information continue to be provided only in English and community meetings are also held in English. The community calls are hosted over Zoom; Mayra finds these virtual meetings difficult to access from her phone. She still does not have her housing voucher and her children are about to go back to school. Mayra continues to voice her need for Spanish-language communication. Recently, with the aid of a County Attorney community organizer,

Mayra asked DRA again by email for communications to be bilingual in Spanish.<sup>12</sup> DRA replied to her email in English stating that there would be accommodations moving forward. Mayra reports no such accommodation since the date of the email.

Many Clayton Homes residents, including Mayra, told the Harris County Attorney's Office that the relocation process has been confusing and stressful for them to navigate. Although some Clayton Homes residents have received their vouchers, many have not, and they are wondering when and how much these will be. Without knowing their budget, these residents cannot plan for their future home. According to one resident, HHA first told residents that they would receive their vouchers by Halloween of 2020, then Christmas, then after New Year, then May and June of 2021, and, most recently, August 2021. Residents would not have to deal with voucher but for HHA and TxDOT's failure to plan for seamless transition into replacement housing. Instead, the agencies chose to proceed hastily on the NHHIP and public housing residents are suffering as a result.<sup>13</sup> Had TxDOT prioritized the quality of life of public housing residents, it would have waited until the replacement housing was completed prior to kicking people out of their homes. For those residents who wish to come back to the community and take advantage of the new housing development, the vouchers mean that they will have to move once again in the near future. Residents expressed that these conditions are very stressful to live under.

Clayton Homes residents have concerns about the TxDOT relocation assistance program. Residents who have completed their intake interview would like a copy of the documents they signed and do not understand why DRA needs TxDOT's approval to release these documents. There are also issues with TxDOT's related moving assistance benefit. Some residents were told last year that this benefit would be \$1,400 but recently learned that it would only be \$100. The eligibility requirements for this benefit are unclear and at least two residents told the Harris County Attorney's Office that they know of neighbors who have moved away and were denied reimbursements for their moving costs, including one who was told the funds were depleted. Residents would also like for TxDOT to be more sensitive to the community's needs. For example, when DRA hosted its first on-site community event, it did so days after the murder of a well-known community member. One resident missed this event and earlier calls because her family

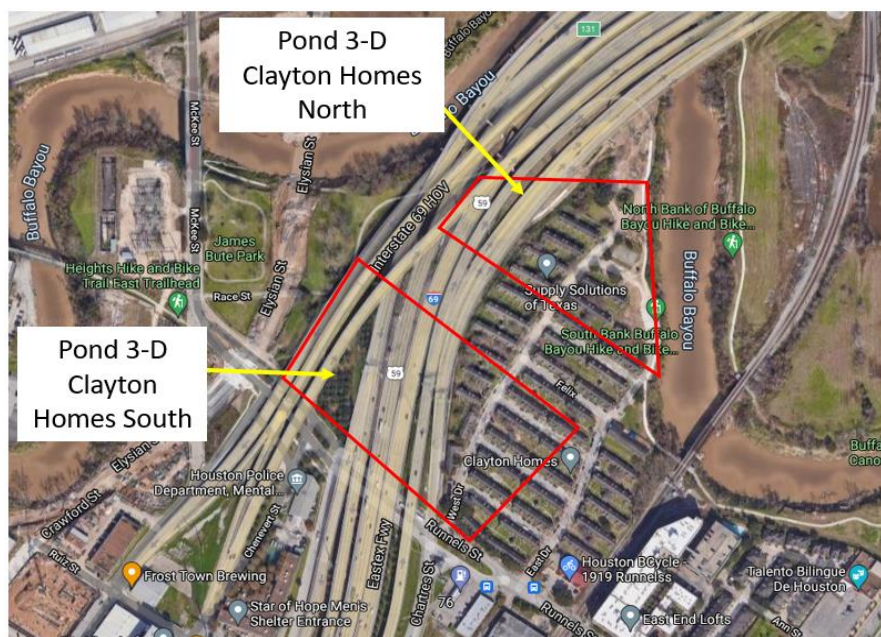
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<sup>12</sup> See Arellano July 28, 2021 Memo.

<sup>13</sup> F-EIS, App'x M, Agency Coordination Documentation, Letter from Quincy D. Allen, P.E., TxDOT District Engineer, Houston District to the Hon. Sylvester Turner, Mayor of the City of Houston (Sept. 17, 2017), at PDF page 75 ("Once acquisition of the two properties takes place [Kelly Village and Clayton Homes], the City could continue to use both properties until the replacement units are completed. In case the replacement housing is not completed by the time the contractor should need the property, HUD vouchers would be available for residents.").

was personally affected by this loss. During Clayton Homes community calls, residents voiced that they felt unsafe and want a community-oriented peace officer walking throughout the community instead of having a Harris County Constable driving around the complex once an hour.

The residents also want to know about the NHHIP and for TxDOT to explain why it chose Clayton Homes for a stormwater detention pond, or as one resident put it, “to dig a hole.” Residents told the Harris County Attorney’s Office that they did not know that TxDOT was taking Clayton Homes to install a pond and were upset to learn this only after HHA sold the land to TxDOT.



Approximate Location of the Proposed Clayton Homes Stormwater Detention Ponds<sup>14</sup>  
Source: Google Maps (2021)

They are concerned about contamination at the site of the proposed pond. After Hurricane Harvey, stagnant floodwaters in the community became contaminated<sup>15</sup> so much so that a section of Clayton was no longer safe for human habitation and was finally demolished over the summer of 2020, according to residents. Since this experience, some

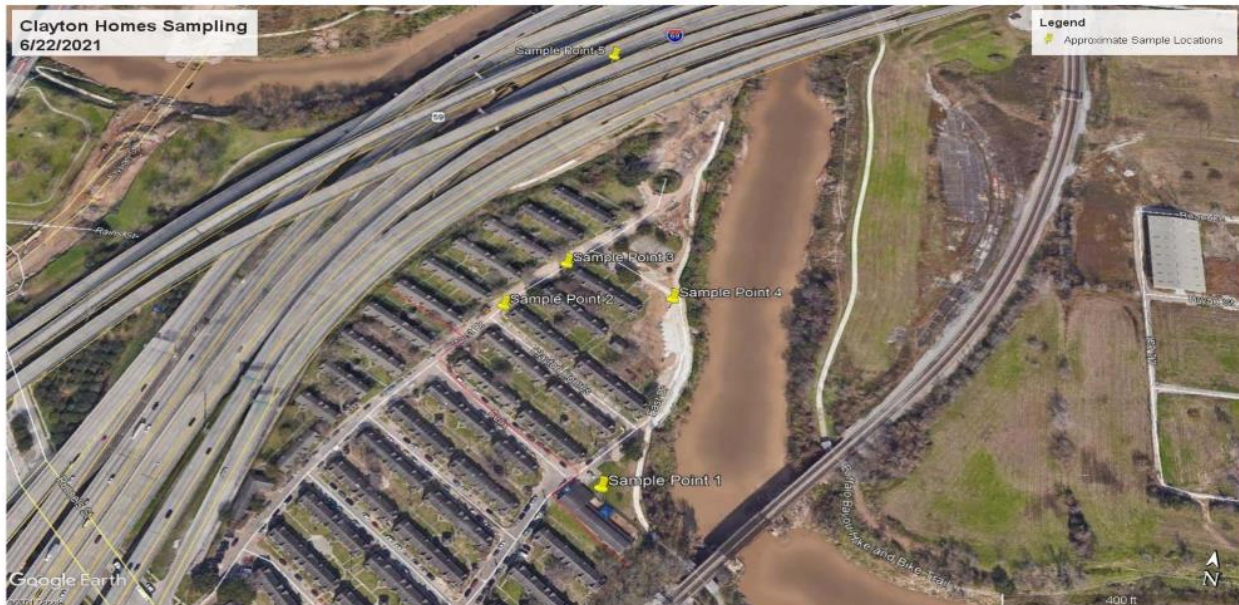
<sup>14</sup> Approximate locations of other proposed stormwater detention ponds can be found in Attachment 6.

<sup>15</sup> Shelia Kaplan and Jack Healy, The New York Times, “Houston’s Floodwater Are Tainted, Testing Shows” (Sept. 11, 2017) (“In the Clayton Homes public housing development downtown, along the Buffalo Bayou, scientists found what they considered astonishingly high levels of E. coli in standing water in one family’s living room — levels 135 times those considered safe — as well as elevated levels of lead, arsenic and other heavy metals in sediment from the floodwaters in the kitchen.”), <https://www.nytimes.com/2017/09/11/health/houston-flood-contamination.html>.



residents still worry anytime water ponds in the community. Harris County Pollution Control Services Division conducted water quality testing at Clayton and found elevated levels of *E. coli* in areas of concern identified by residents.<sup>16</sup>

### Water Quality Testing at Clayton Homes



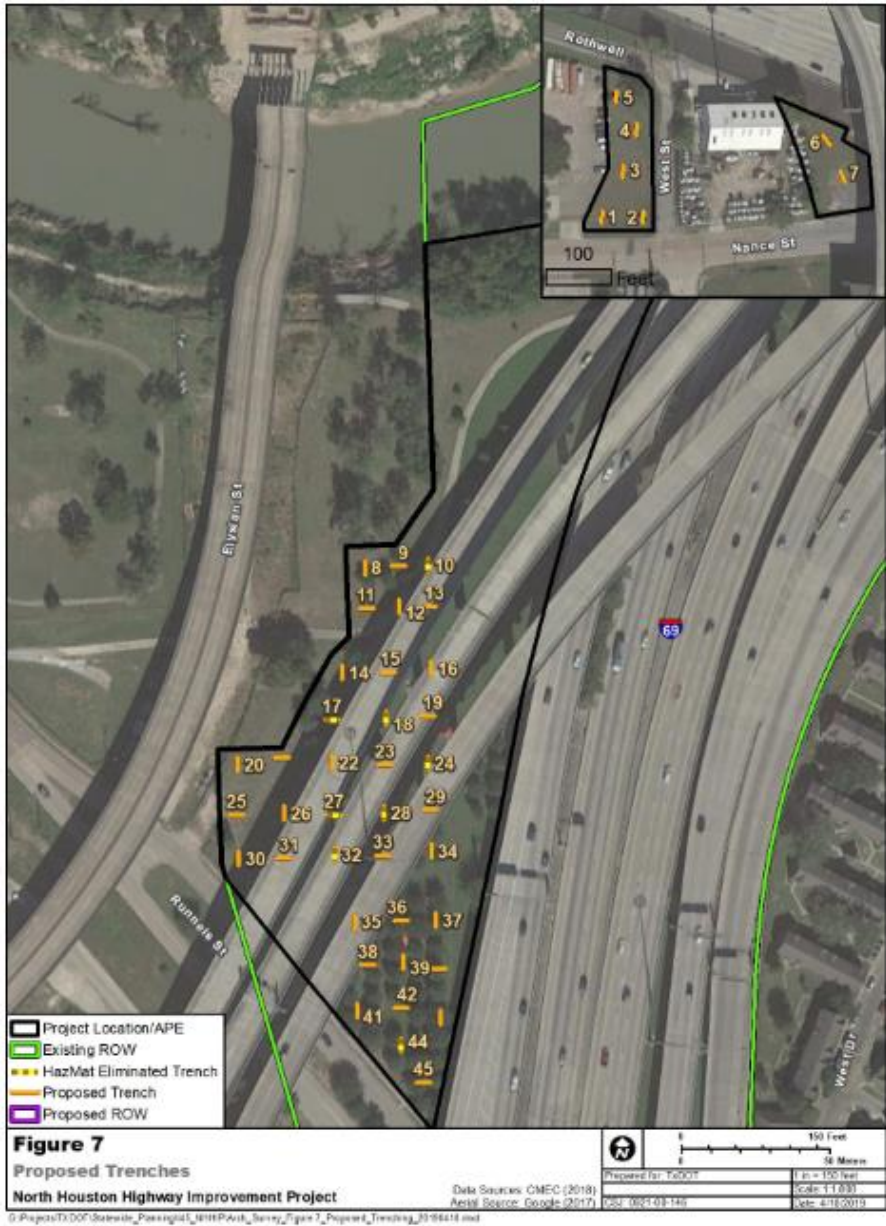
Map Location	LOCATION	6/22/2021	6/29/2021
Sample 1	Community Center	310 MPN	DRY
Sample 2	Sample 2: Clayton Home - Vacant Lot (Pooled water)	2800 MPN	DRY
Sample 3	Sample 3: Clayton Homes - Water in Manhole	17000 MPN	DRY
Sample 4	Sample 4: Pooled Water, Northeast Fence line/bike path	2000 MPN	330 MPN
Sample 5	Sample 5: Duck Pond (under HWY 59)	6100 MPN	24000 MPN

Soil testing data attached to the archaeological survey, conducted pursuant to NEPA, buttresses the residents’ concerns. Despite having “two high-probability areas” of archaeological artifacts in and near Clayton Homes, the archaeological team could not dig in several places because it was unsafe for them to do so.<sup>17</sup> “Seven proposed trench locations were removed from consideration after soil testing revealed elevated levels of lead, fecal coliform, and *E. coli*,” though the team attributes some of the results to an unsheltered encampment close-by.<sup>18</sup> There were elevated levels of lead, with testing site T-18 reading at 2,070 mg/kg of lead in the soil, the highest reading. As discussed below, excavation at the Clayton property also impacts American Indian interests in the NHHIP.

<sup>16</sup> Harris County Pollution Control, Clayton Homes Sampling on June 22 and June 29, 2021, Attachment 7.

<sup>17</sup> F-EIS, 3-96 to -97.

<sup>18</sup> *Id.*, App’x D, Final Archaeological Survey/Testing Report (May 2019) (“Archaeological Report”), at 26, 37-38 and App’x D, App’x A, Soil Analytical Results (TRC/XENCO).



**c) Residents of Victoria Manor Apartments**

Victoria Manor Apartments (830 Victoria Dr., Houston, Texas 77022) is another community that will be impacted by a newly proposed pond. TxDOT plans to tear down a Star Furniture Clearance Outlet store and warehouse to install a pond. This pond would be directly across the street from Victoria Manor, a community in a Census Block Group

where 31% to 49% of the population speaks English less than very well or not at all.<sup>19</sup> The Harris County Attorney's Office met with several of these residents and none of the residents were aware of the proposed pond. While residents have serious concerns about the ponds, they did not want to be named in this Complaint, some out of fear of retaliation.

Victoria Manor is home to many Central American immigrants, LEP persons, and low-resource residents. The residents are concerned about flooding, mosquitoes, air contamination, and open dumping, among other issues. An elderly Victoria Manor resident of over a decade shared his Harvey survival story. When Harvey struck, his apartment filled with water and his electricity stopped working. This resident owned a generator for his contracting business. Navigating flooded waters, the resident and his adult son were able to set the generator up above the floodwater. With this generator, the resident was able to provide power for himself and neighboring residents. According to the resident, his community would not receive relief support for several weeks after the hurricane. His apartment has no carpet because he tore it out after Harvey to control mold and other health hazards. His stove and air conditioning unit haven't worked since Harvey. Mold along the walls has reached his ceiling and the rotting ceiling over his bathtub falls on him when he showers.

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<sup>19</sup> LEP Map.



Victoria Manor Apartments (May 19, 2021)



Victoria Manor residents report water reaching the ledge during non-hurricane severe rain events (May 19, 2021)

He doesn't want another Harvey, which was a deeply traumatizing event, and is extremely concerned that the pond will increase the flooding risk in his community. He also does not oppose the concept of the project and thinks it could be beneficial to his contracting business. His son shares his father's concerns and approves of the pond only if it reduces flooding risk in his community. Along with his father, he is also very concerned about mosquitoes and insects in the community and does not want the pond to worsen these existing problems. However, if the pond must be installed, he would like to see the land be put to good use. According to this resident, many single adult men live at Victoria Manor and they would benefit from a soccer field and a picnic and barbeque area.

A mother who lives directly in front of the proposed pond is concerned about flooding, open dumping, mosquitoes, and safety. She gave an account of a time when she had to pick her child up from Kennedy Elementary School, which is about half of a mile west on Victoria Drive.<sup>20</sup> On a non-hurricane severe rain event, she had to wade through

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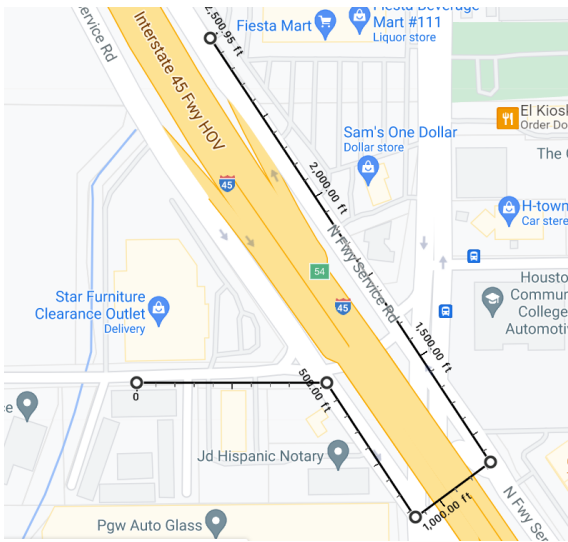
<sup>20</sup> According to the Texas Education Agency, 97.2% of the student population at Kennedy Elementary School is economically disadvantaged, meaning that nearly every child at this school is on free or reduced lunch. The student populations is 74.6% Hispanic and 23.3% African American, with LEP students making up 55.5%. Texas Education Agency, 2019-20 School Report Card, KENNEDY EL (101912188), Attachment 8 (also includes school information relied on elsewhere in this Complaint).

chest-high waters and walk down the street to pick her child up from school. This was a traumatic experience for this resident and her family. She does not want the pond to increase flooding risk in the community. She is also concerned about the safety of her child around the pond. According to the resident, many young children live at Victoria Manor and could drown if the pond is filled and unsecured. There is open dumping in her community and she does not want the pond to worsen this existing problem. Mosquitoes concern the resident greatly. She said that her air conditioning unit does not work so she keeps the door open for ventilation, but many mosquitoes come in and this situation is difficult for her to manage. According to the resident, many other residents are in the same predicament with nonfunctioning air conditioning units. A neighboring resident even bought a mosquito net for her baby's basinet. She would like the pond to help and not worsen the mosquito issue and she wants it built in a way that safeguards children from drowning risk. She wants to see the pond benefit the community by, for example, installing a plaza-style walking path around the perimeter of the pond and a playground.

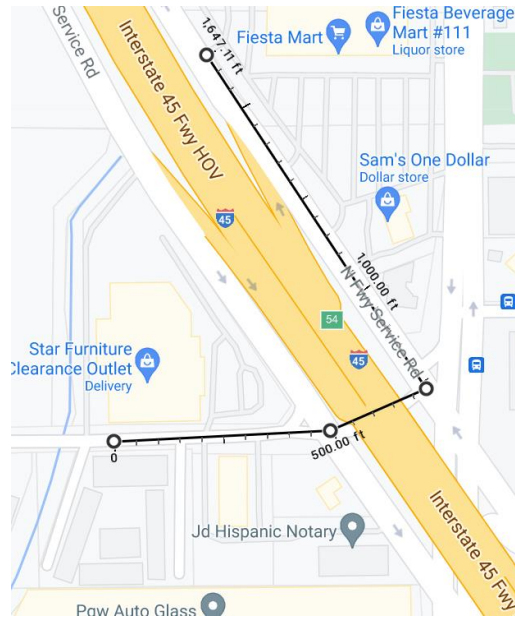
A grandmother is concerned about air quality and walkability in her community. This elder cares for her grandchildren while their parents work. She expressed serious concern about the increased air pollution that her grandchildren will breathe. Her grandchildren like to play outdoors and already have to deal with mosquitoes. She would like to see a park installed on the pond, something targeted at younger children. She would also like to see a pedestrian bridge to help her get to the Fiesta grocery store across the highway. She likes to walk in her community but walking to Fiesta is a real challenge for her. She has to walk from Victoria Manor down the I-45 frontage road to Airline Drive and then turn around and walk back up I-45 to get to the Fiesta. Depending on the day and how she is doing, however, she will cross I-45 by walking along the u-turn where Victoria Manor Dr. meets I-45. There is no crosswalk at this intersection and the underpass paving serves as a form of sidewalk. A pedestrian bridge would not only make her walk safer, but it would cut about 1,000 feet from her trip, about a fifth of a mile.



View east of the intersection of Victoria Manor Dr. and I-45; Source: Google Maps (July 2021)



Source: Google Maps (July 2021)



Source: Google Maps (2021)

Other residents of Victoria Manor shared these concerns. Residents would like to know when they should expect construction and whether there will be community advisories to keep residents abreast of disruptions to the community during construction. Residents want to learn about different park-like design options for the pond, if the NHHIP proceeds as designed.<sup>21</sup> Some would like clarity on TxDOT's weatherization program<sup>22</sup> and whether it could cover the cost of replacement window units.

## 2. Recipient

TxDOT is an agency of the State of Texas charged with administering the state's transportation infrastructure development. TxDOT is the designated lead agency for the

<sup>21</sup> TxDOT could, for example, follow stormwater detention basin manuals developed by the Harris County Flood Control District ("HCFCD") and submit their plans for approval with the District. These manuals offer basin options best-suited for Harris County. See HCFCD, Design Guidelines for HCFCD Wet Bottom Detention Basins with Water Quality Features (Apr. 2014), <https://www.hcfcd.org/Resources/Technical-Manuals/Design-Guidelines-for-HCFCD-Wet-Bottom-Detention-Basins-With-Water-Quality-Features?folderId=16296&view=gridview&pageSize=10>; see also HCFCD, Policy, Criteria, and Procedure Manual for Approval and Acceptance of Infrastructure (Oct. 2018), zip file available, <https://www.hcfcd.org/Resources/Technical-Manuals/2019-Atlas-14-Policy-Criteria-and-Procedures-Manual-PCPM?folderId=16290&view=gridview&pageSize=10>.

<sup>22</sup> For example, whether TxDOT's weatherization program generally has the goal of reducing energy costs and addressing air pollution concerns for low-income households.

NHHIP.<sup>23</sup> Among its duties, TxDOT must “plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads.”<sup>24</sup>

USDOT has delegated authority to the State of Texas, through TxDOT, to fulfill federal environmental law requirements as required by the Surface Transportation Project Delivery Program (“Program”).<sup>25</sup> TxDOT assumed these responsibilities by entering into the Program in 2014 (renewing participation in 2019) through a memorandum of understanding with the FHWA.<sup>26</sup> “TxDOT is responsible for complying with all applicable federal environmental laws and FHWA NEPA regulations, policies and guidance. . . . TxDOT is legally responsible and liable for decisions made under NEPA assignment.”<sup>27</sup>

TxDOT must conduct federally required NEPA environmental reviews for qualifying transportation projects, such as the NHHIP.<sup>28</sup> In carrying out its NEPA duties, TxDOT must administer activities to receive “public comment on the department’s environmental reviews.”<sup>29</sup> This includes the public participation needs of LEP people.<sup>30</sup> Agency actions to implement NEPA “must comply with any federal laws, including FHWA’s rules, applicable to the project as an EIS.”<sup>31</sup> Specifically, TxDOT must certify and give assurances that its transportation planning process is being carried out in accordance with all applicable requirements of Title VI and USDOT Title VI implementing regulations.<sup>32</sup>

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<sup>23</sup> TxDOT, Record of Decision, North Houston Highway Improvement Project From US 59/I-69 at Spur 527 at Beltway 8 North Harris County, Texas, 3 (Feb. 2021) (“ROD”).

<sup>24</sup> Tex. Transp. Code § 201.103(a); *see also* Title 43, Tex. Admin. Code ch. 2, subpt. A.

<sup>25</sup> 23 U.S.C. § 327.

<sup>26</sup> TxDOT and FHWA, First Renewed Memorandum of Understanding Between the Federal Highway Administration and the Texas Department of Transportation (Dec. 9, 2019), <https://ftp.txdot.gov/pub/txdot-info/env/nepa-assignment/2019-nepa-assignment-mou.pdf>.

<sup>27</sup> TxDOT, National Environmental Policy Act (NEPA) Assignment Documentation, <https://www.txdot.gov/inside-txdot/division/environmental/nepa-assignment.html> (last visited Aug. 6, 2021).

<sup>28</sup> Tex. Transp. Code §§ 201.6035, 201.604 & 201.753.

<sup>29</sup> *Id.* at § 201.604.

<sup>30</sup> *Id.* at § 201.802(b); 43 Tex. Admin. Code § 2.101(e).

<sup>31</sup> 43 Tex. Admin. Code § 2.84(g); *see also* 49 CFR § 21.7(a) (requiring assurances of federal funding recipients).

<sup>32</sup> 23 CFR § 450.220(a)(2).

## **B. TxDOT Receives Federal Financial Assistance**

USDOT regulations define a “recipient” of federal funds as “any State...or any political subdivision thereof...to whom Federal financial assistance is extended, directly or through another recipient.”<sup>33</sup>

For fiscal year 2020, the State of Texas (DUNS No. 002537595) received \$320,198,472,657.00 in federal funding.<sup>34</sup> Of this amount, TxDOT (DUNS No. 806782553) received \$4,347,434,562.00. As of July 2021, TxDOT has already received nearly four billion dollars in federal assistance. Because the State of Texas and TxDOT receive federal financial assistance, they are subject to Title VI and USDOT’s implementing regulations.

## **C. TxDOT Is a “Program or Activity” as Defined by Title VI**

Title VI defines “program or activity” to include “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.”<sup>35</sup> And “when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered” under Title VI.<sup>36</sup>

TxDOT is a Texas state agency. It uses federal funding in connection with transportation infrastructure development, including for federal highway projects.<sup>37</sup> Accordingly, TxDOT is a “program” and its “operations” are subject to Title VI.

## **D. The Complaint Is Timely Filed**

USDOT’s Title VI implementing regulations require that Title VI complaints be filed within 180 days of the alleged discriminatory act. 49 CFR § 21.11(b). The alleged discriminatory act is TxDOT’s final action on the NHHIP as memorialized in the Record of Decision, published in the Federal Register on February 9, 2021. 86 Fed.

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<sup>33</sup> 49 CFR § 21.23(f).

<sup>34</sup> USASpending.gov, State Profile, Texas, <https://www.usaspending.gov/state/texas/latest> (TxDOT award total may be found under “View child recipients”).

<sup>35</sup> 42 U.S.C. § 2000d-4a(1)(A).

<sup>36</sup> S. Rep. No. 64, 100th Cong., 2d Sess. 16 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 3, 18.

<sup>37</sup> Highway construction is an activity to which Title VI applies. *See* 49 CFR pt. 21 App’x A, 1.



Reg. 8,828. This Complaint is timely because it was filed on August 9, 2021, within 180 days of February 9, 2021.<sup>38</sup>

### **E. This Written Complaint is Submitted by Complainants Subjected to Racial Discrimination**

Complainants shelter, live, and seek social services in the Project Area of the NHHIP. This Complaint is submitted in writing on behalf of Complainants and other similarly situated Harris County residents.

## **II. Community Life in the NHHIP Project Area**

The NHHIP will have a disproportionate impact on minority, LEP, and low-income populations. TxDOT's attempts to downplay this impact are unavailing. In the F-EIS, TxDOT evades a discussion on disproportionality by claiming that Houston is a "predominantly minority" city. While that may be true, it alone cannot determine whether an impact is disproportionate, defined as "too large or too small in comparison with something else."<sup>39</sup> According to the U.S. Census, people who identify as "White alone, not Hispanic or Latino" make up 24.4% of the population of the City of Houston and non-white people make up the remaining 75.6%.<sup>40</sup> Minorities make up 87% of the population in Segment 1, 83.5% of the population in Segment 2, and 73.6% in Segment 3.<sup>41</sup> Based on this data alone, it is clear that there will be a disproportionate impact on minorities in Segment 1 and 2 and that TxDOT is plainly wrong. Further, there will also be a disproportionate impact on minorities in Segment 3 and this impact will be felt by populations that are disproportionately Black, including public housing and unsheltered and unhoused populations.

The NHHIP spans over a dozen Houston-area communities, including Super Neighborhoods.<sup>42</sup> Super Neighborhoods represent artificially drawn community boundaries based loosely on historical boundaries.

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<sup>38</sup> Complainants reserve the right to supplement this Complaint with additional exhibits and/or arguments, and no provision of the applicable statutory or regulatory provisions bars them from doing so; Complainants understand that USDOT has accepted supplemental information in the course of its complaint investigations. *See also* 49 CFR § 21.11(b).

<sup>39</sup> Cambridge University Press, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/disproportionate>.

<sup>40</sup> U.S. Census Bureau, QuickFacts, Houston city, Texas, <https://dictionary.cambridge.org/us/dictionary/english/disproportionate>.

<sup>41</sup> F-EIS at 3-14.

<sup>42</sup> *Id.* at 3-9.

## Super Neighborhoods



### A. Profiles by Segment

As further discussed below, Segment 1 has the highest percentage of minorities and LEP residents. In Harris County, approximately 20% of residents speak English “less than very well,” with Spanish being the most commonly language spoken at home, according to the U.S. Census Bureau. For these residents, Spanish is also the most frequently spoken language at home.

	<b>Percentage of the population 5 years and over that speaks English less than very well</b>
<b>United States</b>	8.2%
<b>Texas</b>	13.3%
<b>Harris County</b>	20.4%

Each segment is distinct in its makeup and will face its own individual disruptions and impacts from the NHHIP. Additionally, some segments will have overlapping, disproportionate and adverse impacts on low-income and minority communities. For example, proportionally, more children live in Segment 1 than Segment 2 or 3 and more differently abled people live in Segments 3 and 2 than in 1. Segment 1 has the lowest average household income, by over fifteen thousand dollars, of all threesegments. Segment 2 and 3 will see a reduction in the amount of land within the 500-year floodplain, while Segment 1 will see an increase. The largest Right of Way (“ROW”) acquisition will be in Segment 1, followed by Segments 3 then 2. Noise walls will be 14 feet in Segment 1 but 16 feet in Segments 2 and 3. There are dozens of bus lines running through each segment, but Segment 3 has the most at 60. TxDOT has conducted a detailed drainage study for Segments 2 and 3, but not 1.<sup>43</sup> Below are more detailed discussions on each segment.

### **1. Segment 1**

Segment 1 includes Aldine, Texas and five Super Neighborhoods: Greater Greenspoint, Hidden Valley, Acres Homes, Northside, and Independence Heights. **Racial and ethnic minorities make up 87% of the Segment 1 population, of which 65.6% is Hispanic and 17.6% is Black.**<sup>44</sup> LEP persons make up 51.7% of the population, with Spanish being the predominant language.<sup>45</sup> Children make up 30% of the Segment 1 population, higher than the City (27.7%) and the County (29.8%).<sup>46</sup>

There are at least three Title I schools in Segment 1—schools that receive supplemental federal dollars because of their high concentrations of low-income students.<sup>47</sup> These are Aldine High School, Aldine Ninth Grade School, and Bussey

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<sup>43</sup> Complainants attach a memorandum from a County Attorney community organizer documenting a visit to a low-income medical services provider close to the Project Area and documenting impacted bus routes, Attachment 9.

<sup>44</sup> F-EIS at 3-5.

<sup>45</sup> *Id.*, App’x F, Community Impacts (“Community Impacts”) at 4-4.

<sup>46</sup> F-EIS, 3-7.

<sup>47</sup> *Id.*

Elementary School, and minorities make up 98% or more of each of their student populations.<sup>48</sup>

Housing values in Segment 1 range from \$40,000 to \$250,000.<sup>49</sup> Household income in Segment 1 is \$30,159, lower than both the City (\$47,010) and the County (\$55,584).<sup>50</sup> There are 23 Census Block Groups in Segment 1 and 11 of them are low-income.<sup>51</sup> At 8.5%, Segment 1 is the only NHHIP segment with an unemployment rate higher than that of the County (7%) and the City (7.4%).<sup>52</sup>

Segment 1 is approximately 8.8 miles long and the area of the existing ROW is approximately 349 acres.<sup>53</sup> The NHHIP would require an additional 246 acres of ROW in Segment 1, the most new ROW out of any segment.<sup>54</sup> Segment 1 includes Aldine, Texas and five Super Neighborhoods: Greater Greenspoint, Hidden Valley, Acres Homes, Northside, and Independence Heights.

There are 3 METRO transit centers in Segment 1, Greenspoint (12455 Greenspoint Dr.), Acres Homes (1220 West Little York Rd.), and Northline (7705 Fulton St.).<sup>55</sup> These transit centers service a network of 37 bus routes that cross or run parallel to Segment 1.<sup>56</sup> The NHHIP will potentially affect 27 bus stops.<sup>57</sup> TxDOT found that “[r]elocation of bus stops may affect populations that do not have access to automobiles or that are dependent on public transportation.”<sup>58</sup>

There will be noise impacts in Segment 1. Existing noise will continue and the NHHIP will encroach into adjacent communities and affect primarily residential areas.<sup>59</sup> Proposed noise barriers in Segment 1 would be 14 feet high, unlike in Segment 2 and 3 where the height is 16 feet.<sup>60</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Community Impacts at 4-7 to -8.

<sup>50</sup> *Id.* at 4-9.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 4-8.

<sup>53</sup> F-EIS at 2-63.

<sup>54</sup> *Id.* at 2-64.

<sup>55</sup> *Id.* at 3-23.

<sup>56</sup> *Id.* at 3-24.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 3-39.

<sup>60</sup> *Id.* at 3-41.

Segment 1 is the only segment where the Preferred Alternative increases the amount of land in the ROW that is in the 500-year floodplain, from 141 acres to 148 acres.<sup>61</sup> Segment 1 is also the only segment where TxDOT has not conducted a detailed drainage study, only a project-wide preliminary drainage study.<sup>62</sup> TxDOT claims that it “will prepare a detailed drainage study using the Atlas 14 data for Segment 1 during detailed design.”<sup>63</sup> In the F-EIS, when TxDOT made the finding that the “NHHIP improvements would not adversely impact existing [flooding] conditions,” it only did so for Segment 2 and 3.<sup>64</sup> TxDOT did not propose any mitigation measures for the floodway conveyance in Segment 1.<sup>65</sup> TxDOT preliminarily determined that Segment 1 needs approximately 36 acres in detention pond area,<sup>66</sup> but TxDOT proposes only 29.96 acres in area from 11 ponds meaning that Segment 1 residents will see more ROW acquisition in the future.<sup>67</sup>

## 2. Segment 2

Segment 2 includes two Super Neighborhoods: Greater Heights and Near Northside. **Racial and ethnic minorities make up 83.5% of the Segment 2 population, of which 69.6% is Hispanic.**<sup>68</sup> LEP persons make up 21.5% of the population, with Spanish being the predominant language.<sup>69</sup> Differently abled people make up 14.1% of the Segment 2 population, higher than the City (9.8%) and the County (9.3%).<sup>70</sup>

Housing values in Segment 2 range from \$68,000 to \$562,000.<sup>71</sup> Household income in Segment 2 is \$48,298, lower than the County (\$55,584).<sup>72</sup> There are 15 Census Block Groups in Segment 2 and 1 of them is low-income.<sup>73</sup> The unemployment rate in Segment 2 is 5.9%.<sup>74</sup>

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<sup>61</sup> *Id.* at 3-57.

<sup>62</sup> *Id.* at 3-57.

<sup>63</sup> *Id.* at 3-59.

<sup>64</sup> *Id.* at 3-62.

<sup>65</sup> *Id.* at 3-58.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2-43.

<sup>68</sup> *Id.* at 3-5 (TxDOT fails to provide data on Black people).

<sup>69</sup> Community Impacts at 4-6.

<sup>70</sup> F-EIS at 3-8.

<sup>71</sup> Community Impacts at 3-7 to -8.

<sup>72</sup> *Id.* at 4-10.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

Segment 2 is approximately 4.5 miles long and the area of the existing ROW is approximately 220 acres.<sup>75</sup> The NHHIP would require an additional 44 acres of ROW in Segment 2.<sup>76</sup>

There are no METRO transit centers located in Segment 2. There is a network of 37 buses that cross or run parallel I-45 to Segment 2.<sup>77</sup> One bus stop within Segment 2 at the intersection of Quitman St. and I-45 may be impacted or displaced.

There will be noise impacts in Segment 2. Existing noise will continue and the NHHIP will affect people adjacent to the ROW. Some people will experience noise reduction. Affected people in Segment 2 are primarily residential in residential areas and also include a park and a cemetery.<sup>78</sup> Proposed noise barriers in Segment 2 would be 16 feet high.<sup>79</sup>

In Segment 2, the Preferred Alternative decreases the amount of land in the 500-year floodplain, from 138 acres to 16 acres.<sup>80</sup> TxDOT has conducted both a preliminary and a detailed drainage study for Segment 2.<sup>81</sup> TxDOT found that the “NHHIP improvements would not adversely impact existing conditions” in Segment 2.<sup>82</sup> Based on the detailed drainage study, TxDOT has proposed flooding mitigation measures in Segment 2, including: (1) replacing 4 drainage crossings; (2) installing 2 stormwater sewer systems; (3) installing a pump station; and (4) installing 3 detention ponds,<sup>83</sup> with a total capacity of 21.79 acres.

### 3. Segment 3

Segment 3 includes a dozen Super Neighborhoods, including, Second, Third, and Fifth Wards. **Racial and ethnic minorities make up 73.6% of the population in Segment 3, of which 42.3% is Black and 24.7% Hispanic.**<sup>84</sup> LEP persons make up 10% of the population, with Spanish being the predominant language.<sup>85</sup> People with disabilities

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<sup>75</sup> *Id.* at 2-63.

<sup>76</sup> *Id.* at 2-65

<sup>77</sup> F-EIS at 3-25.

<sup>78</sup> *Id.* at 3-39.

<sup>79</sup> *Id.* at 3-41.

<sup>80</sup> *Id.* at 3-57.

<sup>81</sup> *Id.* at 3-57.

<sup>82</sup> *Id.* at 3-59.

<sup>83</sup> *Id.* at 3-59 to -60.

<sup>84</sup> *Id.* at 3-6.

<sup>85</sup> Community Impacts at 4-8.

make up 12% of the Segment 3 population, higher than the City (9.8%) and the County (9.3%).<sup>86</sup>

There are at least three Title I schools in Segment 3—schools that receive supplemental federal dollars because of their high concentrations of low-income students.<sup>87</sup> These schools are Bruce Elementary School, Houston Academy for International Studies, Young Women’s College Preparatory School, and minorities make up 90% or more of each of their student populations.<sup>88</sup>

Housing values in Segment 3 range from \$25,000 to \$2,300,000.<sup>89</sup> Household income in Segment 3 is \$55,574, lower than the County (\$55,584).<sup>90</sup> There are 36 Census Block Groups in Segment 3 and 6 of them are low-income.<sup>91</sup> The unemployment rate in Segment 3 is 6.9%.<sup>92</sup>

Segment 3 is approximately 13.1 miles long and the existing ROW is approximately 638 acres.<sup>93</sup> The NHHIP would require an additional 160 acres of ROW in Segment 3.<sup>94</sup>

All three structural caps proposed by the NHHIP are in Segment 3.<sup>95</sup> These are to be located over (1) the depressed lanes of I-45 and US 59/I-69 from approximately Commerce St. to Lamar St.; (2) the depressed lanes of US 59/I-69 between approximately Main St. and Fannin St.; and (3) the area of the Caroline St./Wheeler St. intersection.

There are three METRO transit centers located in Segment 3, Burnett (1450 North Main St.), Downtown (1900 Main St.), and Wheeler (4500 ½ Main St.).<sup>96</sup> These transit centers service a network of 60 bus routes and three light rail lines (Main Street, East End, and Southeast) that cross or run parallel to Segment 3.<sup>97</sup> The NHHIP will potentially affect 33 bus stops.

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<sup>86</sup> F-EIS at 3-8.

<sup>87</sup> *Id.* at 3-7 to -8.

<sup>88</sup> *Id.* at 3-7.

<sup>89</sup> Community Impacts at 3-7 to -8.

<sup>90</sup> *Id.* at 4-11.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> F-EIS at 2-63.

<sup>94</sup> *Id.* at 2-65.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 3-23.

<sup>97</sup> *Id.* at 3-25.

There will be noise impacts in Segment 3.<sup>98</sup> Existing noise will continue and the NHHIP will affect people adjacent to the ROW, including new ROW acquisitions. Some people will experience noise reduction. Affected people in Segment 3 are primarily residential in residential areas as well as parks, schools, churches and other community resources. Proposed noise barriers in Segment 3 would be 16 feet high.<sup>99</sup>

In Segment 3, the Preferred Alternative decreases the amount of land in the 500-year floodplain, from 179 acres to 45 acres.<sup>100</sup> TxDOT has conducted a both a preliminary and a detailed drainage study for Segment 3.<sup>101</sup> “NHHIP improvements would not adversely impact existing conditions” in Segment 3.<sup>102</sup> Based on the detailed drainage study, TxDOT has proposed flooding mitigation measures in Segment 3, including: (1) replacing 4 drainage crossings; and (2) installing 5 detention basins, with a total capacity of .<sup>103</sup>

## **B. Schools in and around the Project Area**

For environmental justice communities, schools are an important source of information about everyday life in the community. The history of schools serving children in the NHHIP Project Area demonstrates that infrastructure development in the community has led to long-term detrimental impacts to neighborhood schools. Years after construction, minority children continue to bear a disproportionate burden of hazards and pollution associated with their proximity to highways. These conditions contribute to patterns of diminished school success for children attending schools within and nearby the Project Area. For example, elevated asthma rates cause children to miss school and deprive them of safe walking routes to school. And this legacy is visible today in school performance data from the Texas Education Agency (“TEA”). Among the children disproportionately impacted by the NHHIP are those that are so lacking in resources that the federal government ensures that they get fed at least twice a day; many others do not speak English well or at all; and, this population is disproportionately made up of children who are Black and Latinx, and immigrants. TxDOT fails the next generation by failing to account for long-term adverse impacts on schools, safe walking routes to schools, and by failing to take affirmative steps to redress its legacy of adverse impacts to schools.

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<sup>98</sup> *Id.* at 3-39.

<sup>99</sup> *Id.* at 3-41.

<sup>100</sup> *Id.* at 3-57.

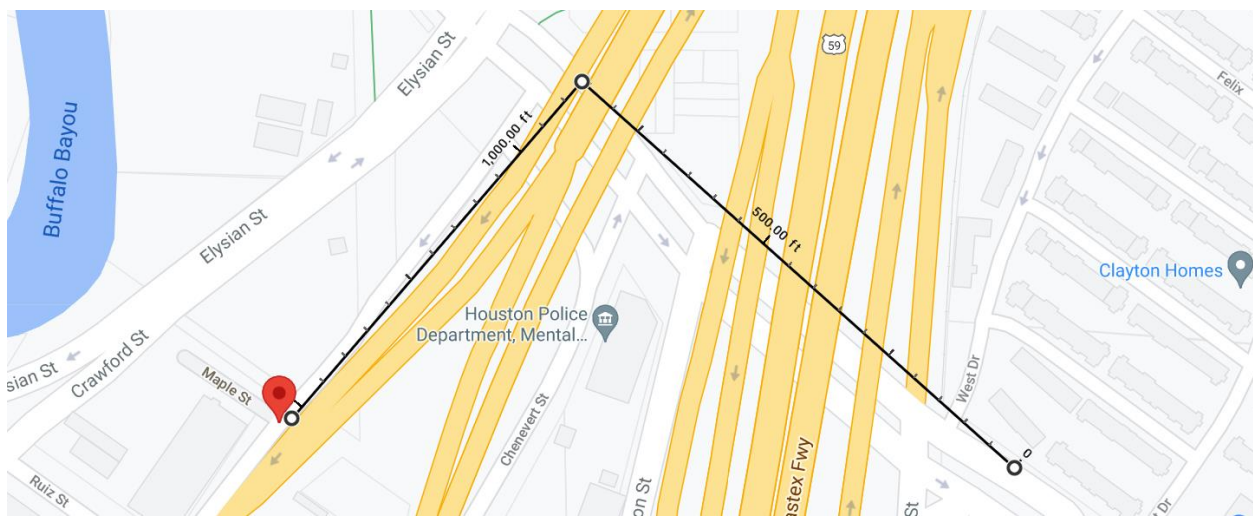
<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 3-59.

<sup>103</sup> *Id.* at 3-59 to -60.



Schools in NHHIP Segment 3 illustrate the indirect impacts that highways can have on neighborhood schools. In Barrio Segundo, or Second Ward, Our Lady of Guadalupe School, located just down the street from the land that would become Clayton Homes, opened on September 12, 1912 and continues to operate today.<sup>104</sup> This school served Mexican and Mexican American children, most of whom were Spanish speaking. After community push back, the school offered instruction in Spanish, though it would change back to English by 1929.<sup>105</sup> During this period, Rusk Elementary (1701 Maple Avenue) served the same student body as it transitioned from being a white school to a so-called “Mexican School.”<sup>106</sup> Many children who could have attended Rusk did not do so because they could not afford to pay for lunch.<sup>107</sup> This school was approximately a third of a mile walking distance from the land that would become Clayton Homes.



Source: Google Maps (July 2021)

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<sup>104</sup> Mexican Americans in Houston at 12; see Our Lady of Guadalupe School, History, <https://olgschoolhouston.org/about/history/>.

<sup>105</sup> Mexican Americans in Houston at 12, 28.

<sup>106</sup> *Id.* at 12-13.

<sup>107</sup> *Id.*



Mexican American and white children pose with Easter baskets outside of the Rusk Settlement House next to Rusk Elementary in the 1920s<sup>108</sup>

Unfortunately, “[i]n the mid-1950s, the school district condemned Rusk Elementary School and demolished it to make way for the Eastex Freeway. Most of the students were sent—across a chain of traffic hazards—to Jones Elementary at 914 Elysian.”<sup>109</sup> Jones Elementary served Mexican and Mexican American children in the Northside community which, at the time, included parts of present day Fifth Ward.<sup>110</sup> Also known as the Elysian Street School, Jones Elementary was located at 914 Elysian.<sup>111</sup> Residents had to cross the Bayou to get to school if they lived in the area that would become Clayton Homes. And, at approximately half a mile, it was a considerable increase in walking distance for primary schoolchildren who used to go to Rusk.

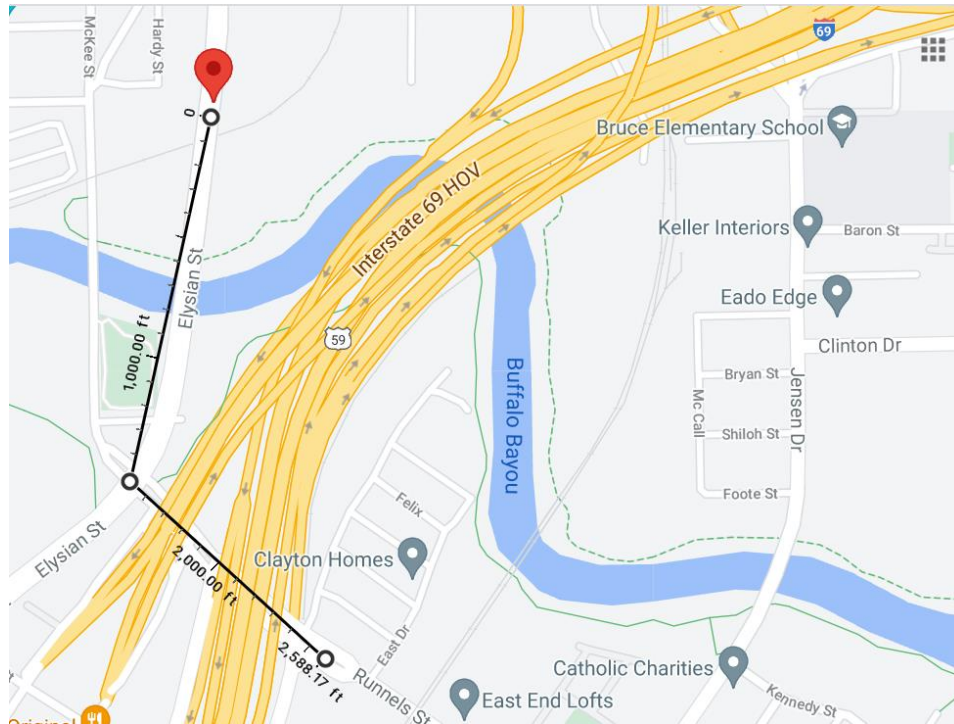
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<sup>108</sup> McWorter, Thomas, *Houston History (magazine)*, *Trailblazers in Houston’s East End: The Impact of Ripley House and the Settlement Association on Houston’s Hispanic Population*, Vol. 9, No. 1, at 10 (Mar. 2012), <https://houstonhistorymagazine.org/wp-content/uploads/2012/03/mcwhorter-Ripley-House.pdf>.

<sup>109</sup> Mexican Americans in Houston at 101.

<sup>110</sup> *Id.* at 27.

<sup>111</sup> *Id.*



Source: Google Maps (July 2021)

The entire school was severely disrupted by the construction of the highway - not just people living in the Clayton Homes area. The new highway was just a few feet from classrooms and “students using the upper floor rooms looked out upon the overpass.”<sup>112</sup> Ultimately, in 1956, the school board voted to move Jones to a new building at 2805 Garrow—this school would not be completed until 1960 meaning that Mexican and Mexican American children would suffer years of exposure to hazardous road conditions<sup>113</sup> and dangerous pollution, including lead in gasoline.

Along with the highway, other acts of discrimination against Mexican and Mexican American children led to diminished school success. In addition to lacking qualified staff, “[s]chools in predominantly Mexican neighborhoods were generally old, run down, and short on playground space.”<sup>114</sup> Schools implemented ‘No Spanish’ rules and other discriminatory practices that “reminded Mexican American students of their inferiority and second-class status while simultaneously” Americanizing them.<sup>115</sup> This discrimination sits as the backdrop for lower levels of school completion by Mexican and Mexican American students. In 1950, “the median number of years of schooling completed by Mexican Americans twenty-five years old and over was 5.2, compared with

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<sup>112</sup> *Id.*

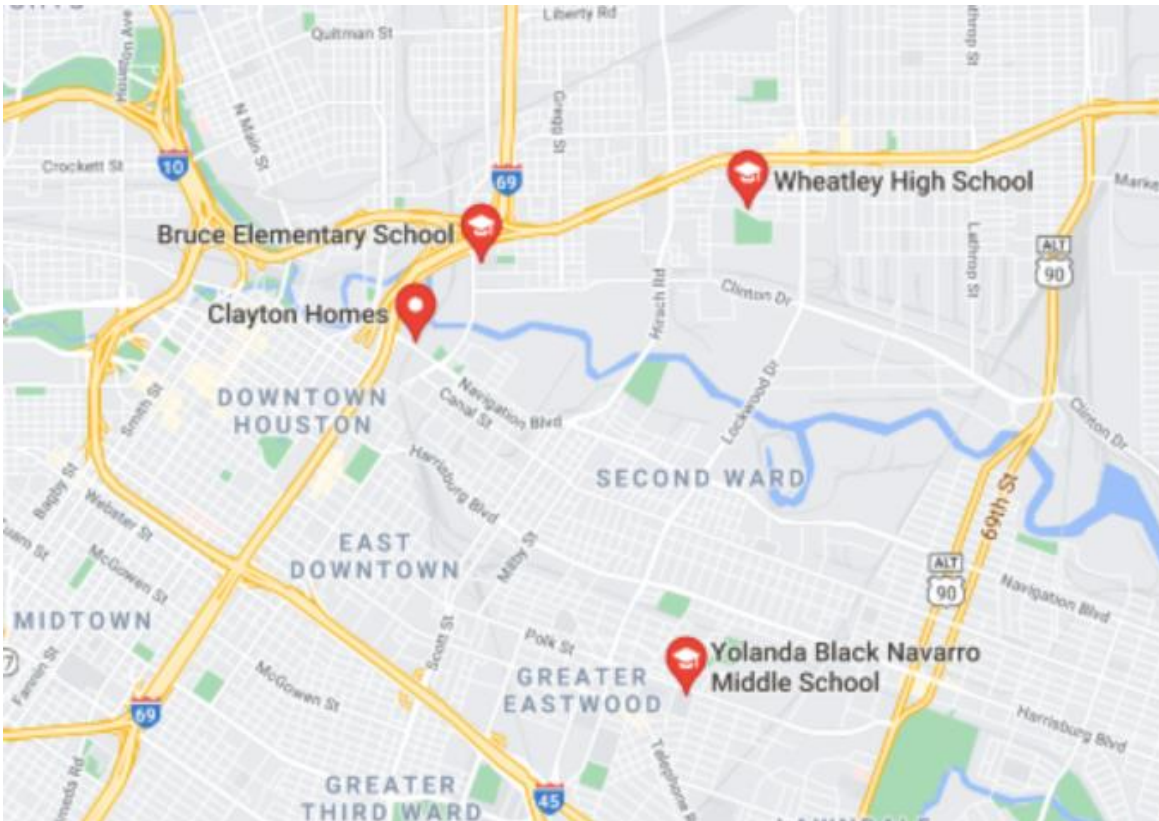
<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 101-102.

<sup>115</sup> *Id.* at 101.

11.4 for Anglos and 7.6 for blacks. In the next decennial, a slight increase occurred: Mexicans had 6.4 median years of school completed, as opposed to 12.1 for Anglos and 8.8 for blacks.”<sup>116</sup>

Though the demographics of the Clayton Homes area have changed, it remains a predominantly minority community. Today, children who live at Clayton Homes are zoned by HISD to Bruce Elementary School, Navarro Middle School, and Wheatley High School – where nearly all of the student populations are made up of economically disadvantaged, racial and ethnic minorities.



According to the TEA, children in this school track underperform in the state’s benchmark testing, the State of Texas Assessments of Academic Readiness (“STAAR”).<sup>117</sup>

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<sup>116</sup> *Id.* at 102.

<sup>117</sup> See Attachment 7 for all school information.

## 2019-2020 School Profiles

	<b>% African American (District: 22.7%)</b>	<b>% Hispanic (District: 62.3%)</b>	<b>% Asian (District: 4.2%)</b>	<b>% Economically Disadvantaged<sup>118</sup> (District: 79.1%)</b>	<b>% English Learners (District: 33.9%)</b>
<b>Bruce Elementary School</b>	68%	30.1%	0.9%	97.5%	16.1%
<b>Navarro Middle School</b>	7.2%	92.1%	0.1%	93.7%	47.6%
<b>Wheatley High School</b>	52.2%	46.9%	0.3%	94.4%	19.5%

## 2019-2020 STAAR Performance Rates for All Subjects

	<b>Approaches Grade Level or Above (District: 72%)</b>	<b>Meets Grade Level or Above (District: 44%)</b>	<b>Masters Grade Level (District: 21%)</b>
<b>Bruce Elementary School</b>	60%	27%	9%
<b>Navarro Middle School</b>	61%	28%	10%
<b>Wheatley High School</b>	55%	27%	7%

For children zoned for Bruce Elementary, the NHHIP would potentially expose them to more traffic, construction hazards, and harmful pollution from fossil fuel toxic emissions, as well as their cancer-causing compounds. But Bruce, Navarro, and Wheatley are only some of the schools that stand to face direct and indirect impacts from construction of the NHHIP.

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<sup>118</sup> According to the Texas Education Agency “[a]n economically disadvantaged student is defined as one who is eligible for free or reduced-price meals under the National School Lunch and Child Nutrition Program,”

<https://rptsvr1.tea.texas.gov/acctres/gloss0708.html#:~:text=An%20economically%20disadvantaged%20student%20is,Lunch%20and%20Child%20Nutrition%20Program>; see also Benefits.gov, National School Breakfast and Lunch Program for Texas (“Children from families with incomes at or below 130 percent of the Federal poverty level are eligible for free meals. Those with incomes between 130 and 185 percent of the Federal poverty level are eligible for reduced price meals.”), <https://www.benefits.gov/benefit/1990#:~:text=Children%20from%20families%20with%20incomes,eligible%20for%20reduced%20price%20meals>.

**C. Unsheltered, unhoused, and low-resource populations in and around the NHHIP Project Area.**

**1. Black Americans are overrepresented in populations of unsheltered, unhoused and low-resource populations in the Houston area.**

Black Americans are overrepresented in unhoused and unsheltered populations. Unsheltered and unhoused complainants are all Black Americans. In Harris County, Black Americans make up nearly 60 percent of the people in these groups, though Black Americans only make up approximately 20 percent of the County’s population. A consequence of this racial disparity is that TxDOT’s exclusion of low-resource populations disproportionately impacts Black Americans to an extensive and unlawful degree. This violates Complainants’ civil rights, as protected by Title VI of the Civil Rights Act of 1964. Further, Complainants argue that TxDOT’s final action on the NHHIP does not “advance equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality”<sup>119</sup> and thus runs contrary to President Biden’s national directive on these issues. As Complainants demonstrate below, there are less discriminatory alternatives that TxDOT could have used to seek public participation of low-resource populations, yet it chose not to.

There are strong prejudices against unsheltered, unhoused, and low-resource populations. As Complainants explain below, the experiences of low-resource people are as diverse as the experiences of those who do not exist in the margins of society.<sup>120</sup>

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<sup>119</sup> Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985; *see also* Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, Exec. Order 12,898, 59 Fed. Reg. 7,629, at §§ 1-101, 5-5 (Feb. 16, 1994) (directs federal agencies to make environmental justice part of their missions and imposes specific requirements, including receiving recommendations from the public about public participation and access to information).

<sup>120</sup> For an intimate look into the obstacles unsheltered and unhoused Black American males face when trying to integrate back into society, watch *Queer Eye: The North Philadelphia Story* (Netflix broadcast, season 5, episode 4) (June 5, 2020); *see also* Tremoulet, PhD, Andrée, *et al.*, Portland State University, Center for Urban Studies, Homeless Encampments on Public Right-of-Way: A Planning and Best Practices Guide, at 5 (Sept. 2012) (“There are a number of societal and individual conditions that can combine to result in sending an individual into a homeless situation. A shortage of living wage jobs and a lack of affordable housing are key economic factors affecting the incidence of homelessness. The lack of decent, safe housing alternatives for adults experiencing mental illness is another. Certain populations in transition, such as children aging out of foster care or people leaving incarceration, are particularly

“Contrary to common belief, most people experiencing homelessness are not mentally ill or dangerous.”<sup>121</sup> Among low-resource populations are people who claim fixed income and others who are fully employed; yet neither of these subpopulations earn enough to cover the cost of essential needs, such as food and shelter.

As of January 19, 2021, there were at least 3,055 sheltered and unsheltered people experiencing homelessness in the cities of Houston, Pasadena, and Conroe and in the Counties of Fort Bend, Harris, and Montgomery.<sup>122</sup> Black Americans accounted for 1,710 of these individuals— 56 percent of those surveyed. However, Black Americans make up only approximately 20 percent of the general population in Harris and Fort Bend Counties and approximately 6 percent of the population in Montgomery County.<sup>123</sup>

Prior to the SARS-CoV 2 (“COVID-19”) global pandemic, the Point-in Time Count (“Count”), a program administered by HUD to count people experiencing homelessness, took place over three days. Due to the pandemic, the most recent Count took place over ten days and resulted in data that cannot easily be compared to that of prior years. Despite this challenge, the most recent data is consistent with historic patterns of over-representation of Black Americans in the Houston-area among unsheltered and unhoused populations. This data also shows that approximately 14 percent of people surveyed, or one in seven, indicated the COVID-19 pandemic as the reason for their homelessness, specifically citing pandemic-related job loss and evictions as the precipitating event.<sup>124</sup>

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vulnerable to experiencing homelessness. Young people who experience violence or severe dysfunction in their home environments may end up on the street. The challenges associated with retuning to civilian life after experiencing the ravages of war present another factor that can send people into homelessness.”) (“ROW Best Practices Report”), Attachment 10; *see also* Downtown Management District and SEARCH Homeless Services, Being Downtown (undated) (Among other findings, this study found that the majority but not all people who congregate in downtown Houston are homeless; that some people who congregate downtown are largely driven by income and the need for support services and libraries to search for jobs; that several use panhandling as a source of income but feel “humiliation, frustration and despair at having to resort to this method”; and that many consider downtown part of their community, finding services, work, and friends there), Attachment 11.

<sup>121</sup> *Id.*

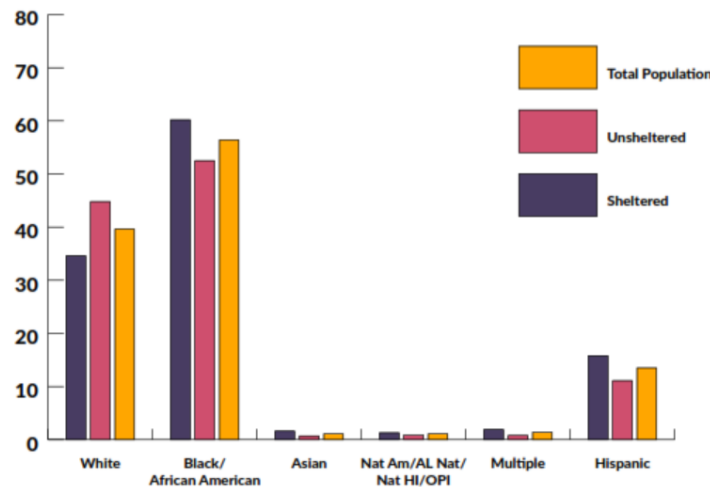
<sup>122</sup> Troisi, PhD, Catherine, UT School of Public Health, The Way Home Continuum of Care 2021 Point-in-Time Homeless Count & Survey Independent Analysis (March 2021) (“2021 Count Report”) (for all Counts cited here, people were asked whether they were Hispanic separately from their racial identity), at 4, <https://irp-cdn.multiscreensite.com/2d521d2c/files/uploaded/2019%20PIT%20Report%20-%20Final.pdf>.

<sup>123</sup> U.S. Census Bureau, QuickFacts, individual searches for Fort Bend, Harris, and Montgomery Counties, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

<sup>124</sup> 2021 Count Report at 7.

The Coalition for the Homeless, a Houston-area charitable organization, works with HUD to collect and analyze annual Counts and their data support this pattern. The Coalition is “addressing racial equity through proportionally housing more African Americans (78%) than Hispanics<sup>125</sup> and whites.”<sup>126</sup> Even with these efforts, a wide racial disparity persists, as seen below.

**Racial Composition of Homeless Population in the Houston Area**  
**2021 Point-in-Time Count<sup>127</sup>**



**Racial Composition of Homeless Population in the Houston Area**  
**2020 Point-in-Time Count<sup>128</sup>**

Race/Ethnicity <sup>8</sup>	Harris Co population 7/1/2019	Total population experiencing homelessness	Sheltered people experiencing homelessness	Unsheltered people experiencing homelessness	Young Adults experiencing homelessness
White	69.6%	39.7%	32.6%	49.4%	29%
Black/African American	19.9%	55.8%	61.6%	47.7%	65.1%
Asian	7.4%	0.5%	0.5%	0.5%	1.2%
American Indian/ Alaska Native/ Native Hawaiian/ Pacific Islander	1.2%	1.3%	1.5%	1.2%	0.6%
Multiple Races	1.9%	2.7%	3.8%	1.2%	4.1%
Hispanic*	43.3%	14.1%	14.5%	13.6%	14.5%

<sup>125</sup> This reference fails to account for Black or Afro-Latinos who may identify as both Black and Hispanic.

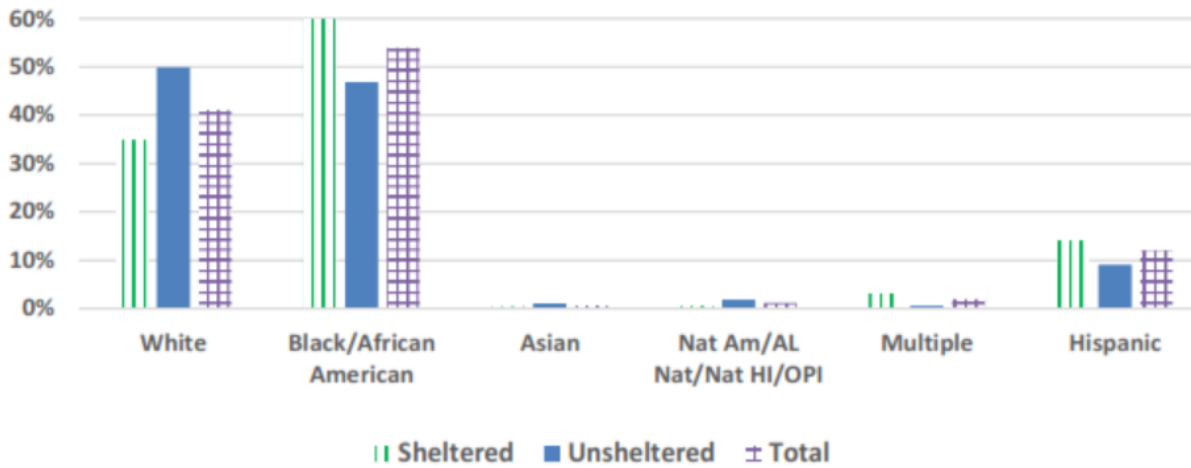
<sup>126</sup> 2021 Count Report at 13.

<sup>127</sup> *Id* at 10.

<sup>128</sup> Troisi, PhD, Catherine, UT School of Public Health, The Way Home Continuum of Care 2020 Point-in-Time Homeless Count & Survey Independent Analysis (June 2020), at 11, [https://irp-cdn.multiscreensite.com/2d521d2c/files/uploaded/FINAL%202020%20PIT%20Report\\_Pgs.pdf](https://irp-cdn.multiscreensite.com/2d521d2c/files/uploaded/FINAL%202020%20PIT%20Report_Pgs.pdf).

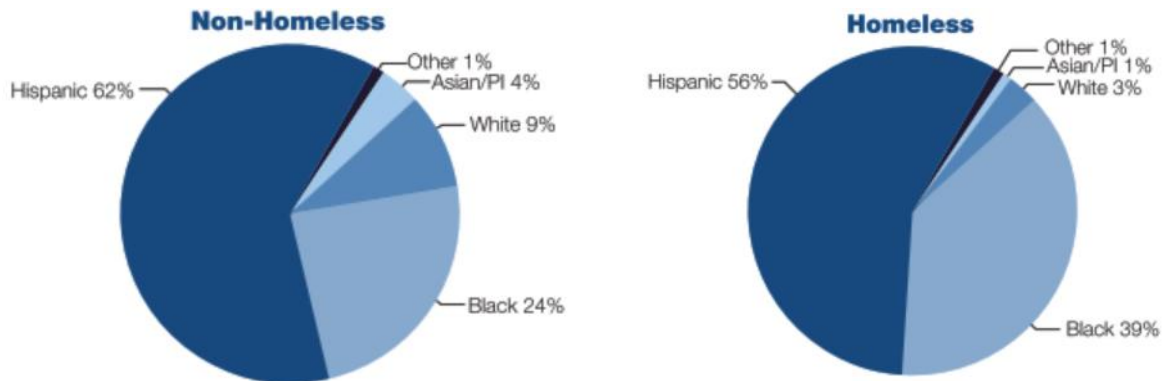


**Racial Composition of Homeless Population in the Houston Area  
2019 Point-in-Time Count<sup>129</sup>**



2. There are unhoused, unsheltered, and low-resource children in the Project Area

**Houston Independent School District Student Population by Race/Ethnicity and Housing Status, 2013-2017<sup>130</sup>**



<sup>129</sup> 2021 Count Report at 21.

<sup>130</sup> Pavlakis, Alexandra, PhD, et al, Examining Complexity in Student Homelessness: The Educational Outcomes of HISD’s Homeless Students (Apr. 2020) (“HISD Homeless Children Report”), at 9, <https://herc.rice.edu/sites/g/files/bxs3001/files/inline-files/HERC%20-%20Complexity%20in%20Student%20Homelessness%20brief.pdf>.

Between 2013 and 2017, the Houston Independent School District (“HISD”) educated approximately 220,000 children. Of these children, 6,669 identified as homeless, making up approximately 3 percent of HISD’s student population. “Black students were substantially overrepresented among HISD’s homeless students.”<sup>131</sup> During the same period, Black Americans accounted for approximately 25 percent of HISD’s student population but 40 percent of HISD’s homeless student population.<sup>132</sup>

The U.S. Department of Education defines homeless children and youths to mean those children and youths who lack a fixed, regular, and adequate nighttime residence. This includes children and youths in shared housing situations, places not meant for human habitation, and migratory children.<sup>133</sup> At the federal level, children experiencing homelessness receive some protections through the McKinney-Vento Act, which requires that, even without requisite documents, homeless children be immediately enrolled in school. The Act also provides homeless children with resources for school success, such as transportation, counseling, and clothing.<sup>134</sup>

Through no fault of their own, Houston-area children experiencing homelessness find themselves in situations that are detrimental to their school success. A recent university study found that, when compared to housed children, HISD’s homeless students are<sup>135</sup>:

- 18 percent more likely to drop out of school, especially children living in shelters;
- Less likely to take mandatory standardized testing;
- More likely to receive school disciplinary infractions; and
- 29 percent less likely to graduate on time from high school.<sup>136</sup>

HISD students experiencing homelessness are also three times more likely than their housed peers to move schools between school years and during the school year.<sup>137</sup> Because they are a highly mobile population, children experiencing homelessness may

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<sup>131</sup> *Id.* at 9.

<sup>132</sup> *Id.*

<sup>133</sup> 42 U.S.C. § 11434a(2).

<sup>134</sup> McKinney-Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. § 11431 *et seq.*; see also Texas Education Agency, Texas Education for Homeless Children and Youth (TEHCY) Program, <https://tea.texas.gov/texas-schools/support-for-at-risk-schools-and-students/texas-education-for-homeless-children-and-youth-tehcy-program>.

<sup>135</sup> HISD Homeless Children Report at 3, 7.

<sup>136</sup> *Id.* at 21.

<sup>137</sup> *Id.* at 8.

have to leave friends, family, and teachers behind. And “nearly every homeless student is also experiencing poverty, and thus, at risk of food insecurity and other poverty-related challenges.”<sup>138</sup>

As discussed above, Complainants Tyeshia and Jeremy are parents to two toddlers. Ms. Vaughn and Mr. Hurst’s toddlers are zoned for HISD schools and are within the population of children, if enrolled under the family’s present conditions, that experience diminished school success due to their homelessness.

### **3. COVID-19 impacts on unsheltered, unhoused, and low-resource populations**

Dispersing low-resource populations within the Project Area will sever connections with service providers such as Fish & Loaves, SEARCH and others and therefore increase the likelihood of spreading COVID-19 infections in the community. The Centers for Disease Control and Prevention’s (“CDC”) most recent Interim COVID-19 Guidance for encampments recommends that people who are living unsheltered or in encampments be allowed to remain and suggests the importance of “continuing homeless services during community spread of COVID-19 [and] maintain[ing] services for all people experiencing unsheltered homelessness.”<sup>139</sup>

Constant displacement ignores the mental and physical conditions suffered by low-resource people. These populations are susceptible to weather conditions (such as natural disasters during hurricane season), criminalization due to local ordinances, and violence. By allowing encampments to remain in place when individual housing is not available, people in the encampments can continue to receive vital services, such as basic hygiene supplies, handwashing stations, and COVID-related care, including tests and vaccines. These services can help stop the spread of COVID-19 and its recently identified more deadly delta variant. Further, providing continuity of care helps to ameliorate the increased vulnerability experienced by these populations, such as providing them with food security to meet their basic nutritional needs and stay as healthy as possible during the pandemic.

People without a home are at higher risk for some of the worst health outcomes of the COVID-19 pandemic. Using data from the Point-in-Time Count, university

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<sup>138</sup> *Id.* at 4.

<sup>139</sup> CDC, Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials (last updated Jul. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

researchers modeled the impacts of COVID infections and found that those experiencing homelessness would be twice as likely to be hospitalized, two to four times as likely to require critical care, and two to three times as likely to die, when compared to the general population.<sup>140</sup> Given these findings, TxDOT must not cause the displacement of low-resource populations while the COVID-19 global pandemic persists.

#### D. Air Pollution in the Community

The air in the Houston-Galveston-Brazoria (“HGB”) area is unhealthy to breathe.<sup>141</sup> At present, the HGB area is out of compliance with two federal ozone standards and may violate a particulate matter standard given recent data. According to EPA, mobile sources emit at least nine priority compounds that are known cancer risk drivers: 1,3-butadiene, acetaldehyde, acrolein, benzene, diesel particulate matter (DPM), ethylbenzene, formaldehyde, naphthalene, and polycyclic organic matter (POM).<sup>142</sup> These compounds are part of a list of 93 mobile source air toxics, or MSATs. DPM “is the dominant component of MSAT emissions, making up 50-70 percent of all priority MSAT pollutants by mass, depending on calendar year.”<sup>143</sup>

Though TxDOT acknowledges that the NHHIP will increase MSAT pollution, it did not conduct an air toxics health impacts analysis for any part of the NHHIP.<sup>144</sup> The NHHIP will bring traffic closer to homes and businesses and “[t]he localized increases in MSAT concentrations would likely be most pronounced along the expanded roadway sections at Beltway 8 [Segment 1], I-610 [Segment 2], US 59/I-69 and SH 288 [both in Segment 3].”<sup>145</sup> As its rationale, the agency cites uncertainties with this type of modeling. Nor does TxDOT appear to have conducted targeted health impacts analyses in some of the NHHIP’s most vulnerable communities, such as those by schools and residences. Without knowing the true health impact of the NHHIP’s MSAT emissions, TxDOT proposes to entrench and compound existing poor air quality by Houston area highways, especially for PM<sub>2.5</sub> and ozone.

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<sup>140</sup> Culhane, Treglia, *et al.*, University of Pennsylvania, University of California, Boston University, Estimated Emergency and Observational/Quarantine Capacity Need for the US Homeless Population Related to COVID-19 Exposure by County; Projected Hospitalizations, Intensive Care Units and Mortality, at 4 (Mar. 27, 2020) (emphasis added), [https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper\\_clean-636pm.pdf](https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper_clean-636pm.pdf).

<sup>141</sup> Made up of eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

<sup>142</sup> F-EIS, App’x C, Mobile Source Air Toxics (MSAT) Quantitative Technical Report (“MSAT Analysis”) (Aug. 2020), at 4.

<sup>143</sup> *Id.* at 5.

<sup>144</sup> *Id.* at 6-9.

<sup>145</sup> *Id.* at 7.

In support of its lack of analysis, TxDOT cites to an EPA air quality study conducted between 2009-2012 at a small HISD magnet school in downtown Houston, the Young Scholars Academy for Excellence (1809 Louisiana St.). The study measured the ambient air levels of benzene and 1,3-butadiene, two MSATs, and found that “long-term concentrations were not as high as was expected.” However, “EPA chose not to evaluate diesel particulate as a fraction of PM<sub>2.5</sub> since diesel particulate emission reductions were predicted to drop by 90% between 1999 and 2020.” TxDOT does not elaborate on the study’s findings or whether DPM emissions in the area were actually reduced by 90% by 2020. Further, this school is hardly representative of all schools in the Project Area. The Academy does not appear to have outdoor spaces, such as the Aldine High School track and ball fields which are directly next to I-45 in Segment 1. MSAT emissions, and PM<sub>2.5</sub> and ozone discussed below, will disproportionately impact low-income and minority populations in and around the Project Area. Thus, TxDOT must conduct a health impact analysis.

### **1. Particulate Matter (“PM”)**

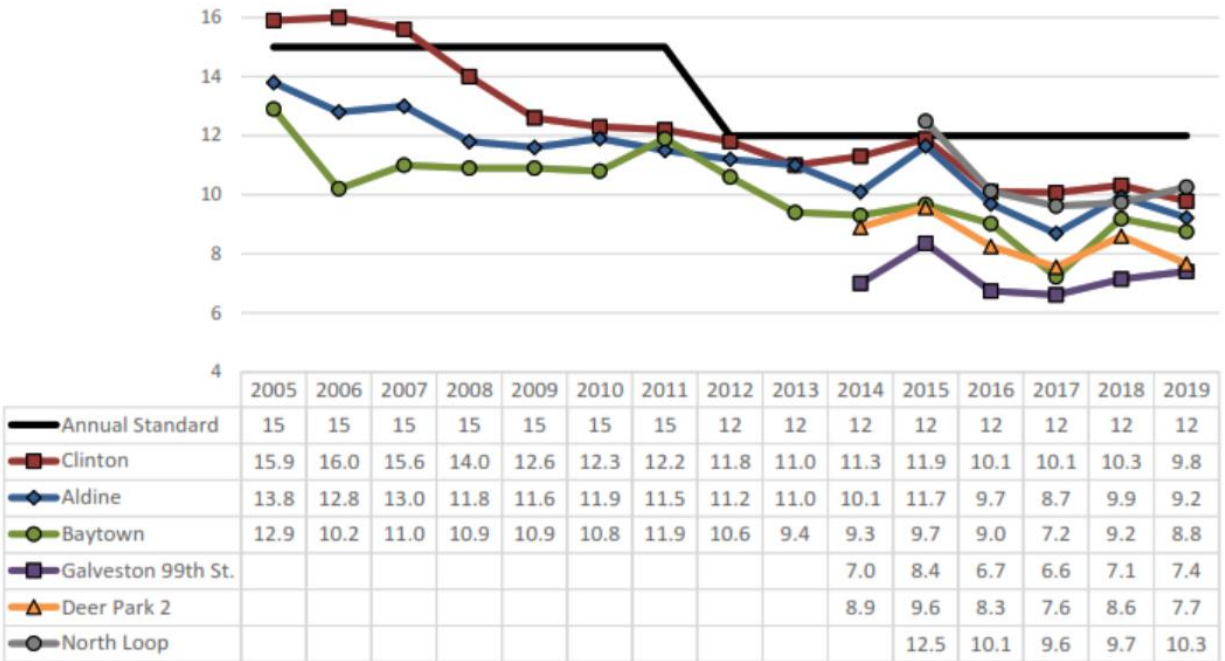
There is a PM<sub>2.5</sub> problem in Houston. On January 12, 2015, EPA designated the HGB area as “unclassified” for the 2012 PM<sub>2.5</sub> National Ambient Air Quality Standard (“NAAQS”).<sup>146</sup> The 2012 PM<sub>2.5</sub> NAAQS sets the maximum permissible PM<sub>2.5</sub> ambient concentration at 12.0 µg/m<sup>3</sup> down from 15.00 µg/m<sup>3</sup>. The HGB area has avoided a nonattainment designation through voluntary PM<sub>2.5</sub> abatement programs. The effectiveness of these voluntary measures has waned and reductions in PM<sub>2.5</sub> ambient air concentrations remain stagnant.<sup>147</sup>

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<sup>146</sup> 79 Fed. Reg. 2,206 (Jan. 14, 2015).

<sup>147</sup> Houston Galveston Area Council, Houston-Galveston-Brazoria (HGB) PM<sub>2.5</sub> Advance Path Forward (2020) (“HGB PM<sub>2.5</sub> Report”), at 11, <https://www.h-gac.com/getmedia/6b575914-9d73-491c-9c07-1729215056b1/ITEM-3a-PM2.5-Advance-Path-Forward-2020-Final-Draft.pdf>.

## Preliminary Annual PM<sub>2.5</sub> Averages for HGB Region Regulatory Monitors



According to TCEQ, Harris County “may be designated nonattainment for the revised PM<sub>2.5</sub> standard depending on recent data” and points to a 22% reduction seen between 2007 and 2011 – a decade ago.<sup>148</sup> A 2020 report by the Houston-Galveston Area Council, an entity partially responsible for implementing the Clean Air Act in Harris County, also found “indications that increased PM<sub>2.5</sub> concentrations may exist within the HGB region and beyond the existing monitoring network.”<sup>149</sup> Indeed, in its last revision to Texas’s air quality monitoring plan, TCEQ proposed new PM<sub>2.5</sub> monitors in several Houston-area communities, including Fifth Ward—only after years of advocacy from community leaders, including environmental justice advocate Reverend James Caldwell.<sup>150</sup>

<sup>148</sup> TCEQ, Air Pollution from Particulate Matter, What is being done about PM?, [www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-pm](http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-pm). Houston Galveston Area Council, Houston-Galveston-Brazoria (HGB) PM<sub>2.5</sub> Advance Path Forward, Prepared in Partnership with Members of the H-GAC Regional Air Quality Planning Advisory Committee, 2015 Update, [www.epa.gov/sites/production/files/2016-02/documents/houstonupdate2015.pdf](http://www.epa.gov/sites/production/files/2016-02/documents/houstonupdate2015.pdf).

<sup>149</sup> HGB PM<sub>2.5</sub> Report at 6.

<sup>150</sup> TCEQ, 2021 Annual Monitoring Network Plan at 25, <https://www.tceq.texas.gov/downloads/air-quality/air-monitoring/network/historical/2021-amnp-portfolio.pdf>.

Communities along the NHHIP Project Area regularly experience unhealthy PM<sub>2.5</sub> ambient air concentrations. In 2020, every PM<sub>2.5</sub> monitor in the HGB area significantly exceeded the 2012 NAAQS repeatedly.<sup>151</sup> And 2021 appears to follow this trend.<sup>152</sup>

#### **Four Highest 24-Hour PM<sub>2.5</sub> Concentrations in 2020 in the HGB Area (ppb)**

<a href="#">Houston East C1/G316</a>	1	01/01/2020	<b>56.9</b>	06/26/2020	<b>43.4</b>	07/02/2020	<b>30.6</b>	07/01/2020	<b>24.3</b>
<a href="#">Houston Aldine C8/AF108/X150</a>	4	01/01/2020	<b>110.6</b>	06/26/2020	<b>39.3</b>	07/02/2020	<b>30.2</b>	12/08/2020	<b>25.7</b>
<a href="#">Hou.DeerPrk2 C35/235/1001/AFH139FP239</a>	4	06/26/2020	<b>47.7</b>	07/02/2020	<b>35.4</b>	01/01/2020	<b>35.3</b>	07/01/2020	<b>27.3</b>
<a href="#">Seabrook Friendship Park C45</a>	3 N	06/26/2020	<b>45.6</b>	07/02/2020	<b>31.1</b>	07/01/2020	<b>25.5</b>	09/01/2020	<b>24.6</b>
<a href="#">Conroe Relocated C78/A321</a>	3 N	01/01/2020	<b>39.4</b>	06/26/2020	<b>38.0</b>	09/02/2020	<b>24.1</b>	07/04/2020	<b>23.4</b>
<a href="#">Clinton C403/C304/AH113</a>	3 N	06/26/2020	<b>44.6</b>	01/01/2020	<b>41.1</b>	07/02/2020	<b>35.3</b>	09/02/2020	<b>28.2</b>
<a href="#">Park Place C416</a>	3 N	06/26/2020	<b>42.7</b>	01/01/2020	<b>42.7</b>	07/02/2020	<b>34.1</b>	07/01/2020	<b>25.0</b>
<a href="#">UH West Liberty C699</a>	3 N	06/26/2020	<b>43.0</b>	07/02/2020	<b>39.3</b>	07/01/2020	<b>30.3</b>	06/30/2020	<b>30.1</b>
<a href="#">Galveston 99th St. C1034/A320/X183</a>	2	06/26/2020	<b>50.9</b>	07/02/2020	<b>33.4</b>	07/01/2020	<b>30.8</b>	06/25/2020	<b>30.7</b>
<a href="#">Oyster Creek C1607</a>	1 N	06/26/2020	<b>52.3</b>	07/02/2020	<b>35.1</b>	07/01/2020	<b>30.9</b>	06/27/2020	<b>28.8</b>

#### **Four Highest 24-Hour PM<sub>2.5</sub> Concentrations in 2021 in the HGB Area (ppb)**

<a href="#">Houston East C1/G316</a>	1	01/17/2021	<b>47.4</b>	01/16/2021	<b>23.6</b>	07/11/2021	<b>23.0</b>	05/03/2021	<b>22.4</b>
<a href="#">Houston Aldine C8/AF108/X150</a>	4	01/17/2021	<b>34.1</b>	01/16/2021	<b>27.4</b>	07/04/2021	<b>20.7</b>	05/03/2021	<b>20.7</b>
<a href="#">Hou.DeerPrk2 C35/235/1001/AFH139FP239</a>	4	07/25/2021	<b>45.8</b>	03/12/2021	<b>32.9</b>	01/17/2021	<b>31.7</b>	07/11/2021	<b>24.8</b>
<a href="#">Seabrook Friendship Park C45</a>	3 N	01/17/2021	<b>21.7</b>	07/11/2021	<b>19.3</b>	07/12/2021	<b>17.4</b>	01/16/2021	<b>17.0</b>
<a href="#">Conroe Relocated C78/A321</a>	3 N	05/03/2021	<b>21.6</b>	08/05/2021	<b>21.4</b>	07/24/2021	<b>20.9</b>	07/11/2021	<b>19.3</b>
<a href="#">Clinton C403/C304/AH113</a>	3 N	01/17/2021	<b>26.8</b>	05/03/2021	<b>26.1</b>	08/05/2021	<b>22.4</b>	07/11/2021	<b>21.8</b>
<a href="#">Houston North Wayside C405/C1033</a>	1	07/04/2021	<b>28.5</b>	08/05/2021	<b>25.8</b>	08/06/2021	<b>23.9</b>	07/05/2021	<b>21.5</b>
<a href="#">Houston Westhollow C410/C3003</a>	1	07/04/2021	<b>25.5</b>	05/03/2021	<b>23.0</b>	07/05/2021	<b>22.7</b>	07/24/2021	<b>21.0</b>
<a href="#">Park Place C416</a>	3 N	01/16/2021	<b>27.9</b>	01/17/2021	<b>27.2</b>	03/23/2021	<b>19.4</b>	04/13/2021	<b>15.4</b>
<a href="#">UH West Liberty C699</a>	3 N	01/17/2021	<b>22.0</b>	01/18/2021	<b>12.3</b>	01/16/2021	<b>12.2</b>	02/10/2021	<b>11.3</b>
<a href="#">Galveston 99th St. C1034/A320/X183</a>	2	07/11/2021	<b>23.2</b>	05/03/2021	<b>20.0</b>	07/12/2021	<b>18.6</b>	04/28/2021	<b>16.4</b>
<a href="#">Houston North Loop C1052</a>	2	07/05/2021	<b>28.7</b>	07/04/2021	<b>27.5</b>	08/05/2021	<b>24.8</b>	07/24/2021	<b>24.2</b>
<a href="#">Oyster Creek C1607</a>	1 N	01/16/2021	<b>22.7</b>	01/17/2021	<b>21.3</b>	07/11/2021	<b>21.0</b>	02/13/2021	<b>20.8</b>

<sup>151</sup> TCEQ, Four Highest 24-Hour PM-2.5 Concentrations in 2020 as of December 31, 2020, [https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25\\_24hr\\_4highest.pl](https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25_24hr_4highest.pl).

<sup>152</sup> TCEQ, Four Highest 24-Hour PM-2.5 Concentrations in 2021 as of August 9, 2021 (monitoring locations appear different from 2020 because the TCEQ revises the state's air quality monitoring network on an annual basis), [https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25\\_24hr\\_4highest.pl](https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25_24hr_4highest.pl).

## i. Ozone

The HGB area has never met any of the ozone standards at the time of their initial implementation. Ozone is not emitted, rather, it is formed through a chemical reaction between oxides of nitrogen (“NO<sub>x</sub>”) and volatile organic compounds (“VOCs”) when they are exposed to sunlight. Based on the best available science, the four ozone standards, established in 1979, 1997, 2008, and 2015, have set progressively lower permissible ozone levels. When an area fails to meet ozone deadline, the area is designated as “nonattainment.” Depending on the severity of air pollution, the area is then classified as marginal, moderate, serious, severe, and extreme, in increasing order of pollution.

The HGB area remains in nonattainment for the 2008<sup>153</sup> and 2015<sup>154</sup> standards. For the 2008 ozone standard, 75 ppb, the HGB area was initially classified as marginal; then it failed to meet the attainment deadline and was reclassified to moderate. Then again, in 2018, the HGB area failed to meet the moderate attainment deadline and was reclassified to serious in 2019. Modeling data prepared by the TCEQ indicate that the HGB area failed to meet the serious area deadline of July 20, 2021,<sup>155</sup> but EPA has not finalized its attainment determinations. If so, the HGB area will be reclassified to severe, triggering some of the Act’s most stringent public health protections. The 2021 ozone season has not yet ended and nearly every monitor in the HGB area has exceeded both the 2008 and the 2015 standards. These include monitors covering the NHHIP Project Area, such as the Houston Harvard Street monitor which reports readings at 79, 78, 76, and 75 ppb—all exceeding the 2015 standard and all but one exceeding the 2008 standard.<sup>156</sup>

By 2020, TCEQ projected that on-road emissions in the HGB area would account for 25% of NO<sub>x</sub>, only second to emissions from industrial facilities, and approximately 10% of VOC emissions, third after area sources (gas stations, dry cleaners, etc.) and

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<sup>153</sup> 75 ppb; *see also* 42 U.S.C. § 7511a(b); 40 CFR. § 51.1103(a) tbl.1 (attainment dates for Texas).

<sup>154</sup> 70 ppb.

<sup>155</sup> TCEQ, Revisions to the State of Texas Air Quality Implementation Plan for the Control of Ozone Air Pollution, Houston-Galveston-Brazoria Serious Classification Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard, TCEQ Project Number 2019-077-SIP-NR (adopted Mar. 4, 2020), at ES-1 (“The peak ozone design value for the HGB nonattainment area is projected to be 76 ppb in 2020...” and at 76 ppb, it is also possible that the HGB area may fail to attain by the 2015 ozone standard marginal area attainment date of August 3, 2021).

<sup>156</sup> Four Highest Eight-Hour Ozone Concentrations in 2021 as of August 9, [https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr\\_4highest.pl](https://www.tceq.texas.gov/cgi-bin/compliance/monops/8hr_4highest.pl).



industrial facilities.<sup>157</sup> Because the HGB area is considered NO<sub>x</sub> limited, any reduction in on-road NO<sub>x</sub> emissions has the potential to bring the area closer to attainment. And a reduction in ambient air quantities of NO<sub>x</sub> is sorely need because “[o]ver the past three years (2016 through 2018), the eight-hour ozone design values for the HGB area have not shown as significant a downward trend compared to longer-term trends.”<sup>158</sup>

**2012 Baseline and 2020 Future Modeling Emissions for the Eight-County HGB Area  
(tons per day)**

HGB Emission Source Type	2012 NO <sub>x</sub> (tpd)	2020 NO <sub>x</sub> (tpd)	2012 VOC (tpd)	2020 VOC (tpd)
On-Road	157.09	83.04	73.60	55.17
Non-Road	56.36	31.59	43.94	28.39
Off-Road - Airports	8.88	8.99	2.50	1.55
Off-Road - Locomotives	15.30	11.98	0.99	0.63
Off-Road - Commercial Marine	27.74	23.88	1.33	1.37
Area Sources	18.29	30.47	248.27	319.30
Oil and Gas - Drilling	0.79	0.21	0.06	0.01
Oil and Gas - Production	2.09	1.63	66.60	40.08
Point - EGUs (August Average)	36.49	38.54	3.99	1.75
Point - Non-EGUs (Ozone Season Average)	69.76	105.06	130.68	119.80
<b>Eight-County HGB Total</b>	<b>392.79</b>	<b>335.39</b>	<b>571.96</b>	<b>568.05</b>

### III. Legal Background

#### A. Federal Laws Prohibit Discrimination Based on Race, Color, and National Origin

Title VI prohibits federal funding recipients from discriminating against people on the basis of race, color, or national origin.<sup>159</sup> Discriminatory acts include those that cause

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<sup>157</sup> TCEQ, Revisions to the State Air Quality Implementation Plan for the Control of Ozone Air Pollution, Houston-Galveston-Brazoria Serious Classification Attainment Demonstration State Implementation Plan Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard, Project No. 2019-077-SIP-NR (adopted Mar. 4, 2020), at 3-43.

<sup>158</sup> TCEQ, Response to Comments Received Concerning the Houston-Galveston-Brazoria (HGB) Serious Classification Attainment Demonstration (AD) State Implementation Plan (SIP) Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standards (NAAQS) (adopted March 4, 2021) (TCEQ RTC), at 14.

<sup>159</sup> 42 U.S.C. § 2000d; 49 CFR § 21.1; *see also*, Exec. Order No. 11,764, Nondiscrimination in Federally Assisted Programs (Jan. 21, 1974) (President Richard Nixon ordered the U.S. Attorney General to work with federal agencies to implement Title VI).

exclusion and those that deny benefits. *Id.* When Title VI was enacted, President Kennedy explained its purpose:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.<sup>160</sup>

Among other prohibited discriminatory acts, Title VI provides that federal funding recipients cannot:

directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

49 CFR § 21.5(b)(2). USDOT regulations provide specific examples of Title VI violations. States may not “discriminate against eligible persons in making relocation payment and providing relocation advisory assistance where relocation is necessitated by highway right-of-way acquisitions.”<sup>161</sup> States also cannot “locate or design a highway in such a manner as to require, on the basis of race, color, or national origin, the relocation of any persons.”<sup>162</sup>

For Title VI purposes, national origin-based discrimination includes discrimination against LEP persons.<sup>163</sup> In 2000, President Bill Clinton issued Executive Order 13,166 which required federal agencies to review and, where necessary, implement

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<sup>160</sup> U.S. Department of Justice (“DOJ”) Title VI Manual § II (quoting H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

<sup>161</sup> 49 CFR pt. 21, app’x B(a)(2)(ii).

<sup>162</sup> *Id.* at pt. 21, app’x B(a)(2)(vi).

<sup>163</sup> *Lau v. Nichols*, 414 U.S. 563 (1974) (school district violated Title VI when it failed to provide approximately 1,800 LEP students of Chinese origin with equal education opportunities).

policies regarding inclusion of LEP persons in federal activities.<sup>164</sup> USDOT developed guidance documents as required by the Executive Order.<sup>165</sup> USDOT defines an LEP person as people who “do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English.”<sup>166</sup> Protected populations include LEP people who live “in areas affected or potentially affected by transportation projects.”<sup>167</sup> To determine its obligations to specific LEP populations, USDOT, and its funding recipients, must consider: (1) the number or proportion of LEP persons encountered by the agency’s actions; (2) the frequency of contact with LEP persons; (3) “the nature and importance of the program, activity, or service provided by the recipient to people’s lives”; and (4) the resources available to the recipient and costs.<sup>168</sup> According to the guidance, accommodations for LEP increase as agency actions involve more LEP people or higher proportions of them, the agency is in frequent contact with these people, the proposed action will have an important effect on their lives, and the agency has resources to provide language access services.<sup>169</sup> Since issuing this guidance, USDOT has prepared a Language Access Plan which details the agency’s process when addressing LEP concerns.<sup>170</sup>

Federal funding recipients must also address historic discrimination. “Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.”<sup>171</sup> Thus, TxDOT has an affirmative duty to not only avoid discriminating against Complainants today, but also to ameliorate its well-documented legacy of past discrimination.

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<sup>164</sup> Improving Access to Services for People with Limited English Proficiency, 65 Fed. Reg. 159 (Aug. 16, 2000); see also *Coldwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112 (9th Cir. 2009); *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073 (D. Ariz. 2012); and *Jones v. Gusman*, 296 F.R.D. 416 (E.D. La. June 6, 2013).

<sup>165</sup> 70 Fed. Reg. 74,087 (Dec. 15, 2005); The Harris County Attorney also reviewed FHWA civil rights guidance, [https://www.fhwa.dot.gov/civilrights/programs/title\\_vi/guidance.cfm](https://www.fhwa.dot.gov/civilrights/programs/title_vi/guidance.cfm). However, because of an April 25, 2019 agency memorandum rescinding many FHWA civil rights policy and guidance, it is unclear whether these policies and guidance documents remain applicable after the change in administration.).

<sup>166</sup> *Id.* at 74,091/2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 74,091/2-3.

<sup>169</sup> *Id.* at 74,091-93.

<sup>170</sup> USDOT, Language Access Plan (June 2013), [https://www.lep.gov/sites/lep/files/resources/DOT\\_LEP\\_Policy\\_Statement\\_2013.pdf](https://www.lep.gov/sites/lep/files/resources/DOT_LEP_Policy_Statement_2013.pdf).

<sup>171</sup> *Id.* § 21.5(b)(7) (emphasis added).

A state agency's discriminatory action need not be intentional to violate Title VI. "[A]ctions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI."<sup>172</sup> "Title VI . . . delegated to agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."<sup>173</sup>

People who file complaints may establish a *prima facie* case of discrimination that shifts the evidentiary burden onto federal funding recipients. USDOT may find a disparate impact *prima facie* case where a federal funding recipient "use[d] a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification."<sup>174</sup> USDOT investigates the allegations to find whether the federal funding recipient has: (1) "utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI"; (2) lacks a "substantial legitimate justification" insofar as the challenged action was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission"; and (3) that there is no "equally effective alternative practices that would result in less racial disproportionality." *Id.* (quotations omitted). The investigation focuses on the "consequences of the recipient's practices, rather than the recipient's intent."<sup>175</sup> *Prima facie* discrimination cases may only be rebutted if federal funding recipients can articulate legitimate reasons for their actions.<sup>176</sup> As discussed below, for transportation projects, Title VI requires that agencies take measures to avoid and mitigate disproportionate impacts on protected populations.

## **B. Public Participation in Federal Highway Projects**

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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<sup>172</sup> *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (discussing *Guardians Ass'n v. Civil Serv. Comm'n of N.Y. City*, 463 U.S. 582 (1983)).

<sup>173</sup> *Id.* at 293–94; accord DOJ Title VI Manual § VIII(B) (discussing *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996)).

<sup>174</sup> DOJ Title VI Manual § VIII(B) (discussing *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995)).

<sup>175</sup> *Id.* (citing *Lau v. Nichols*, 414 U.S. 563, 568 (1974)).

<sup>176</sup> *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1278 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

42 U.S.C. § 4331(c). Congress concluded its declaration of a national environmental policy, the NEPA, with these carefully crafted words. According to Congress, Americans not only have a right to a healthy environment, but they also have a civic duty to ensure that it is so. Any unlawful hinderance to a person’s right to public participation frustrates this Congressional priority. The NEPA applies to every federal action significantly affecting the quality of the human environment.<sup>177</sup> To give effect to Congress’s policy, the Council on Environmental Quality (“CEQ”)—an executive advisory board that creates binding NEPA regulations<sup>178</sup>—requires public participation in NEPA environmental reviews.

CEQ regulations set baseline NEPA public participation requirements. Agencies carrying out federally delegated NEPA reviews, like TxDOT, must:

Provide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions.

40 CFR § 1506.6(b). Agencies must “[post] notice on and off site in the area where the action is to be located.” *Id.* at § 1506.6(b)(ix). After issuance of a draft environmental impact statement and before issuance of a final environmental impact statement, agencies must “affirmatively solicit[] comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.” *Id.* at § 1503.1(a)(2)(v). The CEQ warns that traditional tools of public outreach may not be effective for soliciting public input from environmental justice community members.

CEQ guidance provides a public outreach framework. According to the CEQ, public outreach to low-income, minority, and tribal populations may require “adaptive or innovative approaches to overcome linguistic, cultural, or other potential barriers.”<sup>179</sup> “[A]gencies must consider both impacts on the natural or physical environmental and related social, cultural, and economic impacts.”<sup>180</sup> Further, “[a]gencies should recognize that the impacts within minority populations, low-income populations, or Indian tribes may be differed from impacts on the general population due to a community’s distinct

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<sup>177</sup> 40 CFR § 1508.1(g), (q).

<sup>178</sup> *Id.* at § 1500.3(a) (“The regulations in this subchapter apply to the whole of section 102(2) of NEPA.”); *see also id.* at § 1507.1 (“All agencies of the Federal Government shall comply with the regulations in this subchapter.”).

<sup>179</sup> CEQ, Environmental Justice Guidance Under the National Environmental Policy Act (“CEQ NEPA Guidance”), at 13 (Dec. 10, 1997).

<sup>180</sup> *Id.* at 8.

cultural practices. For example, data on different patterns of living, such as subsistence fish, vegetation, or wildlife consumption and the use of well water in rural communities may be related to the analysis.”<sup>181</sup> “When the agency has identified a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, the distribution as well as the magnitude of the disproportionate impacts in these communities should be a factor in determining the environmentally preferable alternative.”<sup>182</sup> Lastly, “[m]itigation measures identified in an EIS or developed as part of a FONSI [finding of no significant impact] should reflect the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable.”<sup>183</sup>

### **C. TxDOT and FHWA Must Prevent and Mitigate Environmental Justice Impacts**

USDOT regulations implement Title VI’s prohibition on discrimination.<sup>184</sup> USDOT regulations apply to TxDOT contractors and agency programs for federal financial aid.<sup>185</sup> As such, TxDOT and its contractors may not:

“[D]irectly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin.”

Or

When making siting decisions, “make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin.”<sup>186</sup>

And these prohibitions must be broadly construed.<sup>187</sup>

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<sup>181</sup> *Id.* at 14 (internal citation omitted) (emphasis added).

<sup>182</sup> *Id.* at 15.

<sup>183</sup> *Id.* at 16.

<sup>184</sup> 49 CFR § 21.5(a) (“No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies.”).

<sup>185</sup> *Id.* at § 21.5(b)(1), (4).

<sup>186</sup> *Id.* at § 21.5(b)(2), (3).

<sup>187</sup> *Id.* at § 21.5(b)(5).

USDOT Departmental Order 5610.2(a) incorporates environmental justice priorities into the agency's programs, policies, and activities.<sup>188</sup> USDOT makes clear that engaging in NEPA environmental justice analyses does not necessarily satisfy Title VI obligations, and vice versa, especially because Title VI does not protect low-income populations.<sup>189</sup> TxDOT chose to be bound by this order when it requested and received authority from the USDOT and FHWA to implement federal programs. The USDOT EJ Order implements the requirements of Executive Order 12,898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."<sup>190</sup> Pursuant to Executive Order 12,898, agencies must "prevent disproportionately high and adverse effects to minority and low-income populations through Title VI and environmental justice analyses conducted as part of Federal transportation planning and NEPA provisions."<sup>191</sup> A "disproportionately high and adverse effect" is defined as an effect that "is predominantly borne by a minority population and/or low-income population" or an effect that "will be suffered by the minority population and/or low-income populations and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and non-low-income population."<sup>192</sup>

The statutes, rules, and guidance make clear that TxDOT has authority and a duty to identify, consider, and take affirmative and even innovative steps to address the environmental justice issues the NHHIP creates.

#### **D. TxDOT Must Implement NEPA Public Participation Requirements**

TxDOT must provide assurances to the USDOT that the agency's programs and activities in regard to NEPA public participation requirements comply with Title VI.<sup>193</sup>

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<sup>188</sup> USDOT, Department of Transportation Updated Environmental Justice Order 5610.2(a) ("DOT EJ Order"), 77 Fed. Reg. 27,534 (May 10, 2012).

<sup>189</sup> *Id.* at 27,535/3-36/1.

<sup>190</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994), *as amended* by Exec. Order No. 12,948, 60 Fed. Reg. 6,381 (1995) (unlike Title VI, this order also includes low-income populations) (President Clinton remarked on the order that "[a]ll Americans have a right to be protected from pollution — not just those who can afford to live in the cleanest, safest communities. Today we direct Federal agencies to make environmental justice part of all that they do," statement available: <https://www.presidency.ucsb.edu/documents/statement-the-executive-order-environmental-justice>).

<sup>191</sup> 77 Fed. Reg. at 27,534/2.

<sup>192</sup> *Id.* at 27,537/1.

<sup>193</sup> 23 CFR § 200.9(a)(1).

TxDOT has promulgated public participation rules for NEPA reviews.<sup>194</sup> TxDOT's public notice rules require notice publication at project milestones to inform the public of the agency's process, findings, and also to make agency documents. Prior to the scoping process, TxDOT must prepare a coordination plan to achieve involvement from "agencies with an interest in the project and the public in the early stages of development of an EIS."<sup>195</sup> TxDOT must publish on its website and in local newspapers, notices of availability for Draft Environmental Impact Statements, Final Environmental Impact Statements, and Records of Decision.<sup>196</sup> TxDOT's regulations further provide that "[o]utreach methods may include posting information on a website, publishing in the newspaper, or use of a changeable message sign."<sup>197</sup> The regulations provide for notice to property owners and local governments that will be impacted by property acquisition.<sup>198</sup> These rules also require public meetings<sup>199</sup> and notice of such meetings must be "be provided to any public official, individual, or affected interest group that has expressed interest in the relevant transportation project." *Id.* at § 2.105(c).

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<sup>194</sup> See 43 Tex. Admin. Code §§ 2.101(c), (d) (Providing that the rules establish "minimum requirements for public participation" and that FHWA project sponsors must "comply with any additional public participation or coordination requirements that may apply under Federal law." Where state and federal rules are in conflict, "the Federal law will prevail.").

<sup>195</sup> *Id.* at § 2.103.

<sup>196</sup> *Id.* at § 2.108(c)(2)-(3).

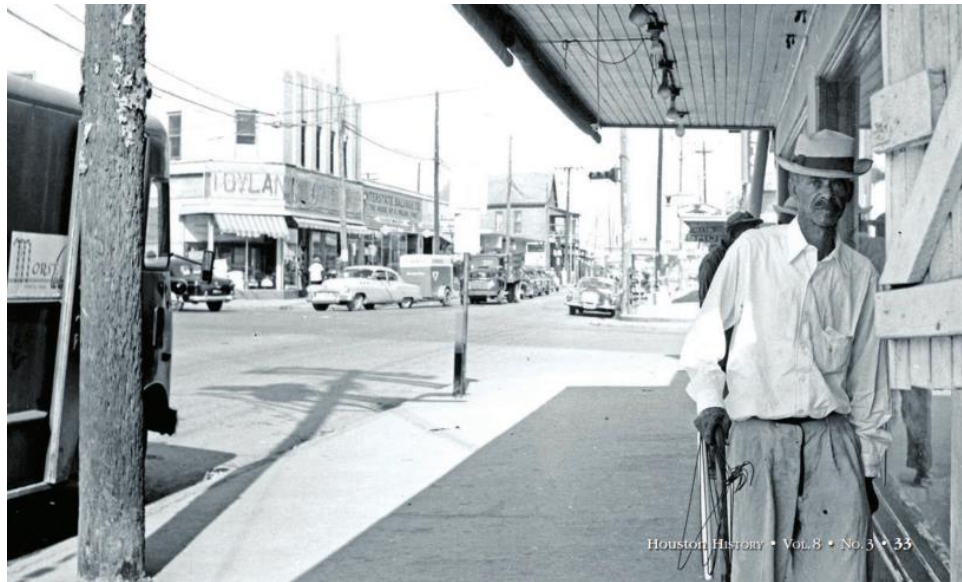
<sup>197</sup> *Id.* at § 2.101(a).

<sup>198</sup> *Id.* at § 2.104.

<sup>199</sup> See also *id.* at § 2.106 (allowing TxDOT to hold discretionary public hearings "when the project sponsor is not otherwise obligated to hold a public hearing under § 2.107 of this subchapter" and setting notice requirements identical to those required for nondiscretionary hearings).



#### IV. TxDOT and Its Predecessor Agencies Have a Legacy of Discrimination Against Black and Latinx Populations in Houston



Before and after view of Lyons Drive and Jensen Avenue in Fifth Ward in 1956 (top) and 2012 (bottom) before and after major highway construction<sup>200</sup>

TxDOT's history of discrimination against racial and ethnic minorities in Houston, Texas is well documented. James M. Bass, TxDOT's former Executive Director, openly

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<sup>200</sup> Pando, Patricia, Houston History Magazine, "When There Were Wards: A Series In The Nickle, Houston's Fifth Ward," Jan. 31, 2012, at 33, <https://houstonhistorymagazine.org/wp-content/uploads/2011/07/Fifth-Ward.pdf>.

acknowledges the agency's past discrimination.<sup>201</sup> When questioned by State Senator Royce West about the NHHIP's disproportionate impact on Hispanic and African American communities and whether TxDOT could do anything to address historic disproportionate impacts from highway development in these communities, Director Bass testified that:

[D]ecisions were made by the Department of Transportation and/or city councils decades ago to put highways where they've been placed for decades. And now with additional demands coming in, we are often times asked to expand those highways and those highways are where they are... [Sen. West redirects Dir. Bass] You expand the road where it is and that's an unfortunate reality. And one of the directions I gave to staff is, I would hope that once we are done, those who are able to remain in that community, they are able to see benefits from that project not just a bigger wider highway going through their neighborhood.

Former Director Bass goes on to testify that TxDOT has done more for communities impacted by the NHHIP than in past projects but fails to provide specific details about TxDOT's efforts to redress its legacy of discrimination. Director Bass also failed to address concerns specific to the NHHIP or Houston area minority communities, as questioned by Senator West.

By 1920, Segundo Barrio, or Second Ward, had established itself as the "heart" of the Mexican American community in Houston.<sup>202</sup> Previously a white community, Segundo Barrio is where Mexican American "poverty-stricken newcomers staked claim to vacant lands, neglected by the municipal government" along Buffalo Bayou, at the future site of Clayton Homes Apartments.<sup>203</sup> In other parts of the community, "Mexicanos took over vacated homes and turned them into rooming houses."<sup>204</sup> Known as Frost Town when it was a white community, this makeshift residential area became known as El Alacrán, or The Scorpion, and lay within Schimpf's Alley, a severely economically depressed neighborhood within Segundo Barrio.<sup>205</sup>

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<sup>201</sup> The Texas Senate, Finance Committee, [https://tlcenate.granicus.com/MediaPlayer.php?view\\_id=49&clip\\_id=15406](https://tlcenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15406) (starting at minute 2:50) (87th Reg. Sess.) (March 2, 2021).

<sup>202</sup> De León, Arnoldo, *Ethnicity in the Sunbelt City: Mexican Americans in Houston* ("Mexican Americans in Houston") (2001), at 12

<sup>203</sup> *Id.* at 11-12, 27.

<sup>204</sup> *Id.* at 24.

<sup>205</sup> *Id.* at 56.



Frost Town and Schrimpf's Alley (1869)<sup>206</sup>

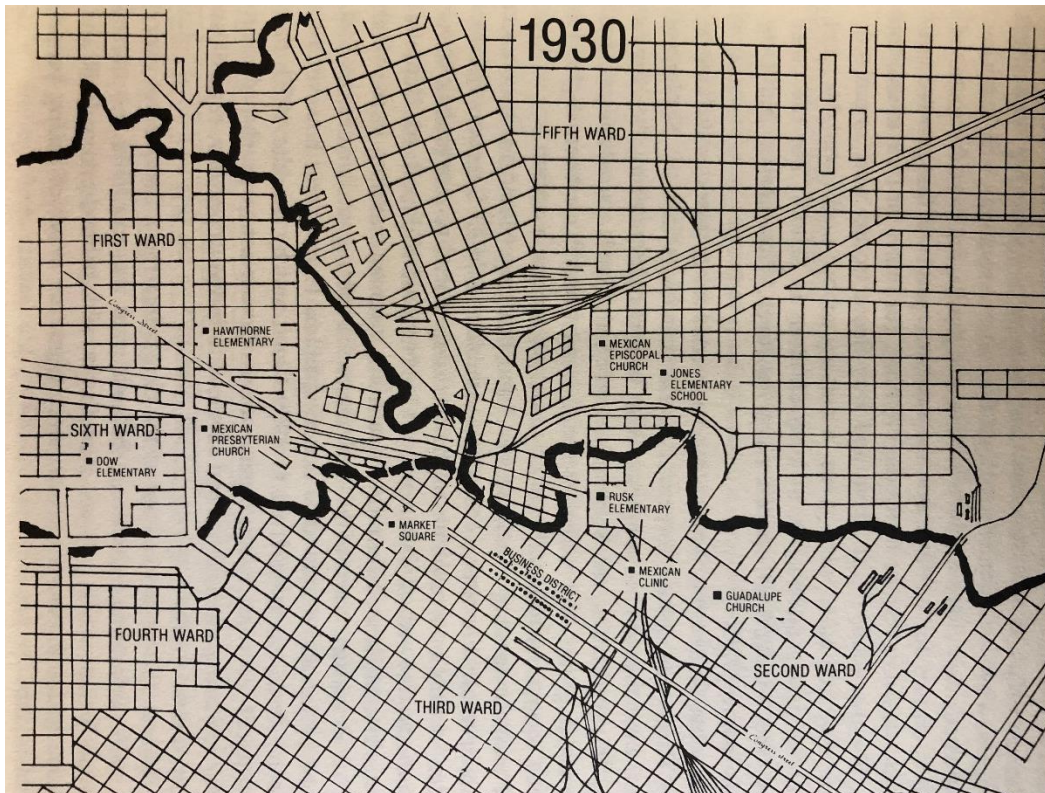
El Alacrán earned its name because of an infestation of scorpions in the neighborhood. This neighborhood was home to many of the city's tailors, clerks, cooks, bootmakers, as well as workers for refineries, shipyards, and the Houston Ship Channel.<sup>207</sup> Greater Segundo Barrio, however, was a mixed class, mixed nationality community. For example, during the Mexican Revolution, wealthy Mexicans sought refuge in Segundo Barrio, with some permanently relocating.<sup>208</sup>

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<sup>206</sup> Archaeological Report at 11.

<sup>207</sup> Esparza, Jesus Jesse, *Houston History Magazine*, "La Colonia Mexicana: Mexican Americans in Houston," ("La Colonia Mexicana") (Dec. 2, 2011), <https://houstonhistorymagazine.org/2011/12/la-colonia-mexicana-a-history-of-mexican-americans-in-houston/>.

<sup>208</sup> Mexican Americans in Houston at 11.



Mexican American Settlements in Houston (1930)<sup>209</sup>

In the early 1900s, a hub of Mexican American businesses was located along Congress Avenue, catering both to Mexican Americans and Houstonians at large.<sup>210</sup> This business center, located between the 1700 and 2100 blocks of Congress Avenue, served Mexican American communities located primarily in east Houston, all of which were within walking distance from the business center.<sup>211</sup> In 1930, the Chronicle reported that the center was home to “drug stores, hotels, cafes, doctors’ offices, dentists’ offices, dry goods stores, jewelry shops, filling stations, grocery stores, bakery shops and innumerable other small shops.”<sup>212</sup> “Up until the era of WWII, people had stopped to patronize Mexican businesses as they rode or drove into town and as they left their homes.”<sup>213</sup> “In each direction from the downtown district were located railroad yards and railroad shops which tied Houston to...lumber, grain, and cotton enterprises of East Texas and the interior of the state. Houston, therefore, was still a ‘walking city’ as business people, shoppers, shopkeepers, and workers got to their destinations by foot.”<sup>214</sup> These

<sup>209</sup> *Id.* at 29.

<sup>210</sup> *Id.* at 16-17.

<sup>211</sup> *Id.* at 25.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 56.

<sup>214</sup> *Id.* at 9.

early Houston Mexican American communities lacked paved streets, running water, gas, and electric services – unlike white communities.<sup>215</sup> During this period, the City of Houston, in a cost-cutting measure, redesigned downtown streets to be one-way and this led to decreased patronage and ultimate closure or relocation of businesses.<sup>216</sup>



Mexican American family moving out of Schrimpf's Alley (1951)<sup>217</sup>

As discussed above, in the mid-1950s, TxDOT's predecessor agency constructed the Eastex Freeway through Second Ward, including in El Alacrán. Along with Eastex, construction of the Elysian Street Viaduct led to the demise of the community.<sup>218</sup> At the same time, Susan V. Clayton dedicated land in the area to the City of Houston in 1951 for public housing. Clayton Homes Apartment would be constructed by 1952 to serve a population actively being displaced.<sup>219</sup>

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<sup>215</sup> See La Colonia Mexicana at 2.

<sup>216</sup> *Id.*

<sup>217</sup> J.R. Gonzales, *The Houston Chronicle*, "Life in Schrimpf Alley," (Sept. 15, 2010), <https://blog.chron.com/bayoucityhistory/2010/09/life-in-schrimpf-alley/>.

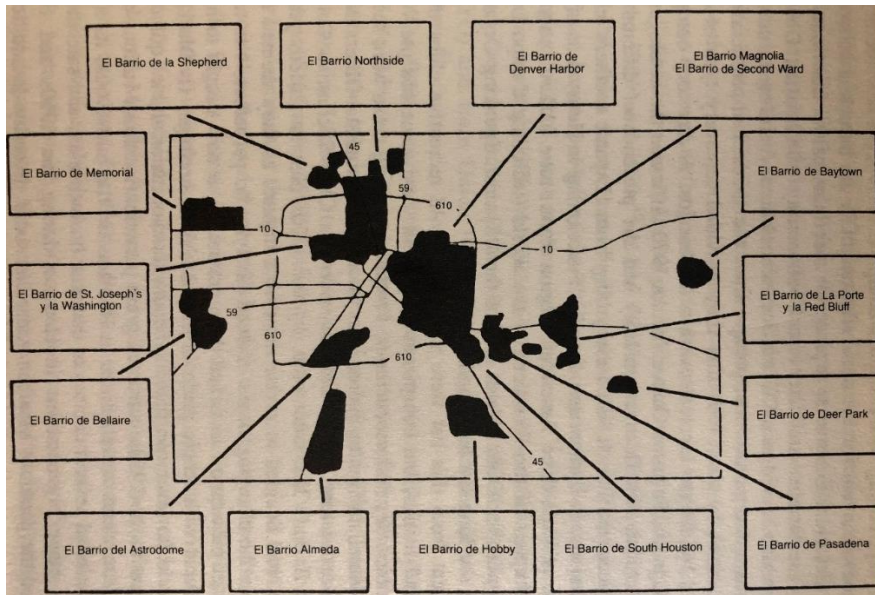
<sup>218</sup> Archaeological Report at 13.

<sup>219</sup> HHA, Clayton Homes, <http://www.housingforhouston.com/public-housing/housing-developments/clayton-homes.aspx>.



View of highway construction; Clayton Homes public housing development is on the bottom right and Fifth Ward is across the Buffalo Bayou from it (1950s)<sup>220</sup>

The displacement caused by the construction contributed to the creation and expansion of Mexican and Mexican American communities throughout the Houston area.



Mexican American Barrios of Houston (1979), The Houston Post<sup>221</sup>

<sup>220</sup> Texasfreeway.com, [http://www.texasfreeway.com/Houston/historic/photos/images/59\\_downtown\\_construction\\_undated.jpg](http://www.texasfreeway.com/Houston/historic/photos/images/59_downtown_construction_undated.jpg) (original source TxDOT archive library) (Complainants citation to these publicly-available photos does not in itself endorse the views and written product on this website).

<sup>221</sup> Mexican Americans in Houston at 151.

Historically, Houston's major Black business centers were Reed Road in Sunnyside, Lyons Avenue in Fifth Ward, Dowling Street<sup>222</sup> in Third Ward, and West Dallas in Fourth Ward.<sup>223</sup> In 1983, Houston's Black business owners reported that nine of ten Black-owned businesses depended on Black customers for their economic livelihood.<sup>224</sup> The photos at the beginning of this section show the ultimate impact of highway construction on Lyons Drive, specifically, the ouster of Black businesses after the community was segmented by the construction of I-69. As discussed below, highway construction through Fifth Ward, including I-69, both segmented and isolated the community and led to the taking of many businesses and homes.

The Texas Highway Department, TxDOT's predecessor agency, deemed Houston's downtown interstate highways a priority in the 1950s and 1960s. As was the case with Black and minority communities across the nation, federal and state officials purposely targeted these minority communities "under the guise of 'slum removal'" with Black communities being disproportionately affected.<sup>225</sup> In Texas and across the nation, highway construction "displaced Black households and cut the heart and soul out of thriving Black communities as homes, churches, schools, and businesses were destroyed."<sup>226</sup> Highways were planned and constructed quickly, with little to no public input.<sup>227</sup> Rapid construction and segmentation of the community weakened community cohesion and this broke "community networks that might have helped organize resistance" to highway projects.<sup>228</sup> This process happened repeatedly in Houston's Black communities. Ramona Toliver, a Fifth Ward resident, recalls that she learned about the construction of the I-10/I-69 interchange when she saw a surveyor on the front lawn.<sup>229</sup> She was able to identify a surveying error that kept her property from being condemned. Between 1956 and 1961, the government spent more than \$306,300,000 on Houston area

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<sup>222</sup> As of 2016, Emancipation Avenue.

<sup>223</sup> Bullard, Robert D., *Invisible Houston The Black Experience in Boom and Bust ("Invisible Houston")*, at 72 (1987).

<sup>224</sup> *Id.* at 95-97.

<sup>225</sup> Deborah N. Archer, *White Men's Roads Through Black Men's Homes: Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1265 ("White Men's Roads Through Black Men's Homes") (Oct. 2020) (footnote omitted); *See also id.* at 1276 ("Although many local, state, and federal highway builders had a racial agenda, they often hid their intent behind nominally race-neutral criteria. The language of urban renewal—the promise to clear 'blighted' areas and 'slums'—was the most common criterion") (footnote omitted).

<sup>226</sup> *Id.* at 1265 (footnote omitted).

<sup>227</sup> Shelton, Kyle, *Power Moves: Transportation, Politics, and Development in Houston ("Power Moves")*, at 58 (2017).

<sup>228</sup> *Id.* at 73.

<sup>229</sup> *Id.* at 55.

highway projects.<sup>230</sup> Unfortunately for these Black Houstonians, the NEPA would not be enacted until 1970 and would not be fully implemented until much later. Thus, these residents had little recourse to learn about or challenge these highway projects.

In 1950, Fifth Ward was the largest black area in Houston, with more than 40,680 residents.<sup>231</sup> Fifth Ward became a predominantly black community after WWII as white residents relocated to Houston's sprawling suburbs. Black veterans used their benefits to buy homes in Fifth Ward. "[A]t the time, Fifth Ward was one of the few areas of Houston where blacks were permitted to own homes and operate businesses."<sup>232</sup> "Though the Fifth Ward once boasted a thriving retail area known as Lyons Avenue Commercial District, the social and economic vitality of the area was severely disrupted with the completion of two major freeways, Interstate 10 and U.S. 59, which bisected the community...[t]he community to this day has experienced a steady economic decline."<sup>233</sup> By 1980, only half of Fifth Ward's pre-highway population remained.<sup>234</sup> This population remained predominantly black with Black Americans making up 90 percent of the remaining Fifth Ward residents.<sup>235</sup>

Built in the 1960s, the I-10/U.S. 59 interchange in Fifth Ward "alone claimed nearly nine hundred structures; as the freeways ran north and east, they claimed several thousand more in the ward and other communities. Beyond simply removing the structures, the road's construction disrupted established patterns of life in Fifth Ward. Its lanes bisected routes students took to school and those adults followed to run daily errands or get to work. Along with existing rail lines, the road put a concrete barrier between the neighborhood and the city, boxing the ward in with massive infrastructure. To the south, I-10; to the west, the then US 59; to the north and east, rail yards. Entry and exit meant crossing markers that signaled a neighborhood apart."<sup>236</sup> In the end, the interchange destroyed thirty-six blocks of Fifth Ward near downtown, as illustrated below.<sup>237</sup>

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<sup>230</sup> *Id.* at 50.

<sup>231</sup> *Id.* at 24.

<sup>232</sup> *Id.* at 27.

<sup>233</sup> *Id.* at 30.

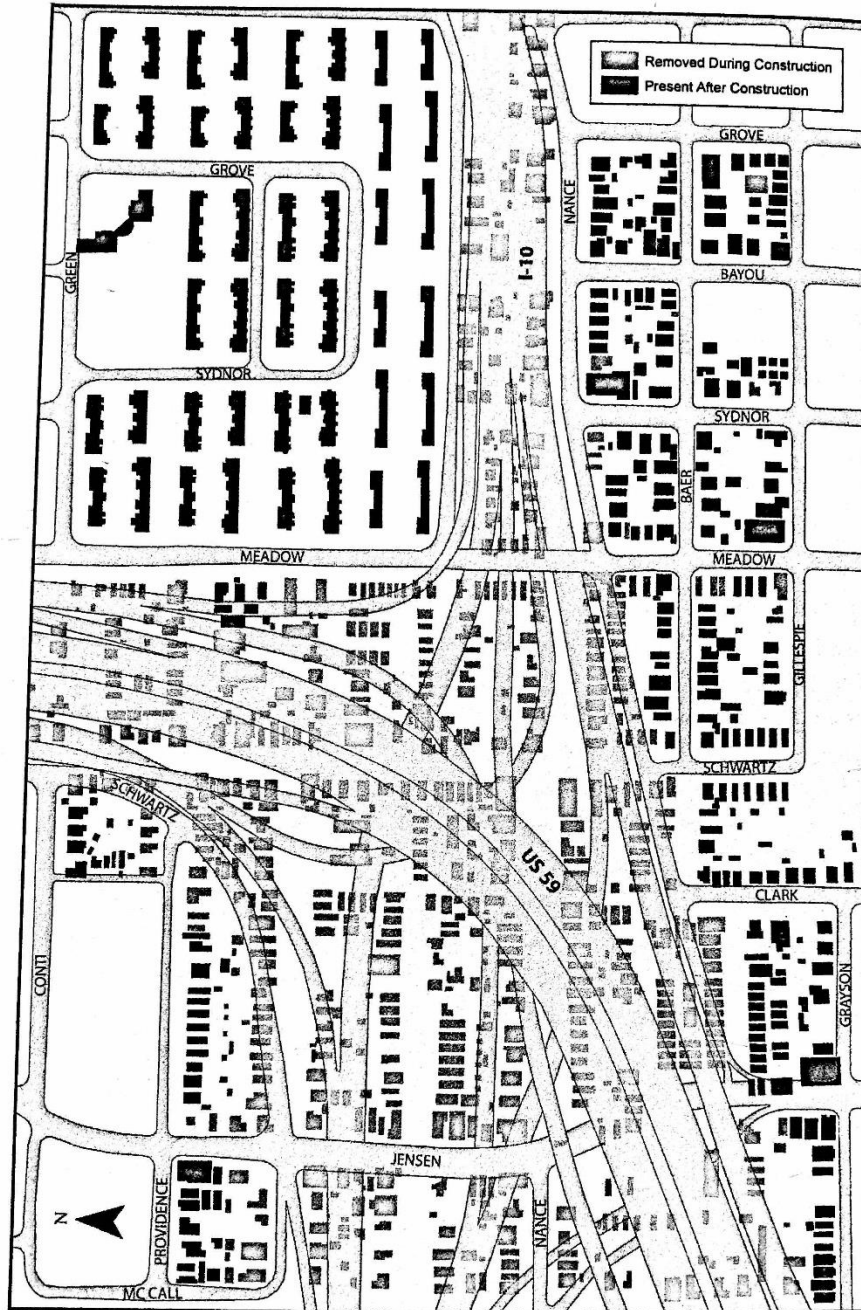
<sup>234</sup> *Invisible Houston* at 27.

<sup>235</sup> *Id.* at 27.

<sup>236</sup> *Power Moves* at 1, 85.

<sup>237</sup> *Id.* at 87.





**Fig. 2.7. Interchange of I-10 and US 59 in the Fifth Ward**

For this image, 1950 and 1970 Sanborn Fire Insurance Company maps were overlaid in a geographic information system (GIS) program. The highways shown are the current expanse of the highways, not the historical boundaries of the roadways, so some differences in routing may exist. The buildings in light gray were demolished by the construction of the highway. The maps from the Sanborn collection are from the Houston Metropolitan Research Center. Map overlay by Kyle Shelton.

Even prior to the construction of the I-10/U.S. 59 Interchange, Fifth Ward had already experienced serious community disruption. Construction of the Eastex Freeway (U.S. 59), which extended I-10 East from the I-610 loop, took place between 1956 and 1966. This highway project “displaced more than 330 residences and businesses in the Fifth Ward.” The I-10/U.S. 59 interchange would claim 890 more, in total displacing over 1,220 residences and businesses.<sup>238</sup>

Today, gentrification encroaches on Fifth Ward’s remaining Black residential areas. Despite present and historic patterns of displacement and racism, Fifth Ward continues to be a hub for Black excellence, producing many notable figures including congresswoman Barbara Jordan (TSU alumna), boxing legend George Foreman, and congressman Mickey Leland.

Third Ward is another Houston-area community in the NHHIP Project Area segmented by highway construction. In 1872, when the City of Houston refused to build parks in Black communities and for Black residents, the Antioch Baptist Church and the Trinity Methodist Church arranged for the purchase of land for a park in Third Ward. This land would become Emancipation Park, a public park that still stands today.<sup>239</sup> Third Ward is home to Texas Southern University (“TSU”), a historically Black university with a law school, and the site of major civil rights movements organized in Texas.<sup>240</sup> Third Ward is also a hub of Black excellence, producing many notable figures including George Floyd, renowned blues musician Sam John Hopkins, renowned artists Solange Knowles, and internationally renowned artist Beyoncé. Today, the cumulative effects of systemically racist laws and policies are visible in Third Ward. Among these are gentrification and community segmentation caused by major highway projects, including the development of the Pierce Elevated.

Opened in 1967, 90 percent of the funding for the construction of the Pierce Elevated in Third Ward was provided by the federal government.<sup>241</sup> The Pierce Elevated refers to Pierce Street as it enters downtown Houston from I-45. Pierce Elevated consists of six elevated lanes running between Dowling Street on the east and Allen Parkway on the west.<sup>242</sup> “For many white Houstonians, the building of the Pierce Elevated offered the opportunity to remove the eyesore of dilapidated housing and undesirable businesses in

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<sup>238</sup> Power Moves at 61.

<sup>239</sup> *Id.* at 115.

<sup>240</sup> See Invisible Houston, chapter 10, The Quest for Civil Rights at 121 (for example, TSU student sit-ins in the spring of 1960 at counter service restaurants in Third Ward).

<sup>241</sup> Power Moves, at 73-74, 80.

<sup>242</sup> *Id.* at 61.

the northwest corner of the Third Ward.”<sup>243</sup> “Prior to eminent domain taking for Interstate 45 and State Highway 288, the neighborhood held nearly 17,000 dwellings. By 1966, the community had only 15,000 dwellings. The twin road projects resulted in the removal of over 2,000 homes and put pressure on housing stock in other parts of the ward as they became even more densely populated.”<sup>244</sup>



View of construction of I-45 and US-59 Interchange looking southeast and segmenting Third Ward (April 11, 1972)<sup>245</sup>

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<sup>243</sup> *Id.* at 74.

<sup>244</sup> *Id.* at 76-77.

<sup>245</sup> Texasfreeway.com,

[http://www.texasfreeway.com/Houston/historic/photos/images/i45\\_59\\_interchange\\_4\\_11\\_1972.jpg](http://www.texasfreeway.com/Houston/historic/photos/images/i45_59_interchange_4_11_1972.jpg)  
(original source TxDOT archive library).



3825 Construction of I.H. 45-U.S. 59 interchange in

View of the I-45 and US-59 Interchange looking north through Third Ward (April 11, 1972)<sup>246</sup>



View of Right-of-Way clearing in a residential neighborhood for I-45 where US-59 and SH 288 would merge in Third Ward (1969)<sup>247</sup>

<sup>246</sup> *Id.* [http://www.texasfreeway.com/Houston/historic/photos/images/59\\_i45\\_interchange\\_4\\_11\\_1972.jpg](http://www.texasfreeway.com/Houston/historic/photos/images/59_i45_interchange_4_11_1972.jpg).

<sup>247</sup> *Id.*

[http://www.texasfreeway.com/Houston/historic/photos/images/us59\\_near\\_pierce\\_row\\_clearance\\_1969.jpg](http://www.texasfreeway.com/Houston/historic/photos/images/us59_near_pierce_row_clearance_1969.jpg).

Dowling Street served as the business center of Third Ward. In 1960, there were 74 Black-owned, Black-patronized businesses on Dowling Street: “fourteen beauty salons and barber shops, eleven restaurants and cafes, five gas stations, three pharmacies, one movie theater, two African-American insurance companies, seven dentists’ or doctors’ offices, the headquarters of the Houston chapter of the NAACP, and the headquarters of the student-led Progressive Youth Association, another civil rights group.”<sup>248</sup> By 1964, only 42 businesses remained on Dowling Street after I-45 construction. Ernie Attwell, a Third Ward resident and city planner, explained the impacts of highway construction on this community<sup>249</sup>:

That about killed it. Instead using transportation, resolving a transportation problem as a positive resolution, it made a negative resolution in development. Because now, if you own the hair style place, you have no people coming to your hair style place, right, you moved 30,000 people. You have nobody coming to your grocery store, you moved 30,000 people. That set the Third Ward back. It caused a knock down, an abandoning of many houses and many buildings, other than the roads that they had to know down. In the Third Ward you have a larger ratio of undeveloped land to the total land than you normally have. That was conveyed by the displacement of all the houses and everything that you had to move or knock down for the 288 and 59 highway. That transportation problem became a development problem in the Third Ward.

Government efforts to level Black and Latino communities in Houston for transportation projects share some characteristics. State actors have mischaracterized minority communities in pre-NEPA project plans and post-NEPA Environmental Impact Statements as “rundown and outdated” to justify “urban renewal” efforts.<sup>250</sup> So-called “blighted” communities could be revitalized by the government to make them more inviting for the return of white Houstonians into the inner city.<sup>251</sup> Transportation projects also moved at a lightning pace, as discussed above. The lack of public information limited residents’ opportunities to object. Thousands were moved before any form of resistance

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<sup>248</sup> Invisible Houston at 76-77.

<sup>249</sup> University of Houston, Department of History, The Center for Public History Stories, Oral History Project, Interview of Ernie Attwell “Desegregation Brought No Change to the Neighborhood,” at 27-28 (Nov. 22, 2004), transcript available: <https://digital.lib.uh.edu/collection/houhistory/item/570/show/569>.

<sup>250</sup> Power Moves at 96 (mischaracterizing the Magnolia Park and Harrisburg Mexican American communities of east Harris County in a NEPA Environmental Impact Statement as blighted communities).

<sup>251</sup> *Id.* at 2.

could be organized.<sup>252</sup> Further, the “federal government seldom provided relocation assistance” and the lack of significant time between condemnation and actual demolition led to “deteriorating neighborhood conditions.”<sup>253</sup> These conditions made it difficult for “property owners to sell their homes or business and move to a new community”<sup>254</sup> increasing the impact that highway construction had on these minority communities. Often, displaced residents would “resettle into already dense parts of the Third and Fifth Wards, over-taxing their services and resources” and creating a serious but unaccounted for indirect impact.<sup>255</sup> Lastly, the Texas Highway Department prevented homeowners from improving their homes after “building lines” for highways projects were established—without the community’s input—to keep home values low in advance of eminent domain proceedings.<sup>256</sup>

Though former Director Bass may hope that impacted minority residents will benefit from the NHHIP, vehicle ownership rates show that this may not be the case. “Car ownership rates among African Americans, for example, while on the rise in the 1950s, remained about half that of white Americans, making this group more dependent on public transportation...Even today, while car ownership has risen across all racial groups, minority Americans are still far less likely to own a vehicle than white Americans...As cities became increasingly auto-centric, this meant circumscribed mobility and second-class citizenship for those who could not afford cars.”<sup>257</sup> Historically, for example, Third and Fifth Ward would not be served by meaningful public transportation until well into the 1970s.<sup>258</sup>

TxDOT’s legacy of discrimination does not exist in a vacuum. Even after road construction, racial and ethnic minorities, in specific, Black Americans, do not enjoy their Constitutionally protected right<sup>259</sup> to travel on public roads like white Americans, including Black Americans living in Houston, Texas. Historically, “[b]lack people faced the many dangers of traveling through ‘white spaces.’ Many Black travelers had to bring buckets or portable toilets along with them, sleep in their cars, or drive through the night because they were turned away by motels, restaurants, and service stations. Many were

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<sup>252</sup> *Id.*

<sup>253</sup> White Men’s Roads Through Black Men’s Homes at 1287.

<sup>254</sup> *Id.*

<sup>255</sup> Power Moves at 74.

<sup>256</sup> *Id.* at 84.

<sup>257</sup> *Id.* at 16.

<sup>258</sup> *Id.* at 32, 87 (noting that Mexican Americans were also less likely to own a car when compared to white Houstonians).

<sup>259</sup> See *Kent v. Dulles*, 357 U.S. 116 (1958).

caught on dangerous roads, unable to find hotels willing to let them stay.”<sup>260</sup> From the 1930s to the 1960s, Black Americans used the “Negro Motorist Green Book” to find locations friendly to African Americans while traveling throughout the United States.<sup>261</sup> The Green Book helped Black Americans “find towns where they would be welcomed, hotels and restaurants that would serve them, and service stations where they could stop to use the restroom.”<sup>262</sup> Even with help from the Green Book, “Black drivers were never able to fully escape the challenges of “driving while black,” including harassment and violence at the hands of the police and white travelers.”<sup>263</sup>

Even though publication of the Green Book ended in 1966, this legacy of discrimination and its effects have not.<sup>264</sup> Black Americans, Latinos, and other minorities continue to be the target of unjustified police pull-overs and searches, longer prison sentences, restricted use of drivers’ licenses, and police brutality. One need look no further than the murder of George Floyd at the hands of police in Minneapolis, Minnesota in May of 2020 that sparked national anti-police brutality demonstrations. This discrimination is still exists in society and it occurs over roads that TxDOT regulates. Of this legacy, late United States Congressman John Lewis wrote:

[T]he legacy of Jim Crow transportation is still with us. Even today, some of our transportation policies and practices destroy stable neighborhoods, isolate and segregate our citizens in deteriorating neighborhoods, and fail to provide access to jobs and economic growth centers.<sup>265</sup>

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<sup>260</sup> White Men’s Roads Through Black Men’s Homes at 1262

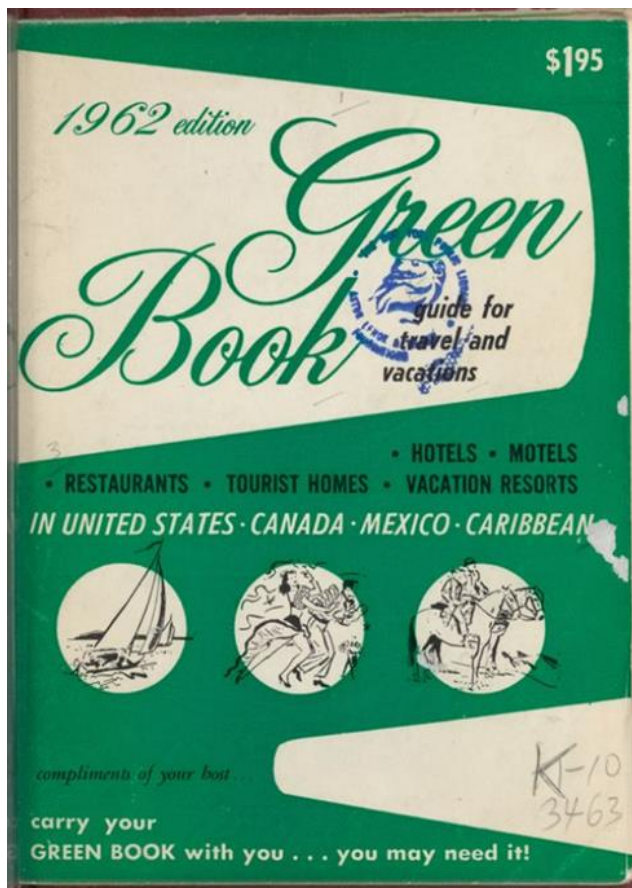
<sup>261</sup> Evan Andrews, The Green Book: The Black Travelers’ Guide to Jim Crow America, History.com, <https://www.history.com/news/the-green-book-the-black-travelers-guide-to-jim-crow-america> (last updated Mar. 13, 2019).

<sup>262</sup> White Men’s Roads Through Black Men’s Homes at 1263.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at fn 8.

<sup>265</sup> *Id.* at 1268; *See also* Letter from Julian Castro, U.S. Sec’y of Hous. and Urban Dev., John B. King, Jr., U.S. Sec’y of Educ., and Anthony R. Foxx, U.S. Sec’y of Transp. (June 3, 2016) (recognizing racial discrimination in housing, education, and transportation and interagency collaboration to address this legacy).



Established 1936

## THE TRAVELERS' GREEN BOOK

The Guide to Travel and Vacations  
Allied Member, Nationwide Hotel Assn., Inc.

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THE TRAVELERS' GREEN BOOK, published yearly by Victor H. Green & Co., 200 West 133rd St., New York 30, N. Y. ADVERTISING RATES, write to the publishers, last forms close Nov. 1st. We reserve the right to reject any advertising which does not conform to our standards.  
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Cover (left) and Index (right) of the 1962 Edition of The Green Book (1962)<sup>266</sup>

### HOUSTON

Ajapa Hotel	2412 Dowling Street
Crystal Hotel	3308 Lyons Avenue
Kirk Courts	2121 Kirk Street
La Jayo Hotel	4024 Lyons Avenue
Lincoln Restaurant	Conti & Jenson
Mingo Motel	4749 Reed Road
New Day Hotel	1912 Dowling Street
Oriental Restaurant	2751 Lyons Avenue
Robinson's Manor	3211 Jackson Street
Sid's Ranch	8051 W. Montgomery

Houston locations in the 1962 edition of The Green Book (1962)<sup>267</sup>

<sup>266</sup> *Green Book*: 1962, The New York Public Library Digital Collections, at 2 <https://digitalcollections.nypl.org/items/786175a0-942e-0132-97b0-58d385a7bbd0> (last visited July 19, 2021).

<sup>267</sup> *Id.* at 88.



**V. TxDOT's decision to double the footprint of the proposed stormwater detention ponds**

In the F-EIS, TxDOT increased the footprint of the NHHIP and, specifically, the footprint of the proposed stormwater detention ponds, or basins. In the F-EIS, the largest need for new ROW is in Segment 1 at 246 acres.<sup>268</sup> This amounts to a 70.49% increase from existing ROW, 349 acres, dedicated to I-45 in Segment 1.<sup>269</sup> Segment 2 only sees a 20% increase and Segment 3 a 25.08% increase.<sup>270</sup>

**Existing and Proposed ROW**

Segment	Existing ROW	Proposed New ROW	% Increase
1	349	246	70.49%
2	220	44	20%
3	638	160	25.08%

**Segment 2 Pond Surface Area and Capacity**

TxDOT ID	Descriptor	Average Depth (feet)	Area (acres)	Area within D-EIS Project ROW (acres)	Additional Area (acres)	Volume Studied in D-EIS (acre feet)	Additional Volume (acre feet)
2-A	I-45 and I-610	8.0	2.29	2.29		18.32	
2-B	Two ponds: Patton St. and Love's Travel Stop	5.0 - 12.0	19.50		19.50		97.50 - 274.00
Totals:		13.0 - 20.0	21.79	2.29	19.50	18.32	97.50 - 274.00
<b>Segment 2 total pond storage capacity (acre feet):</b>							115.82 - 292.32
<b>% of Segment 2 total pond storage capacity that was added after the D-EIS:</b>							84.18% - 93.73%
<b>% of Segment 2 total pond storage surface area added after the D-EIS:</b>							89.86%

<sup>268</sup> F-EIS at 2-64.

<sup>269</sup> *Id.* at 2-63.

<sup>270</sup> *Id.* at 2-63, -65.

### Segment 3 Pond Surface Area and Capacity

TxDOT ID	Descriptor	Average Depth (feet)	Area (acres)	Area within D-EIS Project ROW (acres)	Additional Area (acres)	Volume Studied in D-EIS (acre feet)	Additional Volume (acre feet)
3-A	Elysian St.	5.0	4.76	4.76		23.8	
3-B	Railroad Bridge	5.0	2.78	2.78		13.9	
3-C	Harmony House	5.0	7.02	7.02		35.1	
3-D	Clayton Homes North	10.0	6.10	6.10		61	
3-D	Clayton Homes South	10.0	20.80	20.80		208	
Totals:		35.0	41.46	41.46	0.00	341.80	
<b>Segment 3 total pond storage capacity (acre feet):</b>							341.80
<b>% of Segment 3 total pond storage capacity added after the D-EIS:</b>							0.00%
<b>% of Segment 3 total pond storage surface area added after the D-EIS:</b>							0.00%

There are at least 19 proposed stormwater detention ponds in the F-EIS. Only 10 were proposed in the D-EIS and of those, 7 remained unchanged between the D-EIS and the F-EIS. There are 11 ponds in Segment 1, 3 ponds in Segment 2, and 5 ponds in Segment 3. Segment 3 has the largest new pond capacity storage at 341.8 acre feet and this amount remained unchanged between the D-EIS and the F-EIS. The largest ponds in Segment 3 are the two ponds TxDOT proposes to install at the site of Clayton Homes.<sup>271</sup>

### Segment 1 Ponds By Surface Area and Capacity

TxDOT ID	Descriptor	Average Depth (feet)	Area (acres)	Area within D-EIS Project ROW (acres)	Additional Area (acres)	Volume Studied in D-EIS (acre feet)	Additional Volume (acre feet)
1-A*	Two ponds at Esplanade Blvd.	8.0	0.60	0.60		4.80	
1-B*	Walmart	4.5	2.38		2.38		10.71
1-D	Dewalt St.	2.0	2.33		2.33		4.66

<sup>271</sup> *Id.* at 2-43.

1-E	Tortilleria La Ranchera	2.0	2.45		2.45		4.90
1-F*	Parker Rd.	2.3	2.80	0.04	2.76	0.09	6.35
1-G*	Ishmeal St.	3.2	2.80		2.80		8.96
1-H	E. Rogers St.	2.2	2.67		2.67		5.87
1-I	Victoria Manor Apartments	4.5	1.41		1.41		6.35
1-J*	Crosstimbers St.	7.7	1.01	0.13	0.88	1.00	6.78
1-K*	Texas Inn & Suites	10.0	11.51	0.97	10.54	9.70	105.40
Totals:		46.4	29.96	1.74	28.22	15.59	159.97
<b>Segment 1 total pond storage capacity (acre feet):</b>							175.57
<b>% of Segment 1 total pond storage capacity that was added after the D-EIS:</b>							90.78%
<b>% of Segment 1 total pond storage surface area added after the D-EIS:</b>							94.19%
* 50% or more of the population in or adjacent to the proposed ROW is LEP							

In Segment 1, a disproportionate number of ponds increased in size and were added in communities with high LEP people concentrations. Of the 11 ponds proposed in Segment 1, 6 are newly proposed in the F-EIS, 4 increased in size since the D-EIS, and only one remains unchanged.

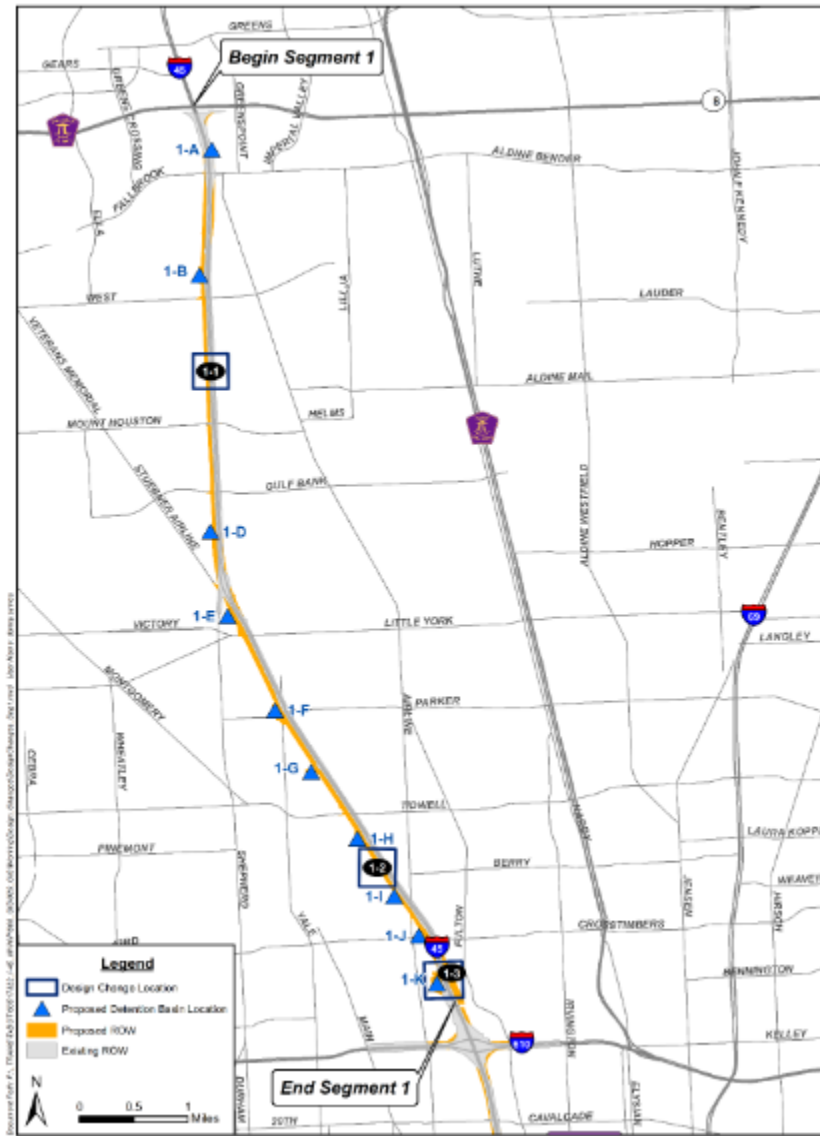
It is not evident from the record whether TxDOT conducted any targeted community outreach in the areas where the NHHIP encroaches further into the community. “The design changes [since the D-EIS] also include proposed storm water detention basins along the project corridor. Some changes developed in the latter phase of the Draft EIS preparation were not evaluated in the Draft EIS. However, proposed design changes (as of April 2017) were presented at the Public Hearing and additional public meeting in May 2017.”<sup>272</sup> “Approximately 46 acres of the approximately 99 acres of land that is proposed to be storm water detention basins is within the project ROW that was evaluated in the Draft EIS. Approximately 48 acres were not evaluated in the Draft EIS.”<sup>273</sup> “The design changes in Segment 1 were related primarily to the acquisition of additional ROW to accommodate 11 proposed storm water detention basins, and modifications at three intersections (Figure 2-14).”<sup>274</sup>

<sup>272</sup> *Id.* at 2-41.

<sup>273</sup> *Id.* at 2-42.

<sup>274</sup> *Id.*

**TxDOT's Proposed Detention Pond Locations in Segment 1<sup>275</sup>**



In Segment 1, every proposed pond is in or adjacent to a Census Block Group where 16% or more of the population speaks English less than very well or not at all.<sup>276</sup> When compared to the communities in and adjacent to ponds in other segments, Segment 1 has the largest number of ponds in areas where concentrations of LEP people live. People who speak English less than very well or not at all make up 50% or more of the

<sup>275</sup> *Id.* at 2-44.

<sup>276</sup> Compare F-EIS Schematics, App'x B, NHHIP I-45 Segments 1 to 3 (labeled as "Potential Detention Pond Location" in light blue) with F-EIS, Community Impacts, Limited English Proficient Populations by Census Block Groups within or adjacent to the Proposed Project ("LEP Map"), App'x C, Exhibit C-2, Sheet 1-6.

population in and adjacent to 7 of the 11 proposed ponds and all but one of these ponds was proposed in the D-EIS. There are no Census Block Groups with concentrations of LEP people of 50% or more in or adjacent to the ponds in Segments 1 and 2. There are 10 ponds in or adjacent to High-minority Census Block Groups and 10 ponds in or adjacent to Low-income Block Groups.<sup>277</sup>

**Segment 1 Census Data for Low-Income, High-Minority, and LEP Populations**

Segment	Description	U.S. Census		Low-income Block Group	High-minority Block Group	Limited English Proficient			
		Block	Tract			0-15%	16-30%	31-49%	50%+
1-A	Esplanade Blvd. north	1	2226	x					x
	<i>1 adjacent</i>				x				
1-A	Esplanade Blvd. south	1	2226	x	x				x
1-B	Walmart	1	5337.01	x	x		x		
	<i>3 adjacent</i>								x
1-D	Dewalt St.	1	5335	x	x			x	
1-E	Tortillería La Ranchera	2	5333	x				x	
	<i>5 adjacent</i>								
1-F	Parker Rd.	3	5307	x	x				x
	<i>1 adjacent</i>				x			x	
1-G	Ishmeal St.	1	5307		x			x	
	<i>7 adjacent</i>								x
1-H	E. Rogers St.	2	5305		x			x	
	<i>8 adjacent</i>			x			x		
1-I	Victoria Manor Apartments	2	5305					x	
	<i>9 adjacent</i>			x	x		x		
1-J	Crosstimbers St.	2	5304	x					x
	<i>10 adjacent</i>				x		x		

<sup>277</sup> Compare F-EIS Schematics, App'x B, NHHIP I-45 Segments 1 to 3 (labeled as "Potential Detention Pond Location" in light blue) with Community Impacts, Census Study Area Tracts, Block Groups, and High-Minority and Low-Income Areas ("Census Income and Minority Areas"), App'x C, Exhibit C-1, Sheet 1-6.

1-K	Texas Inn & Suites	2	5304	x	x				x
			<b>Total:</b>	10	11		4	6	7

Of the 159.97 acre feet of additional pond storage capacity since the D-EIS, at least 138.2 acre feet will be located in Census Block Groups where 50% or more of the population speaks English less than very well or not at all. This represents 86.39% of the total proposed new storage capacity in Segment 1, yet LEP people only make up 51.7% of the Segment 1 population.<sup>278</sup>

It is unclear from the record whether TxDOT conducted any targeted outreach to the newly-impacted low-income, minority, or LEP residents. No such outreach can be gleaned from the F-EIS record.

## VI. TxDOT’s Violations of Title VI and Less Discriminatory Alternatives

TxDOT erred when it found that the NHHIP will not have disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, or Indian tribes. One need not look far in the record to identify a multitude of disproportionate impacts on these protected populations.

The NHHIP will add to the disproportionate pollution burden already borne by low-income and minority populations in and around the Project Area. Fifth Ward, in specific, is the site of a known cancer cluster.<sup>279</sup> The cancer cluster is over the now-shuttered Union Pacific Houston Wood Preserving Works—a site that is considered a de facto Superfund site by the community. The cancer cluster is approximately 1.3 miles as the crow flies from the northernmost end of the NHHIP at I-69. Instead of working toward lessening this burden, TxDOT disregards the health of historically excluded groups. TxDOT eschews its responsibility to safeguard the public health and welfare by citing to technical difficulties around health impacts analyses for Mobile Source Air Toxics (“MSATs”). TxDOT failed to consider the cumulative impacts of MSATs on human health in the F-EIS—including the impacts of the nine priority cancer and

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<sup>278</sup> F-EIS at 4-4.

<sup>279</sup> See TCEQ, *In re Union Pacific Railroad Company, Hazardous Waste Permit/Compliance Plan No. 50343*; 4910 Liberty Road, Houston, Texas, Public comment and request for public meeting accessibility by the Harris County Attorney (June 7, 2021) (also demonstrating added community vulnerability with COVID low vaccination rates), Attachment 12.

noncancer risks drivers—because it gave itself authority to do so. This is not enough, especially for Fifth Ward residents who continue to die of cancer.

TxDOT proposes to add detention pond area and capacity in communities where there are high concentrations of LEP people. TxDOT failed to give these community members an opportunity to be heard. For example, in Segment 1, over 90% of the surface area and volume of the 11 proposed ponds, the most out of any segment, were added in the F-EIS just a few months ago. By increasing the footprint of the NHHIP in these communities without targeted public outreach, TxDOT deprived LEP community members of their right to participate in NEPA proceedings. These residents have serious concerns, including life-threatening flooding risk. Part of the NHHIP's purpose and need is to address flooding risk. However, the agency's lack of public outreach to LEP populations cast doubt on whether this benefit will be justly distributed among impacted communities in all three segments. The record shows that TxDOT treated Segment 1 differently to its detriment. Segment 2 and 3 are the only segments where TxDOT conducted a detailed drainage analysis and the only segments that stand to receive specific flooding mitigation measures, like pump stations and culvert replacements.

TxDOT must prevent disproportionately high and adverse effects on protected populations, and, if it cannot, TxDOT must implement mitigation measures of the scope and magnitude of the harms disproportionately borne by low-income and minority populations. The project can only proceed if: (1) TxDOT has exhausted all non-practicable mitigation measures; (2) there is a substantial need for the project; and (3) a less discriminatory alternative would have other adverse impacts or be cost prohibitive.<sup>280</sup> TxDOT has not done so here.

By arbitrarily changing its disproportionate impact finding, TxDOT evades its obligation to mitigate disproportionate impacts in a way that “reflect[s] the needs and preferences of affected low-income populations, minority populations, or Indian tribes to the extent practicable.”<sup>281</sup> Some of the most impacted communities have recommendations and concerns about the NHHIP. Title VI and NEPA guarantees their right to be heard in each case where there is a proposed major federal action significantly affecting the quality of the human environment, such as the NHHIP.

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<sup>280</sup> 77 Fed. Reg. at 27,536/1-2.

<sup>281</sup> CEQ NEPA Guidance at 16.

Summarily, TxDOT fails to begin to dismantle its legacy of discrimination against Houston area communities. This and other unaddressed disproportionate impacts mean that the NHHIP cannot proceed as currently proposed. TxDOT violated Title VI and USDOT's implementing regulations in the following ways.

**A. TxDOT treats LEP residents in Segment 1 and 3 disparately on issues that will also disproportionately impact them.**

When TxDOT decided to enlarge the footprint of the NHHIP, it encroached further into communities. In Segment 1, LEP populations are disproportionately impacted by increased ROW acquisition for stormwater detention ponds. Pond storage capacity added after the D-EIS accounts for 90.78% of total capacity in Segment 1, as discussed above. Likewise, added surface area accounts for 94.19% of total surface area in Segment 1, also discussed above. Yet it does not appear from the F-EIS that TxDOT conducted community outreach where it chose to expand the Project Area ROW. TxDOT also fails to state whether its 2019 survey included targeted outreach to newly impacted LEP communities.<sup>282</sup> TxDOT failed to implement USDOT's four-factor analysis in Segment 1 in a manner that ensured that LEP people had meaningful access to the NEPA public participation process.<sup>283</sup> If it had done so, TxDOT should have concluded that it has among the most extensive obligations to LEP populations impacted by the NHHIP. The same applies to Clayton Homes LEP residents. DOJ's four factors are:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program.
- (2) The frequency with which LEP individuals are exposed to the program.
- (3) The nature and importance of the program, activity, or service provided.
- (4) The resources available to the program and costs.

Further, TxDOT, through its contractor DRA, failed to provide LEP Clayton Homes residents equal access to relocation and other benefits for public housing residents. LEP residents are being deprived of information necessary to make important decisions about their future housing. LEP residents are also being made to sign forms that they can't understand and then not being given copies of these forms. All of this amounts to depriving them of vital information related to the NHHIP. Pursuant to DOJ's four-factor

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<sup>282</sup> F-EIS at 8-24.

<sup>283</sup> USDOT, Language Access Plan at 7; Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons ("DOJ LEP Guidance"), 67 Fed. Reg. 41,455, 41,459/2-3 (Jun. 18, 2002).



analysis, TxDOT failed to meet its extensive obligation to create access for LEP people in the Project Area.

**(1) There is a large number of LEP persons who live by ponds in Segment 1 and they are eligible to be served by TxDOT.**

According to DOJ, persons “eligible to be served...are those people who are served or encountered in the eligible service population. This population is program-specific, and includes persons who are in the geographic area that has been approved by a Federal grand agency as the recipient’s service area.”<sup>284</sup> High concentrations of LEP persons live adjacent or in the proposed pond areas. Further, if TxDOT reconsidered its F-EIS analyses, newly-impacted LEP residents would be in TxDOT’s study area for several of the F-EIS analyses. One example is Victoria Manor, a community in a Census Block Group where 31% to 49% of the population speaks English less than very well or not at all.<sup>285</sup>

**(2) The NHHIP will permanently impact LEP people.**

Victoria Manor residents will live directly across the street from a newly-proposed stormwater detention pond. “If an LEP individual accesses a program or service on a daily basis, a recipient has greater duties than if the same individual’s program or activity contact is unpredictable or infrequent.”<sup>286</sup> “In applying this standard, recipients should take care to consider whether appropriate outreach to LEP persons could increase the frequency of contact with LEP language groups.”<sup>287</sup>

**(3) Construction of the NHHIP will be highly disruptive and will have impacts for generations to come.**

TxDOT estimates that construction may start as early as late 2021 in Segment 3, 2024 in Segment 2, and 2026 in Segment 3.<sup>288</sup> Construction will necessitate demolitions, the use of heavy machinery, work at all hours of the day, along with constant air emissions and other nuisance conditions. The outcome would be a completely redesigned highway system. Minority, LEP, and low-income populations will bear the lion’s share

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<sup>284</sup> *Id.* at 41,459/3.

<sup>285</sup> LEP Map.

<sup>286</sup> DOJ LEP Guidance at 41, 460/3.

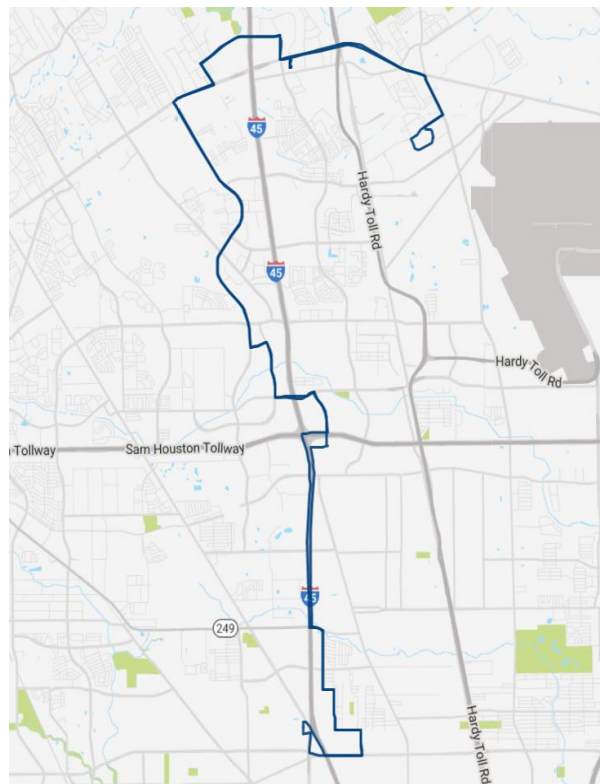
<sup>287</sup> *Id.*

<sup>288</sup> ROD, App’x B, at 21.

of these impacts. For example, disruption to established community patterns of life, such as bus routes.

As another example, the Walmart pond will displace part of Walmart’s parking lot and a shopping center that houses several medical service providers. Walmart is an important community resource for low-resource people, including for low-cost food, eye exams, and affordable furniture. At least two busses go to this Walmart, METRO bus routes 59 and 99. Route 59 runs mostly east-west around Aldine Mail Route, looping back at I-69. Route 99 comes from FM 1960 and runs mostly north-south and significantly along I-45. Someone living southeast of Spring, Texas could take route 99 to the Walmart and transfer to 59 to get to the Mt. Houston area. This driving distance would be about 20 miles if one were to own a car or have the money to pay for private transportation services. Bus route 99 is expansive and will be seriously disrupted by the NHHIP. Yet, TxDOT only guarantees that riders will have at least one week of advanced notice of service interruptions.<sup>289</sup>

**METRO Bus Route 99**<sup>290</sup>



<sup>289</sup> F-EIS, 3-26.

<sup>290</sup> METRO, Schedules & Alerts, System Map, <https://www.ridemetro.org/Pages/SystemMap.aspx>.

It is also unclear how close replacement and temporary routes would be from their current location. Dr. Robert Bullard, the father of environmental justice, has successfully argued that even small increases in the distance of frequently used walking routes can amount to significant impacts. In a Nuclear Regulatory Commission permit challenge, the administrative law judge found that “permanently adding that distance [.38 m] to the 1- or 2-mile walk between these communities for those who must regularly make the trip on foot may be more than a “very small” impact, especially if they are old, ill or otherwise infirm.”<sup>291</sup> The judge found that the staff had not considered this impact and ordered staff to revise the F-EIS.<sup>292</sup>

**(4) The NHHIP is a major intergovernmental transportation project that will cost billions of dollars.**

The NHHIP is a major undertaking. “The general construction cost of the project is currently estimated to be approximately \$7 Billion (in 2017 dollars), which does not account for estimated ROW costs.”<sup>293</sup>

LEP people suffered disparate treatment in the development of the NHHIP. TxDOT failed to conduct targeted outreach to LEP communities after its decision to increase by nearly tenfold the capacity and surface area of the proposed ponds in Segment 1. This omission deprived LEP people from meaningfully participating in the NEPA public participation process for a project that will significantly disrupt their life and have impacts for generations to come. TxDOT failed to implement effective and targeted community outreach efforts in areas that became impacted by the NHHIP when TxDOT published the F-EIS in August of 2020. Had TxDOT spoken with these residents, the agency would have learned that there are serious health and safety issues in the impacted communities. TxDOT would have also learned of mitigation measures that these residents would like to see in their community.

To reach newly-impacted LEP people, TxDOT could have posted notice at the site of the new and expanded pond locations.<sup>294</sup> It could have visited the communities to affirmatively solicit community feedback.<sup>295</sup> It could have applied tested methods, like those used by the U.S. Census Bureau, to develop adaptive and innovative community outreach efforts that take into account that the impacts on LEP populations may be

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<sup>291</sup> *In re Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367, 405-06 (1997), <https://www.ejnet.org/ej/LES.pdf>.

<sup>292</sup> *Id.* at 406.

<sup>293</sup> F-EIS, 1-20.

<sup>294</sup> 40 CFR § 1506.6(b)(ix).

<sup>295</sup> *Id.* at § 1503.1(a)(2)(v).

different from the impacts on the general population affected by the NHHIP.<sup>296</sup> Lacking community input, TxDOT's decisions regarding stormwater detention ponds do not account for mitigation measures that reflect the needs and preferences of the immediate community.<sup>297</sup>

**B. TxDOT's relocation services for public housing residents are hard to use and discriminate against LEP residents.**

TxDOT must mitigate the disproportionate burden placed on displaced public housing residents. Though TxDOT claims to offer displaced residents services to help with their relocation, these services have been hard to access, especially for LEP residents.<sup>298</sup> TxDOT, through its contractor DRA, has treated LEP public housing residents in a disparate manner. As discussed above, TxDOT must accommodate the language needs of LEP people. Complainant Mayra, a Clayton Homes resident, continues to be denied equal access to information and programs that are supposed to mitigate the impacts of the NHHIP on public housing residents. Repeatedly, she has asked for information in Spanish. Only once did Mayra receive this accommodation but, unfortunately, the oral translation she received was hard for her to understand and failed to address her questions. Mayra wants her housing voucher and for TxDOT, or its consultant DRA, to guide Mayra through the relocation process in Spanish. She wants information about the workshops DRA is supposed to be hosting for residents. She specifically requested workshops about home buying, entrepreneurship, English classes, and others. From the NHHIP she would like to see direct benefits for her kids, such as investments in youth programs. Mayra still does not know whether she will have a Spanish-speaking DRA Navigator to lead her through the process.

Other residents share Mayra's concerns and would like to see TxDOT, HHA, DRA, and all involved with the NHHIP to implement the following suggestions:

- 1) Give residents clear information and answer their questions. Translate information into Spanish and any other language spoken by Clayton Homes residents.
- 2) Give residents instructions and clear requirements for each of the three move-out option packages and clarify the amount of money related to each.

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<sup>296</sup> CEQ Guidance at 13-14.

<sup>297</sup> *Id.* at 16.

<sup>298</sup> If the services are improved upon, the DOJ Guidance, 77 Fed. Reg. at 27, 536/1-2 suggests that this could be an effective mitigation measure.

- 3) If HHA cannot issue the vouchers, that HHA should give each resident a letter with the amount to help residents make informed decisions about their future housing options.
- 4) Give residents a written assurance that they will receive a voucher and the last date by which they have to leave Clayton Homes.
- 5) Give the residents written assurances that they will have guaranteed housing at HHA's new housing developments, for those residents who would like to come back to the community

For TxDOT's programs to mitigate the adverse impacts on public housing residents, these programs must be accessible to them. Many residents say that this is not the case, including LEP residents.

**C. TxDOT failed to consider and take affirmative action on indirect impacts on majority-minority schools within and adjacent to the Project Area.**

TxDOT restricted its indirect impacts analysis to induced growth and its mobility and economic impacts.<sup>299</sup> Induced growth is not the only indirect impact that the NHHIP will have. There is a well-documented history of displacements and school closures following highway development in and around Clayton Homes. Nearly every child attending schools zoned for Clayton Homes is a racial or ethnic minority and economically disadvantaged. Once more, children in this community could be displaced and this will have detrimental future effects on neighborhood schools. For example, the schools may lose funding due to reduced student enrollment. Similarly, schools receiving displaced children may see strained budgets and resources due to spikes in enrollment. Past experience shows that the NHHIP may create unanticipated safety hazards for children walking to school; this is especially true for Bruce Elementary where I-10 bifurcates the school's zone. For current Clayton Homes residents, this future risk compounds the barriers that parents are experiencing in their efforts to keep their children at their current schools after they are displaced. There are other communities with schools in and around the NHHIP area that could face similar indirect impacts.

The maps below show school zones for HISD schools just in the Segment 3 area. Several of the school zones cross Buffalo Bayou and highways. Highways also bifurcate school zones in Segment 1 and 2.

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<sup>299</sup> F-EIS at 5-1.





HISD High School Zones  
Source: HISD

It is unclear whether TxDOT considered and addressed school displacements in Segments 1 and 2. In calls with HHA, TxDOT, and others, Clayton Homes’ parents were directed to apply for HISD’s “hardship transfer” to keep their children at Bruce—something that the mothers that the County Attorney spoke with and those on the monthly calls were not aware of. TxDOT claims that this information is some type of mitigation. However, a County Attorney community organizer applied the information given at these calls to follow the steps a parent would have to take to speak with someone about the transfer. After placing many calls over two days, the community organizer was not able to have their questions answered.<sup>301</sup>

TxDOT must address its legacy of discriminations against minority and low-income schoolchildren. TxDOT failed to analyze future indirect impacts to schools in and around the Project Area and thus failed in its obligation to “take affirmative action to remove or overcome the effects of [its] prior discriminatory [acts].”<sup>302</sup> TxDOT’s discriminatory acts are not trivial; they contribute to long-standing patterns of diminished school success for minority and low-income children and further entrench racial and economic divides in this country. Even now, TxDOT’s so-called mitigation measures have done little to preserve established familial patterns developed around community schools.

<sup>301</sup> Presentations given to Clayton Homes residents in 2021 by TxDOT, HHA, DRA, and HISD, Attachment 13.

<sup>302</sup> 49 CFR § 21.5(b)(7).

To mitigate indirect impacts to schools, TxDOT must engage directly with the parents and guardians of children attending these schools to educate them about the project and solicit feedback. TxDOT should have educated parents and guardians about the NHHIP and solicited suggestions on how to avoid and mitigate impacts, giving priority to those who are unsheltered and unhoused. For example, TxDOT could have asked whether any specific type of financial aid could help improve a students' school success. Examples provided to the County Attorney from impacted parents include back-to-school and technology needs, helmets and bicycles for children to ride to school, gas money and bus passes, and direct monetary assistance to improve students' home life—such as financial assistance for housing, food, and transportation.

**D. TxDOT failed to affirmatively solicit public comment from unsheltered, unhoused, and low-resource populations.**

TxDOT excluded unsheltered, unhoused, and low-resource populations from the NEPA public participation process. TxDOT sweeps unsheltered, unhoused, and low-resource people into one category: people that must be removed from the Project Area.<sup>303</sup> But these populations stand to be among the most affected by the construction of the NHHIP. As discussed above, TxDOT's omission disproportionately impacts Black Americans who make up over half of the unsheltered and unhoused population in the Houston area, while making up only approximately 20% of the Houston-area population.

Social service providers informed TxDOT of their concerns regarding communication with their clientele but TxDOT did not develop a communication plan for low-resource populations that are and will be adversely impacted by the NHHIP.<sup>304</sup> Instead of speaking directly with impacted people, TxDOT chose to speak with local governments and charitable organizations:

“Regarding homeless camps and homeless individuals in the right-of-way, TxDOT will coordinate with the City of Houston and homeless service providers to develop a plan to assist in the relocation of the homeless prior to construction.”<sup>305</sup>

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<sup>303</sup> See also, ROW Best Practices Report at 42 (“For the most part, when the homeless are mentioned by [transportation] agencies, it is in terms of being in the way, or needing to be ‘cleaned up.’”).

<sup>304</sup> Community Impacts, App'x A, A-20 (In public comment, SEARCH Homeless Services informed TxDOT of its “[c]oncern about how they will communicate information about relocating to their clients.”).

<sup>305</sup> ROD at 20.



TxDOT makes a perfunctory conclusion that it does not need to speak with impacted people directly, presumably because governmental and charitable interests align with those of the impacted populations. But this is not necessarily the case, as further discussed below. At the core of any action concerning environmental justice is that people must speak for themselves – no matter their status in society.<sup>306</sup> The County Attorney learned that many unsheltered, unhoused, and low-resource people are unhappy with the handling of social service programs. For example, one resident told the County Attorney that some charitable organizations force religious requirements on participants and for him these requirements are inconsistent with his religious practices. Thus, the resident reluctantly observed these religious requirements in exchange for food and shelter. This resident would like secular social service providers and thus does not align with the views and practices of at least some of the social services providers TxDOT spoke with.

By failing to engage with unsheltered, unhoused, and low-resource populations directly, TxDOT's deprived these residents of a meaningful opportunity to comment on the NHHIP and advocate for their rights and interests in the NHHIP. For example, residents could have advocated for employment opportunities equal to those offered to other impacted people and entities, rental assistance, and relocation assistance – like programs offered to other people displaced by the NHHIP.<sup>307</sup> Or, an equitable appraisal and compensation for their belongings and relocation. Encampments for the unsheltered and unhoused are more permanent than they seem. People living in encampments expend time and resources to make these spaces habitable, such as by setting up a semi-permanent sleeping and storage areas, creating wash stations, and constructing enclosures for pets.

Complainants demand further relief for the harm that they have already suffered and will suffer as TxDOT proceeds with pre-construction activities, including acquisition and demolition of social services institutions. Principal among Complainants' demands is a plea to be treated with respect and compassion and for TxDOT and all government actors involved with the NHHIP to guarantee a seamless transition from existing social service providers to new ones.

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<sup>306</sup> *Jemez Principles of Democratic Organizing* (a list of demands from a national coalition of grassroots environmental justice groups directed at large, almost entirely white environmental organizations in 1996) (#3 Let People Speak for Themselves – “We must be sure that relevant voices of people directly affected are heard. Ways must be provided for spokespersons to represent and be responsible to the affected constituents. It is important for organizations to clarify their roles, and who they represent, and to assure accountability within structures.”), <http://www.ejnet.org/ej/jemez.pdf>.

<sup>307</sup> ROD App'x A at 6.

**E. TxDOT has failed to mitigate the health effects of toxic air pollution both entrenched and increased by the NHHIP.**

Black, brown, and poor people bear the brunt of air pollution in the NHHIP Project Area and this burden is “appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and the non-low-income population.”<sup>308</sup> The Houston area remains out of compliance with federal ozone health-protective standards. In addition to living with unhealthy levels of ozone, and PM<sub>2.5</sub>, minority and low-income communities along the Project Area will see an increase in MSAT emissions, for which TxDOT has not conducted a health impacts study.

There are real world consequences to this pollution. According to the American Lung Association’s *State of the Air*, Houston is ranked as one of the 25 most ozone-polluted cities and one of the 25 cities most polluted by year-round particle pollution (annual PM<sub>2.5</sub>).<sup>309</sup> A study of Medicaid-enrolled children in Harris County showed an association between increases in new asthma cases and increased levels of ozone, nitrogen dioxide, and fine particulate matter (PM<sub>2.5</sub>) levels in the air.<sup>310</sup> Poor air quality especially harms Black Americans in Harris County.

Between 2006 and 2017, state death certificates noted that 264 people died of asthma in Harris County.<sup>311</sup> For this period, **Black Americans made up approximately 20% of the Harris County population<sup>312</sup> but accounted for nearly 50% of asthma related deaths.**

TxDOT projects that the NHHIP will cause an increase in MSAT emissions. However, according to TxDOT, even without emissions from the NHHIP, MSAT emissions “are projected to decrease by 72% from 2018 through 2040” in the project study area.<sup>313</sup> However, MSAT emissions, and their cancer-causing components, are harmful now and

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<sup>308</sup> 77 Fed. Reg. at 27,537/1.

<sup>309</sup> American Lung Association, *State of the Air*, <https://www.stateoftheair.org/city-rankings/most-polluted-cities.html> (last visited April 6, 2021).

<sup>310</sup> J. Wendt et al., *Association of short-term increases in ambient air pollution and timing of initial asthma diagnosis among Medicaid-enrolled children in a metropolitan area*, *Envtl. Research*, 131: 50-58 (May 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4502952/>.

<sup>311</sup> Texas Department of State Health Services, Texas Health Data, Deaths (2006-2017), [https://healthdata.dshs.texas.gov/dashboard/births-and-deaths/deaths-2006-2017?utm\\_source=govdelivery&utm\\_medium=email&utm\\_campaign=march2021updates](https://healthdata.dshs.texas.gov/dashboard/births-and-deaths/deaths-2006-2017?utm_source=govdelivery&utm_medium=email&utm_campaign=march2021updates).

<sup>312</sup> U.S. Census, QuickFacts, Harris County, Texas, <https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219#qf-headnote-a>.

<sup>313</sup> ROD, App’x B, Responses to Issues Commonly Raised in Comments Received on the Final EIS, at 6.

low-resource and minority communities would benefit for faster and greater reductions today and not by 2040. A growing body of scientific research also indicates that even small increases in air pollution can lead to higher rates of COVID-19 deaths.<sup>314</sup> TxDOT's actions prevent analysis of mitigation measures that could lessen this pollution burden and prevent even more prolonged exposure to pollutants that are incompatible with public health and environmental welfare. Thus, air pollution is an impact from the NHHIP that will have a disproportionately high and adverse effect on minority and low-income populations.

TxDOT has not done enough to mitigate air pollution impacts in low-income and minority communities. To mitigate air pollution impacts, TxDOT proposes to develop and fund near-road air monitoring for PM<sub>2.5</sub>, NO<sub>2</sub>, CO, and priority MSATs (nine cancer-causing compounds) for a minimum of five years during construction in Segment 2 and Segment 3.<sup>315</sup> TxDOT proposes no monitors for Segment 1. TxDOT will publish this data on a public facing website that will provide an alert when air quality is poor. Residents of Segment 1 objected to this program and would like to know why they will not receive air quality monitoring. The record does not indicate whether TxDOT made findings disqualifying Segment 1 from monitoring. Absent a finding that air monitoring in Segment 1 would exacerbate or create problems and is extraordinary in cost, TxDOT's actions are irrational.<sup>316</sup>

Residents of Segment 1 proposed ideas to mitigate air pollution impacts in their community in addition to air quality monitoring. Residents would like to see an addition of trees and foliage that is known to reduce PM<sub>2.5</sub> air pollution. Further, they would like to benefit from the weatherization program by having it include replacement of their air conditioning units. Unlike air quality monitors, the mitigation measures presented by the residents could actually reduce the level of air pollution they are exposed to on a daily basis because they live next to a highway.

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<sup>314</sup> Xiao Wu *et al.*, Harvard T.H. Chan School of Public Health, Exposure to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study (Apr. 27, 2020) (finding "that an increase of only 1  $\mu\text{g}/\text{m}^3$  in PM<sub>2.5</sub> is associated with an 8% increase in the COVID-19 death rate"), <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2>; see also Marco Travaglio *et al.*, Environmental Pollution, Links between air pollution and COVID-19 in England (Apr. 17, 2020) (finding higher numbers of COVID-19 deaths in areas with higher levels of ozone and oxides of nitrogen in ambient air, also finding higher numbers of COVID-19 cases in areas with higher levels of NO<sub>x</sub> and PM<sub>2.5</sub> in ambient air), <https://www.medrxiv.org/content/10.1101/2020.04.16.20067405v5>; see also Jonah Lipsitt *et al.*, Environment International, Spatial analysis of COVID-19 and traffic-related air pollution in Los Angeles (Mar. 15, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7983457/>.

<sup>315</sup> ROD at 21.

<sup>316</sup> See DOT EJ Order at 12.

**F. TxDOT has failed to address its legacy of discrimination in transportation development in the Houston area.**

There is a well-documented legacy of discrimination by TxDOT and its predecessors against racial and ethnic minorities communities in Houston, Texas. TxDOT deflects responsibility for these discriminatory acts by pointing to past decisions to justify its present actions. Irrationally, TxDOT seeks to continue disproportionately burdening minority communities with impunity. Federal regulations make clear that TxDOT has a duty to “take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.”<sup>317</sup> TxDOT must affirmatively redress government-sponsored discrimination that sited I-45, I-10, US-69, and SH-288 in Black, Latinx, LEP, and low-income communities. TxDOT cannot be allowed to further entrench this discrimination through the NHHIP as presently developed. Residents have ideas on how TxDOT can begin to undo its lengthy history of discrimination.

Residents gave the County Attorney many recommendations in the course of its investigation. Victoria Manor residents would like to see a pedestrian bridge over I-45 in their community, a pond that can function as a park, design features that can lessen air pollution, and reductions in the flooding risk to their community. They also want air quality monitoring and for all information to be in Spanish. Clayton Homes residents want better relocation assistance and written assurances that they will receive priority in the replacement housing developments. They want copies of all of the paperwork that DRA has made them sign and that all communication be in Spanish as well as any other necessary languages. They want transparency around relocation assistance programs, such as rental assistance. Unsheltered, unhoused, and low-resource populations want priority in housing, rental assistance, and employment opportunities.

**G. Other issues that merit investigation.**

**American Indian interests.** It is clear from the record that there are areas where there is a high probability of locating items of cultural significance for American Indian nations. Indeed, early human remains and property have been uncovered in Harris County during the Grand Parkway highway construction project in 2012, a matter that the Harris County Attorney was a party to.<sup>318</sup> All people on the land that is now the

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<sup>317</sup> 49 CFR § 21.5(b)(7).

<sup>318</sup> See *In re Prehistoric Human Remains Discovered at Archeological Site 41HR796*, No. 2012-38253 (234th Dist. Ct., Harris County, Tex. Dec. 12, 2012); see also ABC13, “Prehistoric human remains found along Hwy 99 (Jul. 26, 2012) (Noting that “[w]ater is typically where communities would first form.” The NHHIP spans

United States benefit from the protection of American Indian patrimony, particularly those who descend from American Indian peoples who are indigenous to the Coastal Bend (now, the Gulf of Mexico coast). It does not appear that TxDOT prepared repatriation plans for the unearthing of American Indian remains and property, especially in Segment 1 and 3 where TxDOT itself identified areas of high probability for items of cultural significance.<sup>319</sup>

Federal and state governments may recognize American Indian tribal nations. Recognized tribal nations receive protections afforded by the respective government, such as land, natural resource, and cultural protections, including repatriation programs. Unrecognized tribal nations do not. Recognition at either level of government can safeguard a tribe's sovereignty and promote their right to self-determination. Unrecognized tribal nations cannot avail themselves of these protections.

American Indian peoples living in Texas are largely members of tribes not recognized by Texas or the United States. The State of Texas does not recognize tribes at a state level. Today, members of unrecognized tribes in Texas continue to advocate for their interests. For example, the Carrizo/Comecrudo Tribe of Texas is an unrecognized tribe that has members who live and congregate in the Houston area. Also, Indigenous People of the Coastal Bend, whose members include descendants of the Karankawa people, a tribe indigenous to the Houston area.<sup>320</sup> Members of these unrecognized tribes are active in environmental matters along the Gulf Coast.

Because they are unrecognized, Texas American Indian tribal nations have little legal recourse when they try to protect their property and the bodies of their ancestors. But this does not have to be so. Civil rights law cited above expressly creates an obligation on TxDOT that the NHHIP must advance the interests of American Indian peoples in Texas. For example, TxDOT could precautionary apply the Native American Graves Protection and Repatriation Act ("NAGPRA"), a tested federal law that has resulted in repatriation of American Indian property and remains.<sup>321</sup> NAGPRA applies to both inadvertent discoveries and planned excavations on federal property. NAGPRA creates an identification and repatriation system for American Indian property, human remains,

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several waterways, including Buffalo Bayou and Little White Oak Bayou),  
<https://abc13.com/archive/8750045/>.

<sup>319</sup> For this issue, the Harris County Attorney reviewed the following F-EIS appendices: (1) App'x D, Report for Archaeological Survey; (2) App'x H, Historical Resources Survey Update; and (3) App'x O, Final Section 4(f) Evaluation.

<sup>320</sup> See Texas State Historical Association, Handbook of Texas, Karankawa Indians,  
<https://www.tshaonline.org/handbook/entries/karankawa-indians>.

<sup>321</sup> 25 U.S.C. § 3001 *et seq.*

sacred objects, and other objects of cultural importance. In its archeological review, TxDOT identified several sites where such items may be present, including at Clayton Homes where a full excavation of priority sites could not be conducted because of dangerous soil contamination.

TxDOT appears to have consulted only with out-of-state, federally-recognized tribal nations.<sup>322</sup> Title VI of the Civil Rights Act of 1964, Executive Order 12,898, and law cited above create an obligation on TxDOT to consider, elevate, and plan for the protection of American Indian interest. TxDOT is not free to do nothing. By consulting with the descendants of unrecognized Texas tribal nations, TxDOT can ensure plans are in place for any appropriate and necessary repatriation of irreplaceable American Indian remains and property. Further, TxDOT can ensure that the agency respects sacred and religious practices that Texas American Indian nations may wish to bestow on land that forms part of the NHHIP’s Project Area.

**Noise.** TxDOT did not consider buffer zones as a type of mitigation for noise impacts because the agency claims that buffer zones are “designed to avoid rather than abate traffic noise impacts and, therefore, [are] not feasible.”<sup>323</sup> Instead, TxDOT proposes noise barriers: 7 in Segment 1, 12 in Segment 2, and 57 in Segment 3.<sup>324</sup> According to, TxDOT, these noise barriers will benefit more receptors in Segments 2 and 3 than in Segment 1.

**Summary of Noise Abatement Analysis Results**<sup>325</sup>

Segment	Number of Representative Receivers Modeled	Numbers of Representative Receivers Impacted	Number of Representative Receivers Benefited	Number of Barriers Proposed (Preliminary)	Estimated Number of Benefited Receptors
1	47	43	27	7	40
2	73	60	33	12	104
3	163	119	77	57	270
Total	283	222	137	76	414

Segment 1 will see the largest acquisition of new ROW, a 70.49% increase from existing ROW dedicated to I-45.<sup>326</sup> TxDOT does not make clear why Segment 1 receives only 7

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<sup>322</sup> F-EIS, App’x M, Agency Coordination Documentation, at M-1 (describing TxDOT’s consultation efforts with federally-recognized tribes in 2017).

<sup>323</sup> *Id.* at 3-41.

<sup>324</sup> ROD at 21.

<sup>325</sup> F-EIS at 3-41.

<sup>326</sup> ROD at 4-5.

noise barriers or whether the total mileage of these 7 barriers is comparable to that of the other two segments.

As demonstrated above, the NHHIP will have a disproportionately high and adverse effect on low-income and minority populations. This creates an obligation on TxDOT to avoid the NHHIP's disproportionate impacts and mitigate impacts where they cannot be avoided.<sup>327</sup> Per TxDOT's own findings, noise buffers can avoid noise impacts. Thus, TxDOT must consider noise buffers because they are an effective method to reduce noise impacts in low-income and minority communities impacted by the NHHIP, especially in Segment 1. The footprint of the NHHIP does not have to increase to install noise buffers. Rather, and consistent with community demands, TxDOT could decrease the size of the area of construction and dedicate portions of the proposed ROW acquisitions for use as buffer zones, for example.

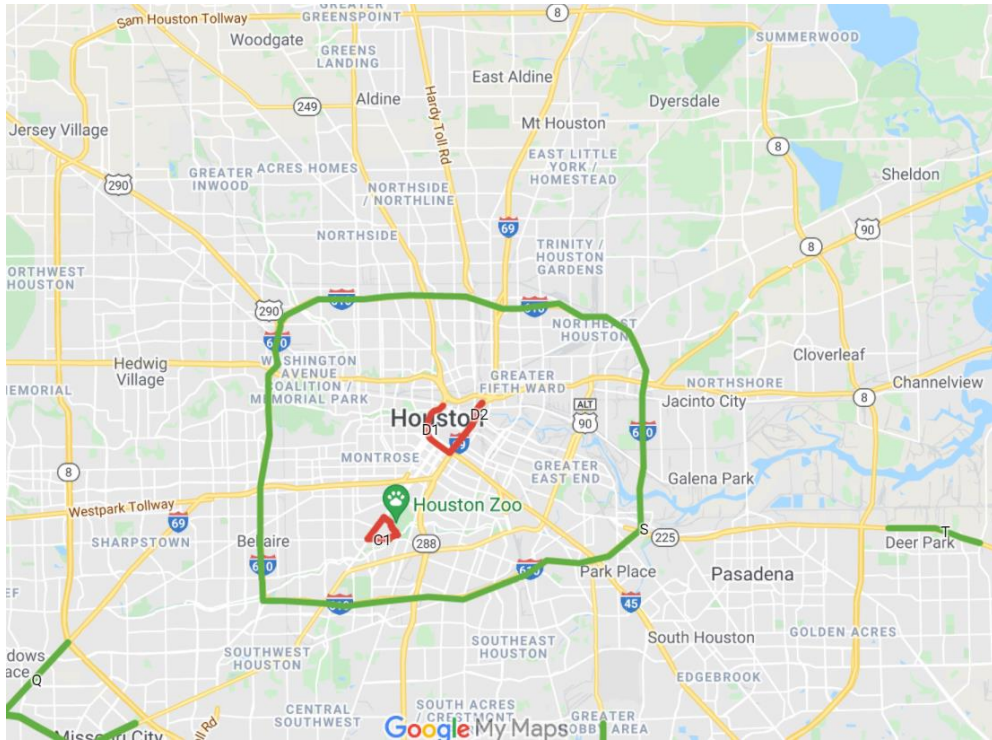
**Hazardous waste routes.** TxDOT does not appear to have analyzed the indirect impacts from increased hazardous waste transportation through interstate highways and the added risk this presents to low-income and minority communities. The Resource Conservation and Recovery Act ("RCRA") and related hazardous waste regulation set specific requirements for operators who transport, store, and dispose of hazardous waste. For transporters, RCRA and its implementing regulations mandate the use and nonuse of specific highways. According to the Federal Motor Carrier Safety Administration, RCRA-regulated facilities and operators in Houston alone generated 431,719.2 tons hazardous materials, managed 412,157.9 tons, shipped 40,941.5 tons, and received 26,597.5 tons.<sup>328</sup> This does not include other municipalities in and around the Houston Ship Channel and the Port of Houston which form part of the nation's petrochemical capital.

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<sup>327</sup> See DOT EJ Order.

<sup>328</sup> USDOT, Federal Motor Carrier Safety Administration ("FMCSA"), National Hazardous Materials Route Registry – By State (search for Texas), table attached as Attachment 13, <https://www.fmcsa.dot.gov/regulations/hazardous-materials/national-hazardous-materials-route-registry-state>; see also, EPA, RCRA Biennial Report (search for Houston, Texas), <https://rcrapublic.epa.gov/rcrainfoweb/action/modules/br/search/view>.

## National Hazardous Route Registry for Houston, Texas Area<sup>329</sup>



What TxDOT refers as the “Downtown Loop” at present includes several highway segments on which transportation of hazardous waste is restricted. TxDOT claims that the NHHIP will bring certain parts of the impacted highways in compliance with modern highway building standards. It is unclear whether doing so will open more hazardous waste routes that would run through communities, including those otherwise impacted by the NHHIP. This is not a trivial matter. A recent U.S. Nuclear Regulatory Commission finalized a NEPA Environmental Impact Statement recommending issuance of a permit for Interim Storage Partners LLC to operate spent nuclear fuel in Andrews County, Texas.<sup>330</sup> There are not many of these disposal facilities in the U.S. There are two nuclear power plants in Texas and one, South Texas Project Nuclear (“STP Nuclear”) is located approximately 20 miles southwest of Houston. Further, there are abundant sources of hazardous waste in and around the Houston Ship Channel and the Port of Houston.

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<sup>329</sup> FMCSA, National HM Route Registry created by FMCSA using Google Maps (red routes indicated “Restricted Routes” while green indicate “NRHM Designated Routes”),

[https://www.google.com/maps/d/viewer?hl=en\\_US&app=mp&mid=1xb1EJc\\_1LLaJtepg1D8SCZ-IIBA&ll=29.787456995602515%2C-95.34994224279697&z=11](https://www.google.com/maps/d/viewer?hl=en_US&app=mp&mid=1xb1EJc_1LLaJtepg1D8SCZ-IIBA&ll=29.787456995602515%2C-95.34994224279697&z=11) (last visited August 4, 2021).

<sup>330</sup> U.S. Nuclear Regulatory Commission, Environmental Impact Statement for Interim Storage Partners LLC’s License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas (NUREG-2239), Final Report (July 2021), <https://www.nrc.gov/docs/ML2120/ML21209A955.pdf>.



These sources could also seek to transport their hazardous or radioactive waste through downtown Houston. Thus, communities may face impacts from radioactive waste traveling to Andrews County, waste transported in and out STP Nuclear, along with the voluminous amounts of waste generated by operators along the Houston Ship Channel.

## **VII. Relief**

### **A. Accept this Complaint for investigation**

This Complaint meets all jurisdictional and prudential requirements and establishes a *prima facie* case that TxDOT has discriminated against protected groups in the development of the NHHIP both in a disproportionate and disparate manner.

### **B. Find that the NHHIP will have a disproportionately high and adverse effects on populations protected by Title VI and that TxDOT fails to adequately avoid and mitigate these effects**

Just as the effects of Jim Crow on mobility and past transportation projects are still felt throughout minority communities today, if development of the NHHIP does not address its discrimination against protected groups, its effects will be felt throughout minority communities now and for generations to come. By making arbitrary findings, TxDOT willfully ignores the requirement to avoid and mitigate the disproportionate and adverse effects on low-income and minority communities.

### **C. Transparency around TxDOT's proposed financial aid efforts**

Residents and businesses have already moved out of the proposed ROW. TxDOT proposes several financial aid mitigation measures, including rental assistance. However, TxDOT has not presented program parameters or an application process. Thus, this mitigation measure is not accessible to impacted persons who are already moving away. It is unclear when and how TxDOT will finally make this rental assistance available. Public housing and unsheltered, unhoused, and low-resource populations would like to benefit from this program.

Additionally, residents would like clarity about TxDOT's weatherization program. Specifically, whether this program could help residents purchase air conditioning units.

**D. Re-open the NHHIP public comment period**

TxDOT failed to provide Segment 1 LEP residents who live by the stormwater detention ponds with a meaningful opportunity to participate in the NHHIP development process. To do so, TxDOT must re-open the comment period so it can receive feedback about these newly-proposed ponds and how TxDOT could mitigate the impacts of the ponds in the community.

**E. Address the immediate needs of public housing residents**

Immediately, TxDOT must ensure that all communications to public housing residents regarding its relocation assistance program proceed at least in English and Spanish, with an assessment of all other languages necessary to create equal access for LEP populations.

**F. Require TxDOT to immediately establish or add to the existing webpage information on how residents can qualify for financial assistance and relocation programs.<sup>331</sup>**

TxDOT and its relocation services consultant provided a website for residents from the Hilcrest neighborhood who were impacted by the Harbor Bridge project in Corpus Christi. This website includes, for example, information on how residents can qualify for assistance programs and also provides project updates. The residents that the Harris County Attorney spoke with would like to see a website like this, separate and apart from TxDOT's existing NHHIP website.

**VIII. Conclusion**

TxDOT failed in its obligation to treat all Texans equitably. The NHHIP cannot proceed as proposed—USDOT and FHWA have authority to stop the project and hold TxDOT accountable, even if the State of Texas will miss out on billions of dollars. Federal law mandates that people come before money. TxDOT made inapposite assurances regarding environmental justice and public participation requirements. USDOT must rescind the certification submitted by TxDOT. To this end, the Office of the Harris County Attorney elevates the voices of those who are amongst the most vulnerable in and around the NHHIP Project Area, and least heard. Their concerns matter and they want an

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<sup>331</sup> TxDOT and DRA provided Corpus Christi, Texas residents impacted by TxDOT's Harbor Bridge project, <https://ccharborbridgerelocation.com/>.

opportunity to provide feedback and develop mitigation measures that best fit their needs. Further, they want effective and transparent mitigation measures. Mitigation measures that lack transparency and are difficult to use are not mitigation measures at all. TxDOT must do more to ameliorate the NHHIP's negative and disproportionate impacts on minority and low-resource populations as well as addressing the agency's legacy discrimination in the Houston area. Plainly, USDOT and FHWA must hold TxDOT accountable because there is no room for this type of discrimination in this country anymore.

Respectfully submitted,

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