



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

1200 New Jersey Avenue, SE.  
Washington, DC 20590

DEC 6 2016

In Reply Refer To: HCR-20  
DOT# 2017-0095

(b) (6)

On behalf of (b) (6)

(b) (6)

633 17th St.; Suite 1600  
Denver, CO 80202

**Subject:** Acknowledgment and Acceptance of Complaint DOT# 2017-0095

Dear (b) (6):

This letter acknowledges that the Federal Highway Administration's (FHWA) Office of Civil Rights has received and accepted the complaint of discrimination that you have filed alleging a violation of Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations, including Title VI regulations administered by the United States Department of Transportation (49 C.F.R. Part 21) and the Federal Highway Administration (23 C.F.R. Part 200). Your complaint was received in this office on November 15, 2016.

We have reviewed your complaint and determined that the investigation will focus on the following allegation(s):

1. Whether the Colorado Department of Transportation's (CDOT) adoption of a Statewide Transportation Improvement Program (STIP)—which included the Interstate 70 East project—violates Title VI due to potentially disparate, adverse impacts to the predominantly Hispanic communities of Elyria-Swansea and Globeville.
2. Whether CDOT's process for selecting of the preferred alternative for the Interstate 70 East project lacked adequate consultation with the predominantly Hispanic communities of Elyria-Swansea and Globeville.
3. Whether CDOT's proposed mitigation actions for the Interstate 70 East project will not sufficiently offset potentially disparate, adverse impacts to the predominantly Hispanic communities of Elyria-Swansea and Globeville.

The complaint has been assigned to Carey Shepherd, Civil Rights Program Coordinator for the FHWA Florida Division, for investigation. Mr. Shepherd will keep you informed regarding the investigation of your complaint. You may contact him at 850-553-2206 or via e-mail at [carey.shepherd@dot.gov](mailto:carey.shepherd@dot.gov).

Please be advised that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. Any individual alleging such harassment or intimidation may file a complaint with the FHWA. Any questions or concerns that you have regarding the investigative process and your rights can be discussed with the investigator.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. Therefore, enclosed for your information are the "Complainant Consent/Release Form" and the "Notice of Investigatory Uses of Personal Information" fact sheet. Please sign and date the "Complainant Consent/Release Form" and return to this office either by postal mail or electronically to:

Carey Shepherd  
Federal Highway Administration – Florida Division  
3500 Financial Plaza, Suite 400  
Tallahassee, FL 32312  
carey.shepherd@dot.gov

In the event that we receive such a request, we will seek to protect, to the extent provided by law, personal information, which, if released, could constitute an unwarranted invasion of privacy.

Sincerely,



Irene Rico  
Associate Administrator for Civil Rights

**Enclosures:**

Complainant Consent/Release Form  
Notice of Investigatory Uses of Personal Information

cc: John Cater, Division Administrator, FHWA CO Division Office  
Alicia Nolan, Assistant Division Administrator, FHWA CO Division Office  
Nicole Bumpers, Civil Rights Program Manager, FHWA CO Division Office  
Carey Shepherd, Civil Rights Program Coordinator, FHWA FL Division Office

## COMPLAINANT CONSENT/RELEASE FORM

Name: (b) (6)

Address: (b) (6)

Complaint number(s): DOT # 2017-0095

*Please read the information below, check the appropriate box, and sign this form.*

I have read the Notice of Investigatory Uses of Personal Information by the Federal Highway Administration (FHWA). As a complainant, I understand that in the course of an investigation it may become necessary for FHWA to reveal my identity to persons at the organization or institution under investigation. I am also aware of the obligations of FHWA to honor requests under the Freedom of Information Act. I understand that it may be necessary for FHWA to disclose information, including personally identifying details, which it has gathered as a part of its investigation of my complaint. In addition, I understand that as a complainant I am protected by FHWA's regulations from intimidation or retaliation for having taken action or participated in action to secure rights protected by nondiscrimination statutes enforced by FHWA.

### CONSENT/RELEASE

**CONSENT** - I have read and understand the above information and authorize FHWA to reveal my identity to persons at the organization or institution under investigation. I hereby authorize the FHWA to receive material and information about me pertinent to the investigation of my complaint. I understand that the material and information will be used for authorized civil rights compliance and enforcement activities. I further understand that I am not required to authorize this release, and do so voluntarily.

**CONSENT DENIED** - I have read and understand the above information and do not want FHWA to reveal my identity to the organization or institution under investigation, or to review, receive copies of, or discuss material and information about me, pertinent to the investigation of my complaint. I understand this is likely to impede the investigation of my complaint and may result in the closure of the investigation.

SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

## **NOTICE ABOUT INVESTIGATORY USES OF PERSONAL INFORMATION**

### **NOTICE OF COMPLAINANT/INTERVIEWEE RIGHTS AND PRIVILEGES**

Complainants and individuals who cooperate in an investigation, proceeding or hearing conducted by FHWA are afforded certain rights and protections. This brief description will provide you with an overview of these rights and protections.

- A recipient may not force its employees to be represented by the recipient's counsel nor may it intimidate, threaten, coerce or discriminate against any employee who refuses to reveal to the recipient the content of an interview. An employee does, however, have the right to representation during an interview with FHWA. The representative may be the recipient's counsel, the employee's private counsel, or anyone else the interviewee authorizes to be present.

- The laws and regulations which govern FHWA's compliance and enforcement authority provide that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual because he/she has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted under DOJ's jurisdiction, or has asserted rights protected by statutes DOJ enforces.

- Information obtained from the complainant or other individual which is maintained in FHWA's investigative files may be exempt from disclosure under the Privacy Act or under the Freedom of Information Act if release of such information would constitute an unwarranted invasion of personal privacy.

*There are two laws governing personal information submitted to any Federal agency, including the Federal Highway Administration (FHWA): The Privacy Act of 1974 (5 U.S.C. ' 552a), and the Freedom of Information Act (5 U.S.C. ' 552).*

**THE PRIVACY ACT** protects individuals from misuse of personal information held by the Federal Government. The law applies to records that are kept and that can be located by the individual's name or social security number or other personal identification system. Persons who submit information to the government should know that:

- FHWA is required to investigate complaints of discrimination on the basis of race, color, national origin, sex, disability, age, and, in some instances, religion against recipients of Federal financial assistance. FHWA also is authorized to conduct reviews of federally funded recipients to assess their compliance with civil rights laws.

- Information that FHWA collects is analyzed by authorized personnel within the agency. This information may include personnel records or other personal information. FHWA staff may need to reveal certain information to persons outside the agency in the course of verifying facts or gathering new facts to develop a basis for making a civil rights compliance determination. Such details could include the physical condition or age of a complainant. FHWA also may be required to reveal certain information to any individual who requests it under the provisions of the Freedom of Information Act. (See below)

- Personal information will be used only for the specific purpose for which it was submitted, that is, for authorized civil rights compliance and enforcement activities. Except in the instances

**defined in FHWA's regulation at 28 C.F.R. Part 16, FHWA will not release the information to any other agency or individual unless the person who supplied the information submits a written consent. One of these exceptions is when release is required under the Freedom of Information Act. (See below)**

**- No law requires a complainant to give personal information to FHWA, and no sanctions will be imposed on complainants or other individuals who deny FHWA's request. However, if FHWA fails to obtain information needed to investigate allegations of discrimination, it may be necessary to close the investigation.**

**- The Privacy Act permits certain types of systems of records to be exempt from some of its requirements, including the access provisions. It is the policy of FHWA to exercise authority to exempt systems of records only in compelling cases. FHWA may deny a complainant access to the files compiled during the agency investigation of his or her civil rights complaint against a recipient of Federal financial assistance. Complaint files are exempt in order to aid negotiations between recipients and FHWA in resolving civil rights issues and to encourage recipients to furnish information essential to the investigation.**

**- FHWA does not reveal the names or other identifying information about an individual unless it is necessary for the completion of an investigation or for enforcement activities against a recipient that violates the laws, or unless such information is required to be disclosed under FOIA or the Privacy Act. FHWA will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under FOIA, the Privacy Act, or otherwise required by law.**

**THE FREEDOM OF INFORMATION ACT gives the public access to certain files and records of the Federal Government. Individuals can obtain items from many categories of records of the Government --not just materials that apply to them personally. FHWA must honor requests under the Freedom of Information Act, with some exceptions. FHWA generally is not required to release documents during an investigation or enforcement proceedings if the release could have an adverse effect on the ability of the agency to do its job. Also, any Federal agency may refuse a request for records compiled for law enforcement purposes if their release could be an "unwarranted invasion of privacy" of an individual. Requests for other records, such as personnel and medical files, may be denied where the disclosure would be a "clearly unwarranted invasion of privacy."**




U.S. Department  
of Transportation

Federal Highway  
Administration

# Memorandum

Subject: **ACTION:** (b) (6) v. Colorado  
Department of Transportation  
DOT# 2017-0095

From: Irene Rico   
Associate Administrator for Civil Rights

To: John Cater  
Division Administrator (HDA-CO)  
Denver, CO

Date: DEC 6 2016

In Reply Refer To:  
HCR-20

This memorandum is in reference to a complaint of discrimination filed by (b) (6) alleging violations of Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations, including Title VI regulations administered by the United States Department of Transportation (49 C.F.R. Part 21) and the Federal Highway Administration (23 C.F.R. Part 200).

The complainant alleges that:

1. The Colorado Department of Transportation's (CDOT) adoption of a Statewide Transportation Improvement Program—which included the Interstate 70 East project—violates Title VI due to potentially disparate, adverse impacts to the predominantly Hispanic communities of Elyria-Swansea and Globeville.
2. CDOT's process for selecting the preferred alternative for the Interstate 70 East project lacked adequate consultation with the predominantly Hispanic communities of Elyria-Swansea and Globeville.
3. CDOT's proposed mitigation actions for the Interstate 70 East project will not sufficiently offset potentially disparate, adverse impacts to the predominantly Hispanic communities of Elyria-Swansea and Globeville.

The Headquarters' Office of Civil Rights Investigations team has determined that the complainant's allegations may fall under the jurisdiction of Title VI, and will proceed to investigate the complaint.

If you have any questions about this complaint, please contact Kevin Resler at (202) 366-2925.

cc: Alicia Nolan, Assistant Division Administrator, FHWA CO Division Office  
Nicole Bumpers, Civil Rights Program Manager, FHWA CO Division Office  
Carey Shepherd, Civil Rights Program Coordinator, FHWA FL Division Office



*By email and hand delivery*

November 15, 2016

Leslie Proll  
Director  
Office of Civil Rights  
U.S. Department of Transportation  
DOCR (S-30)  
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Acting Associate Administrator for Civil Rights  
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Daria Neal  
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Re: Complaint Against Colorado Department of Transportation Pursuant to Title VI of the Civil Rights Act of 1964

Dear Ms. Proll, Ms. Rico, and Ms. Neal,

Colorado Latino Forum (“CLF”), Cross Community Coalition (“CCC”), and Elyria and Swansea Neighborhood Association (“ESNA”) (collectively, “Complainants”) respectfully submit this complaint alleging violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and U.S. Department of Transportation’s (“USDOT”) implementing regulations, 49 C.F.R. pt. 21. These civil rights violations stem from the Colorado Department of Transportation’s (“CDOT”) adoption of a Statewide Transportation Improvement Program (“STIP”) on May 19, 2016 that will result in disparate and severe environmental and economic impacts on the predominantly Latino communities of Elyria-Swansea and Globeville, which lie

in the path of the proposed expansion of Interstate I-70 (“I-70”) through north Denver.<sup>1</sup> CDOT is a recipient of federal funds and prohibited from taking actions that have a discriminatory impact on citizens on the basis of their race, color, and national origin.

The Elyria-Swansea neighborhood was initially severed by I-70 when it was constructed in the 1960s, before Congress enacted environmental laws that would have given the residents a voice in the decision and the opportunity to fully consider and mitigate the social, economic and environmental impacts of the freeway. The current effort to address I-70’s use and contribution to area transportation needs should not further the wrongs of the initial decision and the decades of significant adverse impacts in these neighborhoods. Instead, the STIP intensifies the existing impacts by committing CDOT to tripling the width of I-70 through the Elyria-Swansea neighborhood, where the population is 83.8% Latino. The proposed expansion would widen the freeway from 85 to 278 feet wide; destroy 54 homes and displace approximately 180 residents; exacerbate the already high levels of air pollution in Colorado’s most overburdened neighborhood; and replace the Swansea Elementary School playground with “managed” toll lanes allowing drivers willing and able to pay a fee to use presumably less-congested lanes. In the short term, construction would disturb and expose Complainants to chemical-laden soils in an existing Superfund site and result in noise, congestion and other harmful impacts. Once again, Elyria-Swansea residents are being forced to bear the burdens of a project that inures to the benefit of the rest of metro-Denver, but puts their health and community at risk.

This complaint first explains why USDOT has jurisdiction to investigate this complaint. *Infra* pp. 4–6. It then provides background information about the Globeville and Elyria-Swansea neighborhoods and the longstanding environmental impacts they continue to face. *Infra* pp. 6–9. The complaint then describes the environmental impact statements (“EIS”) that USDOT produced with CDOT pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *et seq.*, and the NEPA processes’ relationship to the STIP. This section also discusses the public concerns raised by residents of Elyria-Swansea (and other neighborhoods) that CDOT received, but did not heed, throughout the NEPA process and before issuing the STIP. *Infra* pp. 9–20. Finally, the complaint explains that CDOT’s decision to widen I-70 will result in disproportionate impacts on a predominantly Latino community already overburdened by environmental hazards; that the mitigation measures CDOT has proposed do not adequately address those disparate impacts; and that there are practicable alternatives to the decision that would be less discriminatory. *Infra* pp. 21–31.

USDOT regulations require the Secretary of Transportation to “make a prompt investigation whenever a . . . complaint, or any other information indicates a possible” violation of Title VI. 49 C.F.R. § 21.11(c). If the Secretary determines that violations exist, he must inform the recipient of federal funds (here, CDOT) and resolve the violations “by informal means whenever possible.” *Id.* § 21.11(d). If informal resolution is not possible, CDOT’s continued violations may result in loss of federal financial assistance for the I-70 project. *Id.* § 21.13(a).

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<sup>1</sup> CDOT, *Statewide Transportation Improvement Program Fiscal Years 2017 – 2020* (May 19, 2016), <https://www.codot.gov/business/budget/documents/draft-fy2017-fy2020-stip> (“STIP”) (Exhibit 1) (Exhibits are being sent via overnight delivery).

Because of the severe nature of the threats to the Complainants' health, community cohesion, and economic vitality that the proposed expansion would bring to the community, Complainants request that the USDOT Departmental Office of Civil Rights accept this complaint and investigate whether CDOT violated Title VI of the Civil Rights Act and its implementing regulations. Complainants request that USDOT withhold the Record of Decision ("ROD") finalizing the NEPA process, until the investigation is complete. Complainants further reserve the right to supplement this complaint with additional exhibits and legal arguments at a later date.

Finally, Complainants request that the Civil Rights Division of the U.S. Department of Justice ("DOJ") play an active role in coordinating this federal investigation and any enforcement actions, consistent with the Federal Coordination and Compliance Section's mission. *See* Exec. Order No. 12250 § 1-201(a), Leadership and Coordination of Federal Nondiscrimination Laws, 45 Fed. Reg. 72,995 (Nov. 2, 1980) ("The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of . . . Title VI of the Civil Rights Act of 1964.").

## **I. Parties**

### **A. Complainants**

CLF, CCC, and ESNA all have Latino members living in Elyria-Swansea that suffer from the existing impacts of I-70 and who would suffer from the intensified impacts of the I-70 expansion. Complainants will submit a more detailed witness list and/or set of affidavits describing the interests of those members and the impacts they experience as a supplement to this complaint at a later date.

Founded in 2009, Colorado Latino Forum ("CLF") is an influential, statewide grassroots organization focused on Latino issues that supports individuals in communities and organizations throughout Colorado. It is involved in public policy, voter mobilization, candidate education, and coalition building. CLF's mission is to increase the political, social, educational and economic strength of Latinas and Latinos. CLF has a vision of transforming Colorado's political, social, educational, and economic landscape by increasing Latino participation and awareness in the electoral process and educating and mobilizing the community on vital issues. CLF has members, including board members, living in communities impacted by the proposed I-70 expansion, including Globeville and Elyria-Swansea.

Cross Community Coalition ("CCC") is a registered neighborhood organization ("RNO") with the City of Denver that was recognized by the City in 2015. It represents the entire community in the area bordered by Colorado Boulevard to the east, the Denver/Adams County line to the north, the South Platte River to the west, and 38th Street and 40th Avenue to the south. CCC is a grassroots, non-hierarchical organization with approximately 45 active participants. CCC is honored to take up the mantle of a previous iteration of CCC, which was a

neighborhood services organization that advocated for and served Elyria-Swansea residents for decades.<sup>2</sup>

The Elyria and Swansea Neighborhood Association (“ESNA”) is an RNO with the City of Denver. It represent residents and small business owners, including Latinos, within the geographical neighborhoods of Elyria and Swansea in north Denver. ESNA’s mission is to educate and inform the community and facilitate informed discussion of the many, unique issues and challenges facing the neighborhoods. It provides grassroots access for residents and property owners to the dialogue formulating and implementing the community’s common shared future. That mission includes public meetings and outreach, advocacy of common interests and goals to civic leaders, as well as specific projects that provide tangible benefit for the community. ESNA is an advocate for the interests of its residents, and a bulwark against outside interests interfering with the cohesion of these affected communities.

## **B. Recipients**

CDOT is an agency of the State of Colorado. COLO. REV. STAT. § 43-1-103. Among other things, the General Assembly created CDOT in order to “[p]rovide strategic planning for statewide transportation systems” and “[e]nhance the state’s prospects to obtain federal funds by responding to federal mandates for multi-modal transportation planning.” *Id.* § 43-1-101(1)(a), (e). CDOT’s responsibilities include transportation planning in general, COLO. REV. STAT. § 43-1-1103, and developing the STIP specifically, 2 COLO. CODE REGS. § 601-22:7.00. This includes the responsibility “for carrying out public participation for developing” the STIP. *Id.* § 601-22:4.02.2. CDOT regulations define the STIP as “a staged, fiscally constrained, multi-year, statewide, multimodal program of transportation projects which is consistent with the statewide transportation plan and planning processes, with metropolitan planning area plans, Transportation Improvement Programs and processes, and which is developed pursuant to 23 U.S.C. 135.” *Id.* § 601-22:1.29. By including projects in a STIP, a state certifies that funds for the project are available and committed. *See* 23 C.F.R. § 450.218(m), (o).

## **II. 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.” 42 U.S.C. § 2000d. Accepting federal funds from USDOT creates an obligation for the recipient to comply with Title VI and

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<sup>2</sup> *See* Tina Griego, *Having Done So Much, Rest Is Hard*, DENVER POST (June 24, 2009), <http://www.denverpost.com/2009/06/24/griego-having-done-so-much-rest-is-hard/> (Exhibit 2); Julie Dugdale, *In a Run-Down Neighborhood, There’s Lots of Love: A Denver Activist Fights for Her Community*, HIGH COUNTRY NEWS (June 13, 2005), <http://www.hcn.org/issues/300/15583> (Exhibit 3).

USDOT's implementing regulations.<sup>3</sup> As explained below, CDOT is a "program" receiving federal financial assistance and therefore is subject to Title VI and USDOT's implementing regulations. This Complaint satisfies all jurisdictional and prudential considerations established by Title VI, USDOT's implementing regulations, and other agency guidance.

#### **A. CDOT Is a "Program" as Defined by Title VI.**

Title VI defines a program or activity as "all of the operations of . . . a department, agency . . . or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a. Accordingly, if any part of a state agency receives federal funds, the entire agency is covered by Title VI. *See Ass'n of Mexican-Am. Educators v. California*, 195 F.3d 465, 474–75 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc); *see also* U.S. Dep't of Justice, *Title VI Legal Manual* § VII(D) (Nov. 1998), <https://www.justice.gov/crt/title-vi-legal-manual> ("DOJ Title VI Manual").

CDOT is a Colorado state agency. COLO. REV. STAT. §§ 43-1-101, 103. It uses grants in connection with federal highway projects, which is listed in USDOT's Title VI implementing regulations as an "[a]ctivity to which this part applies." 49 C.F.R. pt. 21 App. A(1)–(2). Accordingly, CDOT is a "program" that falls under Title VI.

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

USDOT regulations define a "recipient" of federal funds as "any State . . . or any political subdivision thereof, or . . . any public or private agency . . . to whom Federal financial assistance is extended, directly or through another recipient." 49 C.F.R. § 21.23(f); *accord* DOJ Title VI Manual § VI(A).

CDOT received \$537,325,360.00 in federal funds in Fiscal Year 2015 in the form of 3,147 individual grants from USDOT.<sup>4</sup> Because CDOT receives financial assistance from USDOT, it is subject to Title VI and USDOT's implementing regulations.

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<sup>3</sup> USDOT regulations require applicants for agency funds to give "assurance" that they will comply with the agency's Title VI implementing regulations. 49 C.F.R. § 21.7a(1). CDOT certified in the STIP that it complied with Title VI and its implementing regulations at 49 C.F.R. pt. 21. STIP at 1.

<sup>4</sup> USASpending.gov, *Advance Data Search: Results Summary* (search run Nov. 14, 2016), <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (search filters: Spending Type = "Grants," Fiscal Year = "FY 2015," Recipient State = "Colorado," Awarding Agency = "Department of Transportation," & Type of Recipient = "State Government.") (Exhibit 4). Note that USASpending.gov refers to CDOT as the "Colorado Department of Highways." This was CDOT's name until 1991, when the General Assembly renamed it as CDOT. *See* CDOT, *About CDOT: CDOT History* (last visited Nov. 14, 2016), <https://www.codot.gov/about/CDOTHistory> (Exhibit 5); CDOT, *Project Priority Programming Process (4P) and STIP Development Guidelines* 1 (Sept. 16, 2009), <https://www.codot.gov/programs/tetp/4p-and-stip-development-guidelines> (Exhibit 6).

**C. This 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 C.F.R. § 21.11(b).<sup>5</sup>

The alleged discriminatory act is CDOT's adoption of the STIP on May 19, 2016. This Complaint is timely because it was filed on November 15, 2016, within 180 days of May 19, 2016.<sup>6</sup>

**D. This Written Complaint is Submitted by Representatives of Elyria-Swansea Residents Subjected to Racial Discrimination.**

USDOT regulations provide that “[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint.” 49 C.F.R. § 21.11(b).

In compliance with the regulation, Complainants submit their complaint in writing, through their representative, Earthjustice, a law firm authorized to represent CLF, CCC, and ESNA. As discussed in *supra* Section I(A), all three organizations have Latino members who reside in Elyria-Swansea and Globeville who are impacted by CDOT's decision to implement the STIP, which has subjected them to discrimination on the basis of their race, color, and/or national origin. Accordingly, this Complaint meets the requirements of § 21.11.<sup>7</sup>

**III. Factual Background**

This section first summarizes historical and present day facts about Elyria-Swansea and Globeville. It then describes the NEPA process that led to CDOT's choice to triple I-70's width

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<sup>5</sup> See also Fed. Transit. Admin. (“FTA”), *FTA C 4702.1B, Title VI Requirements and Guidelines for Federal Transit Administration Recipients*, at Ch. IX § 2 (Oct. 1, 2012) [https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA\\_Title\\_VI\\_FINAL.pdf](https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf) (“FTA Title VI Guidance”). The Federal Highway Administration (“FHWA”) does not have its own Title VI guidance. Accordingly, the FTA Title VI Guidance is cited throughout this complaint as a model.

<sup>6</sup> Complainants intend 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; indeed, we understand that USDOT routinely accepts supplemental information in the course of its complaint investigations. However, should USDOT determine not to accept supplemental information after the date of this complaint, Complainants request that USDOT extend the 180-day deadline for the purpose of allowing later submissions of additional evidence and arguments. See 49 C.F.R. § 21.11(b); see also FTA Title VI Guidance at Ch. IX-1 § 2 (authorizing extension of filing deadline).

<sup>7</sup> FTA Guidance provides that complaints raising civil rights allegations that have already been raised in another forum may be dismissed. FTA Title VI Guidance at Ch. IX-2. Complainants have not raised any claims that CDOT's approval of the STIP constitutes impermissible racial discrimination in any other forum, and their complaint therefore presents unique allegations.

through the predominantly Latino neighborhoods and the community's ongoing opposition to this plan. Finally, it discusses the STIP and Complainants' advocacy related to the STIP.

**A. Elyria-Swansea and Globeville Are Historically Latino Communities with a Legacy of Environmental Injustice.**

Elyria and Swansea were founded and platted in 1870 and 1881, respectively, as two separate settlements near Denver's growing industrial and railroad industries.<sup>8</sup> They were consolidated into Denver in 1902, and are today considered part of the same "statistical neighborhood" even though many residents still consider the two neighborhoods to be distinct.<sup>9</sup> According to a recent Health Impact Assessment ("HIA"), even after they became part of the City and County of Denver, Elyria-Swansea, along with Globeville, a neighborhood to their west, remained physically isolated from the rest of Denver by railroads, industrial facilities, and the South Platte River.<sup>10</sup> The neighborhood remains highly industrial today; only 16% of Elyria-Swansea is made up of residences, parks, recreation facilities, and schools.<sup>11</sup> While much of Denver has witnessed a boom in community improvements, Elyria-Swansea has gotten by with aging infrastructure, limited sidewalks, significant pollution from the freeways, industry that was allowed to encroach into the residential communities through zoning approvals, and a significant lack of public resources.

Elyria-Swansea's population is 84% Latino, one of the highest percent Latino populations of any neighborhood in Denver.<sup>12</sup> Elyria-Swansea is also younger, poorer, less educated, and has more monolingual Spanish speakers and families with children than Denver as a whole.<sup>13</sup> Globeville is also predominantly Latino and low-income.<sup>14</sup> Both neighborhoods are also home to a variety of negative environmental impacts and few public amenities similar to those in more affluent Denver neighborhoods. Highway traffic, freight trains, and industrial activities emit noise at levels above federal thresholds.<sup>15</sup> There is no grocery store and few other retail establishments in Globeville or Elyria-Swansea, a community of 10,000 people.<sup>16</sup> The neighborhoods' residents must travel as much as twice as far as the average Denver resident to

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<sup>8</sup> Denver City Council, *Elyria and Swansea Neighborhoods Plans* 14 (Feb. 23, 2015), [https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria\\_Swansea\\_Neighborhood\\_Plan.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf) ("ESNP") (Exhibit 7).

<sup>9</sup> *Id.*; see also *id.* at 15 (map showing division between Elyria and Swansea at York Street).

<sup>10</sup> Gretchen Armijo & Gene C. Hook, Denver Dep't of Env'tl Health, *How Neighborhood Planning Affects Health in Globeville & Elyria Swansea* 12 (Sept. 2014), [https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report\\_9-18-14.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf) ("HIA") (Exhibit 8).

<sup>11</sup> ESNP at 15.

<sup>12</sup> HIA at 14; see also Ava Farouche, Earthjustice, *Denver Neighborhoods & Percent Hispanic Population Map* (Nov. 14, 2016) (Exhibit 9).

<sup>13</sup> HIA at 14.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 6.

buy food for their families.<sup>17</sup> Given the concentration of these negative impacts and scarce benefits, it is unsurprising that Elyria-Swansea has one of the highest rates of asthma, cancer, cardiovascular disease, diabetes, and obesity in Denver.<sup>18</sup>

Elyria-Swansea has been identified as the “most polluted zipcode in Colorado.”<sup>19</sup> The neighborhood has borne a disproportionate share of the risks posed by a plethora of existing sources of pollution, including, but not limited to, a massive petroleum refinery complex with a history of Clean Air Act and Clear Water Act violations, a power plant, a pet food factory that emits noxious odors, several Superfund sites, and several highways. Highway traffic is the neighborhood’s main source of air pollution, but odors and emissions from nearby industrial operations also cause short-term and long-term health effects that irritate residents and limit outdoor recreation opportunities.<sup>20</sup> Despite these challenges, Elyria-Swansea remains a vibrant and unique community, with well above-average home ownership rates and numerous families that are proud to have considered it their home for generations.

A dominant theme in Elyria-Swansea’s history is the extent to which highway construction has impacted the neighborhood, with significant health, social, and economic impacts. First, in 1958, CDOT constructed Interstate 25 (“I-25”), dividing Globeville from Elyria-Swansea, and significantly restricting the possibility of east-west travel between and within the neighborhoods.<sup>21</sup> Then, in 1964, CDOT added I-70 to the neighborhood, cutting Elyria-Swansea in half, forcing residents to cross under an elevated highway viaduct to go to work, school, and church, and displacing many residents.<sup>22</sup> The viaduct, a looming, concrete structure with no design concession to ameliorate its impact on the neighborhood, has been a destructive influence from the start. It is a legacy of a prior discriminatory practice that continues to impact the health and well-being of the neighborhood.

The negative impacts of smelting and other industrial operations in the neighborhood are also a longstanding health risk. The ASARCO lead and arsenic smelter contaminated air and soil throughout Globeville and Elyria-Swansea, leading to a lengthy legal battle in which the community, lead by CCC, eventually triumphed, resulting in the closure and cleanup of the

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 16–17.

<sup>19</sup> Groundwork Denver, Inc., *Healthy Air for North Denver: CARE Grant Final Report 1* (Dec. 23, 2008), [https://archive.epa.gov/air/care/web/pdf/hand\\_report.pdf](https://archive.epa.gov/air/care/web/pdf/hand_report.pdf) (Exhibit 10).

<sup>20</sup> HIA at 5–6.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.*

smelter, now a Superfund site.<sup>23</sup> Despite this advocacy, much of the neighborhood's soil remains laden with heavy metals like lead and arsenic, and will be disturbed and become airborne during the I-70 expansion, exposing the neighbors to health risks.

## **B. History of the Proposed I-70 Expansion**

For over a decade, CDOT has been considering alternatives for highway improvements along the section of I-70 that bisects Elyria-Swansea through an ongoing NEPA analysis.<sup>24</sup> This process began with a Major Improvement Study ("MIS"), proceeded to a Draft Environmental Impact Statement ("DEIS"), then a Supplemental Draft Environmental Impact Statement ("SDEIS"), and culminated with a January 2016 Final Environmental Impact Statement ("FEIS"). In the FEIS, CDOT identified a preferred alternative that continues the historic pattern of I-70 dividing and polluting Elyria-Swansea.<sup>25</sup> The preferred alternative demolishes 56 homes, displaces approximately 184 residents, and subjects those that remain to dangerous and obnoxious dust, odors, and air pollution. In the STIP, CDOT announced its "inten[t] to move forward with Phase 1 of the preferred alternative detailed in the [FEIS]."<sup>26</sup> The ROD that will end the NEPA process is expected to be signed sometime this winter.

### **1. 1997: Regional Major Improvement Study**

The process of deciding how to improve I-70 began nearly 20 years ago. In 1997, the Denver Regional Council of Governments ("DRCOG") released the MIS of the I-70 corridor with the objective of "identify[ing] the mix of transportation improvements that can be most effective in improving travel in the corridor within anticipated funding constraints while considering environmental and community impacts."<sup>27</sup> The MIS, based in part on community input,<sup>28</sup> included a range of transit options, including buses and light rail,<sup>29</sup> as well as a range of

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<sup>23</sup> *Id.* at 13; see also Cara DeGette, *The Grit of Globeville: Part 2: 'Going Up Against More Money than God,'* COLO. PUB. NEWS (Jan. 22, 2013), <http://news.cpt12.org/index.php/the-grit-of-globeville-part-ii/> (Exhibit 11); Jefferson Dodge, *Justice: Boulder Attorneys' Battles Against Polluter Pay Off for Poor Denver Neighborhood,* BOULDER WEEKLY (May 13, 2010), <http://www.boulderweekly.com/news/justice/> (Exhibit 12); Steve Raabe, *Asarco Closure Plan Cheers Globeville,* DENVER POST (July 12, 2006), <http://www.denverpost.com/2006/07/12/asarco-closure-plan-cheers-globeville/> (Exhibit 13); Luke Turf, *My Way for the Highway,* WESTWORD (Nov. 24, 2005), <http://www.westword.com/news/my-way-for-the-highway-5087536> (Exhibit 14). The ASARCO smelter is not the only Superfund site in the immediate vicinity; the Vasquez Boulevard/I-70 Superfund site, another four-square mile area impacted by historic smelting activities, is located in Globeville. HIA at 13.

<sup>24</sup> CDOT, *I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation* at ES-3 (Jan. 2016), <http://www.i-70east.com/reports.html#feis> ("FEIS") (Exhibit 15).

<sup>25</sup> See *id.* at ES-12.

<sup>26</sup> STIP at 7.

<sup>27</sup> Denver Reg'l Council of Gov'ts, *East Corridor Major Investment Study: Final Report* at ES-1 (July 1997), [http://www.i-70east.com/reports/EastCorridorMIS\\_July1997\\_chapters1-3.pdf](http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters1-3.pdf) ("MIS") (Exhibit 16). USDOT partially funded the study. See *id.* at Cover Page.

<sup>28</sup> See *id.* at 7.

alignment alternatives including not only I-70's current location, but also several other East-West routes: 56<sup>th</sup> Avenue, Smith Road, Martin Luther King Boulevard, and Colfax Avenue.<sup>30</sup> Many of these alternatives became the basis for alternatives considered later during the ensuing NEPA process.

## 2. 2008: Draft Environmental Impact Statement

In 2003, CDOT began a joint effort with FHWA, FTA, the Regional Transportation District, and the City and County of Denver to conduct the requisite NEPA analysis for choosing an option to improve I-70.<sup>31</sup> In 2006, the analysis was split into separate transit and highway components, with CDOT and FHWA continuing to collaborate on highway components.<sup>32</sup> Although the official "purpose" of the project was to "implement a transportation solution that improves safety, access, and mobility and addresses congestion on I-70," due to the separation of public transit and highway analyses, the NEPA analysis was limited strictly to highway-related solutions.<sup>33</sup>

In 2008, CDOT released the first published document in the process, the DEIS. Based on public input, CDOT initially assessed a wide range of alternatives,<sup>34</sup> including six options that would have reduced its impact, including options that re-routed traffic around Elyria-Swansea.<sup>35</sup> CDOT also considered minimizing impacts on Elyria-Swansea and Globeville by rerouting truck traffic from I-70 to Interstate 270 ("I-270") and Interstate 76 ("I-76"), on a loop north of Elyria-Swansea.<sup>36</sup> This route travels through a heavily industrialized and sparsely populated area until it intersects with I-25, a north-south highway.<sup>37</sup> At I-25, I-270 meets I-76, which then proceeds southeast until it intersects again with I-70.

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<sup>29</sup> See *id.* at Ch. 4 p. 22, available at [http://www.i-70east.com/reports/EastCorridorMIS\\_July1997\\_chapters4.pdf](http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters4.pdf) (Exhibit 17).

<sup>30</sup> *Id.* at Ch. 4 p. 24; see also Farouche, *supra* n. 12 (Exhibit 9) (map showing streets in relevant area).

<sup>31</sup> Randy Jensen, CDOT, *et al.*, *I-70 East Draft Environmental Impact Statement Section & Section 4(F) Evaluation* at S-1 (Nov. 2008), [http://www.i-70east.com/DEIS/I-70EastDEISSection4FEvaluation\\_Volume1.pdf](http://www.i-70east.com/DEIS/I-70EastDEISSection4FEvaluation_Volume1.pdf) ("DEIS") (Exhibit 18).

<sup>32</sup> *Id.* For brevity, the preparer of the NEPA process will be referred to as CDOT throughout the rest of this complaint, despite the involvement of other agencies.

<sup>33</sup> *Id.* at S-3.

<sup>34</sup> *Id.* at 3-6 to 3-11.

<sup>35</sup> *Id.* at 3-11 to 3-12. Although Globeville will also be impacted by keeping I-70 along its present route, some rerouting options benefit Elyria-Swansea more or less than Globeville. Because Elyria-Swansea faces some of the greatest impacts from CDOT's preferred alternative for expanding I-70, this complaint focuses on options to reroute the highway around Elyria-Swansea.

<sup>36</sup> *Id.* at 3-14.

<sup>37</sup> See Farouche, *supra* n. 12 (Exhibit 9) (map showing streets in relevant area).



Despite broad public support for rerouting the highway around Elyria-Swansea and other nearby, predominantly Latino neighborhoods like Globeville, CDOT instead narrowed its options to those that would retain the current location of the interstate through the neighborhood. Three of the rerouting options, including the I-270/I-76 reroute, as well as rerouting truck traffic to I-270, were eliminated from consideration at an early “screening” stage, and were not fully considered.<sup>38</sup> Two more options for rerouting the highway around Elyria-Swansea were eliminated at the next stage, “comparative screening.”<sup>39</sup> The only rerouting alternative to get full consideration in the DEIS was a partial realignment that would take traffic along I-270 to Brighton Boulevard (Elyria-Swansea’s western border) then back onto the current I-70 route.<sup>40</sup>

Although CDOT did not fully consider the I-270/I-76 reroute alternative in the DEIS, public comments revealed strong public support for a reroute in general, and that reroute specifically.<sup>41</sup> Several commenters asked CDOT to consider alternatives aside from expanding the highway.<sup>42</sup> Public comments repeatedly expressed concern about air quality impacts, and advocated for the need for a comprehensive health impact assessment.<sup>43</sup> But CDOT failed to conduct such an assessment, and, eight years after releasing the DEIS, still has not done so

<sup>38</sup> DEIS at 3-18; *see also id.* at 3-25, 3-28.

<sup>39</sup> *Id.* at 3-23.

<sup>40</sup> *See id.* at 3-47, 3-55.

<sup>41</sup> *See generally* CDOT, *DEIS Public Release Comments* (May 14, 2009), [http://www.i-70east.com/DEIS/DEIS\\_PublicReleaseComments\\_043009.pdf](http://www.i-70east.com/DEIS/DEIS_PublicReleaseComments_043009.pdf) (“DEIS Comments”) (Exhibit 19).

<sup>42</sup> *Id.* at 30 (Comment of Jim Angell), 35 (Comment of Noah Weiss), 45 (Comment of C. Schultz).

<sup>43</sup> *See, e.g., id.* at 52 (Comment of Michael Harris) (“A more comprehensive assessment of the cumulative health impacts in many of the neighborhoods is clearly warranted to give a better understanding of the health risk each alternative poses to the local communities.”).

### 3. 2014: Supplemental Draft Environmental Impact Statement

Six years later, CDOT issued the SDEIS. The SDEIS eliminated the remaining realignment alternative.<sup>44</sup> Among the reasons CDOT gave for eliminating the realignment was that it would interfere with operations at the National Western Stock Show and plans to expand the National Western Stock Show complex.<sup>45</sup>

Between the issuance of the DEIS and SDEIS, CDOT sought public comment,<sup>46</sup> but it did not heed the communities' concerns and did not give adequate consideration to the alternatives the community proposed. For example, CDOT eliminated the community-developed alternative, a fully-capped tunnel through the length of Elyria-Swansea with ventilation to prevent the health impacts from air pollutants, primarily because of its cost.<sup>47</sup> Additionally, because so many community members questioned why the I-270/I-76 reroute alternative had been eliminated, CDOT "performed additional analysis on this concept to confirm the validity of its elimination from further consideration."<sup>48</sup> CDOT reached the same conclusion as it had before—that the reroute would add 2 to 4 additional travel miles (depending on a driver's destination), reduce redundancy of east-west highways (which is "beneficial" for emergencies), increase costs, and potentially result in additional local traffic on 46th Avenue.<sup>49</sup>

Instead of addressing legitimate concerns about longstanding discriminatory impacts and altering its plans or mitigating their impacts in accordance with neighborhood health concerns, CDOT focused on refuting the community's arguments. Community members strongly advocated for a reroute alternative, and the I-270/I-76 reroute alternative in particular.<sup>50</sup> Multiple groups explained the need for a health impact assessment to understand the air pollution

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<sup>44</sup> CDOT, *I-70 East Supplemental Draft Environmental Impact Statement & Section 4(F) Evaluation* at 3-7 (Aug. 2014), [http://www.i-70east.com/SDEIS/I-70EastEIS\\_SDEIS-Vol1.pdf](http://www.i-70east.com/SDEIS/I-70EastEIS_SDEIS-Vol1.pdf) ("SDEIS") (Exhibit 20).

<sup>45</sup> *Id.* at 3-8 to 3-9; *see also* FEIS at 2-6 (describing plans to expand the National Western Stock Show Complex as a tourist attraction).

<sup>46</sup> *See* SDEIS at 3-3.

<sup>47</sup> *Id.* at 3-11. Because the fully-capped tunnel would exceed 1,000 feet in length, ventilation would be required. FEIS at 3-25.

<sup>48</sup> SDEIS at 3-11.

<sup>49</sup> *Id.* at 3-12 to 3-13.

<sup>50</sup> *See, e.g.*, CDOT, *Comments Received from the September 2014 Public Hearings* (Sept. 2014), [www.i-70east.com/SDEIS/I-70EastSDEIS\\_Comments\\_Public-Hearings.pdf](http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Hearings.pdf) (Exhibit 21); CDOT, *SDEIS Public Comments with Attachments*, [www.i-70east.com/SDEIS/I-70EastSDEIS\\_Comments\\_Public-with-Attachments-Letters.pdf](http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-with-Attachments-Letters.pdf) (Exhibit 22); CDOT, *SDEIS Other Public Comments*, [www.i-70east.com/SDEIS/I-70EastSDEIS\\_Comments\\_Public.pdf](http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public.pdf) (Exhibit 23); CDOT, *SDEIS Comments Received in Spanish*, [http://www.i-70east.com/SDEIS/I-70EastSDEIS\\_Comments\\_Public-Espanol.pdf](http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Espanol.pdf) (Exhibit 24).

impacts of the project on the community.<sup>51</sup> Many commenters expressed concern about the adequacy of mitigation measures to protect public health.<sup>52</sup> All of these measures should have received significantly more attention from CDOT; because they did not, the proposal leaves Elyria-Swansea with disparate ongoing environmental, social, and economic burdens.

#### **4. 2016: Final Environmental Impact Assessment and the Preferred Alternative**

In January 2016, CDOT issued the FEIS. The FEIS assessed only three alternatives: a no-action alternative, an “improved viaduct” alternative, and a “partial covered lower alternative.”<sup>53</sup> CDOT chose the latter as the preferred alternative.<sup>54</sup> CDOT claimed that it had “support from the community” for this option—but that support reflected the narrow range of alternatives presented in the FEIS and not the range of less discriminatory alternatives.<sup>55</sup> CDOT reiterated verbatim the reasons it gave for rejecting the various reroute options in the SDEIS.<sup>56</sup>

Under the preferred alternative, I-70 would be expanded by between 25 and 105 feet in the areas *east* of Elyria-Swansea, many of which are predominately white and more affluent than Elyria-Swansea.<sup>57</sup> In Elyria-Swansea, the highway will more than triple in width, ballooning from 85 feet to 278 feet wide.<sup>58</sup> Two additional lanes in each direction are added through Elyria-Swansea, in addition to shoulders and two frontage roads.<sup>59</sup> Among these additional lanes are so-called “managed” toll lanes, accessible to drivers willing and able to pay a fee to drive in presumably less-congested lanes.<sup>60</sup>

To accommodate I-70’s significantly increased width, many homes and businesses in Elyria-Swansea will be demolished. “All of the residential relocations that result from the proposed project alternatives are located in the Elyria and Swansea Neighborhood. No residential relocations are anticipated by any of the alternatives from the [other impacted]

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<sup>51</sup> See, e.g., CDOT, *SDEIS Comment Summary: Special Interest Groups* (Nov. 2014), [http://www.i-70east.com/SDEIS/I-70EastSDEIS\\_Comments\\_Special-Interests-Businesses.pdf](http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Special-Interests-Businesses.pdf) (Exhibit 25) at 10 (Comments of Clayton United); 61 (Comments of Globeville, Elyria-Swansea Organizers Group); 89 (Comments of Robert E. Yuhnke & Sierra Club).

<sup>52</sup> See, e.g., SDEIS Comments Received in Spanish at 4 (“[V]a a ser mas polvo y mas contaminacion. Ustedes deben pagar para nuevas ventanas y puertas y filtracion de aire en mi casa tengo niños y nosotros no tenemos dinero para poner todo nuevo.”) (There is going to be more dust and contamination. You should pay for new windows and doors and air filters in my house. I have children and we do not have money to put in all new ones).

<sup>53</sup> FEIS at 3-2 to 3-5.

<sup>54</sup> *Id.* at ES-12.

<sup>55</sup> *Id.* at 3-20.

<sup>56</sup> *Id.* at 3-39 to 3-44.

<sup>57</sup> *Id.* at 3-6.

<sup>58</sup> See *id.* at 3-15.

<sup>59</sup> See *id.* at 3-11, 3-15.

<sup>60</sup> See *id.* at ES-10, ES-12, 4-54.

Neighborhoods.”<sup>61</sup> In total, 56 residences will be destroyed—21 owner occupied, and 35 tenant occupied.<sup>62</sup> Approximately 184 people will be forced to relocate.<sup>63</sup> Additionally, there are residents who live in a long-term stay motel who are not included in these impacted figures (approximately 50 more people).<sup>64</sup> This is the maximum number of residences destroyed out of any of the alternatives considered in the FEIS.<sup>65</sup>

The residents whose homes will be demolished will be compensated for the taking of their property,<sup>66</sup> but Complainants are informed and believe that residents are being offered amounts that are too low to purchase comparable homes in Denver, where housing prices have increased dramatically.<sup>67</sup> In its discussion of the value of the houses that will be destroyed, the FEIS used 2012 housing values, even though housing prices in the metro-Denver area increased dramatically since 2012.<sup>68</sup> One commonly-used real estate site estimates that the average home cost in the City of Denver was \$233,000 in December 2012—and that it increased to \$333,000 in January 2016, when the FEIS was released.<sup>69</sup> Nevertheless, relying on now-outdated 2012 values, the FEIS explained that the “individual tax value of impacted residential property located in the Elyria and Swansea Neighborhood ranges from a low of \$36,300 to a high of \$210,000,” with a median value of \$85,000.<sup>70</sup> The FEIS further states that “[t]he majority of households impacted by each alternative have homes valued between \$50,000 and \$99,999. No homes are valued at \$150,000 or more.”<sup>71</sup> The preferred alternative will also result in one non-profit and 17

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<sup>61</sup> *Id.* at 5.5-3.

<sup>62</sup> *Id.* at 5.5-4.

<sup>63</sup> See U.S. Census Bureau, American FactFinder, *Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data* (last visited Nov. 14, 2016), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (search for zip code 80216 shows average household size of 3.29, multiplied by 56 homes being destroyed) (Exhibit 26).

<sup>64</sup> See FEIS at 5.5-15.

<sup>65</sup> *Id.* at 5.5-4.

<sup>66</sup> U.S. CONST. amend V, cl. 4 (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>67</sup> See generally Erica Meltzer, *Families in the Path of I-70 Widening Live in Limbo as they Wait for Relocation*, DENVERITE (Sept. 28, 2016), <http://www.denverite.com/esmeralda-aguilar-displacement-i70-17475/> (Exhibit 27).

<sup>68</sup> FEIS at 5.5-8.

<sup>69</sup> Zillow, *Denver Market Overview* (last visited Nov. 10, 2016), <http://www.zillow.com/denver-co/home-values/> (Exhibit 28); see also Aldo Svaldi, *Denver Median Home Sold Price Nears \$400,000*, DENVER POST (June 3, 2016), <http://www.denverpost.com/2016/06/03/denver-median-home-sold-price-nears-400000/> (Exhibit 29); Tracy M. Cook, *Denver Metro Rents Hit an All-time High as Vacancy Rates Decline*, DENVER POST (July 21, 2016), <http://www.denverpost.com/2016/07/21/denver-metro-rents-all-time-high/> (Exhibit 30); City of Denver, Office of Econ. Dev., *About Affordable Housing* (last visited Nov. 14, 2016), [www.denvergov.org/content/denvergov/en/denver-office-of-economic-development/housing-neighborhoods/about-affordable-housing.html](http://www.denvergov.org/content/denvergov/en/denver-office-of-economic-development/housing-neighborhoods/about-affordable-housing.html).

<sup>70</sup> FEIS at 5.5-8.

<sup>71</sup> *Id.*

commercial buildings being destroyed, including the aforementioned long-term stay hotel.<sup>72</sup> All but four of the businesses are in Elyria-Swansea.<sup>73</sup> To mitigate this impact, CDOT committed to pay \$2 million to fund affordable housing—a tiny fraction of the budget for the \$1.17 billion project—and likely insufficient to ameliorate impacts.<sup>74</sup>

Since 2012, Elyria-Swansea has begun to experience the beginning of a wave of change and gentrification that is sweeping through historically minority and low-income communities throughout North Denver.<sup>75</sup> Displaced residents looking to relocate to homes in the same communities will not be shopping for homes or rental units priced at 2012 pre-gentrification prices, and when they do find a home or rental unit, they will be competing with many more people in the housing market. A gentrification study by the City of Denver indicates that residents of Elyria-Swansea and Globeville are at high risk of being displaced.<sup>76</sup> A very real risk exists that due to rising home prices throughout metro-Denver, displaced residents may be forced to move long distances and end up far away from their jobs, family, and community. The inadequate compensation for lost homes will exacerbate this effect.

Under the preferred alternative, the highway will also expand north and engulf most of the Swansea Elementary School playground, leaving only 135 feet between the school building and the edge of the future 280-foot wide interstate.<sup>77</sup> To mitigate the impacts of expanding the highway in Elyria-Swansea, the preferred alternative would partially cover the interstate near Swansea Elementary School.<sup>78</sup> As the FEIS describes, I-70 will be brought partially below grade between Brighton Boulevard and Colorado Boulevard (the western and eastern borders of Elyria-Swansea, respectively).<sup>79</sup> For just 800 feet, the highway will be partially covered, although not enough to mitigate the negative effects of the expansion, including the concentrated vehicle exhaust in the below-grade trench. CDOT chose to keep the cover less than 1000 feet in length not because it offered sufficient mitigation based on health data and other indicators, but to “minimize requirements” and costs related to safety and ventilation of the interstate.<sup>80</sup> The landscaped deck offers public space, but directly above a roaring interstate with exhaust emanating from either end of the below-grade trench. This is a far cry from the quieter, cleaner,

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<sup>72</sup> *Id.* at 5.5-15.

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

<sup>74</sup> Compare *id.* at 5.3-39 with STIP at 8.

<sup>75</sup> See generally North/East Denver Change, *What’s Changing in North/East Denver* (last visited Nov. 14, 2016), <http://www.northeastdenverchange.org/> (website providing detailed nonpartisan information, interviews and documentation about the many proposed and ongoing projects in the area and their impacts).

<sup>76</sup> See generally City of Denver Office of Econ. Dev., *Gentrification Study: Mitigating Involuntary Displacement* 7 (May 2016), [www.denvergov.org/content/dam/denvergov/---Portals/690/---Reports%20and%20Studies/GENT%20STUDY%20051816.pdf](http://www.denvergov.org/content/dam/denvergov/---Portals/690/---Reports%20and%20Studies/GENT%20STUDY%20051816.pdf) (Exhibit 31).

<sup>77</sup> FEIS at 5.2-37; see also *id.* at 3-15 (showing that preferred alternative’s managed lane option has 16 lanes of traffic, plus 6 shoulders of greater than or equal to 8 feet in width).

<sup>78</sup> See *id.* at 9-5.

<sup>79</sup> See *id.* at 3-11, 3-13 (diagram).

<sup>80</sup> *Id.* at 3-25.

much more attractive public amenities available to more affluent, whiter Denver neighborhoods that have access to plentiful parks and open space.<sup>81</sup>

Public comments on the FEIS revealed a strong and nearly universal opposition to widening I-70, the adequacy of the mitigation measures CDOT proposed, and the need to assess other options, including a reroute.<sup>82</sup> Commenters again asked CDOT to prepare a more detailed health assessment due of the project's air pollution impacts.<sup>83</sup>

In particular, ESNA's comments questioned why widening the highway was necessary, the lack of any health impact assessment, the need for frontage roads on both sides of the highway, the need for toll lanes, the lack of plans to mitigate impacts during the construction period, lack of specificity about funding mechanisms, and the negative impacts of the project on community cohesion.<sup>84</sup> It explained that "[a]lthough the below-grade option is far better than the option of a widened, elevated viaduct, the shear [sic] width of the proposed footprint through Elyria is far too great an adverse impact, and makes the current problem much worse. Merely replacing doors and windows and ventilation in homes does not compensate Elyria residents for the increased pollution and massive negative impact that would result from widening I-70."<sup>85</sup> ESNA's Comments concluded by flagging the serious environmental justice and Title VI concerns raised by the preferred alternative, explaining that "a project like this would never be forced upon wealthier, non-minority, better-connected neighborhoods in Denver or in Colorado."<sup>86</sup>

CCC's comments raised similar concerns. "Over the last 13 years we have endured the psychological and physical trauma of several impending changes to our community. We have attended countless meetings where we expressed our comments and concerns, we have written letters, we have garnered media coverage, we have obtained data from national experts supporting our positions and we have proposed well-studied alternatives. [We are] disheartened to highlight that our resident's needs and wishes have been neglected at every juncture."<sup>87</sup> CCC

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<sup>81</sup> See *id.* at 3-17 to 3-18.

<sup>82</sup> See CDOT, *FEIS Addendum: Citizen and Public Comments*, [http://www.i-70east.com/FinalEIS/I-70EastFEIS\\_Comments-Citizen.pdf](http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Citizen.pdf) (Exhibit 32); CDOT, *FEIS Addendum: Special Interest Groups and Businesses*, [http://www.i-70east.com/FinalEIS/I-70EastFEIS\\_Comments-Business-Special-Interest.pdf](http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Business-Special-Interest.pdf) (Exhibit 33); see also Marianne Goodland, *Elyria-Swansea Residents to CDOT: Leave Us Alone!*, COLO. INDEP. (Feb. 18, 2016), <http://www.coloradoindependent.com/157815/residents-to-cdot-leave-us-alone> (Exhibit 34) (describing public hearing on FEIS).

<sup>83</sup> See Special Interest Groups & Businesses Comments on FEIS at 46 (Exhibit 33) (Comments of Sierra Club).

<sup>84</sup> Comments of Elyria and Swansea Neighborhood Ass'n 1-2 (Mar. 2, 2016) ("ESNA Comments") (Exhibit 35); accord Comments of United Cmty. Action Network of Metro Denver (Mar. 2, 2016) (Exhibit 36) (expressing support for the ESNA Comments).

<sup>85</sup> ESNA Comments 2.

<sup>86</sup> *Id.* at 2-3.

<sup>87</sup> Special Interest Groups & Businesses Comments on FEIS at 13 (Exhibit 33) (Comments of CCC).

similarly questioned the need for a tollway, the funding sources for the project, the adequacy of compensation for displaced residents, the project's contribution to gentrification pressures, air pollution impacts, and the project's disparate racial impact.<sup>88</sup> CCC "demand[ed]" that the I-270/I-76 reroute alternative "be studied thoroughly before proceeding with this project."<sup>89</sup>

Since the closure of the FEIS comment period, community members, including Complainants, have continued to advocate with CDOT and other decisionmakers, such as USDOT and the Denver City Council, to evaluate less-impactful alternatives and to better mitigate the impacts of the preferred alternative.<sup>90</sup>

CDOT and FHWA are expected to issue a ROD, ending the NEPA process, in early 2017.<sup>91</sup> Although a ROD has not yet been issued, CDOT has already begun purchasing residential properties and relocating residents from the houses slated to be destroyed.<sup>92</sup> As discussed above, *supra* p. 3, Complainants request that CDOT and FHWA delay issuance of the ROD until any investigation triggered by this complaint is completed.

### **C. CDOT Commits to Construct the Preferred Alternative in the STIP in May 2016.**

#### **1. Legal Background on State Transportation Planning**

Under federal law, each state must develop "a statewide transportation improvement program ["STIP"] for all areas of the State." 23 U.S.C. § 135(a)(1); *see also* 49 U.S.C § 5304(a)(1). STIPs must "provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter van pool providers) that will function as an intermodal transportation system for the State." 23 U.S.C. § 135(a)(2).

USDOT regulations direct states to adopt STIPs to meet the goals listed in § 135, such as reducing air pollution. *E.g.*, 23 C.F.R. pt. 45, subpt. B; *id.* § 450.200.<sup>93</sup> The regulations provide detailed instructions for how states must involve the public in developing STIPs, including that the state must "[d]emonstrate explicit consideration and response to public input during the development of the . . . STIP." *Id.* § 450.210(a)(1)(vii). STIPs must include all capital surface

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<sup>88</sup> *Id.* at 1–2.

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *See, e.g.*, Letter from Citizens & Cmty. Leaders in Elyria Swansea to Anthony Foxx, U.S. Sec'y of Transp. (Sept. 15, 2016) (Exhibit 37); CLF, *Call to Action* (Apr. 7, 2016) (Exhibit 38).

<sup>91</sup> CDOT, *I-70 East Environmental Impact Statement: Process* (last visited Nov. 14, 2016), <http://www.i-70east.com/process.html>.

<sup>92</sup> CDOT, *I-70 East Environmental Impact Statement: Purchase and Relocation (ROW)* (last visited Nov. 11, 2016), <http://www.i-70east.com/purchase-and-relocation.html>.

<sup>93</sup> *See also generally* FHWA, *STIP State of the Practice Review: Development and Use of Statewide Transportation Improvement Programs* (May 2016), [www.fhwa.dot.gov/planning/processes/statewide/practices/stip/fhwahep16061.pdf](http://www.fhwa.dot.gov/planning/processes/statewide/practices/stip/fhwahep16061.pdf) (Exhibit 39).

transportation projects proposed to receive federal funding, *id.* § 450.218(g), as well as “regionally significant projects” requiring FHWA or FTA action, *id.* § 450.218(h).

States submit their STIPs concurrently to FHWA and FTA for joint approval, *id.* § 450.220(a), and must certify that their “transportation planning process is being carried out in accordance with all applicable requirements of . . . Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d-1), and [USDOT Title VI implementing regulations] 49 CFR part 21.” *Id.* § 450.220(a)(2). FHWA and FTA both then review, and may approve, the state’s STIP. *Id.* § 450.220(b).

CDOT follows these procedures when it develops STIPs. CDOT’s website explains that “[t]he STIP is the planning document that identifies the transportation projects CDOT intends to fund over a four year period. . . . Projects included in the STIP must be consistent with corridor visions and strategies outlined in the long-range Regional and Statewide Transportation Plans.”<sup>94</sup> CDOT also acknowledges that Title VI applies to the STIP process.<sup>95</sup>

## 2. The FY2017-FY2020 CDOT STIP

CDOT claims that it followed these procedures when it approved its latest STIP. On the first page of the Fiscal Year 2017 to Fiscal Year 2020 STIP, Shailen P. Bhatt, CDOT’s Executive Director, signed and certified that the STIP met the requirements of “Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-1) and 49 CFR part 21.”<sup>96</sup> Yet a close examination of the STIP reveals that no such compliance occurred. CDOT glossed over public concerns about the I-70 expansion’s disparate impacts, highlighted only the project’s benefits, and failed to even mention some of its worst impacts, including that it will destroy 56 homes.

In a section labeled “Major Projects in Development,” CDOT stated that it “will begin construction” of “the I-70 B (Reconstruction of Viaduct through Denver and Aurora) . . . project[.]” during FY2017–FY2020.<sup>97</sup> CDOT briefly described the project and its purpose—while highlighting “public involvement” and that it will “provide new community space.”<sup>98</sup> It then committed that “CDOT and its planning partners intend to move forward with Phase 1 of

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<sup>94</sup> CDOT, *Statewide Transportation Improvement Program (STIP)* (last visited Nov. 11, 2016), <https://www.codot.gov/business/budget/statewide-transportation-improvement-program-stip-reports-information>.

<sup>95</sup> See CDOT, *STIP Development Guidance and 4P Process Statewide Transportation Improvement Program* 7–8 (Feb. 2015), [https://www.codot.gov/business/budget/statewide-transportation-improvement-program-stip-reports-information/current-stip-reports-information/4P%20STIP%20Development%20Guidelines%2009-09%20-%20CLEAN.pdf/at\\_download/file](https://www.codot.gov/business/budget/statewide-transportation-improvement-program-stip-reports-information/current-stip-reports-information/4P%20STIP%20Development%20Guidelines%2009-09%20-%20CLEAN.pdf/at_download/file) (Exhibit 40).

<sup>96</sup> STIP at Self-Certification p. 1.

<sup>97</sup> *Id.* at Overview p. 7.

<sup>98</sup> *Id.*

the preferred alternative detailed in the Final Environmental Impact Statement.”<sup>99</sup> CDOT then explained the mechanisms it intends to use to fund the \$1.17 billion project.<sup>100</sup>

Later in the STIP, CDOT acknowledged the public comments it had received about including the I-70 project in the STIP.<sup>101</sup> It noted that the public had raised concerns about drainage for the below-grade section of the highway; air pollution; increased health risks, asthma, and cancer; impacts from disturbing the toxic soil in the area; failure to fully consider alternatives like rerouting traffic to I-270/76; and that the project further divides Elyria-Swansea and Globeville.<sup>102</sup> Rather than responding in a meaningful way, CDOT stated that “individual responses have been sent” to the commenters.

CDOT also specifically addressed a comment letter it received on behalf of CLF and other community groups.<sup>103</sup> CDOT noted that the comments explained that CDOT and DRCOG violated several of the STIP’s planning requirements, and that “[a] formal response is under development at the time of printing this STIP document.”<sup>104</sup>

In that comment letter, Complainants CLF, CCC, ESNA and other community groups made a detailed legal argument explaining how the STIP violated several federal laws, including, *inter alia*, Title VI, the Federal Highway Act’s planning procedures, the Clean Air Act’s conformity requirements, SAFETEA-LU, and MAP-21.<sup>105</sup> Specifically, the comments explained USDOT Order No. 5610.2(a)’s environmental justice directive that planning processes avoid, minimize, and mitigate activities with a potential for a disparate impact on minority and low income populations, consider alternatives to such activities, and elicit public involvement.<sup>106</sup>

The Comments explained that CDOT ignored these directives throughout the NEPA process by refusing to conduct a health impact assessment of the I-70 project, even though the Commenters, including Complainants, submitted detailed comments on the SDEIS demonstrating that fine particulate matter emissions would significantly increase as a result of expanding I-70, resulting in increased asthma, mortality, and cardiovascular disease in the already disproportionately-impacted Elyria-Swansea community.<sup>107</sup> The Comments explained that CDOT justified its refusal to investigate the project’s health impacts because the preferred alternative would have minimally different impacts compared to other alternatives—and that this

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 8.

<sup>101</sup> *Id.* at Public Involvement p. 7.

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

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Comments of Sierra Club, Colorado Latino Forum, and North Denver Community Organizations Objecting to Approval of Proposed 2017-2020 Colorado State Transportation Improvement Program at 1–2, 6–7, 9–10 (Exhibit 41).

<sup>106</sup> *Id.* at 2–3 (discussing Secretarial Order No. 5610.2(a) §§ (1), (7)). The Comments also discussed CDOT’s Title VI implementation plan. *Id.* (discussing CDOT, *Title VI Implementation Plan* (Jan. 2016) (Exhibit 42)).

<sup>107</sup> *Id.* at 3–4.

justification ignores the fact that CDOT artificially constrained the alternatives by eliminating rerouting alternatives at earlier stages of the NEPA process.<sup>108</sup> The Comments explained that their NEPA comments asked CDOT to evaluate, in detail, both rerouting I-70 itself to I-270/I-76, as well as rerouting long-distance truck traffic along that route, but that CDOT did not investigate these options in detail, and did not specifically investigate the health benefits of these alternatives.<sup>109</sup> Accordingly, the Comments concluded that there was no basis for CDOT to certify that it complied with Title VI in the STIP.<sup>110</sup> The Comments requested that USDOT disapprove the STIP and return it to CDOT for further analysis.<sup>111</sup>

Later in the STIP development process, CDOT held a public hearing. CDOT explained that 36 people attended the hearing to express views on the I-70 project, and noted that they expressed the same concerns as the letters discussed above: drainage, air pollution, health risks, disturbing toxic soil, failure to consider alternatives, and further dividing Elyria/Swansea and Globeville.<sup>112</sup>

At last, CDOT provided a response to the concerns, explaining that “[a]t this time, CDOT is not removing Central 70 from the STIP.”<sup>113</sup> It claimed that because the proposed I-70 project had many stakeholders, “[a] decision to modify or remove the project from the STIP is not a decision for one party to make.”<sup>114</sup>

In essence, CDOT turned a blind eye to the concerns repeatedly raised by Elyria-Swansea community members, including Complainants and their members. The STIP did not meaningfully respond to the litany of concerns Complainants raised, including CDOT’s failure to comply with Title VI. Nowhere in the STIP did CDOT discuss or acknowledge the disparate impact imposed by the project on Elyria-Swansea’s predominantly Latino residents. The STIP does not even mention that 56 homes will be destroyed by the project. Instead, CDOT attempted to frame the project as benefitting the community by mentioning the public participation in developing NEPA alternatives (which was then ignored), and highlighting the 800-foot long cap over the highway that will replace Swansea Elementary’s playground. CDOT went so far as to claim that it was not even responsible for its own decisions about what to include in the STIP.

Although CDOT provided opportunities for community input during the NEPA process, especially early in the process, in the end, CDOT did not incorporate the community’s concerns and ideas into the plans to expand I-70. More air pollution, displaced homes, businesses, and schools, and a highway triple its original width that further disrupts community cohesion only retain and exacerbate the disparate, discriminatory impact that I-70 has on Elyria-Swansea.

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<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Id.* at 5–6.

<sup>110</sup> *Id.* at 6.

<sup>111</sup> *Id.* at 1.

<sup>112</sup> STIP at Public Involvement pp. 10–11. CDOT noted that there were also comments supporting the project, although it did not explain how many commenters supported vs. opposed the project, or if some commenters supported some aspects but opposed others. *Id.*

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

<sup>114</sup> *Id.* at 12.

#### **IV. CDOT's Approval of the STIP Violated Title VI of the Civil Rights Act of 1964.**

##### **A. Legal Background**

Title VI prohibits state government entities receiving federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin. Specifically, it provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. When Title VI was passed, 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.

DOJ Title VI Manual § II (quoting H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

As USDOT regulations explain, Title VI ensures “that 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 or activity receiving Federal financial assistance from [USDOT].” 49 C.F.R. § 21.1. This broad purpose statement is implemented by a specifically requirement that “[n]o 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.” *Id.* § 21.5(a). Among other prohibited discriminatory acts:

- A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, 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.

*Id.* § 21.5(b)(2).

- In determining the site or location of facilities, a recipient or applicant may not 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; or with the purpose or

effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

*Id.* § 21.5(b)(3).

- A recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is 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 rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will, substantially impair the accomplishment of the objectives of this part.

*Id.* § 21.5(d).

Critically, USDOT regulations provide that “[w]here 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.*” *Id.* § 21.5(b)(7) (emphasis added). Thus, because of the legacy of discriminatory practices impacting Elyria-Swansea’s Latino residents—including dividing the community in half by building I-70 through it in the first place—CDOT has an affirmative responsibility to not only avoid discriminating against its residents today, but also to overcome the legacy of its past discrimination.

A state agency’s discriminatory action need not be intentional to violate Title VI. Rather, “actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.” *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)). “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.” *Id.* at 293–94; accord DOJ Title VI Manual § VIII(B) (discussing *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996)).

To make a finding of disparate impact, USDOT must find that a federal fund recipient “use[d] a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification.” DOJ Title VI Manual § VIII(B) (discussing *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995)). This entails an investigation revealing: (1) that the federal fund “recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI;” (2) that the recipient lacks a “substantial legitimate justification” insofar as the challenged action was “necessary to meeting a goal that was legitimate, important, and integral” to its mission; and (3) that there are no “equally effective alternative practices that would result in less racial disproportionality.” *Id.* (quotations omitted).

Under USDOT regulations, there is a low bar for accepting Title VI complaints. *See* 49 C.F.R. § 21.11(c) (“The Secretary will make a prompt investigation whenever a . . . complaint . . . indicates a *possible* failure to comply with this part” (emphasis added)).

So long as a complaint alleges a possible action or omission by a federal fund recipient that results in a disparate impact to a minority community in the process of selecting a site or location for a facility, the Secretary must investigate. This complaint easily meets that bar because it provides detailed allegations that CDOT, a federal fund recipient, committed to funding a project that will disproportionately impact the predominantly Latino residents of Elyria-Swansea, including Complainants’ members.

## **B. The STIP Disparately Impacts Elyria-Swansea’s Latino Residents.**

Approving the STIP constitutes discrimination on the basis of race and national origin because it commits funds to CDOT’s plan to triple I-70’s width which will adversely and disproportionately impact the predominantly Latino community in Elyria/Swansea. To determine that a recipient’s actions have a disparate impact on a minority population, “the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI.” DOJ Title VI Manual § VIII(B). An investigation into CDOT’s NEPA procedures and process for adopting the STIP will show that, although the process was facially neutral, it disproportionately impacted the residents of Elyria-Swansea, for several reasons.

### **1. Impacts**

First, tripling I-70’s width and adding several lanes of traffic will increase air pollution. “Roadway air pollution is a complex mixture that can cumulatively impact a diverse range of health effects.”<sup>115</sup> There is a causal link between highway air pollution and asthma onset, worsening of asthma, impaired lung function, mortality, and morbidity. Expanding I-70, and thus the traffic driving on the highway, will increase fine particulate matter (“PM<sub>2.5</sub>”) emissions that cause asthma, heart attacks, and premature death.<sup>116</sup> Many studies have also linked highway proximity to adverse birth outcomes. Elyria-Swansea already faces disproportionately high rates of PM<sub>2.5</sub> emissions and incidences of these related health conditions compared to Denver and Colorado as a whole.<sup>117</sup> The increased number of diesel trucks on the expanded highway also emit air toxics, such as benzene, which are carcinogens.<sup>118</sup> In the STIP, CDOT not only failed to assess this increase in pollution, but also the cumulative impact of that pollution and existing air

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<sup>115</sup> Complainants intend to file a supplemental assessment by a public health expert detailing the causal connection between roadway proximity and adverse health impacts. The relevant scientific information supported by peer-reviewed literature will be included in this assessment.

<sup>116</sup> HIA at 14.

<sup>117</sup> *See generally* Special Interest Groups & Businesses Comments on FEIS at 56 (Exhibit 33) (Comments of Sierra Club).

<sup>118</sup> *See, e.g.*, Sabrina Williams & Gregg Thomas, Denver Dep’t of Env’tl. Health, Env’tl. Qual. Div., *The Denver Air Toxics Assessments* 9–10 (2007), [www.denvergov.org/content/dam/denvergov/Portals/771/documents/Air\\_Quality/Baseline\\_Toxics\\_AWMA\\_2007.pdf](http://www.denvergov.org/content/dam/denvergov/Portals/771/documents/Air_Quality/Baseline_Toxics_AWMA_2007.pdf) (Exhibit 43).

pollution.<sup>119</sup> Further, despite repeated requests by the Complainants and other community groups in their public comments and other advocacy regarding the NEPA process and the STIP, CDOT refused to conduct a health impact assessment to determine how the increased air pollution will impact the health of Elyria-Swansea residents, or determine the health benefits of alternatives rerouting I-70 or truck traffic to I-270/I-76. *See supra* pp. 11–13, 16–17, 19–20 (describing public comments).

Second, in order to triple the width of the highway, the FEIS’s preferred alternative will destroy 56 homes, 13 commercial buildings, one nonprofit, and the Swansea Elementary School playground. *See supra* pp. 14–15. All of these structures are in Elyria-Swansea except for four commercial buildings. *See supra* pp. 13–14. Elyria-Swansea is the only neighborhood where homes will be destroyed and residents will be displaced. It is also the neighborhood with the lowest median home price in the project area.<sup>120</sup> And, based on the outdated housing values discussed in the FEIS and the rapidly increasing home and rental prices across the metro-Denver area, it is possible that displaced residents will be unable to find new housing in Elyria-Swansea, the City and County of Denver, or potentially even within the metro-Denver area, even with the assistance CDOT is legally obligated to provide with relocation.

Third, tripling the width of highway, displacing residents, and eliminating cross-freeway access points and some of the current highway on-ramps will dramatically impact community cohesion. Elyria-Swansea was first torn in half by I-70 fifty years ago. CDOT approving the STIP continues that legacy of environmental injustice. Several local streets that provide some access across the current I-70 elevated structure will be cut off by the 40-foot-deep trench planned for the expanded I-70. Further dividing the community perpetuates a legacy of decisions by CDOT—and USDOT—that disparately impact the predominantly Latino and low-income residents of Elyria-Swansea.

Fourth, the construction on the project and a related drainage system designed to divert water from the below-grade highway that is being developed pursuant to an Intergovernmental Agreement between CDOT and the City of Denver will disturb soil and dust contaminated by arsenic, lead, and potentially other dangerous pollutants by the ASARCO smelter.<sup>121</sup> This contamination disproportionately impacts Elyria-Swansea and Globeville, the communities immediately surrounding the Superfund site. The mitigation measures proposed by CDOT, like providing air conditioners so that residents can keep their windows closed during construction, have not been shown to provide adequate protection against this risk, as CDOT never analyzed whether the air conditioners’ filtration systems are adequate to capture fine dust particles, or whether protecting only against indoor exposure will be sufficient to prevent harmful total exposure for residents who spend time outdoors.<sup>122</sup>

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<sup>119</sup> FEIS at 6-24.

<sup>120</sup> *Id.* at 5.2-28.

<sup>121</sup> *See id.* at 5.3-14, 5.18-13 to -16. Although the FEIS compiled this data in the course of assessing environmental justice impacts, “engaging in environmental justice analysis under Federal transportation planning and NEPA provisions will not necessarily satisfy Title VI requirements.” USDOT Order 5610.2(a) § (7)(a) (Exhibit 44).

<sup>122</sup> *See id.* at 5.20-6.

Fifth, the construction and later operation of the highway will result in noise levels above federal recommended guidelines at homes and businesses throughout Elyria-Swansea.<sup>123</sup> Such impacts are not experienced in other residential areas along I-70, such as Stapleton (with the exception of Globeville which is also predominantly Latino).<sup>124</sup> Nevertheless, as a mitigation option, CDOT chose only to provide a 16-foot noise wall in Elyria, and no noise mitigation at all in Swansea.<sup>125</sup>

Sixth, in the short term, housing values in Elyria-Swansea will be negatively affected by construction, dust and noise pollution, and congestion related to the project. This is a very significant impact because of gentrification pressures that may result in more residents choosing to sell their homes in the next few years than might otherwise be anticipated. *See supra* pp. 14–15. Because houses are farther away from the freeway in the other, whiter neighborhoods along I-70, such as Stapleton, short-term housing prices will not be similarly depressed by construction there. In the long term, increased traffic and air pollution along I-70 will contribute to lower property values at homes in Elyria-Swansea that were not destroyed. No compensation is being offered to offset the losses for these homeowners, who have very few other investments or resources.

## 2. Disproportionality

As discussed above, Elyria-Swansea’s population is 83.8% Latino, 44.4% low-income, and 41% Limited English Proficiency.<sup>126</sup> Elyria-Swansea’s residents are also 6.1% African-American, and 1.9% American Indian.<sup>127</sup>

By comparison, Denver as a whole is 31.8% Latino, 28.3% low-income, and 13.9% Limited English Proficiency.<sup>128</sup> Stapleton, another neighborhood along I-70 in the project area that CDOT assessed in the FEIS, is only 13% Latino, 7.5% low-income, and 5.3% Limited English Proficiency.<sup>129</sup> And Adams County—through which I-270 and I-76 run—is 38.0% Latino, 19.9% low-income, and 15.2% Limited-English Proficiency.<sup>130</sup> No matter what group it

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<sup>123</sup> *See id.* at 5.12-11 to -23.

<sup>124</sup> *See id.* at 5.12-23 to -25.

<sup>125</sup> *Id.* at 5.12-48.

<sup>126</sup> *See* HIA at 14; FEIS at 5.2-23, -24, -29. Latinos are a protected group under Title VI. *See, e.g., Villanueva*, 85 F.3d at 486 (considering Hispanic students in Pueblo, Colorado, to be a protected group for the purposes of Title VI).

<sup>127</sup> FEIS at 5.2-21.

<sup>128</sup> *Id.* at 5.2-23, -24, -29.

<sup>129</sup> *Id.* at 5.2-23, -24, -29.

<sup>130</sup> *Id.* at 5.2-23, -24, -29.

is compared to in the surrounding area, Elyria-Swansea is more Latino, lower-income, and has lower rates of English Proficiency.<sup>131</sup>

As discussed above, Elyria-Swansea residents bear a disproportionate burden of pollution and other environmental harms within Denver, and enjoy disproportionately fewer positive goods. *See supra* pp. 7–8.<sup>132</sup> For example, the HIA found that “northern and western Denver neighborhoods have higher emergency room rates for youth asthma-related events than others, with higher than average rates observed around the I-70 corridor and the junction of I-70 and I-25.”<sup>133</sup> The annual rate of asthma-related emergency room visits by children is 38% greater than Denver as a whole (39.6/1,000 Elyria-Swansea residents, compared to 28.5/1,000).<sup>134</sup> A 2003 study found higher than expected rates of several cancers in Globeville and Elyria-Swansea.<sup>135</sup> Residents of Denver City Council District 9, where Elyria-Swansea and Globeville are located, experience a 42% higher cardiovascular disease death rate than District 2, which has no major interstate highway (213/100,000 residents, compared to just above 150/100,000 residents).<sup>136</sup> These adverse health outcomes are causally linked to air pollution. Indeed, the HIA explained that “[h]ighway traffic is the main source of air pollution” in Globeville and Elyria-Swansea.<sup>137</sup> Another recent study showed that the average life expectancy for a Globeville resident is 73, an Elyria-Swansea resident is 78, and a resident of Stapleton, a neighborhood just a few miles east along I-70, is 84.<sup>138</sup> 80216, Elyria-Swansea’s zip code, is the most polluted in Colorado.<sup>139</sup>

Despite having abundant evidence that Elyria-Swansea was already one of the most polluted and unhealthiest communities in Colorado, CDOT nevertheless chose to add to that already overwhelming burden by tripling I-70’s width through the neighborhood. *See supra* pp. 13–17. Although CDOT initially assessed a wider range of alternatives throughout the NEPA process, it repeatedly narrowed those alternatives until they did not include any options that would reroute the highway or truck traffic around Elyria-Swansea, despite community groups, including Complainants, continually requesting that these alternatives be given further consideration. *See supra* pp. 11–13, 16–17. By the time CDOT issued the FEIS and chose a preferred alternative, it considered *only* options that kept the highway in Elyria-Swansea.

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<sup>131</sup> Although Elyria-Swansea has the highest percent Latino population, it is certainly not the only predominantly Latino (or predominately minority) community impacted by the I-70 expansion. Globeville, located immediately west of Elyria-Swansea, similarly bears a disproportionate burden of pollution from many of the same sources as Elyria-Swansea. Globeville is 67.8% Latino and 53.4% low-income. *Id.* at 5.2-23.

<sup>132</sup> *See also* Ava Farouche, Earthjustice, *Curated EJScreen and Other Demographic Background Maps of North Denver’s I-70 Corridor* (Nov. 15, 2016) (Exhibit 45).

<sup>133</sup> HIA at 16.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 17.

<sup>136</sup> *Id.* at 16.

<sup>137</sup> *Id.* at 6.

<sup>138</sup> Colo. Pub. Radio, *Map: In Denver, Your Neighborhood Can Say A Lot About How Long You’ll Live* (Dec. 2, 2015), <http://www.cpr.org/news/story/map-denver-your-neighborhood-can-say-lot-about-how-long-youll-live> (Exhibit 46).

<sup>139</sup> Groundwork Denver, *supra* n. 19, at 1.

Further, Elyria-Swansea residents receive fewer benefits from the project than other metro-Denver residents, and indeed are not the intended beneficiaries of the project. For example, the purpose of the project is “serve as a multi-modal interstate freeway and rapid transit corridor serving regional and statewide trips.”<sup>140</sup> Notably absent from this purpose are *local* trips. Indeed, the preferred alternative will eliminate the York Street interchange, currently the main highway exit providing access to Elyria-Swansea.<sup>141</sup> One of the primary reasons that the partial reroute alternative was eliminated from the SDEIS was that it would interfere with plans to expand the National Western Stock Show complex—a tourist destination.<sup>142</sup> The I-270/I-76 reroute was rejected in part because it would increase travel time for traffic travelling all the way through Denver.<sup>143</sup> This compounds an existing scarcity of beneficial goods and services—for example, there is no grocery store in Elyria-Swansea or Globeville, a community of 10,000 people.<sup>144</sup> Just as they were in the 1960s, the current residents of Elyria-Swansea are being forced to bear the burden of a highway project intended to benefit the rest of metro-Denver—but not the neighborhood itself.

Because Latinos and other people of color are the predominate population in Elyria-Swansea, the disproportionate pollution and impacts they already face, and the fact that the proposed I-70 project impacts Elyria-Swansea more than any other neighborhood, CDOT itself concluded in the FEIS that “[w]ithout mitigation, there will be disproportionately high and adverse construction impacts to the environmental justice population of the Elyria and Swansea Neighborhood.”<sup>145</sup> The FEIS specifically identified disproportionate adverse impacts on Elyria-Swansea based on construction noise, dust, and mobility disruptions; residential relocations; and long-term traffic noise.<sup>146</sup> CDOT concluded that “Without considering the avoidance, minimization, and mitigation measures, the Partial Cover Lowered Alternative would have a disproportionately high and adverse impact to the environmental justice communities due to residential relocations, disturbance of hazardous material sites, construction impacts, increased physical barrier, displacement of food markets, impacts to Swansea Elementary School, increased noise, and impacts to connectivity because of the lowered highway.”<sup>147</sup> CDOT acknowledges that the proposal will have a disproportionately high impact on the environmental justice population, and relies on the mitigation measures to avoid that impact, yet the mitigation measures fall short as documented in the many public comments that CDOT received.

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<sup>140</sup> FEIS at 2-2.

<sup>141</sup> *Id.* at 4-27.

<sup>142</sup> SDEIS at 3-8 to 3-9; *see also* FEIS at 2-6.

<sup>143</sup> SDEIS 3-12 to 3-13.

<sup>144</sup> HIA at 6.

<sup>145</sup> FEIS at 5.3-12; *see also id.* at 5.3-10 (explaining that no other neighborhoods are disproportionately adversely impacted by the preferred alternative).

<sup>146</sup> *Id.* at 5.3-12, -29, -30.

<sup>147</sup> *Id.* at 5.3-34 to -35.

### C. CDOT's Proposals Will Not Adequately Remedy the Disparate Impact.

When DOT finds that a facially neutrally policy disparately impacts a minority community, the burden shifts to the agency to show that its action has a “substantial legitimate justification.” DOJ Title VI Manual § VIII(B). Although CDOT admits that the preferred alternative will disparately impact Elyria-Swansea’s predominantly Latino population, it takes the position that the disparate impacts are mitigated by various proposals—in other words, that it has a “substantial legitimate justification” for its actions. This is simply not true—particularly because, due to the legacy of discriminatory practices in the community (including, but not limited to, building I-70 through the neighborhood in the first place), CDOT has an obligation to take “affirmative action to remove or overcome the effects of prior discriminatory practice or usage.” 49 C.F.R. § 21.5(b)(7).

CDOT fails to acknowledge the 50-year discriminatory legacy of I-70 emissions contributing to Elyria-Swansea being one of the most polluted communities in Colorado, which in turn has contributed to its residents’ disproportionate adverse health outcomes. CDOT further fails to acknowledge that expanding I-70 will cause disproportionately higher exposures to air pollution than is occurring in other neighborhoods. CDOT did not fully assess mitigation strategies designed to remove traffic from the impacted communities and thereby reduce pollutant exposure and health impacts.

Rather than meaningfully mitigate the project’s air quality impacts, among the mitigation measures that CDOT proposes are taking the highway below grade through Elyria-Swansea, covering it for 800 feet with a landscaped deck, providing residents and Swansea Elementary School air conditioners and storm windows to mitigate dust exposure during construction, dust suppression measures during construction, relocation services for residents whose homes are destroyed pursuant to the Uniform Relocation Act, and \$2 million in funding for affordable housing programs.<sup>148</sup> These are insufficient.

First, simply covering part of the highway and taking it below grade does not eliminate the air pollution that the additional traffic on the wider highway will cause. Further, because the cover is only 800 feet long (a length chosen to minimize CDOT’s responsibility to ventilate the underground area), it does little to improve community cohesion and connectivity. It offers only a space where the noise and pollution emanating from both ends will dominate what might otherwise be a park environment. A platform with a highway less than 40 feet below is materially different than a park.<sup>149</sup>

Second, the air conditioners and storm windows CDOT has pledged to provide to residents and Swansea Elementary School will make some difference for residents who would otherwise have their windows open to toxic dust and noise during construction, but it hardly solves the bigger problem. To avoid the possibility of exposure, residents will have to remain indoors for the entire five-year duration of the construction period.<sup>150</sup> Children at Swansea

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<sup>148</sup> *Id.* at 9-3 to 9-26 (comprehensively listing mitigation measures).

<sup>149</sup> *See id.* at 3-13.

<sup>150</sup> *See id.* at 8-3.

Elementary School, located just 135 feet from the highway's edge, will very likely be playing outside. It is also unclear whether the air conditioners have filtration systems adequate to remove fine particulates that may contain carcinogens and toxics like lead and arsenic from the neighborhood's contaminated soil, and whether CDOT's dust-control measures pledged during construction would prevent the disturbed contaminants from becoming airborne. Too many open questions remain—further highlighting the necessity of a health impact assessment so that CDOT and neighborhood residents can make informed choices.

Third, CDOT has not provided any mitigation for the long-term increase in air pollution due to the expanded highway. All of the air quality-related mitigation measures that CDOT has proposed relate to short-term air quality impacts during construction (construction fugitive dust and mobile source air toxic emissions).<sup>151</sup> For decades after construction is completed, the already overburdened community will continue breathing even pollutants than they do today.

Fourth, the displacement of the residents of 56 homes, combined with the tripling in width of a highway through a neighborhood already divided, will have community cohesion impacts that simply cannot be mitigated. This is particularly true because rapidly increasing housing and rental costs throughout metro-Denver—and in rapidly gentrifying north Denver, in particular—make it unlikely that residents who wish to stay in Elyria-Swansea or the surrounding neighborhoods will be able to do so. Even with the assistance mandated by the Uniform Relocation Act, the low-income, less educated, and limited-English proficiency neighborhood residents may lack the resources or opportunities to navigate the complex relocation process in the optimal way. This is particularly true because CDOT has *already* begun relocations.<sup>152</sup> Based on information and belief, Complainants understand that officials have been knocking on residents' doors for months, asking to buy their houses because I-70 will be expanding—before the ROD approving the preferred alternative is even signed.<sup>153</sup> With affordable housing less available today than ever before, low-income residents from all over Denver are already being displaced, creating massive competition for the limited stock of available affordable housing throughout the city. The \$2,000,000 CDOT has committed to affordable housing is too small a drop in too large a bucket to fund any meaningful assistance to displaced residents.

#### **D. Less Discriminatory Alternatives Exist.**

Investigation of a Title VI complaint is warranted if there are “equally effective alternative practices” to a recipient's actions that result in less racial disproportionality. DOJ Title VI Manual at § VIII(B). Pursuant to USDOT Order No. 5610.2(a) § (8)(c), activities “that will have a disproportionately high and adverse effect on minority populations or low-income populations will only be carried out if mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are not practicable.” Projects that disparately impact protected populations will be carried out only if there is both a “substantial

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<sup>151</sup> *Id.* at 9-12 to -14.

<sup>152</sup> CDOT, *I-70 East Environmental Impact Statement: Purchase and Relocation (ROW)* (updated Nov. 2, 2016), <http://www.i-70east.com/purchase-and-relocation.html>.

<sup>153</sup> *See, e.g.,* Meltzer, *supra* n. 67.

need” for the project and alternatives with less adverse effects either “would have other adverse social, economic, environmental or human health impacts that are severe; or [w]ould involve increased costs of extraordinary magnitude.” *Id.* § (8)(d)(2)(a)–(b). There is thus a high burden—impracticability—that must be overcome before a less discriminatory alternative is rejected. CDOT’s cursory consideration and rejection of various less discriminatory alternatives and mitigation measures based on speculation about their costs, which CDOT has not shown to be greater by an “extraordinary magnitude,” fails to meet this burden.

There are a variety of equally effective, and less discriminatory, options for CDOT to improve I-70. CDOT did not have to choose the preferred alternative. Throughout the past fourteen years of NEPA analysis, less-discriminatory alternatives have repeatedly been raised by community members only to be rejected by CDOT, which chose the alternative that displaces the *most* residents, keeps the highway within the most polluted and one of the most heavily Latino neighborhoods in Denver, and triples the highway’s width. Several less discriminatory alternatives are identified below.

First, from the beginning, community members have advocated for rerouting I-70 and returning 46th Avenue to an urban arterial. *See supra* pp. 11–13, 16–17, 19–20 (citing comments on the DEIS, SDEIS, FEIS, and STIP advocating such a reroute). CDOT never fully assessed this alternative. Instead, CDOT eliminated this alternative at an early stage, then repeatedly dismissed it as an option based on only partial later analysis. *See supra* pp. 9–17. This dismissive approach to artificially narrowing the alternatives renders CDOT’s decisionmaking process fundamentally flawed. Moreover, there is reason to believe that CDOT’s cost estimates for the I-270/I-76 reroute are artificially inflated.<sup>154</sup> This alternative route is much less densely populated, and mostly goes through industrial, rather than residential areas.<sup>155</sup> It can be designed in a way that avoids disparate impacts to minority communities.

Second, CDOT never fully assessed an alternative to completely rerouting the highway: rerouting heavy truck traffic to I-270/I-76.

Third, the I-270/I-76 reroute is not the only reroute that CDOT rejected. Other reroutes were quickly dismissed without complete analysis in the DEIS. *See supra* pp. 10–11. The only reroute to receive full consideration, rerouting traffic on Brighton Boulevard to I-270, and thus around Elyria-Swansea, was dismissed at the SDEIS stage. *See supra* p. 12. Although this alternative would still have more impacts on Elyria-Swansea residents and would keep more traffic in Globeville and other heavily Latino neighborhoods in west Denver than an I-270/I-76 reroute, it would reduce the need to destroy houses, businesses, and the Swansea Elementary School playground.

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<sup>154</sup> *See generally* I-76/I-270 Replacement of Elevated I-70 (last visited Nov. 12, 2016), [http://www.geslivewell.org/uploads/1/6/3/2/16325376/i-76\\_i-270\\_replacement\\_of\\_elevated\\_i-70.pdf](http://www.geslivewell.org/uploads/1/6/3/2/16325376/i-76_i-270_replacement_of_elevated_i-70.pdf) (Exhibit 47).

<sup>155</sup> *See* Farouche, *supra* n. 132 (Exhibit 45) (maps showing demographic data for I-70 and I-270/I-76 corridors).

Fourth, the impacts to community cohesion related to destroying 56 houses could have been mitigated by providing realistic housing options that kept residents who wished to stay in the neighborhood. Options range from creating community land trusts to building replacement homes in vacant lots in the neighborhood. Simply invoking the Uniform Relocation Act process without giving residents meaningful opportunities to stay in a community where some families have lived for generations is perhaps the most impactful option CDOT could choose.

Fifth, a number of alternatives that would require destroying fewer houses were rejected. Widening the highway by three times its current width could have been avoided by providing fewer frontage roads, fewer highway lanes (including no toll lanes), or a vertical structure. One such vertical structure alternative was submitted to CDOT as the community-developed alternative: a fully-capped tunnel through the neighborhood. *See supra* p. 12. CDOT rejected this alternative.

Sixth, fully capping the highway when it goes below-grade through Elyria-Swansea could provide many of the benefits of the currently proposed project without many of the harmful impacts. It would improve community cohesion and connectivity by providing more options for crossing the highway. Because a cap of greater than 1000 feet would require ventilation, it would also provide opportunities to mitigate air quality impacts by, for example, filtering air and capturing particulates that would otherwise become airborne.

Finally, it is nearly impossible to identify with certainty the exact air pollution consequences of the preferred alternative because CDOT has resolutely refused to conduct a complete health impact analysis, despite repeated requests at every stage of the NEPA process. Such an analysis, if conducted, could reveal many options for reducing air pollution—perhaps offsets of emissions from other pollution sources in the neighborhood, such as the pet food plant, power plant, or refinery.

## **V. Relief**

Because this Complaint meets all the elements necessary to support a *prima facie* Title VI violation, Complainants request that USDOT “make a prompt investigation.” 49 C.F.R. § 21.11(c). While that investigation is being conducted, Complainants request that CDOT withhold issuance of the ROD.<sup>156</sup> No further resources should be committed to the preferred alternative by USDOT until the investigation is completed. Should such an investigation reveal a violation that cannot be resolved informally or otherwise, Complainants request that USDOT terminate federal financial assistance to CDOT for all matters related to the proposed I-70 expansion. *Id.* § 21.13(a).

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<sup>156</sup> Based on communications with state and federal agency staff, Complainants understand that FHWA and/or FTA have already approved the STIP, or at least the components of the STIP related to the I-70 expansion project. Complainants request copies of the decision documents containing and supporting such agency action. If this understanding is incorrect, Complainants request in the alternative that USDOT withhold approval of the STIP pending completion of any investigation undertaken pursuant to this complaint.

Complainants will provide a more detailed proposal explaining specific relief, mitigation, and alternatives that CDOT must consider at a later date as a supplement to this Complaint. Meaningful assessment of alternatives must include the costs as well as benefits of rerouting I-70 and/or truck traffic, as well as options that keep the highway in place but narrow its width. Mitigation measures must provide long-term assistance to remedy the financial, health, and community cohesion impacts that the proposed I-70 expansion imposes on residents and businesses in Elyria-Swansea and Globeville. Remedies must be long-term in scope and impact, and must address both the financial and health impacts of the expansion on the community.

This complaint does not purport to provide a comprehensive list of adequate mitigation measures. However, the eventual request for mitigation may include, but will not be limited to:

- A health and/or community impact assessment to determine the magnitude of disparate health impacts attributable to project emissions, and the extent to which those impacts could be avoided by alternatives and/or mitigation, to be conducted by a neutral third party, selected by the community rather than CDOT, the City of Denver, USDOT, or FHWA;
- Targeted mitigation measures and/or project alternatives identified by such an assessment, potentially including, but not limited to: long-term, community-administered funding for community health program; long-term funding for adult, early-childhood, and public education in the community; and long-term, community-administered funding for affordable housing and anti-gentrification measures.
- Meaningfully funding a community land trust, with funds administered by a board of Elyria-Swansea residents, rather than City of Denver officials, to provide long term rental and privately-owned housing within Elyria-Swansea and/or Globeville to residents displaced not only by the I-70 expansion, but also by the gentrification pressures contributed to by the highway expansion;
- Increase funding provided for affordable housing to mitigate the impacts of displacement, potentially including building affordable housing for displaced residents within the neighborhood;
- Additional air quality monitoring, with specific thresholds triggering additional mitigation measures to reduce burdens on the community, potentially including funding offsets at non-highway sources, such as the nearby pet food plant, refinery, and power plant;
- Precautionary, evidence-based, and permanent methods to prevent dust and particulates from entering homes, businesses, and schools within a conservatively-chosen radius of the highway.

Respectfully submitted,

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## INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
1	CDOT, <i>Statewide Transportation Improvement Program Fiscal Years 2017 – 2020</i> (May 19, 2016), <a href="https://www.codot.gov/business/budget/documents/draft-fy2017-fy2020-stip">https://www.codot.gov/business/budget/documents/draft-fy2017-fy2020-stip</a> .
2	Tina Griego, <i>Having Done So Much, Rest Is Hard</i> , DENVER POST (June 24, 2009), <a href="http://www.denverpost.com/2009/06/24/griego-having-done-so-much-rest-is-hard/">http://www.denverpost.com/2009/06/24/griego-having-done-so-much-rest-is-hard/</a> .
3	Julie Dugdale, <i>In a Run-Down Neighborhood, There’s Lots of Love: A Denver Activist Fights for Her Community</i> , HIGH COUNTRY NEWS (June 13, 2005), <a href="http://www.hcn.org/issues/300/15583">http://www.hcn.org/issues/300/15583</a> .
4	USASpending.gov, <i>Advance Data Search: Results Summary</i> (search run Nov. 14, 2016), <a href="https://www.usaspending.gov/Pages/AdvancedSearch.aspx">https://www.usaspending.gov/Pages/AdvancedSearch.aspx</a> .
5	See CDOT, <i>About CDOT: CDOT History</i> (last visited Nov. 14, 2016), <a href="https://www.codot.gov/about/CDOTHistory">https://www.codot.gov/about/CDOTHistory</a> .
6	CDOT, <i>Project Priority Programming Process (4P) and STIP Development Guidelines</i> (Sept. 16, 2009), <a href="https://www.codot.gov/programs/tetp/4p-and-stip-development-guidelines">https://www.codot.gov/programs/tetp/4p-and-stip-development-guidelines</a> .
7	Denver City Council, <i>Elyria and Swansea Neighborhoods Plans</i> (Feb. 23, 2015), <a href="https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf">https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf</a> .
8	Gretchen Armijo & Gene C. Hook, Denver Dep’t of Env’tl Health, <i>How Neighborhood Planning Affects Health in Globeville &amp; Elyria Swansea</i> (Sept. 2014), <a href="https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf">https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf</a> .
9	Ava Farouche, Earthjustice, <i>Denver Neighborhoods &amp; Percent Hispanic Population Map</i> (Nov. 14, 2016).
10	Groundwork Denver, Inc., <i>Healthy Air for North Denver: CARE Grant Final Report</i> (Dec. 23, 2008), <a href="https://archive.epa.gov/air/care/web/pdf/hand_report.pdf">https://archive.epa.gov/air/care/web/pdf/hand_report.pdf</a> .
11	Cara DeGette, <i>The Grit of Globeville: Part 2: ‘Going Up Against More Money than God,’</i> COLO. PUB. NEWS (Jan. 22, 2013), <a href="http://news.cpt12.org/index.php/the-grit-of-globeville-part-ii/">http://news.cpt12.org/index.php/the-grit-of-globeville-part-ii/</a> .
12	Jefferson Dodge, <i>Justice: Boulder Attorneys’ Battles Against Polluter Pay Off for Poor Denver Neighborhood</i> , BOULDER WEEKLY (May 13, 2010), <a href="http://www.boulderweekly.com/news/justice/">http://www.boulderweekly.com/news/justice/</a> .
13	Steve Raabe, <i>Asarco Closure Plan Cheers Globeville</i> , DENVER POST (July 12, 2006), <a href="http://www.denverpost.com/2006/07/12/asarco-closure-plan-cheers-globeville/">http://www.denverpost.com/2006/07/12/asarco-closure-plan-cheers-globeville/</a> .
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15	CDOT, <i>I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation</i> (Jan. 2016), <a href="http://www.i-70east.com/reports.html#feis">http://www.i-70east.com/reports.html#feis</a> .

16	Denver Reg'l Council of Gov'ts, <i>East Corridor Major Investment Study: Final Report</i> at ES-1 (July 1997), <a href="http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters1-3.pdf">http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters1-3.pdf</a> .
17	The Major Improvement Study, Ch. 4 p. 22, available at <a href="http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters4.pdf">http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters4.pdf</a> .
18	Randy Jensen, CDOT, et al., <i>I-70 East Draft Environmental Impact Statement Section &amp; Section 4(F) Evaluation</i> (Nov. 2008), <a href="http://www.i-70east.com/DEIS/I-70EastDEISSection4FEvaluation_Volume1.pdf">http://www.i-70east.com/DEIS/I-70EastDEISSection4FEvaluation_Volume1.pdf</a> .
19	CDOT, <i>DEIS Public Release Comments</i> (May 14, 2009), <a href="http://www.i-70east.com/DEIS/DEIS_PublicReleaseComments_043009.pdf">http://www.i-70east.com/DEIS/DEIS_PublicReleaseComments_043009.pdf</a> .
20	CDOT, <i>I-70 East Supplemental Draft Environmental Impact Statement &amp; Section 4(F) Evaluation</i> (Aug. 2014), <a href="http://www.i-70east.com/SDEIS/I-70EastEIS_SDEIS-Vol1.pdf">http://www.i-70east.com/SDEIS/I-70EastEIS_SDEIS-Vol1.pdf</a> .
21	CDOT, <i>Comments Received from the September 2014 Public Hearings</i> (Sept. 2014), <a href="http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Hearings.pdf">www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Hearings.pdf</a> .
22	CDOT, <i>SDEIS Public Comments with Attachments</i> , <a href="http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-with-Attachments-Letters.pdf">www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-with-Attachments-Letters.pdf</a> .
23	CDOT, <i>SDEIS Other Public Comments</i> , <a href="http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public.pdf">www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public.pdf</a> .
24	CDOT, <i>SDEIS Comments Received in Spanish</i> , <a href="http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Espanol.pdf">http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Espanol.pdf</a> .
25	CDOT, <i>SDEIS Comment Summary: Special Interest Groups</i> (Nov. 2014), <a href="http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Special-Interests-Businesses.pdf">http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Special-Interests-Businesses.pdf</a> .
26	U.S. Census Bureau, American FactFinder, <i>Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data</i> (last visited Nov. 14, 2016), <a href="http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF">http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF</a> .
27	Erica Meltzer, <i>Families in the Path of I-70 Widening Live in Limbo as they Wait for Relocation</i> , DENVERITE (Sept. 28, 2016), <a href="http://www.denverite.com/esmeralda-aguilar-displacement-i70-17475/">http://www.denverite.com/esmeralda-aguilar-displacement-i70-17475/</a> .
28	Zillow, <i>Denver Market Overview</i> (last visited Nov. 10, 2016), <a href="http://www.zillow.com/denver-co/home-values/">http://www.zillow.com/denver-co/home-values/</a> .
29	Aldo Svaldi, <i>Denver Median Home Sold Price Nears \$400,000</i> , DENVER POST (June 3, 2016), <a href="http://www.denverpost.com/2016/06/03/denver-median-home-sold-price-nears-400000/">http://www.denverpost.com/2016/06/03/denver-median-home-sold-price-nears-400000/</a> .
30	Tracy M. Cook, <i>Denver Metro Rents Hit an All-time High as Vacancy Rates Decline</i> , DENVER POST (July 21, 2016), <a href="http://www.denverpost.com/2016/07/21/denver-metro-rents-all-time-high/">http://www.denverpost.com/2016/07/21/denver-metro-rents-all-time-high/</a> .
31	City of Denver Office of Econ. Dev., <i>Gentrification Study: Mitigating Involuntary Displacement 7</i> (May 2016), <a href="http://www.denvergov.org/content/dam/denvergov/---Portals/690/---Reports%20and%20Studies/GENT%20STUDY%20051816.pdf">www.denvergov.org/content/dam/denvergov/---Portals/690/---Reports%20and%20Studies/GENT%20STUDY%20051816.pdf</a> .
32	CDOT, <i>FEIS Addendum: Citizen and Public Comments</i> , <a href="http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Citizen.pdf">http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Citizen.pdf</a> .

33	CDOT, <i>FEIS Addendum: Special Interest Groups and Businesses</i> , <a href="http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Business-Special-Interest.pdf">http://www.i-70east.com/FinalEIS/I-70EastFEIS_Comments-Business-Special-Interest.pdf</a> .
34	Marianne Goodland, <i>Elyria-Swansea Residents to CDOT: Leave Us Alone!</i> , COLO. INDEP. (Feb. 18, 2016), <a href="http://www.coloradoindependent.com/157815/residents-to-cdot-leave-us-alone">http://www.coloradoindependent.com/157815/residents-to-cdot-leave-us-alone</a> .
35	Comments of Elyria and Swansea Neighborhood Ass'n 1–2 (Mar. 2, 2016).
36	Comments of United Cmty. Action Network of Metro Denver (Mar. 2, 2016).
37	Letter from Citizens & Cmty. Leaders in Elyria Swansea to Anthony Foxx, U.S. Sec'y of Transp. (Sept. 15, 2016).
38	CLF, <i>Call to Action</i> (Apr. 7, 2016).
39	FHWA, <i>STIP State of the Practice Review: Development and Use of Statewide Transportation Improvement Programs</i> (May 2016), <a href="http://www.fhwa.dot.gov/planning/processes/statewide/practices/stip/fhwahep16061.pdf">www.fhwa.dot.gov/planning/processes/statewide/practices/stip/fhwahep16061.pdf</a> .
40	CDOT, <i>STIP Development Guidance and 4P Process Statewide Transportation Improvement Program 7–8</i> (Feb. 2015), <a href="https://www.codot.gov/business/budget/statewide-transportation-improvement-program-stip-reports-information/current-stip-reports-information/4P%20STIP%20Development%20Guidelines%2009-09%20-%20CLEAN.pdf/at_download/file">https://www.codot.gov/business/budget/statewide-transportation-improvement-program-stip-reports-information/current-stip-reports-information/4P%20STIP%20Development%20Guidelines%2009-09%20-%20CLEAN.pdf/at_download/file</a> .
41	Comments of Sierra Club, Colorado Latino Forum, and North Denver Community Organizations Objecting to Approval of Proposed 2017-2020 Colorado State Transportation Improvement Program.
42	CDOT, <i>Title VI Implementation Plan</i> (Jan. 2016).
43	Sabrina Williams & Gregg Thomas, Denver Dep't of Env'tl. Health, Env'tl. Qual. Div., <i>The Denver Air Toxics Assessments 9–10</i> (2007), <a href="http://www.denvergov.org/content/dam/denvergov/Portals/771/documents/Air_Quality/Baseline_Toxics_AWMA_2007.pdf">www.denvergov.org/content/dam/denvergov/Portals/771/documents/Air_Quality/Baseline_Toxics_AWMA_2007.pdf</a> .
44	USDOT Order No. 5610.2(a).
45	Ava Farouche, Earthjustice, <i>Curated EJScreen and Other Demographic Background Maps of North Denver's I-70 Corridor</i> (Nov. 15, 2016).
46	Colo. Pub. Radio, <i>Map: In Denver, Your Neighborhood Can Say A Lot About How Long You'll Live</i> (Dec. 2, 2015), <a href="http://www.cpr.org/news/story/map-denver-your-neighborhood-can-say-lot-about-how-long-youll-live">http://www.cpr.org/news/story/map-denver-your-neighborhood-can-say-lot-about-how-long-youll-live</a> .
47	I-76/I-270 Replacement of Elevated I-70 (last visited Nov. 12, 2016), <a href="http://www.geslivewell.org/uploads/1/6/3/2/16325376/i-76_i-270_replacement_of_elevated_i-70.pdf">http://www.geslivewell.org/uploads/1/6/3/2/16325376/i-76_i-270_replacement_of_elevated_i-70.pdf</a> .



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

1200 New Jersey Ave., SE  
Washington, D.C. 20590

APR 12 2017

In Reply Refer To: HCR-20  
DOT # 2017-0095

(b) (6)

EarthJustice  
On behalf of (b) (6)  
633 17th St  
Suite 1600  
Denver, CO 80202

Shailen P. Bhatt  
Executive Director  
Colorado Department of Transportation  
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Subject: Letter of Finding (LOF) DOT 2017-0095  
(b) (6) v. Colorado Department of Transportation

Dear Ms. (b) (6) and Mr. Bhatt:

The Federal Highway Administration (FHWA) Office of Civil Rights (HCR) issues the following Letter of Finding (LOF) summarizing its investigation of the above referenced complaint. The complaint was filed pursuant to Title VI of the Civil Rights Act of 1964 (Title VI) against the Colorado Department of Transportation (hereinafter Respondent) by EarthJustice on behalf of the residents of the Globeville, Elyria, and Swansea neighborhoods of Denver (Complainant).

Based on the available data and information, FHWA finds that there is insufficient evidence that the Project, itself—and the Respondent's advancement of the Project when it approved the 2017-2020 STIP—will create adverse, disparate impacts. FHWA finds, however, that even if the selection of the preferred alternative would result in adverse, disparate impacts, the Respondent has provided a substantial legitimate justification for its actions and shown that a less discriminatory alternative has not been identified.

## **I. Procedural History**

On November 15, 2016, (b) (6) a Hispanic resident of the Elyria-Swansea neighborhood in Denver, Colorado (Complainant), filed a complaint against the Colorado

Department of Transportation (Respondent or CDOT) with U.S. Department of Transportation (USDOT) and the FHWA. The Complainant alleges the Respondent discriminated against the Hispanic residents of the Elyria-Swansea neighborhoods in Denver in violation of Title VI and the USDOT Title VI regulations (collectively Title VI). The complaint was timely filed during the 180-day period following the alleged discriminatory act, the signing of the Statewide Transportation Improvement Program (STIP) dated May 19, 2016.<sup>1</sup> On December 6, 2016, FHWA accepted the complaint for investigation. Complainant is Hispanic and a resident of the minority community on whose behalf she filed. All other grounds for filing a Title VI complaint have been met and Respondent does not dispute the Complainant's standing in this matter.

## **II. Factual Background**

### **a. History and Current Status of the Elyria-Swansea Neighborhoods**

According to the City of Denver, Elyria and Swansea were founded and platted in 1870 and 1881, respectively, as two separate settlements near Denver's growing industrial and railroad industries.<sup>2</sup> They were consolidated into Denver in 1902, and are today considered part of the same statistical neighborhood even though many residents still consider the two neighborhoods to be distinct. The area is surrounded by railroads, industrial facilities, and the South Platte River. The neighborhood remains highly industrial today and only 16% of Elyria-Swansea is made up of residences, parks, recreation facilities, and schools.<sup>3</sup> The towns grew around the Kansas Pacific and Union Pacific railroads and the Globe smelter, established in 1886. The smelter processed the gold, silver, copper, and lead delivered from Colorado's mountain mining communities. The smelter drew immigrants from all over the globe – hence its name. Polish, Slovenian, Russian Croatian, Serbian, Czechs, and Volga Germans were all recruited to come work the dangerous jobs at the smelter and at the adjoining rail yards. Later, Hispanic families came to work in industries such as the meatpacking operations that came afterward.<sup>4</sup>

After two decades of planning and design engineering, Interstate 70 was constructed directly through the Elyria-Swansea neighborhoods in 1964. The freeway is an elevated highway viaduct that runs from Colorado to Brighton Blvd. Some residents opposed the project based on the contention that the viaduct would be a significant visual detraction and would decrease neighborhood property values.<sup>5</sup>

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<sup>1</sup> Statewide Transportation Improvement Program Fiscal Years 2017 – 2020, Colorado Department of Transportation, <https://www.codot.gov/business/budget/documents/draft-fy2017-fy2020-stip>.

<sup>2</sup> Denver City Council, Elyria and Swansea Neighborhoods Plans, p. 14 (February 23, 2015), [https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria\\_Swansea\\_Neighborhood\\_Plan.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf).

<sup>3</sup> *Id.* at 15.

<sup>4</sup> Gretchen Armijo & Gene C. Hook, Denver Dep't of Env't'l Health, How Neighborhood Planning Affects Health in Globeville & Elyria Swansea, p. 12 (Sept. 2014), [https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report\\_9-18-14.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf).

<sup>5</sup> Denver City Council, Elyria and Swansea Neighborhoods Plans, p. 16 (February 23, 2015), [https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria\\_Swansea\\_Neighborhood\\_Plan.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/646/documents/planning/Plans/Elyria_Swansea_Neighborhood_Plan.pdf).

Some of the areas near the Elyria-Swansea neighborhoods have been found to be contaminated with toxic materials. Beginning as early as 1870, three smelting plants, the Omaha-Grant, Argo, and Globe operated for varying lengths of time, and refined metals including gold, silver, copper, lead, and zinc. As a result of these activities, the soils in some areas of the neighborhoods required soil remediation (or cleanup). The sections of those cleanup projects that are in residential areas have largely been completed.<sup>6</sup>

**b. Demographic Profile & Affected Communities**

Title VI requires that Recipients collect and analyze demographic data to ensure their programs and activities do not create a disparate impact based on race, color, or national origin.<sup>7</sup> For construction projects, Recipients must determine the demographics for a reasonable project area that encompasses direct and indirect effects. The Respondent identified the demographic breakdown of the census tracts and block groups associated with the “study area,” which constitutes an area likely to realize direct and indirect impacts from the Project.<sup>8</sup> The study area included the Elyria and Swansea neighborhoods, and the most current U.S. Census data from the American Community Survey for the study area neighborhoods is shown in Figure 1.<sup>9</sup>

**Figure 1**  
*Hispanic Population in Study Area Neighborhoods*

Neighborhood	Total Population	Not Hispanic or Latino	Hispanic or Latino	Percentage Hispanic or Latino
Globeville	3551	1373	2178	61.33%
Elyria and Swansea	6676	1142	5534	82.89%
Northeast Park Hill	9086	6363	2723	29.97%
Stapleton	17,626	15,527	2099	11.91%
Montbello	34,483	13,286	20,897	60.60%
Aurora	7380	3998	3382	45.83%
Gateway	7545	4117	3428	45.43%

The Elyria-Swansea neighborhoods have the highest percentage of Hispanic persons for the study area. The total Hispanic population for the Denver Metropolitan Statistical Area, which includes the study area, is 615,396 or 29.46%, which indicates that all neighborhoods in the study area except Stapleton have higher percentages of Hispanic persons than the City of Denver as a whole.<sup>10</sup>

<sup>6</sup> Gretchen Armijo & Gene C. Hook, Denver Dep’t of Env’tl Health, *How Neighborhood Planning Affects Health in Globeville & Elyria Swansea*, p. 33 (Sept. 2014), [https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report\\_9-18-14.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/746/documents/HIA/HIA%20Composite%20Report_9-18-14.pdf).

<sup>7</sup> 23 C.F.R. §200.9(b)(4).

<sup>8</sup> I-70 East Supplemental Draft Environmental Impact Statement – Environmental Justice Technical Report, Attachment F (adopted by Respondent in the FEIS), August 2014, p. 5, [http://www.i-70east.com/SDEIS/chapters/I-70EastSDEIS\\_Vol2AttF\\_Enviro-Justice-Tech-Report.pdf](http://www.i-70east.com/SDEIS/chapters/I-70EastSDEIS_Vol2AttF_Enviro-Justice-Tech-Report.pdf).

<sup>9</sup> Source: U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates.

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

In addition, both the U.S Census data and interviewees from the FHWA’s site visit show that a large number of persons with Limited English Proficiency (LEP) reside in the Elyria-Swansea neighborhoods, as well as the study area as a whole. Title VI prohibits discrimination based on national origin, which therefore requires that Recipients take reasonable steps to provide meaningful access so that LEP individuals can effectively engage in federally assisted programs and activities.<sup>11</sup> The U.S. Department of Justice defines LEP individuals as those “who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English.”<sup>12</sup>

For the Project, the Respondent assessed the language access needs of persons in the study area and found the Elyria-Swansea areas to have the highest need both compared to the study area and compared to the surrounding Denver area, as shown in Figure 2.

**Figure 2**  
*Limited English Proficiency Needs for the Project*

Geographic unit	Total adult population	Primary language groups of persons who speak English less than very well							
		Spanish		Other-Indo European		Asian/Pacific		Other	
		#	%	#	%	#	%	#	%
Denver MSA	1,844,006	129,502	7.0	15,958	0.9	26,766	1.5	7,755	0.4
Denver County	452,947	50,223	11.1	3,906	0.9	5,828	1.3	2,645	0.6
Adams County	303,605	38,106	12.6	2,403	0.8	5,160	1.7	455	0.1
Globeville	2,633	794	30.2	0	0.0	9	0.3	0	0.0
Elyria and Swansea	4,260	1,739	40.8	0	0.0	11	0.3	0	0.0
Northeast Park Hill	5,469	675	12.3	0	0.0	7	0.1	30	0.5
Stapleton	8,837	288	3.3	43	0.5	71	0.8	63	0.7
Montbello	18,675	5,970	32.0	48	0.3	346	1.9	55	0.3
Aurora	4,949	975	19.7	31	0.6	328	6.6	45	0.9
Gateway	4,434	1,015	22.9	0	0.0	112	2.5	104	2.3
Study Area	49,257	11,456	23.3	122	0.2	884	1.8	297	0.6

Here, 40.8% of the combined Elyria-Swansea populations were identified as Spanish-speaking persons for their primary language.<sup>13</sup> All neighborhoods in the study area, except Stapleton, feature higher percentages of LEP persons than the Denver MSA.

**c. The Complainant**

<sup>11</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>12</sup> Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 FR 41459, June 18, 2002.

<sup>13</sup> I-70 East Supplemental Draft Environmental Impact Statement – Environmental Justice Technical Report, Attachment F (adopted by Respondent in the FEIS), August 2014, p. 17, [http://www.i-70east.com/SDEIS/chapters/I-70EastSDEIS\\_Vol2AttF\\_Enviro-Justice-Tech-Report.pdf](http://www.i-70east.com/SDEIS/chapters/I-70EastSDEIS_Vol2AttF_Enviro-Justice-Tech-Report.pdf).

The named Complainant is (b) (6) who is Hispanic/Latino and member of the Cross Community Coalition (CCC).<sup>14</sup> The Cross Community Coalition is a Registered Neighborhood Organization of Swansea and Elyria, which are neighborhoods of north Denver adjacent to the existing I-70 highway. The Complainant lives approximately three blocks south of the current I-70 in the area of the Project, and she believes the Project will cause an adverse, disparate impact to her, her family, and other similarly-situated individuals in the Project area. Specifically, she alleges that she suffers from health problems that include asthma, which she alleges subsided when she left the state of Colorado for several yearly periods of time and that the asthma returned when she returned to reside in the Elyria-Swansea neighborhood. For these reasons, the Complainant alleges that air pollution from I-70 has caused her health problems and that the Respondent's preferred alternative, which will add additional lanes to I-70, will exacerbate her condition.

The named Complainant is represented by counsel through EarthJustice, a non-profit public interest law firm that advocates for the protection of natural spaces and wildlife, healthy communities, and clean energy and a healthy climate.<sup>15</sup>

In addition, the complaint was joined by the Colorado Latino Forum, the Cross Community Coalition, and the Elyria and Swansea Neighborhood Association ("ESNA"), all of whom oppose the Respondent's selection of the preferred alternative.

#### **d. Project History**

The I-70 East Project (Project)<sup>16</sup> concerns an 11-plus mile stretch of the I-70 corridor with a western boundary at the I-25/I-70 interchange to an eastern limit of Tower Road, beyond the I-225 interchange. The project dates to 2003 when the Respondent first conducted a study of the highway and transit needs of the entire Denver I-70 corridor. In 2006, the Respondent divided the Project, believing the transit component required a discreet, separate study. The Draft Environmental Impact Statement (DEIS) for the highway portion of the Project was published in 2008, though the Respondent did not advance any of the proposed alternatives due to lack of support from the public and other project stakeholders.<sup>17</sup> A depiction of the project area can be found in Figure 3.

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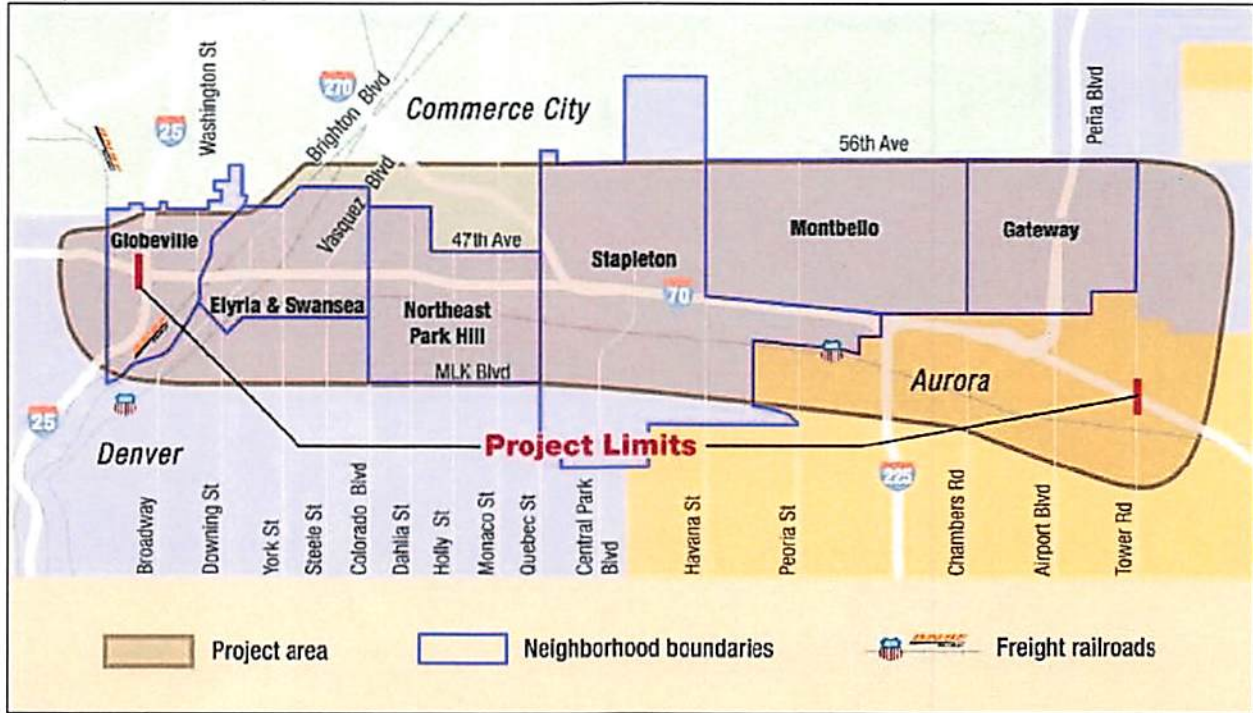
<sup>14</sup> Declaration of (b) (6) May 15, 2016.

<sup>15</sup> Our Story: True and lasting change happens when the power of the law is on your side, EarthJustice About Page, accessed 2/3/17, <http://earthjustice.org/about>.

<sup>16</sup> The I-70 East Project was renamed "Central 70" in the draft CDOT 2017-2020 Statewide Transportation Improvement Program Plan. This LOF will refer to the Project as "I-70 East" to be congruous with the Project environmental and other development documents for clarity.

<sup>17</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, ES-3, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

**Figure 3**  
**Study Area and Project Limits**



Respondent assembled the Preferred Alternative Collaborative Team (PACT), a group representing federal, state and local governments, as well as representatives from community groups and neighborhood associations. While agreeing that the I-70 alignment should remain unaltered, Respondent and PACT members failed to reach a consensus for a preferred alternative.<sup>18</sup> Reexamining previously eliminated options, Respondent developed a new alternative with corresponding analysis, which it published in a Supplemental DEIS in 2014. After additional public involvement, Respondent published the Final Environmental Impact Statement (FEIS) in January 2016, identifying a “no action” alternative, a managed lane alternative, a revised viaduct alternative and a modified partially covered lowered alternative. In addition, the FEIS addressed two other alternatives that followed alignments different from that of I-70, but concluded that neither addressed the purpose and need for the project.

As a Recipient of Federal financial assistance from the FHWA and FTA, Colorado must develop a STIP for selecting projects for all areas of the state. This STIP is a four-year, fiscally constrained, and prioritized set of transportation projects compiled from local and regional plans. Colorado selects STIP projects through an annual development process. In May 2016, the Respondent signed its latest STIP. Projects included in the STIP must be both fiscally

<sup>18</sup> *Id.*

constrained and consistent with longer range planning documents, in this case the MPO's 25-year Regional Transportation Plan.

#### **e. Project Purpose and Need**

The Project need originated with the area's vision in long range transportation plans. In its 2035 Regional Transportation Plan,<sup>19</sup> the MPO's first policy was ensuring that "existing and future transportation facilities are maintained and preserved," followed by increasing transit service and providing sustainable, safe, efficient roadway systems for cars, buses and trucks. The 2040 Plan<sup>20</sup> maintains these policies, listing the following strategies:

- Maintain and enhance a regional roadway system comprised of existing, expanded, or new freeways, major regional arterials and principal arterials that provide regional and statewide connectivity for the movement of people and goods;
- Expand the capacity of existing regional roadways in the most critically congested corridors and at key traffic bottlenecks, after considering demand management strategies and operational efficiencies;
- Implement multimodal facilities and system management improvements when constructing new or retrofitting existing major travel corridors;
- Support local streets and roadways that provide vehicular, local transit, bicycle, and pedestrian access to and from residential and non-residential areas throughout the region;
- Prioritize roadway capacity funds for projects that address gaps in the existing roadway system and eliminate bottlenecks consistent with findings of the congestion management planning process;
- Develop opportunities for implementing congestion pricing and other tolling techniques on existing freeways, and implement a tolling component (price-management) on new freeway lane-addition projects, where feasible, with all impacted communities included in the tolling decision and surplus revenue directed to multimodal investment or system preservation;
- Support legislation that would implement VMT-based fees, pay-as-you-drive insurance, and other pricing strategies that more directly and immediately reflect the cost of vehicle travel to the user.

The various environmental studies of I-70 East provide further detail and clarify the Project's purpose. Chapter 2 of the Final EIS describes a heavily congested roadway in deteriorating condition that nonetheless serves as a "key east-west transportation and freight corridor through

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<sup>19</sup> 2035 Metro Vision Regional Transportation Plan, Denver Regional Council of Governments (DRCOG), February 16, 2011, [https://drcog.org/sites/drcog/files/resources/2035%20MVRTP-2010%20Update%20with%20App%202-9\\_0.pdf](https://drcog.org/sites/drcog/files/resources/2035%20MVRTP-2010%20Update%20with%20App%202-9_0.pdf).

<sup>20</sup> 2040 Fiscally Constrained Regional Transportation Plan, DRCOG, February 18, 2015, <https://drcog.org/sites/drcog/files/resources/2040%20Fiscally%20Constrained%20Regional%20Transportation%20Plan.pdf>.

the American Midwest, Denver and Colorado's Rocky Mountains, and it is the primary access to [Denver International Airport]."<sup>21</sup> Of the four project motivators including safety concerns, limited facility capacity, and increased travel demand, the Final EIS emphasized the current deficiency of the existing viaduct. Rehabilitation projects have improved the structural deficiency rating and extended the life of the viaduct, though Respondent estimates that nine structures along the corridor are beyond their anticipated lifespan and are either structurally deficient or functionally obsolete. The FEIS includes this photo<sup>22</sup> from below the viaduct under 46<sup>th</sup> Avenue.



In addition, the FEIS demand models forecast a 42% increase in population growth and 58% increase in employment through 2035, with continued housing and industrial development in the corridor, along with airport expansion and growth of tourist destinations.<sup>23</sup> Respondent predicts that I-70 would not be able to satisfy the increase in travel demand, as it currently functions at or beyond design capacity. A depiction of the traffic demand model is shown in Figure 4.

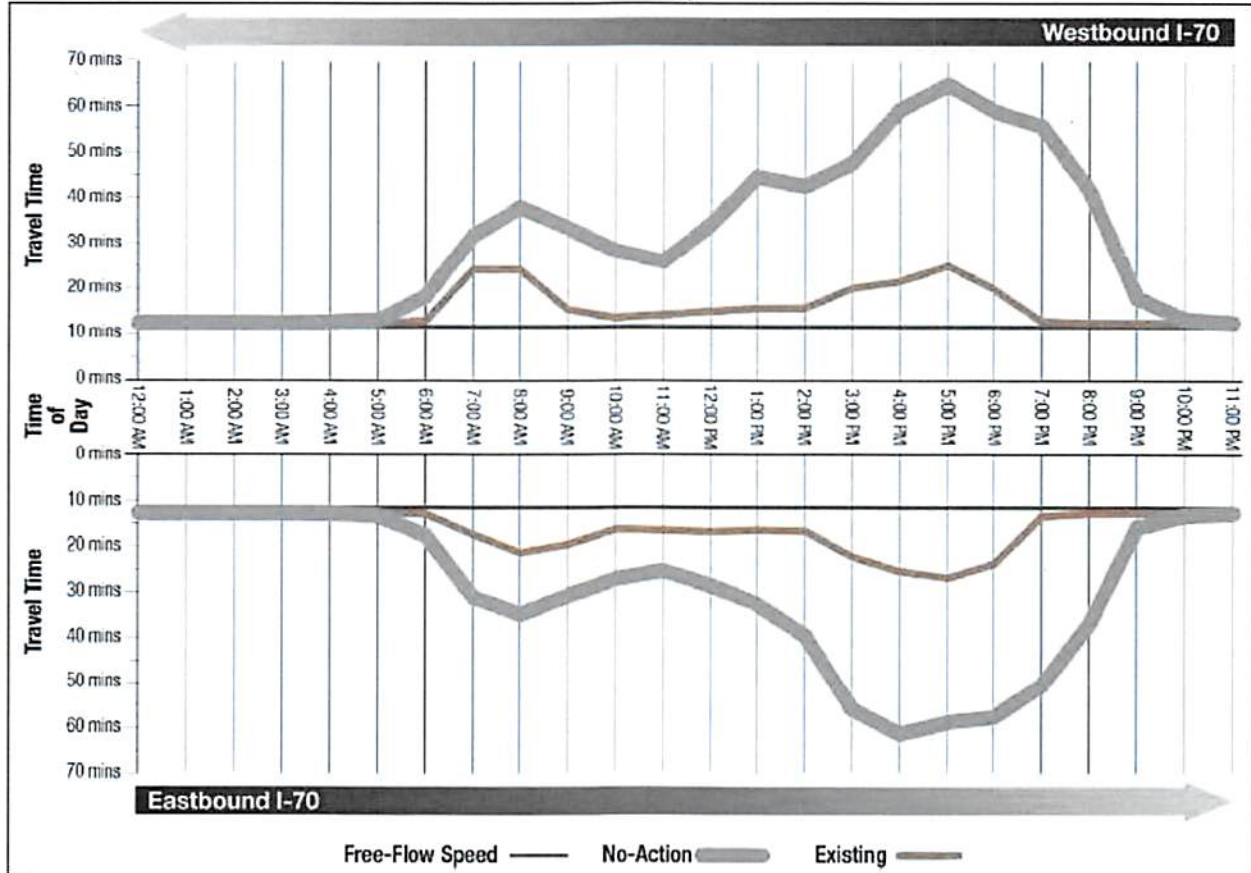
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<sup>21</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, 2-2, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

<sup>22</sup> Undated photo, I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, ES-5, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

<sup>23</sup> *Id.* at 2-7.

**Figure 4**  
**I-70 Travel Demand Model: “no action” vs. Existing**



Finally, the FEIS cites crash statistics that are over twice as high within the project area as found on other sections of I-70, owing to inadequate acceleration/deceleration lane length; insufficient sight distance at ramps; lower than adequate ramp speeds; narrow shoulder widths; overly frequent interchange spacing prompting vehicle weaving; substandard drainage and other deficiencies.<sup>24</sup>

**f. Summary of Project Alternatives**

In selecting the preferred Partial Cover Lowered Alternative, the Respondent eliminated alternatives that it believed failed to meet project purpose and need. The first, a “no action” alternative studied the use of the existing I-70 facility with only those improvements already planned or programmed. The No Action alternative was intended to serve as a baseline but

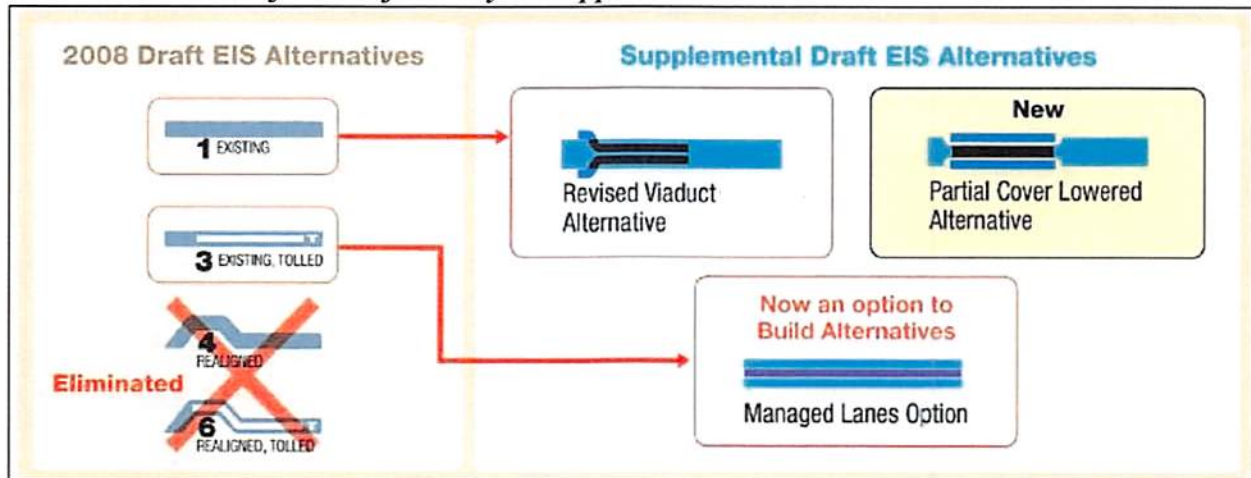
<sup>24</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, 2-10, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

nonetheless included options for adding capacity either to the north or south of the existing corridor, either with tolled or managed lanes.

The second alternative that Respondent analyzed was a Revised Viaduct Alternative that would replace a section of the western existing facility with a new structure, adding one to two additional lanes through the eastern limit of the project, either through restriping or capacity improvements. As with the No Action Alternative, the Revised Viaduct included two expansion options, either to the north or south of the existing roadway with additional lanes. In addition, Respondent considered the revised viaduct for both a general lanes option and a managed lanes option. The Revised Viaduct Alternative would require a footprint of 197 feet, approximately twice the width of the existing facility.

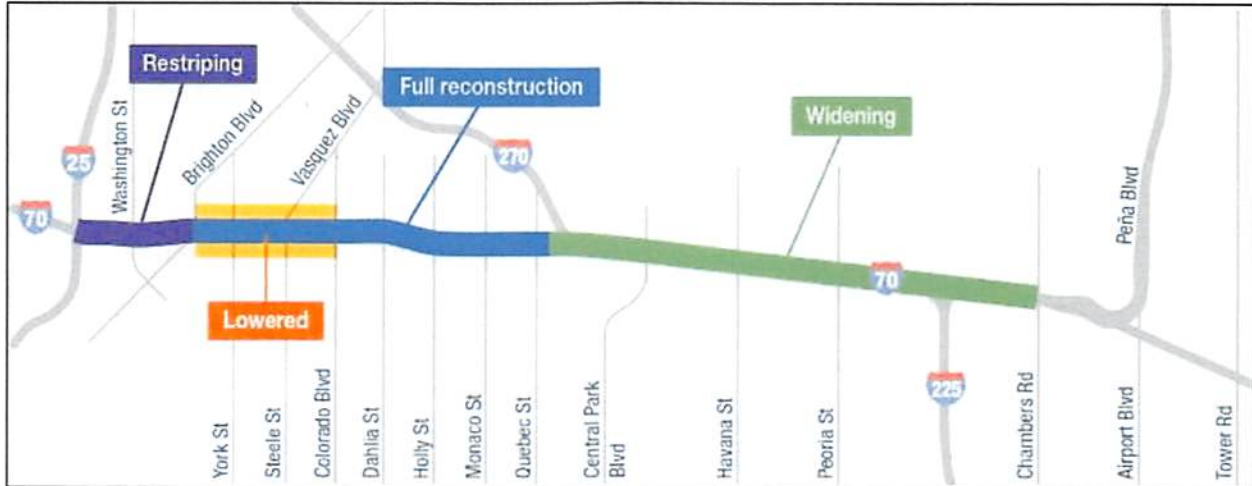
Figure 5 depicts the early elimination of the realignment alternatives in the Draft EIS to those considered in the Supplemental EIS.

**Figure 5**  
*Alternatives carried forward for study in Supplemental EIS*



The Partial Cover Lowered Alternative was advanced as the preferred alternative. This alternative removes the existing I-70 viaduct between Brighton Boulevard and Colorado Boulevard, lowering the highway below grade in this area. It adds additional lane(s) in each direction from Brighton Boulevard to Tower Road. It also adds capacity from I-25 to Brighton Boulevard by restriping. This alternative includes a cover over the highway in the vicinity of Clayton Street and Columbine Street that is approximately, but not more than, 1,000 feet in length. As part of this alternative, 46<sup>th</sup> Avenue would be located on both the north and south sides of the highway. 46<sup>th</sup> Avenue would then be a two-way street between Josephine Street and Milwaukee Street on both sides of the highway and one way in the other locations. This alternative eliminates the portion of 46<sup>th</sup> Avenue north of I-70 between Columbine Street and Clayton Street to allow for a connection between the Swansea Elementary School and the highway cover. The preferred alternative would maintain access to and from I-70 at the Steele Street/Vasquez Boulevard interchange is maintained. A more detailed map of this alternative, along with a visualization of the cover can be found in the Appendix to this LOF. See Figure 6 for a depiction of the preferred alternative.

**Figure 6**  
**Overview of Partial Cover Lowered Alternative (Preferred)**



In addition to these alternatives, in the Final EIS the Respondent reexamined other alternatives that were not pursued after the Draft EIS in 2008. One proposal, a I-270/I-76 Reroute Alternative, which was preferred by the Complainant, proposed removing the Brighton Blvd. to Colorado Blvd. viaduct and realigning I-70 around Denver using the existing I-270 and I-76 corridors (Reroute), as shown in Figure 7. The new 46th Avenue/48th Avenue would be converted to either a 4- or 6-lane arterial.

**Figure 7**  
**Map of I-270/I-75 Complainant Reroute Alternative**



Despite its earlier assessment that the alternative did not meet the purpose and need of the project, Respondent reconsidered the Reroute based upon public and stakeholder input and rejected it because:

- It would increase use by highway users of 46<sup>th</sup> Avenue (which currently runs parallel beneath the I-70 viaduct) rather than the mainline highway, introducing higher volumes of traffic along with safety, accessibility and mobility issues in surrounding neighborhoods.
- The resulting widening of 46<sup>th</sup> Avenue even to six lanes would not alleviate projected traffic projections for 2035, considering the increased use of freight vehicles traveling to and from industry along I-70.
- It increased out of direction travel, particularly burdensome to the 35% of westbound traffic exiting onto south I-25.
- It lacked multiple east-west travel choices for emergency providers.
- The cost of 12 miles of major highway construction and reconstruction along the corridors was more than twice the that of other alternatives
- It lacked stakeholder support due to impacts to existing and planned areas of economic growth.

For example, the Respondent conducted a travel analysis using the Denver Regional Council of Governments (DRCOG) 2035 Regional Travel Demand Model, which simulated the reroute. From the study:<sup>25</sup>

[T]he analysis shows that the traffic on the arterials west of I-25 is reduced with the I-270/I-76 reroute; however, this reduction results in major traffic increase in the arterials east of I-25. The local street networks east of I-25 do not have the capacity to hold the forecasted traffic volumes; therefore, the increase in the local street traffic will result in safety issues and major delays.

The expected changes to traffic are shown in Figure 8.

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<sup>25</sup> Alternative Analysis Technical Report Addendum - I-70 East Final Environmental Impact Statement, p. 4, January, 2016, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol2AttC\\_Alternative-Analysis.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttC_Alternative-Analysis.pdf).

**Figure 8**  
*Visual of Expected Change in Daily Traffic for Six Lane Option Reroute*



The Respondent predicts the Reroute modeling shows an increase in out-of-direction travel, causing mobility issues. Of the traffic heading west on I-70, approximately 50 percent continues past I-25, staying on I-70. The Reroute Alternative adds two miles of out-of-direction travel for these vehicles. Thirty-five percent of the traffic heading west on I-70 exits to southbound I-25. The Reroute adds four miles of out-of-direction travel for these vehicles resulting in additional travel times. Furthermore, traffic modeling indicates that the Reroute would lead to a significant increase in vehicles utilizing 46<sup>th</sup> Avenue, significantly increasing congestion in Elyria-Swansea. According to the DRCOG model.<sup>26</sup>

The average daily traffic for both Reroute scenarios (4-lane and 6-lane 46th/48th Avenue), ranges from 30,000 to 60,000 (as 4-lane) and from 40,000 to 75,000 vehicles a day (as 6-lane) in 2035, resulting in congested conditions. The 6-lane scenario processes higher volumes in comparison to the 4-lane scenario resulting in a reduction in the amount of additional traffic on other arterials in the traffic impact analysis area. The traffic volumes on 46th/48th Avenue in the re-route analysis are typically 4-6 times higher than the traffic volumes in the Partial Covered Lowered Alternative and 10 to 15 times higher than on the levels on 46th Avenue in 2012.

<sup>26</sup> Alternative Analysis Technical Report Addendum - I-70 East Final Environmental Impact Statement, p. 4, January, 2016, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol2AttC\\_Alternative-Analysis.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttC_Alternative-Analysis.pdf).

In addition, the Respondent notes that I-70 and I-270 serve as reliever routes when one highway or the other becomes congested or closed due to accidents. With the reroute, the redundancy of the highway network, which is important for emergency response in the area, is limited. If I-70 was rerouted to combine with I-270, there would be no alternate highway connecting the Denver neighborhoods to the rest of the region.

The Respondent finally states that, in addition to the safety and congestion concerns, keeping the current alignment was supported by the community:<sup>27</sup>

The Preferred Alternative Collaborative Team (PACT), consisting of community, business, and stakeholder agency representatives, was initiated after the publication of the Draft EIS in 2008 to identify the preferred alternative for the project. Based on additional analysis and community input, the group reached a consensus to keep I-70 at its current location. The PACT determined that keeping I-70 at its current location rather than rerouting or realigning it is the most beneficial to the surrounding communities, businesses, and the transportation system, because of the amount of traffic that would be on 46th Avenue if the highway was moved.

The Respondent rejected a previously studied Realignment Alternative because it did not meet the purpose and need of the project. In fact, there were several realignments considered, shown in Figure 6, one using the current alignment of existing rail facilities, and two that prosed realigning either I-70 westbound to the north of the existing I-70 alignment, or I-70 eastbound to the south following the alignment of Smith Road.

Most of the Realignment Alternatives failed to pass first level screening due to unacceptable community impacts or requiring improvements to facilities that did not meet purpose and need. Similarly, other Realignment Alternatives were eliminated during comparative screening. The northern and southern realignments along existing city streets were also eliminated because both would require major highway construction through a high number of existing residential properties. Figure 9 depicts one of the realignment alternatives considered.

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<sup>27</sup> Alternative Analysis Technical Report Addendum - I-70 East Final Environmental Impact Statement, p. 6, January, 2016.

**Figure 9**  
**Map of Realignment Alternatives**



Only the alternatives adjacent to the existing railway corridor were advanced among the Corridor Alternatives – one realigned using general purpose lanes and one realigned with tolled express lanes. Both were eliminated from further consideration based on lack of PACT and public support.

In the 2016 Final EIS, Respondent concluded that the Partial Cover Lowered Alternative with managed lanes was preferred because it met project purpose and need, addressed concerns of the public and stakeholders, and had more community and local public agency support than any of the other alternatives. Respondent further proposed the cover design to protect and expand the Swansea Elementary School’s current location and meet drainage requirements, and because it was considered more visually and aesthetically appealing.

### III. Issues Raised by Complainants

The Complainant alleges that the Respondent’s selection of the preferred project alternative, the Partial Cover Lowered Alternative, violates Title VI due to adverse and disparate impacts that are predominantly borne by the Hispanic populations in the Project area. Specifically, Complainants allege:

1. Respondent's approval of the STIP, which allowed the Project to move forward, led to disparate, adverse impacts on the predominantly Hispanic residents of

- Globeville and Elyria-Swansea, established minority neighborhoods divided by the construction of I-70 beginning in 1953.
2. Respondent's proposed mitigation strategies for the preferred alternative are insufficient to offset the disparate, adverse impacts to the Hispanic communities.
  3. Respondent's process for selecting the preferred alternative lacked adequate consultation with Hispanic communities in the Project area.
  4. Even if Respondent can offer a substantial, legitimate justification for its selection of the preferred alternative, Respondent failed to adequately analyze a proposal to reroute I-70, which is a less discriminatory alternative that meets the Respondent's legitimate needs, but that will do so without the same level of disparate effect on a class protected by Title VI.

#### **IV. Legal Background**

##### **a. Title VI**

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that:

[n]o 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>28</sup>

The Civil Rights Restoration Act of 1987 clarified Title VI congressional intent, ensuring that when an entity receives Federal financial assistance, all of that recipient's programs and activities fall under the jurisdiction of Title VI. This includes even those programs and activities that do not directly receive Federal financial assistance.<sup>29</sup>

The U.S. Department of Justice (DOJ), as the Federal government's coordinating agency for Title VI, implemented its Title VI program in 28 C.F.R. Part 42, which provides that the responsibility for enforcing Title VI rests with the federal agencies which extend financial assistance, such as the FHWA. The USDOT issued common Title VI regulations for all USDOT modes at 49 C.F.R. Part 21. When individuals file discrimination complaints under Title VI with regards to highways, the HCR will process the complaints. If HCR accepts the complaint, it will investigate and issue a LOF with potential findings and recommendations. Specific provisions regarding the investigation of Title VI complaints are found at 49 C.F.R. § 21.11. FHWA requires State Departments of Transportation (State DOTs) to take specific steps in compliance with Title VI. These are enumerated at 23 C.F.R. § 200.9, and include submitting nondiscrimination assurances, developing policies and procedures, resolving identified areas of noncompliance and collecting demographic data on those impacted by its decision-making.<sup>30</sup> The

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<sup>28</sup> 42 U.S.C. § 2000d.

<sup>29</sup> [Civil Rights Restoration Act of 1987](#), P.L. 100-259 [S.557].

<sup>30</sup> See [28 C.F.R. Part 42](#); [49 C.F.R. Part 21](#); [23 C.F.R. Part 200](#).

FHWA's complaint investigation procedures are contained in its [Procedures Manual for Processing External Complaints of Discrimination](#).<sup>31</sup>

## b. Discrimination Prohibited

Discrimination under Title VI can be analyzed under two types of legal analysis: (1) disparate treatment and (2) disparate impact. Regarding disparate impact, the U.S. Supreme Court has held that agencies may create regulations to prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.<sup>32</sup> The USDOT's Title VI implementing regulations state that a recipient "may not utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin," 49 C.F.R. § 21.5(b)(2). FHWA's Title VI regulations similarly require Title VI compliance by recipients receiving Federal financial assistance from FHWA. 23 C.F.R. Part 200.

The first step in analyzing any disparate impact case is determining whether the recipient's criteria or method of administering its programs or activities *adversely* and *disparately* affect members of a protected class. In some cases federal agencies proceed directly to preliminary findings after this step. The elements of a Title VI disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law.<sup>33</sup> To establish a *prima facie* case<sup>34</sup> of discrimination, the investigating agency must ascertain whether the recipient utilized:

1. A specific, facially neutral policy or practice;
2. That had a disproportionate impact on a protected group; and
3. Whether the policy or practice likely caused the disproportionate impact.

In a Title VI disparate impact analysis, a causal connection must be shown between the facially neutral policy or practice and the disproportionate and adverse impact on the protected group.<sup>35</sup> To demonstrate causation, evidence that "adequately captures" the impact of the project on similarly situated members of protected and non-protected groups must be shown, using an "appropriate measure."<sup>36</sup>

After a *prima facie* showing is made, the burden shifts to the respondent to demonstrate the existence of a "substantial legitimate justification" for the allegedly discriminatory practice. To prove a "substantial legitimate justification," the recipient must be able to show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral

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<sup>31</sup> Procedures Manual For Processing External Complaints of Discrimination, Federal Highway Administration, <http://www.fhwa.dot.gov/civilrights/programs/finalcomplaintmanual110410.cfm>

<sup>32</sup> *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 582; *Alexander v. Choate*, 469 U.S. at 292-94; see *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.), reh'g denied, 7 F.3d 242 (11th Cir. 1993).

<sup>33</sup> *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

<sup>34</sup> *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston*, 997 F.2d 1394, 1407.

<sup>35</sup> *New York City Emtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000).

<sup>36</sup> *New York Urban League v. New York*, 71 F.3d 1031, 1037-38 (2d Cir. 1995).

to the [recipient's] institutional mission."<sup>37</sup> The justification must bear a "manifest demonstrable relationship" to the challenged policy.<sup>38</sup>

If the recipient can make a showing of "substantial legitimate justification," the investigating agency must then focus on whether the complainant has identified "less discriminatory alternatives" that meet the recipient's legitimate needs, but that will do so without the same level of disparate effect on a class protected by Title VI.<sup>39</sup> In a transportation context, courts have analyzed site selection alternatives, particularly where the recipient had already considered and rejected them, establishing a record.<sup>40</sup> In cases involving site selection, courts have considered not only whether the construction was necessary to begin with, but also whether the recipient can justify selection of the particular site over alternatives.<sup>41</sup>

### **c. Prior Discrimination and Site Selection**

First, the USDOT Title VI regulations provide that, 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 in applicable programs and activities, recipients must take actions to remove or overcome the effects of the prior discriminatory practice or usage.<sup>42</sup> Even in the absence of prior discriminatory practice or usage, recipients are expected to ensure no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.<sup>43</sup>

The regulations further provide that recipients may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is 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 rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will, substantially impair the accomplishment of the objectives of Title VI.<sup>44</sup>

### **d. Jurisdiction**

A recipient may mean any State, territory, possession, the District of Columbia, or Puerto Rico, or any political subdivision thereof, or instrumentality thereof, any public or private agency,

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<sup>37</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) (quoting *Elston*, 997 F.2d at 1413).

<sup>38</sup> *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d. 1403, 1418 (11th Cir. 1985); *See, e.g., Elston*, 997 F. 2d at 1413 (In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e. there must be an "educational necessity" for the practice).

<sup>39</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d at 1407.

<sup>40</sup> *See, e.g., Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 119-20 (S.D. Ohio 1984), (conducting a thorough review of alternatives sites for highway or other methods, such as light rail or public transportation).

<sup>41</sup> *See, e.g., Damian*, 608 F. Supp. at 127; *see also Bryan, Jr., et al., v. Edward I. Koch et al., and District Council 37, American Federation of State, County and Municipal Employees Union, AFL-CIO, et al.*, 627 F.2d 612 (1985), at 617-18.

<sup>42</sup> 49 C.F.R. § 21.5(b)(7) (1970).

<sup>43</sup> *Id.*

<sup>44</sup> 49 C.F.R. § 21.5(d) (1970).

institution, or organization, or other entity, or any individual, in any State, territory, possession, the District of Columbia, or Puerto Rico, to whom Federal financial assistance is extended, directly or through another recipient.<sup>45</sup>

Respondent is the recipient of Federal financial assistance through FHWA, as it receives an annual apportionment of funding under the prevailing highway act. For example in 2016, Respondent was apportioned \$542,412,699<sup>46</sup> pursuant to the Fixing America's Surface Transportation Act (FAST Act), Public Law (Pub. L.) 114-94. According to the Final EIS, Respondent has programmed \$50 million of FHWA funding for Phase 1 of the I-70 East project. Further, it has expended \$12,504,737 of advance construction funds during the environmental analysis phase of the project under the National Environmental Policy Act (NEPA) alone.<sup>47</sup> However, even in the absence of Federal monies on this project, Respondent would still be subject to Title VI.<sup>48</sup>

Any person who believes they, or any specific class of persons, have been subjected to discrimination prohibited by Title VI may by themselves or by a representative file a written complaint with the FHWA.<sup>49</sup> A complaint must be filed not later than 180 days after the date of the alleged discrimination, unless the time for filing is extended by a competent authority.<sup>50</sup> Once a complaint is accepted, FHWA will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with Title VI. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with Title VI.<sup>51</sup>

The Complainant is of Hispanic or Latino national origin, whose residence is in the Project area and alleges the Project will disproportionately adversely impact her and other Hispanic members of her community on the basis of national origin. As noted previously, the Complainant filed the Title VI complaint on November 15, 2016, 176 days after the date of the Respondent's action to approve the STIP.

## V. Analysis

This section summarizes information related to potential adverse disparate impacts stemming from selection of the preferred alternative for the I-70 East project, including community demographics, adverse impacts, and mitigation measures.

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<sup>45</sup> 49 C.F.R. § 21.23(f).

<sup>46</sup> See [Notice of Apportionment](#), N 4510.802, January 8, 2016.

<sup>47</sup> Respondent project funding summary shows a total of \$37,500,000 in advance construction of which \$12,504,737 are Federal.

<sup>48</sup> See Section IV and footnote 2.

<sup>49</sup> 49 C.F.R. § 21.11(b).

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

<sup>51</sup> 49 C.F.R. § 21.11(c).

### **a. Disparate Impacts Based on Race, Color, or National Origin**

The Complainant asserts the preferred alternative will have a disproportionate and adverse impact on the predominantly Hispanic persons in Elyria-Swansea. Specifically, the Complainant expresses concerns that the project:

- Increases air pollution and resulting/associated health issues;
- Destroys homes, businesses and an elementary school playground;
- Widens the existing divide within the impacted communities;
- Disturbs ground contaminants that exacerbate air quality along the project corridor;
- Increases noise levels, particularly in Globeville, Elyria and Swansea;
- Decreases property values, particularly in Elyria-Swansea based on their project proximity.

FHWA examined the evidence for each listed concern in an effort to assess Complainant's and Respondent's expectations of adverse impacts.

#### **1. Air Quality and Health Impacts**

The Complainant alleges that adding lanes to I-70 will increase air pollution and therefore cause a disparate impact. Specifically, Complainant alleges that expanding I-70 will increase traffic driving on the highway, and will, thus, increase fine particulate matter ("PM2.5") emissions that cause "asthma, heart attacks, and premature death." Complainant also alleges that the Respondent failed to conduct a health impact assessment of the Project. In support of its allegations, the Complainant offered documents regarding the harmful effects of highway traffic on air quality. Some of the Complainant's evidence speaks to general concerns about potential negative health impacts of the Project. During interviews with FHWA, residents anecdotally referred to their health problems, such as asthma and cancer. Interviewees stated that I-70 was the cause for these health problems.

Other Complainant documents allege the Respondent failed to comply with legal requirements for air quality and related health impacts, but the weight of evidence does not support these allegations. The Complainant cited public comments for the Project made by the Sierra Club, Colorado Latino Forum, and North Denver Community Organizations regarding the Colorado 2017-2020 STIP (Sierra Club).<sup>52</sup> To begin, the Sierra Club alleges "[v]iolations of Federal Requirements Governing the Metropolitan Planning Process for the Development and Adoption of Regional Transportation Plans and Transportation Improvement Programs."<sup>53</sup> The Sierra Club

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<sup>52</sup> Comments of Sierra Club, Colorado Latino Forum, and North Denver Community Organizations Objecting to Approval of Proposed 2017-2020 Colorado State Transportation Improvement Program, <http://www.sierraclub.org/sites/www.sierraclub.org/files/sce-authors/u557/STIPcommentsSierraClub,CLF,CGD,etc20160429.pdf>.

<sup>53</sup> *Id.* at 1.

alleges the Respondent failed to comply with the legal requirements of Title VI and Environmental Justice. For example, the Sierra Club stated:<sup>54</sup>

Evidence documented by Denver [Department of] Environmental Health (DEH) showing disparate health outcomes for residents in the Globeville/Elyria/Swansea neighborhoods and the city council districts where I-70 is located compared to other council districts in Denver, including a 50% higher incidence of mortality related to cardiovascular disease, 50,000 more years of life lost annually, and 40% greater rate of hospitalization of children for asthma, demonstrate that these residents are disproportionately affected by the diseases of air pollution. The contribution that emissions from current vehicle travel on heavily trafficked highways such as I-70 make to these adverse community health outcomes must be evaluated, disclosed to decisionmakers and the public, and considered in the evaluation of alternatives to determine the extent to which community health can be enhanced by reducing, not increasing, exposure to traffic pollution in these neighborhoods.

The investigation determined that the Respondent did evaluate health impacts, for Globeville/Elyria/Swansea, while also considering the DEH study referenced by the Sierra Club.<sup>55</sup> The Respondent performed environmental studies of the Project, in coordination with the Colorado Department of Public Health and Environment, the federal Environmental Protection Agency (EPA) and the FHWA. No studies during this investigation were found to demonstrate a causal link between adverse health impacts and the preferred alternative for the I-70 project. In fact, the preferred alternative is projected to reduce Elyria-Swansea residents' exposure to emissions and air toxics by alleviating congestion in the community when compared to other alternatives for the project, including the "no action" alternative. As discussed before, traffic modeling conducted for the project demonstrated that rerouting I-70 around the community would result in heavy traffic along 46<sup>th</sup> Avenue, exposing residents to increased emissions. Therefore, it is expected that the preferred alternative will benefit Elyria-Swansea with regards to air quality, by replacing an aging and congested system.

The Clean Air Act, Section 176(c), requires that federally supported highway and transit projects are consistent with state air quality goals found in the State Implementation Plan (SIP). The process to ensure this consistency is called Transportation Conformity. A transportation project is said to conform to the provisions and purposes of the SIP if the project, both alone and in combination with other planned projects, does not:<sup>56</sup>

- Cause or contribute to new air quality violations of the NAAQS;
- Worsen existing violations of the NAAQS; or
- Delay timely attainment of the NAAQS or required interim milestones

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<sup>54</sup> Supplemental Draft EIS Comments and Responses, S-105, January 2016, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol3AttQ-Part1\\_Agency-Biz-Special-Int.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol3AttQ-Part1_Agency-Biz-Special-Int.pdf).

<sup>55</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 2, Attachment J, Section 5.2, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol2AttJ\\_Air-Quality.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttJ_Air-Quality.pdf).

<sup>56</sup> 40 C.F.R. §93.116(a).

Transportation conformity is required for federally supported transportation projects in areas that have been designated by the U.S. Environmental Protection Agency (EPA) as not meeting one or more of the transportation-related NAAQS.

The Project is in a nonattainment area for ozone, and an attainment/maintenance area for PM10 and carbon monoxide; therefore, it must comply with transportation conformity requirements for these NAAQS.<sup>57</sup> FHWA concurred that the project would meet the transportation conformity requirements because the Central 70 Project does not contribute to any new local violations, increase the frequency or severity of any existing violation, or delay timely attainment of the NAAQS or any required interim emission reductions or other milestones.<sup>58</sup>

Some public commenters asked why the respondent did not examine some additional transportation related pollutants. The Respondent did not model PM2.5 and nitrogen dioxide for roadside concentrations in the Final EIS because they are not pollutants of concern in the Denver area or the project area at the present time or into the foreseeable future. PM2.5 and nitrogen dioxide were examined through emissions inventories. The Denver area has never violated the NAAQS for PM2.5. Since Denver is an attainment area for PM2.5, no hot spot modeling for PM2.5 is required. With regard to nitrogen dioxide, the EPA conformity regulations do not require hot spot modeling for nitrogen dioxide. 40 CFR §93.116 clearly states that it only applies to non-attainment or maintenance areas, thereby exempting the Denver metro area from performing hot spot analyses for nitrogen dioxide. The project used the best science and data available to make its determinations about NAAQS violations. The approved methods to determine air quality impacts, developed in consultation with EPA and CDPHE-APCD, show the project will not cause exceedances of the NAAQS.

Since the Complainant filed her complaint, the Respondent posted and distributed an Air Quality Update to its *Draft Air Quality Conformity Determination and NEPA Comparative Analysis* in response to comments received on the FEIS.<sup>59</sup> The comment period extended from December 16, 2015 through January 14, 2017 and offered another opportunity for the Complainant and affiliated community members to provide input. The report included the results of analysis of the preferred alternative as well as a comparison between alternatives. Of note, in regard to the Project's air quality impacts, the analysis in the report shows that the I-70 East project meets the requirements of the Clean Air Act and, "will not cause violations of air quality standards in the Denver Region when the project is completed and being used by the traveling public." Final conformity is documented in Section 6.1 of the FHWA Record of Decision, which was issued in January, 2017.

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<sup>57</sup> I-70 East Record of Decision: Phase 1 (Central 70 Project), Federal Highway Administration, p. 67, January, 2017.

<sup>58</sup> *Id.* at 68.

<sup>59</sup> Air Quality Update Draft Air Quality Conformity Determination and National Environmental Policy Act (NEPA) Comparative Analysis, December 2016, [http://www.i-70east.com/AirQuality/I-70EastEIS\\_DraftAirQuality.pdf](http://www.i-70east.com/AirQuality/I-70EastEIS_DraftAirQuality.pdf).

The investigation also determined that the Respondent was responsive to air quality concerns and recommendations raised by EPA and comments received by the public, including the Sierra Club.<sup>60</sup>

When looking at the complete record, the air quality studies demonstrate that the preferred alternative would not adversely impact the regional or project-level air quality.<sup>61</sup> The Respondent also demonstrated it was responsive to the concerns and suggestions EPA raised regarding air quality issues. Based on the evidence discussed in this section, FHWA finds there is insufficient evidence of adverse harm on the basis of air quality.

## 2. Right of Way Acquisition

The Complainant alleges the preferred alternative disproportionately impacts Hispanics in Elyria-Swansea due to the number of relocations/displacements necessary. The FEIS shows the preferred alternative would require relocations of 56 residential properties as well as 35 tenants as shown in Figure 10, while the resulting relocations for all alternatives would take place in the Elyria-Swansea neighborhoods.<sup>62</sup>

**Figure 10**  
*Summary of Residential Relocations/Displacements for Project Alternatives*

Alternative/Option	Residential Relocations		
	Total Residential	Owner-Occupied <sup>1</sup>	Tenant-Occupied
No-Action Alternative, North Option	15	7	8
No-Action Alternative, South Option	13	3	10
Revised Viaduct Alternative, North Option	38	16	22
Revised Viaduct Alternative, South Option	44	11	33
Partial Cover Lowered Alternative	56	21	35

The preferred alternative would require 17 total business relocations and one non-profit, as shown in Figure 11. Note that the Swansea Elementary School changes are not considered a relocation—the original facilities will be expanded on and not moved.

<sup>60</sup> Letter from Monica Morales (Acting Director, Air Program, EPA) to Chris Horn (Senior Area Engineer, FHWA CO Division) and Vanessa Henderson (I-70 East Environmental Manager, CDOT), January 18, 2017.

<sup>61</sup> I-70 East Record of Decision: Phase 1 (Central 70 Project), Federal Highway Administration, p. 68, January, 2017.

<sup>62</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 5.5, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

**Figure 11**  
*Summary of Business Relocations/Displacements for Project Alternatives*

<b>Alternative/ Option</b>	<b>Neighborhood</b>	<b>Business Relocations</b>	<b>Non-Profit Relocations</b>
No-Action Alternative, North Option	Elyria and Swansea	5	1
	<b>Total</b>	<b>5</b>	<b>1</b>
No-Action Alternative, South Option	Elyria and Swansea	15	—
	<b>Total</b>	<b>15</b>	<b>—</b>
Revised Viaduct Alternative, North Option	Elyria and Swansea	10	1
	Northeast Park Hill	3	—
	Stapleton	1	—
	<b>Total</b>	<b>14</b>	<b>1</b>
Revised Viaduct Alternative, South Option	Elyria and Swansea	22	1
	Northeast Park Hill	3	—
	Stapleton	1	—
	<b>Total</b>	<b>26</b>	<b>1</b>
Partial Cover Lowered Alternative	Elyria and Swansea	13	1
	Northeast Park Hill	3	—
	Stapleton	1	—
	<b>Total</b>	<b>17</b>	<b>1</b>

The preferred alternative would require more residential relocations compared to the other alternatives at 56, and would require more business relocations than all but the South Revised Viaduct Alternative, with 17 impacted business properties and one impacted not-for-profit property. All of the residential relocations are in the Elyria-Swansea neighborhood, as are all but four of the impacted businesses.

The Complainant also alleges the lower property values in Elyria-Swansea, coupled with rising residential, rental and commercial property values city-wide, may make it difficult for relocatees

to find suitable replacement properties within the neighborhood or even in the City or County. FHWA finds insufficient evidence to indicate that relocatees will have difficulty finding suitable replacement properties. Furthermore, the Respondent has committed to using the Uniform Relocation Act's "housing of last resort" option for residents affected by the relocation, making it possible for relocatees to be offered equitable housing options that may be more costly than their current homes.<sup>63</sup>

The Respondent attempted to collect demographic data for the proposed relocatees, per 23 C.F.R. §200.9(b)(4), but the state personnel stated they were unable to collect sufficient data due to the collection form being voluntary. FHWA could infer that, since all residential locations are within the majority Hispanic Elyria-Swansea neighborhood, a majority of relocatees are therefore Hispanic. As demonstrated in Figure 1, Elyria-Swansea residents are 82.89% Hispanic or Latino, while the rest of the neighborhoods in the study area range from 11.91% Hispanic or Latino (Stapleton) to 61.33% Hispanic or Latino (Globeville).

Nevertheless, the Respondent states that it has and will continue to follow the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act). FHWA's Uniform Act regulations at 49 C.F.R. Part 24 provide that owners of real property, and other displaced persons, to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs. The Respondent states that:<sup>64</sup>

Residents will not be required to move unless at least one comparable DSS replacement unit is available. Decent, safe, and sanitary standards are established by federal regulations and conform to applicable local housing and occupancy codes. CDOT will provide comparable replacement housing that is DSS and within the resident's financial means, before any residents will be required to move. If such comparable replacement housing is not available, the regulations allow the agency to provide a replacement housing payment in excess of the statutory maximum as part of the Last Resort Housing process.

In addition, the Respondent has committed in its FEIS to providing \$2 million in funding to develop affordable housing units in the Elyria and Swansea Neighborhood through available programs.<sup>65</sup> This commitment, which will become legally binding when FHWA issued its Record of Decision on January 19, 2017, may help those residents who need additional housing assistance beyond what the Uniform Act provides.

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<sup>63</sup> FHWA conducted interviews with individuals regarding the Right of Way Acquisition, but that matter is discussed in greater detail under the Public Involvement section

<sup>64</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 5.5-19, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

<sup>65</sup> *Id.* Volume 9, p. 9-7. [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol1Ch9\\_Preferred-Alt-Mitigation-Commit.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol1Ch9_Preferred-Alt-Mitigation-Commit.pdf).

Due to the relatively large amount of residential relocations, and the likelihood that these relocations will disproportionately affect Hispanic residents, the preferred alternative could have a disparate and adverse impact on Elyria-Swansea.

### 3. Community Cohesion

The Complainant alleges adverse impacts to community cohesion with the preferred alternative, alleging that the highway will be wider, and some north-south access points and on-ramps will be eliminated. Respondent states that any detrimental effects to community cohesion are mitigated by the preferred alternative, in particular through the cover portion of the Project, which is illustrated in Figure 12.

**Figure 12**  
*Preferred Alternative Cover Illustration*



The Respondent intends for the cover to serve as an active community space for the surrounding residents and local neighborhoods, as well as provide required mitigation for Swansea Elementary School. The Respondent consulted with the City of Denver and Denver Public Schools to arrive at this connectivity solution, including the boundaries of the school playground (school use only areas) and the potential use of the shared space (shared school and community use) on the highway cover. Further, the Respondent believes the integrated design of the highway cover will have a direct impact on the perception of safety and will influence an individual's willingness to use the space. Designing for safety includes meeting the needs of its users; providing diverse and interesting features, and will reconnect the surrounding areas and provide easy and safe connections between these communities for all users, especially

pedestrians and bicyclists. The inclusion of the highway cover helps achieve some broader community goals of livability, quality schools, and safe streets along with supporting the existing communities along the corridor. In addition, the highway cover reduces noise impacts in adjacent areas. The cover also will directly contribute to improved air quality, resulting in PM10 concentrations that are lower at Swansea Elementary School than future conditions without the cover (No-Action Alternative), and indirectly by encouraging more walking and bicycling for short trips to local destinations.<sup>66</sup>

In contrast, the existing facilities do not offer many of the pedestrian and livability features that the cover will provide, as shown in Figure 13.

**Figure 13**

*Photo of Clayton Street and 46<sup>th</sup> Street; East End of Proposed Cover*



The evidence demonstrates that the Project is likely to improve community cohesion in the Elyria-Swansea neighborhoods, with few temporary impacts during construction and overall positive cumulative impacts. While the preferred alternative eliminates one interchange at York Street, it also provides an interchange a half mile west and another 0.5 miles east. Moreover, interchange reconstruction provides longer ramp lanes, reduces weaving and appears an overall safer option. Similarly, the preferred alternative does eliminate one north-south access point at Garfield Street, but it maintains and improves crossings at York Street, Josephine Street, Columbine Street, Clayton Street, Fillmore Street and Steele Street. It further provides an additional crossing over the lowered I-70 at Cook and Monroe Streets. With improvement and/or addition of pedestrian facilities, Elyria-Swansea will enjoy the best connectivity since the construction of the viaduct.

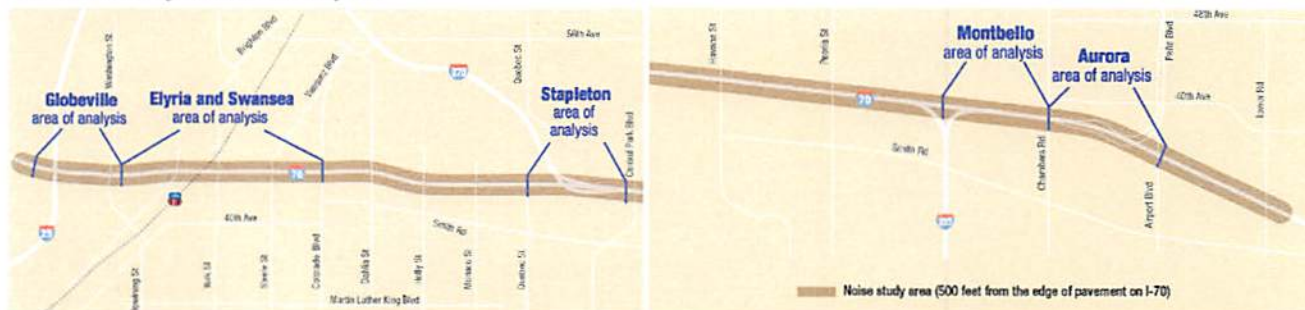
<sup>66</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 5.3-34, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

Finally, other than Swansea Elementary School (which under the preferred alternative realizes improvements for both students and the surrounding community) and the Denver Rescue Mission there are no other public services identified that are adversely affected. Therefore, the preferred alternative is unlikely to cause adverse impacts to the affected community.

#### 4. Noise

The Complainant alleges the preferred alternative will result in higher than permissible noise levels along the I-70 corridor, primarily impacting the Hispanic neighborhoods of Globeville and Elyria-Swansea. Respondent argues that noise mitigation is in compliance with 23 C.F.R. §772 and that it will install a sound wall in the area where noise receptors indicate the need for abatement, as shown in Figure 14.

**Figure 14**  
*Locations of Noise Analysis*



For all federal aid projects, recipients must compare projected noise levels to the minimum standards provided by the FHWA and provide mitigation.<sup>67</sup> These minimums are referred to as Noise Abatement Criteria (NAC) standards. A “traffic noise impact” occurs when design year build condition noise levels approach or exceed the NAC standards for future conditions or over existing noise levels.<sup>68</sup> Noise can be defined as unwanted or undesired sound, and can affect peoples’ daily activities, especially those that occur outdoors. Noise from traffic on roadways can be disruptive at high noise levels if it is not mitigated. Noise typically affects humans in three different ways: intensity, frequency, and variation with time. Noise intensity, or loudness, is determined by how sound pressure fluctuates. Since the range of sound pressure ratios vary greatly over many orders of magnitude, a base-10 logarithmic scale is used to express sound levels in dimensionless units of decibels (dB). The range of noise normally encountered can be expressed by values between 0 (threshold of hearing) dB and 120 dB. A 3-dB change in sound level generally represents a barely noticeable change in noise level, whereas a 10-dB change is typically perceived as a doubling of loudness. Because sensitivity to sound varies from person to person, the A-weighted system— expressed as dBA—is used to provide a value that represents human response. Leq(h) is the hourly equivalent noise level; the equivalent steady-state sound level that contains the same amount of acoustic energy as the time- varying sound level over a one-hour period.

<sup>67</sup> 23 C.F.R. §772.3.

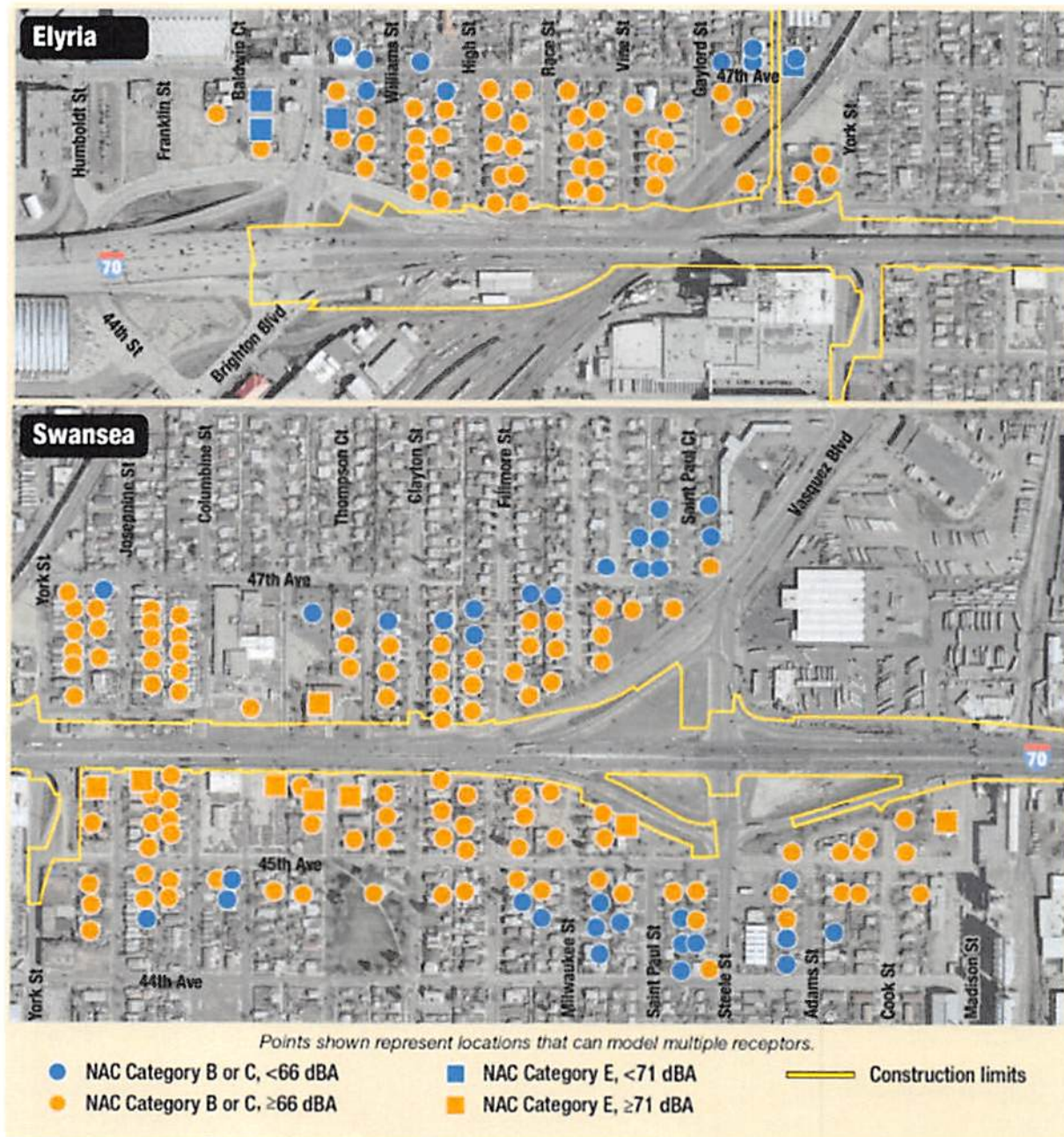
<sup>68</sup> *Id.* §772.5.

Due to the expected increase in traffic volumes along the I-70 East corridor by 2035, and the changes proposed by the design alternatives, the Respondent expects that traffic noise will increase over time for all alternatives. However, the evidence shows that compared to the “no action” alternatives, the preferred alternative will ultimately result in fewer impacts. By 2035, the preferred alternative is projected to have fewer noise impacts compared to the “no action” alternatives, therefore rendering the construction of the preferred alternative a future benefit to the community with regards to noise impacts. Both “no action” alternatives result in impacts to numerous noise receptors primarily because of the higher future (2035) traffic volumes coupled with the highway alignment moving closer to many of the noise receptors.<sup>69</sup> For the “no action” North option, for example, the noise levels in Elyria will range from 64 dBA to 75 dBA, which is 3 dBA to 13 dBA greater than the existing noise range. Of the 136 noise receptors modeled for this option, 116 are anticipated to exceed their respective NAC thresholds. Of the 116 impacted noise receptors, 20 will experience a substantial noise increase. In Swansea, the noise levels range from 61 dBA to 76 dBA, which is 2 dBA lower to 11 dBA greater than the existing noise levels. Of the 297 noise receptors modeled for this option, 233 are anticipated to exceed their respective NAC thresholds. Of the 233 impacted noise receptors, 20 will experience a substantial noise increase. As an example, the impacts for the No Action North alternative are depicted in Figure 14.

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<sup>69</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 5.12-14, Colorado Department of Transportation, January 2016 [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol1Ch5-12\\_Noise.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol1Ch5-12_Noise.pdf)

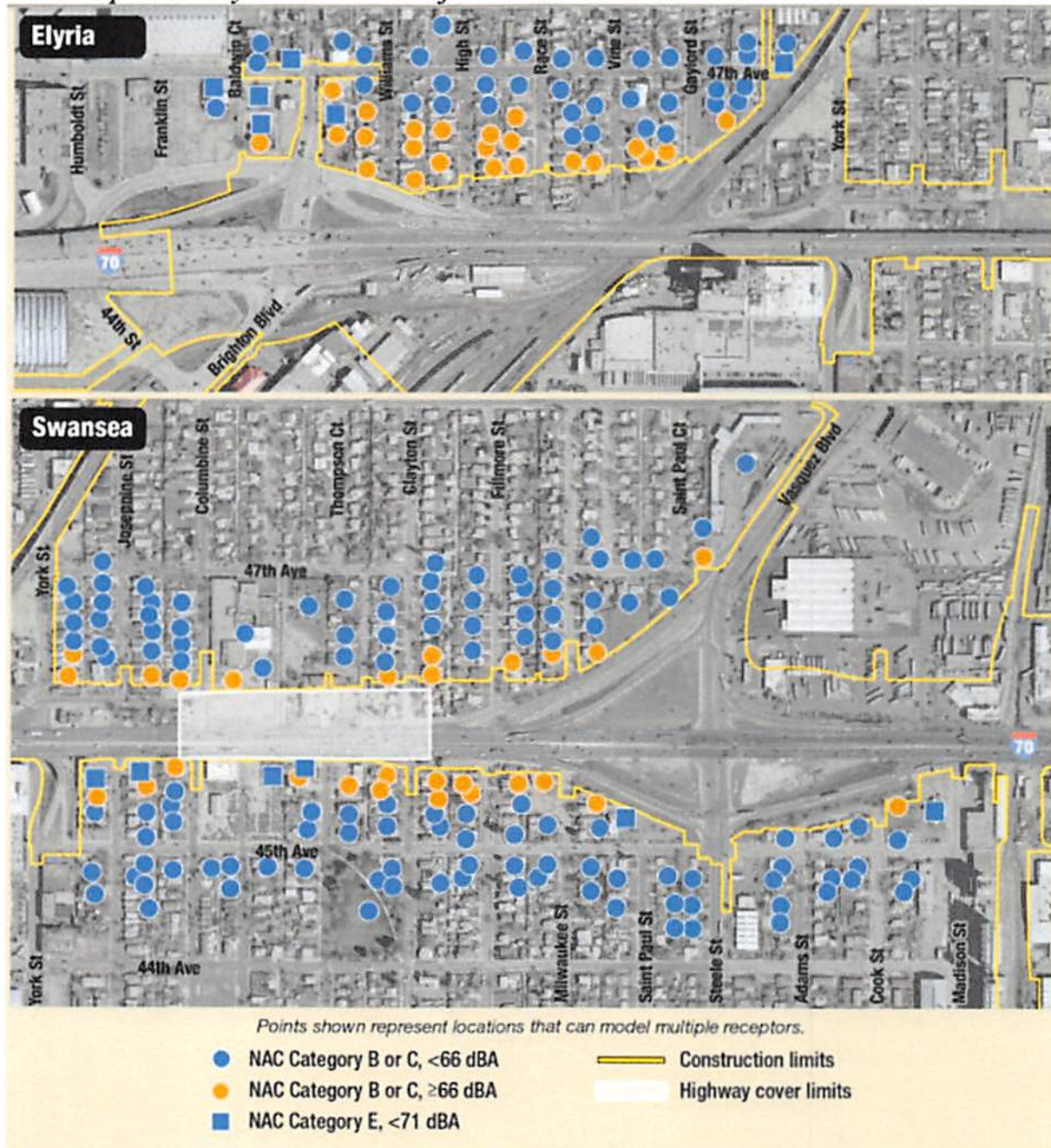
**Figure 14**  
*Noise Impacts in Elyria and Swansea for No-Action Alternative, North Option*



In comparison, of the 129 noise receptors in Elyria, 55 noise receptors (23 modeled locations) are anticipated to exceed their respective Noise Abatement Criteria (NAC) thresholds with the Partial Cover Lowered Alternative. Of these 55 impacted receptors, 11 also would experience a substantial increase in noise. The noise levels in Elyria would range from 60 dBA to 75 dBA, which is 3 dBA lower to 16 dBA greater than the existing noise levels. In Swansea, of the 287 receptors, 50 receptors (21 north of I-70 and 29 south of I-70, 27 modeled locations) would exceed their respective NAC thresholds with the Partial Cover Lowered Alternative. None of the

50 impacted receptors would experience a substantial noise increase. The noise levels for the Partial Cover Lowered Alternative range from 52 dBA to 74 dBA, which is 6 dBA lower to 8 dBA greater than existing noise levels. This is shown in Figure 15.

**Figure 15**  
*Noise Impacts in Elyria and Swansea for Partial Cover Lowered Alternative*



Regarding mitigation, when recipients identify traffic noise impacts, noise abatement shall be considered and evaluated for feasibility and reasonableness.<sup>70</sup> Recipients must determine and

<sup>70</sup> 23 C.F.R. § 772.13(a).

analyze alternative noise abatement measures to abate identified impacts by giving weight to the benefits and costs of abatement and the overall social, economic, and environmental effects by using feasible and reasonable noise abatement measures for decision-making.

Regarding feasibility, recipients must define, and receive FHWA approval for, the number of receptors that must achieve at least a 5 dB(A) reduction for the noise abatement measure to be acoustically feasible and explain the basis for this determination.<sup>71</sup> In addition, recipients must determine it is possible to design and construct the noise abatement measure. Factors to consider are safety, barrier height, topography, drainage, utilities, and maintenance of the abatement measure, maintenance access to adjacent properties, and access to adjacent properties.

Recipients must also consider the reasonableness of noise abatement measures, which involves two factors: (1) the viewpoints of the affected community and (2) cost effectiveness.<sup>72</sup> Recipients shall solicit the viewpoints of all of the benefited receptors and obtain enough responses to document a decision on either desiring or not desiring the noise abatement measure. Regarding cost effectiveness, recipients shall determine, and receive FHWA approval for, the allowable cost of abatement by determining a baseline cost reasonableness value. This determination may include the actual construction cost of noise abatement, cost per square foot of abatement, the maximum square footage of abatement/benefited receptor and either the cost/benefited receptor or cost/benefited receptor/dB(A) reduction. The highway agency must re-analyze the allowable cost for abatement on a regular interval, not to exceed 5 years.

The Respondent's noise analysis was performed as outlined in its CDOT Noise Analysis and Abatement Guidelines (January 2015).<sup>73</sup> Project noise impacts were analyzed for land uses such as homes, parks, schools, and churches that were located within 500 feet of the edge of the pavement of I-70. Typically, noise mitigation is not considered for any industrial or commercial properties unless they have a noise-sensitive function, such as a recording studio or a hotel. Noise impacts were predicted using Traffic Noise Model version 2.5 (TNM), which is supported by the FHWA.<sup>74</sup> To be considered feasible, the Recipient's guidelines state that a noise wall must:<sup>75</sup>

1. Cause at least a 5-dBA reduction for at least one impacted receptor;
2. Not reduce safety, such as reducing sight distance;
3. Be possible to construct with reliable and common engineering practices; and
5. Be no more than 20 feet in height.

Walls along 46th Avenue were placed on the side of the street adjacent to the I-70 mainline. The walls were assumed to be located at the edge of pavement of the proposed roadway. Based on the mitigation analysis performed, the total length of the noise wall complex is proposed to be approximately 2,380 feet in Elyria, 1,370 feet along the north side of I-70 in Swansea, and

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<sup>71</sup> 23 C.F.R. § 772.13(d)(1) et seq.

<sup>72</sup> *Id.* § 772.13(d)(2) et seq.

<sup>73</sup> <https://www.codot.gov/programs/environmental/noise>.

<sup>74</sup> [http://www.fhwa.dot.gov/environment/noise/traffic\\_noise\\_model/](http://www.fhwa.dot.gov/environment/noise/traffic_noise_model/).

<sup>75</sup> Noise Technical Report, I-70 East Final Environmental Impact Statement, p. 19, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol2AttK\\_Noise.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttK_Noise.pdf).

approximately 3,650 feet along the south side of I-70 in Swansea.

TNM analyzed wall heights of eight feet to 20 feet. In Elyria, 12-foot to 20-foot walls were found to be both feasible and reasonable. Walls analyzed from 12-foot to 20-foot were found to be feasible in Swansea north of I-70 and achieve the 7-dBA design reduction goal, but fail to meet reasonability criteria because of the high cost-benefit index. In Swansea south of I-70, 8-foot to 20-foot walls met feasibility requirements, but failed to meet reasonability requirements because an 8-foot wall did not benefit any receptors by 7-dBA and 10-foot to 20-foot wall heights and did not result in an acceptable cost-benefit index value.

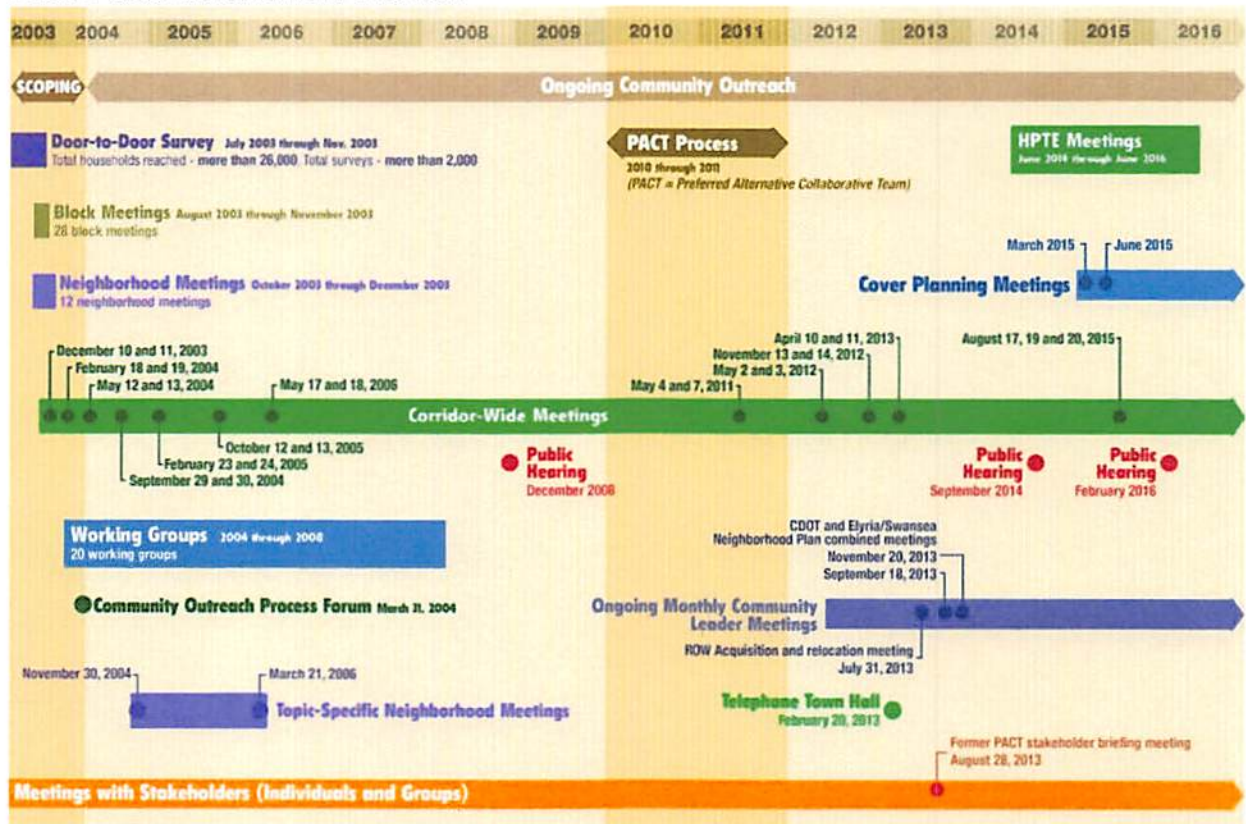
In Swansea, Respondent found noise abatement unreasonable because they failed to lower the noise by required decibels. Elyria will receive 2,380 feet of noise walls, as receptors indicated 12 to 20 foot walls to be both feasible and reasonable.

Because the preferred alternative will have a lesser adverse impact compared to the “no action” alternative, FHWA finds there is insufficient evidence that the preferred alternative would adversely impact Elyria-Swansea on the basis of noise. Were the project not to be constructed at all, Elyria-Swansea would face higher noise levels in the future than if the preferred alternative were built.

## **5. Public Involvement**

One of the prevailing principles of transportation planning and project development is need for early, continuous and extensive public involvement, including both access to information and solicitation of public input. The Complainant alleges that Respondent failed to provide adequate consultation with the minority communities in the selection of the preferred alternative. Respondent argues that public involvement was and continues to be an integral part of the project study, particularly with regard to the Globeville and Elyria-Swansea communities and those who are Limited English Proficient (LEP). The Respondent’s overall public involvement process for the Project is found in Figure 16.

**Figure 16**  
**FEIS Public Involvement overview**



In Chapter 10 of the Final EIS, Respondent provides a detailed summary of project outreach, beginning as early as 2003 and including both agency coordination and community outreach.<sup>76</sup> The Respondent produced flyers, print media, newsletters, and email/phone blasts. For example, agency coordination for the 2008 Draft EIS included both an Environmental Justice Compliance Committee and Air Quality Compliance Committee to ensure specific concerns were addressed and the results in compliance with federal laws and related authorities. Community outreach included a number of FHWA-identified strong practices, including hiring community residents to share project information; using faith-based organizations to distribute project information; providing food and child care at project events to promote attendance; taking project information into the impacted neighborhoods and collecting survey responses; holding block meetings to build rapport with communities and better understand needs and values of specific parts of a neighborhood; and tiered meetings to collect information from entire neighborhoods as well as the perspectives of the overall corridor. The community outreach included members of the Elyria-Swansea neighborhoods, and the Respondent held neighborhood-specific meetings for Elyria-Swansea.

<sup>76</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 10, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

To ensure continued involvement, Respondent formed project working groups focused on particular areas of concern, as well as meetings specific to each neighborhood, including Elyria-Swansea.<sup>77</sup> The groups consisted of interested members of the communities who then worked with transportation and project specialists to help evaluate the project alternatives and impacts. When this and other methods failed to identify a preferred alternative after the 2008 Draft EIS, Respondent formed the Preferred Alternative Collaborative Team (PACT), consisting of government agencies at all levels as well as representatives from community residents, businesses and interest groups. In 2011, this effort too failed to reach consensus on a project alternative beyond general agreement that the project alignment should remain in the current I-70 footprint.

With the assistance of the City of Denver, Respondent participated in a series of working group sessions, prompting re-examination of the previously eliminated alternatives and the eventual development of a hybrid alternative that both met project needs and addressed the documented concerns of the public and stakeholders, the preferred Partial Cover Lowered Alternative. Since then, involvement has continued with targeted meetings, notably with Elyria-Swansea stakeholders, to discuss impacts to Swansea Elementary School and other local issues. Respondent conducted telephone town hall meetings in English and Spanish, at least one of which addressed project alternatives/impacts and resulted in 2600 participants. Finally, Respondent provided an information kiosk near the Swansea Elementary School to advise the community of project contacts, announcements and opportunities for involvement. It also opened project offices within the project corridor to provide information and undertake specific outreach tasks, such as addressing right of way issues. Respondent committed to maintaining an office during construction to ensure fast and efficient public communication.

Respondent's project website, available in both English and Spanish,<sup>78</sup> provides details on past public engagement and solicits input from the public. The site's visualization techniques include maps, schedules, project documents, high definition "fly over" videos and updated technical studies and summaries, among others. The Respondent displays photos to display its public involvement with headings such as "Walk-ins Welcome" and "Your Opinion is Important." The Respondent also created a 29-minute video that provides a history of Globeville and Elyria-Swansea, including its use for heavy industry and disenfranchisement during construction of the interstate system. The video features audio clips from residents and stakeholders expressing their love of and concern for the community, and not all of whom were or are project supporters.

Even with an extensive record of public involvement activities, FHWA did discover during its investigation that there was potential for improvement. For example, FHWA interviewed a number of witnesses who expressed confusion about the right of way process and whether it would impact their residence. One witness shared that information on right of way relocation was not distributed to her landlord, the property owner. Another said she was unaware of any right of way specific meetings in either Spanish or in English. Witnesses generally agreed that the impacted residents were concerned about two things: 1) Respondent did not provide

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<sup>77</sup> E.g. CDOT and City and County of Denver I-70 East Elyria and Swansea Joint Public Meeting Summary, [http://www.i-70east.com/meetingminutes/ElyriaSwansea/ESNPMMeeting\\_11-20-13\\_MeetingSummary.pdf](http://www.i-70east.com/meetingminutes/ElyriaSwansea/ESNPMMeeting_11-20-13_MeetingSummary.pdf).

<sup>78</sup> See <http://www.i-70east.com/index-es.html>.

sufficient updates or new information on right of way; and 2) affected persons would not have enough time to find affordable housing and move.


Though overall not constituting an adverse impact, FHWA will make recommendations to the Respondent to ensure that public involvement is meaningfully engaging the public through all aspects and phases of a project.

### 6. Summary of Benefits and Mitigation of Impacts

The Complainant suggests that, as a small minority community bisected by I-70, the Elyria-Swansea neighborhoods will realize fewer project benefits compared to other affected populations in the Project area, as well as the City of Denver. When determining the level of adverse impact, the countervailing benefits accruing to impacted communities from a proposed project or policy are to be weighed against the harms.<sup>79</sup> When recipients take actions to mitigate impacts, they must be balanced against the adverse impacts to determine if the project as a whole is adverse.

The weight of the evidence shows that many of the project benefits, which include the Project cover features, appear directly targeted toward Elyria-Swansea. Furthermore, as previously stated in this LOF, the preferred alternative will result in less adverse impacts to noise and reduced exposure to air pollution when compared to all alternatives, particularly the “no action” alternative. While it is possible the Project may have an adverse and disparate impact on the neighborhood due to the number of residential relocations in Elyria-Swansea, the Respondent has made commitments to mitigate that impact to the extent possible. The Respondent has committed to an extensive list of mitigation features targeted toward the natural and human environments. A summary of the mitigation is found in Figure 17.

**Figure 17**  
*Summary of Benefits; Impacts and Mitigation*

Benefits all users	Benefits to all affected neighborhoods	Impacts	Mitigation
Less congestion on free lanes by addition of managed lanes	Enhanced, improved north/south connectivity	Relocation of residences and businesses.	<div style="text-align: center;">  </div> Provide \$2 million in funding to develop affordable housing units in the Elyria and Swansea Neighborhood through available programs Piloting hiring preference programs for work on the project Helping essential businesses remain in the same

<sup>79</sup> See, e.g., *NAACP v. Wilmington Med. Ctr.*, 657 F.2d at 1340 (3d Cir. 1980); see also *United States v. Bexas County*, 484 F. Supp. 855, 859 (W.D. Tex. 1980).

			community
Improving safety due to fewer interchanges, longer ramps and less traffic weaving		Impacts to 105 noise receptors and air quality issues, particularly during construction	Participate in and fund city and related programs to facilitate access to fresh food; affordable housing
			Provide residents near highway from Brighton to Colorado Blvd (Elyria-Swansea, primarily) with A/C and storm windows
Faster east-west access, particularly for emergency vehicles	Removal of truck stop and resulting source of pollution	Visual obstruction by safety barriers, isolating community views	Remove the viaduct, lower the highway, and cover portions of the highway to include space for community and neighborhood activities
			Enlist community to develop project aesthetics and design guidelines
Maintaining a freight corridor within the existing interstate footprint	Preserving large area employer	Moving Highway closer to school	Redesign and reconstruct the school playground; this will include the adjacent parcels as part of the elementary school site and will eliminate Elizabeth Street between 46th Avenue and 47th Avenue and 46th Avenue between Clayton Street and Columbine Street will be removed to allow for a connection between Swansea Elementary School and the landscape on the highway cover
	Preserving location of Elementary School		
	Improving safety due to lighting and improved pedestrian facilities		Provide new HVAC, doors, windows for Swansea

			Elementary School to reduce noise and dust during construction
		Financial burden to minority community that may not be able to afford to use managed lanes	Research methods for providing access assistance for those in low income areas
			Conduct or facilitate job fairs and ready-to-work training programs

## 7. Conclusion Regarding Adverse, Disparate Impacts

After examining the likely impacts of the selection of the preferred alternative, taking into consideration project benefits and mitigation, FHWA finds that there is insufficient evidence that the Project will create adverse, disparate impacts.

### b. Substantial Legitimate Justification

FHWA’s determination that there is insufficient evidence of disparate impacts ends the Title VI analysis of this matter. FHWA finds, however, that even if the selection of the preferred alternative resulted in adverse, disparate impacts, the Respondent has provided a substantial legitimate justification for its actions and shown that a less discriminatory alternative has not been identified. After a prima facie showing of disparate impact, the investigating agency must determine whether a “substantial legitimate justification” exists for the allegedly discriminatory practice. The investigating agency must determine whether the challenged policy is “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.”<sup>80</sup> The justification must bear a “manifest demonstrable relationship” to the challenged policy.<sup>81</sup> This analysis is similar to the “business necessity” part of the Title VII disparate impact analysis.

As stated in more detail in Section II of this document, the overall purposes and needs for the Project stem from infrastructure deficiencies, limited capacity, safety concerns, and community support. Beyond the aforementioned structural deficiencies for the viaduct, the Respondent’s travel model shows that I-70 between I-25 and Tower Road is one of the most heavily traveled and congested highway corridors in the region and state. The largest factor contributing to the increase in traffic on I-70 for the Build Alternatives is the increase of capacity which results in a decrease in drivers that would use local streets to complete trips. Maximizing the capacity of I-70 will result in lower volumes on the local streets, including 46th Avenue, as drivers will choose to use the freeway for a faster trip. Conversely, not improving I-70 capacity increases the traffic on local streets like 46<sup>th</sup> Avenue and may result in an increase in crashes and safety issues along

<sup>80</sup> *Sandoval*, 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*, 532 U.S. 275 (2001) (quoting *Elston*, 997 F.2d at 1413).

<sup>81</sup> *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d. 1403, 1418 (11th Cir. 1985); See, e.g., *Elston*, 997 F. 2d at 1413 (In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e. there must be an “educational necessity” for the practice).

with reducing the overall quality of life for the neighborhood residents.<sup>82</sup> Increasing capacity is necessary because existing traffic models predict that overall demand for I-70 will increase in the future, without the improved capacity more traffic will be diverted onto the local street network. However, with capacity improvements, even in the form of managed lanes, traffic that already wants to use I-70 will now have the ability to use the facility and not divert to the local streets.<sup>83</sup>

FHWA finds the FEIS data support that the Respondent has established purposes and needs that are legitimate, important, and integral to the [recipient's] institutional mission and that the preferred alternative bears a manifest demonstrable relationship to those needs.

### **c. Less Discriminatory Alternatives**

FHWA does not find evidence that a less discriminatory alternative exists in this case. If a substantial legitimate justification for the recipient's discriminatory policy or practice is identified, the investigating agency must also determine whether there are alternative practices that may be comparably effective with less disparate impact. Title VI requires recipients to implement a "less discriminatory alternative" if it is feasible and meets their legitimate objectives.<sup>84</sup> If a substantial legitimate justification for the recipient's discriminatory policy or practice is identified, the investigating agency must also determine whether there are alternative practices that may be comparably effective with less disparate impact. Title VI requires recipients to implement a "less discriminatory alternative" if it is feasible and meets their legitimate objectives.<sup>85</sup> The Complainant alleges Respondent failed to adequately study project alternatives that would either completely remove and relocate the I-70 corridor, or would otherwise realign it to follow an existing rail corridor—and that these alternatives would have had a lesser adverse impact on the Elyria-Swansea neighborhoods. Specifically, the Complainant believes Respondent must include the Reroute (removing the Brighton Blvd. to Colorado Blvd. viaduct and realigning I-70 around Denver using the existing I-270 and I-76 corridors) in the FEIS alternatives evaluation.

However, the Respondent did acknowledge the public comments regarding the Reroute in the STIP development, and the Respondent did offer a written response in that regard. Later, the Respondent provided a study of the alternatives, including the Reroute, which is available on the Project website and was published in 2012 and updated in 2015.<sup>86</sup> There, the Respondent showed evidence that the Reroute would result in major traffic increases and shift more traffic onto local streets. Taken as a whole, the Reroute was eliminated because it did not meet the purpose and need of the Project, which is why it was not considered as an alternative in the FEIS. Moreover, while the PACT was unable to select a suitable alternative in the wake of the 2008 Draft EIS, it did conclude that the existing alignment should be retained as it most closely matched project objectives.

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<sup>82</sup> I-70 East Final Environmental Impact Statement and Section 4(f) Evaluation, Volume 1, Section 4-33, Colorado Department of Transportation, January 2016, [http://www.i-70east.com/FinalEIS/I-70EastEIS\\_FEIS-Volume1.pdf](http://www.i-70east.com/FinalEIS/I-70EastEIS_FEIS-Volume1.pdf).

<sup>83</sup> *Id.* at 4-33.

<sup>84</sup> *Elston*, 997 F.2d at 1407, 1413; *Georgia State Conf.*, 775 F.2d at 1417.

<sup>85</sup> *Elston*, 997 F.2d at 1407, 1413; *Georgia State Conf.*, 775 F.2d at 1417.

<sup>86</sup> Alternative Analysis Technical Report Addendum, I-70 East Final Environmental Impact Statement, Appendix A to Attachment C, [http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS\\_Vol2AttC\\_Alternative-Analysis.pdf](http://www.i-70east.com/FinalEIS/chapters/I-70EastFEIS_Vol2AttC_Alternative-Analysis.pdf).

FHWA finds the available evidence supports the Respondent's justifications for eliminating these alternatives from consideration.

**V. Conclusion**

Based on the available data and information, FHWA finds that there is insufficient evidence that the Project, itself—and the Respondent's advancement of the Project when it approved the 2017-2020 STIP—will create adverse, disparate impacts. FHWA finds, however, that even if the selection of the preferred alternative would result in adverse, disparate impacts, the Respondent has provided a substantial legitimate justification for its actions and shown that a less discriminatory alternative has not been identified.

FHWA looks forward to working with the Respondent to continue to improve its compliance with Title VI and assist the affected community for the Project.

This letter concludes FHWA's investigation, and the case will be closed with no further action. If you have any questions regarding this matter, please contact Kevin Resler, FHWA National Title VI Coordinator, at (202) 366-2925, or [kevin.resler@dot.gov](mailto:kevin.resler@dot.gov).

Sincerely yours,



Irene Rico

Associate Administrator for Civil Rights

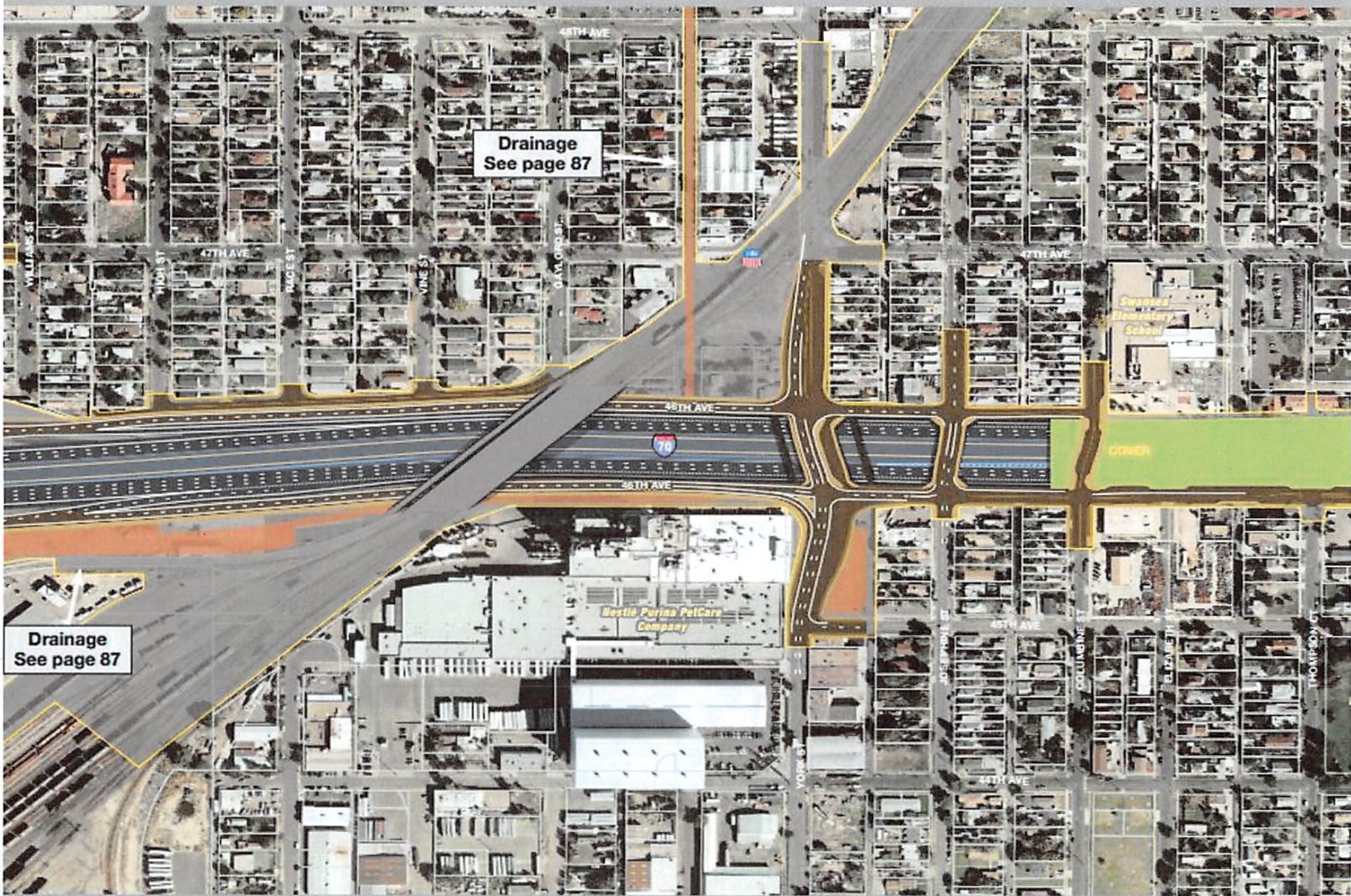
cc: John Cater, Division Administrator, FHWA CO Division Office  
Alicia Nolan, Assistant Division Administrator, FHWA CO Division Office  
Nicole Bumpers, Civil Rights Program Manager, FHWA CO Division Office  
Carey Shepherd, Civil Rights Program Manager, FHWA FL Division Office  
James Esselman, Senior Attorney Advisor, FHWA Office of Chief Counsel (HCC-40)  
Yvette Rivera, Associate Director, Equity and Access Division



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

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**APPENDIX**  
**Map of Preferred Alternative**



Proposed highway and ramps  
 Proposed street configuration  
 Proposed sidewalk and median  
 Existing Pavement  
 General-purpose lanes  
 Managed lanes  
 Striped buffer  
 Drainage  
 Construction limits  
 Parcel boundaries

Provided in this attachment are graphical representations of the alternatives evaluated in the Final EIS. They show the alternatives at a point in time that is preliminary in design, and details are subject to change through final design and construction. The information presented in this attachment is intended for illustration purposes only, and is not suitable for site specific decision making or impact determinations.

Partial Cover Lowered Alternative • Managed Lanes Optic



Proposed highway and ramps

Proposed sidewalk and median

Existing Pavement

Central-purpose lanes

Managed lanes

Striped buffer

Drainage

Construction limits

Parcel boundaries

*Noted in this attachment are graphical representations of the alternatives evaluated in the Final EIS. They show the alternatives at a point in time that is preliminary in design, and details are subject to change through final design and construction. Presented in this attachment is intended for illustration purposes only, and is not suitable for site specific decision making or impact determinations.*

