



By email and hand delivery

November 15, 2016

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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.¹ 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).

¹ 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.²

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

² *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.³ 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.⁴ Because CDOT receives financial assistance from USDOT, it is subject to Title VI and USDOT's implementing regulations.

³ 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.

⁴ 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).⁵

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, 2016.⁶

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 § 21.11.⁷

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

⁵ 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 (“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.

⁶ 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).

⁷ 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.⁸ 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.⁹ 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.¹⁰ The neighborhood remains highly industrial today; only 16% of Elyria-Swansea is made up of residences, parks, recreation facilities, and schools.¹¹ 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.¹² Elyria-Swansea is also younger, poorer, less educated, and has more monolingual Spanish speakers and families with children than Denver as a whole.¹³ Globeville is also predominantly Latino and low-income.¹⁴ 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.¹⁵ There is no grocery store and few other retail establishments in Globeville or Elyria-Swansea, a community of 10,000 people.¹⁶ The neighborhoods' residents must travel as much as twice as far as the average Denver resident to

⁸ 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 ("ESNP") (Exhibit 7).

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

¹⁰ 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 ("HIA") (Exhibit 8).

¹¹ ESNP at 15.

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

¹³ HIA at 14.

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 6.

buy food for their families.¹⁷ 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.¹⁸

Elyria-Swansea has been identified as the “most polluted zipcode in Colorado.”¹⁹ 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.²⁰ 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.²¹ 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.²² 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

¹⁷ *Id.*

¹⁸ *Id.* at 16–17.

¹⁹ 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 (Exhibit 10).

²⁰ HIA at 5–6.

²¹ *Id.* at 12.

²² *Id.*

smelter, now a Superfund site.²³ 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.²⁴ 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.²⁵ 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].”²⁶ 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.”²⁷ The MIS, based in part on community input,²⁸ included a range of transit options, including buses and light rail,²⁹ as well as a range of

²³ *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.

²⁴ 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).

²⁵ See *id.* at ES-12.

²⁶ STIP at 7.

²⁷ 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 (“MIS”) (Exhibit 16). USDOT partially funded the study. See *id.* at Cover Page.

²⁸ See *id.* at 7.

alignment alternatives including not only I-70's current location, but also several other East-West routes: 56th Avenue, Smith Road, Martin Luther King Boulevard, and Colfax Avenue.³⁰ 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-70.³¹ In 2006, the analysis was split into separate transit and highway components, with CDOT and FHWA continuing to collaborate on highway components.³² 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.³³

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,³⁴ including six options that would have reduced its impact, including options that re-routed traffic around Elyria-Swansea.³⁵ 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.³⁶ This route travels through a heavily industrialized and sparsely populated area until it intersects with I-25, a north-south highway.³⁷ At I-25, I-270 meets I-76, which then proceeds southeast until it intersects again with I-70.

²⁹ See *id.* at Ch. 4 p. 22, available at http://www.i-70east.com/reports/EastCorridorMIS_July1997_chapters4.pdf (Exhibit 17).

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

³¹ 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 ("DEIS") (Exhibit 18).

³² *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.

³³ *Id.* at S-3.

³⁴ *Id.* at 3-6 to 3-11.

³⁵ *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.

³⁶ *Id.* at 3-14.

³⁷ 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.³⁸ Two more options for rerouting the highway around Elyria-Swansea were eliminated at the next stage, “comparative screening.”³⁹ 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.⁴⁰

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.⁴¹ Several commenters asked CDOT to consider alternatives aside from expanding the highway.⁴² Public comments repeatedly expressed concern about air quality impacts, and advocated for the need for a comprehensive health impact assessment.⁴³ But CDOT failed to conduct such an assessment, and, eight years after releasing the DEIS, still has not done so

³⁸ DEIS at 3-18; *see also id.* at 3-25, 3-28.

³⁹ *Id.* at 3-23.

⁴⁰ *See id.* at 3-47, 3-55.

⁴¹ *See generally* CDOT, *DEIS Public Release Comments* (May 14, 2009), http://www.i-70east.com/DEIS/DEIS_PublicReleaseComments_043009.pdf (“DEIS Comments”) (Exhibit 19).

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

⁴³ *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.⁴⁴ 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.⁴⁵

Between the issuance of the DEIS and SDEIS, CDOT sought public comment,⁴⁶ 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.⁴⁷ 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."⁴⁸ 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.⁴⁹

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.⁵⁰ Multiple groups explained the need for a health impact assessment to understand the air pollution

⁴⁴ 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 ("SDEIS") (Exhibit 20).

⁴⁵ *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).

⁴⁶ *See* SDEIS at 3-3.

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

⁴⁸ SDEIS at 3-11.

⁴⁹ *Id.* at 3-12 to 3-13.

⁵⁰ *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 (Exhibit 21); CDOT, *SDEIS Public Comments with Attachments*, 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 (Exhibit 23); CDOT, *SDEIS Comments Received in Spanish*, http://www.i-70east.com/SDEIS/I-70EastSDEIS_Comments_Public-Espanol.pdf (Exhibit 24).

impacts of the project on the community.⁵¹ Many commenters expressed concern about the adequacy of mitigation measures to protect public health.⁵² 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.”⁵³ CDOT chose the latter as the preferred alternative.⁵⁴ 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.⁵⁵ CDOT reiterated verbatim the reasons it gave for rejecting the various reroute options in the SDEIS.⁵⁶

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.⁵⁷ In Elyria-Swansea, the highway will more than triple in width, ballooning from 85 feet to 278 feet wide.⁵⁸ Two additional lanes in each direction are added through Elyria-Swansea, in addition to shoulders and two frontage roads.⁵⁹ 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.⁶⁰

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]

⁵¹ 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 (Exhibit 25) at 10 (Comments of Clayton United); 61 (Comments of Globeville, Elyria-Swansea Organizers Group); 89 (Comments of Robert E. Yuhnke & Sierra Club).

⁵² 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).

⁵³ FEIS at 3-2 to 3-5.

⁵⁴ *Id.* at ES-12.

⁵⁵ *Id.* at 3-20.

⁵⁶ *Id.* at 3-39 to 3-44.

⁵⁷ *Id.* at 3-6.

⁵⁸ See *id.* at 3-15.

⁵⁹ See *id.* at 3-11, 3-15.

⁶⁰ See *id.* at ES-10, ES-12, 4-54.

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

The residents whose homes will be demolished will be compensated for the taking of their property,⁶⁶ 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.⁶⁷ 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 2012.⁶⁸ 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.⁶⁹ 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 \$85,000.⁷⁰ 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.”⁷¹ The preferred alternative will also result in one non-profit and 17

⁶¹ *Id.* at 5.5-3.

⁶² *Id.* at 5.5-4.

⁶³ 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).

⁶⁴ See FEIS at 5.5-15.

⁶⁵ *Id.* at 5.5-4.

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

⁶⁷ 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).

⁶⁸ FEIS at 5.5-8.

⁶⁹ 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.

⁷⁰ FEIS at 5.5-8.

⁷¹ *Id.*

commercial buildings being destroyed, including the aforementioned long-term stay hotel.⁷² All but four of the businesses are in Elyria-Swansea.⁷³ 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.⁷⁴

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.⁷⁵ 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.⁷⁶ 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.⁷⁷ To mitigate the impacts of expanding the highway in Elyria-Swansea, the preferred alternative would partially cover the interstate near Swansea Elementary School.⁷⁸ 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).⁷⁹ 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.⁸⁰ 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,

⁷² *Id.* at 5.5-15.

⁷³ *Id.*

⁷⁴ Compare *id.* at 5.3-39 with STIP at 8.

⁷⁵ 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).

⁷⁶ 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 (Exhibit 31).

⁷⁷ 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).

⁷⁸ See *id.* at 9-5.

⁷⁹ See *id.* at 3-11, 3-13 (diagram).

⁸⁰ *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.⁸¹

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.⁸² Commenters again asked CDOT to prepare a more detailed health assessment due of the project's air pollution impacts.⁸³

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.⁸⁴ 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."⁸⁵ 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."⁸⁶

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."⁸⁷ CCC

⁸¹ See *id.* at 3-17 to 3-18.

⁸² See CDOT, *FEIS Addendum: Citizen and Public Comments*, 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 (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).

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

⁸⁴ 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).

⁸⁵ ESNA Comments 2.

⁸⁶ *Id.* at 2-3.

⁸⁷ 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.⁸⁸ CCC "demand[ed]" that the I-270/I-76 reroute alternative "be studied thoroughly before proceeding with this project."⁸⁹

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.⁹⁰

CDOT and FHWA are expected to issue a ROD, ending the NEPA process, in early 2017.⁹¹ 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.⁹² 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.* § 450.200.⁹³ 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

⁸⁸ *Id.* at 1–2.

⁸⁹ *Id.* at 2.

⁹⁰ *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).

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

⁹² 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>.

⁹³ *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 (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.”⁹⁴ CDOT also acknowledges that Title VI applies to the STIP process.⁹⁵

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.”⁹⁶ 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–FY2020.⁹⁷ CDOT briefly described the project and its purpose—while highlighting “public involvement” and that it will “provide new community space.”⁹⁸ It then committed that “CDOT and its planning partners intend to move forward with Phase 1 of

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

⁹⁵ 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 (Exhibit 40).

⁹⁶ STIP at Self-Certification p. 1.

⁹⁷ *Id.* at Overview p. 7.

⁹⁸ *Id.*

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

Later in the STIP, CDOT acknowledged the public comments it had received about including the I-70 project in the STIP.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.”¹⁰⁴

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-21.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.* at Public Involvement p. 7.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 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).

¹⁰⁶ *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)).

¹⁰⁷ *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.¹⁰⁸ 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.¹⁰⁹ Accordingly, the Comments concluded that there was no basis for CDOT to certify that it complied with Title VI in the STIP.¹¹⁰ The Comments requested that USDOT disapprove the STIP and return it to CDOT for further analysis.¹¹¹

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.¹¹²

At last, CDOT provided a response to the concerns, explaining that “[a]t this time, CDOT is not removing Central 70 from the STIP.”¹¹³ 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.”¹¹⁴

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.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 1.

¹¹² 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.*

¹¹³ *Id.*

¹¹⁴ *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.”¹¹⁵ 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_{2.5}”) emissions that cause asthma, heart attacks, and premature death.¹¹⁶ Many studies have also linked highway proximity to adverse birth outcomes. Elyria-Swansea already faces disproportionately high rates of PM_{2.5} emissions and incidences of these related health conditions compared to Denver and Colorado as a whole.¹¹⁷ The increased number of diesel trucks on the expanded highway also emit air toxics, such as benzene, which are carcinogens.¹¹⁸ In the STIP, CDOT not only failed to assess this increase in pollution, but also the cumulative impact of that pollution and existing air

¹¹⁵ 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.

¹¹⁶ HIA at 14.

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

¹¹⁸ *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 (Exhibit 43).

pollution.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²²

¹¹⁹ FEIS at 6-24.

¹²⁰ *Id.* at 5.2-28.

¹²¹ *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).

¹²² *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.¹²³ 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).¹²⁴ 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.¹²⁵

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.¹²⁶ Elyria-Swansea’s residents are also 6.1% African-American, and 1.9% American Indian.¹²⁷

By comparison, Denver as a whole is 31.8% Latino, 28.3% low-income, and 13.9% Limited English Proficiency.¹²⁸ 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.¹²⁹ 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.¹³⁰ No matter what group it

¹²³ *See id.* at 5.12-11 to -23.

¹²⁴ *See id.* at 5.12-23 to -25.

¹²⁵ *Id.* at 5.12-48.

¹²⁶ *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).

¹²⁷ FEIS at 5.2-21.

¹²⁸ *Id.* at 5.2-23, -24, -29.

¹²⁹ *Id.* at 5.2-23, -24, -29.

¹³⁰ *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.¹³¹

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. 7–8.¹³² 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.”¹³³ 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).¹³⁴ A 2003 study found higher than expected rates of several cancers in Globeville and Elyria-Swansea.¹³⁵ 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).¹³⁶ 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.¹³⁷ 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 84.¹³⁸ 80216, Elyria-Swansea’s zip code, is the most polluted in Colorado.¹³⁹

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.

¹³¹ 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.

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

¹³³ HIA at 16.

¹³⁴ *Id.*

¹³⁵ *Id.* at 17.

¹³⁶ *Id.* at 16.

¹³⁷ *Id.* at 6.

¹³⁸ 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).

¹³⁹ 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.”¹⁴⁰ 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.¹⁴¹ 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.¹⁴² The I-270/I-76 reroute was rejected in part because it would increase travel time for traffic travelling all the way through Denver.¹⁴³ 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.¹⁴⁴ 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.”¹⁴⁵ 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.¹⁴⁶ 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.”¹⁴⁷ 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.

¹⁴⁰ FEIS at 2-2.

¹⁴¹ *Id.* at 4-27.

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

¹⁴³ SDEIS 3-12 to 3-13.

¹⁴⁴ HIA at 6.

¹⁴⁵ 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).

¹⁴⁶ *Id.* at 5.3-12, -29, -30.

¹⁴⁷ *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.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ Children at Swansea

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

¹⁴⁹ *See id.* at 3-13.

¹⁵⁰ *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).¹⁵¹ 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.¹⁵² 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.¹⁵³ 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

¹⁵¹ *Id.* at 9-12 to -14.

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

¹⁵³ *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.¹⁵⁴ This alternative route is much less densely populated, and mostly goes through industrial, rather than residential areas.¹⁵⁵ 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.

¹⁵⁴ *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 (Exhibit 47).

¹⁵⁵ *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.¹⁵⁶ 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).

¹⁵⁶ 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
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