

**b(6) Privacy**

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April 4, 2022

**By email and certified mail**

*For the U.S. Environmental Protection Agency:*

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*For the U.S. Department of Justice:*

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**Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7**

Dear Director Simons and Deputy Chief Neal:

**b(6) Privacy** submits this Complaint on behalf of its residents alleging that the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) administers a program that is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the U.S. Environmental Protection Agency’s (“EPA”)

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implementing regulations at 40 C.F.R. part 7, and runs contrary to Executive Orders 12,898,<sup>1</sup> 13,166,<sup>2</sup> and 13,985,<sup>3</sup> and Administrator Michael Regan’s directive to EPA regional offices<sup>4</sup> because it unjustifiably creates and perpetuates a disproportionately high pollution burden on racial and ethnic minorities, Limited English Proficient (“LEP”) people, and low-resource people.

This Complaint concerns TCEQ’s minor source air quality permit program that EPA has delegated authority to Texas to administer under the Clean Air Act (“CAA”). In particular, this Complaint concerns two TCEQ minor source New Source Review (“NSR”) permits specifically for concrete batch plants (“CBPs”)—the CBP Standard Permit and the CBP Standard Permit with Enhanced Controls. CBP operators in the County primarily use the CBP Standard Permit, which is a generally applicable permit used by hundreds of CBP operators across the State of Texas and by over one hundred CBP operators in the County.

On September 22, 2021, the TCEQ Commissioners adopted an amendment to this permit (“2021 CBP Standard Permit”) and this amendment is the triggering action for this Complaint.<sup>5</sup> The purpose of the amendment, according to TCEQ, was to correct a so-called “clerical error” discovered through a permit challenge where community members were able to demonstrate that TCEQ failed to model and consider the health impacts of cancer-causing crystalline silica.<sup>6</sup> This permit challenge was one of the very few times in TCEQ’s history where the agency denied a “registration” (agency term) under the CBP Standard Permit. Despite opposition from Harris County<sup>7</sup> and others, the 2021 amendment re-adopted the permit’s previous version, the 2012 CBP

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<sup>1</sup> Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

<sup>2</sup> Exec. Order 13,166, Guidance to Environmental Protection Agency Federal Financial Aid Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 Fed. Reg. 35,602 (Jun. 25, 2004).

<sup>3</sup> Exec. Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7,009 (Jan. 25, 2021).

<sup>4</sup> Email from Michael Regan, EPA Administrator, to EPA employees, “Message from The Administrator,” (Apr. 7, 2021) (directing EPA offices to “[t]ake immediate and affirmative steps to incorporate environmental justice considerations into their work, including assessing impacts to pollution-burdened, underserved, and Tribal communities in regulatory development processed and considering regulatory options to maximize benefits to these communities.”).

<sup>5</sup> TCEQ, Order Issuing an Amendment to Air Quality Standard Permit (effective Sept. 22, 2021 and order signed Oct. 5, 2021), TCEQ Docket No. 2021-0493-MIS, Non-Rule Project No. 2021-016-OTH-NR (“2021 Amendment TCEQ Order”), included as Attachment 1 with the agency’s response to public comment (“RTC”); *also see*, TCEQ, Archived video Commissioners Agenda – September 22, 2021 (“Sept. 22, 2021 TCEQ Commissioners Meeting”), [https://www.youtube.com/watch?v=R1ep\\_9QwL9I](https://www.youtube.com/watch?v=R1ep_9QwL9I) (minute 45:40).

<sup>6</sup> *See* Application of Bosque Solutions, LLC for Permit No. 152013, Concrete Batch Plant, Tarrant County, Texas, Proposal for Decision at 17; SOAH Docket No. 582-19-6473; TCEQ Docket No. 2019-0665-AIR (discussion on TCEQ’s failure to consider crystalline silica individually), Attachment 2.

<sup>7</sup> Harris County Attorney, Harris County’s Comments and Request for an Extension of Time; Non-Rule Project No. 2021-016-OTH-NR; Proposed Amendments to Texas Commission on Environmental Quality Air Quality Standard Permit for Concrete Batch Plants (Jun. 29, 2021) (“Harris County CBP Comment”), Attachment 3.

Standard Permit, and re-instated an exemption related to crystalline silica that the agency claimed was “inadvertently omitted” during the 2012 permit amendment proceedings. The TCEQ failed to demonstrate whether the agency ever modeled crystalline silica emissions from CBPs. The CBP Standard Permit with Enhanced Controls is authorized under the same CAA delegated authority and its terms are very similar to the 2021 CBP Standard Permit; thus, it is also part of this Complaint.<sup>8</sup>

Using a March 28, 2022 snapshot of CBPs in the County that have active registrations under the 2012 CBP Standard Permit, the County calculated the total potential emissions for 96 CBPs, assuming perfect compliance with permit terms and emission limits. Under these limitations, it is estimated that these 96 CBPs emit 1,942,617.6 pounds of coarse particulate matter (PM<sub>10</sub>), per year and 2,603.52 pounds of fine particulate matter (PM<sub>2.5</sub>), per year. These are the emissions Harris County hopes to address in this Complaint.<sup>9</sup>

However, most CBPs in the County have compliance issues. According to the Harris County Pollution Control Department (“HCPCSD”), there are approximately 140 CBPs in Harris County and the majority of them use the CBP Standard Permit. PCS and the County Attorney are authorized by state law to enforce environmental laws, statutes, and permits, including CBP permits.<sup>10</sup> In response to concerns from residents who share their community with CBPs, PCS initiated the Concrete Batch Plant Initiative where PCS set out to investigate all CBPs in the County and conduct enforcement activities until each facility achieved full permit compliance. Thus far, PCS has conducted 349 investigations and issued a total of 224 violation notices. Despite PCS’s efforts, our residents are still being exposed to unhealthy levels of pollution because TCEQ’s permit is not protective of public health or welfare, even under perfect compliance.

**b(6) Privacy** commissioned independent air dispersion modeling that proves that the 2021 CBP Standard Permit allows for offsite emissions that far exceed health-based limits. The County modeled emissions allowed under the 2012 CBP Standard Permit, which was adopted verbatim by the 2021 amendment. The County modeled CBP emissions of PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica. The models assumed perfect permit compliance and considered emissions from one CBP, emissions from one CBP and background concentrations, and emissions from two CBPs without background concentrations and operating with separate permits located on the same site. The modeled emissions were compared to their respective particulate matter National Ambient Air Quality Standard (“NAAQS”) and the TCEQ crystalline silica Effects Screening Levels (“ESLs”).

Though the TCEQ has not evaluated the 2012 PM<sub>2.5</sub> NAAQS in the context of this permit, it nonetheless claims that the 2021 CBP Standard Permit complies with this NAAQS. TCEQ also claims that the permit is otherwise protective of public health and the environment. The County’s

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<sup>8</sup> Both permits allow the facility to operate 24-hours a day, seven days per week, but, unlike the CBP Standard Permit, the CBP Standard Permit with Enhanced Controls does not have a daily production limit. For a permit comparison, see Attachment 4.

<sup>9</sup> TCEQ estimates that under the 2012 CBP Standard Permit, CBPs emit a total of 2.31 pounds per hour of PM<sub>10</sub> and 1.13 pounds per hour of PM<sub>2.5</sub> from silos, engines, and fugitive emissions. TCEQ does not account for in-plant road emissions. The list of facilities (“CBP March 28, 2022 Snapshot”) is included as Attachment 5.

<sup>10</sup> Tex. Health & Safety Code § 382.111.

modeling shows that under nearly every modeling scenario—even when background concentrations were not considered—PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica CBP emissions far exceeded their respective health-protective limits.

There are also issues with TCEQ’s adherence to the Texas State Implementation Plan (“SIP”) required under the CAA. SIP provisions are rules that are mandatory on TCEQ. TCEQ made certain representations to EPA regarding its minor source NSR program regarding the permit protectiveness and public participation, among others. However, TCEQ is not adhering to these representations. For example, TCEQ did not provide technical information in support of the 2021 CBP Standard Permit amendment. TCEQ’s stated purpose of the 2021 amendment is to correct a “clerical error” that consists of re-inserting a sweeping exemption from buffer and emissions limitations for CBPs that was “inadvertently omitted” from the 2012 CBP Standard Permit. Further, even though these permits apply statewide, notices were provided only in English and only published in three newspapers, TCEQ’s website, and by a listserv email. Harris County and many others submitted public comment and urged the TCEQ to make supporting documents public, to provide information in Spanish, and to extend the comment period—including a bipartisan cohort of federal, state, and local elected officials.

TCEQ did not extend the comment period or provide supporting documents. TCEQ hosted a virtual public meeting on June 28, 2021 and the comment period closed the next day.<sup>11</sup> TCEQ ended the meeting prior to giving all participants an opportunity to speak. Meeting participants requested another public meeting but TCEQ did not grant one. The agency issued its RTC at the same time that it adopted the 2021 CBP Standard Permit on September 22, 2021 instead of prior to adoption, like the SIP requires. The RTC was the first time that the public learned of TCEQs substantive rationale behind the 2021 amendment, at least in part because the agency did not disclose modeling that the public would learn about later when a TCEQ Commissioner spoke of it at a TCEQ public meeting.<sup>12</sup> TCEQ’s RTC was provided only in English and fails to respond or even acknowledge certain substantive comments, including emission abatement recommendations from PCS and requests for translation and interpretation in Spanish.

A disproportionate number of CBPs exist in communities where racial and ethnic minorities and poor people are overrepresented. The typical environmental justice community in the County is made up of racial and ethnic minorities and poor people, experiences flood risk, has limited access to resources, has many sources of pollution, and often includes linguistically isolated communities. The County’s environmental justice communities have an amount of pollution in the community—through no fault of their own—that exceeds that borne by the general population. The County analyzed U.S. Census Bureau data for Census Tracts where two or more CBPs are sited. This government-backed data demonstrates that Census Tracts with two or more CBPs are disproportionately made up of racial and ethnic minorities, linguistically isolated populations, and poor people. And TCEQ is considering siting yet another CBP in a low-income, minority area and to make matters worse, it would be across the street from a Harris County all-

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<sup>11</sup> TCEQ listserv email notice and website announcement included as (“TCEQ CBP Notice”), Attachment 6.

<sup>12</sup> Sept. 22, 2021 TCEQ Commissioners Meeting.

inclusive park that was recently expanded to accommodate adults and children with disabilities and special needs.<sup>13</sup>

It is the duty of the Harris County Attorney to protect County resident’s right to breathe healthy air and to use any legal means necessary to achieve this goal. Overwhelmingly, CBP emissions of PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica exceed health-based standards—standards backed by the best available science. This affects millions of Harris County residents and, in specific, those who are without means, those who do not speak English, and those with the immutable characteristics of having Brown and Black skin. These wrongs are illegal and EPA must hold TCEQ accountable. The County asks that EPA withdraw the authority it delegated to TCEQ to carry out this minor NSR program and institute a moratorium on any future registrations under the CBP Standard Permit and the CBP Standard Permit with Enhanced Controls unless and until TCEQ addresses the issues raised in this Complaint. Doing so will not impinge on the rights of Texans to operate CBPs because case-by-case NRS permits will remain available to them.<sup>14</sup> In specific, that EPA require TCEQ to create a regionally specific permit for Harris County that accounts for factors unique to the County and further discussed below.

**b(6) Privacy** asks that EPA accept this Complaint for investigation because it establishes a *prima facie* case of discriminatory conduct by TCEQ. Further, that EPA’s Office for Civil Rights (“OCR”) promptly and thoroughly investigate the allegations made in this Complaint and take all actions necessary to ensure that TCEQ complies fully with the law.

Respectfully submitted,

**b(6) Privacy**  
[Redacted signature]

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<sup>13</sup> Harris County Attorney’s Office Comments; Avant Garde Construction, Co., Application for Air Quality Standard Permit for Concrete Batch Plant; Registration No. 167453; 10945 Eastex Freeway, Houston, Texas (Apr. 4, 2022) (County comment requesting Spanish language interpretation and noting high percentage of racial and ethnic minorities and LEP people, specifically schoolchildren, in the Census Tracts including and surrounding the proposed CBP. This proposed plant is in the Aldine, Texas area where multiple CBPs are already in operation.), Attachment 7.

<sup>14</sup> See 40 C.F.R. § 7.25 (EPA defines “normal operation” to mean “the operation of a program or activity without significant changes that would impair its ability to meet its objectives.” The purpose of challenged program or activity cited in this Complaint is TCEQ’s administration of minor NSR permit programs, which does not exclusively rest on the 2021 CBP Standard Permit).

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ATTORNEYS FOR b(6) Privacy  
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cc:

Toby Baker, Executive Director, TCEQ  
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## I. Parties

### A. Complainants

**b(6) Privacy** files this Complaint on behalf of its residents. Harris County, Texas is home to over 4.71 million people and spans over 1,777 square miles.<sup>1</sup> It is home to the Nation’s largest petrochemical complex, the Houston Ship Channel, while also being hurricane- and flood-prone because of its proximity to the Gulf of Mexico. Many of our communities are still recovering from the devastation caused by Hurricane Harvey in 2017 and other natural and anthropogenic disasters in our region. We are one of the most diverse Counties in the Nation. Over a quarter (26.27%) of the County’s population is foreign-born and a fifth (20.40%) speak English “less than very well,” if at all. Over 100 languages are spoken in the County with Spanish being the most prevalent. Nearly a quarter (22.40%) of the County’s population lacks health insurance coverage and at least 12.10% live in poverty.

Too often, the air in the County is unhealthy to breathe and this burden falls heavy on the shoulders of racial and ethnic minorities, LEP people, and poor people—even when taking into account the fact that Harris County is a minority-majority county. At present, the County is part of the Houston-Galveston-Brazoria (“HGB”) nonattainment area for the 2008 and 2015 ozone National Ambient Air Quality Standards (“NAAQS”)<sup>2</sup> and there is a considerable risk that the area may soon be redesignated to nonattainment for the 2012 NAAQS for fine particulate matter, PM<sub>2.5</sub>.<sup>3</sup>

### B. Recipient

TCEQ “is the agency of [Texas] given primary responsibility for implementing the constitution and laws of [Texas] relating to the conservation of natural resources and the protection of the environment.”<sup>4</sup> In part, TCEQ must “safeguard the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic

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<sup>1</sup> All demographic data is taken from the U.S. Census Bureau and available at data.census.gov and reflects the most recent U.S. Census count (2020) and the 2019 American Communities Survey, to the greatest extent possible. The specific tables used by the County are described in Census cover sheets in Attachment 8. The County has all original tables and can make them available upon request (“Census Tables”).

<sup>2</sup> The HGB area is classified as a “marginal” nonattainment area for the 2015 ozone NAAQS and “serious” for the 2008 ozone NAAQS, however, the state’s data demonstrate that the HGB area has failed to meet yet another deadline and there is a strong likelihood that the area will be formally reclassified to “serious” – the second worst classification under the Clean Air Act. *See Center for Biological Diversity, et al. v. Michael Regan*, No. 3:22-cv-01855 (N.D.C.A. filed Mar. 24, 2022) (nondiscretionary duty case alleging that EPA is overdue in its obligation to reclassify or “bump up” the HGB area and other “serious” areas, to “severe” nonattainment, the second worst classification under the CAA).

<sup>3</sup> Recent high PM<sub>2.5</sub> readings from TCEQ air quality monitors are discussed below.

<sup>4</sup> Tex. Water Code § 5.012; 30 Tex. Admin. Code § 1.1.

enjoyment of air resources by the public and the maintenance of visibility.”<sup>5</sup> This duty includes administering Texas’s SIP, which includes minor NSR obligations, and submitting to EPA assurances that the agency will comply with EPA’s nondiscrimination regulations.

## **II. Jurisdiction**

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>6</sup> Acceptance of federal funds, such as EPA assistance, creates an obligation on the recipient to comply with Title VI and the federal agency’s implementing regulations.<sup>7</sup> TCEQ receives federal financial assistance from EPA and administers a “program or activity” as defined by Title VI, making it subject to the requirements of Title VI and EPA’s implementing regulations. Thus, this Complaint alleging unlawful discriminatory behavior by TCEQ is properly filed with EPA.

### **A. Federal Financial Assistance**

TCEQ is a recipient of EPA federal financial assistance as defined in EPA’s Title VI implementing regulations. EPA’s Title VI regulations define a “[r]ecipient” as “any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient . . .”<sup>8</sup> For fiscal year 2021, the State of Texas (DUNS No. 002537595) was awarded a staggering \$342,342,297,027.00 in federal funding assistance.<sup>9</sup> Of this amount, the TCEQ (DUNS No. 808805154) was awarded at least \$51,488,348.00. As of 2017, EPA has awarded TCEQ at least \$103,013,093 in federal financial assistance. Current EPA award obligations to TCEQ spanning to 2024 include at least \$77,787,066 in federal financial assistance to fund TCEQ programs. Thus, the State of Texas and the TCEQ receive federal financial assistance within the meaning of EPA’s Title VI regulations.

### **B. Program or Activity**

Title VI defines a “program or activity” to include “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.”<sup>10</sup> Further, “if any part of a listed entity

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<sup>5</sup> Tex. Health & Safety Code § 382.011.

<sup>6</sup> 42 U.S.C. § 2000d.

<sup>7</sup> 40 C.F.R. § 7.80.

<sup>8</sup> *Id.* at § 7.25.

<sup>9</sup> USASpending.gov, State Profile, Texas, <https://www.usaspending.gov/state/texas/latest> (award information may be found under “View child recipients” and by using the advanced search feature using the applicable DUNS).

<sup>10</sup> 42 U.S.C. § 2000d-4a.

receives federal funds, the entire entity is covered by Title VI.”<sup>11</sup> TCEQ is an agency of the State of Texas. The Texas Legislature conferred general jurisdiction onto the TCEQ to execute a broad range of regulatory functions.<sup>12</sup> The agency is also vested with plenary powers that it may utilize as necessary and convenient to perform acts within its jurisdiction.<sup>13</sup> Administering CAA requirements is within the TCEQ’s jurisdiction, in specific, minor source NSR requirements such as the CBP Standard Permit and the CBP Standard Permit with Enhanced Controls. Accordingly, TCEQ’s operations meet the definition of “program or activity” under Title VI.

### **C. Timeliness**

EPA Title VI implementing regulations require that a “complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the [EPA’s Office of Civil Rights] waives the time limit for good cause.”<sup>14</sup> The County considers the triggering action for this Complaint the date when the public was made aware of the adoption of the 2021 CBP Standard Permit. The TCEQ Chairman signed the order adopting this amendment on October 5, 2021 and it was made publicly available on October 6, 2021.<sup>15</sup> This order is only in English and was not accompanied by supporting or explanatory material in any other languages.

### **D. Other Jurisdictional and Prudential Considerations**

EPA Title VI implementing regulations require that a complaint be filed with EPA, in writing, and that it include a description of the alleged discriminatory acts.<sup>16</sup> Harris County submits this Complaint to EPA on behalf of County residents who are exposed to unhealthy levels of PM<sub>2.5</sub>, PM<sub>10</sub>, and cancer-causing crystalline silica. Specifically, racial and ethnic minorities, LEP populations, and poor County residents who bear a disproportionately high burden of this pollution.

## **III. Concrete Batch Plant Background**

### **A. How Concrete Batch Plants Work**

The primary purpose of CBPs is prepare a concrete mixture and load it into mixing trucks. This mix includes water, cement, fine aggregate (sand), coarse aggregate (gravel), and binding

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<sup>11</sup> *Ass'n of Mexican-Am. Educators v. State of Cal.*, 195 F.3d 465, 475 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (citing *Grimes v. Superior Home Health Care*, 929 F. Supp. 1088, 1092 (M.D. Tenn. 1996)).

<sup>12</sup> Tex. Water Code § 5.013.

<sup>13</sup> *Id.* at §§ 5.002, 5.102.

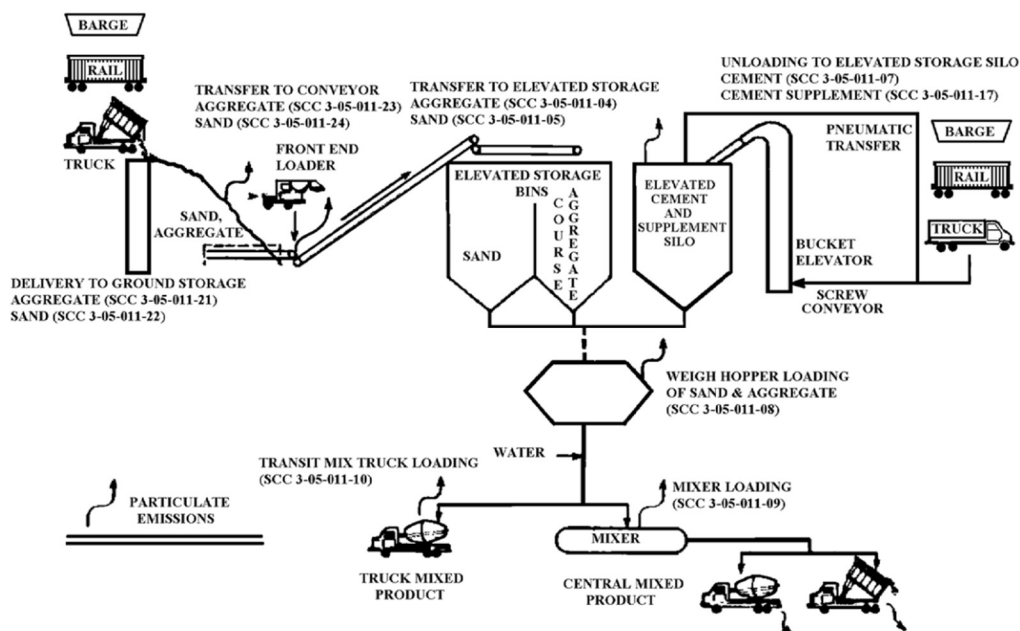
<sup>14</sup> 40 C.F.R. § 7.120(b)(2); for Title VI purposes, EPA defines an “action” to mean “activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration”).

<sup>15</sup> 2021 Amendment TCEQ Order.

<sup>16</sup> 40 C.F.R. § 7.120(b).

compounds which have small amounts of chemical additives. Each component is housed in a specific part of the plant. Cement is typically stored in silos and fed into mixing trucks through a conveyor belt. Aggregate is commonly stored in stockpiles that may or may not be enclosed. As cement enters the rotating drum of the truck, the other concrete elements are introduced. Not all CBPs will follow this process.<sup>17</sup>

Typical concrete batching process<sup>18</sup>



## B. CBP Emissions and Impact on Human Health and Communities

The pollutants at issue are PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica. Crystalline silica is a known carcinogen and a pollutant of concern for CBPs. The TCEQ Toxicology Division has developed ESLs for many pollutants. ESLs are used to evaluate the potential for effects to occur from air contamination exposure.<sup>19</sup> Acute exposure is evaluated using short-term ESLs, which are based on a one-hour averaging period.<sup>20</sup> Chronic exposure is evaluated with a long-term ESL based on an annual averaging period.<sup>21</sup> If ambient levels of contaminants exceed an ESL, a more in-

<sup>17</sup> EPA, AP 42, Fifth Edition, Vol. I, Ch. 11: Mineral Products Industry, at ch. 11.12, <https://www3.epa.gov/ttnchie1/ap42/ch11/>.

<sup>18</sup> *Id.* at ch. 11.12-2.

<sup>19</sup> See TCEQ, Toxicology Division, About Air Monitoring Comparison Values, <https://www.tceq.texas.gov/toxicology/amcv/> and TCEQ, Toxicology Division, About Effects Screening Levels, <https://www.tceq.texas.gov/toxicology/esl/ESLMain.html>.

<sup>20</sup> *Id.*

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

depth review is required.<sup>22</sup> The TCEQ has set the short-term silica ESL at 14  $\mu\text{g}/\text{m}^3$  and the long-term ESL at 0.27  $\mu\text{g}/\text{m}^3$ .<sup>23</sup>

Particulate matter is harmful in a variety of ways. The current annual  $\text{PM}_{2.5}$  NAAQS is 12.0  $\mu\text{g}/\text{m}^3$  while the 24-hour NAAQS is 12.0  $\mu\text{g}/\text{m}^3$ . EPA is currently assessing the adequacy of the current particulate matter standards, including the most recent scientific literature.<sup>24</sup> But much is already known about particulate matter and its toxic effects on human health. Inhalation exposure to particulate matter is associated with infertility.<sup>25</sup> There is an association between an increase of just 1  $\mu\text{g}/\text{m}^3$   $\text{PM}_{2.5}$  and an 8% increase in the COVID-19 death rate.<sup>26</sup> Meaning that [a] small increase in long-term exposure to  $\text{PM}_{2.5}$  leads to a large increase in the COVID-19 death rate.<sup>27</sup> Low birth weights at a global scale can be attributable to particulate matter pollution.<sup>28</sup> We know that sources of particulate matter disproportionately *and systemically* affect people of color.<sup>29</sup> Particulate matter pollution drives up the cost of healthcare.<sup>30</sup> Children under using Medicaid in the Houston area are more likely to be diagnosed with asthma after short-term exposure to particulate matter.<sup>31</sup> Long-term exposure to particulate matter among the elderly is

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<sup>22</sup> TCEQ, Toxicology Factor Database Screening Levels, March 8, 2018, Interoffice Memo, available at <https://www.tceq.texas.gov/assets/public/implementation/tox/esl/special%20notations.pdf>.

<sup>23</sup> ESL data is be found in the TCEQ Texas Air Monitoring Information System Database.

<sup>24</sup> EPA, Supplement to the 2019 Integrated Science Assessment for Particulate Matter (External Review Draft) (Sept. 2021), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=352823>.

<sup>25</sup> Li, Qin et al., Association between exposure to airborne particulate matter less than 2.5  $\mu\text{m}$  and human fecundity in China, *Env'tl Int'l* 1146 (2021), Attachment 9.

<sup>26</sup> Wu, Xiao, et al., Exposure to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study, Harvard T.H. Chan School of Public Health (Apr. 27, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2.full.pdf>.

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

<sup>28</sup> Ghosh, Rakesh, et al., Ambient and household  $\text{PM}_{2.5}$  pollution and adverse perinatal outcomes: A meta-regression analysis of attributable global burden for 204 countries and territories, *PLOS Medicine* (Sept. 28, 2021), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1003718>.

<sup>29</sup> Tessum, Christopher W., et al.,  $\text{PM}_{2.5}$  pollutants disproportionately and systemically affect people of color in the United States, *Science Advances* (2021), <https://www.science.org/doi/10.1126/sciadv.abf4491>.

<sup>30</sup> Birnbaum, Howard G., et al., Measuring the Impact of Air Pollution on Health Care Costs (Dec. 2020), *Health Affairs* 2113, <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00081>.

<sup>31</sup> Wendt, Judy K., et al., Association of short-term increases in ambient air pollution and timing of initial asthma diagnosis among medicaid-enrolled children in a metropolitan area, *131 Environ Res.* 50 (Mar. 20, 2014), Attachment 10.

associated with a higher risk of stroke and other cardiac disease.<sup>32</sup> Plainly, PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica emissions are harmful to human health.

Prior to the COVID-19 pandemic, heart disease, cancer, cerebrovascular disease (including strokes), and respiratory disease were the in the top five leading causes of death in Harris County,<sup>33</sup> all of which are associated with exposure to CBP pollutants of concern. Disparity exists within the mortality data as Black Americans have the highest morality rates of heart disease and cancer, and the lowest life expectancy when compared to all other races.<sup>34</sup> COVID-19 drastically altered mortality rates and became third leading cause of death in Harris County in 2020.<sup>35</sup> Harris County mortality data from 2010 to 2020, shown in a chart below, shows across the board higher death rates in 2020, but highlights the drastic increases in mortality for people of color – an increase of 46.6% for Hispanics and 22.6% for non-Hispanic Blacks compared to 12.4% for whites.<sup>36</sup>

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<sup>32</sup> Yazdi, Mahdiah Danesh, et al., Long-term Association of Air Pollution and Hospital Admissions Among Medicare Participants Using a Doubly Robust Additive Model, American Heart Association, *Circulation* Vol. 143, No. 16 (Apr. 20, 2021), <https://www.ahajournals.org/doi/10.1161/CIRCULATIONAHA.120.050252>.

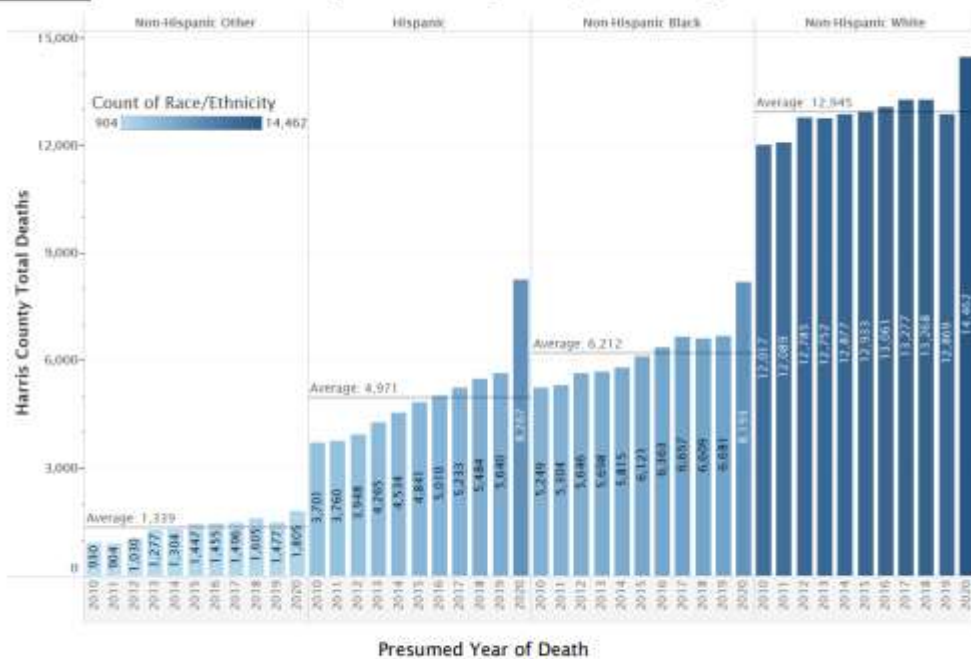
<sup>33</sup> Harris County Public Health, Harris County leading Causes of Death Analysis 2015-2019 with Preliminary Exploration of 2020 (Aug. 2021), [https://publichealth.harriscountytexas.gov/Portals/27/Documents/Harris%20County%20Leading%20Causes%20of%20Death%20Analysis%202015-2019.pdf?ver=CerSFfKZL\\_07nyGqLOOM\\_w%3d%3d](https://publichealth.harriscountytexas.gov/Portals/27/Documents/Harris%20County%20Leading%20Causes%20of%20Death%20Analysis%202015-2019.pdf?ver=CerSFfKZL_07nyGqLOOM_w%3d%3d).

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> Harris County Commissioners Court's Analyst's Office Memo to Harris County Precinct Two Commissioner Adrian Garcia, Annual Deaths in Harris County, 2010 through 2020 (Jul. 28, 2020), [https://ccao.harriscountytexas.gov/Portals/72/Documents/Harris%20County%20Annual%20Deaths%20Memo\\_2021.pdf?ver=0ovW-6zxPdIGFqmGWqy-OA%3d%3d](https://ccao.harriscountytexas.gov/Portals/72/Documents/Harris%20County%20Annual%20Deaths%20Memo_2021.pdf?ver=0ovW-6zxPdIGFqmGWqy-OA%3d%3d).

**Figure 3 Harris County Deaths by Race/Ethnicity, 2010 – 2020**



**Note:** Death data for 2020 are provisional. Provisional statistics are tabulated based on data that are not yet edited and may be incomplete. Provided data are subject to change before data are finalized.  
**Source:** Texas Death Certificate Data-Prepared by the Texas Department of State Health Services, Center for Health Statistics, date of run: 06/14/2021.

In addition to health impacts, CBPs create conditions in the community that affect resident’s ability to use and enjoy their property and outdoor spaces. HCPCSD often receives complaints from residents regarding vibrations in their homes tied to activity at a CBP, such as 18-wheeler traffic transporting aggregate. CBPs are allowed to operate 24 hours a day, seven days a week. They affect peoples’ sleep by, for example, subjecting neighboring residents to loud noises and bright lights in the middle of the night. Members of the Super Neighborhood Alliance, an alliance of communities that represent all of Houston, expressed concern about these impacts and community mental health, including the self-worth of people who live next to these facilities through no fault of their own. Constant heavy truck traffic creates dangerous conditions for children playing outdoors. This is a concern no child should have.

### C. Concrete Batch Plant Distribution in Harris County

Given their prolific nature, it is difficult to determine the exact number of CBPs in the County because TCEQ’s databases are not always up to date and new CBPs are frequently permitted. Considering a March 28, 2022 snapshot of CBPs, the County identified 96 CBPs in 68 U.S. Census Bureau Tracts<sup>37</sup> that have active registrations under the 2012 CBP Standard Permit.<sup>38</sup>

<sup>37</sup> See CBP March 28, 2022 Snapshot. (A Census Tract could not be identified for a facility located in zip code 77572. The total Census Tract number does not include this facility.).

<sup>38</sup> There are over 100 CBPs in the County and the remainder are permitted under the CBP Standard Permit with Enhanced Controls or an NSR case-by-case permit.

Then, the County identified Census Tracts where two or more CBPs are sited, 16 in total.<sup>39</sup> These 16 Census Tracts are home to 43 CBPs—nearly half of the facilities identified. These Census Tracts are:

<b>Zip</b>	<b>Census Tract</b>	<b>Number of CBPs</b>
77048	3308.01	7
77045	3341.02	5
77447	5560	4
77041	5401.02	3
77022	2204	2
77026	2108	2
77038	5336	2
77039	2228	2
77047	3308.02	2
77048	3317	2
77048	3338.01	2
77338	2507.01	2
77375	5548.09	2
77447	5430.05	2
77447	5431	2
77449	5422.02	2
	<b>Total:</b>	<b>43</b>

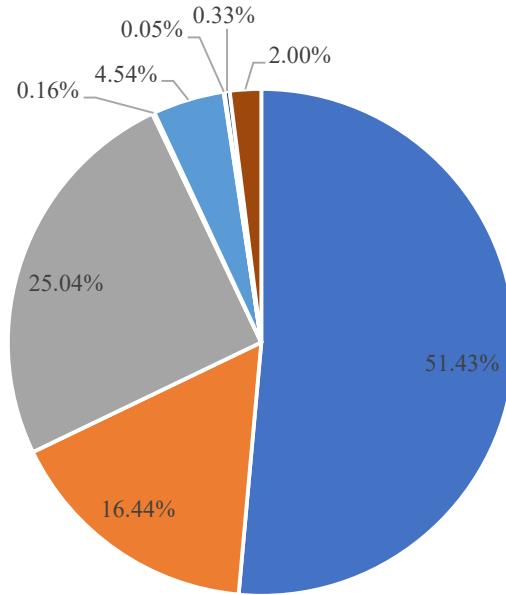
Then, the County analyzed Census Tract data for race and ethnicity, LEP status, and poverty. The averages shown below are averages of percentages for each Census Tract, not an average of the overall population in all Census Tracts. This analysis shows that racial and ethnic minorities and LEP people generally face a disproportionately higher risk of having more than one CBP sited in their community when compared to the general Harris County population, even accounting for the County’s majority-minority population status. Further, the County found that Black Americans face a disproportionately high risk of having the most CBPs sited in one Census Tract. Census Tract 3308.01 in zip code 77048 has the most CBPs sited, seven in total. The population in this Census Tract is 40.86% Black or African American.

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<sup>39</sup> See Census Tables.

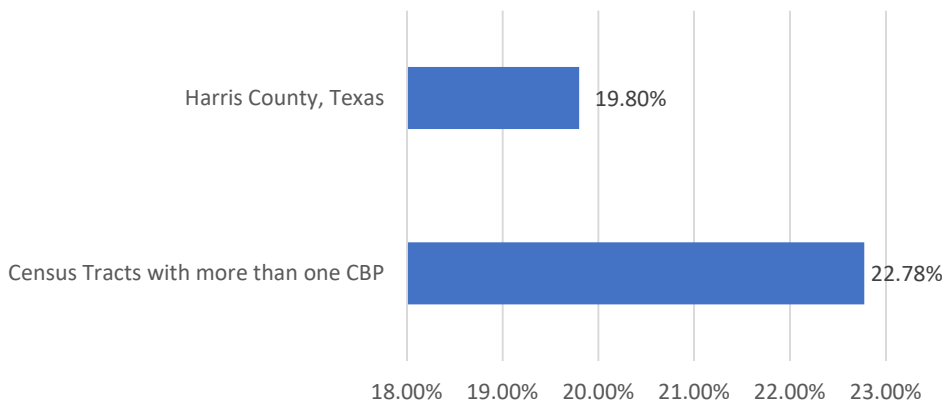


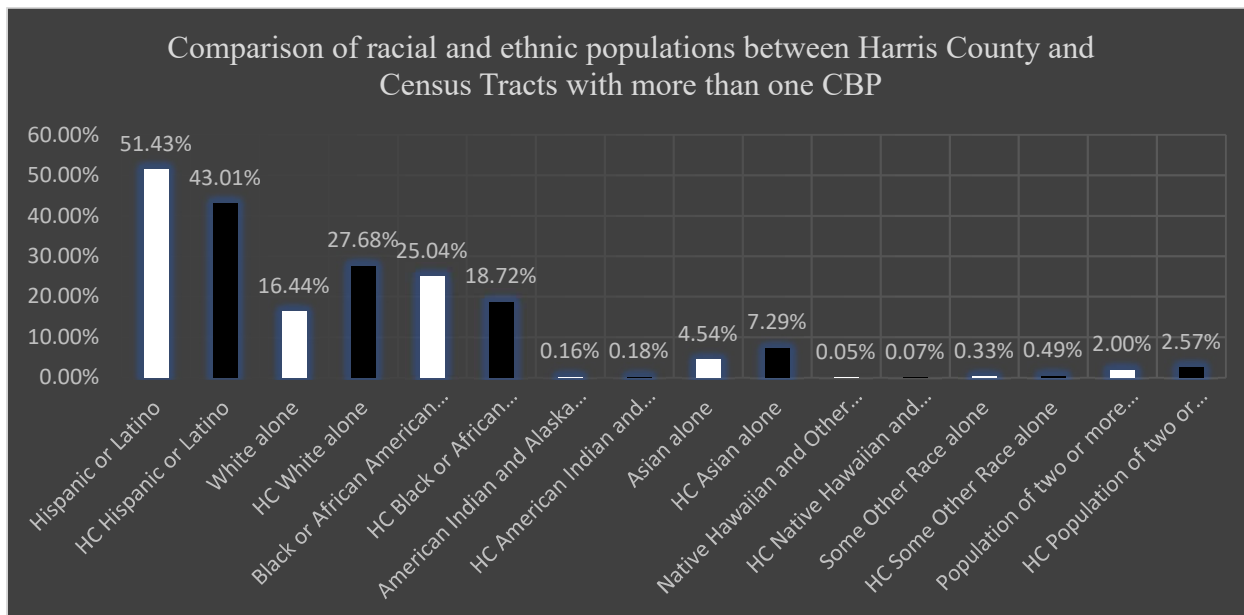
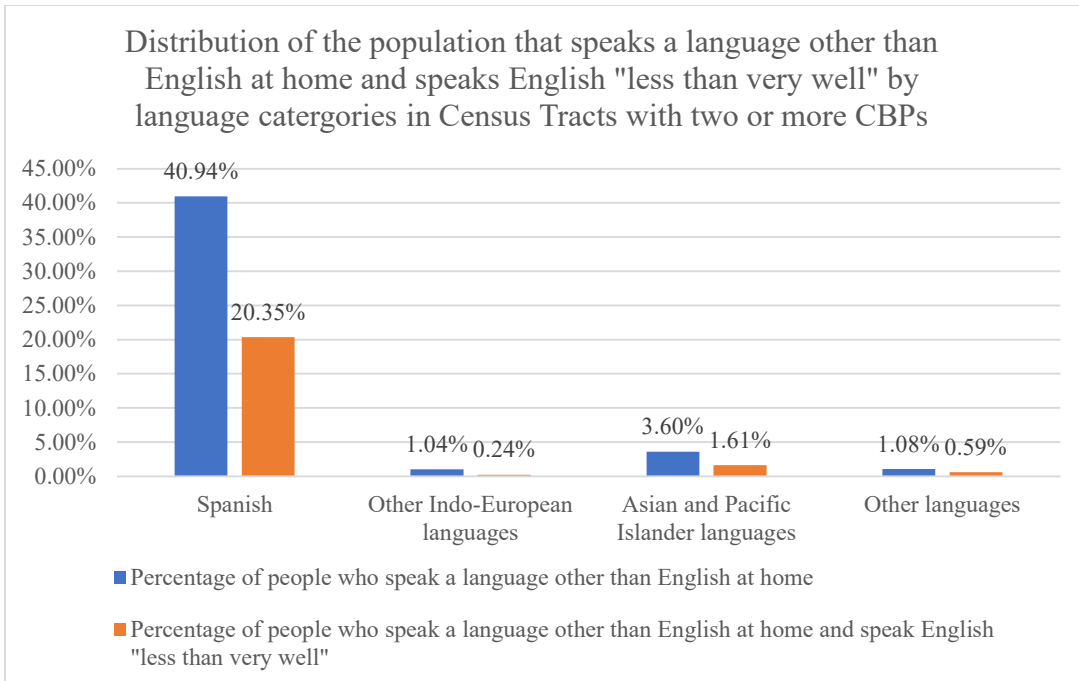
### Racial and ethnic populations in Census Tracts with more than one CBP

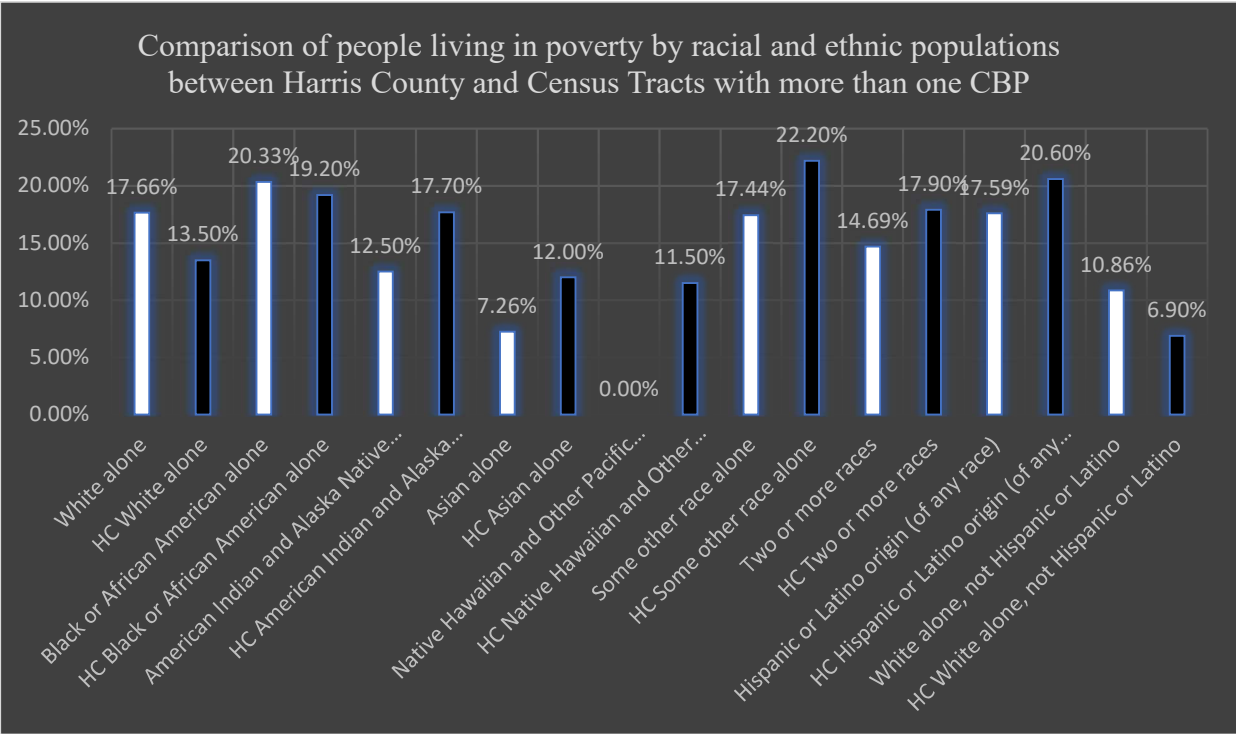
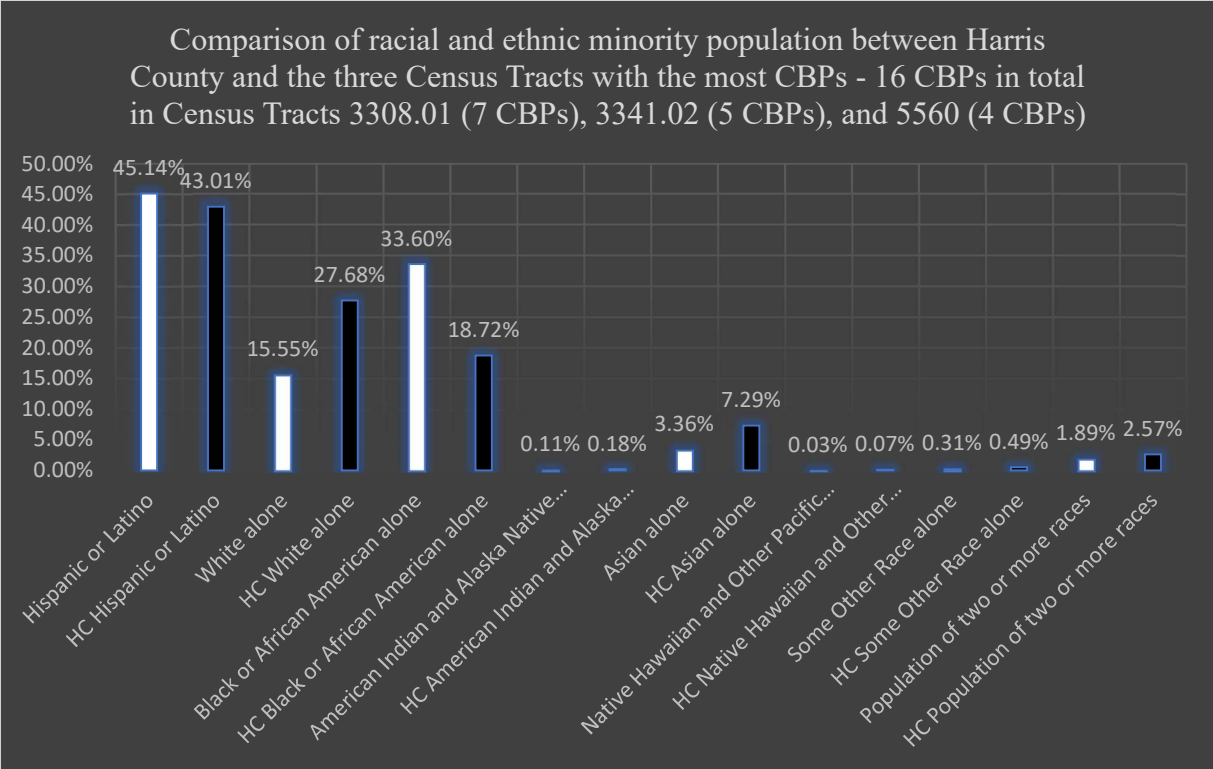


- Hispanic or Latino
- Black or African American alone
- Asian alone
- Some Other Race alone
- White alone
- American Indian and Alaska Native alone
- Native Hawaiian and Other Pacific Islander alone
- Population of two or more races

### Comparison of LEP populations that speak English less than "very well" between Harris County and Census Tracts with two or more CBPs







Note: This comparison does not reflect the percentage of non-white Hispanic or Latino people who live in poverty and is thus may not accurately represent this ethnic group's minority status.

## IV. Environmental and Public Health Issues Specific to Harris County

### A. Legacy Ozone Pollution

TCEQ failed to consider historic ozone pollution as an air pollution cumulative impact in the development of the 2021 CBP Standard Permit. Ozone is not emitted; rather, it is formed through a chemical reaction between nitrogen oxides (“NO<sub>x</sub>”) and volatile organic compounds (“VOCs”) when they are exposed to sunlight. Ozone is a corrosive air pollutant that can inflame the lungs, constrict breathing, and even lead to life-threatening conditions. Ozone’s precursor pollutants are harmful to public health on their own, like cancer-causing VOCs benzene and ethylene. According to EPA’s own findings in support of the NAAQS, ozone pollution can harm healthy persons but vulnerable populations are more susceptible to its harmful effects. Children, elders, persons with disabilities, and residents of environmental justice communities are among the most vulnerable to ozone pollution. For example, children living in areas with higher concentrations of ozone in ambient air have been shown to be more likely to have asthma or to experience asthma attacks compared to children who are exposed to less ozone pollution.<sup>40</sup> Ozone can also harm vegetation and entire ecosystems, thereby exacerbating the loss of vegetative cover and poor environmental conditions in the community.

Harris County, and the HGB nonattainment area, have never met any of the ozone NAAQS at the time of their initial implementation. Based on the best available science, the four ozone standards, established in 1979, 1997, 2008, and 2015, have set progressively lower permissible ozone levels. The standards reflect eight-hour averages, except the 1979 standard, which reflects a one-hour average. The HGB area remains in nonattainment for the 2008<sup>41</sup> and 2015<sup>42</sup> NAAQS. For the 2008 ozone standard, the HGB area was initially classified as “marginal,” then it failed to meet that attainment deadline and was reclassified to “moderate.” Then again in 2018 the area failed to meet the “moderate” attainment deadline and was reclassified to “serious” in 2019. Modeling data prepared by the TCEQ indicate that the HGB area will fail to meet the serious area deadline of July 20, 2021<sup>43</sup> and pending litigation make reclassification to “severe” a considerable likelihood in the short term.<sup>44</sup>

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<sup>40</sup> Akinbami, Lara J., *et al.*, The association between childhood asthma prevalence and monitored air pollutants in metropolitan areas, United States 2001-2004 110 *Env’tl Research* 294, (Apr. 2010), <https://doi.org/10.1016/j.envres.2010.01.001> <http://dx.doi.org/10.1016/>.

<sup>41</sup> 75 parts per billion (ppb); *see also* 42 U.S.C. § 7511a(b); 40 C.F.R. § 51.1103(a) tbl. 1 (attainment dates for Texas).

<sup>42</sup> 70 ppb.

<sup>43</sup> TCEQ, Houston-Galveston-Brazoria (HGB) Serious Classification Attainment Demonstration State Implementation Plan (SIP) Revision for the 2008 Eight-Hour Ozone National Ambient Air Quality Standard (NAAQS), TCEQ Rule Project No. 2019-077-SIP-NR, TCEQ Docket No. 2019-0692-SIP, at ES-1 (“The peak ozone design value for the HGB nonattainment area is projected to be 76 ppb in 2020...”); at 76 ppb, it is likely that the HGB area may fail to attain by the 2015 ozone standard marginal area attainment date of August 3, 2021, though it has not been reclassified.

<sup>44</sup> *See Center for Biological Diversity*, No. 3:22-cv-01855.

## B. HGB Area's Challenge to Remain in Attainment for the PM<sub>2.5</sub> NAAQS

The HGB area has a PM<sub>2.5</sub> problem, even though the area meets the NAAQS. According to the HGB area's air planning authority, the Houston-Galveston Area Council ("H-GAC"), "[t]he region has historically been most troubled by high concentrations of ground-level ozone, however within the last decade there have been additional concerns about elevated concentrations of PM<sub>2.5</sub>." Further, H-GAC notes that "[a]ir monitoring data collected, compiled, and validated by the [TCEQ] identifies the certified PM<sub>2.5</sub> annual design value [measurement of NAAQS compliance] for 2010-2012 for the HGB region as 12.1 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ )" which is above the PM<sub>2.5</sub> NAAQS for annual exposure, 12.0  $\mu\text{g}/\text{m}^3$ .<sup>45</sup> H-GAC recognizes that there is a "continued risk of future PM<sub>2.5</sub> nonattainment for the" HGB area and thus the agency continues to collect and report on voluntary PM<sub>2.5</sub> emission reduction programs.<sup>46</sup>

H-GAC is not wrong. When EPA refused to designate the HGB area under the PM<sub>2.5</sub> NAAQS to "attainment" and instead classified it to "attainment/unclassifiable" it did so over TCEQ's objection where TCEQ claimed that it justifiably excluded high PM<sub>2.5</sub> readings at the Clinton Park air quality monitor and that an "attainment" designation was warranted.<sup>47</sup> This tacit acknowledgement perhaps helps to explain why there are recent alarmingly high PM<sub>2.5</sub> readings from TCEQ's Wayside Drive air quality monitor, which is not far from the Clinton Park monitor. This monitor is in an area where there are at least 3 CBPs located nearby. As of April 3, 2022, the four highest readings from the Wayside Drive monitor are 27.4 (3/1/22), 25.6 (1/17/22), 23.2 (1/14/22), and 22.1 (3/4/22)  $\mu\text{g}/\text{m}^3$ .<sup>48</sup>

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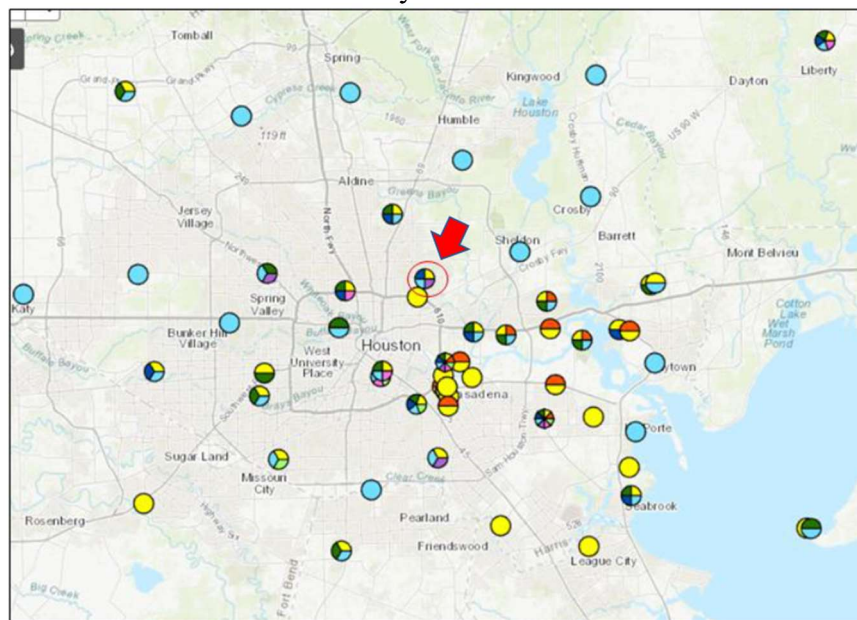
<sup>45</sup> Houston-Galveston Area Council, Regional Air Quality Planning Advisory Committee, Houston-Galveston-Brazoria (HGB) PM<sub>2.5</sub> Advance Path Forward 2021 at 9-10, <https://www.h-gac.com/board-of-directors/advisory-committees/regional-air-quality-planning-advisory-committee/2019-pm2-5-advance-path-forward-report>.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> 79 Fed. Reg. 51,517; *see also* Letter from Bryan W. Shaw, PhD, P.E., Chairman, TCEQ to Ron Curry, EPA, Region 6 Administrator (Oct. 14, 2014), Attachment 11.

<sup>48</sup> TCEQ, Four Highest 24-Hour PM-2.5 Concentrations (updated daily, Apr. 3, 2022 readings), [https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25\\_24hr\\_4highest.pl](https://www.tceq.texas.gov/cgi-bin/compliance/monops/pm25_24hr_4highest.pl).

### Location of Wayside Drive monitor<sup>49</sup>



According to TCEQ, the Wayside Drive design value for PM<sub>10</sub> currently meets the PM<sub>10</sub> NAAQS. However, the current PM<sub>2.5</sub> design value at this monitor exceeds the annual PM<sub>2.5</sub> NAAQS.

### Preliminary design values for TCEQ’s Wayside Drive air quality monitor<sup>50</sup>

PM <sub>2.5</sub> NAAQS	Wayside Drive values ( $\mu\text{g}/\text{m}^3$ )	NAAQS ( $\mu\text{g}/\text{m}^3$ )
24-hour	27.0	35
Annual	12.8	12

TCEQ analyzed possible contributing sources near the monitor. Two of these sources are CBPs, Five Star Ready Mix (0.75 miles southwest) and Queen Ready Mix (1.75 miles southeast).<sup>51</sup> The HCPCSD has cited numerous violations at both facilities.

The Queen Ready Mix is located at 8702 Liberty Road, Houston, Texas 77028 in Census Tract 2325.<sup>52</sup> This CBP is not identified in the County’s March 28, 2022 snapshot. Approximately 25% of the population in Census Tract 2325 speaks English “less than very well.”<sup>53</sup> Latinos of any

<sup>49</sup> TCEQ, Houston North Wayside Particulate Matter, presentation to the Houston PM Advance Committee, at 5 (part of H-GAC) (Feb. 7 2022), Attachment 12.

<sup>50</sup> *Id.* at 7 (noting that the values were calculated using preliminary data from May 4, 2021 through January 24, 2022).

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *See* Census Tables.

race make-up 66% of the population and while 20% of the total population is Black or African American. Half of the population in Census Tract 2325 under the age of 18 lives in poverty. HCPCSD has authority like TCEQ to enforce environmental statutes, rules, and orders – this includes enforcing TCEQ-issued air quality permits. HCPCSD inspected this facility in 2020 and documented many violations, including dust and stormwater discharges, as shown below.



View of regular loading operations at the baghouse



Offsite stormwater runoff



Dust emissions from aggregate transportation on dusty pavement

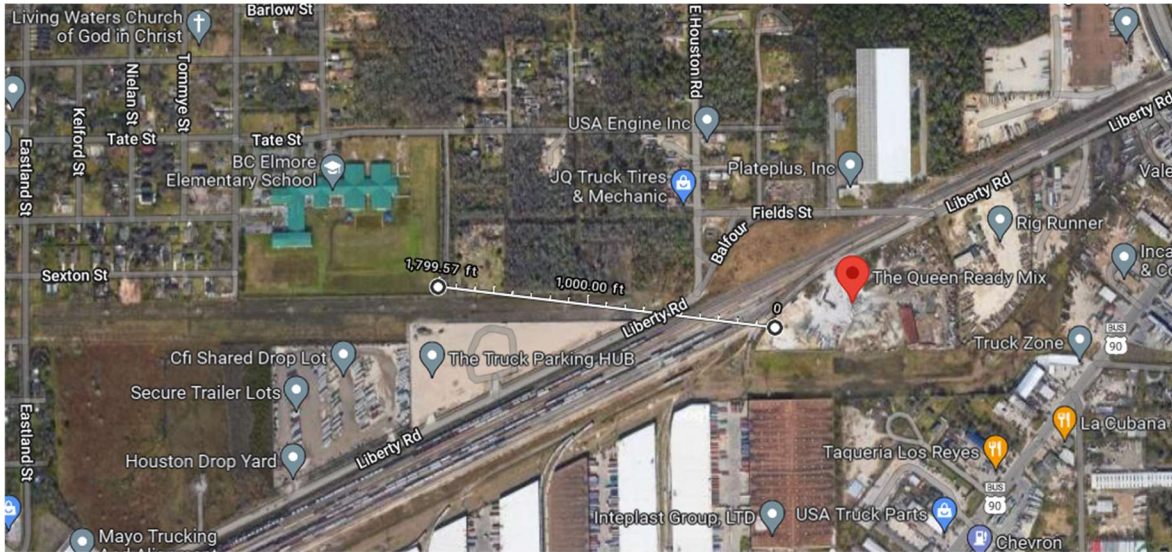
The Queen Ready Mix is approximately 1,800 feet west of Elmore Elementary School. Between Elmore and Queen Ready Mix lies many railroad lines that used by oil tankers servicing the Houston Ship Channel, adding to the pollution burdens experienced by the students and nearby residents. According to the Texas Education Agency (“TEA”), the student body at this primary school is 44.5% African American and 54% Hispanic.<sup>54</sup> Nearly every child at this school is economically disadvantaged—98%—meaning that nearly the entire student body at this school experiences food insecurity and thus the federal government ensures that these children receive at

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<sup>54</sup> TEA, 2020-21 School Report Card, ELMORE EL (101912475), Attachment 13.



least two hot meals a day at free or reduced cost. English Language Learners make up 39.4% of the population. Though the school was not rated for the 2020-2021 school year because of the COVID-19 pandemic, the 2019 figures show that only 16% of the student body met or exceeded minimum standardized testing requirements which are necessary to advance to the next grade level and eventually graduate from high school in Texas.



The County’s modeling, discussed below, shows that children at this school are exposed to unhealthy levels of particulate matter and crystalline silica, especially during recess because the school’s track is closest to the facility. Because of Texas’s extremely restrictive CBP standing rules, no parent, child, teacher, or school administrator would be able to challenge permits for this facility because the school is more than 440 yards from the baghouse and no person permanently resides at the school.<sup>55</sup>

<sup>55</sup> See Tex. Health & Safety Code § 382.058(c) (to challenge a CBP Standard Permit, “only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing...”).



Elmore Elementary School 1<sup>st</sup> grader organizing a food pantry in her front yard at the beginning of the COVID-19 Pandemic<sup>56</sup>

Many CBP operators routinely violate their permit terms and it is no accident that HCPCSD has issued hundreds of violations to these owners/operators. The County also attaches photos from a HCPCSD inspection of the Concrete Pros Ready Mix Inc. facility located at 4005 Swingle Rd, Houston, Texas 77047.<sup>57</sup> This facility is identified in the County's March 28, 2022 snapshot. The photos show common nuisance conditions at CBPs in addition to CBP permit violations, these include open dumping, unauthorized accumulation of hazardous materials, broken fences, damaged equipment. In response to community concerns, the TCEQ Public Interest Counsel has recommended to the TCEQ and the Texas Legislature for years for the creating of a taskforce to address issues at CBPs and other aggregate processing facilities.<sup>58</sup> No such committee has been formed. The TCEQ Public Interest Counsel, based on community feedback from across the state, recommends that such committee study proposals for:

1. Minimizing the effects of such operations on neighboring communities;
2. Limiting operating hours;
3. Routine audits or inspections to ensure compliance with permit terms and associated proposals for increased application fees to cover the cost of inspections;
4. Standardized buffer zone or setback requirements across all authorizations under which these facilities may operate;

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<sup>56</sup> Source: Elmore Tigers Twitter account @ElmoreTigers (May 7, 2020).

<sup>57</sup> Attachment 14.

<sup>58</sup> TCEQ, Office of Public Interest Counsel's Annual Report to the TCEQ (Fiscal Year 2018) (report also discusses CBP permitting matters that the Counsel has participated in, for example, a CBP permit that was issue to a plant sited across the street from a dedicated emergency room in a rural part of Texas), [https://www.tceq.texas.gov/assets/public/comm\\_exec/pubs/sfr/057\\_18/appC.pdf](https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/057_18/appC.pdf).

5. Enhanced monitoring of particulate matter in geographic areas where these facilities are more concentrated; and
6. Reviewing and standardizing, as appropriate, the various types of authorizations and public participation processes that may apply to the permitting of such facilities.

## V. Legal and Regulatory Background

### A. Civil Rights Law

EPA’s Title VI implementing regulations provide that “a recipient [of federal financial assistance] shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity.”<sup>59</sup> Nondiscrimination executive orders and agency guidance establish how EPA should administer civil rights laws to consider, for example, subgroups of protected populations, including LEP people and poor people. The “environmental justice order,” Exec. Order 12,898, directs EPA to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>60</sup> Meaning that EPA has to take affirmative steps to remedy past discrimination in all of its functions. While EPA’s LEP guidance, intended to comply with Exec. Order 13,166, describes elements of acceptable LEP policies.<sup>61</sup> President Joe Biden recently adopted a “whole-of-government” approach to addressing systemic racism in the Nation and required the federal agencies to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.”<sup>62</sup> Collectively, these laws, regulations, and policies prohibit the disparate treatment of protected populations and provide EPA with baseline investigation elements for Title VI investigations.<sup>63</sup> EPA Title VI investigations must ensure that “[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a

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<sup>59</sup> 40 C.F.R. § 7.35(a).

<sup>60</sup> 59 Fed. Reg. 7,629 (emphasis added).

<sup>61</sup> EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 65 Fed. Reg. 159 (Aug. 16, 2000) (emphasis added) (“LEP Guidance”).

<sup>62</sup> 86 Fed. Reg. 7,009 (In part, requiring a formal equity assessment for impacts to “underserved communities.”) (emphasis added).

<sup>63</sup> 40 C.F.R. §§ 7.30 (general prohibition), 7.35(b) (specific prohibitions); see, also, *Guardians Ass’n. v. Civil Serv. Comm’n*, 463 U.S. 582, 593 (1983) (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. 287, 292-293 (1985) (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases cite *Guardians* in support of the validity of Title VI disparate impact claims. See, U.S. EPA’s External Civil Rights Compliance Office Toolkit, p. 8 (Jan. 18, 2017) (“ECRCO Toolkit”), [https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal\\_letter-faqs.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf).

particular race, color, national origin, or sex.”<sup>64</sup> These nondiscrimination obligations extend to the siting of facilities.<sup>65</sup>

To establish a *prima facie* case of disparate impact discrimination, EPA must determine whether a federal funding recipient used a facially neutral policy or practice that had a sufficiently adverse and disproportionate effect based on race, color, or national origin. To establish a disparate impact, EPA must:

- (1) identify a specific policy or practice;
- (2) establish adversity/harm<sup>66</sup>;
- (3) establish disparity<sup>67</sup>; and
- (4) establish causation.

The focus of EPA’s investigation is on the consequences of the recipient’s actions, rather than the recipient’s intent.<sup>68</sup> The neutral policy or decision in question need not be in writing but could be understood as a standard practice by the recipient’s employees. Neutral policies also include an agency’s failure to act or adopt important policies, such as a failure to adopt policies to serve a LEP populations despite repeated requests.<sup>69</sup> A violation of Title VI and its regulations can be established when a recipient fails to consider the disparate impact of a facility’s operation on the basis of race, color or national origin as part of a decision to permit.<sup>70</sup>

If the evidence establishes a *prima facie* case of adverse disparate impact, EPA must then determine whether the recipient has articulated a “substantial legitimate justification” for the

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<sup>64</sup> 40 C.F.R. § 7.35(b).

<sup>65</sup> *Id.* § 7.35(c).

<sup>66</sup> ECRCO Toolkit, at 18, fn. 41 (relevant factors to establish an actionable harm include the nature, size, and likelihood of the alleged impact).

<sup>67</sup> A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. *See Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576-77 (2d Cir. 2003) (internal citations omitted).

<sup>68</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (school district was required to provide non-English speaking students of Chinese origin with a meaningful opportunity to participate in federally funded educational programs).

<sup>69</sup> *See, e.g., Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient “failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services” and discriminatory conduct of detention officers was facilitated by “broad, unfettered discretion and lack of training and oversight” resulting in denial of access to important services).

<sup>70</sup> *See, e.g., S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 481 (D.N.J. 2001), modified, 145 F. Supp. 2d 505 (D.N.J. 2001), rev’d sub nom. on other grounds, 274 F.3d 771 (3d Cir. 2001) (in a pre-*Sandoval* Title VI action, granting plaintiff’s request for declaratory judgment on this basis).

challenged policy or practice.<sup>71</sup> The analysis requires balancing recipient's interests in implementing their policies with the substantial public interest in preventing discrimination.<sup>72</sup> Even when EPA finds a substantial legitimate justification, it must determine whether there are any comparably effective alternative practices that would result in less adverse impacts. Thus, even if a recipient demonstrates a substantial legitimate justification, the challenged policy or decision may nonetheless violate federal civil rights law if the evidence shows that a less discriminatory alternative exists.<sup>73</sup>

For complaints alleging air quality impacts, an area's attainment status for the NAAQS can be considered in EPA Title VI investigations but should not alone dispose of allegations of discrimination.<sup>74</sup> "[C]ompliance with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not ensure that persons are not adversely affected by a permitted facility, particularly if they are exposed to multiple sources of pollution in overly burdened communities."<sup>75</sup> EPA may identify a disproportionately affected population where a facility's proposed emissions would impair an Air Quality Control Region's ("AQCR") (as determined by EPA under the CAA) ability to comply with a NAAQS.<sup>76</sup> In doing so, EPA has considered additional modeling to determine whether emissions from a proposed permit are in fact below the NAAQS.<sup>77</sup> This additional modeling may change the administrative record and thus could lead to different permit terms or a denial.<sup>78</sup>

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<sup>71</sup> *Georgia State Conf.*, 775 F.2d at 1417. See also, *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (noting the framework for proof developed in civil rights cases), citing, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>72</sup> See, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, <https://www.justice.gov/crt/fcs/T6Manual7#U>.

<sup>73</sup> *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); see ECRCO Toolkit, at 9-10.

<sup>74</sup> *In Re: Shell Gulf of Mexico, Inc., Shell Offshore, Inc.* (frontier Discovery Drilling Unit), 15 E.A.D. 103, 2010 WL 5478647 (Dec. 30, 2010), at \*2 (holding EPA erred in relying solely on compliance with the then-existing annual NO<sub>2</sub> NAAQS in finding that Alaska Native populations would not experience adverse human health or environmental effects from the permitted activity when the NAAQS was under revision).

<sup>75</sup> Marianne Engelman Lado, TOWARD CIVIL RIGHTS ENFORCEMENT IN THE ENVIRONMENTAL JUSTICE CONTEXT: STEP ONE: ACKNOWLEDGING THE PROBLEM, 29 *Fordham Env'tl. L. Rev.* 1, 16 (2017) (citing to Steve Lerner, SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES (2010).

<sup>76</sup> See Letter from Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, to Diane [sic] E. Goode, Director, EPA (June 9, 1998), [https://www.documentcloud.org/documents/2162464-epa\\_05r-98-r5.html](https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html) (*Select Steel* Title VI complaint); also see Letter from Ann E. Goode, EPA, to Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, (Oct. 30, 1998), [https://www.documentcloud.org/documents/2162464-epa\\_05r-98-r5.html](https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html).

<sup>77</sup> See Order Denying Review, *In re Select Steel Corporation of America Permit No. 579-97*, Docket No. PSD 98-21, at 13 (Sept. 11, 1998) (denying review of the *Select Steel* decision on jurisdictional grounds), [https://yosemite.epa.gov/oa/eab\\_web\\_docket.nsf/Unpublished~Final~Orders/1890AA3427C194748525706C0053DB75/\\$File/select.pdf](https://yosemite.epa.gov/oa/eab_web_docket.nsf/Unpublished~Final~Orders/1890AA3427C194748525706C0053DB75/$File/select.pdf).

<sup>78</sup> *In Re: Shell Gulf of Mexico, Inc., Shell Offshore, Inc.*, 2010 WL 5478647, at \*3.

## B. Limited English Proficient Populations

The failure to provide access to agency programs or activities to LEP people through translation and interpretation can violate Title VI.<sup>79</sup> EPA's LEP Guidance defines Limited English Proficient, or LEP, persons as "[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English."<sup>80</sup> EPA's LEP Guidance confirms that "Title VI prohibits conduct that has a disproportionate effect on LEP persons because such conduct constitutes national origin discrimination."<sup>81</sup> Further, it confirms that written materials informing LEP persons of "rights or services is an important part of 'meaningful access'" because "[l]ack of awareness that a particular program, right, or service exists may effectively deny LEP individuals meaningful access."<sup>82</sup> Thus, EPA recognizes that "[i]n certain circumstances, failure to ensure that LEP persons can effectively participate in or benefit from [f]ederally assisted programs and activities may violate the prohibition under Title VI of the Civil Rights Act of 1964 [...] and Title VI regulations against national origin discrimination."<sup>83</sup> The LEP Guidance sets criteria for EPA to use to evaluate whether a recipient has fulfilled its Title VI obligations to LEP populations.

EPA established four factors used to determine the extent of a federal funding recipient's obligation to provide LEP persons with language services:

- (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- (2) the frequency with which LEP individuals come in contact with the program;
- (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and
- (4) the resources available to the grantee/recipient and costs.

The LEP Guidance directs recipients to consider their past interactions with groups of LEP people and to affirmatively search for data on LEP individuals from, for example, the U.S. Census Bureau, school systems, and governments.<sup>84</sup> Immediacy and high toxicity can indicate an obligation to provide LEP people with language services. "A recipient needs to determine whether denial or delay of access to services or information could have serious or even life-threatening implications for the LEP individual."<sup>85</sup>

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<sup>79</sup> *Lau*, 414 U.S. at 566.

<sup>80</sup> 69 Fed. Reg. 35,602, 35,606.

<sup>81</sup> *Id.* at 35,605 (citing *Lau*).

<sup>82</sup> *Id.* at 35,610.

<sup>83</sup> *Id.* at 35,604.

<sup>84</sup> *Id.* at 35,606.

<sup>85</sup> *Id.* at 35,607.

EPA may revisit LEP issues resolved under prior complaints to find new Title VI violations tied to the agency’s implementation of informal resolution agreement terms.<sup>86</sup> For example, in a recent complaint against the Bay Area Air Quality Management District (“BAAQMD”), EPA found that the agency’s website failed to provide LEP people with an identifiable link to information in other languages on its homepage. What little information was provided using the website’s search feature only resulted in “information that was vague and limited and can only be accessed by persons with LEP if they search the website and know how to activate the Google Translate function.”<sup>87</sup> BAAQMD provided a phone interpretation service, but callers had to navigate through a pre-recorded message that was only in English. Further, EPA found that the agency’s internal guidance documents regarding services to LEP populations—which were also only provided in English—were outdated and included Census information that was over twenty years old. EPA found that BAAQMD’s agency-wide public participation plan was provided only in English and did “not provide specific policies and procedures on how it will provide [LEP] populations effective translation and interpretation services to ensure meaningful participation.”<sup>88</sup>

### **C. TCEQ’s Minor Source CBP Standard Permit, the Texas State Implementation Plan, and Texas’s Requirements for Crystalline Silica**

EPA first authorized Texas’s standard permit program in 2003.<sup>89</sup> It did so under the understanding that TCEQ’s program would comply with all minor source NSR permit “applicable requirements” under the CAA.<sup>90</sup> These include “emissions, production or operational limits, monitoring, and reporting.”<sup>91</sup> According to EPA, standard permits provide a streamlined mechanism for permit approvals for similar sources by “provid[ing] an alternative process for approving construction of certain categories of new and modified sources for which TCEQ has adopted a Standard Permit.”<sup>92</sup> Pursuant to Texas’s SIP, so long as standard permits meet EPA-

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<sup>86</sup> Letter from Lilian S. Dorka, External Civil Rights Compliance Office, Office of General Counsel, EPA to Jack P. Broadbent, Chief Executive Officer/Air Pollution Control Officer, BAAQMD, Preliminary Findings for EPA Complaint No. 01R-21-R9 (Jun. 21, 2021), <https://www.epa.gov/system/files/documents/2021-07/2021.06.21-baaqmd-final-preliminary-findings-letter-recipient-signed.pdf>; *see also* Letter from Lilian S. Dorka, External Civil Rights Compliance Office, Office of General Counsel, EPA to Carol S. Comer, Director, Missouri Dep’t of Nat. Resources, Partial Preliminary Finding for EPA Complaint No. 01RNO-20-R7: Non-Compliance at 9-10 (Mar. 30, 2021) (issuing a preliminary finding of discrimination against LEP people based in part on a recipient’s failure to provide translation services and in specific, the recipient’s failure to “provide evidence that it offered or provided meaningful access to individuals with LEP during its solicitation for comments related to [a federal operating permit application under the CAA]), <https://www.epa.gov/ogc/partial-preliminary-findings-letter-administrative-complaint-no-01rno-20-r7>.

<sup>87</sup> *Id.* at 29.

<sup>88</sup> *Id.* at 30.

<sup>89</sup> 68 Fed. Reg. 64,543 (Nov. 14, 2003).

<sup>90</sup> 42 U.S.C. §§ 7410(a)(2)(A), (C).

<sup>91</sup> 68 Fed. Reg. at 65,544.

<sup>92</sup> *Id.* at 64,546.

approved rules, then the permits satisfy CAA requirements. In its application to EPA to revise the Texas SIP, TCEQ made certain representations to EPA about TCEQ’s standard permits<sup>93</sup>:

1. The permits would not apply to new major sources or major modifications.
2. Minor sources will satisfy CAA New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.
3. Facility emissions will be registered.
4. Recordkeeping requirements will assure compliance.
5. The permits will be enforceable.
6. Standard permits development process includes public participation.<sup>94</sup>

TCEQ also represented to EPA that each “new or revised Standard Permits [would] undergo public notice and a 30-day comment period, and TCEQ [would] address all comments received from the public before finalizing its action to issue or revise a Standard Permit.”<sup>95</sup> Further, standard permits must apply the best available control technology (“BACT”).<sup>96</sup> In practice, CBP permit applicants are required to demonstrate that their facility’s emissions will not cause or contribute to NAAQS and are protective of human health, general welfare, and physical property, commonly referred to a protectiveness review.<sup>97</sup>

TCEQ promulgated a standard permit for CBPs in 2000, with amendments in 2003, 2012, and 2021—the subject of this Complaint. The TCEQ claims that the most recent amendment is only to correct a clerical error, an error discovered only after TCEQ denied a CBP Standard Permit application, one of its very few denials on this permit. Through an administrative challenge to Bosque Solutions LLC’s CBP application, residents were able to defeat the permit by demonstrating that TCEQ never evaluated the impacts of crystalline silica, a known carcinogen, in any of its protectiveness reviews in support of the standard permits.<sup>98</sup> Crystalline silica is a regulated pollutant under state law. Standard permits must meet emission limitations set by Table 262 to 30 Tex. Admin. Code § 106.262. While this table does not list crystalline silica, it notes that for compounds not listed, the TCEQ must apply “[t]he time weighted average (TWA) Threshold

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<sup>93</sup> *Id.* at 64,544.

<sup>94</sup> Texas’s standard permits are not subject to the Texas Administrative Procedure Act and thus do not follow the ordinary rulemaking process. Tex. Health & Safety Code § 382.05195(g). Instead, the TCEQ must publish only one notice of the draft permit in the Texas Register and the same in one or more statewide newspapers to solicit public comments for 30 days. *Id.* at § 382.05195(b). TCEQ must issue an RTC but, unlike individual permits and rules, “the commission shall issue a written response to the comments at the same time the commission issues or denies the permit” instead of prior to any commission action. *Id.* at § 382.05195(d). TCEQ can set an effective date for standard permit amendments, otherwise amendments take effect when permit registrations are renewed. *Id.* at § 382.05195(f).

<sup>95</sup> 68 Fed. Reg. at 64,547.

<sup>96</sup> Tex. Health & Safety Code §§ 382.051(b)(3), 382.05195(a).

<sup>97</sup> TCEQ, Air Quality Modeling Guidelines, APDG 6232, Air Permits Division, TCEQ (November 2019) at 10.

<sup>98</sup> *Lau*, 414 U.S. 563.



Limit Value (TLV) published by the American Conference of Governmental Industrial Hygienist (ACGIH) in its TLVs and BEIs guide (1997 Edition).”<sup>99</sup> Emissions of chemical has a limit value of less than 200 µg/m<sup>3</sup> are prohibited under state law.<sup>100</sup> According to the ACGIH, crystalline silica has a time value that is under 200 µg/m<sup>3</sup> and its emissions are prohibited.

TCEQ attempted to rely on an exemption but realized that it was removed during the 2012 permit amendment. This term exempted CBP operators from having to comply with, arguably, the two most protective permit conditions, buffers and emission limitations for certain compounds, including crystalline silica. This gave TCEQ no choice but to adopt the administrative law judges’ findings and deny the permit application. Soon after, the TCEQ Chairman directed agency staff to correct the permit quickly. Under this guidance, the TCEQ Executive Director’s staff re-opened the CBP Standard Permit for the purpose of reinstalling the broad exemption.

In response to the Bosque findings, the TCEQ published an English-only notice of a proposed amendment to the 2012 CBP Standard Permit to “add the exemption from emissions and distance limitations in 30 Tex. Admin. Code § 116.610(a)(1).”<sup>101</sup> The agency opened the public comment period for only 30 days, from May 28 to June 29, 2021, providing the public with no information about the agency’s technical findings in support of the amendment.<sup>102</sup> On June 29, 2021, Harris County timely filed comments with the TCEQ regarding the proposed amendment. Despite considerable public participation, requests from a bipartisan cohort of elected officials from the local, state, and federal levels, and requests for materials and notice to be translated into Spanish, the Commission did not take further comment and instead proceeded to adopt the 2021 Amended CBP Standard Permit, effective on September 22, 2021.<sup>103</sup>

On October 18, 2021, Harris County filed a Motion for Rehearing with the TCEQ.<sup>104</sup> The Harris County’s Motion requested that the TCEQ remand the matter to the executive director because the 2021 CBP Standard Permit is not protective of human health. In support, Harris

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<sup>99</sup> 30 Tex. Admin. Code § 106.262(a)(2), fig. 2.

<sup>100</sup> *Id.* at § 106.261(a)(3).

<sup>101</sup> *See* TCEQ CBP Notice.

<sup>102</sup> TCEQ, Order Issuing an Amendment to Air Quality Standard Permit (signed Oct. 5, 2021), TCEQ Docket No. 2021-0493-MIS, Non-Rule Project No. 2021-016-OTH-NR; Harris County has submitted a Texas Public Information Act request to obtain documents and records relating to the 2000, 2003, and 2012 Protectiveness Reviews (discussed below) developed by TCEQ during the adoption of the initial concrete batch plant standard permit and subsequent amendment. In specific Harris County has requested the methods, calculations, models, workbooks, and any other items prepared or relied on by the TCEQ in support of its findings. The request covers all compounds reviewed by TCEQ, including PM<sub>2.5</sub> and PM<sub>10</sub> particulate matter and crystalline silica. *See* Office of the Harris County Attorney, Christian D. Menefee, Information request for Amendment to the Air Quality Standard Permit for Concrete Batch Plants; TCEQ Docket No. 2021-0493-MIS; Non-Rule Project No. 2021-016-OTH-NR (submitted on Oct. 15, 2021 and TCEQ sought clarification on the same day, Harris County clarified its request on Oct. 18, 2021).

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

<sup>104</sup> Harris County, Texas’s Motion for Rehearing on Order Issuing an Amendment to Air Quality Standard Permit, TCEQ Docket No. 2021-0493-MIS (Oct. 18, 2021), Attachment 15.

County submitted independent air dispersion modeling, discussed below, that demonstrates the CBP Standard Permit far exceeds NAAQS for PM<sub>2.5</sub> and PM<sub>10</sub> and the ESL for crystalline silica and fails to meet state air permitting requirements. On November 15, 2021, the TCEQ denied all Motions for Rehearing. Having exhausted all possible administrative remedies, Harris County filed suit in state district court.<sup>105</sup> The matter remains pending in the 345<sup>th</sup> Judicial District in Travis County, Texas.

## **VI. The 2021 CBP Standard Permit is not Protective of Public Health or the Environment**

A lot has changed since the agency issued the original CBP Standard Permit in 2000. Yet, the agency continues to rely on the protectiveness review it conducted for the original permit<sup>106</sup> and the limited review it conducted for the 2012 revision.<sup>107</sup> Also, for the 2021 CBP Standard Permit amendment, TCEQ also relied on modeling for aggregate production operations (“APOs”). There are considerable differences between CBPs and APOs that call into question whether using this modeling is appropriate.<sup>108</sup> TCEQ makes clear that “[t]his amendment to the standard permit does not affect the protectiveness review conducted during the development of the original standard permit.”<sup>109</sup> According to the agency, its findings continue to comport with “current effects screening level guidelines and current [NAAQS].”<sup>110</sup> However, and as Harris County noted in its comment, that the current PM<sub>2.5</sub> NAAQS was promulgated by EPA after the 2012 Protectiveness Review.<sup>111</sup> Effective March 18, 2013, EPA lowered the PM<sub>2.5</sub> NAAQS from 15.0 micrograms per cubic meter (µg/m<sup>3</sup>) to 12.0 µg/m<sup>3</sup> (“2012 PM<sub>2.5</sub> NAAQS”).<sup>112</sup> TCEQ’s 2012 CBP Standard Permit became effective on December 21, 2012.<sup>113</sup> The memorandum summarizing the 2012 Protectiveness Review makes no mention of the 2012 PM<sub>2.5</sub> NAAQS.<sup>114</sup> Thus, TCEQ cannot

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<sup>105</sup> *Harris County v. Tex. Comm. On Env’t Qual.*, D-1-GN-21-006505 (345th Dist. Ct., Harris County, Texas) (filed Oct. 22, 2022) (petition, without accompanying attachments, Attachment 16).

<sup>106</sup> Texas Natural Resource Conservation Commission (TCEQ’s predecessor agency), Air Permits Division, Office of Permitting, Proposed Standard Permit for Concrete Batch Plants (Apr. 25, 2000) (referred by TCEQ as the “2000 Protectiveness Review”), Attachment 17.

<sup>107</sup> TCEQ, Interoffice Memorandum from Mike Gould, P.E., Mechanical/Agricultural/Construction Section to Robert Opiela, P.E., Technical Program Support Section, Concrete Batch Plant Standard Permit Protectiveness Review (“2012 Protectiveness Review”) (Sept. 24, 2012), Attachment 18.

<sup>108</sup> See comparison of the CBP Standard Permit to APO permit requirements, Attachment 19.

<sup>109</sup> 2021 Amendment, RTC at 7.

<sup>110</sup> *Id.* at RTC 1, 10 (“In addition, the protectiveness review conducted by the TCEQ in 2012 showed that the concentrations of PM<sub>2.5</sub> were below the levels of the [NAAQS], which are set to protect public health with an adequate margin of safety.”).

<sup>111</sup> See Harris County CBP Comments at 9.

<sup>112</sup> 78 Fed. Reg. 3,086 (Jan. 15, 2013).

<sup>113</sup> TCEQ, Amendments to the Air Quality Standard Permit for Concrete Batch Plants at 1 (effective Dec. 21, 2012).

<sup>114</sup> 2012 Protectiveness Review at 2.

assure compliance with the 2012 PM<sub>2.5</sub> NAAQS because EPA had not yet finalized the standard by the time TCEQ completed the 2012 Protectiveness Review.

For over two decades, TCEQ has permitted CBPs in communities based on deficient air dispersion modeling for particulate matter and having never evaluated the effects of crystalline silica. Harris County conducted independent modeling using TCEQ’s own CBP Emission Rate Calculation Workbook using both AERMOD and ISCST3 (v02035) to model for PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica. Unlike TCEQ, the County speciated pollutants in specific, crystalline silica. The results of this modeling are attached to this Complaint.<sup>115</sup>

First, Harris County modeled the 2012 CBP Standard Permit under perfect compliance, without considering background concentrations. Under nearly every circumstance, the offsite impacts exceeded the respective particulate matter NAAQS or TCEQ’s crystalline silica ESL. The relevant pollutant standards are:

Pollutant	Standard/Metric
PM	150 µg/m <sup>3</sup> (24 hr); 60 µg/m <sup>3</sup> (annual) [1971-1987]
PM <sub>10</sub>	150 µg/m <sup>3</sup> (24 hr)
PM <sub>2.5</sub>	35 µg/m <sup>3</sup> (24 hr); 12 µg/m <sup>3</sup> (primary NAAQS, annual)
Silica (PM)	14 µg/m <sup>3</sup> (short-term)
Silica (PM <sub>4</sub> )	0.27 µg/m <sup>3</sup> (long-term)

These models reveal shocking levels of PM<sub>2.5</sub> and PM<sub>10</sub> and crystalline silica impacts as far as 3 miles from the emission point, the bag house. In the tables below, the County summarizes AERMOD models under all types of terrain roughness and using meteorological data from three airports. These models do not account for background concentrations.

**Crystalline silica.** AERMOD results far exceed the short-term ESL threshold with maximum modeled concentrations ranging from 489.54 µg/m<sup>3</sup> to 1081.35 µg/m<sup>3</sup>. Similarly, ISCST3 results exceed the short-term ESL threshold with maximum modeled concentrations at 786.84 µg/m<sup>3</sup>. AERMOD results far exceed the long-term ESL threshold with maximum modeled concentrations ranging from 2.81 µg/m<sup>3</sup> to 5.78 µg/m<sup>3</sup>. Similarly, ISCST3 results exceed the long-term ESL threshold with maximum modeled concentrations at 1.46 µg/m<sup>3</sup>.

**PM<sub>10</sub> NAAQS.** The PM<sub>10</sub> 24-hour NAAQS is 150 µg/m<sup>3</sup>. All but one AERMOD modeled concentration exceeds the NAAQS. Maximum modeled concentrations exceeding NAAQS range from 179.04 µg/m<sup>3</sup> to 497.97 µg/m<sup>3</sup>. Similarly, ISCST3 results exceed the NAAQS with maximum modeled concentrations at 259.77 µg/m<sup>3</sup>.

**PM<sub>2.5</sub> NAAQS.** Many AERMOD modeled concentrations exceed the 24-hour NAAQS, with the highest modeled concentration at 79.01 µg/m<sup>3</sup>. Similarly, ISCST3 results exceed

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<sup>115</sup> Harris County’s air dispersion modeling tables and maps, Attachment 20.

the NAAQS with maximum modeled concentrations at 39.44  $\mu\text{g}/\text{m}^3$ . All AERMOD modeled emissions exceed the Annual NAAQS, with the highest modeled concentration at 22.92  $\mu\text{g}/\text{m}^3$ .

Because all modeled emissions far exceeded their respective Significant Impact Level (“SIL”), the County, following TCEQ guidance, proceeded to run models that considered background concentrations—TCEQ did not take this step. When determining whether to account for background, the TCEQ compares the highest modeled concentration to a SIL.<sup>116</sup> For purposes of particulate matter emissions, the 24-hour  $\text{PM}_{10}$  SIL is 5  $\mu\text{g}/\text{m}^3$ , the Annual  $\text{PM}_{10}$  SIL is 1  $\mu\text{g}/\text{m}^3$ , the 24-hour  $\text{PM}_{2.5}$  SIL is 1.2  $\mu\text{g}/\text{m}^3$ , and the Annual  $\text{PM}_{2.5}$  SIL is 0.2  $\mu\text{g}/\text{m}^3$ .<sup>117</sup> If the modeled concentration is greater than the SIL, the proposed source could make a significant impact on existing air quality.<sup>118</sup> In that case, the predicted concentration, plus representative monitoring background concentrations, are compared to the respective PM NAAQS.<sup>119</sup>

Background concentrations of  $\text{PM}_{2.5}$  in the County are significant. There are seven TCEQ air quality monitors in Harris County that measure  $\text{PM}_{2.5}$ .<sup>120</sup> Between 2018 and 2020, on average,  $\text{PM}_{2.5}$  concentrations in the ambient air ranged from 7.3  $\mu\text{g}/\text{m}^3$  to 10.3  $\mu\text{g}/\text{m}^3$  and the average reading for all the monitors is 9.29  $\mu\text{g}/\text{m}^3$ . TCEQ’s 2012 Protectiveness Review found that at 100 feet from the emission source (the bag house),  $\text{PM}_{2.5}$  emissions from the CBP alone are 9.31  $\mu\text{g}/\text{m}^3$  for 30 cu. yd/hour and 7.19  $\mu\text{g}/\text{m}^3$  for 300 cu. yd/hour.<sup>121</sup> Taking background and modeled emissions together, like County residents experience, puts  $\text{PM}_{2.5}$  levels well above the former (15.0  $\mu\text{g}/\text{m}^3$ ) and current (12.0  $\mu\text{g}/\text{m}^3$ ) 2012  $\text{PM}_{2.5}$  NAAQS. In almost every separate analysis, using both AERMOD and ISCST3 models, modeled emissions exceed the 2012  $\text{PM}_{2.5}$  NAAQS, the  $\text{PM}_{10}$  NAAQS. The County also modeled for cumulative impacts and this is discussed below.

The County’s modeling, including for cumulative impacts as discussed below, renders TCEQ’s BACT determinations for the CBP Standard Permit null.<sup>122</sup> The TCEQ is authorized to issue standard permits for similar facilities only if the standard permit is enforceable, includes adequate compliance monitoring, and uses BACT.<sup>123</sup> Whether a type of control technology

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<sup>116</sup> TCEQ, Air Quality Modeling Guidelines, APDG 6232, Air Permits Division, TCEQ (November 2019).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Harris County CBP Comments at 9 (Clinton Park, Deer Park, Baytown, Aldine, Seabrook, Houston East, and Park Place).

<sup>121</sup> *Id.* at 10.

<sup>122</sup> While BACT only applies to major sources pursuant to the CAA, 42 U.S.C. § 7479(3), TCEQ applies a comparable state BACT standard, and that is the standard discussed here.

<sup>123</sup> Texas Health & Safety Code §§ 382.051(b)(3), 382.05195(a)(3); 30 Tex. Admin. Code § 116.602.

qualifies as BACT depends on whether the TCEQ finds that the technology is technically practicable and economically reasonable.<sup>124</sup>

The TCEQ has not demonstrated that the 2021 Amended CBP Standard Permit uses BACT. TCEQ last assessed for BACT in the 2012 CBP Standard Permit – over 9 years ago.<sup>125</sup> In light of the modeling results discussed above and the length of time since a BACT analysis, a proper assessment would include updated modeling and require a re-evaluation of BACT. BACT could include further distance requirements, additional requirements to address visible emissions, and added requirements for housekeeping to prevent dust, such as the ones recommended by HCPCSD in public comment which went unacknowledged by the TCEQ.

Pollutant: Silica						
Met Station	Maximum Modeled Ground-Level Concentrations ( $\mu\text{g}/\text{m}^3$ )					
	1-Hour (14)			Annual (0.27)		
	Low	Med	High	Low	Med	High
IAH	897.21	567.39	488.27	5.53	4.96	3.72
EFD	850.93	519.99	477.26	4.78	4.06	2.81
HOU	1081.35	587.28	489.54	5.78	4.29	3.26

Pollutant: PM <sub>10</sub>						
Met Station	Maximum Modeled Ground-Level Concentrations ( $\mu\text{g}/\text{m}^3$ )					
	24-Hour (150)			Annual		
	Low	Med	High	Low	Med	High
IAH	497.97	267.83	201.22	139.80	129.65	97.54
EFD	410.23	214.49	136.64	123.07	100.98	75.88
HOU	400.72	224.58	179.04	144.45	117.73	90.16

Pollutant: PM <sub>2.5</sub>						
Met Station	Maximum Modeled Ground-Level Concentrations ( $\mu\text{g}/\text{m}^3$ )					
	24-Hour (35)			Annual (12)		
	Low	Med	High	Low	Med	High
IAH	79.01	43.65	31.95	21.78	20.34	15.51
EFD	64.74	34.98	22.29	19.46	15.78	12.06
HOU	64.72	35.37	28.48	22.92	18.31	14.23

<sup>124</sup> Texas Health & Safety Code at § 382.0518(b)(1).

<sup>125</sup> TCEQ, Amendments to the 2012 Concrete Batch Plant Air Quality Standard Permit Summary Document, at Page 2, available at <https://www.tceq.texas.gov/permitting/air/newsourcereview/mechanical/cbp.html>.

The following table summarizes modeled offsite impacts from a single CBPs for PM<sub>2.5</sub>, PM<sub>10</sub>, and crystalline silica using ISCST3 and using rural land use as the dispersion coefficient. Like the above AERMOD tables, the below results do not include background.

**RURAL ISCST3 Version 02035 Runs**

<b>Permanent Concrete Batch Plant</b>			
<b>Pollutant</b>	<b>Maximum Modeled Ground-Level Concentrations (µg/m<sup>3</sup>)</b>		
	<b>1-Hour</b>	<b>24-Hour</b>	<b>Annual</b>
PM		553.57	96.24
PM <sub>10</sub>		259.77	
PM <sub>2.5</sub>		39.44	6.67
SIL	786.84		
SIL <sub>4</sub>			1.46

ISCST3 modeling using rural land use dispersion.

**Pollutant:** PM<sub>2.5</sub> and PM<sub>10</sub>

**Values:** Site + Background

**Generated:** 10/14/2021

**Averaging Period:** 24-hour and Annual

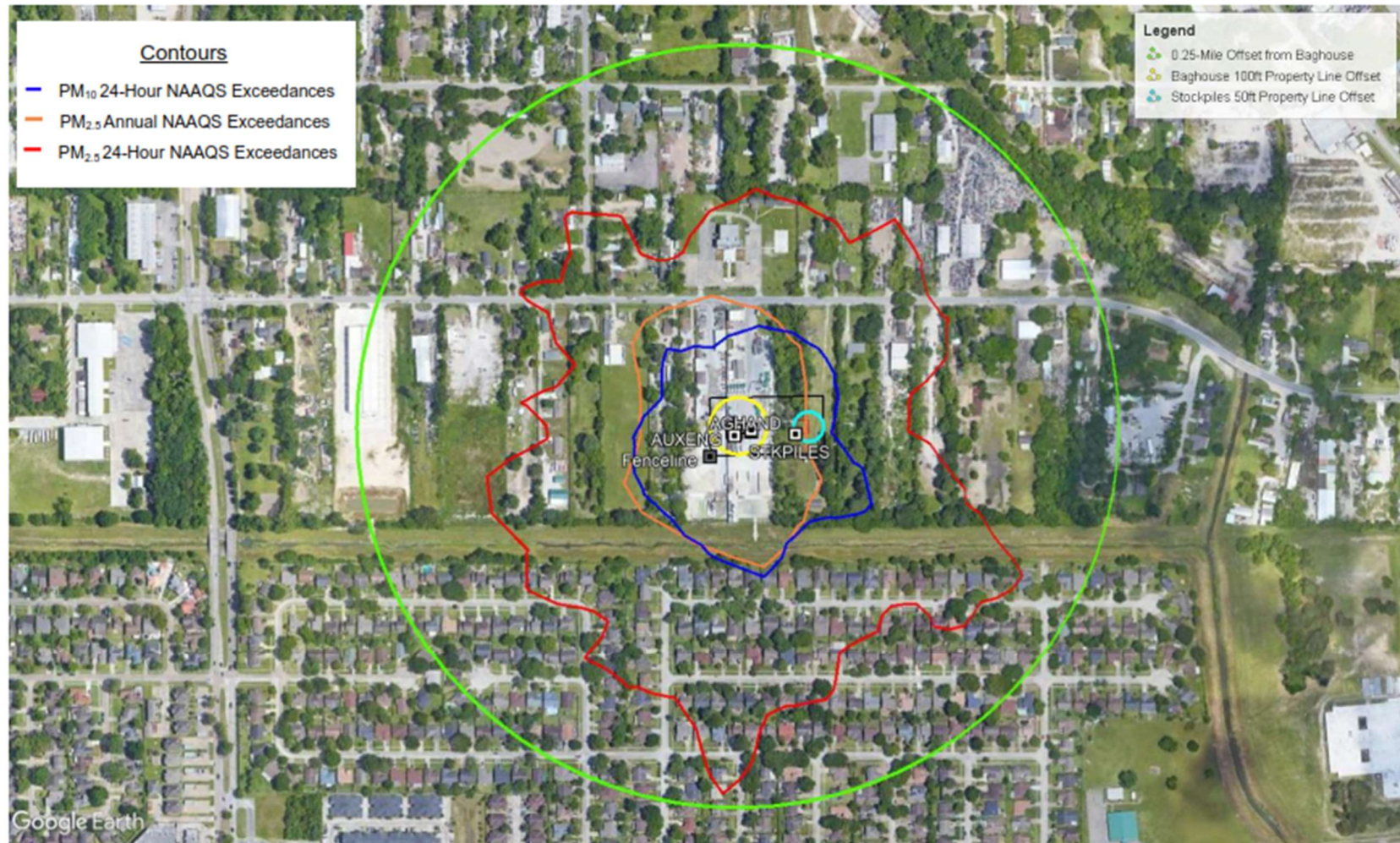
**Map Type:** Google Earth

**MET Data:** IAH

**Output Units:** µg/m<sup>3</sup>

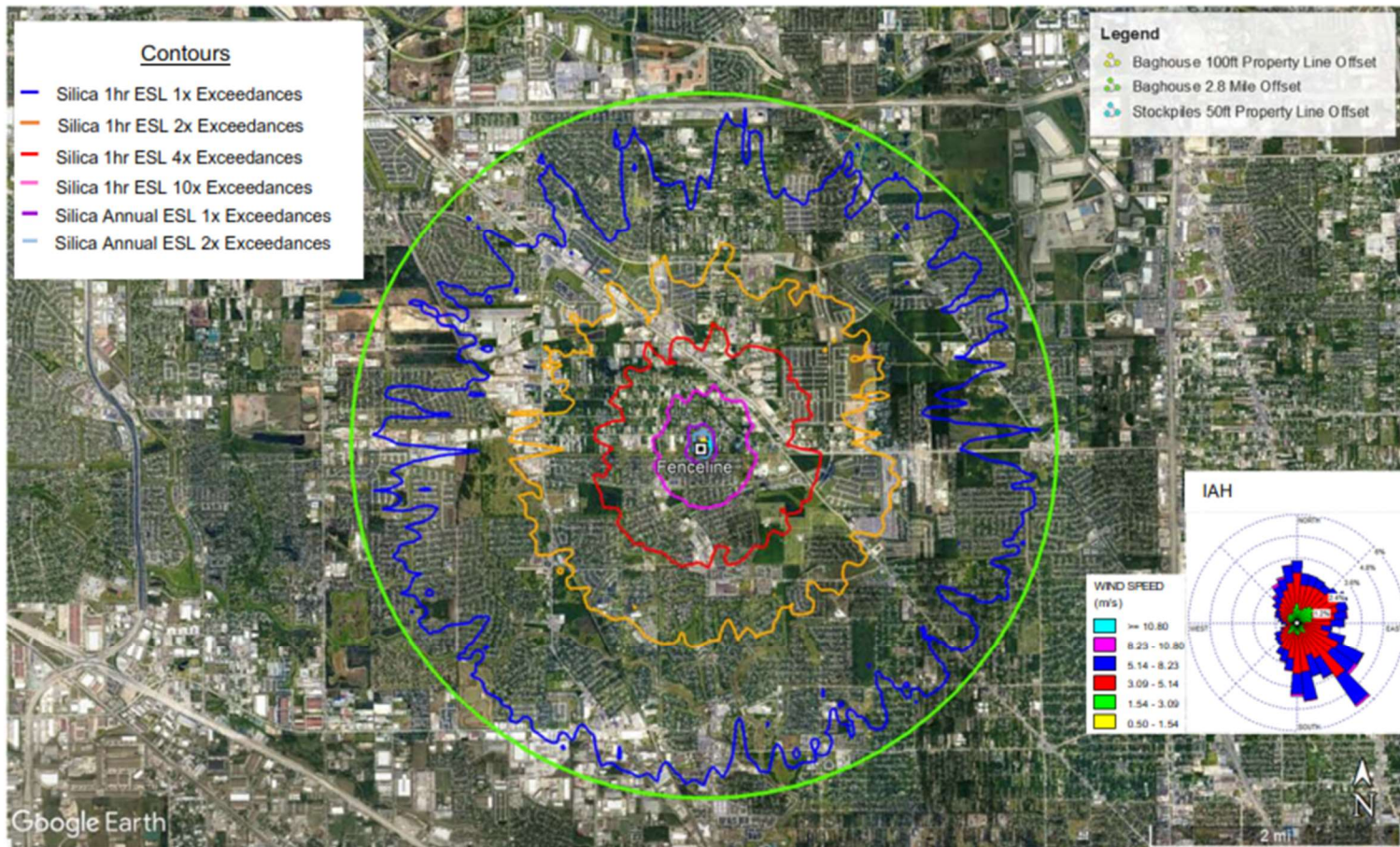
**Model:** ISCST3 (v02035)

**Page:** 1 of 1



[Silica] The figure below depicts air dispersion modeling results of crystalline silica from CBP operations. Model input emission rates are based on [TCEQ's emission calculation workbook for CBPs](#). One (1) year of [surface meteorological data provided by TCEQ](#) was used. Contours mark the extent of the area in which the CBP impacts exceed some multiple of a TCEQ toxicological level (either the short- or long-term Effects Screening Level, or ESL).

**Model:** ISC3T3 (v02035)    **Configuration:** 2 CBPs (Stacked)    **Pollutants:** Crystalline silica    **Met Data:** IAH







TCEQ excluded LEP people from the public process it affords to the development of CBP Standard Permits.

**A. The 2021 CBP Standard Permit is Not Protective of Human Health and Fails to Consider Cumulative Impacts**

The HGB area's attainment status for the 2012 PM<sub>2.5</sub> NAAQS cannot alone determine whether the 2021 CBP Standard Permit is protective of human health or the environment.<sup>128</sup> And even if EPA were to take this approach, TCEQ would still fail the mark. As demonstrated above, and in the cumulative impacts discussion that follows, the County's air dispersion modeling demonstrates that the permit is not protective of public health or the environment. EPA can and should give weight to this additional modeling that demonstrates that the permit exceeds health-based limits for particulate matter and crystalline silica. NAAQS are designed to protect the ambient air, not the air at the fence line of a facility. Houston's lack of community planning and zoning restrictions further intensifies this problem. In Harris County, it is not uncommon for a CBP to share a fence with a residential property.

There are many communities in the County where there are multiple CBPs and other industry within the community. TCEQ is statutorily mandated to "protect the public from cumulative risk in areas of concentrated operations" and to "give priority to monitoring and enforcement in areas in which regulated facilities are concentrated."<sup>129</sup> TCEQ states that it considered "cumulative or additive emissions during the protectiveness review [2000 and 2012, presumably]."<sup>130</sup> However, TCEQ's definition of "cumulative impact" restricts its analysis to cumulative impacts from one site. In response to comment, the agency did not explain its rationale on this point or whether or why the agency could not apply a different definition.

According to the TCEQ, the protectiveness review in support of the CBP Standard Permit "included site-wide production limits to avoid the potential for cumulative emissions that would be higher than what is authorized by the standard permit."<sup>131</sup> While emissions from multiple sources at one site can contribute to cumulative impacts, the County and many other commenters made TCEQ aware of other, more prevalent cumulative impacts. For example, communities with several CBPs that are not in the same site and communities with one or more CBP co-located or in the vicinity of other sources of air pollution in the community.

TCEQ regulations do not define "cumulative impacts" in this action or in rules. For the 2021 Amended CBP Standard Permit, TCEQ states that "cumulative impacts" are those from one "site" - another term that is undefined for the purpose of determining cumulative impacts. In another permitting matter, TCEQ states that "[t]he TCEQ's Toxicology Division specifically considers the possibility of cumulative and aggregate exposure when developing ESL values that

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<sup>128</sup> See *In Re: Shell Gulf of Mexico, Inc., Shell Offshore, Inc.*, 2010 WL 5478647, at \*3.

<sup>129</sup> Tex. Water Code § 5.130.

<sup>130</sup> 2021 Amendment at RTC 8.

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

are used in air permitting.”<sup>132</sup> And in another agency permitting action for oil and gas operations, the TCEQ claims that “emissions monitoring and inventory in the Barnett Shale....addresses ambient air conditions from a cumulative basis to ensure groups of facilities are not contributing to problems in particular locations.”<sup>133</sup>

To assess cumulative impacts, the County modeled two CBPs side-by-side using AERMOD under medium terrain roughness, considering background concentrations, and working under perfect compliance with two separate CBP Standard Permits. The County considered a situation where one CBP is downwind from another CBP. Under every circumstance, modeled emissions far, far exceeded applicable NAAQS and ESLs.

<b>Pollutant: Silica</b>		
<b>Maximum Modeled Ground-Level Concentrations (µg/m³)</b>		
	<b>1-Hour (14)</b>	<b>Annual (0.27)</b>
<b>Met Station</b>	<b>Med</b>	
IAH	599.48	5.47
EFD	564.53	4.42
HOU	623.87	4.78

Table 6: Multi-plant crystalline silica modeled emissions.

<b>Pollutant: PM</b>		
<b>Maximum Modeled Ground-Level Concentrations (µg/m³)</b>		
	<b>24-Hour (150)</b>	<b>Annual (60)</b>
<b>Met Station</b>	<b>Med</b>	
IAH	875.98	347.29
EFD	693.65	279.34
HOU	690.94	310.66

Table 7: Multi-plant total particulate matter modeled emissions.

<b>Pollutant: PM<sub>10</sub></b>		
<b>Maximum Modeled Ground-Level Concentrations (µg/m³)</b>		
	<b>24-Hour (150)</b>	<b>Annual</b>
<b>Met Station</b>	<b>Med</b>	
IAH	293.99	141.36
EFD	233.19	112.84
HOU	241.20	131.21

<sup>132</sup> See TCEQ, Application by Valero Refining - Texas, L.P. Houston Refinery, Houston, Harris County (Air Quality Permit No. 2501A) 13; SOAH Docket No. 582-20-4163; TCEQ Docket No. 2020-0783-AIR (application remanded to the ED on Mar. 17, 2021 by order of the ALJs).

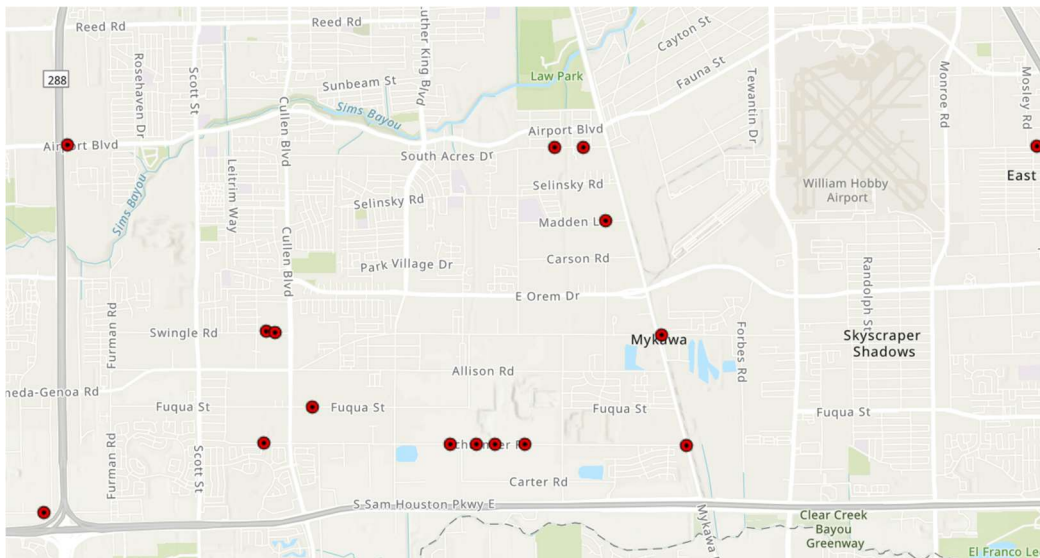
<sup>133</sup> TCEQ, Commission Approval for Rulemaking Adoption, Chapter 106 – Permits by Rule, Non-Rule Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, Oil and Gas Permit by Rule and Standard Permit Corrections, Response to Comment, Rule Project No. 2011-014-106-PR 172 (adopted Jan. 11, 2012); TCEQ Docket No. 2011-0893.

Table 8: Multi-plant coarse particulate matter modeled emissions.

Pollutant: PM <sub>2.5</sub>		
Maximum Modeled Ground-Level Concentrations (µg/m <sup>3</sup> )		
	24-Hour (35)	Annual (12)
Met Station	Med	
IAH	47.92	22.23
EFD	38.03	17.72
HOU	38.10	20.50

Table 9: Multi-plant fine particulate matter modeled emissions.

Racial and ethnic minorities and low resource people bear a disproportionate share of this excessive pollution. In southeast Harris County, for example, there are at least 16 CBPs within approximately a three-mile radius from the intersection of East Orem Drive and Martindale Road. This part of the County includes Sunnyside, a community with a legacy of blatant environmental racism against Black Americans.<sup>134</sup>

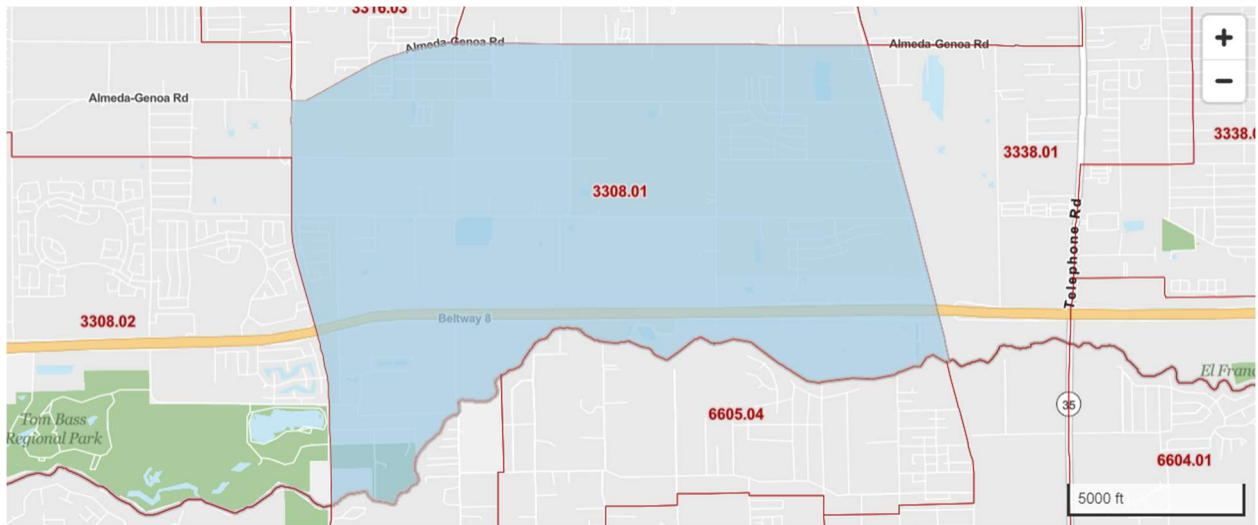


Concrete batch plant locations in and around Sunnyside.<sup>135</sup>

This area is where Census Tract 3308.01 in zip code 77048 is located. This Census Tract has the most CBPs sited, 7 in total, out of all of the Census Tracts identified by the County with active registrations under the 2012 CBP Standard Permit. The population in this Census Tract is 40.86% Black or African American.

<sup>134</sup> See Bullard, Robert D., PhD, *Invisible Houston: The Black Experience in Boom and Bust at 71-72* (1987) (discussing a disproportionate number of incinerators and landfills in Sunnyside).

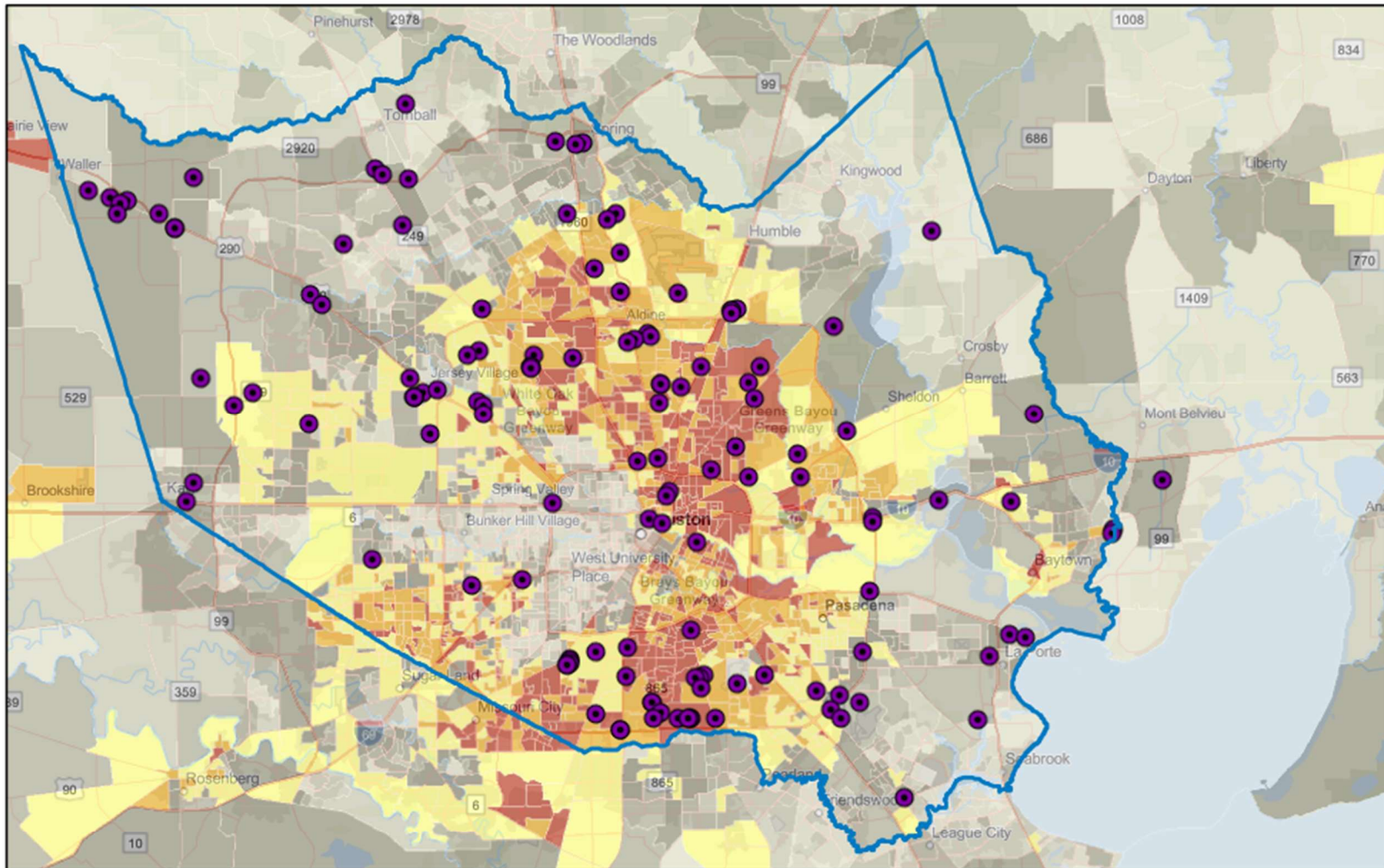
<sup>135</sup> Interactive map maintained by Harris County Pollution Control Services available: <https://harriscounty.maps.arcgis.com/apps/webappviewer/index.html?id=28e3ce8cf8c5475989beb52b090e8db5>.



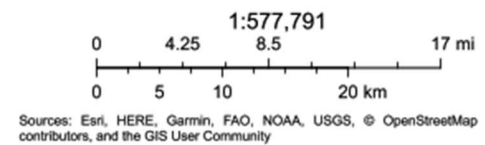
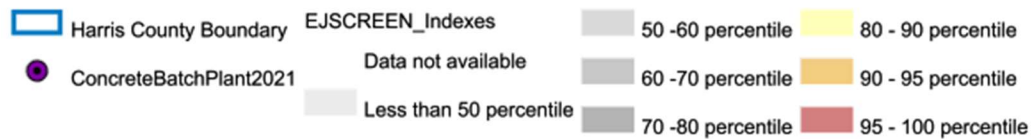
The failings of the CBP Standard Permit allow operators to pollute with impunity in communities that are already unjustly burdened by sources of pollution from CBPs and other sources. Though racial and ethnic minorities make up the majority of the population in Harris County, this does not mean that disproportionate impacts are not possible in the County. Disproportionate impacts are apparent in the County’s east-west divide. More industrial facilities are sited in eastern parts of Harris County, including the Houston Ship Channel, where minorities and low-income people are overrepresented. Meanwhile, less facilities are sited in western Harris County where there are less communities of color and greater wealth.<sup>136</sup> This pattern holds true for the bulk of CBP sites, as seen in the maps below. Higher percentiles indicate higher concentrations of people of color and poor people.

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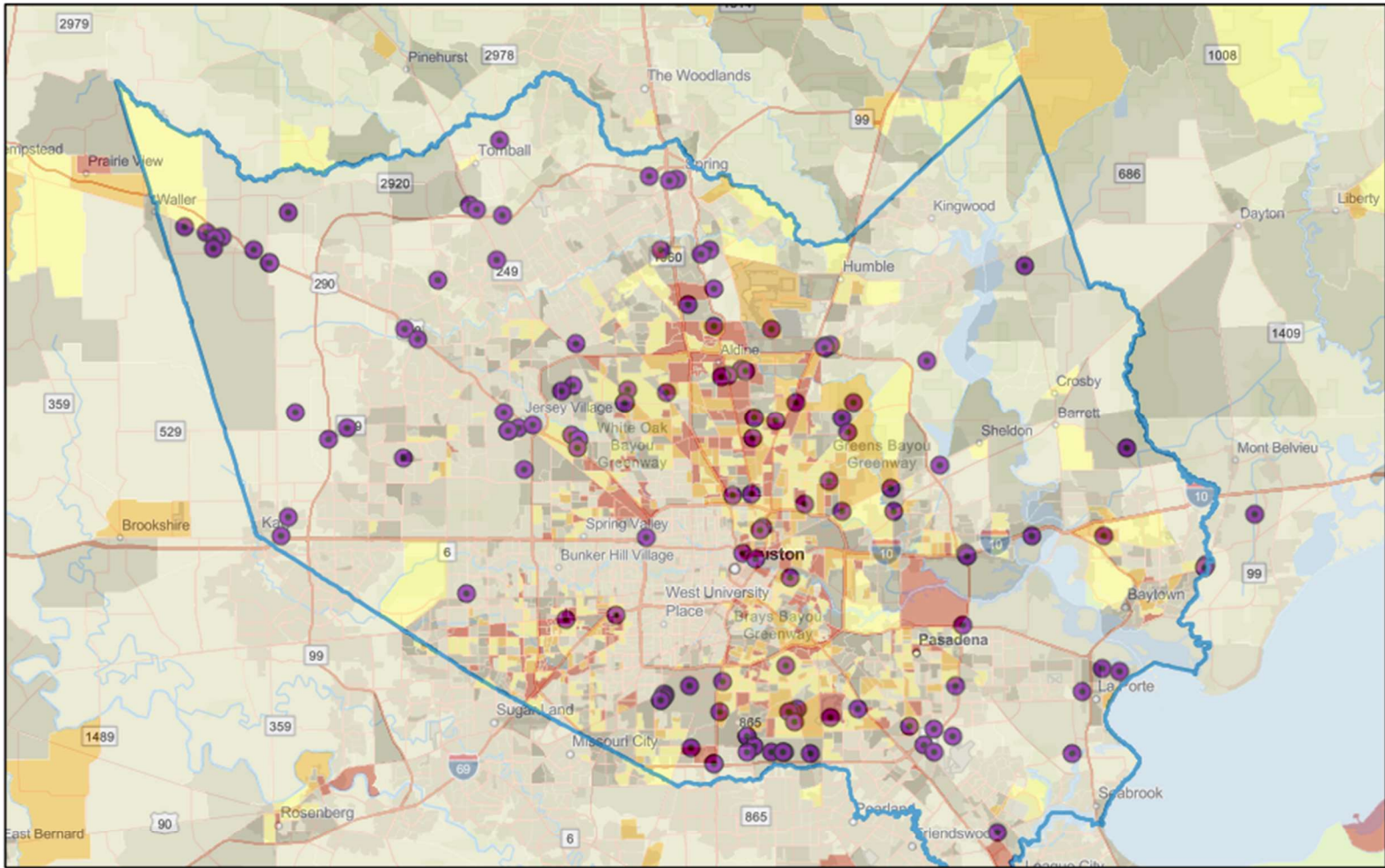
<sup>136</sup> Union of Concerned Scientists and Texas Environmental Justice Advocacy Services, *Double Jeopardy in Houston: Acute and Chronic Chemical Exposures Pose Disproportionate Risk for Marginalized Communities* (Aug. 22, 2016) (discussing higher risk of chemical accidents and toxic exposure in minority communities in eastern Harris County communities in comparison to white western Harris County communities), <https://www.ucsusa.org/resources/double-jeopardy-houston>.



10/29/2021



EPA's People of Color National Index and Concrete Batch Plant Locations in Harris County, Texas



10/29/2021

EJSCREEN\_Indexes  
 Data not available  
 Less than 50 percentile  
 50 -60 percentile  
 60 -70 percentile  
 70 -80 percentile  
 80 - 90 percentile  
 90 - 95 percentile  
 95 - 100 percentile  
 Harris County Boundary  
 ConcreteBatchPlant2021

1:577,791  
 0 4.25 8.5 17 mi  
 0 5 10 20 km  
 Sources: Esri, HERE, Garmin, FAO, NOAA, USGS, © OpenStreetMap contributors, and the GIS User Community

EPA's Low Income Population National Index and Concrete Batch Plant Locations in Harris County, Texas

TCEQ’s permit places impacted residents in an impossible situation when an operator decides to site a facility in the community. Residents have little recourse when a CBP operator decides to move into their community. Restrictive state laws limit who can challenge CBP Standard Permit applications to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant.”<sup>137</sup> Even when residents can meet this high bar, TCEQ rarely denies CBP Standard Permit applications, making the Bosque Solutions, LLC denial truly extraordinary. In an act that further limits a residents ability to challenge a CBP application, TCEQ’s rules prohibit the admissibility of air dispersion modeling at a contested case hearing on a CBP Standard Permit registration.<sup>138</sup> In 2017, the Texas Legislature further restricted the process when it changed the CBP Standard Permit public notice rules to require only one notice providing for a 30-day public comment period, down from two notices, two 30-day comment periods, and any time between the two notices.<sup>139</sup>

Communities with CBPs regularly have other sources of pollution in the community, like industrial plants, highways, 18-wheeler truck terminals, and several CBPs. The County accounted for cumulative impacts by modeling two facilities “stacked” and operating in perfect compliance with two separate CBP Standard Permits. These models again show exceedances well beyond the property line. These models are attached.<sup>140</sup> The crystalline silica model shows exceedances up to a 3-mile radius from the bag house with background concentrations.

## **B. Failure to Provide Meaningful Public Participation**

TCEQ failed on its promise to provide meaningful public engagement as part of the development of the CBP Standard Permit. On May 28, 2021, TCEQ announced that it opened the CBP Standard Permit for 30 days of public comment. TCEQ did so through a government listserv, on its website, and in one newspaper in each of Austin, Houston, and Dallas. This short announcement was only in English. TCEQ provided no technical information in support of the announcement, even when the agency was asked to do so.<sup>141</sup> It held only one virtual public meeting where the agency took comment but ended the meeting before all participants had an opportunity to speak. The result of this nontransparent process is that LEP people were excluded. TCEQ mailed its RTC after the TCEQ Commissioners adopted the CBP Standard Permit amendment on September 22, 2021. TCEQ adopted the amendment under the objection and request for more time and information from many, including Harris County and a bipartisan cohort of state and federal elected officials. The RTC also falls short. Several of Harris County’s comments went unacknowledged, including one suggesting more protective permit conditions. TCEQ’s process deprives the public—and local governments like Harris County—from providing well-informed

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<sup>137</sup> Tex. Health & Safety Code § 382.058(c).

<sup>138</sup> 30 Tex. Admin. Code § 80.128.

<sup>139</sup> 30 Tex. Admin. Code § 39.603(c) (for CBPs, combining the Notice of Intent to Obtain a Permit (also known as “NORI” or first notice) and the Notice of Application and Preliminary Decision (also known as “NAPD” or second notice)).

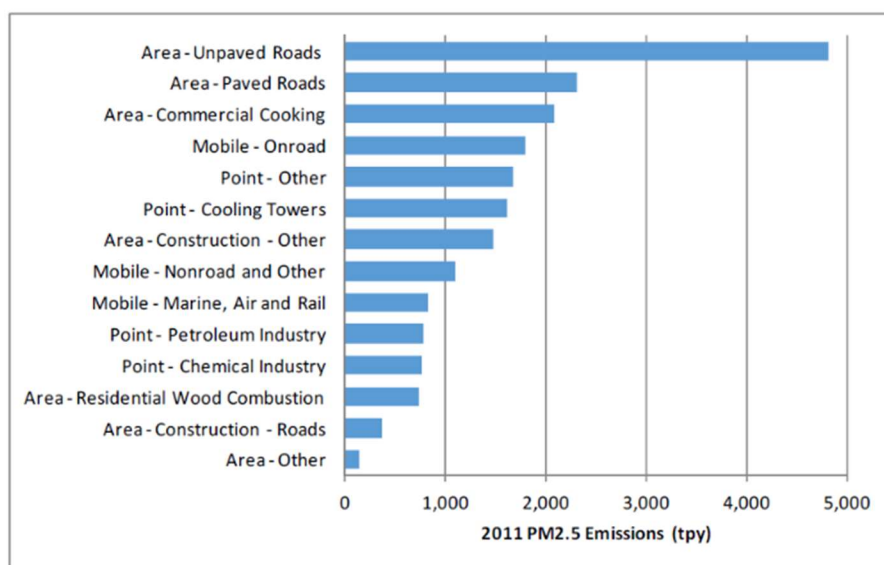
<sup>140</sup> See Attachment 20.

<sup>141</sup> See Harris County CBP Comment.



comments based on first-hand knowledge and reviews of technical and other supporting information.

In comment, HCPCSD presented TCEQ with specific improvements to the CBP Standard Permit based on its years of CBP enforcement experience and “122 Facility investigations and a total of 144 Violation Notices” completed by PCS since February 2020 as part of its Concrete Batch Plant Initiative.<sup>142</sup> As more fully described in the County’s comment, PCS’s recommendations include common-sense adjustments to the CBP Standard Permit intended to achieve enduring compliance with the permit’s terms. For example, because “[f]ailure to pave all entry and exit and main traffic routes” is a very common violation, PCS recommended that facilities submit “an As-Built Certification, signed and sealed by an engineer, to tell TCEQ and the local pollution control authority that all entry and exit and main traffic routes...have been paved.”<sup>143</sup> Unpaved roads are also the leading source of PM<sub>2.5</sub> emission sources in the County.



2011 Houston-Galveston-Brazoria Annual PM<sub>2.5</sub> Emissions.<sup>144</sup>

Land development in the County requires a permit from the Harris County Engineering Department, including CBPs.<sup>145</sup> The typical permit application must be supported by an As-Built Certification signed and sealed by an engineer. Thus, the burden of such a requirement could be little to none. PCS would like for the Commission to consider and respond to its recommendations.

<sup>142</sup> *Id.* at 7-8.

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

<sup>144</sup> 2021 H-GAC Update at 15.

<sup>145</sup> *See* Regulations of Harris County, Texas for Floodplain Management (July 9, 2019).

Perhaps a reason that the CBP Standard Permit went unchallenged for so long is because Texas law prohibits applicants from conducting “air dispersion modeling before beginning construction of a concrete plant, and evidence regarding air dispersion modeling may not be submitted at a hearing...”<sup>146</sup>

### C. TCEQ Excluded LEP from the Public Participation Process

TCEQ’s notice for the 2021 CBP Standard Permit amendment excluded LEP residents from the CBP Standard Permit public participation process. Harris County explained in its comment to TCEQ that a quarter or more of the CBPs in Harris County are in zip codes where 20% or more of the population age 5 years and over do not speak English or do not speak it very well, with Spanish being the most widely spoken language among these residents.<sup>147</sup> TCEQ seems to think that Title VI obligations are fulfilled by merely adhering to state law which requires it to only “provide reasonable notice throughout the state.”<sup>148</sup> In rules, TCEQ interprets its enabling legislation to mean that it must only “publish notice in the daily newspaper of largest general circulation” in Austin, Dallas, and Houston.<sup>149</sup> In its RTC,<sup>150</sup> and without discussion, TCEQ perfunctorily concludes that “[b]ilingual notice was not required per state statute or rule.”<sup>151</sup> TCEQ should know better. It was recently the subject of a Title VI civil rights investigation that prompted sweeping changes at the agency to create greater access to agency programs for LEP populations.<sup>152</sup>

It is clear that EPA’s four factor test is more than substantiated here. First, approximately 20% of the County is made up of LEP people and this figure rises to 23% among the Census Tracts with two or more CBPs. This far exceed the 5% benchmark TCEQ recently set in its public participation plan for LEP people.<sup>153</sup> Second, TCEQ receives applications for CBPs in Harris

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<sup>146</sup> Tex. Health & Safety Code at § 382.058(d).

<sup>147</sup> Harris County CBP Comment.

<sup>148</sup> Tex. Health & Safety Code § 382.05195(b).

<sup>149</sup> 30 Tex. Admin. Code §116.605(c).

<sup>150</sup> Found within the 2021 Amendment and formed part of supporting materials given to the Commissioners for deliberation at the September 22, 2021 Commissioners’ Meeting. Harris County notes that the RTC was not provided prior to the Commissioners’ deliberations.

<sup>151</sup> 2021 Amendment, RTC at 22.

<sup>152</sup> See Informal Resolution Agreement between the Texas Commission on Environmental Quality and the United States Environmental Protection Agency, EPA Complaint No. 02NO-20-R6 (Nov. 3, 2020), Attachment 21.

<sup>153</sup> TCEQ, Language Access Plan (The County notes that there are at least two ways of accessing this and other Title VI compliance documents but the public has to navigate several webpages to get to them. The first would have a member of the public click through 4 pages that are not clearly labeled, from TCEQ’s homepage, the pages are titled “Agency,” “Agency Deliberations and Decisions,” “Public Representation and Participation,” and “Title VI Compliance at TCEQ.” The second also starts with the agency’s homepage, then the public has to scroll to the bottom to find “Learn about public participation and inclusion,” then click on “Title VI Compliance at TCEQ.”), <https://www.tceq.texas.gov/agency/decisions/participation/title-vi-compliance#:~:text=TCEQ's%20Language%20Access%20Plan,a%20timely%20and%20reasonable%20manner.>

County, the agency has reason to know that there is a substantially high likelihood that it will encounter LEP people, specifically Spanish speakers. Repeatedly, the County, residents, and advocates must raise LEP concerns only to be ignored by TCEQ over and over again. For example, on average, 53% of households are made up of LEP people in the Census Tracts that include and surround the proposed Avant Garde facility cited above. Despite this, community members have to plead with TCEQ to provide language interpretation services at an upcoming public meeting, as well as Spanish notice for the upcoming meeting. TCEQ also recently engaged in similar discriminatory behavior in a landfill permit application for the Hawthorne Landfill in southwest Harris County.<sup>154</sup> There, the agency held a public meeting without Spanish translation knowing that many comments made in Spanish were part of the record. This also runs contrary to the rules and policies TCEQ enacted. In Harris County, TCEQ must always provide Spanish language services, residents should not have to plead with TCEQ every time. TCEQ is engaging in the same behavior that was subject of the 2019 Title VI complaint.

Third, the public process afforded to CBP Standard Permit applications is important. These facilities create tremendous problems in the community and permit are issued for years at a time. Community members have a very small window to make their concerns heard. Without translation and publication in appropriate newspapers, LEP people in Harris County and throughout the state remain without notice of this important change in regulation, including those who own and operate CBPs and work in the facilities. In this instance, LEP community members were denied meaningful access to TCEQ's public participation process for CBPs, including the agency's public meeting on the amendment held on June 28, 2021.

Public meetings provide meaningful and exclusive opportunities for public participation. They often mark the end of the public comment period and offer the only opportunity to introduce oral public comment into the administrative record. Public meetings serve to democratize important decisions affecting communities for years to come. Panelists may provide attendees with presentations, handouts, and contact information. The TCEQ Executive Director's staff will typically talk about the status of the application, technical review, and procedural next steps. Community members also have an opportunity to ask questions of staff during an informal question and answer session. Nowhere else can community members receive this information succinctly and tailored to their concerns about a particular facility.

Lastly, the fourth factor in EPA's analysis looks at agency resource. The TCEQ has the resources to provide adequate language service to LEP people. The agency often touts the fact that it is the second largest environmental regulation agency in the Nation, after EPA. It funds its programs, in part, through application fees. If it is such a financial burden to TCEQ, something the agency has not outwardly claimed, perhaps it should pass the cost to the applicant.

### **VIII. Violations of Title VI**

The facts and law cited in this Complaint establish a *prima facie* case of discriminatory conduct by TCEQ. Harris County believes that an investigation is warranted pursuant to EPA's

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<sup>154</sup> Harris Count Attorney, Request for a Public Meeting; USA Waste of Texas Landfills Inc., Application for Municipal Solid Waste Permit No. 2185A; 10550 Tanner Road, Houston, Texas (Mar. 28, 2022), Attachment 22.

Case Resolution Manual<sup>155</sup> and that this investigation would result in further evidence pointing to discrimination including further review of Texas law, TCEQ rule and policy, TCEQ practice, modeling, Census data, and other information provided support this Complaint and that EPA may encounter during its investigation. There is no “substantial legitimate justification” for TCEQ’s discriminatory conduct. For years, communities and advocates across the state have warned the agency of the discriminatory impacts of the CBP Standard Permit to no avail.

Further, Harris County believes that the evidence cited in this Complaint supports a finding of discrimination by a preponderance of the evidence, in specific, on the two points below.

**A. TCEQ’s Administration of CAA Minor Source NSR Requirements Negatively and Disproportionately Impact the Public Health in Communities where Racial and Ethnic Minorities, LEP People, and Low-Income People are Overrepresented**

The Texas SIP requires that TCEQ administer the CBP Standard Permit in compliance with the CAA. To do so, TCEQ must establish “emissions, production or operational limits, monitoring, and reporting” sufficient to comply with the NAAQS.<sup>156</sup> TCEQ is supposed to do this through a protectiveness review and modeling in support the permit. Further, TCEQ is supposed to provide a meaningful public participation process and respond to public comments prior to issuing minor source NSR permits. The 2021 CBP Standard Permit does not meet these requirements and these failings disproportionately and adversely affect racial and ethnic minorities, LEP people, and low-income people.

The permit fails on enforceability against the PM<sub>10</sub> and the PM<sub>2.5</sub> NAAQS because even when operators perfectly comply with 2021 CBP Standard Permit terms, the CBP emissions still exceed the applicable NAAQS. Further, by nesting a state law requirement for crystalline silica into a federally-required permit, TCEQ compounds the disproportionate pollution burden borne by surrounding communities. Further, TCEQ did not provide a meaningful public participation process. The agency failed to provide the public with information in support of its permit proposal, even when asked to do so. The agency offered one virtual public meeting on an English-only notice and did not allow all participants to provide comment. As a result, TCEQ’s administration of this program falls short of meeting CAA requirements and U.S. Census Bureau data demonstrates that TCEQ’s inability to comply with the CAA disparately impacts racial and ethnic minorities, LEP people, and low-income people.

**B. TCEQ’s Public Participation Process Excluded LEP People, Again**

The TCEQ lacks procedural safeguards required by 40 C.F.R. Parts 5 and 7 sufficient to ensure that the agency complies with general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to TCEQ’s services, programs, and activities, for individuals who are racial and ethnic minorities and LEP people. As discussed above, the

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<sup>155</sup> EPA, Case Resolution Manual (Jan. 2021), [https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual\\_.pdf](https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

<sup>156</sup> 68 Fed. Reg. at 65,544.

TCEQ is not providing LEP people with meaningful access to the public participation the agency gives to the development of standard permits. For example, TCEQ did not provide background information or notices in Spanish. Also, the record does not indicate that TCEQ conducted any LEP outreach, especially for LEP people.

TCEQ is also in violation of at least two terms from the Informal Resolution Agreement resolving EPA Title VI Complaint 02-NO-20-R6. Specifically, § III.A.3. where TCEQ was supposed to hold two community meetings within one year of its first virtual meeting on it LEP rule changes. The first meeting was held on April 27, 2021. As of the date of this Complaint, TCEQ has neither held nor noticed such meetings. Further, § III. B.1.c. requires that TCEQ develop nondiscriminatory public participation procedures, including procedures for engaging with LEP people. TCEQ does not have such procedures in place for the public participation process it affords to CBP Standard Permits. Like the BAAQMD case cited above, TCEQ's public participation plans and Title VI compliance documents are not easy to access. EPA should revisit its 2020 compliance review of TCEQ's public participation processes and, in specific, those that apply to LEP people.

## **IX. Disproportionality**

TCEQ's CBP Standard Permit program disproportionately and adversely impacts racial and ethnic minorities, LEP people, and poor people. According to TCEQ data, there are approximately 96 CBPs in the County that hold active registrations under the 2012 CBP Standard Permit. Of these, 46 are sited in Census Tracts with more than one CBP. These 46 CBPs are sited in just 16 Census Tracts. U.S. Census Bureau data shows that in these 16 Census Tracts:

1. LEP people make up 19.80% of the Harris County population but they make up 22.78% of the population in the selected Census Tracts and this population is disproportionately made up of Spanish speaking people.
2. Hispanic or Latino people make up 43.01% of the Harris County population but they make up 51.43% of the population in the selected Census Tracts and 45.14% of the population in the top three Census Tracts.
3. Black or African American people make up 25.04% of the Harris County population but they make up 27.68% of the population in the selected Census Tracts and 33.60% of the population in the top three Census Tracts.
4. Black or African American people living in poverty make up 19.20% of the Harris County population but they make up 20.33% of the population in the selected Census Tracts.

## **X. Less Discriminatory Alternatives**

There are less discriminatory alternatives available to TCEQ. The purpose of the CBP Standard Permit program is to provide air quality permits for CBPs and TCEQ could simply withdraw the permit and require that applicants apply for an NSR case-by-case permit. Through a case-by-case permit, community members would have a greater opportunity to effect permit changes requisite for the protection of their health. Also, they would have a greater opportunity to challenge permit applications through administrative contested case hearings and not be subject to the restrictive standing requirements associated with the CBP Standard Permit.

TCEQ could develop regionally specific permits. Texas is large state and its many regions do not all share the same environmental conditions. For example, large metroplexes like Dallas, and Houston have long-standing air pollution issues. Other areas of the state are predisposed to specific natural hazards such as wildfires in the Texas Panhandle, drought in Central Texas, and hurricanes along the Gulf Coast. Such conditions could justify regionally applicable permits. The TCEQ administers such permits, for example, for water quality over the Edwards Aquifer.

## **XI. Relief**

**b(6) Privacy** asks that EPA’s OCR accept this Complaint for investigation to determine whether TCEQ violated Title VI of the Civil Rights Act of 1964 and the agency’s implementing regulations, and whether TCEQ is in violation of the November 3, 2020 Informal Resolution Agreement between EPA and TCEQ. The County requests that the Civil Rights Office of the U.S. Department of Justice play an active role in coordinating this federal investigation and any subsequent enforcement actions. During the pendency of this investigation, the County requests that EPA place a moratorium on TCEQ’s ability to issue registrations under the 2021 CBP Standard Permit and the CBP Standard Permit with Enhanced Controls until EPA determines whether this permit is protective of public health and the environment. Harris County asks to be part of EPA’s investigation and for the agency to specifically meet with representatives from the Super Neighborhood Alliance to hear from local leaders across the County about their experiences living next to CBPs.

**b(6) Privacy** also asks that EPA rescind assurances submitted by TCEQ under 40 C.F.R. § 7.80 certifying the agency’s compliance with EPA’s nondiscrimination regulations. Further, that the EPA reject future assurances from TCEQ for all of its programs or activities unless and until the agency addresses the issues raised in this Complaint.

## **XII. Conclusion**

EPA has powerful tools at its disposal—including the Clean Air Act and Title VI of the Civil Rights Act of 1964—to redress systemic racism is the distribution of pollution burdens. Consistent with President Biden’s whole-of-government approach, and Administrator Regan’s directive to all EPA offices that they take immediate and affirmative steps to ameliorate historic injustices against racial and ethnic minorities, EPA must hold TCEQ accountable. This Complaint establishes a *prima facie* case of discrimination because it demonstrates that the 2021 CBP Standard Permit is not protective of public health and the environment and that this pollution burden is disproportionately felt by Black, Brown, non-English speaking poor people in the County.

EPA has an opportunity to do right by communities throughout Texas where nondemocratic public processes have allowed CBPs to pollute with impunity in communities that sorely need public health protections. TCEQ’s administration of the minor NSR CBP Standard Permit program functions in a way that is an affront to American values and it must not stand, EPA must not let it stand.