

b(6) Privacy
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May 17, 2022

VIA E-FILING @ [title vi complaints@epa.gov](mailto:title_vi_complaints@epa.gov)
US Environmental Protection Agency
Office of General Counsel (2310A)
External Civil Rights Compliance Office
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Complaint Pursuant to Title VI of the Civil Rights Act of 1964 by Impacted Communities
Against the Texas Commission on Environmental Quality for Actions Related to a
Rulemaking Amendment to the Concrete Batch Plant Standard Permit

Dear Sirs:

On behalf of b(6) Privacy [Redacted] hereinafter collectively referred to as “Complainants” or “Impacted Communities”, b(6) Privacy [Redacted] submits this complaint (“Complaint”) pursuant to Title VI of the Civil Rights Act of 1964 (“Title VI”) concerning actions by the Texas Commission of Environmental Quality (“TCEQ”) in approving a rulemaking amendment to the Concrete Batch Plant Standard Permit (“CBPSP”).

On September 22, 2021, despite public comments by individuals, legislators, communities, and other advocates, TCEQ passed a rulemaking amendment to the CBPSP, exempting applicants for concrete batch plants (“CBPs”) from the air pollutant emissions and distance limitations set forth in Chapter 30 of the Texas Administrative Code (the “Rulemaking Amendment”). The Rulemaking Amendment was passed without providing proper notice to Limited English Proficiency (“LEP”) individuals, and without conducting a new protectiveness review. In

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approving this Rulemaking Amendment, TCEQ effectively ensured that minority communities already inundated with CBPs will continue to be disproportionately burdened by the adverse effects of proximity to these plants, a clear violation of Title VI. Accordingly, Complainants request an investigation be opened into TCEQ's actions in failing to provide notice of the Rulemaking Amendment in Spanish, failing to conduct a new protectiveness review, and in approving the Rulemaking Amendment. Complainants further request EPA provide the following relief to Complainants:

- 1) Investigate the allegations in this Complaint regarding the discriminatory actions by TCEQ taken against the communities represented by Complainants where TCEQ has permitted CBPs;
- 2) Abate TCEQ's issuance of any permits for proposed CBPs or amendments in Houston pending any EPA investigation of this Complaint;
- 3) Require TCEQ to define "cement dust" with respect to the CBPSP;
- 4) Require TCEQ to conduct an updated protectiveness review for the CBPSP for particulate matter, crystalline silica, and cement dust impacts from CBP operations;
- 5) Require TCEQ to re-evaluate the conditions of the CBPSP to address environmental justice concerns;
- 6) Require TCEQ to revise its public participation requirements for the issuance of standard permits to ensure access for LEP populations;¹ and
- 7) Provide a new notice and comment period with respect to the Rulemaking Amendment on the CBPSP which complies with TCEQ's Informal Resolution Agreement with EPA regarding Limited English Proficiency and with TCEQ's Language Access Plan.

Complainants would further request any other and further relief that EPA feels they are entitled to after conducting its investigation to remedy TCEQ's discriminatory actions in adopting the Rulemaking Amendment.

I. PROCEDURAL HISTORY

TCEQ issued its Rulemaking Amendment for its CBPSP in October 2021, but the history of this discriminatory action began long before this order was issued. In November 2020, the Agency was at a crossroads after an administrative law judge ("ALJ") at the State Office of Administrative Hearings ("SOAH") adopted the arguments made by a group of protestants against a proposed CBP permit for Bosque Solutions, LLC ("Bosque"). The ALJ's findings recognized that the Agency's current standard permit for CBPs failed to exempt certain materials from its permitting requirements for applicants for its standard permit. Rather than have applicants actually quantify the amount of potential pollutants the proposed site would generate on a permit-by-permit basis, TCEQ felt it could not issue any more CBP permits in the State of

¹ 30 TEX. ADMIN CODE § 116.603.

Texas until it fixed this issue, which TCEQ described as an administrative error² due to the “inadvertent removal” during the 2012 amendment of an exemption from emissions and distance limitations in 30 TAC § 116.610(a)(1).³ An “error” that had been on the books since 2012.

The “error” only became a concern for TCEQ because of the Agency’s pending denial of a CBPSP application, the first denial ever.⁴ In its effort to fix the issue that had been latent for years, TCEQ moved with such speed that TCEQ: (1) failed to conduct the scientific analysis and due diligence required to ensure its CBPSP was protective of sensitive and overburdened populations like Complainants’ neighborhoods in Houston, Texas; and (2) failed to properly notice the permit for impacted LEP populations like Complainants’ neighborhoods to ensure participation. The following timeline will chronologize the events leading up to this administrative complaint:

Year	Events Related to “Administrative Error”	Years Elapsed Since Last, Complete Protectiveness Review
2000	TCEQ Amendments to CBPSP – Protectiveness Review	0
2003	TCEQ Amendments to CBPSP – No Protectiveness Review	3
2012	TCEQ Amendments to CBPSP – Limited Protectiveness Review	12
2020	Administrative Law Judge Issues Proposal for Decision in Bosque Solutions LLC Recommending Denial of the Permit ⁵	20
2021	TCEQ Rulemaking Amendment to CBPSP – <i>No Protectiveness Review Conducted or Disclosed for Review</i>	21

2021 Events Related to Rulemaking Amendment		Days Elapsed
Public Notice to End of Public Comment Period		
May 28	Notice of Rulemaking Amendment on CBPSP Published (in English) ⁶	0
	Public Comment Period on Rulemaking Amendment Begins	

² APPX_000341. Cites to documents in the Appendix will uniformly be referenced with the prefix “APPX_.” All Appendix documents are continuously Bates and included with the Submission of the Title VI Complaint. Cites to the Appendix will include a pincite or range that denotes the applicable Appendix pages, retaining only the last two digits and dropping the repetitious digits. (eg. APPX_000001 or APPX_0000001-05).

³ APPX_000105-07.

⁴ Magaly Ayala, “Mansfield neighbors relieved after permit for concrete batch plant in their neighborhood is denied.” Spectrum News (June 12, 2021) available at <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/06/11/mansfield-neighbors-relieved-after-permit-for-concrete-batch-plant-in-their-neighborhood-is-denied>.

⁵ APPX_000125-54.

⁶ APPX_000105-09.

2021 Events Related to Rulemaking Amendment		Days Elapsed
Public Notice to End of Public Comment Period		
June 9	TCEQ Denies CBPSP Application for Bosque Solutions, LLC	12
June 28	Public Meeting on Rulemaking Amendment ⁷ (in English)	31
June 29	Public Comment Period on Rulemaking Amendment Ends Complainants Timely Submit Comments ⁸	32
TCEQ's Review of Public Comments to Approval		
September 3	TCEQ's ED Issues Response to Comments ⁹ (in English)	66
September 22	TCEQ's ED Issues Amended Response to Comments ¹⁰ (in English) Commissioners Hearing Agenda on Rulemaking Amendment ¹¹	85
October 5	TCEQ Issues Order Amending the CBPSP ¹²	98
TCEQ's Review of Concerns Post-Approval & Complainants' Compliance with Administrative Exhaustion Requirements		
October 18	Complainants and Harris County file separate Motions for Rehearing ¹³	13
October 21	Complainants and Harris County file separate lawsuits against TCEQ seeking judicial review ¹⁴	16
November 15	TCEQ's ED responds to Motions for Rehearing ¹⁵	41
November 29	Motion for Rehearing overruled as a matter of law ¹⁶	55

TCEQ's approval process for the Rulemaking Amendment from the date of public notice to the signed order took no more than 130 days. In moving this quickly to fix an issue that was actually decades old, TCEQ left out the Impacted Communities and LEP populations and failed to conduct a protectiveness review to ensure that what the Agency was doing was good science and would not have an adverse effect on public health. In short, our state environmental protection agency should be doing more to protect the Impacted Communities and fence-line LEP populations where CBPs are prolific in Houston, Texas—not less. This issue is not just about a state agency being able to issue permits, but about protecting public health.

⁷ *Id.*

⁸ APPX_000023-53; APPX_000094-95; APPX_000103-04.

⁹ APPX_000329-69.

¹⁰ APPX_000000370-94.

¹¹ *Id.*

¹² APPX_000791.

¹³ APPX_000001-22; APPX_000458-78.

¹⁴ APPX_000184-224; APPX_000403-32.

¹⁵ APPX_000395-402.

¹⁶ 30 TEX. ADMIN. CODE § 80.272(e)(1).

II. EPA'S JURISDICTION OVER TCEQ

Title VI, codified under 42 U.S.C. § 2000d, states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

EPA implements Title VI under 40 C.F.R. § 7.10 *et seq.*:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin[...]

A. Program or Activity

Under Title VI, a “program” or “activity” includes all the operations of a department or agency of a State or local government, or the entity of such a State or local government that distributes such assistance and each such department or agency to which the assistance is extended.¹⁷ TCEQ is the environmental agency of the State of Texas entrusted with protecting the state’s public health and natural resources. Operations of TCEQ include administering environmental regulations and enforcement of the same. Accordingly, TCEQ qualifies as a “program” or “activity” as defined by Title VI.

B. Recipient of Federal Financial Assistance from EPA

TCEQ is a recipient of EPA financial assistance. “EPA assistance” is defined as any grant or cooperative agreement, loan, contract...or any other arrangement by which EPA provides funds, services of personnel, or real or personal property.¹⁸

In September 2019, TCEQ received approximately \$58.5 million from EPA in Performance Partnership Grants, with a funding period through August 31, 2022.¹⁹ The purpose of the funding is for the “operation of the TCEQ’s continuing environmental programs while giving it greater flexibility to address its highest environmental priorities...”²⁰ The operations referenced include managing activities to protect and maintain air, water, land, pollution prevention, and chemical safety.²¹ Furthermore, in its 2022 Fiscal Year, which runs from September 1, 2021 through August 31, 2022, TCEQ’s operating budget includes \$39.9 million from federal funds, with nearly \$21 million from EPA’s Performance Partnership Grant.²²

¹⁷ 42 U.S.C. § 2000d-4a (2015).

¹⁸ 40 C.F.R. § 7.25 (2010).

¹⁹ Grants to TCEQ from EPA located using USASpending.gov database found here: https://www.usaspending.gov/award/ASST_NON_99662720_6800.

²⁰ *Id.*

²¹ *Id.*

²² TCEQ, OPERATING BUDGET FOR FISCAL YEAR 2022, SFR-030/22, (December 1, 2021), available at <https://www.tceq.texas.gov/downloads/agency/administrative/legislatively-mandated-reports/sfr-030-22.pdf>.

C. Timeliness

Under Title VI as implemented by EPA, a complainant who believes a specific class of persons has been discriminated against may file a complaint with EPA in writing within 180 calendar days of the alleged discriminatory acts, unless this time frame is waived for good cause.²³ Furthermore, this 180-day time limitation may be waived for good cause.²⁴

This Complaint is timely as it is filed within 180 days of Complainants' Motion for Rehearing on TCEQ's approval of the discriminatory Rulemaking Amendment being overruled by operation of law. While the amendment was approved by the Commission after a public hearing on September 22, 2021, the order approving the Rulemaking Amendment was not signed until October 5, 2021.²⁵ Under Chapter 30 of the Texas Administrative Code ("TAC"), a motion for rehearing must be filed within 25 days of the signed order, a reply must be filed within 40 days of the signed order, and the motion for rehearing is overruled by operation of law after 55 days unless TCEQ extends time or rules on the motion.²⁶ Complainants exhausted their administrative remedies by filing a Motion for Rehearing with the Agency before pursuing other avenues for relief, such as filing this Title VI Complaint. As demonstrated in Section I above, all motions and replies were timely filed. However, TCEQ did not extend time or rule on the Motion within 55 days of the signed order. Therefore, Complainants' Motion for Rehearing was officially overruled by operation of law on November 29, 2021.²⁷

The overruling of Complainants' Motion for Rehearing is significant as it deprived Complainants of their last opportunity to resolve concerns regarding the amendment directly with TCEQ. TCEQ's refusal to grant a rehearing solidified its stance on the amendment: it would remain in force despite its discriminatory impacts on minority groups of various Houston communities, and TCEQ being advised of same during the public comment process. TCEQ's stance was further solidified by the Executive Director's Response to the Motion, which clearly demonstrated TCEQ believes it has no duty to ensure the minority communities most affected by the Rulemaking Amendment are protected.²⁸

Following TCEQ's affirmation of its order, Complainants filed a Petition for Judicial Review in Travis County, Texas, seeking review and reversal of the notice and approval of the Rulemaking Amendment.²⁹ This court action remains pending as of the date of the filing of this Complaint. Harris County, Texas filed a similar lawsuit, challenging the administrative action.

Finally, ongoing issuance of standard permits under this nonprotective Rulemaking Amendment continues to cause discriminatory impacts, which is good cause for waiver of any time limitation. Since September 22, 2021, when the CBPSP Rulemaking Amendment was approved, the following concrete batch plant permits have been issued or renewed in zip codes in Houston:

²³ 40 C.F.R. § 7.120(a)-(b) (2010).

²⁴ *Id.*

²⁵ APPX_000791.

²⁶ 30 TEX. ADMIN. CODE §§ 55.201, 80.272(d).

²⁷ *Id.*

²⁸ APPX_000395-402.

²⁹ APPX_000184-224.

Table 1: CBP Permits Applied For and Issued Since 9/22/2021 CBPSP Amendment³⁰

<u>Customer Name</u>	<u>Project Type</u>	<u>TCEQ Rec'd Date</u>	<u>Project Complete Date</u>	<u>Project Status</u>	<u>Physical Location</u>
WILLIAMS BROTHERS CONSTRUCTION CO., INC.	RENEWAL	9/23/21	11/24/21	COMPLETE	20406 HUFSMITH KOHRVILLE RD
ALAMO CONCRETE PRODUCTS COMPANY	REVISION	10/11/21	10/27/21	COMPLETE	11206C GIFFORD HILL ROAD
AUZ MATERIALS COMPANY LLC	REVISION	9/16/21	9/30/21	COMPLETE	17203 PREMIUM DR
AVANT GARDE CONSTRUCTION CO	INITIAL	12/17/21		PENDING	10945 EASTEX FWY
CAMPBELL CONCRETE & MATERIALS LLC	AMEND	2/2/22		PENDING	3935 SCHURMIER RD
CONCRETE PROS READY MIX INC	REVISION	10/7/21	10/14/21	COMPLETE	4005 SWINGLE RD
CS CONCRETE READY MIX INC	INITIAL	12/14/21	4/12/22	COMPLETE	7515 FURAY RD
D&D READY MIX CONCRETE LLC	AMEND	4/14/22		PENDING	5125 SCHURMIER RD
NEW HOUTEX READY MIX CONCRETE INC	INITIAL	6/24/21	10/25/21	COMPLETE	6262 S ACRES DR
OLDCASTLE INFRASTRUCTURE INC	RENEWAL	12/20/21	3/15/22	COMPLETE	13600 S WAYSIDE DR
RHINO READY MIX, LLC	INITIAL	8/18/20	4/20/22	VOID	9230 WINFIELD RD
SHIP CHANNEL CONSTRUCTORS LLC	AMEND	7/9/21	12/3/21	COMPLETE	15015 E FWY B
TERRELL MATERIALS CORPORATION	INITIAL	11/30/21	12/17/21	COMPLETE	19500 FOXWOOD FOREST BLVD
THE PRECAST COMPANY LLC	INITIAL	12/6/21	2/2/22	COMPLETE	8510 E SAM HOUSTON PKWY N
THE QUEEN READY MIX INC	INITIAL	8/3/21	12/16/21	COMPLETE	2507 N HOUSTON AVE
TRICON PRECAST LTD	RENEWAL	5/9/22		PENDING	15055 HENRY ROAD
WILLIAMS BROTHERS CONSTRUCTION CO., INC.	RENEWAL	9/23/21	11/24/21	COMPLETE	20406 HUFSMITH KOHRVILLE RD

The foregoing are all good cause for waiver of the 180-day time limitation.

³⁰ Data available at TCEQ New Source Review Air Permit Search, Concrete Batch Plant Standard Permit Search by date 9/22/2021, available at: <https://www2.tceq.texas.gov/airperm/index.cfm?fuseaction=airpermits.start>

III. THE CONCRETE BATCH PLANT STANDARD PERMIT IN TEXAS

Concrete batch plants (“CBPs”) are sites constructed to produce concrete. Producing concrete generally requires mixing water, cement, and other aggregates such as sand and gravel, into a large drum.³¹ The cement is stored in silos, while the sand, gravel, and other aggregate materials are stored in bins, before all being combined into the drum, then into concrete trucks to be mixed with the water.³² The concrete is then transported to construction sites.³³

The concrete production process causes significant air pollution in the neighborhoods where CBPs are sited.³⁴ Emissions include cement dust, crystalline silica, coarse and fine particulate matter (“PM”), which can be emitted during transfer or mixing of materials, truck loading, or simply from wind blowing through stockpiles.³⁵ Due to the air pollution caused by CBPs, the facilities must obtain air permits to operate.

A. TCEQ’s Broad Authority to Issue Standard Permits

TCEQ is tasked with administering the requirements of the Texas Clean Air Act (“TCAA”), which is designed to safeguard the state’s air resources from pollution.³⁶ Under the TCAA, a permit is required for any person to construct a new facility or modify an existing facility that may emit air contaminants.³⁷ TCEQ is authorized to issue standard permits for the construction or modification of new or existing similar facilities that have similar operations, processes, and emissions, such as CBPs.

Under Texas law, standard permits must be enforceable, include adequate monitoring, and apply best available control technology (“BACT”). TCEQ must grant an application for a CBPSP if it finds that it will satisfy BACT and there is “no indication that the emissions from the facility will contravene the intent of [the TCAA], including protection of the public’s health and physical property.”³⁸

As described more fully below, TCEQ began issuing a new type of standard permit for CBPs in the year 2000, with some amendments to the permit over the last 22 years.

B. The CBPSP from 2000-2011

In 2000, TCEQ issued a new air quality standard permit for CBPs effective September 1, 2000 which was applicable to permanent, temporary, and specialty CBPs.³⁹ The new CBPSP was the result of a “protectiveness review” to determine whether the conditions of the standard permit would comply with all applicable state and federal air quality standards and be protective of the

³¹ Guide to Air Quality Permitting for Concrete Batch Plants, University of Texas at Austin Environmental Clinic, First Edition at 2 (2018), available at <https://law.utexas.edu/wp-content/uploads/sites/11/2019/01/2019-EC-ConcreteBatchPlantsGuide.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.*

³⁶ TEX. HEALTH & SAFETY CODE § 382.002.

³⁷ TEX. HEALTH & SAFETY CODE § 382.0518(a); 30 TEX. ADMIN. CODE § 116.110.

³⁸ TEX. HEALTH & SAFETY CODE § 382.0518(b).

³⁹ APPX_000225-75.

general health and welfare of the public.⁴⁰ Beginning around 1996 until the issuance of the 2000 standard permit, CBPs were reviewed against property-line standards, the National Ambient Air Quality Standards (“NAAQS”), and health effects guidelines of the Texas Natural Resource Conservation Commission (“TNRCC”), the predecessor agency of TCEQ.⁴¹

In relevant part, the 2000 CBPSP required the following:

Administrative Requirements

The facilities shall be registered in accordance with 30 TAC § 116.611 “Registration Requirements” [...]. Facilities which meet the conditions of this standard permit do not have to meet the emissions and distance limitations listed in 30 TAC § 116.610(a)(1).⁴²

Under 30 TAC § 116.610(a)(1), “any project that results in a net increase in emissions of air contaminants...must meet the emission limitations of § 106.261...”. In turn, 30 TAC § 106.261(a)(1) states that facilities or changes thereto shall be located at least 100 feet from any residence. The statute also states that total new or increased emissions, including fugitives, shall not exceed 6.0 pounds per hour and ten tons per year for numerous materials, including cement dust.⁴³ Additionally, total new or increased emissions, including fugitives, shall not exceed 1.0 lb/hr of any chemical having a limit value greater than 200 mg/ m³ as listed and referenced in Table 262 of § 106.262.⁴⁴ The statute also bans emissions of a chemical with a limit value of less than 200 mg/m³.⁴⁵ TCEQ alleged that when it created the new standard permit an “extensive protectiveness review” was completed which addressed emissions and distance limitations for CBPs.⁴⁶ In effect, CBPs did not have to comply with the foregoing statutory limitations.

In 2003, TCEQ amended the CBPSP to “expedite the authorization process for concrete batch plant public works projects.”⁴⁷ It was specifically designed to ease requirements for registering temporary batch plants, but “[g]eneral requirements concerning distance limitations, emission limits, control requirements, and recordkeeping” remained unchanged.⁴⁸ CBPs continued to be exempt from statutory requirements related to air emissions and distance limitations, and TCEQ did not conduct a new protectiveness review before passing the 2003 amendment.⁴⁹

C. The CBPSP from 2012-2020

In 2012, the CBPSP issued by TCEQ underwent significant amendments. According to TCEQ, while the standard permit was protective of public health, amendments were made to account for

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² APPX_000262.

⁴³ 30 TEX. ADMIN. CODE § 106.261(a)(2).

⁴⁴ 30 TEX. ADMIN. CODE § 106.261(a)(3).

⁴⁵ *Id.*

⁴⁶ APPX_000230.

⁴⁷ APPX_000276-99.

⁴⁸ APPX_000276.

⁴⁹ APPX_000276-99.

the 2006 AP-42 emission factors and engine requirements as promulgated by EPA.⁵⁰ TCEQ stated pollutants of concern included particulate matter less than or equal to 2.5 microns in diameter (PM_{2.5}) as well as PM₁₀.⁵¹ TCEQ performed an air quality analysis of emission generating facilities and activities, including material handling operations, truck loading, stockpiles, and cement silos.⁵² The evaluated air contaminants were carbon monoxide (CO), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), PM_{2.5}, PM₁₀, nickel particulate, and formaldehyde.⁵³ TCEQ concluded the CBPSP was protective with respect to the evaluated pollutants.⁵⁴

The 2012 amendment provided preconstruction authorization for any concrete batch plant complying with the standard permit but *did not relieve CBP owners and operators from any other additional state or federal regulations*.⁵⁵ In relevant part, the 2012 CBPSP amendment to the “Administrative Requirements” removed the language exempting facilities from the emissions and distance limitations listed in 30 TAC §116.610(a)(1).⁵⁶ In effect, CBPs operating with standard permits were now required to be located at least 100 feet from any residence, could not emit total new or increased air pollutants such as cement dust at more than 6.0 pounds per hour and ten tons per year, could not emit total new or increased air pollutants of any chemical having a limit value greater than 200 mg/m³ as listed and referenced in Table 262 at more than 1.0 lb/hr, and could not emit chemicals with a limit value of less than 200 mg/m³.⁵⁷

Despite removing the exemption, TCEQ did not enforce the emissions and distance limitations listed in 30 TAC § 116.610(a)(1) (and therefore did not enforce the limitations in 30 TAC § 106.261) in issuing CBP permits. In 2018, when the CBP applicant, Bosque Solutions LLC applied with TCEQ for a CBPSP, Bosque was met with major resistance.⁵⁸ Protestants of the CBPSP application contended that Bosque misrepresented in its application that the limitations set forth in 30 TAC §§ 106.261 and 106.262 did not apply to its proposed concrete batching facility, noting the removal of the exemption in 2012.⁵⁹ Protestants had significant concerns about emissions of crystalline silica and cement dust.⁶⁰

The Bosque protestants were granted a contested case hearing on the merits in front of SOAH, and the record closed on September 25, 2020, after a 2-day hearing.⁶¹ In November 2020, the ALJ concluded the 2012 CBPSP amendment expressly incorporated the emissions limitations set forth in 30 TAC §§ 106.261 and 106.262.⁶² The ALJ also found that emissions of crystalline

⁵⁰ APPX_000300-28.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ APPX_000310.

⁵⁵ APPX_000318.

⁵⁶ TCEQ maintains the removal of this language was inadvertent. APPX_000395. Nevertheless, even though TCEQ removed the exemption to the referenced emissions and distance limitations, TCEQ failed to follow its own regulatory change. For over eight years, until Bosque, TCEQ was issuing CBPSP that failed to comply with TCEQ’s own regulations.

⁵⁷ 30 TEX. ADMIN. CODE § 106.261(a)(1-3).

⁵⁸ APPX_000125-64.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² APPX_000146.

silica pose a danger to human health and safety.⁶³ As Bosque failed to demonstrate its concrete batch plant would be constructed and operated in accordance with required emissions limitations, the ALJ proposed TCEQ deny the application to construct and operate the Bosque CBP.⁶⁴ TCEQ denied Bosque’s CBPSP application in June 2021.⁶⁵

D. The CBPSP 2021 Amendment

On May 28, 2021, shortly before denying Bosque’s CBPSP, TCEQ issued a “Notice of Request for Public Comment and Notice of a Public Meeting on a Proposed Amendment to the Air Quality Standard Permit for Concrete Batch Plants.”⁶⁶ TCEQ’s notice stated the amendment would “add the exemption from emissions and distance limitations in 30 TAC § 116.601(a)(1)” which was “inadvertently removed during the 2012 amendment.”⁶⁷

The 2021 amendment heavily relied on the protectiveness review conducted between 1996 and 2000 in developing the 2000 CBPSP.⁶⁸ TCEQ also noted the 2012 supplemental protectiveness review showed that concentrations of PM_{2.5} were below NAAQS.⁶⁹ According to TCEQ, its outdated air dispersion modeling (“ISCST3”) from over 20 years prior was sufficient to reinstate an exemption that would allow CBPs to bring even more harm to affected communities than they already cause.⁷⁰

TCEQ received several comments from advocacy groups, local governments, elected officials, and Texas residents concerned that the 2000 protectiveness review was outdated and the CBPSP was not protective of public health and safety, especially with respect to crystalline silica emissions.⁷¹ These groups also expressed concerns with the cumulative impacts of the numerous CBPs located in specific geographic areas.⁷² Despite the concerns raised and without conducting a new protectiveness review or providing affected parties with adequate responses to their valid health concerns, TCEQ passed the 2021 amendment, reinstating the exemption first set forth over 20 years ago.⁷³

⁶³ APPX_000161.

⁶⁴ APPX_000125-64.

⁶⁵ Magaly Ayala, “Mansfield neighbors relieved after permit for concrete batch plant in their neighborhood is denied.” Spectrum News (June 12, 2021) available at <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/06/11/mansfield-neighbors-relieved-after-permit-for-concrete-batch-plant-in-their-neighborhood-is-denied>.

⁶⁶ APPX_000105-09.

⁶⁷ *Id.*

⁶⁸ APPX_000329-69, 370-94.

⁶⁹ *Id.*

⁷⁰ APPX_000342-43.

⁷¹ APPX_000332-33.

⁷² *Id.*

⁷³ APPX_000791.

IV. COMPLAINANTS

Despite being the fourth most populous city in America, the City of Houston is the only major American city that has no zoning regulations.⁷⁴ Moreover, the City of Houston makes up the majority of Harris County (roughly the size of the State of Rhode Island), which also has no zoning protections. Due to Houston's lax zoning, the effects of systemic discrimination persist and are evident today.

One of the few tools that exists to combat the lack of zoning are deed restrictions. Deed restrictions are a legal mechanism which limit land uses in certain geographic areas to prevent unwanted and incompatible land uses. However, in the early 20th century, nearly all communities afforded the protection of deed restrictions were also perpetuating discrimination.⁷⁵ Complainants' communities are historically unprotected and without deed restrictions. Because deed restrictions were originally a repugnant tool to keep people of color out of White neighborhoods, many historically Black and Hispanic communities of Houston remain unprotected today. This discrimination forced communities of color out into unrestricted areas. According to the Federal Housing Authority's ("FHA") underwriting manual at the time, "inharmonious racial groups" could cause "instability and a decline in values."⁷⁶ The FHA recommended that subdivision developers with federally-backed construction loans use deed restrictions to control the race of residents.⁷⁷

Below is a demonstrative map showing the approximate location of Complainants' communities and illustrating that while these communities span across Houston, these communities are all affected by TCEQ's faulty Rulemaking Amendment.

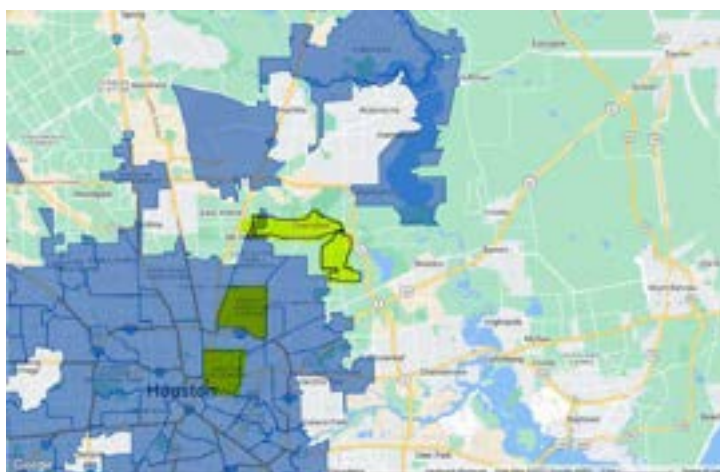


Figure 1: Impacted Communities Represented in Yellow

⁷⁴ Robert D. Bullard & Beverly Wright, *The Wrong Complexion for Protection: How the Government Response to Disaster Endangers African American Communities*, 13, (2012).

⁷⁵ R.A. Schuetz, "It's so damn offensive': More Houston neighborhoods push to remove racist deed language" *The Houston Chronicle* (Apr. 16, 2021).

⁷⁶ FHA 1938a, sec. 937.

⁷⁷ R.A. Schuetz, "It's so damn offensive': More Houston neighborhoods push to remove racist deed language" *The Houston Chronicle* (Apr. 16, 2021).

Since there are no regulations and Complainants are historically unrestricted communities, nothing exists to protect these communities from undesirable and incompatible land uses in their area. This circumstance, in turn, has subjected predominately minority communities in what should be residential neighborhoods to unprecedented amounts of environmental, health, and safety hazards at the hands of industrial and commercial businesses. Because these deed restricted communities originally excluded minorities, Complainants' communities predominately include undervalued and unrestricted land. In Houston, Complainants are also specifically victim to concrete batch plants which are incentivized by TCEQ to choose these communities over sites in White, more affluent neighborhoods, where restrictions historically insulated these communities from industry encroachment. Today, there are over 100 permitted concrete batch plants in Harris County affecting environmental justice communities. The following subsections profile the specific Impacted Communities by geography, history, their challenges with concrete batch plants, and demographics.

A. Super Neighborhood 48 “Trinity / Houston Gardens”

1. Current Geography

“Super Neighborhoods” in Houston were created to “encourage residents of neighboring communities to work together to identify, prioritize and address the needs and concerns of the broader community.”⁷⁸ SN 48 is otherwise known as Trinity / Houston Gardens takes its name from two communities: Trinity Gardens and Houston Gardens.⁷⁹ SN 48 is within City Council District B and comprises 4,395 acres (6.87 sq. miles) in the Northeastern part of the City of Houston, Texas.⁸⁰

SN 48 is among the Houston residential neighborhoods subject to industrial encroachment, as shown below in purple in Figure 2:

⁷⁸ Super Neighborhoods Guidelines, <https://www.houstontx.gov/superneighborhoods/guidelines.html>.

⁷⁹ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at https://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Trinity_Gardens_Final.pdf.

⁸⁰ *Id.*

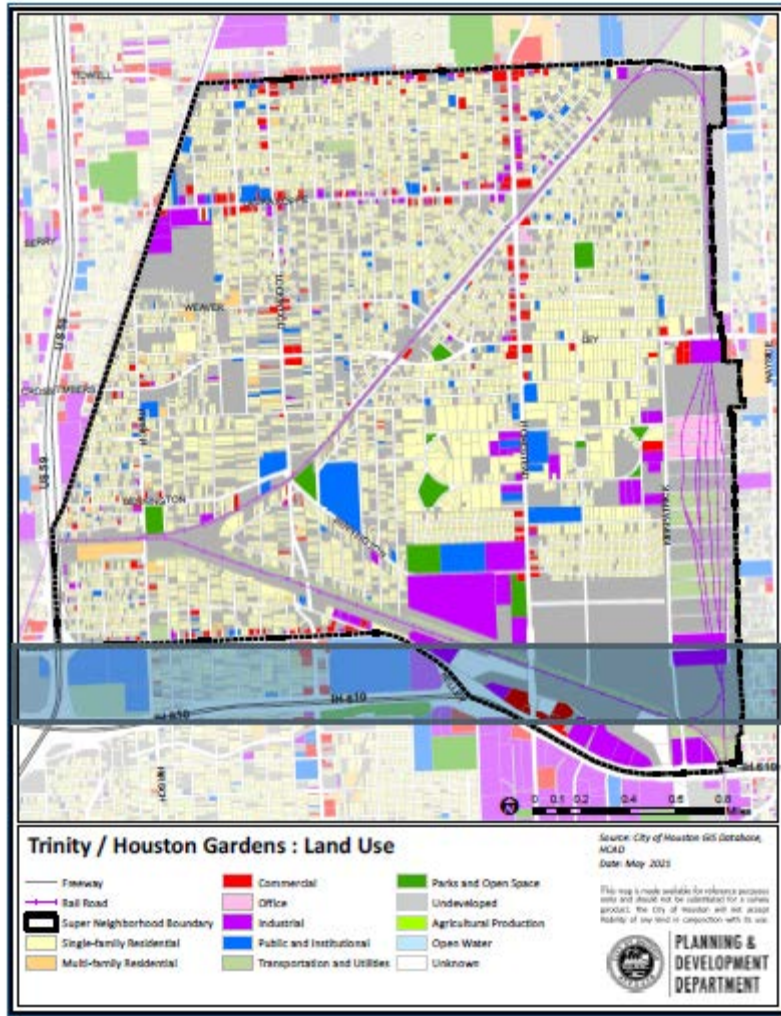


Figure 2: Land Use within the boundaries of SN 48⁸¹

One of these industrial uses includes the inundation of concrete batch plants. Presently, Table 2 lists the eight CBPs within the 6.87 sq. miles boundaries of SN 48:

Concrete Batch Plant	Location within SN 48
Alamo Ready Mix	5303 S Lake Houston Pkwy (77049)
Best Redi-Mix	7119 Kindred St. (77049)
Queen Ready Mix	8702 Liberty Rd. (77028)
Cemtex Concrete Ready Mix	5716 Jensen Dr. (77026)
Texas Concrete Ready Mix	6001 Homestead Rd. (77028)
Texas Concrete Ready Mix	6523 Homestead Rd. (77028)
Texas Concrete Ready Mix	3315 Carr St. (77026)
Five Star Ready Mix	8001 Ley Rd. (77028)

Table 2: Concrete Batch Plants Within the Boundaries of SN 48

⁸¹ *Id.*

2. History

In 1940, the City of Houston annexed Trinity / Houston Gardens.⁸² Census data from 1950 reported that the area at this time was predominately White. In 1960, Houston Independent School District (“HISD”) began to make its first integration attempts and the first Black student to attend an all-White school in the City was enrolled at Kashmere Elementary School, less than a mile from the Gardens neighborhood.⁸³ Integration attempts throughout Houston triggered “white flight” causing Whites to move out of neighborhoods they previously stayed in, in fear of more Blacks moving in.⁸⁴ By 1960, most of the Gardens neighborhoods population, 71% was Black. Since then, due to both de jure and de facto segregation, SN 48 has remained a predominately Black community. Houston’s history of redlining and White flight to suburbs north of SN 48 likely created the community’s majority-minority demographic.

Today, SN 48 is comprised of leaders and community activists who have continually battled with the City to improve the existing living conditions of their community. Many of these residents were born and raised in the community and have lived there their entire lives, showing their commitment to investment in the community. These residents are property owners, parents, grandparents, retirees, and church leaders, with both personal and commercial interests at stake as a result of the continuous disinvestment in their community.

One of the threats to the quality of life in SN 48 is the proliferation of CBPs. The Rulemaking Amendment’s emissions exemption adds to a larger environmental and public health problem that disproportionately impacts this minority low-income community. TCEQ has already permitted more than one concrete batch plant for every square mile in this community. In fact, two of the concrete batch plants are located next to each other on Homestead Road and operated by the same company, Texas Concrete Ready Mix. Recent air pollution monitoring observed within the boundaries of the neighborhood exemplifies the cumulative impacts resulting from TCEQ’s failure to consider environmental injustice in the Impacted Communities.

In May 2021, TCEQ installed a state-run air monitor at the edge of SN 48 to measure certain constituents—like coarse and fine particulate matter.⁸⁵ The monitor is located at 7330 ½ N. Wayside Drive, Houston, TX 77028 (“North Wayside Monitor”).⁸⁶ The North Wayside Monitor began measuring PM_{2.5} using Federally Equivalent Methods (“FEM”) beginning on May 4, 2021.⁸⁷ Since this monitor was installed, the PM_{2.5} readings have consistently exceeded NAAQS standards.⁸⁸ According to TCEQ, the readings from the North Wayside Monitor exceed

⁸² https://www.houstontx.gov/planning/Annexation/docs_pdfs/HoustonAnnexationHistory.pdf.

⁸³ University of Houston, Collaborative Community Design Initiative. No. 5, Kashmere Gardens | Trinity / Houston Gardens: Super Neighborhood 52 and 48, Briefing Book at 13 (2018).

⁸⁴ *Id.*

⁸⁵ TCEQ Annual Air Monitoring Network Plan (Jul. 1, 2021) at 17.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ “2012 PM_{2.5} NAAQS: Primary Annual Standard: 12.0 micrograms per cubic meter (µg/m³); Secondary Annual Standard: 15.0 µg/m³; Primary and Secondary 24-Hour Standard: 35 µg/m³; 2012 PM₁₀ NAAQS: Primary and Secondary Standard 15.0 µg/m³; On December 18, 2020, the United States Environmental Protection Agency (EPA) published a final rule retaining the primary and secondary standards for both PM_{2.5} and PM₁₀.” TCEQ Presentation to Houston-Galveston Area Council Houston PM Advance Committee, “Houston North Wayside Particulate Matter” (Feb. 7, 2022). (hereinafter “TCEQ HGAC PM_{2.5} Presentation”).

the NAAQS standard for PM_{2.5}, averaging at 12.5.⁸⁹ As a result, TCEQ identified several industrial users responsible for the problem—including three concrete batch plants in or near SN 48.⁹⁰ The following concrete batch plants are located near the North Wayside Monitor:

- Five Star Ready Mix is .37 miles NE of the North Wayside Monitor at 8001 Ley Rd. Houston, TX 77028;
- Texas Concrete Ready Mix is 1.4 Miles SW of the North Wayside Monitor at 6001 Homestead Rd. Houston, TX 77028;
- Texas Concrete Ready Mix is 1.4 Miles SW of the North Wayside Monitor at 6523 Homestead Rd., Houston, TX 77028; and
- The Queen Ready Mix is 1.75 miles SE from the North Wayside Monitor at 8702 Liberty Rd. Houston, TX 77028.

Based on the data from the North Wayside Monitor, TCEQ has begun to identify individual members of industry in hopes of resolving the current NAAQS violations that are significantly burdening SN 48's air quality and throwing the region out of compliance. However, this does not resolve the deficient CBPSP, nor does it slow TCEQ's issuance of this standard permit to concrete batch plant operators. Because the CBPSP specifically exempts CBPs from emissions limitations and the batch plants cluster in communities of color, it is significantly deteriorating air quality in these overburdened areas—as evidenced by the NAAQS exceedances. This Complaint targets the heart of problem: the Rulemaking Amendment's revived emissions exemptions without scientific support. TCEQ failed to conduct an adequate protectiveness review of the CBPSP.

3. Neighborhood Demographics

In April 2021, the City of Houston Planning and Development Department assessed the demographics of SN 48 using 2019 statistics and U.S. Census Bureau estimates, noting SN 48 had a total population of 17,485 at the time.⁹¹ The combination of a high concentration of minority and low-income residents in conjunction with a high concentration of large industrial polluters is indicative of an environmental justice community, the statistics below illustrate SN 48's demographics.

⁸⁹ TCEQ Presentation, North Wayside Monitor Update May 2021-January 2022, (Feb. 8, 2022) at 3.

⁹⁰ *Id.* at 13.

⁹¹ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at https://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Trinity_Gardens_Final.pdf.

*Ethnicity*⁹²

Ethnicity	Percent of Total Population
Non-Hispanic Whites	2%
Non-Hispanic Blacks	63%
Hispanics	34%
Non-Hispanic Others	1%

*Languages Spoken at Home*⁹³

Language	Percent of Total Population
English	67%
Spanish	32%
Other	1%

*Housing*⁹⁴

Housing	Statistic
Total Housing Units	6,975
Median Housing Value	\$72,852

B. Dyersforest Heights Civic Club

1. Current Geography

Dyersforest Heights Civic Club is a nonprofit civic club incorporated under the laws of Texas and created to promote civic and social welfare and well-being of the residents and property owners in the Dyersforest Heights community. Dyersforest Heights includes: Dyersdale, Forest Acres, and Houston Heights subdivisions which are all situated in the historic Dyersdale area in Houston and Harris County, Texas.^{95,96} According to the U.S. EPA EJ Screen, 75-77% of the population in Dyersdale lives below 200% of federal poverty guidelines. Below is a map

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ The Dyersforest community is in the Extraterritorial Jurisdiction (“ETJ”) of the City of Houston, and so demographic and other statistical information is included in affected Census Block Group Nos. (482012320002, 482012312001, 482012320001) or other federal databases, rather than from the City of Houston Planning Department.

⁹⁶ Extraterritorial Jurisdiction (“ETJ”): Houston’s extraterritorial jurisdiction is essentially a five-mile band around the City’s general-purpose boundaries, with the exception of instances when that band intersects another municipality or its ETJ. Within its ETJ, Houston has limited regulatory authority. Defined on the City of Houston’s Planning & Development Website, available at:

[https://www.houstontx.gov/planning/Annexation/#:~:text=Houston's%20extraterritorial%20jurisdiction%20\(ETJ\)%20is,Houston%20has%20limited%20regulatory%20authority.](https://www.houstontx.gov/planning/Annexation/#:~:text=Houston's%20extraterritorial%20jurisdiction%20(ETJ)%20is,Houston%20has%20limited%20regulatory%20authority.)

showing the demographic index⁹⁷ of the Dyersforest community according to EPA’s EJ Screen tool.

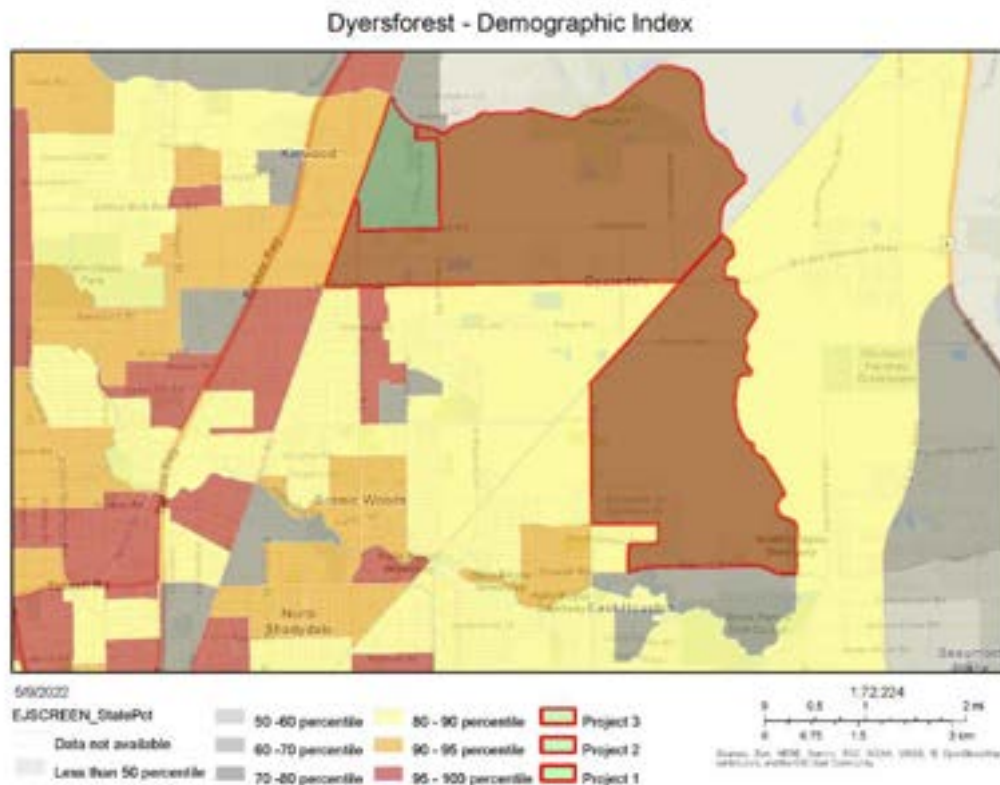


Figure 3: Dyersforest Civic Club Demographic Index from EPA’s EJ Screen Tool

2. History

Dyersforest residents have a long history of trying to keep their community free from concrete facilities. In 2016, the community began submitting comments and engaging with the public participation process in efforts stop a massive concrete crushing plant, Cherry Crushed Concrete (“Cherry”), from becoming its neighbor. The Harris County’s Attorney Office (“Harris County” or the “County”) additionally submitted comments which included a public meeting and hearing request to TCEQ regarding Cherry’s permit application.⁹⁸ The County expressed concerns that the concrete facility would share a fenceline with residential properties, the facility’s air emissions modeling was inaccurate, and that air emissions calculations excluded the existing soil stabilization plant emissions.⁹⁹ In its comments, Harris County requested that additional modeling be completed to include particulate emissions from in-plant roadways and the soil stabilization plant.¹⁰⁰

⁹⁷ Demographic Index refers to Socioeconomic Indicators – Demographic Index: combination of percent low income and percent minority. U.S. EPA’s Environmental Justice Screening and Mapping Tool available at: https://ejscreen.epa.gov/mapper/ejscreen_v1/index.html.

⁹⁸ APPX_000055–58.

⁹⁹ APPX_000055–56.

¹⁰⁰ *Id.*

The community requested and received a public meeting on January 9, 2017. During the meeting, a representative of Dyersforest Heights Civic Club, Ms. Dejean, expressed community concerns about Cherry taking up residency in her neighborhood. On June 15, 2017, she submitted a hearing request as an affected person on the basis that Cherry would further compromise the community's air quality and violate both NAAQS and the Clean Air Act given the number of pollutants and quantities of pollutants to which Cherry would likely be subjecting the community.¹⁰¹ Mrs. Dejean also expressed environmental justice concerns related to her fenceline community, deficient air emissions calculations, as well as the impacts Cherry would have on the community's health. She further asserted that 110 residents in Dyersforest did not have access to city water as the community is in the ETJ, and that the Cherry plant had the potential to contaminate residents' drinking water.¹⁰²

Despite these concerns, TCEQ issued the permit to Cherry in 2018 and placed 7,947,739 square foot Concrete Crushing Plant¹⁰³ at the Western boundary of this community. While the community vehemently expressed opposition, TCEQ still granted Cherry a permit to operate without concern for the environmental justice community next door.

TCEQ's Health Effects Review of 2017-2019 Ambient Air Network Monitoring Data mentions the closest monitor in Aldine. Specifically, in TCEQ's Memorandum dated May 12, 2021, Dr. Tracie Phillips, Ph.D, and Distinguished Toxicologist, noted that the 2018 values of Chromium exceed regular levels. Cement includes many heavy metals, including hexavalent chromium.¹⁰⁴ Notably, the 2018 chromium PM_{2.5} annual average concentration was 0.0060 ppbv at Houston Aldine, which is 1.4x greater than the Air Monitoring Comparison Value ("AMCV")¹⁰⁵ of 0.0043 ppbv.¹⁰⁶ Interestingly, chromium was not noted for above average values at the Houston-Aldine Monitor in the 2016 Health Effects Review for the Ambient Air Network—before Cherry moved into the community.

History repeated itself in 2020-2022 when another concrete facility, Rhino Ready Mix ("Rhino"), applied for a CBPSP in the Dyersforest community, to be located directly next to Cherry. The community amplified and echoed its concerns from 2016-2017 to TCEQ because Rhino's proposed location was mere feet away from the existing Cherry. The figure below illustrates the problematic location of the concrete facilities within this neighborhood.

¹⁰¹ APPX_000062–63.

¹⁰² See Hearing Request submitted by Mrs. Carol Dejean, Administrator & Organizer of Dyersforest Heights Civic Club, to TCEQ Docket No. 2017-0906-AIR (Jun. 15, 2017).

¹⁰³ Harris County Appraisal District information for Account No. 0411050000001, available at: <https://arcweb.hcad.org/parcelviewer/>.

¹⁰⁴ J. Leem, Epidemiology: The Health Effect of Chromium Containing Cement Dust Assessed by Combined Methods of Epidemiologic and Toxicologic Approach, (Nov. 2008), Volume 19, Issue 6, available at: https://journals.lww.com/epidem/fulltext/2008/11001/The_Health_Effect_of_Chromium_Containing_Cement.648.a.spx.

¹⁰⁵ TCEQ and EPA use AMCVs to evaluate the potential for effects to occur as a result of exposure to concentrations of constituents in the air. AMCVs are based on data concerning health effects, odor, and vegetation effects. They are not ambient air standards. If predicted or measured airborne levels of a constituent do not exceed the comparison level, adverse health or welfare effects would not be expected to result. See https://www.tceq.texas.gov/cgi-bin/compliance/monops/agc_amcvs.pl.

¹⁰⁶ TCEQ Memorandum Health Effects Review of 2017 through 2019 Ambient Air Network (May 21, 2021), available at: <https://www.tceq.texas.gov/assets/public/implementation/tox/monitoring/evaluation/multi/reg12.pdf>.



Figure 4: HCAD Map showing Cherry Crushed Concrete, Rhino Ready Mix’s Proposed CBP Site and the neighboring Dyersforest Heights Community highlighted in yellow.¹⁰⁷

As illustrated, Cherry and Rhino would now create a concrete batch plant border on the entire Western edge of the Dyersforest residential community. Without the community raising any concerns, Rhino’s application for a CBPSP would likely be issued by TCEQ, despite the problematic siting issue. Therefore, representatives of Dyersforest again submitted hearing requests to TCEQ related to Rhino Ready Mix and voiced their concerns. These hearing requests detailed the community’s specific concerns such as Rhino’s proximity to sensitive populations, their environmental justice community unfairly burdened by concrete facilities and toxic air emissions, the potential health risks from cumulative impacts of collocated facilities, and the health impacts that the community was already suffering from as a result of Cherry’s activities.¹⁰⁸

The community specifically expressed concerns about particulate matter, chromium, formaldehyde, and other metal oxides like—calcium oxide, silicon oxide, aluminum trioxide, ferric oxide, magnesium oxide, and crystalline silica—all known concrete batch plants

¹⁰⁷ HCAD Parcel Viewer, search for 920 Winfield Road, Houston TX 770050 available at: <https://arcweb.hcad.org/parcelviewer/>.

¹⁰⁸ See Hearing Requests submitted by Ms. Carol Dejean, Administrator & Organizer of Dyersforest Heights Civic Club, to TCEQ Docket No. 2021-1465-AIR (Oct. 31, 2020 & Nov. 6, 2020).

emissions.¹⁰⁹ The community members were concerned about these toxins getting into the air they breathe and the water they drink.

Ultimately, TCEQ voided Rhino’s permit after the applicant failed to publish required notices for the contested case hearing or attend the preliminary hearing scheduled in front of SOAH.¹¹⁰ The lot Rhino intended to use for a batch plant, however, remains unoccupied, and a new batch plant could apply for a permit at any time. This temporary victory means that the Dyersforest community is subject to an uncertain future. Moreover, with TCEQ’s revival of harmful emissions exemptions via the CBPSP Rulemaking Amendment, the community’s air quality hangs in the balance.

3. *Neighborhood Demographics*

Like SN 48, the combination of a high concentration of minority and low-income residents in conjunction with a high concentration of large industrial polluters qualifies the Dyersforest community’s status as an environmental justice community.

*Ethnicity*¹¹¹

Ethnicity	Percent of Total Population
Non-Hispanic Whites	1.5%
Non-Hispanic Blacks	55%
Hispanics	44%
Non-Hispanic Asians	0%
Non-Hispanic Others	0%

*Languages Spoken at Home*¹¹²

Language	Percent of Total Population
English	31.3%
Spanish	72.3%
Other	27.6%

¹⁰⁹ APPX_000075 –76.

¹¹⁰ TCEQ Docket No. 2021-1465-AIR SOAH Order No. 1 Memorializing Preliminary Hearing and Granting Motion for Remand (Apr. 7, 2022) and TCEQ Letter Permit No. 162413 Void (Apr. 20, 2022).

¹¹¹ EJ Screen ACS Summary Report (2015-2019) averages from relevant Block Groups 482012320001, 482012312001, 482012320002.

¹¹² *Id.*

Housing¹¹³

Housing	Statistic
Total Housing Units	2,362
Median Housing Value	\$84,900

C. Progressive Fifth Ward Community Association & Prince Square Civic Association (Greater Fifth Ward)

1. Current Geography

Progressive Fifth Ward is an incorporated community association focused on revitalizing the Fifth Ward community, and Prince Square Civic Association is a civic association recognized by the City of Houston. Both of these community organizations serve Greater Fifth Ward, also known as Super Neighborhood 55. Greater Fifth Ward is within City Council District B & H and comprises 3,192 acres (4.99 sq. miles) in the Northeastern part of the City of Houston, Texas.¹¹⁴

Like SN 48, Greater Fifth Ward has also found itself amongst one of the Houston residential neighborhoods with industrial land use surroundings, as shown below in purple in Figure 5:¹¹⁵

¹¹³ *Id.*

¹¹⁴ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at http://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Greater_FifthWard_Final.pdf.

¹¹⁵ *Id.*

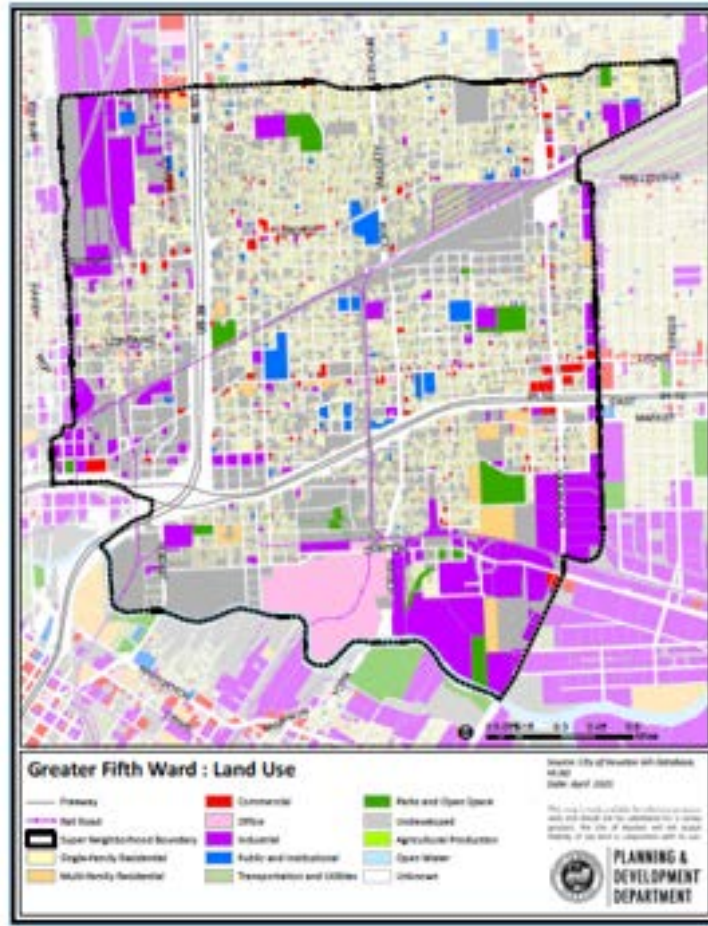


Figure 5: Land Use within the boundaries of Greater Fifth Ward

One of these industrial uses includes the inundation of concrete batch plants. Presently, Table 3 lists the three CBPs affecting Progressive Fifth Ward and Prince Square:

Table 3: Concrete Batch Plants Within the Boundaries of Greater Fifth Ward

Concrete Batch Plant	Location within Greater Fifth Ward
Texas Concrete Enterprise	3506 Cherry St. (77026)
Texas Concrete Enterprise	3508 Cherry St. (77026)
Cemtech Concrete Ready Mix Inc.	3116 Jensen Rd. (77026)

2. History

Former slaves settled Fifth Ward beginning in 1865, post-Civil War, and the area was established as one of Houston’s original six wards in 1866.¹¹⁶ By 1870, the population was approximately half White and half Black, with 578 Black residents and 561 White residents.¹¹⁷ In 1876, two

¹¹⁶ Tyina Steptoe, *Fifth Ward, Houston, Texas*, Blackpast (April 19, 2015), available at <https://www.blackpast.org/african-american-history/fifth-ward-houston-texas-1866/>.

¹¹⁷ Diana Kleiner, *Fifth Ward, Houston*, Texas State Historical Association (January 1, 1995), available at <https://www.tshaonline.org/handbook/entries/fifth-ward-houston>.

segregated schools existed in the community.¹¹⁸ The population quickly evolved, and by 1880 the population was predominantly Black.¹¹⁹

The government has neglected Fifth Ward since its early days. In both 1875 and 1883, the community threatened to secede from the City of Houston.¹²⁰ Despite the tax collected from the community, the City of Houston failed to adequately provide basic municipal services to the community, such as paved roads and utilities.¹²¹ In the 1940's, during the continuing period of segregation, the City offered less than 200 hospital beds to serve the entire Black population of the City of Houston, including residents of Fifth Ward.¹²² In the 1960's, Interstate 10 and Highway 59 were constructed in the heart of the ward, displacing families and businesses.¹²³ The construction was also completed in such a way to divide residential areas from business districts, ultimately causing an economic loss for the community.¹²⁴ Today, Greater Fifth Ward remains a neglected and low-income minority community.

Fifth Ward shares a history with concrete facilities that is similar to Dyersforest. Like Dyersforest, Fifth Ward is a smaller community, a little less than 5 square miles with predominantly minority low-income residents. The EJ Screen Demographic Index is below, for reference.

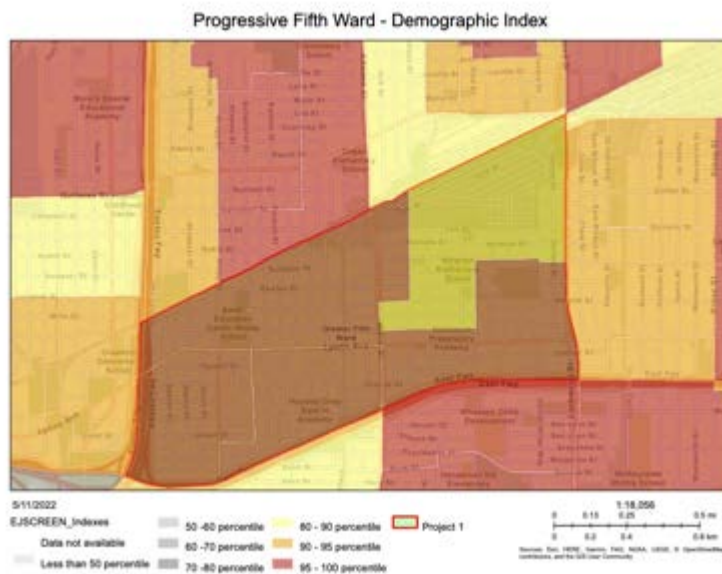


Figure 6: Fifth Ward Demographic Index from EPA's EJ Screen Tool

¹¹⁸ *Id.*

¹¹⁹ Tyina Steptoe, *Fifth Ward, Houston, Texas*, Blackpast (April 19, 2015).

¹²⁰ Patricia Pando, *When There Were Wards: A Series—In the Nickel, Houston's Fifth Ward*, Houston History Vol. 8 No. 3 at 34 (Summer 2021), available at <https://houstonhistorymagazine.org/wp-content/uploads/2011/07/Fifth-Ward.pdf>.

¹²¹ *Id.*

¹²² *Id.* at 35.

¹²³ *Id.*

¹²⁴ *Id.* at 37.

CBP Applicant Soto Ready Mix (“Soto”) has faced challenges finding a home in Houston’s minority low-income neighborhoods for years. Originally, Soto Ready Mix sought to open shop in Acres Home, a historically Black community, but after legislators, the Mayor of Houston, and other local advocates intervened, Soto withdrew its application in early 2020 and attempted to move somewhere else.¹²⁵ After the first withdrawal, Soto targeted Houston’s Fifth Ward “subbing one less-protected community for another.”¹²⁶ Once operational, Soto would be the fourth concrete batch plant in the Greater Fifth Ward’s less than five-square-mile footprint.

TCEQ issued a permit to Soto for its proposed Fifth Ward location; however, the plant required a variance from the City of Houston to use a street that dead-ended into its lot. In May 2021, the Houston Planning Commission entertained Soto’s request for a variance, but the residents of Fifth Ward opposed it, and ultimately Soto withdrew its variance request to the City.¹²⁷ To date, Soto has not yet built its permitted facility: the lot currently remains vacant. Like Dyersforest, there is uncertainty for this community about the potential for harmful air emissions from another emissions-exempt concrete batch plant in their neighborhood.¹²⁸

3. *Neighborhood Demographics*

In April 2021, the City of Houston Planning and Development Department assessed the demographics of Greater Fifth Ward using 2019 statistics and US Census Bureau estimates, noting Greater Fifth Ward had a total population of 19,391 at the time.¹²⁹ Like SN 48 and Dyersforest Heights, the combination of a high concentration of minority and low-income residents in conjunction with a high concentration of large industrial polluters also qualifies the Greater Fifth Ward as an environmental justice community.

*Ethnicity*¹³⁰

Ethnicity	Percent of Total Population
Non-Hispanic Whites	4%
Non-Hispanic Blacks	43%
Hispanics	51%
Non-Hispanic Asians	1%
Non-Hispanic Others	1%

¹²⁵ TCEQ Docket No. 2019-0903-AIR, Order No. 2 Granting Motion to Remand and Dismissing Case (Jan. 22, 2020).

¹²⁶ Emily Foxhall, “Houston’s dangerous concrete plants are mostly in communities of color. Residents are fighting back.” Houston Chronicle. (Apr. 10, 2022).

¹²⁷ City of Houston Planning Commission Agenda No. 149 (May 27, 2021).

¹²⁸ City of Houston Planning Commission Agenda No. 127 (Jun. 10, 2021).

¹²⁹ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at https://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Greater_FifthWard_Final.pdf.

¹³⁰ *Id.*

*Languages Spoken at Home*¹³¹

Language	Percent of Total Population
English	54%
Spanish	45%
Other	1%

*Housing*¹³²

Housing	Statistic
Total Housing Units	8,376
Median Housing Value	\$90,165

V. TITLE VI VIOLATIONS UNDER EPA REGULATIONS

As noted above, EPA implements Title VI of the Civil Rights Act of 1964 under 40 C.F.R. § 7.10 *et seq.* Under its Title VI regulations, EPA’s investigations can cover certain types of discrimination including: intentional discrimination and actions causing disparate impact.¹³³ In assessing whether a recipient has intentionally discriminated, the agency investigates whether the recipient intentionally treated individuals or a class of individuals differently or otherwise knowingly caused them harm because of their race, color, or national origin (including limited English proficiency).¹³⁴ However, in assessing whether a recipient’s actions have a disparate impact and are thereby discriminatory, the agency investigates if an implemented regulation has the effect of subjecting individuals to discrimination because of their race, color, or national origin (including limited English proficiency).¹³⁵

A. Intentional Discrimination

In an intentional discrimination case, EPA will evaluate the “totality of the relevant facts,” including direct, circumstantial, and statistical evidence, to determine whether a recipient engaged in intentional discrimination.¹³⁶ Direct evidence is often unavailable, but EPA will evaluate evidence such as: statements by decision makers, historical background and sequence of the events at issue, legislative or administrative history, foreseeability of the consequences, and the history of discriminatory or segregated conduct.¹³⁷

¹³¹ *Id.*

¹³² *Id.*

¹³³ EPA Case Resolution Manual, at 26-27 (January 2021), available at https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ U.S. EPA’s External Civil Rights Compliance Office Compliance Toolkit, at 3 (January 2017), available at http://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

¹³⁷ *Id.*

B. Disparate Impact

40 C.F.R. § 7.35(b) specifically prohibits the following:

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[...]

In a disparate impact case, EPA uses a 4-step model to determine whether a recipient uses a “facially neutral” policy or practice that has a sufficiently adverse and disproportionate effect based on race, color, or national origin.¹³⁸

1. Identify the specific policy or practice at issue;
2. Establish adversity/harm;
3. Establish disparity; and
4. Establish causation.

The focus in a disparate impact case is on the consequences of a recipient’s policy or decisions.¹³⁹ A facially neutral policy can be affirmatively undertaken by a recipient, *or it can be based on a recipient’s failure to take action or adopt an important policy.*¹⁴⁰ EPA then determines whether the recipient can show the policy has a substantial legitimate justification.¹⁴¹ If so, EPA ascertains whether there are less discriminatory alternatives to the policy.¹⁴²

VI. TCEQ’S TITLE VI VIOLATIONS

By approving the Rulemaking Amendment exempting CBPs from air pollutant emissions and distance limitations without conducting a new protectiveness review, TCEQ all but ensured environmental justice communities such as SN48, Dyersforest, and Greater Fifth Ward, are disproportionately exposed to toxic air pollutants. Not only did TCEQ approve a rule that would disproportionately impact minority communities, but it also failed to provide proper notice in other languages to these communities, depriving LEP residents of the opportunity to express their everyday experiences with the pollution from CBPs. TCEQ’s actions and inactions with respect to the Rulemaking Amendment demonstrate a failure by the Agency to fulfill its obligations to ensure compliance with Title VI. Instead, the effects of the Rulemaking Amendment will disparately impact Black and Hispanic residents of the Impacted Communities who continue to suffer from health issues and decreased property values at higher rates than Whiter, more affluent communities nearby.

¹³⁸ *Id.* at 8.

¹³⁹ *Id.* at 9.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

A. TCEQ’s Rulemaking Amendment exempting CBPs from air pollutant emissions and distance limitations violates Title VI.

1. Concrete batch plants cause major air pollution that will remain rampant due to the affirmative undertaking by TCEQ in passing the Rulemaking Amendment.

CBPs cause air pollution concerns, but CBPs are cause for heightened concerns related to coarse and fine particulate matter (specifically PM₁₀ and PM_{2.5} and), crystalline silica, and cement dust. CBPs are known emitters of both particulate matter and crystalline silica. The inhalation of these pollutants are associated with heart and lung disease, increased respiratory symptoms, and other chronic diseases. Furthermore, cement dust can be composed of many harmful constituents in undefined quantities, for example: metal oxides including calcium oxide, silicon oxide, aluminum trioxide, ferric oxide, magnesium oxide, sand and other impurities.¹⁴³ EPA regulates particulate matter whereas crystalline silica and cement dust are both pollutants regulated under Title 30 of the TAC with regulatory authority delegated to TCEQ. However, with TCEQ’s approval of the Rulemaking Amendment, CBPs are exempted from meeting these regulated emissions limitations. This development is significant because TCEQ now clearly authorized CBPs to emit these pollutants in an almost unrestricted manner, without any corresponding reporting requirements.¹⁴⁴



Photograph of Concrete Batch Plant in Houston (Credit: Houston Air Alliance)

¹⁴³ Arshad H. Rahmani, “Effect of Exposure to Cement Dust among the Workers: An Evaluation of Health-Related Complications.” Open Access Maced J Med Sci. 2018 Jun 20; 6(6): 1159–1162, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6026423/>.

¹⁴⁴ APPX_000341 (“In fact, the commission explicitly noted that the standard permit ‘eliminates any requirement for an applicant to submit modeling and impact analysis...’ . . .”).

a. Particulate Matter¹⁴⁵

Particulate matter (PM) is a mixture of solid particles and liquid droplets found in the air. PM includes PM₁₀, which are inhalable particles with diameters that are generally ten micrometers and smaller, such as dust, pollen, and mold. PM also includes PM_{2.5}, which are fine inhalable particles that are generally 2.5 micrometers and smaller, such as combustion particles, organic compounds, and metals. Most PM forms in the atmosphere from complex reactions of chemicals in industrial sites.

Inhalation of PM is linked directly to causing serious health problems as they can get deep into the lungs and the bloodstream. Exposure to PM is linked to premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, including irritation of airways, coughing, or difficulty breathing. PM_{2.5} poses the greatest risk to health due to its size. PM_{2.5} is also the main cause of haze in the United States.

Data maps extracted from EJ Screen confirm that the City of Houston has some of the worst exposure to PM_{2.5} in Texas:

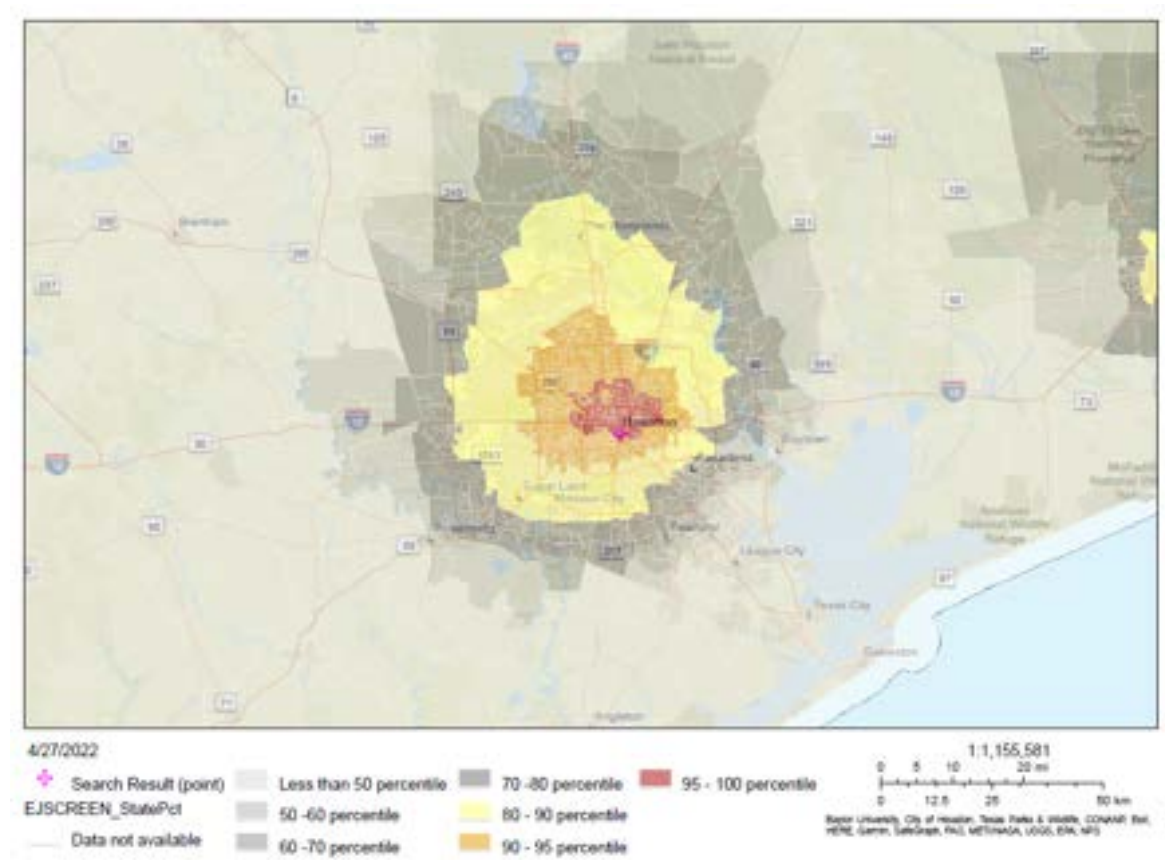


Figure 7: City of Houston Exposure to PM_{2.5}

¹⁴⁵ Sources for information in this section are available at EPA’s webpage, available at <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics#effects>.

The map demonstrates Houston falls within the 95th to 100th of geographic areas exposed to PM_{2.5} in the air compared to the rest of the state.

EPA regulates inhalable PM₁₀ and PM_{2.5} pursuant to the Clean Air Act (“CAA”), which requires EPA to set NAAQS for pollutants considered harmful to public health and the environment. CAA also requires EPA to periodically review NAAQS to ensure that they provide adequate health and environmental protection, and to update the standard, as necessary. NAAQS for PM is also further determined by whether the PM is directly emitted from a source (“primary”) or formed by a chemical reaction (“secondary”). NAAQS for PM was first established in 1971. The following table demonstrates NAAQS for PM since 2006:

<u>Final Rule and Date</u>	<u>Primary/Secondary</u>	<u>Type of Particulate Matter</u>	<u>Averaging Time</u>	<u>PM Standard Level</u>
71 FR 61144 10/17/2006	Primary & Secondary	PM _{2.5}	24 hour	35 mg/m ³
71 FR 61144 10/17/2006	Primary & Secondary	PM _{2.5}	Annual	15 mg/m ³
71 FR 61144 10/17/2006	Primary & Secondary	PM ₁₀	24 hour (annual revoked)	150 mg/m ³
78 FR 3085 01/15/2013	Primary	PM _{2.5}	Annual	12 mg/m ³
78 FR 3085 01/15/2013	Secondary	PM _{2.5}	Annual	15 mg/m ³
78 FR 3085 01/15/2013	Primary & Secondary	PM _{2.5}	24 hour	35 mg/m ³
78 FR 3085 01/15/2013	Primary & Secondary	PM ₁₀	24 hour	150 mg/m ³
85 FR 82684 12/18/2020	Primary & Secondary	PM _{2.5} and PM ₁₀	24 hour and annual (PM _{2.5}) and 24 hour (PM ₁₀)	Previous Retained

Table 4: NAAQS for PM Since 2006¹⁴⁶

EPA has re-evaluated NAAQS for PM several times over the last 50 years, including in 2013 and as recently as 2020.

A primary pollutant of concern from CBPs is PM, consisting of cement, pozzolan dust,¹⁴⁷ coarse aggregate, and sand dust emissions. PM is emitted during the transfer of cement and pozzolan material to silos, which are then vented to a fabric filter. Fugitive sources of PM from CBPs include the transfer of sand and aggregate, cement unloading to storage silos, truck loading, mixer loading, vehicle traffic, and wind erosion from sand and aggregate storage piles.

¹⁴⁶ U.S. EPA, Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS), available at <https://www.epa.gov/pm-pollution/timeline-particulate-matter-pm-national-ambient-air-quality-standards-naaqs>.

¹⁴⁷ Pozzolan minerals include fly ash, ground granulated blast-furnace slag, and silica fume.

b. Crystalline Silica

Another pollutant of concern from CBPs is crystalline silica.¹⁴⁸ Crystalline silica is a natural mineral found in sand and concrete, among other construction materials. While crystalline silica comes in several forms, its most usual form is quartz. Quartz dust, otherwise known as respirable crystalline silica or silica dust, is created when cutting, sawing, grinding, drilling, and crushing stone, rock, concrete, brick, block and mortar.

Exposure to and inhalation of airborne crystalline silica is extremely hazardous to human health. Since 1997, the International Agency for Research on Cancer (“IARC”) has classified crystalline silica inhaled from occupational sources in the form of quartz as a Group 1 carcinogen. According to the Occupational Safety & Health Administration (“OSHA”), breathing in respirable crystalline silica particles causes multiple diseases, including silicosis, an incurable lung disease that leads to disability, and ultimately death.¹⁴⁹ Silicosis can take 15-20 years to occur, therefore the effects are revealed long after exposure.¹⁵⁰ Respirable crystalline silica exposure also causes lung cancer, chronic obstructive pulmonary disease (“COPD”), and kidney disease.¹⁵¹ Furthermore, exposure to respirable crystalline silica is related to the development of cardiovascular impairment.¹⁵²

Concrete batch plants emit ambient crystalline silica during the concrete production process, which requires the transfer, mixing, loading, and storage of cement, sand, and gravel. The concrete production process exposes nearby communities to crystalline silica, a hazardous carcinogen. Emissions of crystalline silica are incorporated into TCEQ’s rules regarding environmental quality, found in Title 30 of the TAC. Chapter 116 of the TAC sets forth regulations related to the control of air pollution by permits for new construction or modification. As demonstrated in Section III(B) above, 30 TAC § 116.610(a)(1) requires any project that results in a net increase in emissions of air contaminants to meet the emission limitations of 30 TAC § 106.261. 30 TAC § 106.261 bans emissions of a chemical with a limit value of less than 200 mg/m³.¹⁵³ The TWA TLV of crystalline silica is 25 mg/m³. Accordingly, any emission of crystalline silica is a violation of this chapter.¹⁵⁴

The amount of crystalline silica involved at a facility will also vary depending on the sand used by the facility. Data sheets showing the composition of the sand potentially used by the CBP should be disclosed and reviewed by the Agency to make a proper protectiveness determination to cover these contingencies in the CBPSP, which it admitted was not done. Thus, it is not apparent that the current CBPSP is prepared to address this variety, and the Agency did not do a

¹⁴⁸ APPX_000143.

¹⁴⁹ OSHA, Safety and Health Topics, available at <https://www.osha.gov/silica-crystalline/health-effects>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ While crystalline silica is not explicitly regulated under this chapter and does not have a listed limit value, 30 TAC § 106.262 states the time weighted average (TWA) Threshold Limit Value (TLV) published by the American Conference of Governmental Industrial Hygienists (ACGIH) shall be used for compounds not included in this section of the statute. This section cannot be used if the compound is not listed in the table or does not have a published TWA TLV, STEL, or Ceiling Limit in the ACGIH TLVs and BEIs guide. As crystalline silica has a published TWA TLV, it is incorporated into the regulation.

¹⁵⁴ APPX_00143-47.

protectiveness review of crystalline silica that would model the distinct types of sand that could potentially be used in CBP operations under a CBPSP.

c. Cement Dust

Cement dust is a primary pollutant of concern found at CBPs. Under 30 TAC § 106.261(a)(2)-(3), total new or increased emissions for cement dust shall not exceed 6.0 pounds per hour and ten tons per year. However, TCEQ has not defined the term “cement dust” in any of its rules or regulations. Thus, it is difficult to determine what products at a CBP must be included in these calculations to ensure that these limitations are met.

Further, the calculation should be tied to effects screening levels (“ESL”) for the specific pollutant. As stated above, cement dust can be made up of many other harmful constituents. Thus, there are significant questions raised as to what constitutes “cement dust”. Part of any revision to the CBPSP because of this Complaint should include a clarification of what comprises “cement dust” and publication of guidance for making ESL determinations. Otherwise, the standard in CBPSP cannot be considered “standard” if each applicant is free to determine what constitutes cement dust. Given the potential harmfulness of these pollutants, the CBPSP lacks the specificity required to ensure sufficient protectiveness.

2. TCEQ’s failure to conduct a new protectiveness review before passing the Rulemaking Amendment was discriminatory.

In determining whether a policy is discriminatory, EPA may also focus on a recipient’s failure to act. In this instance, TCEQ failed to conduct a new protectiveness review before passing the Rulemaking Amendment exempting CBPs from statutory emissions and distance limitations, further violating Title VI. The failure to conduct a current or adequate protectiveness review was problematic as it resulted in TCEQ primarily relying on an outdated protectiveness review from over 20 years ago.¹⁵⁵ TCEQ further failed to grant Complainants a rehearing, despite the highlighted deficiencies with TCEQ’s approval of the Rulemaking Amendment and the potential health impacts on the Impacted Communities where the Agency had already permitted CBPs and would likely be approving more.¹⁵⁶

a. The 2000 protectiveness review did not evaluate PM2.5, crystalline silica, or cement dust and is outdated.

The technical requirements of the CBPSP issued in 2000 were stated to be the result of the TNRCC protectiveness review conducted from 1996-2000.¹⁵⁷ TCEQ asserted the review determined the ability of different types of CBPs to meet the requirements of 30 TAC § 111.155,¹⁵⁸ off-property concentration limits for total suspended PM (400 mg/m³ for a 1-hour period and 200 mg/m³ for a 3-hour period), NAAQS for PM₁₀ (150 mg/m³ for a 24-hour period and 50 mg/m³ annually), and applicable TNRCC toxicology and risk assessment health effects guidelines.¹⁵⁹

¹⁵⁵ APPX_00336.

¹⁵⁶ APPX_00395- 402.

¹⁵⁷ APPX_00237.

¹⁵⁸ Repealed 2005.

¹⁵⁹ APPX_00237.

According to TCEQ, emissions were calculated based on “reasonable worst-case assumptions of design, layout, and operation.”¹⁶⁰ EPA’s ISCST3 (version 99155) full air dispersion modeling was used to evaluate each CBP configuration.¹⁶¹ In the 2000 protectiveness review, there is no mention of evaluating PM_{2.5}, crystalline silica, or cement dust.¹⁶²

Because crystalline silica is a known carcinogen and the TAC clearly instructs the Agency to consider it a pollutant of concern, the Agency should have conducted a comprehensive evaluation of both emissions and distance limitations required for a standard concrete batch plant permit to be safe, before creating the original standard permit in 2000. Furthermore, given that the amount of crystalline silica involved will vary depending on the type of sand used by the facility, data sheets showing the composition of the sand being emitted by the CBP should be disclosed and reviewed to make a protectiveness determination. “Standard” limits for the CBPSP cannot be considered “standard” at all for crystalline silica given that each facility may be using diverse types of sand that include different ratios of this carcinogen in their operations. Evaluating crystalline silica emissions from CBPs is necessary and will remain an environmental justice concern until TCEQ thoroughly addresses whether such emissions are within statutory limitations and, in fact, protective of public health.

Similarly, evidence of protectiveness from cement dust also should have been and should be required for a CBP facility to acquire a permit. This would, of course, first require TCEQ to define “cement dust” in its regulations and publish related guidance for making ESL determinations. Otherwise, the factors considered to be “standard” for the CBPSP cannot be considered “standard” for cement dust either, as each applicant for a CBPSP may choose its own definition of cement dust. Further, if TCEQ has not done any modeling to determine a limit of cement dust which is protective for the CBPSP, such work needs to be done before limits set forth in the TAC are allowed to be permanently exempted.

b. The 2012 protectiveness review does not meet current NAAQS for PM_{2.5}, used inappropriate factors in calculating emission rates, and again failed to evaluate crystalline silica or cement dust.

In 2012, TCEQ conducted a limited protectiveness review using EPA guidance on emission factors and methodology to significantly amend the CBPSP.¹⁶³ TCEQ stated pollutants of concern included PM_{2.5} as well as PM₁₀.¹⁶⁴ Specifically, TCEQ asserted it amended the standard permit to account for EPA’s 2006 AP-42 emission factors, and to address 24-hour PM_{2.5}, annual PM_{2.5}, and NAAQS.¹⁶⁵ As TCEQ noted, EPA no longer allowed use of the 1997 policy that granted permitting authorities to demonstrate meeting NAAQS requirements for PM_{2.5} by showing compliance with NAAQS requirements for PM₁₀.¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See generally APPX_000225–75.

¹⁶³ APPX_000300–28.

¹⁶⁴ APPX_000300.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Major amendments to the CBPSP included new efficiency requirements of filter systems to specifically address PM_{2.5}, new visible emission standards, requirements for silo loading operations, and site production limits.¹⁶⁷ Given the changes made to the standard permit, the removal of the exemption for CBPs to comply with the emissions and distance limitations in 30 TAC §116.610(a)(1) (which TCEQ now states several years later was a clerical error) appeared very much in line with TCEQ's attempt to comply with federal guidelines and NAAQS.

TCEQ's 2012 limited protectiveness review fell short. TCEQ published notice of the amended standard permit on August 27, 2012, with an effective date of December 21, 2012.¹⁶⁸ As Table 4 above demonstrates, EPA promulgated new NAAQS for PM_{2.5} on January 15, 2013. Specifically, the new standards lowered the annual emissions for PM_{2.5} from a primary source from 15 mg/m³ to 12 mg/m³. It is impossible for TCEQ's 2012 protectiveness review to adequately address NAAQS for annual PM_{2.5}, as these standards were amended less than a month after the 2012 CBPSP became effective.¹⁶⁹

Furthermore, TCEQ was aware that EPA was preparing to publish new NAAQS for annual emissions for PM_{2.5} and was strongly opposed to this change.¹⁷⁰ During EPA's comment period on its revised NAAQS in 2012, TCEQ expressed the view that the 2006 standards provided the requisite degree of public health protection.¹⁷¹ Specifically, TCEQ opined that there was no evidence of greater risk since the 2006 review to justify tightening the annual PM_{2.5} standard. Neither the protectiveness review from 2000 nor 2012 can be considered current with respect to particulate matter.¹⁷²

Additionally, TCEQ heavily relied on EPA's 2006 AP-42 emission factors in its 2012 protectiveness review.¹⁷³ However, EPA has made clear the AP-42 emission factors are not a replacement for more source-specific emission values to demonstrate compliance with federal regulations. In fact, as recently as November 2020, EPA published an Enforcement Alert entitled "EPA Reminder About Inappropriate Use of AP-42 Emission Factors."¹⁷⁴ In the alert, EPA expressed concerns that permitting agencies were incorrectly using AP-42 factors as said factors were "not likely to be accurate predictors of emissions from any one specific source, except in very limited scenarios" and therefore should be used as a last resort. Specifically, EPA issued the following warning:

Use of these factors as source-specific permit limits and/or as emission regulation compliance determinations is not recommended by EPA. Because emission factors essentially represent an average of a range of emission rates, approximately half of the subject sources will have emission rates greater than the emission factor and the other half will have emission rates less than the factor. As such, *a permit limit using an AP-42 emission factor would result in half of the sources being in noncompliance.*¹⁷⁵

¹⁶⁷ APPX_000304 –05.

¹⁶⁸ APPX_000311.

¹⁶⁹ 78 Fed. Reg. 3,086 (Jan. 15, 2013).

¹⁷⁰ 78 Fed. Reg. 3,111 (Jan. 15, 2013).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ APPX_000302–03.

¹⁷⁴ APPX_000451–54.

¹⁷⁵ APPX_000451 (emphasis added).

Accordingly, half the concrete batch plants being permitted under the CBPSP are potentially out of compliance. Furthermore, most of the emission factors in the AP-42 related to concrete batch plants are rated “D” or “E,” meaning the quality of the factor is either below average or poor.¹⁷⁶ A below average rating (“D”) is a factor based on a small number of facilities, with reason to suspect the facilities do not represent a random sample of the industry.¹⁷⁷ A poor rating (“E”) is a factor developed from either tests based on an unproven/new methodology or a generally unacceptable method.¹⁷⁸ Therefore, TCEQ’s reliance on the AP-42 Emissions Factors during its protectiveness review in creating its 2012 CBPSP is questionable at best.

Finally, in the limited 2012 protectiveness review, there is again no mention of evaluating crystalline silica or cement dust, known pollutants emitted by concrete batch plants.¹⁷⁹ Furthermore, there is no mention of evaluating distance limitations of CBPs with respect to key locations of concern, such as residences, schools, and community centers.¹⁸⁰ In theory, the 2012 amended standard permit indirectly addressed these emissions and distance limitations by removing the CBP exemption and requiring CBPs to comply with the emissions and distance limitations of in 30 TAC §116.610(a)(1).¹⁸¹ However, based on the Bosque decision and TCEQ’s actions thereafter (discussed more fully in section III(C) above), it did not appear TCEQ ever intended to enforce this exemption.¹⁸² Accordingly, the 2012 CBPSP remained inadequately protective of human health and safety.

c. TCEQ’s response to public concern with the protectiveness of the 2021 amendment was inadequate.

In 2021, TCEQ again amended the CBPSP to reinstate the exemption from the emissions and distance limitations in Chapter 30 of TAC, which were originally developed 21 years ago and removed from the standard permit 9 years prior. TCEQ cited little reason for this amendment, other than the exemption was “inadvertently removed” in 2012. The public notice describing this Rulemaking Amendment read as follows:

The Texas Commission on Environmental Quality is providing an opportunity for the public to comment on a proposed amendment to the air quality standard permit for concrete batch plants.

TCEQ originally issued the concrete batch plant standard permit in 2000, amended it in 2003, and again in 2012.

This proposed amendment will update the standard permit to add the exemption from emissions and distance limitations in 30 TAC § 116.610(a)(1). This exemption was inadvertently removed during the 2012 amendment.¹⁸³

¹⁷⁶ APPX_000454.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See generally* APPX_000300–28.

¹⁸⁰ *Id.*

¹⁸¹ *See, supra*, III(C) at 9.

¹⁸² *Id.*

¹⁸³ APPX_000106.

It was evident that this sudden reinstatement of the exemption was in direct response to the Bosque application, which pointed out the deficiencies in the standard permit related to crystalline silica. There was no new protectiveness review conducted prior to the approval of the 2021 amendment. The last protectiveness review for crystalline silica was in 2000 and is outdated. The limited protectiveness review from 2012, which did not include crystalline silica, did not justify this change. The Agency had no science prior to 2000 to support its effort to “fix” the alleged error.

During the comment period, TCEQ received over fifty comments from politicians, numerous community members, and many advocacy groups, all expressing concerns with the proposed amendment.¹⁸⁴ Specifically, these interested parties requested a new protectiveness review, referencing the insufficient protectiveness reviews of 2000 and 2012 and updates in science. They also expressed concerns that the amendment would diminish TCEQ’s consideration of crystalline silica emissions in its issuance of permits to CBPs.¹⁸⁵

TCEQ did little to address these concerns. TCEQ responded that as it conducted an “extensive protectiveness review” during the adoption of the initial CBPSP (over 20 years ago) to ensure emissions from CBPs are protective of public health and welfare, it was unnecessary to conduct another review.¹⁸⁶ It also briefly noted the supplemental protectiveness review in 2012 showed that the concentrations of PM_{2.5} emitted by CBPs were below the levels of NAAQS.¹⁸⁷ TCEQ admitted it has not explicitly modeled the levels of crystalline silica emitted by a CBP for purposes of the standard permit, despite acknowledging it is potentially a more toxic particle.¹⁸⁸ Ultimately, TCEQ declined to conduct a new protectiveness review, as “there [had] been no changes since the last update to the standard permit that would require updating the protectiveness review.”¹⁸⁹

This statement is inaccurate for several reasons. First, TCEQ’s substantial reliance on the 2000 protectiveness review to endorse the 2021 amendment is a poor demonstration of keeping up with new developments in science. The 2000 protectiveness review was done long before permitting agencies were even required to demonstrate compliance with NAAQS for PM_{2.5}. It also used an outdated air dispersion modeling (EPA’s ISCST3 version 99155) to evaluate each CBP configuration.¹⁹⁰ This air dispersion modeling is not considered a preferred/recommended model by EPA.¹⁹¹

Second, the 2012 protectiveness review was conducted shortly before EPA published new NAAQS for PM_{2.5}.¹⁹² Accordingly, for that reason alone, a new protectiveness review is warranted.

¹⁸⁴ APPX_000331–33.

¹⁸⁵ See generally APPX_000329–69, 370–94.

¹⁸⁶ APPX_000339, 341.

¹⁸⁷ APPX_000345.

¹⁸⁸ APPX_00344, 346.

¹⁸⁹ APPX_000342.

¹⁹⁰ APPX_000342-43.

¹⁹¹ APPX_000342.

¹⁹² APPX_000311 compare with 78 Fed. Reg. 3,086 (Jan. 15, 2013).

Finally, the scientific community continues to study the dangers of crystalline silica, especially with respect to ambient exposure of crystalline silica. Accordingly, a protectiveness review from over twenty years ago does not withstand the test of time with respect to toxic air emissions from concrete batch plants.

3. The adverse effects of the exemption and failure to conduct a new protectiveness review will disproportionately affect Black and Hispanic communities.

Minority communities within the un-zoned boundaries of the City of Houston are disproportionately burdened with the air pollution and health issues caused by industrial land use, which also results in decreased property values. The decreased property values entice additional industrial players to continue buying land in these communities to operate facilities, causing a vicious cycle of pollution, health issues, and the decline of property values. The excessive number of CBP facilities present in Complainants' communities already causes adverse effects in emitting particulate matter, crystalline silica, cement dust, and other pollutants. These effects will only be exacerbated by the exemptions CBPs are afforded under TCEQ's Rulemaking Amendment, and TCEQ's disregard of community concerns regarding the protectiveness of the same.

As TCEQ continues to pass regulations that ease pollution and distance limitations without any scientific support and simplify the processes major polluters must follow, those most affected are communities of color, specifically Black and Hispanic communities. Data extracted from EPA's EJScreen further supports the assertion that Black and Hispanic communities, such as SN 48, Dyersforest, and Greater Fifth Ward, are disproportionately burdened by the adverse effects of CBPs emitting air pollutants because the number of CBPs are far concentrated in these lower-income neighborhoods. Contrast the profiles of the Impacted Communities from Section IV with the statistics below for two wealthier, whiter neighborhoods in Houston, less than 15 miles away, and the relative number of CBPs in each of these neighborhoods.

- Greater Heights or Super Neighborhood 15 ("SN15") in Central Houston in City Council District C & H. Based on the 2019 data available from the City of Houston, SN15 is 65% White, with 74% of the total population mainly speaking English at home.¹⁹³
- Afton Oaks/ River Oaks or Super Neighborhood 23 ("SN23") is also in Central Houston in City Council District G & C. Based on the 2019 data available from the City of Houston, SN23 is 72% White, with 77% of the total population mainly speaking English at home.¹⁹⁴

¹⁹³ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at https://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Greater_Heights_Final.pdf.

¹⁹⁴ City of Houston Planning & Development Department Super Neighborhood Resource Assessment available at https://www.houstontx.gov/planning/Demographics/2019%20Council%20District%20Profiles/Afton%20Oaks%20River%20Oaks_Final.pdf.

Table 5: Comparison for Numbers of Concrete Batch Plants within Super Neighborhood Boundaries

Super Neighborhood	Population	Geographic Area	Number of CBPs
SN23 – Afton Oaks/ River Oaks	15,477	3.61 sq miles	0
SN48 – Trinity /Houston Gardens	17,485	6.87 sq miles	8
SN15 – Greater Heights	43,899	7.32 sq. miles	0
SN 55 – Greater Fifth Ward	19,391	4.99 sq miles	3

Further, compared with these two, Whiter wealthier neighborhoods and even Houston or Harris County as a whole, the resulting disparities in Impacted Communities reflected in both property values and health outcomes are concerning:

a. Comparison of Cumulative Health Impacts Lived in Impacted Communities

Asthma is a health condition in which a person's air passages become inflamed, and the narrowing of the respiratory passages makes it difficult to breathe. The Houston Health Department (HHD) states symptoms of asthma can include tightness in the chest, coughing, and wheezing and are often brought on by exposure to inhaled allergens, such as dust, pollen, mold, cigarette smoke, and animal dander.¹⁹⁵ According to HHD, reducing exposure to poor housing conditions, traffic pollution, secondhand smoke and other factors impacting air quality can help prevent asthma and asthma attacks.¹⁹⁶ In some cases, asthma symptoms are severe enough to warrant hospitalization, and can result in death.

HHD compiles data to summarize city-wide statistics on various health conditions, including asthma. The most recent data available is from 2019, reflected below in Table 6, which shows the contrast between neighborhoods with CBPs (red) and without CBPs (green). EJScreen confirms that the rates found in the Impacted Communities are in the 80th-95th percentile or higher nationally of neighborhoods wherein asthma is prevalent among adults.

Table 6: Comparison of Rates of Asthma in Adult Population¹⁹⁷

Comparison of Rates of Asthma in Adult Population		Relative Ranking
Nationally	7%	50% Best Neighborhoods in Texas Counties
SN15 – Greater Heights	7.2%	
SN23 – Afton Oaks/ River Oaks	7.2%	
Harris County	8%	25% Worst Neighborhoods in Texas Counties
Dyersforest	10%	
Greater Fifth Ward	10.9%	
SN48 – Trinity /Houston Gardens	11.3%	

¹⁹⁵ As defined by HHD on <https://www.houstonstateofhealth.com/>.

¹⁹⁶ *Id.*

¹⁹⁷ Data compiled using <https://www.houstonstateofhealth.com/tiles/index/display?alias=neighborhood>.

Since 2006, EPA has conducted research and funded studies to further understand the link between air pollution and heart disease.¹⁹⁸ In 2016, a study funded by EPA revealed a direct link between air pollution and atherosclerosis, a buildup of plaque in the coronary artery that can affect heart health.¹⁹⁹ Specifically, the study found that long-term exposure to particulate matter and nitrogen oxides at levels close to NAAQS can prematurely age blood vessels and contribute to a more rapid building of calcium in the coronary artery, increasing the likelihood of cardiac events.²⁰⁰

Concrete batch plants emitting scarcely monitored or controlled particulate matter under standard permits can further contribute to the prominent levels of cardiac diseases. HHD data from 2019 reflected in Table 7 below reflects the relative rates of coronary heart disease between the comparison neighborhoods with CBPs in red and without CBPs in green.

Table 7: Comparison of Rates of Coronary Heart Disease in Adult Population²⁰¹

Comparison of Rates of Coronary Heart Disease in Adult Population		Relative Ranking
SN15 – Greater Heights	3.6%	50% Best Neighborhoods in Texas Counties
Harris County	5.1%	
SN23 – Afton Oaks/ River Oaks	5.2%	
Nationally	6.2%	
Dyersforest	6.7%	25% Worst Neighborhoods in Texas Counties
Greater Fifth Ward	8.3%	
SN48 – Trinity /Houston Gardens	9%	

In 2019, UT Southwestern Medical Center (“UTSMC”) published a report demonstrating that life expectancy in the State of Texas varies by zip code and confirming health disparities are significant between different geographical areas of the state.²⁰² Again, Table 8 illustrates the apparent disparities in life expectancy between neighborhoods (in green) without significant industrial encroachment and those with a multitude of CBPs and other environmental hazards (in red).

¹⁹⁸ According to EPA’s webpage “Linking Air Pollution and Heart Disease” available at <https://www.epa.gov/sciencematters/linking-air-pollution-and-heart-disease>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Data compiled using <https://www.houstonstateofhealth.com/tiles/index/display?alias=neighborhood>.

²⁰² Katie Watkins, Life Expectancy In Houston Can Vary Up To 20 Years Depending On Where You Live, Houston Public Media, March 19, 2019, accessed at: <https://www.houstonpublicmedia.org/articles/news/harris-county/2019/03/04/323859/life-expectancy-in-houston-can-vary-up-to-20-years-depending-on-where-you-live/>.

Table 8: Comparison of Relative Life Expectancies in Years by Zip Code²⁰³

SN 55 Greater Fifth Ward	SN48 Trinity/ Houston Gardens	Texas	Harris County	SN15 Greater Heights	SN23 Afton Oaks/ River Oaks
77020: 76.8	77016: 70.2	78.5 years	78.9 years	77007: 89.1	77027: 84.6
77026: 69.8	77026: 69.8			77008: 80.9	77019: 84.9
	77028: 71.0			77009: 76.9	

The data shows a significant disparity between the life expectancy of members of SN 48 in comparison to Harris County or the State of Texas. The disparity widens when comparing the life expectancy of Black members of SN 48 to the average person in Harris County or the State of Texas. A Black individual from SN 48 has a reduced life expectancy of approximately 8-10 years from the county or the state.²⁰⁴ A Black or Hispanic individual from Greater Fifth Ward has a reduced life expectancy of approximately 1-7 years from the county or the state.²⁰⁵

Even more jarring is the disparity between the average life expectancy of persons of color from SN 48 or Greater Fifth Ward compared to that of any individual from Greater Heights or Afton Oaks / River Oaks, both predominantly White neighborhoods less than 15 miles away. The average life expectancy of a Black individual from SN 48 or Greater Fifth Ward can be up to *21 years lower* than that of a resident of Greater Heights, and up to *17 years lower* than that of a resident of Afton Oaks/River Oaks.²⁰⁶ The average life expectancy of a Hispanic individual from Greater Fifth Ward can be up to *11 years lower* than that of a resident of Greater Heights, and up to *7 years lower* than that of a resident of Afton Oaks/River Oaks.²⁰⁷

Other cumulative impacts of the proliferation of industrial actors like CBPs in residential neighborhoods show up in relative cancer rates. In March 2020, the Texas Department of State Health Services (“TDSHS”) published a study evaluating the occurrence of cancer across twenty-one census tracts in Houston, Texas.²⁰⁸ The State’s investigation surveyed data related to nine types of cancer over 17 years. A cancer cluster is defined by the Center for Disease Control and Prevention and the Council of State and Territorial Epidemiologists “as a greater than expected number of cancer cases that occurs within a group of people in a geographic area over a defined period of time.”²⁰⁹ This Texas study found that the rates of acute myeloid leukemia, esophagus, larynx, liver, and lung and bronchus cancers were “statistically significantly greater

²⁰³ Data compiled using interactive map Life Expectancy by Zip-Cde in Texas, available at <https://www.texashealthmaps.com/lfex>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Texas Department of State Health Services, *Assessment of the Occurrence of Cancer: Houston, Texas 2000-2016*, (March 20, 2020) available at <https://www.dshs.texas.gov/epitox/CancerClusters/Assessment-of-Occurrence-of-Cancers,-Houston,-Texas---2000-2016.pdf>.

²⁰⁹ Kashmere Gardens Trinity / Houston Gardens Super Neighborhoods 52 and 48, Collaborative Community Design Initiative No. 5, Community Design Resource Center, Univ. of Houston, 13 (Special Edition: Harvey ed. 2018).

than expected based on cancer rates in Texas.”²¹⁰ Furthermore, the study cited multiple cancer clusters located in census tracts in both Greater Fifth Ward and SN 48.²¹¹

b. Comparison of Disparate Property Values in the Impacted Communities

Decades of rampant air pollution and neglect of the Black and Hispanic communities of Greater Fifth Ward have also resulted low in property values, especially when compared with the overall property values in the City of Houston.

Years of underregulated or unregulated air pollution and neglect of the Black and Hispanic communities of Super Neighborhood 48 have also resulted in inexpensive property values in comparison with overall property values in the City of Houston. Moreover, as illustrated by the relative, recent changes in property values over the past 20 years shown in Table 9, the Impacted Communities have not enjoyed the same growth either.

Table 9: Comparing Relative Changes in Property Values between Impacted Communities and Across Houston²¹²

Neighborhood²¹³	2000	2019	Relative Change
SN48 – Trinity /Houston Gardens	\$33,739	\$72,852	Under \$40,000
SN 55 – Fifth Ward	\$28,977	\$90,165	Under \$61,000
City of Houston	\$79,300	\$171,800	Over \$100,000

With the inexpensive property values, industrial actors continue to acquire land in the Greater Fifth Ward and SN48, causing additional air pollution and aggravating the adverse effects of the same. Similarly, and as evidenced by the Dyersforest community’s recent CBP challenge to Rhino Ready Mix in 2020-2022, industrial actors are also attracted to the devalued unregulated properties available in Dyersforest. Approval of the CBPSP Rulemaking Amendment exempting applicants from air pollutant emissions and distance limitations only eases what little restrictions CBPs must comply with to construct and operate their facilities on acquired land. This circumstance all but ensures that SN 48, Greater Fifth Ward, and Dyersforest will continue to be disproportionately burdened by air pollution, health issues, and low property values in comparison to their White counterpart neighborhoods continue to soar in value and experience higher than average life expectancies.

²¹⁰ *Assessment of the Occurrence of Cancer: Houston, Texas 2000-2016*, (March 20, 2020) at 4.

²¹¹ *Id.* at 10.

²¹² Data compiled using each neighborhood’s respective City of Houston Planning & Development Department Super Neighborhood Resource Assessment, available at https://www.houstontx.gov/planning/Demographics/super_neighborhoods_3.html.

²¹³ The ACS historical data has been decommissioned, so this information is not available for relevant Census blockgroups that make up Dyersforest. However, Dyersforest’s current median home value is \$84,000, making it well below the average home price for a home in the City of Houston.

4. TCEQ had less discriminatory alternatives to passing the Rulemaking Amendment.

TCEQ rushed through the administrative process to adopt the Rulemaking Amendment so that it could keep issuing permits for CBPs. TCEQ even states as much in its Executive Summary supporting the Rulemaking Amendment's adoption: "if the amendment to this standard permit does not move forward, applicants could be required to demonstrate the emission from the CBP meet the emission and distance limitations in § 116.610(a)(1)."²¹⁴ The need to continue easily issuing permits became paramount for the Agency over public health and the civil rights of Impacted Communities and LEP persons. There is no excuse for the Agency not conducting a protectiveness review for the 2021 Rulemaking Amendment when it had just been through a contested case hearing in Bosque Solutions, LLC and knew it did not have the science to support the current exemption for crystalline silica that it claims should have been in the CBPSP but of a clerical error.²¹⁵ Thus, in its rush to fix the error, the Agency unnecessarily compromised public health by failing to conduct a protectiveness review, given the outdated and ill-conceived protectiveness review of 2012 prior to the NAAQS amendments.

a. New Protectiveness Review in 2021

TCEQ should have affirmatively conducted a new and relevant protectiveness review prior to proposing and ultimately approving the Rulemaking Amendment. The last full protectiveness review of the CBPSP was conducted from 1996-2000. TCEQ, however, insists on its 20-year-old review as support justifying its approval of the 2021 amendment that exempts CBPs from statutory air pollutant emissions and distance limitations—all while TCEQ ignores the intervening federal regulatory changes in air modeling standards and intervening changes to NAAQS requirements for PM_{2.5}.

b. Enforce the emissions and distance limitations of 30 TAC §§ 106.261 and 106.262.

Despite the removal of the exemption in 2012, TCEQ did not enforce the emissions and distance limitations of 30 TAC §§ 106.261 and 106.262 in issuing CBP standard permits for several years. However, in 2020, the conclusion of the Bosque matter brought this enforcement failure to TCEQ's attention when the ALJ found the 2012 CBPSP amendment expressly incorporated the emissions limitations set forth in 30 TAC §§ 106.261 and 106.262, and by reference, required a demonstration that crystalline silica emissions would comply with said limitations.

Instead of enforcing the limitations that were clearly set forth in the 2012 CBPSP and reinforced by the ALJ, TCEQ opted to immediately issue a "Notice of Request for Public Comment and Notice of a Public Meeting on a Proposed Amendment to the Air Quality Standard Permit for Concrete Batch Plants" to reinstate the exemption it had first issued over 20 years ago.²¹⁶ While it would have been less burdensome on the affected minority communities for TCEQ to finally impose the statutory limitations on owners and operators of CBP facilities with respect to the air pollutants emitted and the siting of these facilities, TCEQ chose to categorize the 2012 amendment as a "clerical error," requiring nothing but a simple reversal to permitting language from 2000.

²¹⁴ APPX_000334-35.

²¹⁵ APPX_00143-47

²¹⁶ APPX_000105-09.

c. Alternate Solutions to Address Environmental Justice Concerns

Not only did TCEQ refuse to conduct a new protectiveness review or enforce the emissions and distance limitations of 30 TAC §§ 106.261 and 106.262, but it also failed to consider *any* other alternate solutions or revisions to the CBPSP to address the environmental justice concerns raised by many interested parties. In its public comments to the Rulemaking Amendment, Complainants proposed several recommendations for TCEQ to consider in its standard permitting process with respect to CBPs.²¹⁷ These recommendations included:

- Siting controls which consider communities without zoning;
- Evaluating the number of industrial operations already in particular areas of concern;
- Evaluating applicants for CBPSPs for history of violations before issuing permits;
- Restricting hours of CBP operations;
- Increasing TCEQ oversight of “standard” CBP facilities;²¹⁸ and
- Conducting third-party independent research studies on ambient crystalline silica emissions on residential communities near CBPs.²¹⁹

Despite these proposals, TCEQ did not consider any of the above before reverting to its standard permit from 2000. TCEQ overlooked an ideal opportunity to effectuate change in minority communities facing daily environmental justice concerns, but instead TEQ moved forward in a manner demonstrating complete disregard for issues plaguing the Impacted Communities.

B. TCEQ’s failure to publish notice the Rulemaking Amendment in languages other than English violates Title VI.

TCEQ’s rush to fix the error further compromised the civil rights of LEP persons in the Impacted Communities directly affected by existing CBPs in their neighborhood as well those living in areas where CBPs are likely to be proposed. The absence of zoning in Houston puts these communities at extreme risk within Harris County because residential or recreational areas in Houston are not immune or insulated from having a CBP sited in their neighborhoods. There are no local restrictions that can prevent a CBP from being located in a predominantly residential area or directly across the street from a public park or school. These failures of the system have a disproportionate effect on these communities, which typically have a higher-than-average Spanish-speaking population as demonstrated in the Impacted Communities joining in this Complaint. Under Title VI and as a recipient of Federal financial assistance, TCEQ has a duty to provide LEP persons with equal access to its programs and activities. In conducting the Rulemaking Amendment, TCEQ failed to fulfill this duty.

1. TCEQ failed to implement its 2020 Informal Resolution with EPA to ensure meaningful access for individuals with Limited English Proficiency.

EPA makes clear that discrimination on the basis of national origin includes discrimination against individuals with Limited English Proficiency. In fact, EPA investigated TCEQ in 2019 for alleged discrimination against LEP individuals in the administration of its permitting and

²¹⁷ APPX_000023-53.

²¹⁸ *Id.*

²¹⁹ APPX_000095.

public engagement programs once before.²²⁰ Therefore, TCEQ has been on notice that EPA and others recognize TCEQ has been excluding LEP individuals for decades, and TCEQ should have reflected on this problem when providing notice on the Rulemaking Amendment.

In November 2019, Texas Environmental Justice Advocacy Services (“t.e.j.a.s.”) and Sierra Club filed a complaint against TCEQ for failing to provide the non-English-speaking community of Texas with public notices in alternative languages, excluding LEP community members from meaningful participation in public meetings.²²¹ The complaint highlighted TCEQ’s failure to properly notice in alternative languages in instances as far back in time as 2014. The complaint emphasized TCEQ’s pattern of exclusion contributed to the perpetuation of disproportionate pollution burdens in environmentally overburdened immigrant and Latinx communities. Contemporaneously, t.e.j.a.s and Sierra Club also filed a petition for a rulemaking amendment with TCEQ, requesting the commission adopt rules extending the existing alternative language requirement beyond those for publications of Notice of Receipt of Application and Intent to Obtain Permit (“NORI”) and Notice of Application and Preliminary Decision (NAPD). Specifically, the request was to extend the alternative language requirement to public meetings held under 30 TAC § 55.154.

The 2019 complaint resulted in an Informal Resolution (the “Resolution”) executed on November 3, 2020.²²² As a part of the Resolution, TCEQ specifically committed to a plan to ensure meaningful access for individuals with LEP.²²³

Through the Resolution, TCEQ vowed to “develop, publicize, and implement written procedures to ensure meaningful access to all TCEQ programs and activities by all persons, including access by individuals with LEP, at no cost to those individuals.”²²⁴ TCEQ was to develop a language access plan consistent with EPA’s LEP Guidance, which was established in 2004.²²⁵ Critical elements of TCEQ’s commitment to this resolution included agreeing to translate vital documents into prominent and/or particular languages for LEP individuals.²²⁶

Following the Resolution, TCEQ established its Language Access Plan (“LAP”) to “establish guidance to better ensure individuals with LEP may meaningfully access TCEQ programs, activities, and services in a timely and effective manner.”²²⁷ Notably, TCEQ agreed to prioritize written translation of vital documents related to significant Agency decisions if 5% or more of the affected (or expected to be affected) population comprised of LEP individuals who share a common non-English language.²²⁸ Among other factors, TCEQ also agreed to assess: (1) the number or proportion of LEP individuals in Texas eligible to be served or likely to encounter

²²⁰ APPX_000111.

²²¹ See generally APPX_000110-24.

²²² APPX_000110-24.

²²³ APPX_000116-22.

²²⁴ APPX_000119.

²²⁵ *Id.*

²²⁶ APPX_000120.

²²⁷ TCEQ Language Access Plan, available at

<https://www.tceq.texas.gov/downloads/agency/decisions/participation/language-access-plan-gi-608.pdf>.

²²⁸ *Id.*

TCEQ services and (2) the nature and importance of TCEQ programs, activities, and services to the LEP population.²²⁹

Despite knowledge of its years of disenfranchising LEP individuals, committing to the Resolution to address its actions, and working on the development of a language access plan, TCEQ again failed the communities of SN 48, Dyersforest, and Greater Fifth Ward when it passed the Rulemaking Amendment to the CBPSP without proper notice of a public meeting in Spanish. On May 28, 2021, TCEQ issued its “Notice of Request for Public Comment and Notice of a Public Meeting on a Proposed Amendment to the Air Quality Standard Permit for Concrete Batch Plants” in the Texas Register.²³⁰ The notice stated the proposed amendment to the air quality standard permit was subject to a 30-day comment period ending on June 29, 2021.²³¹ It also stated the public meeting was scheduled for June 28, 2021.²³² The notice was issued in English only, and the notice did not even reference alternative languages or interpretation services.²³³ TCEQ was preparing to completely alter the air emissions and distance limitations concrete batch plants were bound to, facilities which are disproportionately located in Hispanic communities throughout Texas, and once again ensured the Spanish-speaking population was excluded from participating in the permitting process. TCEQ’s actions demonstrated a clear disregard of its own commitment from only six months prior to translate vital documents into prominent and/or particular languages for LEP individuals. TCEQ also clearly failed to evaluate the nature and importance of this amendment to the CBPSP.

Furthermore, throughout the comment period, TCEQ received comments from elected officials, local governments, advocacy groups, and citizens of Texas, expressing concern as the notice did not include representation of non-English speaking communities.²³⁴ These groups emphasized that concrete batch plants are often located in underserved neighborhoods, rural communities, communities of color, and low-income areas with a lack of resources, understanding, limited representation, or an inability to participate in the permitting process.²³⁵

In spite of the impassioned comments regarding the importance of an alternate language notice for this proposed amendment, TCEQ simply responded “[b]ilingual notice was not required per state statute or rule.”²³⁶ TCEQ’s apathetic response after having notice of years of its exclusion of LEP individuals confirmed that at best, it is unconcerned with the disparate impact the amendment has on Spanish-speaking communities, and at worst, it is deliberately excluding minority communities from public participation.

²²⁹ *Id.*

²³⁰ APPX_000108-09.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ APPX_000356.

²³⁵ *Id.*

²³⁶ APPX_000357.

2. Complainants are all Impacted Communities with significant Spanish-speaking populations.

Nationally, populations who speak English less than very well is 8.2% of the total population.²³⁷ In Texas, statewide this percentage is higher than the nation at 13.3%. In the Resolution, TCEQ agreed to prioritize written translation of vital documents related to significant Agency decisions if 5% or more of the affected (or expected to be affected) population comprised of LEP individuals who share a common non-English language.²³⁸ TCEQ further agreed to assess the number or proportion of LEP individuals eligible to be served or likely to encounter TCEQ services utilizing US Census Bureau data.²³⁹ Specifically, TCEQ defines individuals who speak English less than “very well” as LEP. It is evident TCEQ did not evaluate these criteria before issuing a notice regarding its Rulemaking Amendment to the CBPSP.

The American Community Survey (“ACS”) is an official, ongoing survey conducted by the US Census Bureau that collects and produces information on social, economic, housing, and demographic characteristics about the nation’s population every year, including language proficiency. The ACS creates period estimates representing the characteristics of the population and housing over a specific data collection period, either 1-year or 5-years. The most current ACS represents 5-year data collected from 2016-2020 for the estimated number of Spanish-Speaking individuals who speak English less than “very well” in Harris County, Texas is 19.8% and within the City of Houston this number is 22.2%. Table 10 reflects these comparable percentages in the Impacted Communities:

Table 10: Comparison of Spanish-Speaking Populations in Impacted Communities

SN48			Dyersforest Blockgroups			Greater Fifth Ward Zip Codes		
Zip Code	Total Pop.	Percent of Total	Blockgroup	Total Pop.	Percent of Total	Zip Code	Total Pop.	Percent of Total
77016	4,487	15.9%	482012320002	1,054	42%	77020	7,324	30.7%
77026	4,145	20.6%	482012312001	399	12%	77026	4,145	20.6%
77028	2,052	11.8%	482012320001	77	5%			

²³⁷ Source for information cited in this section is from: <https://www.census.gov/acs/www/about/why-we-ask-each-question/language/>

²³⁸ APPX_00119-20.

²³⁹ APPX_000118-19.

<u>Spanish Spoken at Home</u>	<u>Percent of Total Population</u>
Dyersforest	100.00%
(Blockgroups 482012320002, 482012320001, and 482012312001)	100.00%
	17.00%
Greater Fifth Ward	45.0%
Houston, Texas	38.2%
Harris County	35.0%
SN 48	32.0%
Texas	28.8%
National	13.2%

3. TCEQ had less discriminatory alternatives in how it procedurally noticed the Rulemaking Amendment.

TCEQ’s public outreach and notice for the CBPSP Rulemaking Amended excluded LEP individuals. Under Title VI, TCEQ must provide LEP persons with equal access to its programs and activities. All of TCEQ’s communications regarding the Rulemaking Amendment were in English, including the permit itself.²⁴⁰ On June 28, 2021, TCEQ held a telephonic public meeting that was also in English, and no information was provided to attendees regarding any accommodations for LEP persons.²⁴¹

a. Providing Notice in an Alternative Language

To comply with the Resolution and Title VI, TCEQ should have provided notice of the Rulemaking Amendment in alternative languages, and specifically in Spanish, to ensure participation in the rulemaking process by the Spanish-speaking populations of SN 48, Dyersforest, and Greater Fifth Ward. During the Public Comment Period, many commenters, including Complainants²⁴² and Harris County,²⁴³ asked the Agency to: (1) re-notice the Rulemaking Amendment with English and Spanish notice, (2) conduct another public meeting with live two-way Spanish professional interpretation, and (3) translate the CBPSP into Spanish.²⁴⁴ TCEQ refused to do any of the foregoing.

b. Extend Alternative Notice Requirements to 30 TAC § 116.603

In response to t.e.j.a.s and Sierra Club’s petition for a rulemaking amendment extending the alternative language requirement, TCEQ amended 30 TAC § 55.154 relating to public meetings

²⁴⁰ APPX_000105-09, 329-94, 449-50.

²⁴¹ APPX_000010-12.

²⁴² APPX_000337-38.

²⁴³ *Id.*

²⁴⁴ APPX_000023-53; *see also* APPX_000434.

for hazardous air pollutant permits, among other types of permits.²⁴⁵ The amendment, effective September 16, 2021, requires notice of a public meeting related to hazardous air pollutant permits to comply with the alternative language requirements of 30 TAC § 39.426(d).²⁴⁶ This requirement includes a published alternative language notice of public meeting on TCEQ’s website.²⁴⁷ Similar alternative language requirements should also be required for issuing and amending standard permits related to air pollution.

TCEQ was firm in its position that “[b]ilingual notice was not required per state statute or rule”²⁴⁸ with respect to the Rulemaking Amendment. According to TCEQ, it had provided notice of the change to the standard permit in accordance with 30 TAC § 116.603—Public Participation in Issuance of Standard Permits; and, therefore, as if it had learned nothing from its ongoing informal resolution process, the Agency professed it had fulfilled its obligations to the members of all affected communities. However, the Agency can still violate the civil rights of LEP persons even when it follows the law. A manageable, and clearly less discriminatory alternative to this procedure would have been to extend alternative language notice requirements to public participation in air pollution standard permits, as they were extended to public meetings related to hazardous air pollutant permits. Therefore, TCEQ should be required to revise its statutory requirements related to public participation in the issuance of standard permits to incorporate the needs of LEP populations.

VII. RELIEF REQUESTED

To resolve the violations detailed in this Complaint against TCEQ, Complainants ask EPA to:

- 1) Investigate the allegations in this Complaint regarding the discriminatory actions by TCEQ taken against the communities represented by Complainants where TCEQ has permitted CBPs;
- 2) Abate TCEQ’s issuance of any permits for proposed CBPs or amendments in Houston pending any EPA investigation of this Complaint;
- 3) Require TCEQ to define “cement dust” with respect to the CBPSP;
- 4) Require TCEQ to conduct an updated protectiveness review for the CBPSP for particulate matter, crystalline silica, and cement dust impacts from CBP operations;
- 5) Require TCEQ to re-evaluate the conditions of the CBPSP to address environmental justice concerns;
- 6) Require TCEQ to revise its public participation requirements for the issuance of standard permits to ensure access for LEP populations; and

²⁴⁵ TCEQ Docket No. 2020-0040-RUL, Decision of the Commission Regarding the Petition filed by t.e.j.a.s and Sierra Club, Public Notice at 4 (Dec. 18, 2019).

²⁴⁶ TCEQ Docket No. 2020-0040-RUL, Commission Approval for Rulemaking Adoption, Interoffice Memorandum (Aug. 6, 2021) at 1-2.

²⁴⁷ *Id.*

²⁴⁸ APPX_000357.

- 7) Provide a new notice and comment period with respect to the Rulemaking Amendment on the CBPSP which complies with TCEQ's Informal Resolution Agreement with EPA regarding Limited English Proficiency and with TCEQ's Language Access Plan.

Complainants would further request any other and further relief that EPA feels they are entitled to after conducting its investigation to remedy TCEQ's discriminatory actions in adopting the Rulemaking Amendment.

VIII. CONCLUSION

For these reasons, Complainants Super Neighborhood 48 Trinity / Houston Gardens, Dyersforest Heights Civic Club, Progressive Fifth Ward Community Association, and Prince Square Civic Association ask EPA to investigate TCEQ's process and approval of the Rulemaking Amendment for the CBPSP in 2021 and its discriminatory impact on the communities outlined in this Complaint. For more information, please contact the undersigned counsel for Complainants.

Respectfully submitted,

b(6) Privacy [Redacted]

[Redacted]

[Redacted]

[Redacted]

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cc: VIA EMAIL TO EPA ADMINISTRATORS

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