

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

GWENDOLYN HARRIS and JAMES
RAGLAND,

Petitioners,

v.

MARIE THERESE DOMINGUEZ, in her
official capacity as Commissioner of the New
York State Department of Transportation,
FRANCIS P. CIRILLO, in his official
capacity as the Buffalo Regional Director of
the New York State Department of
Transportation, and STEPHANIE
WINKELHAKE, in her official capacity as
Chief Engineer of the New York State
Department of Transportation,

Respondents.

Index No.

VERIFIED PETITION

PRELIMINARY STATEMENT

1. Petitioners, residents of the Humboldt Park neighborhood in Buffalo, bring this Article 78 proceeding to challenge the New York State Department of Transportation’s decision move forward with a years-long construction project to cap the Kensington Expressway without thoroughly assessing and mitigating the increase in air pollution it will cause in a predominately Black neighborhood already overburdened by air pollution.
2. The construction of the NYS Route 33, Kensington Expressway in the 1950s and 1960s ripped through and displaced an almost entirely Black neighborhood.¹ Its construction

¹ See William Fox, *Segregation Along Highway Lines: How the Kensington Expressway Reshaped Buffalo* at 34, (2017), attached as Exhibit A to the affirmation of Ifeyinwa Chikezie (“Chikezie Affirmation”), available at <https://arts-sciences.buffalo.edu/content/dam/arts-sciences/history/documents/FINAL-Segregation-Along-Highway-Lines-by-Will-Fox.pdf>.

separated neighborhoods by race and class and demolished thousands of homes and businesses, leaving a legacy of ongoing environmental health hazards.

3. Today, this neighborhood has some of the worst air quality and the highest rates of concentrated asthma in the state of New York.²
4. The limited and flawed environmental assessment (“EA”) completed by the New York State Department of Transportation’s (“NYSDOT”) reflects a failure to take a “hard look” at environmental hazards. Notwithstanding the deficiencies of the agency’s assessment, it clearly demonstrates that the Kensington Expressway redevelopment (“Kensington Project”) has the potential to exacerbate the already-poor air quality in the Humboldt Park neighborhood by increasing exposure to harmful particulate matter and other air pollutants. Some of the most significant increases in exposure will be immediately proximate to a public park, science museum, and a magnet school that serves elementary and middle school students.
5. Instead of conducting a thorough environmental review, known as an environmental impact statement (“EIS”), which requires a detailed analysis of environmental concerns and the certification of mitigation measures where environmental impacts are identified, the NYSDOT made the decision years ago to speed up the process.
6. In 2009, prior to any environmental review or consideration of air quality, Craig S. Mozrall, the NYSDOT Region 5 Assistant Design Engineer, emphasized “that NYSDOT

² See Particulate Matter 2.5, EJScreen: Environmental Justice Screening and Mapping Tool, US EPA, Chikezie Affirmation Exhibit B, <https://www.epa.gov/ejscreen> (last accessed May 30, 2024); Asthma, EJScreen: Environmental Justice Screening and Mapping Tool, US EPA, Chikezie Affirmation Exhibit C, <https://www.epa.gov/ejscreen> (last accessed May 30, 2024).

has decided to complete an Environmental Assessment (as opposed to an Environmental Impact Statement).”³

7. On August 13, 2009, during an advisory committee meeting, the NYSDOT Regional Design Engineer Darrell F. Kaminski, who later became the NYSDOT Buffalo Regional Director, stated that “[t]he decision to do an EA [environmental assessment] instead of an Environmental Impact Statement speeds up the process.”⁴
8. On February 16, 2024, in accordance with its foregone conclusion, the NYSDOT issued a negative declaration—a statement declaring no significant negative impacts will occur as a result of this project—thereby affirming its 2009 decision to continue to speed the 1.5-billion-dollar project into the construction phase without a fulsome EIS.
9. The decision to issue a negative declaration and forego an EIS violates both the State Environmental Quality Review Act (“SEQR”), which mandates an EIS where, as here, a project includes the potential for at least one significant environmental impact, and the Climate Leadership and Community Protection Act (“CLCPA”), which requires that agencies prioritize emissions reductions in disadvantaged communities and mitigate actions that would overburden those communities.
10. Petitioners respectfully request that this Court annul the NYSDOT’s negative declaration, compel the completion of an EIS, and direct the agency to identify and implement all necessary mitigation measures as required by SEQR and the CLCPA to protect the Humboldt Park residents from the increase in air pollution.

³ Meeting Minutes, Advisory Committee Meeting #1, Pin 5512.52, NYSDOT (August 13, 2009), at 5, Chikezie Affirmation Exhibit D.

⁴ *Id.*

PARTIES

11. Petitioner Gwendolyn Harris is a Humboldt Park resident who lives less than 500 feet from the Kensington Expressway.
12. Petitioner James Ragland is a Humboldt Park resident who lives approximately 600 feet from the Kensington Expressway.
13. Respondent Marie T. Dominguez is sued in her official capacity as the Commissioner of the New York State Department of Transportation, which is the joint lead agency and project sponsor of the Kensington Project. Under section 10 of the Highway Law, Respondent Dominguez is charged with supervising and approving the construction, improvement, and maintenance of state highways.
14. Respondent Stephanie Winkelhake is sued in her official capacity as Chief Engineer of the New York State Department of Transportation.
15. Respondent Francis P. Cirillo is sued in his official capacity as the Buffalo Regional Director of New York State Department of Transportation.

FACTUAL ALLEGATIONS

A. Background on the Humboldt Park Neighborhood

16. Humboldt Park is a predominantly Black residential neighborhood in Buffalo, New York.
17. The original construction of NYS Route 33 (the “Kensington Expressway”) demolished homes and bifurcated this residential neighborhood in the 1950s and 1960s. Its construction severed several local east-west streets, ripping through the Humboldt Park neighborhood, demolishing homes and businesses, and forcing thousands of mostly Black families out of their homes and neighborhoods. Once completed, the sunken roadway became a barrier, separating parks and neighborhoods.

18. Today, the Humboldt Park neighborhood is disproportionately comprised of people of color. Approximately 90% of the nearly 20,000 people who live in the project area are people of color, and approximately 75% of those residents are Black.⁵
19. The Humboldt Park neighborhood is also disproportionately low-income. Almost one third of these Humboldt Park residents live below the federal poverty level.⁶ Over half have incomes below 200% of the federal poverty level.⁷
20. The Humboldt Park neighborhood has some of the worst health outcomes in the nation. The life expectancy of Humboldt Park residents is in the lowest 95th to 100th percentile nationwide.⁸ The prevalence of asthma and heart disease in the Humboldt Park neighborhood range from the 90th to 100th percentile of the nationwide averages.⁹
21. Much of these poor health outcomes stems from the neighborhood's proximity to the Kensington Expressway.¹⁰ In Erie County, "highways near residential areas" are linked

⁵ U.S. Census Bureau. "Age and Sex." American Community Survey, ACS 5-Year Estimates Subject Tables, Table S0101, 2022, <https://data.census.gov/table/ACSST5Y2022.S0101?g=1400000US36029002703,36029003100,36029003301,36029003302,36029003400,36029003502,36029016600&y=2022&tp=true>. Accessed on May 30, 2024; U.S. Census Bureau. "ACS Demographic and Housing Estimates." American Community Survey, ACS 5-Year Estimates Data Profiles, Table DP05, 2022, <https://data.census.gov/table/ACSDP5Y2022.DP05?t=Black or African American&g=1400000US36029002703,36029003100,36029003301,36029003302,36029003400,36029003502,36029016600&y=2022&tp=true>. Accessed on May 30, 2024.

⁶ U.S. Census Bureau. "Poverty Status in the Past 12 Months." American Community Survey, ACS 5-Year Estimates Subject Tables, Table S1701, 2022, <https://data.census.gov/table/ACSST5Y2022.S1701?t=Poverty&g=1400000US36029002703,36029003100,36029003301,36029003302,36029003400,36029003502,36029016600&tp=true>. Accessed on May 30, 2024.

⁷ *Id.*

⁸ Low Life Expectancy, EJScreen: Environmental Justice Screening and Mapping Tool, US EPA, Chikezie Affirmation Exhibit E, <https://www.epa.gov/ejscreen> (last accessed May 30, 2024).

⁹ Chikezie Affirmation Exhibit C; Heart Disease, EJScreen: Environmental Justice Screening and Mapping Tool, US EPA, Chikezie Affirmation Exhibit F, <https://www.epa.gov/ejscreen> (last accessed May 30, 2024).

¹⁰ See e.g., Amber H. Sinclair, *et al.*, *Childhood asthma acute primary care visits, traffic, and traffic-related pollutants*, Journal of the Air & Waste Management Association Vol. 64, Iss. 5, at 564 (2014), Chikezie Affirmation Exhibit G, available at <https://doi.org/10.1080/10962247.2013.873093> (finding that rates of childhood asthma increase significantly for children living in close proximity to major roadways).

to “asthma and other breathing disorders of children and adults.”¹¹ Across the county, “children living within 200 meters of roads with heavy truck traffic, or a high density of automobile traffic have a higher risk of asthma hospitalization.”¹²

22. Specifically, the harmful pollution in the Humboldt Park neighborhood is traceable to the high rates of exposure to airborne particulates with a diameter of 2.5mm or less (“PM2.5”)—which pose a uniquely dangerous health risk to humans as compared to other particulate matters because of their ability to penetrate the lungs and bloodstream and trigger illness, hospitalization, and premature death at short- and long-term exposure.
23. The Environmental Protection Agency estimates that the Humboldt Park community bears one of the highest statewide burdens from PM2.5 pollution—ranging from the 70th to 90th percentile—given the neighborhood’s heightened vulnerability to the effects of pollution based on demographic and socioeconomic factors and underlying health conditions.¹³
24. As the NYSDOT has recognized, the New York State Department of Environmental Conservation and the New York Climate Justice Working Group have designated the Humboldt Park neighborhood as a “disadvantaged community” under the CLCPA,¹⁴

¹¹ *Humboldt Parkway Deck Economic Impact Study*, NYSDOT and the Regional Institute Urban Design Project at the University at Buffalo, State University of New York (April 25, 2014), at 19, Chikezie Affirmation Exhibit H, available at <https://www.dot.ny.gov/content/delivery/region5/projects/551252-Home/551252-Repository/Ken%20Deck%20Report%20Final%204-25-14.pdf>.

¹² *Id.*

¹³ See EJ Index Descriptions – EJ Screen: Environmental Justice Screening and Mapping Tool, EPA (2024), Chikezie Affirmation Exhibit I, available at <https://www.epa.gov/ejscreen/ej-index-descriptions#:~:text=Particulate%20Matter%202.5%20%E2%80%93%20EJ%20Index&text=The%20PM%202.5%20indicator%20measures,quality%20standard%20for%20PM%202.5> (last accessed May 30, 2024) (defining the EPA’s particulate matter 2.5 EJ index).

¹⁴ See *Disadvantaged Communities Criteria – Summary Table*, New York State Department of Environmental Conservation (2023), Chikezie Affirmation Exhibit J, available at <https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria> (last accessed Mar. 29, 2024); see also *Final Design Report/Environmental Assessment*, NYS Route 33, Kensington Expressway Project, New York State Department of Transportation, at 192-93 (January 2024), Chikezie Affirmation Exhibit K, available at

meaning that these communities “bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households” (ECL 75-0101).

25. The Humboldt Park neighborhood closest to the Kensington Expressway is one of the *most* disadvantaged communities in New York State.
26. The Humboldt Park neighborhood bears more indications of environmental burdens and health vulnerabilities than 78% to 87% of all other census tracts statewide.¹⁵ It has greater indicators of population vulnerability than 88% to 92% of all other census tracks statewide.¹⁶

B. Background of the Kensington Project

27. In 2009, at the project’s inception—prior to the completion of preliminary scoping documents, environmental analyses, or public hearings—the NYSDOT pre-determined that the agency would not conduct an EIS for the project.
28. On August 13, 2009, during an advisory committee meeting held by the NYSDOT, Darrell F. Kaminski, the NYSDOT Region 5 Regional Design Engineer, stated that “[t]he

https://kensingtonexpressway.dot.ny.gov/Content/files/FinalReport/551252%20Final_DR_EA_2_16_24.pdf (last accessed May 24, 2024) (stating that the communities in and surrounding the capping project are disadvantaged communities under the CLCPA).

¹⁵ *Disadvantaged Communities Fact Sheets: New York State’s Disadvantaged Communities Criteria*, New York State Department of Environmental Conservation, Chikezie Affirmation Exhibit L, available for download at https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/LMI-daccriteria-fs-1-v2_acc.pdf (last accessed May 23, 2024); see The New York Climate Justice Working Group identified disadvantaged communities across the state, relying upon 45 indicators representing “environmental burdens,” “climate change risks,” “population characteristics,” and “health vulnerabilities that can contribute to more severe adverse effects of climate change.” *Id.* The group then scored each census track based on these factors and evaluated each tracts score relative to the rest of New York.

¹⁶ Chikezie Affirmation Exhibit L.

decision to do an EA instead of an Environmental Impact Statement speeds up the process. The NYSDOT is looking for ways to reduce the schedule as much as possible.”¹⁷

29. Craig S. Mozrall, the NYSDOT Region 5 Assistant Design Engineer, emphasized that “the NYSDOT has decided to complete an Environmental Assessment (as opposed to an Environmental Impact Statement).”¹⁸

30. The Kensington Project is a multi-year, over \$1 billion project undertaken by NYSDOT to reconnect the community.

31. NYSDOT has classified this project as “non-Type II,” meaning the project carries “the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS” (*id.* ¶ TBD; 6 NYCRR 617.4[a][1] [describing presumption in favor of EIS completion]; 17 NYCRR 15.1[c][2] [analogizing between the NYSDOT non-type II actions and SEQR type I actions]).¹⁹ The threshold for completing an EIS for such projects is low (*see e.g. Watch Hill Homeowners Assn Inc. v Town Bd. of Town of Greenburgh*, 226 AD2d 1031, 1033 [3d Dept 1996]).

32. The Kensington Project will comprise a total distance of approximately 7,100 feet and consist of a cap over a three-quarter mile depressed section of the Kensington Expressway, thereby creating a tunnel with three travel lanes in each direction. NYSDOT plans to add soil and plant trees atop the tunnel, creating “approximately 11 acres of new publicly accessible greenspace.”²⁰

33. In the years following the agency’s decision to not complete an EIS, the NYSDOT met with project stakeholders and held public meetings.

¹⁷ Chikezie Affirmation Exhibit D.

¹⁸ *Id.*

¹⁹ Chikezie Affirmation Exhibit K at ES-1.

²⁰ *Id.* at *13.

34. Throughout this process, the NYSDOT—notwithstanding the glaring omissions, unreasonable assumptions, and unsound technical analysis in its research—acknowledged the project’s potential to cause adverse environmental impacts and received feedback from community members expressing concerns about the project’s environmental impacts to the Humboldt Park neighborhood.
35. For example, in 2012, the NYSDOT published a concept design study that noted that the agency had already “begun to identify areas of environmental concern.”²¹
36. In 2022, the NYSDOT published a Project Scoping Report in which the agency seemingly attempts to remedy the expected increase of air pollution by the construction of “exhaust structures” atop the tunnel to discharge vehicle exhaust as well as the installation of air treatment equipment.²²
37. In 2023, following the publication of a draft environmental assessment, the NYSDOT held a public meeting during which members of the public expressed concerns regarding the increase in air pollution at the exit portals of the planned tunnel.
38. Throughout the public comment period, the NYSDOT was made aware of the concerns residents and experts had with their air quality analysis. These concerns included: fears about increased air pollution at the tunnel portals, shortcomings in the air quality measurements, the air quality and health impacts on the already overburdened Humboldt Park neighborhood, incorrect scientific assumptions concerning vehicle electrification

²¹ Kensington Expressway Concept Design Study Evaluation of Project Alternatives, NYSDOT (August 2012), at 1, Exhibit Y, available at <https://www.dot.ny.gov/content/delivery/region5/projects/551252-Home/551252-Repository/Concept%20Design%20Study.pdf>.

²² *Project Scoping Report*, NYS Route 33, Kensington Expressway Project, NYSDOT, at 44 (December 2022), at 44, Chikezie Affirmation Exhibit R, available at <https://kensingtonexpressway.dot.ny.gov/Content/files/ScopingReport/Project%20Scoping%20Report.pdf>.

within their air quality analysis, and the insufficiency of the NAAQS standard to protect human health.²³

39. The New York Civil Liberties Union submitted public comments alerting the NYSDOT to its failure to conduct an EIS due to the potential negative impacts defined in the EA and its failure to comply with the Climate Leadership and Community Protection Act, which mandates New York State to not disproportionality burden disadvantage communities and prioritize reductions of greenhouse gas emissions and co-pollutants.²⁴
40. Instead of responding to these comments with a thorough, well-reasoned analysis, the NYSDOT consistently relied on the fact that its analysis, which was actively put in question by the comments, showed that particulate matter rates were beneath the NAAQS.²⁵
41. True to its unwavering commitment to its early determination that no EIS would be completed for this project, NYSDOT failed to take a “hard look” at the air quality of the proposed project and the impact of the air pollution increase.
42. And on February 16, 2024, NYSDOT released a negative declaration—ending its environmental review process and greenlighting the project to move forward with construction.²⁶

²³ See generally *Appendix E3 Final Design Report/Environmental Assessment*, NYS Route 33, Kensington Expressway Project, New York State Department of Transportation, 50-54, Chikezie Affirmation Exhibit O (2024), available at https://kensingtonexpressway.dot.ny.gov/Content/files/FinalReport/Appendix_E3_01_Response_to_Comments_Received_on_DDR_EA.pdf (last accessed Apr. 29, 2024).

²⁴ Public Comments on the Kensington Expressway, New York Civil Liberties Union, Chikezie Affirmation Exhibit N, available at https://www.nyclu.org/uploads/2023/11/nyclu_kensington_expressway_public_comments.pdf (last accessed June 13, 2024).

²⁵ Chikezie Affirmation Exhibit O at 52-54.

²⁶ *Finding of No Significant Impact*, NYS Route 33, Kensington Expressway Project, New York State Department of Transportation, U.S. Department of Transportation, Federal Highway Administration, (February 16, 2024), Chikezie Affirmation Exhibit P, available at https://kensingtonexpressway.dot.ny.gov/Content/files/FinalReport/551252%20Kensington%20Expressway%20FO_NSI_2_16_24.pdf (last accessed May 24, 2024)

C. The NYSDOT's Inadequate Environmental Review

43. The NYSDOT's environmental analyses are riddled with irrational omissions, unreasonable assumptions, and unsupported conclusions—all which form the basis for the NYSDOT's conclusion that the Kensington Project has no potential to have significant negative impacts and no EIS is required.²⁷
44. The NYSDOT's environmental analysis has numerous technical flaws (*see generally* Sahu Affirmation).
45. NYSDOT failed to conduct important, routine analyses of environmental impacts for highway construction projects, such as analysis of key sources of pollutants on highways, analysis of starting and idling vehicles, and analysis of tire and brake wear (*id.* ¶¶ 8, 21, 22, 31).
46. The NYSDOT neglected to study the background data of air quality in the neighborhood closest to Kensington Expressway, the Humboldt Park neighborhood—the very neighborhood that has the greatest exposure and will bear the greatest burden of any increase in pollution (*id.* ¶¶ 22, 23). Instead, the NYSDOT relied on background data from air monitors placed miles away (*id.*). This unreasonable reliance on air monitors miles from Humboldt Park neighborhood set an incorrect baseline for the agency's air quality analysis, resulting in an underestimation of air pollution (*id.* ¶¶ 31, 34).
47. Further, the NYSDOT also made a slew of unsupported assumptions and unreasonable research omissions.
48. The NYSDOT assumed that drivers in this community will switch to electric vehicles and the reduction in gas vehicles will reduce air pollution; yet the NYSDOT did not

²⁷ See Affirmation of Dr. Ron Sahu.

analyze or elaborate on this assumption or these purposed impacts. As mentioned, most Humboldt Park residents live below 200% of the federal poverty line. And “[e]lectric vehicles remain a relative rarity in Western New York.”²⁸ A mere 4,200 people are registered electrical vehicle drivers in Erie County, representing about 2% of total drivers in the county.²⁹ This number is nominal as compared to the population of Erie County, which is over 950,000.³⁰

49. Even if the NYSDOT’s electric vehicle assumptions were reasonable and supported by available data, the NYSDOT failed to study the impact of electric vehicles, which raise unique air quality risks due to their electrical and battery components that contribute to large amounts of air pollution (Sahu Affirmation ¶ 20).
50. Additionally, the NYSDOT did not conduct any sensitivity analyses to depict a forecasted range of potential harm upon communities (*id.* ¶¶ 26, 37). Sensitivity analyses are common for environmental assessments and measure the impacts of changing various assumptions to predict a range of possible effects (*id.*).
51. The NYSDOT reached its conclusions regarding air quality impacts based on air quality background data taken from one single hour of one single day during the COVID-19 pandemic, where traffic patterns were depressed, which resulted in an underestimation of ambient air pollution (*id.* ¶¶ 33, 36, 44).

²⁸ See *Electric Vehicle Registration Map*, NYSERD, Exhibit M, available at <https://www.nyserda.ny.gov/All-Programs/ChargeNY/Support-Electric/Map-of-EV-Registrations> (last accessed June 12, 2024).

²⁹ *Id.*

³⁰ United States Census Bureau, available at https://data.census.gov/profile/Erie_County,_New_York?g=050XX00US3602.

52. The NYSDOT's air quality conclusions are reliant upon background data located miles away from the Humboldt Park neighborhood, instead of data specific to the Humboldt Park neighborhood in the project area (*id.* ¶ 31).
53. In reaching its conclusions, the NYSDOT did not support or otherwise elaborate upon its findings that the Kensington Project has no potential to cause significant impacts to the residents of Humboldt Park neighborhood (*id.* ¶ 58). These are glaring omissions of the record.

D. The Kensington Project's Anticipated Negative Impacts

54. The NYSDOT determined the construction of the tunnel will generate an increase in concentrations of air pollution.
55. During the public hearing held on September 27, 2023, the NYSDOT presented data demonstrating that over 10% of air receptors were predicted to demonstrated increased PM2.5 levels by 2027.³¹
56. The final, problematic EA still manages to identify that the Kensington Project would increase PM2.5 levels both in the long-term and short-term. The EA identifies long-term increases of PM 2.5 of up to 6% by the tunnel portals.³²
57. These tunnel portals are located approximately 360 feet from the entrance of the Humboldt Park neighborhood, Charles R. Drew Science Magnet School, the Hamlin Park Community School, and Martin Luther King Jr. Park.

³¹ *Air Quality Receptor Overview*, Public Hearing – September 27, 2023, NYSDOT (2023), Chikezie Affirmation Exhibit Q, available at <https://kensingtonexpressway.dot.ny.gov/Content/files/PublicHearing/21%20Air%20Quality%20Receptor%20Overview.pdf>.

³² Chikezie Affirmation Exhibit K at 194.

58. The EA concludes short-term pollution will increase “[e]nergy consumption and greenhouse gas emissions during construction from construction vehicles and equipment, production of materials, and transport of materials and workers.”³³
59. The EA also predicts that “construction operations may increase particulate matter in the form of fugitive dust, as well as particulate matter in exhaust emissions from material delivery trucks, construction equipment, and worker’s private vehicles.”³⁴
60. In early scoping reports, the NYSDOT included mitigation measures for the long-term air pollution increases at the tunnel, such as exhaust structures, to address negative foreseeable air quality effects they knew would arise from any iteration of this project.³⁵
61. In 2022, NYSDOT suggested constructing “utility building complexes” to house air treatment and/or ventilation equipment to “minimize air quality effects” and “remove a portion of the [air] pollutants” from the tunnel.³⁶
62. These mitigation measures were later dismissed by NYSDOT without explanation.³⁷
63. In its negative declaration, NYSDOT described non-committal plans to investigate wall treatments, wash the tunnel, and plant trees around the portal tunnels for “beneficial effects on air quality and health.”³⁸
64. Notwithstanding these findings, NYSDOT claims the Kensington Project poses no potential negative impacts that would trigger an EIS. The agency claims the project will

³³ Chikezie Affirmation Exhibit P at 8, 11.

³⁴ *Id.*

³⁵ See Chikezie Affirmation Exhibit R.

³⁶ *Id.* at 43-45, 59; see Appendix A: Concept Figures, *Public Scoping Report*, NYS Route 33, Kensington Expressway Project, NYSDOT, at 17-19 (December 2022), Chikezie Affirmation Exhibit S, available at <https://kensingtonexpressway.dot.ny.gov/Content/files/ScopingReport/Appendix%20A%20Concept%20Figures.pdf>.

³⁷ *Kensington Project Poster Build Alternative: Changes since 2022 Scoping Meeting*, NYSDOT Public Information Meeting Materials (June 20, 2023), Chikezie Affirmation Exhibit T, available at <https://kensingtonexpressway.dot.ny.gov/Content/files/PublicInformationMeeting/Kensington%20Project%20Poster%20Build%20Alternative.%20Changes%20since%202022%20Scoping%20Meeting.pdf>

³⁸ Chikezie Affirmation Exhibit P at 4.

have “no adverse effects on air quality” to people living in the Humboldt Park neighborhood or to those living in the homes directly adjacent to the tunnel portals.³⁹

E. Harmful PM 2.5 Exposure

65. The primary source of PM2.5 is the combustion of gasoline, oil, diesel fuel. The EA concludes that PM2.5 emissions will increase both in the short-term and long term.

66. PM2.5 consists of airborne particles that are particularly dangerous because they are small in diameter and pose a significant risk to human health due to their ability to penetrate deep into the lungs and enter the blood stream.

67. The harmful impacts of PM2.5 are especially concerning in the Humboldt Park neighborhood, which already has high levels of particulate matter and residents who are disproportionately susceptible to adverse health effects from air pollution due to decades worth of vehicle pollution.

68. PM2.5 exposure is linked to an increased risk of developing chronic respiratory diseases, like asthma and chronic obstructive pulmonary disease, as well as cardiovascular problems and lung cancer. Additionally, PM2.5 can aggravate preexisting conditions like heart and lung diseases.

69. In 2021, the EPA recognized that PM2.5 research indicates existing standards may “no longer be adequate to protect public health and welfare” and that a “strong body of scientific evidence shows that long- and short-term exposure to fine particles (PM2.5) can harm people’s health, leading to heart attacks, asthma attacks and premature death.”⁴⁰

³⁹ *Id.*

⁴⁰ *EPA to Reexamine Health Standards for Harmful Soot that Previous Administration Left Unchanged*, EPA (Jun. 10, 2021), Chikezie Affirmation Exhibit U, available at <https://www.epa.gov/newsreleases/epa-reexamine-health-standards-harmful-soot-previous-administration-left-unchanged>.

70. The Federal Advisory Committee to the EPA has also made clear that the National Ambient Air Quality Standards (“NAAQS”) is not a proxy for the human health protection. All members of that committee “agree that the current level of the annual [NAAQS PM_{2.5}] standard is not sufficiently protective of public health.”⁴¹ In so concluding, the Committee emphasized “the heterogeneity in . . . PM_{2.5}-attributable mortality risk estimates by race and ethnicity,” noting that “a substantial disparity remains” regarding the “risk for White and Black populations,” even at lower standard.”⁴²
71. Demonstrative here, the EPA strengthened the NAAQS standards after the NYSDOT issued its negative declaration, recognizing its unique harm by lowering PM_{2.5} exposure to 9 ug/m³.⁴³
72. PM_{2.5} is especially dangerous to human health because it is a non-threshold pollutant, meaning that no level of exposure is safe for human beings.⁴⁴ Even exposure to very low levels of PM_{2.5} for short periods of time can lead to negative respiratory and cardiovascular health impacts.⁴⁵

⁴¹ *CASAC Review of the EPA’s Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (External Review Draft – October 2021*, Clean Air Scientific Advisory Committee Review, at *3 (March 18, 2022), Chikezie Affirmation Exhibit V.

⁴² *Id.* at *2, *104.

⁴³ *Fact Sheet: Implementing the Final Rule to Strengthen the National Air Quality Health Standard for Particulate Matter – Clean Air Act Permitting, Air Quality Designations, and State Planning Requirements*, EPA, Chikezie Affirmation Exhibit Z, available at (<https://www.epa.gov/system/files/documents/2024-02/pm-naaqs-implementation-fact-sheet.pdf>) (last accessed June 13, 2024).

⁴⁴ See Affirmation of Dr. Ron Sahu; Robert D. Brook, *et al.*, *Particulate Matter Air Pollution and Cardiovascular Disease*, 121 *Circulation* 2231-2378, 2365 (2010) (“Because the evidence reviewed supports that there is no safe threshold, it appears that public health benefits would accrue from lowering PM_{2.5} concentrations even below present-day annual (15 µg/m³) and 24-hour (35 µg/m³) NAAQS”), Chikezie Affirmation Exhibit W, available at <https://doi.org/10.1161/CIR.0b013e3181dbecel>; Georgia Papadogeorgou, *et al.*, *Low Levels of Air Pollution and Health: Effect Estimates, Methodological Challenges and Future Directions*, 6 *Curr. Environ. Health Rep.* 105-115 (2019), Chikezie Affirmation Exhibit X, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7161422/>

⁴⁵ *Id.*

73. The harmful impacts of PM2.5 are of special concern in the Kensington Project because the projected increase of PM2.5 emissions are estimated to occur within a mere 360 feet of MLK Park, the Buffalo Museum of Science, and the Charles R. Drew Science Magnet School.
74. The EA underestimates the Kensington Project's PM2.5 emissions. Under a technically sound and rigorous analysis, PM2.5 emissions estimates would likely surpass the NAAQS.⁴⁶
75. Because of the significant impact that PM2.5 presents to the Humboldt Park neighborhood, it is unreasonable not to complete a fulsome analysis through an EIS and to identify mitigation measures "consistent with the Climate Leadership and Community Protection Act."

F. State Laws Are Designed to Protect Communities Like Those Residing in the Vicinity of the Expressway from Environmental Harm

76. Both SEQR and the CLCPA are statutes designed to protect residents like Ms. Harris and Mr. Ragland who live in the Humboldt Park neighborhood from further environmental harm. The statutes prioritize protections for vulnerable communities who have experienced decades of exposure to dangerous toxins and pollutants. The statutes mandate specific environmental considerations such as: requiring public participation, identifying potential negative environmental impacts, and requiring certification of mitigation measures where significant adverse impacts may occur.

The State Environmental Quality Review Act

⁴⁶ Sahu Affirmation ¶ 42.

77. SEQR exists to “inject environmental considerations directly into governmental decision making.”⁴⁷
78. The primary procedural component of SEQR is the EIS, which is a comprehensive document that evaluates a project’s environmental, social, and economic impacts. The EIS is a technical analysis, which examines a full range of technical areas to identify and evaluate issues that are significant; eliminate issues that are not significant; and propose mitigation for significant impacts that are identified (6 NYCRR 617.7[a], [c]).
79. To determine the potential for significant impacts requiring an EIS for all major infrastructure projects, as a first step, SEQR obligates agencies to prepare a preliminary environmental assessment.
80. An EA is less comprehensive than an EIS and provides preliminary evidence for identifying potentially significant impacts. It is not intended to discuss any potential impacts and mitigation strategies in detail and is not nearly as robust in its analysis as an EIS.
81. During the process to determine whether a proposed action may have a significant adverse impact, agencies may compare the proposed action against an “illustrative, not exhaustive” list of criteria that “are considered indicators of significant adverse impacts on the environment” (6 NYCRR 617.7[c][1]).
82. Included as an indicator of significance is agency action that creates “a hazard to human health” (6 NYCRR 617.7[c][vii]).
83. The significance of an impact is context specific and should not simply be assessed against generalized baselines. Rather potential impacts “should be assessed in connection

⁴⁷ *Matter of Coca-Cola Bottling Co. of New York, Inc. v Bd. of Estimate of City of New York*, 72 NY2d 674, 679 (1988).

with: (i) it's setting (e.g., urban or rural); (ii) its probability of occurrence;...(iv) its irreversibility;... (vi) its magnitude; and (vii) the number of people affected" (6 NYCRR 617.7[c][3]).

84. Under SEQR, agency actions can be categorized as Type I, Type II, or Unlisted Actions.⁴⁸

85. Under NYSDOT's regulations for implementing SEQR, actions can be classified as type II or non-type II actions (17 NYCRR 15.1 *et seq.*). Actions classified as non-type II by NYSDOT are processed in the same manner as Type I actions (17 NYCRR 15.1[c][2]).

86. Type I actions "carr[y] with [them] the presumption that [they are] likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4[a][1]).

87. State courts have noted that "[i]n Type I actions there is a relatively low threshold for requiring an EIS."⁴⁹

88. If the lead agency determines that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant, then agencies may issue a negative declaration, which allows the project to go forward without a complete EIS (6 NYCRR 617.11).

89. By issuing a negative declaration and declining to do an EIS, agencies are under no obligation to incorporate mitigation measures intended to reduce identified significant impacts as conditions to the project moving forward.

The Climate Leadership and Protection Act

⁴⁸ See 6 NYCRR 617.4 (describing Type I actions); 6 NYCRR 617.5 (describing Type II actions); 6 NYCRR 617.2(al) (defining Unlisted actions as all actions not identified as a Type I or Type II action).

⁴⁹ See *Miller v City of Lockport*, 210 AD2d 955, 957 (4th Dept 1994).

90. The CLCPA was enacted to “minimize the risks associated with climate change” (CLCPA 1[6]). The statute prioritizes the reduction of greenhouse gases and “co-pollutants,” which are hazardous air pollutants produced by greenhouse gas emissions sources (ECL 75-0101[3]).
91. Recognizing the heightened vulnerability of communities that “bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination,” the statute requires actions undertaken by agencies to reduce greenhouse gas emissions and “prioritize the safety and health of disadvantaged communities” (CLCPA 1[7]).
92. To this end, CLCPA commands that agencies “shall consider whether [agency] decisions are inconsistent with or will interfere with” the goals of the CLCPA (CLCPA 7[2]).
93. For administrative decisions that are inconsistent with the CLCPA, the statute obligates agencies to provide “a detailed statement of justification” explaining why and “identifying alternatives or greenhouse gas mitigation measures to be required where such project is located” (*id.*).
94. The CLCPA also obligates all state agencies to take heightened protective measures for disadvantaged communities. The statute directs that “[i]n considering and issuing permits, licenses, and other administrative approvals and decisions...all state agencies, offices, authorities, and divisions *shall not* disproportionately burden disadvantaged communities” (CLCPA 7[3] [emphasis added]).
95. The CLCPA further commands agencies to “prioritize reduction of greenhouse gas emissions and co-pollutants in disadvantaged communities” in administrative approvals and decisions (*id.*).

96. Pursuant to ECL 75-0111, the New York Climate Justice Working Group identified which communities are “disadvantaged” for the purposes of the CLCPA. Indicators upon which the Working Group relied include proximity to existing environmental hazards and large concentrations of vulnerable people including older adults, the percentage of community members of color, and the amount of people with respiratory illnesses, like those living in Humboldt Park.⁵⁰

G. The Petitioners

Gwendolyn Harris

97. Petitioner Gwendolyn Harris is an 81-year-old Buffalo resident who lives in the Humboldt Park neighborhood less than 500 feet away from the Kensington Expressway (Affirmation of Gwendolyn Harris [“Harris Affirmation”], ¶¶ 1-2).

98. Ms. Harris has lived in her home since the late 1950s. She lives with her 80-year-old sister and her 65-year-old daughter (*id.* ¶ 3). Prior to moving into her current home, she lived elsewhere within the Humboldt Park neighborhood (*id.* ¶ 5).

99. Ms. Harris was diagnosed with asthma not long after the Kensington Expressway was constructed (*id.* ¶ 8).

100. Almost two years ago, Ms. Harris was diagnosed with inoperable lung cancer (*id.* ¶ 14). She has completed two forms of radiation since 2022, and she sees her oncologist and her primary care physician on a regular basis (*id.* ¶ 15).

101. These treatments and conditions render her health and recovery particularly vulnerable (*id.* ¶ 16).

⁵⁰ Chikezie Affirmation Exhibit L.

102. Ms. Harris is concerned about the poor air quality in her neighborhood due to her proximity to the Kensington Expressway and the impact poor air quality has upon her already-vulnerable health status (*id.* ¶¶ 17-26).
103. Ms. Harris first learned about the Kensington Project reading the newspaper and watching the local news (*id.* ¶ 12).
104. Ms. Harris is concerned about the environmental harms that the Kensington Project will cause in her neighborhood (*id.* ¶¶ 17-26).
105. Mr. Harris is particularly concerned that the construction-related and long-term impacts of the project will worsen her health, that construction will make it challenging to go to her oncology appointments, and that the lack of information from the DOT makes it hard for her to understand the full scope of air quality impacts the project will have (*id.* ¶¶ 25-26).

James Ragland

106. Petitioner James Ragland is a 70-year-old Buffalo resident who lives in the Humboldt Park neighborhood in close proximity to the Kensington Expressway construction and redevelopment site (Affirmation of James Ragland [“Ragland Affirmation”], ¶¶ 1-2, 11).
107. Mr. Ragland has lived in his home for the last 35 years (*id.* ¶ 1). His daughter, niece, and great-nieces all visit him often (*id.* ¶ 15).
108. Mr. Ragland is active in his neighborhood (*id.* ¶ 13). He spends a lot of time outside, working on his lawn and going on walks in the Martin Luther King, Jr. Park (*id.* ¶¶ 12-13).
109. Mr. Ragland first learned about the Kensington Project through conversations with his neighbors (*id.* ¶ 16).

110. Mr. Ragland is concerned about the environmental harms that the Kensington Project will cause in his neighborhood (*id.* ¶¶ 14, 18, 22).

111. Specifically, Mr. Ragland is concerned that his young great-nieces will be exposed to air pollution when they visit him (*id.* ¶ 15). He is also concerned that he will be exposed to air pollution while he enjoys the outdoors and exercises during peak traffic hours (*id.* ¶ 14).

112. Mr. Ragland is also concerned about the noise impacts during construction (*id.* ¶ 9, 18). He lives approximately 600 feet from the Kensington Expressway, and already finds his neighborhood to be noisy (*id.* ¶¶ 2, 8).

FIRST CAUSE OF ACTION

Violation of the State Environmental Quality Review Act, ECL 8-0101 *et seq.*, 6 NYCRR 617

(For Judgment Pursuant to CPLR 7803)

113. The Petitioners re-allege all preceding paragraphs as if fully set forth herein.

114. The Respondents’ issuance of a negative declaration and failure to complete an EIS violates SEQRA.

115. By issuing a negative declaration and failing to conduct an EIS, the Respondents have made a “determination . . . affected by an error of law” and that is “arbitrary and capricious” (CPLR 7803 [3]).

116. The Petitioners are therefore entitled to judgment under CPLR 7806 annulling the negative declaration and compelling completion of an EIS.

SECOND CAUSE OF ACTION

Violation of the Climate Leadership and Community Protection Act

(For Judgment Pursuant to CPLR 7803)

117. The Petitioners re-allege all preceding paragraphs as if fully set forth herein.

118. NYSDOT’s negative declaration and failure to consider and mitigate environmental impacts on a disadvantaged community violate the CLCPA.
119. NYSDOT’s issuance of a negative declaration is an agency administrative decision subject to CLCPA 7(2) and 7(3).
120. By issuing a negative declaration and failing to provide a statement of justification, the Respondents have made a “determination . . . affected by an error of law” and that is “arbitrary and capricious” (CPLR 7803 [3]).
121. The Petitioners are therefore entitled to judgment under CPLR 7806 annulling the determination and directing Respondents to comply with the CLPCA by the identification and implementation of mitigation measures.

JURISDICTION AND VENUE

122. Pursuant to CPLR 506(b) and 7804(b), venue is proper in Erie County, where the Kensington Expressway is located and where material events regarding the Kensington Project took place.
123. Pursuant to CPLR 7803, this proceeding raises questions of whether the issuance of a negative declaration, failure to complete an EIS, and failure to analyze mitigation measures are affected by an error of law and are arbitrary and capricious.

REQUEST FOR RELIEF

WHEREFORE, Petitioners request that the Court:

- a. Annul Respondent’s negative declaration;
- b. Direct Respondents to comply with the requirements of SEQR by ordering completion of an EIS;

- c. Direct Respondents to comply with the requirements of the CLCPA by ordering the identification of greenhouse gas and co-pollutant mitigation measures;
- d. Award Petitioners reasonable attorney's fees and costs; and
- e. Grant any other relief the Court deems just and proper.

Dated: June 14th, 2024
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

/s/ Ifeyinwa K. Chikezie

Ifeyinwa K. Chikezie

Camara Stokes Hudson

Lanessa Owens-Chaplin

Molly K. Biklen

125 Broad Street, 19th Floor

New York, New York 10004

212-607-3300

ichikezie@nyclu.org

Counsel for Petitioners

STATE OF NEW YORK)

) ss:

COUNTY OF ERIE)

I, Gwendolyn Harris, being duly sworn, deposes and says that:

1. I am one of the Petitioners in this proceeding. I make this Verification pursuant to CPL §3020(d).
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

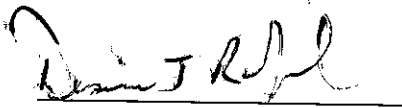


Gwendolyn Harris

Dated: 6-14-2024

Signed and sworn before me

This 14 day of June, 2024



NOTARY PUBLIC

DESIREE J. RADFORD
Notary Public - State of New York
No. 01RA6421777
Qualified in Erie County
My Commission Expires 09/07/2025