

May 5, 2008 Via mail and email: dotseffreeways94nsc@dot.state.wi.us

Bob Gutierrez
Wis DOT
P.O. Box 798
Waukesha, WI 53187-0798

Re: I-94 North-South Corridor Final EIS, Project I.D. No. 1030-20-00

Dear Mr. Gutierrez:

The following comments on the Final Environmental Impact Statement ("FEIS") for the I-94 North-South Corridor Project (I.D. No. 1030-20-00) are being submitted on behalf of the undersigned organizations. The comments supplement the previously submitted comments on the Draft Environmental Impact Statement dated January 25, 2008 as well as the supplemental comments dated April 3, 2008. We will not repeat verbatim our previously submitted comments, but instead incorporate them herein by reference. A copy of our January 25, 2008 comments (without the supporting attachments) is submitted with these comments.

For the reasons we set forth in our previous comments, which were almost entirely ignored by WisDOT and the FHWA (collectively "WisDOT"), the FEIS is inadequate. It violates the National Environmental Policy Act (NEPA) and regulations thereunder, the Clean Air Act, Title VI of the Civil Rights Act and environmental justice requirements, and the Federal Aid Highway Act. A new FEIS should be issued after adequate consideration of and response to our comments -- and the comments of others -- and after a new public comment period.

The FEIS itself, as well as developments since submission of our earlier comments, raise a number of additional issues, including the following:

I. Failure to respond to comments:

NEPA regulations require the agency to "discuss at appropriate points any responsible opposing view" and to adequately summarize or attach such comments to the FEIS. 40 C.F.R. §§ 1502.9(b) and 1503.4(b). WisDOT did not adequately respond to or attach our comments and other private parties' comments, did not directly respond to any of them, and in addition disregarded many of the comments submitted by the Wisconsin DNR and the US EPA.

Of the disregarded agency comments, perhaps the two most important were DNR's request for analysis of a "hybrid" alternative consisting of safety improvements together with additional lanes outside of Milwaukee and no additional lanes within Milwaukee; and EPA's comments regarding inadequate analysis of air pollution impacts.

II. Failure to acknowledge and analyze environmental justice issues/failure to discuss and analyze the "no additional lanes within the City of Milwaukee" hybrid alternative:

The FEIS violates Title VI and environmental justice requirements by imposing greater burdens upon, while providing significantly fewer offsetting benefits to, minority and low income communities.

WisDOT dismissed the potential for the Project to cause disproportionate harm to minority and low income communities by (incorrectly) asserting that neighborhoods through which the Project passes do not have the highest percentage of minority or low-income populations in the region, and "that there is not a large minority or low-income population in the study area, compared to the respective community or county population as a whole." As a result, it claimed that the proposed action "will not have a disproportionately high and adverse impact on low income or minority communities." FEIS at 4-49.

However, this reasoning reflects a serious misunderstanding of environmental justice requirements, and a complete disregard of racially segregated housing patterns in Wisconsin, and in Southeastern Wisconsin in particular. While WisDOT's analysis began with outdated 2000 census-tract data, the FEIS sets forth the results of the agency's more recent door-to-door canvassing of Milwaukee neighborhoods close to the Project. This information revealed current minority population percentages in the nearby neighborhoods approximating the 39% minority population of Milwaukee County. FEIS at 3-31&32. Milwaukee County, unsurprisingly, also has the highest percentage of minority population of any county in the region and the state, approximately 3.25 times the overall percentage of minorities in the State of Wisconsin.¹ The Milwaukee neighborhoods affected by the construction of additional lanes within the City (the portion of the Project which we oppose -- and which the Wisconsin DNR requested be eliminated and analyzed in a "hybrid" alternative) may not have the highest minority population percentage of all neighborhoods in the City, but compared to the outer suburbs within Milwaukee County, to the other Counties in the region, and to the State's population, they have a disproportionately high percentage of minority residents. WisDOT's failure to analyze, and then to address, the environmental justice impacts of this Project violates the requirements of Title VI of the Civil Rights Act, of the implementing regulations, and of FHWA Order 6640.23 (12/2/98), in the multiple manners cited in our previous comments.²

Moreover, the FEIS now includes an additional, disparate impact: in the City of Milwaukee (the only majority-minority city in the region), currently existing, convenient access to I-94 Southbound at the South 27th Street interchange is to be eliminated while in Oak Creek (a predominantly white community), a new interchange is to be constructed at Drexel Avenue.³ The FEIS does not indicate that any consideration whatsoever was given to the environmental justice impacts of these disparate decisions.⁴

Rather than meaningfully addressing such disparate treatment, WisDOT's uniform approach was to assert, without doing any analysis, that there is no environmental justice impact resulting from adding highway lanes in the City of Milwaukee. **However, what is also strikingly absent from the FEIS is**

1 See the 12% estimate for Wisconsin's minority population found at www.dhfs.state.wi.us/Health/MinorityHealth/minoritypopulations.htm. As our previous comments noted, USEPA guidelines call for careful scrutiny of environmental justice impacts whenever affected minority populations exceed twice the state average, a level which is greatly exceeded in these neighborhoods.

2 In the DEIS, WisDOT argued that a principal offsetting benefit was that minority communities would benefit from the highway expansion because it would purportedly connect (and allow commuting between) Milwaukee and Chicago, two minority majority communities. Our previous comments evaluated the fallacy of asserting this was any kind of a benefit to minority communities in the region. That purported offsetting benefit - which was not in fact a benefit - has been deleted from the FEIS. WisDOT asserts no other justification or offsetting benefit to minority communities in its place.

3 Our previous comments noted the environmental justice impacts of the admitted negative effects of the proposed Drexel interchange on development within the City of Milwaukee. WisDOT also failed to respond to these disparities.

4 Similarly, our previous comments noted the stark contrast between minimal increases in state funding for public transit, statewide and in this region, which have been inadequate to prevent continuing service reductions and fare increases, compared to WisDOT's sudden decision last year to find almost \$20 million to fund an interchange for the speculative Pabst Farms retail development in suburban Waukesha County, in an almost entirely white non-Hispanic community.

any discussion or analysis whatsoever of the the environmental justice effects of the “hybrid” alternative which the Wisconsin DNR specifically requested be analyzed. In fact, DNR's request is not discussed at all in the FEIS, and is not responded to in any way. See FEIS at 2-6 through 2-48, which discusses all of the alternatives that were given any consideration. Nor does the FEIS even acknowledge that SEWRPC staff's recommendation for the 2003 Regional Freeway Reconstruction Plan was to adopt precisely such a hybrid approach; nor does the FEIS discuss the Milwaukee County Board's resolution, and the resolution of the Board of School Directors of the Milwaukee Public Schools to similar effect, opposing additional highway lanes in the City of Milwaukee. As noted in our previous comments, neither NEPA nor the Civil Rights Act authorize an agency to avoid doing required analysis regarding environmental or environmental justice impacts by simply ignoring the existence of a reasonable alternative.

III. The air emissions analysis in the FEIS violates NEPA because it relies on a conformity analysis for ozone that is not fiscally constrained, it lacks a sufficient analysis of the impacts of air toxics, and it fails to identify the impacts from changed circumstances:

Even the EPA agreed that the air analysis in the Draft EIS was insufficient. In a comment to WisDOT, the EPA stated that they have “environmental concerns” and that the document contained “insufficient information.”⁵ The EPA’s concerns centered on air quality and mitigation; they took issue with the lack of analysis of air toxics; and they suggested specific mitigation measures that should be incorporated into the project.⁶

A. The Cumulative Impacts Analysis for Air Pollution is Flawed Because it is Based on an Air Quality Conformity Analysis for Ozone that Incorporates Transit Projects That Are Not “Fiscally Constrained.”

WisDOT determined that the project would not have a substantial cumulative impact on air quality by relying on a June 21, 2006 determination by the FHWA and FTA that the regional transportation plan and the Transportation Improvement Program (TIP) are in conformity with the State Implementation Plan (SIP) for the ozone non-attainment area. (EIS at 4-20) The “Conformity Analysis” used air quality modeling to demonstrate compliance with the emission budgets in the SIP for ozone non-attainment. This air modeling incorporated all of the regional transportation plan and TIP “transit improvements and expansion.”⁷ However, the assumption that all the transit improvements and expansion will happen is factually flawed because, in fact, those projects have not been adequately funded, and there is no reasonable likelihood shown they will be adequately funded in the near future.

This factual flaw results in a legal flaw such that WisDOT’s reliance on this Conformity Analysis to justify its conclusion of no significant air impacts from this project is arbitrary and capricious. The inclusion of transit projects in the air quality modeling is only legitimate if the projects are funded. Federal law mandates that, “[t]ransportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.”⁸ The DOT’s regulations only allow a plan to include projects where there is a financial plan that shows “how the adopted transportation plan can be implemented.”⁹ The transportation plan needs a financial plan that demonstrates that costs and revenue sources “are reasonably expected to be available to adequately

⁵ EPA Comment Letter, 1-25-08, at 2.

⁶ Id.

⁷ Conformity Analysis at 16, 21, 22, attached as Exhibit I

⁸ 40 C.F.R. 93.108.

⁹ 23 CFR 450.322(f)(10).

operate and maintain . . . public transportation.”¹⁰ Further, for nonattainment and maintenance areas, this financial plan must include “specific financial strategies required to ensure the implementation” of the transit projects that are used to show conformity with the SIP.¹¹

The DOT has discussed the “reasonably expected to be available” test at some length:

Simply identifying new funding sources without identifying strategies for ensuring their availability will not be acceptable. The financial plan must identify strategies for ensuring their availability. It is expected that the strategies, particularly for new funding sources requiring legislation, voter approval or multi-agency actions, include a specific plan of action that describes the steps that will be taken to ensure that the funds will be available within the timeframe shown in the financial plan.

The plan of action should provide information on the actions that will be taken to obtain the new funding such as how the support of the public, elected officials, business community, and special interests will be obtained, e.g. comprehensive and continuing program to make the public and others aware of the need for revenue sources and the consequences of not providing them. Past experiences (including historical data) with obtaining this type of funding, e.g., success in obtaining legislative and/or voter approval for new bond issues, tax increases, special appropriations of funds, etc., should be included. Where efforts are already underway to obtain a new revenue source, information such as the amount of support (and/or opposition) for the measure(s) by the public, elected officials, business community, and special interests should be provided.

* * *

The financial plan will be part of the plan or TIP and will be reviewed through the public involvement process. The following are examples of specific cases where new funding sources should not generally be considered to be “reasonably available”: (1) past efforts to enact new revenue sources have generally not been successful; (2) the extent of current support by public, elected officials, business community and/or special interests indicates passage of a pending funding measure is doubtful; or (3) no specific plan of action for securing the funding source and/or other information that demonstrates a strong likelihood that funds will be secured is available.¹²

All three disqualifying examples offered by DOT apply here, yet WisDOT relied on a flawed Conformity Analysis in which transit projects were not “fiscally constrained.”

The Conformity Analysis states that the public transit portion of the transportation plan includes “significant improvement and expansion of public transit in Southeastern Wisconsin, including development within the Region of a rapid transit and express transit system, improvement of local bus service, and the integration of local bus service with the proposed rapid and express transit services.”¹³ The air model is based on the 2025 transportation plan and the 2035 transportation plan that propose an increase in transit service (measured in vehicle miles of transit service) by 72% from year 2005 to 2025 and by 100% in 2035, and that fares would be consistent with inflation.¹⁴

¹⁰ 23 CFR 450.322(f)(10)(i).

¹¹ 23 CFR 450.322(f)(10)(vi).

¹² 58 Fed. Reg. 58060 cols. 2-3.

¹³ Conformity Analysis at 7.

¹⁴ Conformity Analysis at 17.

The models were calibrated using 2001 travel data that do not reflect subsequent, significant cuts in transit funding, coupled with increased fares that have resulted in declines in ridership.¹⁵ Contrary to the Conformity Analysis' assumption that "fares would be consistent with inflation,"¹⁶ since 2001 fare increases have considerably outpaced inflation:¹⁷

Fare Type	Dec. 2000	Jan. 2008	Increase	Inflation
Cash Fare	\$1.35	\$2.00	48%	24%
Weekly	\$10.50	\$16.00	52%	24%
Freeway Flyer	\$13.00	\$22.00	69%	24%
Sr. Citizen	\$0.65	\$1.00	53%	24%

The model also incorrectly assumes that all transit projects in the 2005-2007 TIP were implemented.¹⁸ The TIP "incorporates all . . . rapid transit facilities and services and includes both geographic expansion of service and improvement of frequency of transit service."¹⁹ These transit expansions and improvements were included in the emissions model.²⁰ Including this in the model is invalid because transit facilities and services have not expanded, and in fact, have been cut. This has occurred despite regional plan recommendations for improved and increased service, and despite the fact that transit dependence generally correlates with the minority population of Milwaukee County.²¹

For instance, from 2001 - 2007, Milwaukee County eliminated ten bus routes; reduced service on thirteen routes; ended year round downtown trolley service; and cut weekend and night-time service.²² . By early 2007, this had resulted in a 17% cut in annual vehicle miles and a 16% cut in annual vehicle hours of service compared to the year 2000.²³ Thus far in 2008, the County has eliminated another route and modified four routes (resulting in reduced service).²⁴

¹⁵ Conformity Analysis at 22; see also e.g., Draft SEWRPC Community Assistance Planning Report #279, p. 4, at (http://www.sewrpc.org/milwcotdp/pdfs/capr-279_chapter-01_prelim_draft.pdf) (noting that a prior WisDOT audit confirmed service reductions and fare increases on MCTS since 2001 and raised concerns that additional service reductions and fare increases could "further erode the service quality, ridership and performance of the system); SEWRPC Regional Transportation Plan for Southeastern Wisconsin 2035, at p. 274 (http://www.sewrpc.org/publications/pr/pr-049_regional_transportation_system_plan_for_se_wi_2035.pdf) (reduced fixed route bus service from 2000 to 2004, resulting in reduction from 80,000 to 69,300 vehicle miles of bus service during just those years).

¹⁶ Conformity Analysis at 17.

¹⁷ Information in table comes from: Milwaukee County Transit press releases from 2000 - 2008, attached hereto as Exhibit 2. Inflation information calculated for 2000 to 2008, comes from <http://data.bls.gov/cgi-bin/cpicalc.pl>

¹⁸ Conformity Analysis at 19.

¹⁹ Id.; see also Id. at 21.

²⁰ Conformity Analysis at 24.

²¹ SEWRPC, "Milwaukee County Transit System Development Plan: 2007-2011 - Newsletter 1" (Feb., 2007), http://www.sewrpc.org/milwcotdp/pdfs/2007-02_newsletter_01_milwcotdp.pdf at p. 2.

²² Milwaukee County Transit press releases, Exhibit 2; Sandler, Larry, "Bus ridership plunges - Cuts in service, higher fares driving decline, report says," Milwaukee Journal Sentinel (posted Feb. 29, 2008). In addition, the county eliminated student fares and passes. Ex. 2. See also <http://www.keynews.org/archive2/busroutes0308.html>

²³ MCTS Development Plan Newsletter 1. supra., at p. 6

²⁴ Exhibit 2.

Both state and local funding of transit have been inadequate to ensure implementation and maintenance of the recommended transit improvements. For example, between 2000 and 2005 the state only increased operating assistance by 1.5% annually, below the rate of inflation, while budget problems resulted in stagnant transit funding from Milwaukee County during those years.²⁵ Even though federal funding increased during those years, it was inadequate to offset these deficiencies,²⁶ and, as discussed elsewhere in these comments, the prospects for future federal funding increases for transit currently appear unlikely. As the Southeast Wisconsin Regional Planning Commission (SEWRPC) has determined, these problems have contributed to the increases in rates coupled with the decreases in services:

The transit system is heavily dependent on State operating funding, which in recent years has not kept pace with inflation. The Milwaukee County Transit System has had to increase fares, reduce service, and utilize for operating funding about two-thirds of its "bank" of Federal funds intended for capital project funding.

Without increases in State transit assistance funds sufficient to address cost inflation and the enactment of dedicated local funding for public transit, the transit system can expect to deplete its "bank" of unspent Federal capital funds, and face implementing dramatic service cuts—up to a 35 percent reduction in service by the year 2010.²⁷

Contrary to the assumptions in the air analysis about transit growth, SEWRPC has determined that a projected cut of 35% in transit services by the year 2010 would mean:

Eliminate bus service after 10 p.m., Monday through Saturday. Limit Sunday service to 9 a.m. to 6 p.m. Get rid of seven routes and cut back the service on 17 others. Eliminate the Freeway Fliers, the express MCTS routes from suburban communities to downtown Milwaukee.²⁸

To compound the state funding problems, there are significant local funding barriers to maintaining, much less improving, the transit system. SEWRPC admits that "service cuts and higher fares that have been implemented by the Milwaukee County Transit System in 2001 and later years stand as indicators of the local funding problems faced by the Milwaukee County Transit System."²⁹ Milwaukee County is unique in the U.S. because it relies on property taxes to fund transit expenditures.³⁰ The transit system needs to replace this reliance on property taxes with a dedicated source of funding to finance transit. SEWRPC predicts that without this change, Federal funds will soon be "fully exhausted" and "more extensive service cuts and additional fare increases may be needed if property taxes cannot be increased to finance the transit system."^{31 32}

²⁵ MCTS Development Plan Newsletter, supra., at p. 10

²⁶ Id.

²⁷ Id.

²⁸ <http://media.www.marquetttribune.org/media/storage/paper1130/news/2007/03/08/News/Mcts-Running.Low.On.Funds-2762788.shtml>

²⁹ <http://www.sewrpc.org/milwcotdp/need.shtm>.

³⁰ <http://www.sewrpc.org/milwcotdp/need.shtm>.

³¹ <http://www.sewrpc.org/milwcotdp/need.shtm>

³² The Public Policy Forum today released a study entitled Milwaukee County's Transit Crisis: How do we get here and what do we do now?, available at <http://www.publicpolicyforum.org/>. A copy is attached as Exhibit 5.

Accordingly, Milwaukee transit staff told WisDOT in 2004 that “they won’t be building anything and that transit will continue deteriorating, unless there is dedicated funding.”³³ Staff also confirmed that WisDOT has not made transit funding a priority. No dedicated funding source has been developed since that time, on either the state or local levels.

Given these facts, it is clear that the planned transit projects are not “fiscally constrained” because (1) past efforts to enact new revenue sources have generally not been successful; (2) the extent of current support by public, elected officials, business community and/or special interests indicates passage of a pending funding measure is doubtful; or (3) no specific plan of action for securing the funding source and/or other information that demonstrates a strong likelihood that funds will be secured is available.³⁴

The transportation plans and TIP provide no reliable evidence that the revenues required to construct and operate the transit projects will be made available. Nor do the plans and program demonstrate that written commitments to construct and operate the resulting transit improvements have been secured. Since there is no demonstration of “reasonably available” funding for the proposed transit projects, the plan is not “fiscally constrained” and thus the air quality analysis may not lawfully rely on any of the transit projects for demonstrating conformity with air quality emission standards. Conformity with Wisconsin’s SIP has not been satisfied. Accordingly, WisDOT erred in relying on this grossly flawed analysis in its final EIS.³⁵

B. The EIS Violates NEPA by Failing to Adequately Assess the Health Risks Posed by Mobile Source Air Toxics to People Living, Working and Attending School in the Project Area.

Although the highway project will move the highway and its attendant air emissions closer to schools, homes, and businesses, WisDOT claims that it cannot assess the health risks from Mobile Source Air Toxics (MSATs) due to the uncertainties in current models. This failure to analyze project level MSATs is particularly egregious given the fact that this highway has more than 150,000 vehicles per day passing at least 10 schools located within the project area. (EIS at 4-79)

By contrast, the EPA correctly pointed out in its comment letter on the draft EIS that FHWA’s guidance on air toxics, on which the Draft and the Final EIS are based, is “not consistent with current academic literature and other published guidance.”³⁶

In fact, the American Association of State Highway and Transportation Officials (“Highway Association”), of which WisDOT is a member, commissioned a report on MSATs that the EPA characterized as representing “current professional practices of air quality experts . . .”³⁷ This report recognizes the existence of “reasonable scientific evidence” showing adverse impacts from MSAT

³³ Report on Meeting between City of Milwaukee and WisDOT, November 17, 2004, at 4.
<http://www.dot.wi.gov/projects/state/docs/2030city-milwaukee.pdf>

³⁴ 58 Fed. Reg. 58060 cols. 2-3.

³⁵ The air quality modeling analysis is also based on a generic projected increase in vehicle miles traveled of 1-2% per year. (Conformity Analysis at 17). In reality, the growth of vehicle miles traveled for cars is less than 1%, while the growth in freight transport is 2-3%. (WisDOT’s submission to the Transportation Working Group of the Governor’s Global Warming Task Force.) As a result of relatively less strict air pollution emission requirements on freight vehicles, freight transport emits greater air pollution per vehicle mile traveled.

<http://www.fhwa.dot.gov/environment/freightaq/chapter1.htm>, Thus, continuing increases in the proportion of freight traffic would increase emissions compared to the emissions budget results used to show conformity with the ozone SIP.

³⁶ EPA Comment Letter, 1-25-08, at 6-7.

³⁷ EPA Comment Letter, 1-25-08, at 7.

emissions “particularly at locations in close proximity to concentrated motor vehicle activity.”³⁸ The report concludes that “[m]odeling tools are widely available that are capable of predicting MSAT impacts from transportation projects.”³⁹ There are models that provide air emissions and models that show dispersion of the MSATs on the surrounding children, workers and residents, as well as national emissions inventories and project level monitoring to obtain background levels of MSATs.⁴⁰ Moreover, a recent example from the California Air Resources Board demonstrates the kind of health risk assessment that can, and should, be performed prior to finalizing the EIS.⁴¹ In this study, the government agency assessed the cancer risk from diesel mobile sources in Oakland, California, and found an unacceptably high risk of cancer.⁴²

The final EIS fails to adequately assess MSATs despite the existence of credible models and data to assess the risk posed by a highway project. The final EIS simply repeats, based on outdated FHWA guidance, generic statistics about national trends in reductions of MSATs due to regulations promoting cleaner fuels. (EIS 4.7.9 and Appendix B) Ignoring the EPA and the Highway Association’s recommendations, the EIS provides no project level quantitative analysis of MSAT risk. (EIS Appendix B-5, B-6)

Instead, the EIS merely provides a table of MSAT emissions, but fails to show how these emissions will be dispersed in the project area, how they add to the already existing background levels of toxic air emissions, and the human health risks associated with such emissions. (EIS Appendix B) This directly contradicts the Highway Association’s report on professional practices, which makes it clear that simply referring to a general reduction in MSATs in an EIS “does not relieve the study from characterizing differences among the project alternatives, even in the presence of uncertainty.”⁴³ Further, it fails to use the “Best Available Air Quality Modeling Tools for use in Analyzing MSATs under NEPA” that were identified in the Highway Association’s report.⁴⁴ The failure of the EIS to assess MSATs based on a claim of scientific uncertainty violates NEPA regulations about how to deal with such uncertainty.⁴⁵

C. Changed Circumstances Undermine WisDOT’s Conclusion of No Adverse Significant Cumulative Impacts for Air Quality.

There are at least three changed circumstances that undermine WisDOT’s conclusion that this project will result in no significant adverse cumulative impacts to air quality. As previously stated in supplemental comments on the DEIS, on March 12, 2008 the EPA strengthened the NAAQS for ozone to .075ppm, making it even more difficult for southeastern Wisconsin to demonstrate attainment in the future. Second, on March 27, 2008, the EPA issued a finding that the DNR had failed to timely submit Wisconsin’s SIP for ozone. Third, Wisconsin recently changed emissions testing requirements for old cars in the ozone non-attainment area, exempting cars built in 1995 or earlier from emissions testing.

³⁸ Id.

³⁹ “Analyzing, Documenting and Communicating the Impacts of Mobile Source Air Toxic Emissions in the NEPA Process,” commissioned by the American Association of State Highway and Transportation Officials, March 2007, at 2, attached as Exhibit 3.

⁴⁰ Id. at 2-3.

⁴¹ <http://www.arb.ca.gov/ch/communities/ra/westoakland/westoakland.htm>

⁴² Oakland Risk Assessment, attached as Exhibit 4

⁴³ “Analyzing, Documenting and Communicating the Impacts of Mobile Source Air Toxic Emissions in the NEPA Process,” at 12.

⁴⁴ “Analyzing, Documenting and Communicating the Impacts of Mobile Source Air Toxic Emissions in the NEPA Process,” at Table 28, page 157.

⁴⁵ 40 CFR 1502.22.

This change will result in an increase in air emissions related to this program of 18-21% in the year 2009, according to the Legislative Fiscal Bureau.⁴⁶

IV. The FEIS violates NEPA by failing to mitigate adverse air impacts:

The EIS fails to mitigate adverse impacts of diesel emissions during construction. In the EPA's comments outlining deficiencies in the draft EIS, they recommend specific mitigation measures that should have been incorporated into the final EIS. However, the EIS failed to follow the recommendations and instead said that it "will consider" or "will develop" mitigation measures at some unspecified future point. (EIS at 4-85, 4-86) Similarly, the EIS refers to "possible implementation" and "potential mitigation," but never provides for actual mitigation. (EIS Appendix D, par. 8) This fails to meet NEPA's requirements to mitigate adverse impacts.

Because the project area is likely to be listed as non-attainment for PM2.5, the EPA states that: "Everything possible should be done to improve ambient levels of PM2.5."⁴⁷ The EPA is concerned about localized impacts of PM2.5 from diesel equipment and trucks.⁴⁸ Specifically, the EPA highlighted the following mitigation measures that should have been placed in the final EIS to reduce the potential impacts from diesel equipment and trucks,⁴⁹ however, WisDOT failed to require any of these measures in the final EIS:

- ✓ Best Available Control Technology for diesel met through retrofit of all diesel-powered equipment with diesel oxidation catalysts or diesel particulate filters, in addition to cleaner fuels and anti-idling policies;
- ✓ Limiting age of on road vehicles in construction projects to 1998 and newer and 1996 and newer for off road vehicles;
- ✓ Fugitive dust control plans;
- ✓ Use of existing power sources or clean fuel generators instead of temporary power generators;
- ✓ Use of off road equipment that meets Tier 3 standards.

The EPA further recommended that WisDOT formalize the mitigation measures it should have identified in the EIS by placing them in a "construction emissions reduction plan."⁵⁰ Yet, the EIS fails to include these mitigation measures and the construction emissions reduction plan. Thus, the EIS fails to satisfy NEPA's requirement to mitigate potential adverse environmental impacts.

⁴⁶ Legislative Fiscal Bureau, May 17, 2007, Paper #797, "Vehicle Emissions Inspection Program," at p. 4. See also the Milwaukee Journal-Sentinel editorial of May 2, 2008, "A misfire on testing," available at <http://www.jsonline.com/story/index.aspx?id=746101> In addition, it is likely that the slowing economy will continue to depress new vehicle sales, leading to even slower replacement of older, higher-emitting vehicles than was projected in the outdated estimations utilized by WisDOT here.

⁴⁷ EPA Comment Letter at 6.

⁴⁸ Id.

⁴⁹ EPA Comment Letter at 5-6.

⁵⁰ EPA Comment Letter at 6.

V. The FEIS fails to analyze greenhouse gas emissions:

The FEIS inadequately analyzes CO2 impacts, while acknowledging that greenhouse gas emissions are a “concern along the I-94 north-south corridor.” FEIS 4-20. While the DEIS completely ignored the issue, the FEIS includes a few paragraphs discussing CO2, but does not include any quantitative analysis. The FEIS falsely asserts that no “accepted quantitative tools to estimate greenhouse gases at the project level exist.” FEIS at 4-20. In fact, US DOT has performed numerous greenhouse gas emissions studies, and a number of models are available. See <http://climate.dot.gov/areas.html>.⁵¹ The comments submitted today by Foley & Lardner on behalf of the 27th Street Business District Association set forth a number of sources from which the tools and models (that WisDOT asserts do not exist) are and have been publicly available.

We have reviewed Foley’s new comments, as well as their previous comments and supplementary comments, and we adopt them in their entirety as our own, incorporating them within these comments by reference. But WisDOT need not have looked to the USDOT or to the EPA websites cited by Foley for proof that methods existed for estimating the greenhouse gas emission impacts of adding highway lanes in urban areas. We referenced a study by Clark Williams-Derry, published by The Sightline Institute, in our comments submitted to WisDOT in January 2008, including the website address at which it was available.

Moreover, in addition to failing completely to estimate the magnitude of greenhouse gas emissions resulting from construction and use of the added lane-miles of highway which are proposed, the FEIS offers no mitigation plans specific to this Project, instead presenting a general statement that WisDOT will “continue to participate in statewide initiatives to reduce greenhouse gases . . . FEIS at 4-21. For all of these reasons, this inadequate treatment of greenhouse gas emissions renders the FEIS deficient under NEPA requirements.

VI. The FEIS inadequately addresses stormwater and flooding impacts of adding highway lanes within Milwaukee County, and fails to offer any specific mitigation plans:

Our previous comments noted that the DEIS failed to acknowledge the extent to which the urbanized portion of Milwaukee County is already subject to flooding as a result of intensive development, and failed to discuss the project’s impacts on the flood management planning and projects underway by the Milwaukee Metropolitan Sewerage District near the Mitchell interchange. We further criticized the failure of the **narrative** in the DEIS to inform readers of the 50% increase in impervious surface which the recommended alternative would cause in Milwaukee County. The FEIS however, failed to remedy any of these deficiencies. The FEIS did note that Wilson Park Creek is already impacted by excessive runoff of chlorides from highway road salt use and other sources. However, the FEIS fails to present any project specific mitigation plans for dealing with the increased floodwater and increased pollution that will occur within Milwaukee County following a 50% increase in the highway’s impervious surfaces. In light of the documented increases in the need for stormwater management posed by these increases, it is astounding that WisDOT plans “no changes to the existing storm water collection system in Milwaukee.” FEIS at 4-63. This fails to meet the agency’s obligation to mitigate the impacts of the Project.

VII. The FEIS continues to rely on outdated and grossly inadequate gasoline prices:

⁵¹ Other studies on greenhouse gases include one specifically prepared for WisDOT, available at <http://www.dot.state.wi.us/library/research/docs/tsrs/tsrglobalwarming.pdf>, and another for the American Public Transportation Association, available at http://www.apta.com/research/info/online/land_use.cfm.

WisDOT analyzed this project relying on an estimate of gas prices of \$2.30/gallon in 2005 dollars, adjusted for 3% inflation per year. FEIS at 7-8. Three years of additional inflation since 2005 would bring that estimate to \$2.51/gallon at the current time. In contrast, on May 1, the average price for unleaded gas in the Milwaukee area on May 1, 2008 was \$3.74, according to milwaukeegasprices.com. According to the Milwaukee Journal Sentinel, "analysts have predicted gas prices would reach \$4 a gallon by summer."⁵² A supplemental EIS is needed, based on these changed circumstances.

VIII. Without a financing plan for the Project, the conclusion is inescapable that funding for public transit will be even further shortchanged if the recommended alternative is implemented:

There is no explanation in the FEIS of how the proposed Project will be paid for. Our previous comments noted that in the face of the state budget deficit, the expected Fiscal Year 2009 cumulative deficit in the Highway Account of the Highway Trust Fund, and the current fiscal shortchanging of public transit systems, proceeding with the expansion Project will necessarily preclude funding for sustaining and expanding the transit components of the Regional Transportation Plan.⁵³ WisDOT has not responded to the substance of those comments, and recent developments have made the likely shortfall in transportation funds even larger.

First, according to testimony on April 3, 2008 before the United States Senate Subcommittee on Transportation, Housing and Urban Development, by James S. Simpson, Administrator of the Federal Transit Administration, US DOT, the administration proposes to cut federal highway invest in 2009 by \$1.8 billion from the previously announced figures. Second, Simpson requested authority to borrow \$2.7 billion for highway construction from the Mass Transit Account, which is not projected to be in deficit until 2012. Third, it cannot be ignored that two of the three current leading candidates for President have recently proposed a federal fuel tax holiday for this coming summer, in response to rising gas prices.⁵⁴ This would further limit funding for transit improvements, since 2.86 cents per gallon of the federal fuel tax goes to the Mass Transit Account.⁵⁵ These developments demonstrate both the inadequacy of funds to pay for all the planned highway projects in the state and nation, and the very **real** conflict or competition that exists between funding highways and funding public transit. They underscore the validity and reasonableness of our previous comments on these issues, and show the need to supplement the EIS to address them.

Conclusion

For all of the above reasons, together with those set forth in our previous comments and in the

⁵² "Gas hits record \$3.51 a gallon", Milwaukee Journal-Sentinel, April 17, 2008, p. 1.

⁵³ The state's failure to ensure adequate funding of transit – at the same time it is willing to commit resources to fund highway expansion despite the absence of a concrete plan for doing so – is particularly egregious in light of the offsetting benefits that transit provides to minority communities, and in light of the fact that a study actually conducted for WisDOT showed that funding transit provides benefits – including but not limited to congestion management benefits – that outweigh transit costs. See, e.g., "The Socioeconomic Benefits of Transit in Wisconsin, Phase II: Benefit Cost Analysis," (May 2006), available at <http://wisconsin.dot.gov/library/research/docs/finalreports/05-14tranbenefits-f.pdf>

⁵⁴ Milwaukee Journal-Sentinel editorial, "In the 'holiday' spirit, May 2, 2008, available at <http://www.jsonline.com/story/index.aspx?id=746103>

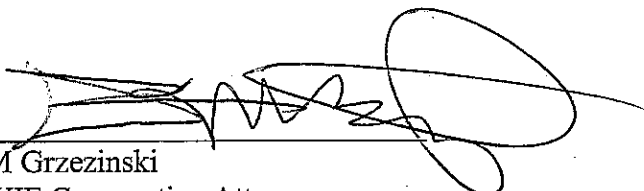
⁵⁵ <http://www.fhwa.dot.gov/infrastructure/gastax.cfm>

comments of others which we have adopted, we believe that the FEIS contains serious factual and methodological errors, omits essential information and analysis, and is inadequate to support meaningful analysis and decisionmaking. As a result, the agency should prepare and circulate for public comment a revised EIS. Failing to do so would be arbitrary and capricious.

Very truly yours,

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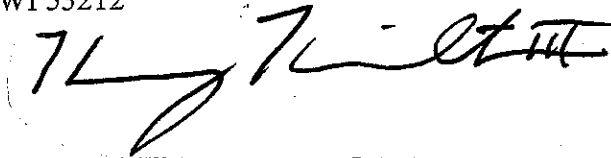
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