January 25, 2008 Via mail and email: dotsefreeways94nsc@dot.state.wi.us

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

Re: I-94 North-South Corridor Draft EIS

Dear Mr. Gutierrez:

We are submitting these comments on the I-94 North-South Corridor Draft Environmental Impact Study. We object to the manner in which the DEIS was prepared and the information that WisDOT did (and did not) consider. We object to the failure of the DEIS to adequately address air quality and related health issues as well as serious environmental issues, including greenhouse gas emissions and global warming impacts. We object to the failure of the DEIS to address or acknowledge that highways and public transit compete for transportation funds -- that massive investments in added highway capacity may foreclose the opportunity to make urgently needed investments in public transit improvements. We also object to the fact that the proposal fails to comply with Title VI and Environmental Justice requirements, and unreasonably and disproportionately burdens the disabled, minority and low income communities, especially in the city of Milwaukee, while providing those communities lesser benefits from the project. With regard to the recommended alternative, we object to the addition of highway lanes, especially through the City and County of Milwaukee, we object to the new Drexel interchange, and we object to the accelerated schedule for construction.

## I. WISDOT'S ANALYSIS OF TITLE VI AND ENVIRONMENTAL JUSTICE ISSUES IS INADEQUATE

WisDOT argues that minority and low income communities will benefit from highway expansion because, first, the I-94 N-S Corridor connects Chicago and Milwaukee, both of which are "minority majority" communities; second, because persons of color commute by car; and third, because WisDOT has provided funding for transit, both statewide and in southeastern Wisconsin.[1]

[1]In its discussion of Environmental Justice, the DEIS notes at 4-42 that:

> A civil rights advocacy group, among others, has raised the issue of highway funding levels versus transit funding levels. The group's position is that expanding the capacity of the study-area freeway system – in the context of SEWRPC's recommendation to expand freeway capacity throughout Southeast Wisconsin – will have a disproportionately adverse impact on low income and minority groups because 1) the state and federal funds required to pay for capacity expansion will reduce the opportunity to fund mass transit services that would benefit low income and minority residents; and 2) these groups are less likely to have access to a vehicle and therefore less likely to benefit from the freeway capacity expansion compared to suburban commuters, who are more likely to be white and have higher income.

As discussed more fully below, there is simply no evidence whatsoever to support the premise underlying the first response - that somehow widening the highway will benefit "majority minority" residents of Milwaukee by facilitating their commutes to Chicago. The second response fails to evaluate whether in fact communities of color commute ***on the freeway system*** for employment or other purposes, in any meaningful proportion, or to compare those rates with the rates of white commuters. The third response fails to substantively address, or even acknowledge, the gross disparity between huge and growing resources being provided year after year for highway expansion (and for acceleration of highway project schedules), and insufficient and fluctuating funding for transit at levels insufficient to even maintain existing services, much less support the substantial increase in services recommended in the regional plans.

Moreover, WisDOT fails to analyze the extent to which white non-Hispanic residents disproportionately benefit from its plans; fails to meaningfully address other negative impacts on minority and low income communities, including disproportionate proximity to the highways and health effects, nor does it address the justification for imposing these burdens in light of the fact that its plans will lead to only "minimal" increases in commuter travel time. At the same time, WisDOT entirely fails to address or justify economic development issues, such as the burdens that could be imposed on the city from construction of an additional interchange and the economic development benefits that could accrue to the city if the highway is not widened and/or if the interchange is not constructed.

Title VI of the Civil Rights of 1964, 42 U.S.C. §2000d, and its implementing regulations prohibit applicants for or recipients of federal funds - including transportation funds - from discriminating based on race, color or national origin. No recipient of U.S. DOT funds may, on the grounds of race, color or national origin, "[p]rovide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;" "[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;"or "[d]eny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program." 49 C.F.R. §§21.5(1)(ii),(iv),(vi). The regulations also prohibit actions, including the siting of facilities, that have the effect of "defeating or substantially impairing the accomplishment of the objectives of the Act or [its regulations]," regardless of discriminatory intent. 49 C.F.R. §21.5(3). If the government engages in racial discrimination under Title VI, it must show that its actions are narrowly tailored to achieve a compelling interest. Title VI applies to procedural, or "process," matters, as well as to the substantive, or real world impacts of government actions and programs.

The FHWA has identified an extensive list of adverse effects that must be considered in evaluating whether low income and minority communities are disproportionately affected by transportation planning.

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Significantly, WisDOT does not dispute the factual validity of the underlying inequity: that minority and low income residents would benefit more than white residents from transit improvements, and are less likely to have access to vehicles than white residents.

> Adverse Effects include the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to: bodily impairment, infirmity, illness or death; air, noise, and water pollution and soil contamination; destruction or disruption of man-made or natural resources; destruction or diminution of aesthetic values; destruction or disruption of community cohesion or a community's economic vitality; destruction or disruption of the availability of public and private facilities and services; vibration; adverse employment effects; displacement of persons, businesses, farms, or nonprofit organizations; increased traffic congestion, isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of, benefits of FHWA programs, policies, or activities.

*FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, FHWA Order 6640.23 (12/2/98).

A. LOW INCOME AND MINORITY POPULATIONS DO NOT NOW COMMUTE TO OR FROM CHICAGO, AND NO EVIDENCE SHOWS THEY WILL DO SO IN THE FUTURE

As stated supra. p. 1, one of WisDOT's primary arguments is that highway widening will benefit minority and low income Milwaukee residents because the I-94 N-S Corridor connects Chicago and Milwaukee, both of which are "minority majority" communities. The presumed benefit is WisDOT's assertion, unsupported by a shred of evidence, that significant numbers of minority and low income residents commute between Milwaukee and Chicago.

In making this claim, WisDOT has either deliberately disregarded or grossly neglected to review census data that shows there is no significant amount of daily jobs commuting by anyone, much less by low income or minority persons, between Milwaukee and Chicago - particularly by automobile. To the contrary, only 2/10 of 1% of city of Milwaukee residents commute to Chicago for employment, and only 1/10 of 1% of Milwaukee enterprise community residents (i.e., 33 census tracts in Milwaukee's central city, federally designated due to problems such as high poverty and unemployment) do so.[2]

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[2]*See*, Attachment A, 2000 Census Transportation Planning Package Data (analyzed by UWM-Center for Economic Development, Jan. 2008). Similarly, the U.S. Census 2006 American Community Survey estimated that only 2387 of the city of Milwaukee's 238,388 workers – less than 1% of the total – lived in the city of Milwaukee and worked in a principal city of any other Metropolitan Statistical Area (a definition that includes Chicago, but also cities such as Madison). 2006 American Community Survey, "C08016. PLACE OF WORK FOR WORKERS 16 YEARS AND OVER--METROPOLITAN STATISTICAL AREA LEVEL - Universe: WORKERS 16 YEARS AND OVER LIVING IN A METROPOLITAN STATISTICAL AREA" (for Milwaukee city, Wisconsin); OMB Bulletin No. 06-01, "Update of Statistical Area Definitions and Guidance on their Uses," (Dec. 5, 2005), at p. 137. Moreover, the fact that WisDOT admits that any reduction in commuting travel times as a result of adding highway capacity will be ""minimal"" demonstrates that the claim of "benefits" to minorities and low income persons is without foundation.

Thus, WisDOT's assertion that highway widening will benefit low income or minority communities is directly contrary to available evidence and cannot be considered to be a reasoned judgment.

B. THERE IS NO EVIDENCE OF THE COMMUTING PATTERNS OF LOW INCOME AND MINORITY POPULATIONS, OR ANY COMPARISON OF THOSE TO THE COMMUTING PATTERNS OF WHITES IN THE REGION

The entire justification for the expenditure of some $200 million on additional highway lanes is to reduce traffic congestion, which occurs almost exclusively during the morning and evening weekday commuter "rush hours." WisDOT concedes that the expansion, and alleged consequent reduction in congestion, will only result in "minimal" reductions in travel time. DEIS, Ex 4-1, 4-2. Further, as the DEIS notes at 1-18, this congestion is on the northbound lanes, toward downtown Milwaukee during the morning rush, and on the southbound lanes, away from Milwaukee during the evening rush. Adding lanes, therefore, would not benefit disadvantaged city of Milwaukee residents who, if they commute out of the city at all, would be commuting against these patterns.

The DEIS claims that the majority of persons of color in "a four county region" have vehicles, 4-44,[3] and thus could benefit from highway expansion. However, despite the availability of data regarding employment of minorities in communities along the project corridor, SEWRPC and WisDOT have failed to gather or present *any* information to indicate that significant numbers of minority residents use this segment of I-94 to commute *in either direction* to jobs along the corridor, much less that there are significant numbers affected by either morning northbound or evening southbound rush hour congestion.[4] To the contrary, data shows that only 1% of city of Milwaukee residents commute to work in Racine County, and only 3/10 of 1% of city of Milwaukee residents commute to employment in Kenosha County, with even smaller percentages of Milwaukee enterprise zone residents commuting to employment in these counties (4/10 of 1% and 1/10 of 1%, respectively).[5] In fact, only 0.6% of the entire Enterprise Community population works in the combined areas of Racine County, Kenosha County, Chicago, and the rest of Illinois. *See* Attachment A, analyses of census data prepared by Peter Armstrong, Associate Scientist at the UWM Center for Economic Development.. Thus, contrary to WisDOT's arguments, the evidence indicates that persons of color represent at most only a tiny proportion of

[3]Inexplicably, it relies for that finding on a study that includes Waukesha, Ozaukee and Washington counties - NONE of which are affected by the project or within the study area.

[4] In May 2006, the ACLU of Wisconsin Foundation (ACLU-WIF) requested that SEWRPC use data on minority employment by county in assessing environmental justice aspects of transportation planning; on February 2, 2007, ACLU-WIF made a similar request of WisDOT, and commented on the need to include and analyze data regarding race, income and disability as part of the required environmental justice analysis for EIS for this project. (Attachment B.) Few of the issues raised in the February 2007 request are addressed in the DEIS, and those which are mentioned are dealt with superficially, at best.

[5] Attachment A.

commuters affected by rush hour congestion in the I-94 North-South corridor, and thus a miniscule percentage of those who would benefit from a congestion reduction.

Further, the DEIS fails to in any way evaluate the vehicle ownership or commuting patterns of white non-Hispanic residents. It is clear that white non-Hispanic persons in the region are more likely to drive to work and less likely to use transit than persons of color. *See* Attachment A. A comparison of whether the entity is providing "any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program,"49 C.F.R. § §21.5(1)(ii), is necessarily predicated upon a comparison and analysis of the extent to which the majority (white and/or non-low-income) population is affected by a particular action, relative to low income and/or minority populations. Because that analysis is absent here, the DEIS is deficient.

C. DISPROPORTIONATE SPENDING ON HIGHWAYS, WITHOUT IMPLEMENTING TRANSIT IMPROVEMENTS, HARMS MINORITY AND LOW INCOME PERSONS

WisDOT concedes that those who lack access to an automobile will not significantly benefit from highway expansion. (DEIS at 4-43). Yet WisDOT argues that communities of color are not harmed because the state spends money on transit. What WisDOT fails to discuss or analyze is the grossly disproportionate share of funding for highway projects, while transit funding languishes. The state and local governments should not be spending billions of dollars for highway construction, including hundreds of millions of dollars for expansion, as long as there is inadequate funding for sustainable transit options that benefit urban communities.[6] Doing so will not only maintain, but will increase, the disparities.

There is no question that minority and low-income populations in Milwaukee are transit-dependent to far greater extents than majority or higher income populations. In fact, the DEIS confirms the transit-dependent status of low income and minority Milwaukee residents at pages 4-43 and 4-44.[7] Similarly, "[h]ousehold income is strongly correlated with transit tripmaking. Households in the lowest quartile of household income, particularly over the last 10 years, make up a substantial share of total weekly transit trips

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[6]WisDOT also fails to analyze any burdens imposed on persons with disabilities who rely on transit.

[7]A striking statistic not included in the DEIS is that:

> Milwaukee County residents are more than twice as likely to be without a drivers license as adults in the balance of the state. Almost a third (30 percent) of Milwaukee County voting age adults do not have a drivers license, compared to 12 percent of residents in the Balance of State. The county is home to much of the state's African American and Hispanic populations who have lower percentages with a current drivers' license. Further, in the city of Milwaukee, 60% of adult African-Americans have no vehicle in their household, compared to 14% of adult whites.

John Pawasarat, "*The Drivers License Status of the Voting Age Population in Wisconsin*," UWM-Employment and Training Institute (June 2005).

-- about 64 percent in 1991 and 54 percent in 2001. *SEWRPC Planning Report 049, 2035 Regional Transportation System Plan* (2006), p. 123. In addition, the proportion of public transit passengers that are minorities has increased since 1991, and particularly since 1972 when less than 5 to 15% of transit passengers were minorities. (*Id.*, p. 138).

WisDOT fundamentally fails to address the ***substance*** of concerns over the discriminatory effect of increasing highway expansion while transit is being reduced, and over the continuing pattern of decisions that commit billions of dollars to funding, if not accelerating, the construction of highway projects. The concern is that paying for these highway projects will reduce the resources available for mass transit funding.[8] This is neither a trivial nor a hypothetical concern in the context of the state's plans for building far more highways than it can afford to pay for, or that the state and local municipalities can afford to patrol and maintain.[9] Yet the DEIS nowhere reveals the existence of shortfalls in either the state's transportation funds or the projected deficit in the federal highway trust fund balance. Since it does not acknowledge the insufficiency of resources to pay ***both*** for the state's long-term highway plans and all of the expansion of transit capacity included within SEWRPC's regional transportation plan, it ignores the ***inevitable*** resulting competition between highways and transit for funding, and the effect of that competition on racial and environmental justice issues.

The DEIS also fails to mention that, although the state historically funded nearly half of transit operating costs, increased funding to address inflation in the cost of providing public transit, and provided for transit improvement and expansion, the " ... 2003-05 State budget provided no funding increase for public transit Statewide and the 2005-07 budget only provides a 2 percent annual increase. An annual 4 to 5 percent increase may be essential to address rising costs, including inflation and real increases in fuel costs, and to support system improvement and expansion." SEWRPC, *March 2006 Newsletter regarding the Regional Land Use and Transportation System Plans*. The most recent budget, for 2007-09, which was adopted in October 2007, only provided a mere 2.5% increase for the Milwaukee County Transit System, plus an additional $4 million over the

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[8] Currently, the Marquette Interchange in Milwaukee is being rebuilt by WisDOT at a cost of over $800 million. Rebuilding the rest of southeastern Wisconsin's interstate highways, to the north and to the west of the N-S Corridor project, will add billions to the roadbuilders' bills. Proposals to add 19 more miles of travel lanes to I-43 and I-94 through the City of Milwaukee, lanes that are unwanted by local citizens, would add an extra $286 million to the cost. In this regard, during 2007, SEWRPC's Regional Transportation Plan revealed an annual gap between revenues and expenditures of $65 million in southeastern Wisconsin alone, and the Legislative Audit Bureau reported in early 2007 that an annual shortfall of between $316 million and $698 million existed in current state funding for transportation.

[9] Compared to reconstruction of this segment of I-94 on its existing footprint, the Safety and Design Improvements Alternative adds $200 million to the cost; the WisDOT's preferred alternative, Safety and Design Improvements with Added Capacity, adds another $200 million; the Drexel Avenue and 27th Street Interchanges could add another $40 million to those numbers. (DEIS 4-45). In short, the WisDOT's preferred alternative involves the expenditure of up to $440 million more than simply rebuilding the existing segment of interstate highway. These costs do not include the hundreds of millions of dollars of interest payments that will be necessary if borrowing is used to finance the project, as will certainly be the case.

two years. Total mass transit funding statewide will increase by only $12,884,300. More shamefully, total aid for transit for the elderly and disabled will increase by only $803,000. *See* http://www.legis.state.wi.us/lfb/2007-09budget/Act%2020/dot.pdf, p. 8 of 37

WisDOT's claim that the state spends money on transit also fails to analyze the disparate impact - including, but not limited to, racial impacts - of requiring local communities to pay far greater shares of costs for transit improvements than of costs for highway construction and expansion. In fact, from 2000 to 2005 state funding for the Milwaukee County Transit system increased only 5%, while local funding for MCTS grew by 30%. *SEWRPC Planning Report 049, 2035 Regional Transportation System Plan*, at p. 274 and n. 3. These costs are imposed on lower income and minority taxpayers. At the same time, the state does not impose similar cost increases on local governments (or their residents) for the kind of highway construction at issue here.

WisDOT's omissions occur despite the fact that SEWRPC's Regional Transportation Plan recommended a substantial public transit element, including a Transportation System Management Plan to increase average weekday revenue vehicle miles of the Region's transit systems by almost 75% between 2001 and 2035. *Id.*, p. 300, Table 108. The report stated at page 366 (emphasis in original):

> All elements of the plan are considered to be of equal priority, and ***each*** element needs to be fully implemented to meet existing and forecast future year 2035 transportation needs and to provide a comprehensive, multi-modal, balanced, high quality transportation system in southeastern Wisconsin.

That has not occurred. Instead, as noted above, Wisconsin's has been making massive investments in highway projects, while public transit has been allowed to languish, and the overwhelming burden of developing it is placed on local taxpayers.

The neglect of transit is a long-term problem that has clear discriminatory effects on minority and low income communities. For years, transit has been facing substantial cuts in service, and transit users have faced the prospect of dramatic fare increases. In 1997, SEWRPC had noted the need for significant increases in and continual expansion of public transit in southeastern Wisconsin. *SEWRPC Planning Report 046, 2020 Regional Transportation System Plan* (1997), pp. 93-96. In 2006, SEWRPC again found that similar expansion and improvements in transit were necessary for economic development, to reduce highway congestion, and in particular to connect low-income residents of Milwaukee's inner city with jobs elsewhere in the region. *SEWRPC Planning Report 049*, pp. 274-75.

Instead, after some initial increases in transit, "between 2000 and 2004, fixed route bus transit service in southeastern Wisconsin was significantly reduced" and "shared-ride taxi service was [also] reduced slightly." State transit funding to the Milwaukee County Transit System increased by only 5% from 2000 to 2005 [much less than inflation] and Federal Transit Administration funding of transit capital and operating costs in the Milwaukee urbanized area increased until 2002, and then declined by 10% in 2004. (*Id.*)

Further, at the time the 2035 Plan was prepared, funding for transit service had been inadequate, and "transit service was significantly reduced between the years 2000 and 2005." (*Id.*, p. 372). Milwaukee County residents -- who are disproportionately low income and minority -- now suffer annual cutbacks in service, accompanied by ever-increasing fares. Bus fares have risen to the point where they are the highest of any major city in the country. Service between Milwaukee County and neighboring counties has also decreased, with one route carrying residents of Milwaukee to and from jobs in Waukesha County being eliminated at the end of 2007.

WisDOT insists on highway widening despite what it concedes will be only "minimal" effects on travel times. As the City of Milwaukee has recognized, the hundreds of millions of dollars for expansion could more than fund substantial transit improvements that would benefit city residents, steps WisDOT refuses to take, even though the benefits to low income and minority communities from improving transit far outweigh the incremental travel time improvements for white suburban commuters. The vast and discriminatory imbalance between the state's willingness to fund highways and public transit is further highlighted by the inclusion of $24 million in funding in the State's current biennial budget for studies and planning for reconstruction of Milwaukee's Zoo Interchange, in an apparent effort to accelerate that project, in addition to $3 million of funding in the next previous budget. ***That $24 million for <u>studies</u> on just one highway project is almost twice the amount as the entire increase, statewide, for support of public transit in the most recent state budget.***[10] In contrast, miniscule state funding has been provided, and minimal if any progress has been made, in implementing SEWRPC's recommendations for large increases in public transit service in the region. ***That imbalance disproportionately burdens minority and low income communities and persons with disabilities.***

Yet, the DEIS does not even acknowledge the existence of deficits and shortfalls in total funding available for transportation purposes. The result is to ignore, obscure, or deny the reality that spending large, budget-busting sums for highway expansion amounts to a decision to deny or delay the funding of transit services -- services on which minority and low-income residents throughout the Milwaukee area particularly depend.

## D. THE PROPOSED EXPANSION OF HIGHWAY LANES IMPOSES DIRECT ADVERSE EFFECTS ON CITY OF MILWAUKEE RESIDENTS

Many of the direct adverse effects of highway expansion are local in nature -- those who live closest to the proposed new highway lanes will be most heavily exposed to some of the pollution caused by vehicular traffic -- noise, vibration, light and certain air emissions, in particular. These adverse affects are not, however, meaningfully addressed, despite the fact that it is residents of Milwaukee - the region's only majority-minority city - who will disproportionately suffer them.

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[10]Moreover, just months ago, WisDOT announced that approximately $20 million in funding would be made available to accelerate planning and construction of an interchange on I-94 west of Milwaukee at CTH P in Waukesha County, to support a wholly speculative retail development proposed for Pabst Farms.

It is clear from the DEIS that I-94 in Kenosha and Racine Counties is located in an unpopulated or very lightly populated corridor – apart from residential developments east of the interstate to the north and south of the intersection with highway 50 in Kenosha County, there are relatively few residents living within 1 mile of the highway in those counties. Significant concentrations of people living within 1 mile of the highway do not become frequent until north of highway 100 in Milwaukee County. Heading north, it is not until reaching approximately Rawson Road and the City of Milwaukee boundary, that Exhibit 3-6 shows the ¼-mile corridor adjacent to each side of the highway becoming packed with people. Minority residents within the 1-mile corridor are very rare south of highway 100, and almost nonexistent within the ¼-mile corridor south of Rawson Road.

Of the people who live within 1 mile of the highway, 91.3% live in Milwaukee County and 60.9% live in the City of Milwaukee; of the people who live within ¼ mile of the highway, 94.5% live in Milwaukee County and 77% live in the City of Milwaukee. Due to residential segregation, few of the minority residents living within the highway corridor live outside of the City of Milwaukee, and almost none live outside Milwaukee County. Of minority residents living within 1 mile of the highway, 72% live within the City and 96% live within the County; of minority residents living within ¼ mile of the highway, 85% live within the City and 98.7% live within the County. (Exhibits 3-7, 3-7, and 3-8). ***These data confirm that people who live in close proximity to the interstate highway are highly concentrated in Milwaukee, the region's only majority-minority city.***

Despite the concentration of the project's impacts on the region's only majority-minority city, WISDOT's environmental justice analysis erroneously concludes that there will not be an environmental justice impact because there is "not a large minority or low income population in the study area, compared to the population as a whole." (DEIS 4-44) Instead of addressing any of these environmental justice issues in a serious manner, WisDOT's summarily dismissed any environmental justice concerns, on the basis that the immediate N-S Corridor had a lower percentage of minority or low income residents than were contained in the southeastern Wisconsin region as a whole. This utterly ignores the fact that southeastern Wisconsin's population is overwhelmingly dominated by the demographics of the County and City of Milwaukee, where the State's low income and minority populations are concentrated and form a majority minority population. A proper approach to the analysis of these environmental justice issues is suggested by the "Environmental Justice Guidelines" of Region 5 of the United States Environmental Protection Agency. According to those guidelines, "if the low-income population or minority population [in the area] is greater than twice the state percentages, the case should be identified and addressed as a potential EJ case." (EJ Guidelines at p. 2) at http://www.epa.gov/region5Superfund/sfd_ej/htm/ej_guidelines.htm Applying those guidelines would rank the impacts on minority and low income populations in the N-S Corridor as environmental justice "priorities."

In fact, recognizing that constructing new highway lanes within densely populated urban areas had significantly different consequences from constructing new lanes in sparsely populated outlying areas, regional planning staff evaluated the impact on the regional highway system of not constructing additional highway lanes within the City of Milwaukee and ***recommended that the proposed 19 miles of highway widening in Milwaukee (including that portion of the I-94 N-S Corridor north of approximately***

***Rawson Road) not be included in the final plan.*** This aspect of the planning history is not even mentioned in the DEIS, nor are the traffic analyses indicating that operations on the remainder of the interstate system would not be significantly affected by not widening these 19 miles of freeway. Instead, WisDOT is adopting the expansion recommendations of SEWRPC's Freeway Reconstruction Advisory Committee – a body that failed to represent the needs of low income and minority communities, in the process likely violating 49 C.F.R. §21.5 (1)(viii) - and the Commission itself, also a grossly unrepresentative body, [11] while ignoring the position of SEWRPC staff, the city of Milwaukee, the Board of Directors of Milwaukee Public Schools, and the Milwaukee County Board.[12]

The DEIS also fails to account for the disparate impact of the proposed highway expansion on the population of children attending schools adjacent to the project area. WISDOT has identified 10 schools in the corridor. (Exhibit 3.5) Children who are predominantly low income and/or minority attend some of these schools and could, therefore, be disproportionately impacted by the proposed project. For example, at Greenfield School, 97% of its students are students or color, and 91% of its students receive free and reduced price lunch, an indicator of low income status. At Lowell School, 66% of its students are students of color and 80% of its students receive free and reduced price lunch. At Victory School, 63% of its students are students of color, and 73% of its students receive free or reduced price lunch. Similarly, at Garland Elementary 65% of its students receive free and reduced price lunch. (*See MPS Schools 2006-2007 Report Cards,* available for individual schools at http://mpsportal.milwaukee.k12.wi.us/portal/server.pt )[13]

## E. THE PROPOSED EXPANSION OF HIGHWAY LANES WILL IMPOSE HEALTH BURDENS ON MILWAUKEE RESIDENTS

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[11] See Thomas Sanchez, *An Inherent Bias? Geographic and Racial-Ethnic Patterns of Metropolitan Planning Organization Boards*, Bookings Institution (2006), Tables 2 and 3, at http://www.brookings.edu/metro/pubs/20060124_mpos.pdf

[12] In an off-hand reference to one of the DEIS appendices, the DEIS notes at 2-44 that "public or agency input and funding availability" may cause WisDOT and FHWA to implement a combination of the proposed alternatives, which would "add capacity in certain areas and reconstruct as a six-lane freeway in other areas." The body of the DEIS itself does not note that the Wisconsin DNR's concurrence for the EIS recommended that the EIS "should analyze a hybrid alternative of Safety & Design Improvements in Metro Milwaukee with Safety & Design Improvements and Capacity Expansion outside of Metro Milwaukee." The DEIS does not set forth any such analysis.

[13] There is substantial scientific evidence regarding the adverse health impacts of attending school or living near high-volume highways. See the discussion at pages 13-15 below. (Dr. Balbus explains the correlation between asthma and attending school or living near a highway. (See Attachment C, Dr. Balbus, at 9-14) Dr. Balbus also explains the correlation between cancer and attending school or living near a highway. (See Attachment C, Dr. Balbus, at 14) Yet, the DEIS fails to review these studies, account for the potential impact on low income students and students of color, nor even identify this student population.

The DEIS contains an inadequate analysis of the air pollution impacts of the proposed added highway lanes in violation of NEPA and the Federal Aid Highway Act. The DEIS fails to address whether and how health effects will result, both from the construction process itself and from any vehicular traffic on the highway, or, as noted below, from any increased traffic induced by highway widening.

Federal regulations mandate consideration of the environmental effects of transportation decisions, including the effects on the "human, natural and manmade environments."[14] FHWA's Environmental Justice Order requires the planning agency to consider the health and environmental effects of transportation decisions on minority and low income populations. Under the Clean Air Act, agency actions must be consistent with attainment of ambient air quality standards. The DEIS fails to comply with these requirements by failing to meaningfully study the potential health effects.

Section 3.4.10 of the DEIS explains that Milwaukee, Kenosha and Racine Counties are currently in moderate non-attainment for the 8-hr ozone standard. (DEIS 3-68) The DEIS also states that this area or a part thereof may be designated as being in non-attainment for the PM2.5 standard as early as 2009. (DEIS 3-68) Additionally, Lake County, Illinois is in non-attainment for PM2.5 and moderate non-attainment for the 8-hr ozone standard. (DEIS 3-68) For areas that are in non-attainment, the State Implementation Plan should establish the means by which the area will get back into attainment in order to protect public health from the harmful effects of excessive air pollution. The DEIS should contain a hot spot conformity analysis for these areas.[15] For areas that are likely to be in non-attainment for PM2.5 in 2009, NEPA and the Federal Aid Highway Act require an assessment of whether emissions from the project will cause new violations of the NAAQS.[16]

The DEIS, section 4.5.5 on environmental justice, erroneously concludes there will be no adverse health effects based on the false premise that the proposed project is in an area that meets standards for particulate matter. (DEIS 4-44) That premise is contradicted by the admissions that the area does not meet standards for PM2.5, and will likely be designated as a non-attainment area for this pollutant in 2009. (DEIS 3-68) Further, the area is in non-attainment for ozone. (Appendix C at C-1)

The overwhelming proportion of those people who live in close proximity to the I-94 N-S Corridor reside within the City and County of Milwaukee. The DEIS also lists a large number of schools, playgrounds, and tot lots which are located near the highway, some of which essentially abut the current right of way, and most if not all of which serve regionally disproportionate numbers of minority and low income students.

Yet the DEIS fails to evaluate whether disproportionate health or environmental effects will occur among low income and minority communities. Nor does it analyze whether, as seems likely, urban residents tend to drive older vehicles, and therefore will be more likely to continue to be subject to higher levels of vehicle-related emissions and associated health and pollution problems in their neighborhoods. It does not evaluate

[14]23 C.F.R. §450.208(11).
[15]42 USC 7506(c)(6).
[16]40 C.F.R. 1502.2; 40 C.F.R. 1508.27(b)(10); 23 USC 109(h).

whether low income and minority residents tend to live closer to heavily traveled freeways (or to freeways which may become more heavily traveled as a result of widening), and thus risk higher levels of potentially associated diseases such as cancer. It does not establish a contingency plan to offset any growth in emissions from increased vehicle use if in fact induced travel or increased emissions do occur. And it fails to meaningfully evaluate methods to ensure a significant expansion of mass transit use and of affordable housing in the suburbs in order to minimize these health and environmental effects in minority and low income communities.

1. The DEIS Fails to Acknowledge the Health Impacts During Construction Adjacent to Schools and High-Density Neighborhoods

The first potential health problem is the construction-related air quality effects that may occur. On February 13, 2006, the Wisconsin Department of Natural Resources (WDNR) sent a letter to WisDOT in which it states that, "the project is in a non-attainment area for the federal 1-hr ozone standard . . . [and for the] federal 8-hr ozone standard." Because of these problems with air quality in the project area, the WDNR cautions that "contributions from construction activities can have a major impact well beyond the project limits." (Appendix C at C-1)

Despite this input from WDNR, the DEIS' discussion of the impacts of air emissions and dust during construction of the project amounts to little more than a description of the sources of air quality impacts (motor vehicle and construction equipment emissions and fugitive dust), statements that these impacts will be mitigated by various control plans and permits, and a promise that WisDOT will work closely with staff and administrators of the affected schools in Milwaukee County to develop appropriate air quality mitigation measures adjacent to the schools. 4-73. What the DEIS fails to do is evaluate and measure the extent to which emissions or dust-generating construction activities will affect neighboring schools when they are in session, or during seasons of the year when nearby residents - especially those who lack air conditioning – may leave windows open. Nor does the DEIS discuss or develop concrete mitigation efforts to reduce the impacts of construction-period air emissions on nearby school children and residents.

2. The DEIS Fails to Consider the Health Impacts of Vehicular Air Pollutants

EPA also has identified 21 carcinogens that motor vehicles emit into the ambient air.[17] Generally speaking, the greater the volume of motor vehicle traffic, the greater the aggregate emissions and the higher the resulting ambient concentrations of these carcinogens. People who breathe air polluted with these greater concentrations of carcinogens bear an increased risk of developing cancer.

The DEIS fails to adequately evaluate and address the localized health impacts from highway-related air pollution. Without appropriate analysis, the DEIS erroneously concludes there will be no adverse health effects based on the unsubstantiated and imprecise premise that Mobile Sources of Air Toxics "are expected to diminish . . ." (DEIS 4-44). This statement is not backed up by actual monitoring of baseline air toxics

[17] 66 Fed. Reg. 17120, 17273 (March 29, 2001)

and modeling of future emissions coupled with exposure assessments of air toxics. In fact, WISDOT claims that it cannot do a project-specific health analysis because it lacks the "technical tools" for this. (Appendix B at B-2) After outlining the deficiencies in the technical tools, WISDOT concludes that because it lacks the tools to quantify the impacts of toxics for this project, "it is not possible to make a determination of whether any of the alternatives would have 'significant adverse impacts on the human environment.'" (Appendix B at B-5)

Oddly, after WISDOT claims it lacks the tools to provide a quantitative analysis for the project, it then explains how it did conduct such an analysis using the Mobile 6.2 model and the FHWA Easy Mobile Inventory Tool (EMIT). (Appendix B at B-6) The data provided showed tons of emissions per year for six toxins separated by county. (Appendix B at B-7 – B-12)

However, the analysis is incomplete because it does not analyze human exposure to these toxins. The DEIS admits as much in its air analysis, section 4.7.9, when it states that because the proposed highway expansion will move the highway closer to some homes and other "receptors" (i.e., school children) there "may be localized areas where ambient concentrations of MSATs could be higher . . ." (DEIS 4-67) Yet, WISDOT fails to analyze these localized impacts because it claims current models are deficient. This ignores current scientific studies and opinions.

Contrary to WISDOT's assertions, Dr. Balbus, the Director of Environmental Health for Environmental Defense, provided an expert opinion for a Maryland highway project in which he showed there are credible studies on the adverse health impacts from MSATs and PM. (*See* Attachment C, *Dr. Balbus Expert Statement on the Proposed Intercounty Connector in Maryland*, 4-10-06, at 2) Dr. Balbus states that a, "growing body of peer-reviewed scientific literature has identified serious health effects from short-term and long-term exposure to MSATs." (*See* Attachment C, Dr. Balbus, at 6) Dr. Balbus also summarizes recent health impact studies from 2006-2007, and concludes that exposure to the toxic mixture of pollutants from motor vehicles can worsen asthma, impair lung development, and contribute to heart disease and premature death. (*See* Attachment D, Dr. Balbus, 5-24-07)

As early as 2000, studies had found increased cancer risks associated with proximity to areas with concentrated traffic. In March 2000, California's South Coast Air Quality Management District published "The Multiple Air Toxics Exposure Study" ("MATES-II"), which estimated cancer risk by measuring toxic air pollutants at 24 sites throughout the Los Angeles air basin. The study found that the regional average risk of cancer attributable to all toxic air pollutants from industrial and transportation sources in the basin is 1400 in one million (1 cancer for each 714 residents, and that ***90% of this heightened cancer risk is attributable to toxic pollutants emitted from mobile sources.*** Areas with concentrated traffic suffered from increased risks of cancer above the regional average, and the highest cancer risk (1 in 170) was found in neighborhoods nearest highways. In February 2000, another study entitled "Distance Weighted Traffic Density in Proximity to a Home is a Risk Factor for Leukemia and Other Childhood Cancers" was published in the peer-reviewed Journal of the Air and Waste Management Association ("Leukemia Study"). That study identified a strong correlation between children with leukemia and living very near highways. It found that children with leukemia were twelve

times more likely to live close to highways than a paired cohort of children without leukemia.[18]

In addition to particulates and MSATs, another air quality problem which the DEIS failed to adequately analyze is ozone. Southeastern Wisconsin is classified a "severe" nonattainment area for ozone pollution.[19] Studies also show that ozone is one of the causes of childhood asthma.[20]Asthma affects up to 12.9% of Wisconsin children under age 18.[21]Further, in Wisconsin asthma is far more prevalent among blacks adults than white adults, and among African-American children than among white children.[22] Wisconsin asthma rates also increase as income decreases, to the point where persons with incomes below $15,000 are nearly twice as likely to have asthma as those with incomes above $50,000.[23]

Nor is asthma the only ozone-related respiratory problem. Scientific evidence indicates that ambient levels of ozone not only affect people with impaired respiratory systems, such as asthmatics, but healthy adults and children as well. Exposure to ozone for several hours at relatively low concentrations has been found to significantly reduce lung function and induce respiratory inflammation in normal, healthy people during exercise. This decrease in lung function generally is accompanied by symptoms including chest pain, coughing, sneezing, and pulmonary congestion.[24]A correlation between elevated ambient ozone levels and increases in daily hospital admission rates, as well as mortality, has also been reported.[25] In addition, older persons who reside in areas with higher levels of air pollution are "significantly" more likely to require medical treatment, particularly for lung ailments.[26] The DEIS also fails to mention, much less address, any racial imbalance due to the fact that asthma rates are particularly high among African-Americans.

Although there is ample evidence of highway-related adverse health impacts, WISDOT refuses to analyze local impacts, claiming it lacks the tools for such an alysis. Contrary to this assertion, there are "methodological tools" available to evaluate the health risks from exposure to particulate matter and MSATs. (*See* Attachment C Dr. Balbus, at 2)

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[18] Pearson, Wachtel, & Ebie, Journal of Air and Waste Management Association 50: 175-180.

[19] *Plain English Guide to the Clean Air Act: Mobile Sources.*

[20] *Study Shows Link Between Ozone and Asthma: 10 year long USC study demonstrates ozone, found in smog, to cause asthma in children* (ENS, Feb. 2, 2002); *see also, e.g., Primate research shows link between ozone pollution, asthma*, by Andy Fell (Dateline UC Davis, Oct. 13, 2000).

[21] *Burden of Asthma in Wisconsin*, Wisc. Dept. of Health & Family Services (2007), p. 11.

[22] *Id.*, at p. 6, 14.

[23] *Id.*, at pp. 7-8.

[24] *Green Book: Criteria Pollutants: Ozone* (U.S. E.P.A., Air Quality Planning & Standards); 40 C.F.R. §50.10.

[25] *1997 Air Quality Management Plan*, Chapter 2, by South Coast Air Quality Management District.

[26] *Bad Air Means Poor Health, Study Says*, by Associated Press (Milwaukee Journal-Sentinel, Nov. 12, 2002), citing a study by Health Affairs.

Dr. Balbus describes the two basic methods available to assess human health exposures. (See Attachment C, Dr. Balbus, at 16) "Both methods combine estimates of exposure with estimates of the "dose-response" function to produce an estimate of risk associated with that exposure."[27] The DEIS is inadequate because it fails to use these known methods to assess risks that may exist for local hot spots.

The DEIS needs to ***address*** the health risks of the recommended highway expansion -- including cancer, asthma, and other respiratory illnesses. This is necessary whether or not the highway is widened, because those pollutants continue to exist. It is particularly appropriate as a result of the induced travel which adding highway lanes will cause -- because with that added travel will come added toxic air emissions, particulates, and ozone. Since the traffic projections used in the DEIS assume no induced travel, the DEIS ignores the increased air pollution which ***will*** result from the increased number of vehicle trips, and their increased length, if the highway expansion occurs. The health risks of that increased air pollution need to be described in the EIS and considered by the agency before a decision can be properly made on whether or not to add highway lanes in the highly populated urban areas of the N-S Corridor.

These air emission-related health risks are particularly important in view of the high population density located immediately adjacent to the highway within the City of Milwaukee, and the presence of numerous schools in close proximity to the highway. (*See* DEIS 3-27) While the proposed relocation of the highway in the area of the Mitchell interchange is likely to increase the distance between the highway traffic and two of the schools, ***the addition of new travel lanes alongside the current roadway footprint would bring pollution-emitting vehicles closer by the width of a lane to all of the homes and to the rest of the schools in the corridor***. While this shortening of the distance between the polluting vehicles and many breathing residents is mentioned in the DEIS, neither the resulting health impacts, nor the impact of induced travel (and induced increases in emissions) have been considered in the DEIS.

## F. THE DEIS FAILS TO CONSIDER POTENTIAL DEVELOPMENT BENEFITS TO MILWAUKEE FROM NOT WIDENING THE HIGHWAY

Declining to expand highway capacity also could benefit the city of Milwaukee by encouraging infill development within city limits. The DEIS itself acknowledges that declining to widen the highway could "increase the market for land closer to downtown" Milwaukee. Sec. 4, Ex. 4.2. The DEIS fails, however, to take the further step of analyzing the extent to which increasing that market - in an area heavily populated with low income and minority community members, and already served by transit - would provide a clear development benefit to the city of Milwaukee and its residents.

## G. THE PROPOSED DREXEL INTERCHANGE DISPROPORTIONATELY HARMS LOW INCOME AND MINORITY COMMUNITIES

The DEIS also recommends construction of a new interchange at Drexel Ave. in Milwaukee County. WisDOT takes this position despite its explicit recognition at 4-8 and

[27] *Id.*

in Exhibit 4-2 that creation of a new interchange at Drexel Avenue will be likely to have indirect effects on development in Milwaukee County, ***including negative impacts on the City of Milwaukee***:

- "a high potential to induce new development in Oak Creek and Franklin;"
- a likely increase in "the pace and intensity of development along Drexel Avenue and the 27th Street corridor;"
- a redirection of "development from other areas within southern Milwaukee County to this area;"
- "potential to influence interregional land development patterns -- redevelopment along 27th Street in Milwaukee may be discouraged as the ease of developing "greenfield" sites in Oak Creek and Franklin increases;"
- "may increase the competitiveness of new "greenfield" sites and discourage reinvestment in existing urban corridors."

Thus, WisDOT explicitly recognizes that the recommended new interchange would likely harm the City of Milwaukee – a majority minority community (47.5% white non-Hispanic as of the 2000 census) – while benefiting Franklin and Oak Creek (cities that were, respectively, 89.1% and 89.6% white non-hispanic). Conversely, of course, WisDOT neglects to analyze the potential benefit to the city of Milwaukee from increased development that could occur if the interchange is not constructed. Contrary to the requirements of Title VI, there is not a word of discussion in the DEIS regarding the discriminatory impacts of this recommendation, much less any attempt to justify the recommendation as narrowly tailored to meet a compelling need.

## II. THE AIR POLLUTION ANALYSIS IN THE DEIS FAILS TO COMPLY WITH THE CLEAN AIR ACT, THE FEDERAL AID HIGHWAY ACT, AND THE NATIONAL ENVIRONMENTAL POLICY AC

First, as commented on above and not repeated here, the MSATs analysis is inadequate.

Second, the PM analysis of air quality impacts is inadequate in that the DEIS never even mentions, much less analyzes, the impact of the proposed project on emissions of PM 2.5 in Milwaukee, Racine and Kenosha counties. Instead it focuses solely on Lake County, Illinois. (DEIS 4-68) This clearly violates the law. A federally-funded highway project may not proceed unless FHWA determines that the "project must not cause or contribute to any new localized CO, PM10, and/or PM 2.5 violations or increase the frequency or severity of any existing CO, PM10 and/or PM 2.5 violations in CO, PM 10, and/or PM2.5 nonattainment and maintenance areas."[28] Despite an acknowledgment earlier in the DEIS that this region is likely to be designated as non-attainment for PM2.5 as early as 2009, (DEIS 3-68), the DEIS fails to analyze whether the project causes or contributes to new localized violations or increases the frequency or severity of existing violations.[29] This

[28] 40 C.F.R. § 93.116(a)

[29] In a January 16, 2008 Editorial, the Milwaukee Journal-Sentinel noted the occurrence in December 2007 of an unprecedented 25-hour mid-winter exceedance of the air quality standards for particulates in Milwaukee. *See Editorial: Alerts that really alert*, at http://www.jsonline.com/story/index.aspx?id=708177

failure is a violation of the Federal Aid Highway Act (23 USC 109(h) and NEPA (40 CFR 1502.2 and 1508.27(b)(10)).

Third, the ozone analysis for consistency with the state SIP is inadequate because it relies entirely on the fact that SEWRPC's Transportation Improvement Program includes the highway expansion alternative, so it assumes this is consistent with the State Implementation Plan to come into compliance with NAAQS. (DEIS 4-69) This ignores the requirement to do a hotspot conformity analysis for areas in non-attainment.[30] In addition, section 4.11 of the DEIS, the mitigation section, fails to mitigate the impacts of the project because it fails to include activities that would reduce the public health impacts on children who attend schools that are in the highway corridor. The map in exhibit 3.5 shows 10 schools that will be impacted. Other highway expansion projects do include this type of mitigation of the impacts of air pollution on students' health. For example, with the expansion of Highway 95 in Nevada, the Nevada DOT agreed to mitigate the impacts (after extensive litigation) by including air monitoring and filtration systems at area schools. (*See* Attachment E, Sierra Club Settlement Agreement) Monitoring and filtration systems, at a minimum, should be included to mitigate the potential harm to students, many of whom are low income and students of color, attending schools in the highway corridor.

## III. THE DEIS FAILS TO COMPLY WITH NEPA REQUIREMENTS

The National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), requires federal agencies to prepare a detailed statement evaluating the environmental impacts of and alternatives to any proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Section 102(E) of NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The documentation required by these statutory provisions is known as an "environmental impact statement" or EIS.[31]

NEPA requires federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(A) (1994). Regulations promulgated by the Council on Environmental Quality to govern the criteria and procedures to be applied by federal agencies when they review proposed projects under NEPA require agencies to "insure the professional integrity, including scientific integrity, of the discussion and analyses in environmental impact statements." 40 C.F.R. § 1502.24. Agencies must make a good faith inquiry into the environmental consequences of proposed actions, and are required

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[30] 42 USC 7506(c)(6).

[31] The Wisconsin Environmental Policy Act (WEPA), Section 1.11, Wis. Stat., is the state counterpart to NEPA. As the Wisconsin Supreme Court noted in *Clean Wisconsin Inc. v. Public Service Commission*, 2005 WI 93, ¶188 n 43: "Because WEPA was patterned on the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1970), federal law construing NEPA is persuasive authority. *See Wis. Envtl. Decade, Inc. v. PSC*, 79 Wis. 2d 161, 174, 255 N.W.2d 917 (1977)(WEDII)."

to use the best available science to support their conclusions. *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403 (D.D.C. 1971). Accordingly, agencies may not selectively ignore consequences or use discredited science. As part of the analysis of the environmental impacts of this proposed highway expansion project, the agencies must take a "hard look" at the indirect or growth-inducing effects of the expansion project, 40 C.F.R. § 1508.8(b), and the cumulative impacts of the expansion project in combination with "past, present, and reasonably foreseeable future" actions in the area. 40 C.F.R. § 1508.7. [32]

According to the DEIS, added highway capacity is necessary to reduce morning and evening rush hour congestion resulting from higher future traffic volumes projected between now and 2035. Even so, as noted above, the DEIS explicitly states that constructing additional highway lanes would only minimally shorten projected travel times. This assessment is in itself inadequate, because it fails to account for increased gas prices and induced travel demand, and because it fails to address issues of greenhouse gas emissions and global warming. The EIS is also inadequate because it fails to analyze all reasonable alternatives, including the alternative recommended by the Wisconsin Department of Natural Resources, the state agency with the greatest expertise respecting environmental impact statements.

## A. THE DEIS FAILS TO PROPERLY CONSIDER ALL REASONABLE ALTERNATIVES

The analysis of environmental consequences provides the basis for "the heart of the environmental impact statement:" the evaluation of alternatives. 40 C.F.R. §§ 1502.14, 1502.16. Using the information on environmental consequences, an EIS must "rigorously explore and objectively evaluate all reasonable alternatives" and . . . [d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparable merits."[33] In essence, all reasonable alternatives need to be

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[32]The portion of the Wisconsin Administrative Code applicable to WisDOT actions makes the same point in a note to Trans 400.08, Wis. Adm. Code:

> Note: The National Environmental Policy Act (NEPA) requires the federal government to prepare environmental documentation for major federal actions. The Wisconsin Department of Transportation prepares the federal environmental documentation for review and approval by the federal government of actions for which federal funds are to be used by the Department. The requirements for federally funded actions are followed by the Department when federal funds are involved. These federally funded actions are also actions of the Department to which the Wisconsin Environmental Policy Act (WEPA) applies. Finally, when the Department pursues an action for which only State funds are involved, NEPA does not apply, but WEPA still applies. The intent of this chapter is to direct the Department to follow NEPA and its implementing regulations for both NEPA and WEPA purposes when federal funds are involved in the proposed action. The intent is to apply WEPA and its implementing rules in this chapter when only State funds are involved in the proposed actions, but to make the WEPA implementing rules track the federal law and federal regulations as closely as possible.

[33]40 C.F.R. § 1502.14(a)

evaluated at a comparable level of detail, in order that decisionmakers and the public may fairly assess their comparative merits. This assessment will be irreparably skewed by a failure to adequately consider either reasonable alternatives or the consequences of the proposed action. The Federal Highway Administration, in its project development guidance, specifically notes that "where appropriate, mass transit options should be considered even when they are outside FHWA's funding authority."

Despite these requirements, the DEIS failed to adequately consider, and improperly rejected without consideration, mass transit improvements as an alternative to adding highway capacity in accommodating travel demand. WisDOT dismissed transit improvements from consideration on the basis that SEWRPC's 2035 Regional Transportation Plan analysis found that transit improvements alone would not address future traffic demand. However, as noted above, ***the future traffic demand projections were based on fuel price assumptions that are now known to be wildly inaccurate, and entirely excluded induced travel.*** Projections based on reasonable, higher fuel price assumptions would by definition result in lower overall travel demand, along with a larger proportion of the remaining travel utilizing transit.

Potential transit improvements include expanded bus service, the Kenosha-Milwaukee-Racine commuter rail service, high speed rail service, and expanded Amtrak service. A proper EIS would analyze the potential for a combination of these transit improvements to eliminate the need for highway expansion, either throughout the entire corridor, or within the most urbanized portions, particularly in light of the dramatically increased fuel prices since preparation of the outdated traffic demand projections used in the DEIS, and in light of the near certainty of further increases in fuel prices in the future.

Moreover, consistent, thorough evaluation of transit and highway expansion alternatives would be in line with accepted regional transportation planning principles, which call for integrated planning of all transportation facilities, in recognition of the potential for transit facilities to affect and reduce future highway traffic and improvement needs. The DEIS does not provide either the data or the analysis necessary to determine whether or not transit improvements in the project corridor could eliminate the need for the highway capacity expansion which adds significantly to the cost of the WisDOT's preferred alternative.

It is noteworthy that, despite the Wisconsin DNR's recommendation at Appendix C-5 that WisDOT analyze a hybrid alternative which adds new highway lanes only outside metropolitan Milwaukee, the DEIS failed to devote ***any*** attention to such an alternative. The Wisconsin DNR is the state agency with the greatest experience and expertise regarding environmental impact statements and the requirements of NEPA and WEPA. WisDOT's failure to follow this recommendation is a serious deficiency in the DEIS.

B. THE PROJECTED "NEED" FOR EXPANDED HIGHWAY CAPACITY IS BASED ON OUTDATED AND CURRENTLY UNSUPPORTED TRAFFIC VOLUME PROJECTIONS

SEWRPC's traffic volume projections, which WisDOT has used in the DEIS, ***were based on an assumption that gasoline prices would be $2.30/gallon throughout the studied project lifetime.*** Both the 2035 Regional Transportation Plan and the Regional Freeway

System Reconstruction Plan anticipated that SEWRPC's preliminary travel demand projections would need to be updated and refined during later planning and project development stages. The Freeway System Reconstruction Plan specifically noted: "The recommendations from this report will necessarily require further consideration through preliminary and final engineering, and depending upon the form of freeway reconstruction recommended, the preparation of an environmental assessment or impact statement prior to construction." Proper analysis and evaluation of the project alternatives requires that the travel demand forecasting model be updated and re-examined in greater detail. Specifically, in addition to assessing the accuracy of previous population and land use projections, the specific mode split factors and assumptions, ***including perhaps most importantly, fuel prices***, used in projecting travel demand need to be refined, updated, and adjusted as necessary. Moreover, the EIS for this project should include travel demand sensitivity analysis information regarding key assumptions to allow decisionmakers and the public to evaluate which alternatives are effective under various possible future conditions.

The need to update and revise travel demand projections is not simply a technical, academic, or hypothetical exercise. In mid-2007, local gasoline prices were more than 50% higher than the $2.30/gallon assumed as the basis for the travel demand projections used in the DEIS. And, while this winter's prices receded somewhat from their summer 2007 peak, they are currently above $3.00/gallon, and there is every reason to believe that even the $3.50/gallon paid by Milwaukee motorists during 2007 will be viewed in retrospect as a "bargain" within a few years, as increasing demand from 100s of millions of new drivers in China and India (and other countries) overtakes global petroleum production.[34],[35]

While the precise price of gasoline 5, 10 or 20 years from now cannot be determined today, it is simply not reasonable to assume that prices will decline substantially from today's levels and then remain at $2.30/gallon for the next 25 years. Any reader of the DEIS who is even minimally aware of the relationship between surging development in Asia and upward pressure on world petroleum prices would recognize that continued use of an assumed $2.30 per gallon price for gasoline between now and 2035 is arbitrary and capricious.

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[34]A recent article, noting that the Ghawar oil field, Saudi Arabia's largest, is significantly declining in production, suggests that in a few years, "we will look back at the summer of 2007 as the last of the days when gasoline -- even at $3.50 a gallon -- was still plentiful and cheap." James D. Hamilton, "*Running Dry*?" The Atlantic, October 2007, pp. 42-43. (Attachment F) In this regard, it needs to be noted that the price of petroleum on the world market has already reached the $100/barrel level at least once since the beginning of 2008.

[35] Other current events demonstrate the folly of basing the DEIS on a long-term $2.30/gallon gasoline price projection. On January 16, 2008, the *Milwaukee Journal-Sentinel* reported that a congressional study committee (which included Wisconsin DOT Secretary Frank Busalacchi) had proposed a 25 to 40 cent per gallon increase in the federal gasoline tax. "Increase in federal gas tax is proposed to fund road repairs," *Milwaukee Journal-Sentinel*, January 16, 2008, at http://www.jsonline.com/story/index.aspx?id=707692

In addition, there is no analysis of the specific effects of higher fuel prices on low income and minority communities, though it is known that they are less able to bear the burden of those increases. Surface Transportation Policy Project and the Center for Neighborhood Technology, *Driven to Spend: Pumping Dollars Out of Our Households and Communities*, June 2005, at http://www.transact.org/report.asp?id=236 Households in regions that have invested in public transportation reap financial benefits from having affordable transportation options, even as gasoline prices rise. The failure of the DEIS to give any consideration to the disparate financial impact on low income and minority communities of underinvestment in public transit in a world of rising gasoline prices is a serious shortcoming.

## C. THE DEIS FAILED TO CONSIDER INDUCED DEMAND IN ASSESSING THE "NEED" FOR INCREASED HIGHWAY CAPACITY

The term "induced travel demand" refers to the fact that highway expansions actually *cause increased traffic (rather than merely serve existing travel demand),* by inducing changes in driving behavior that result in longer and more frequent vehicle trips. The research literature demonstrates that when highways are widened, increased speeds and reduced travel time will "induce" people to undertake longer distance commutes, thereby increasing the attractiveness of residences farther away from employment and other destinations. Others who do not move, nonetheless drive more frequently because of improved road conditions. Within a few years, increased driving results in a return to pre-expansion congestion levels, ***but with many more vehicles and more air pollution.*** The issue of induced travel is important because it demonstrates that the congestion-reducing benefits of adding highway capacity in urban areas -- the entire justification for adding highway lanes here -- are likely to be short-lived. Nevertheless, WisDOT ignores this issue.

A paper presented by FHWA researchers at the January 1998 meeting of the Transportation Research Board (an arm of the National Academy of Sciences), recognized the reality of induced travel and the fact that most transportation models do not capture induced travel. Patrick DeCorla-Souza and Harry Cohen, *Accounting for Induced Travel in Evaluation of Urban Highway Expansion*, FHWA, 1998. This report states that the failure to use transportation models that forecast induced travel within a corridor may result in lower forecasts of traffic and air pollutant emissions, and higher estimates of speed for the Build case than would actually occur. Therefore, it is important for planners to account for induced travel sources not addressed by four-step models.

By 2000, the Transportation Research Board had published three reports examining the phenomenon of induced travel. These reports reflected an emerging consensus that highway expansion induces additional travel demand, and that forecasts that do not account for this effect will seriously underestimate future vehicle use and congestion after highway capacity has been expanded. A report entitled *A Statistical Analysis of Induced Travel Effects in the U.S. Mid-Atlantic Region*, by Fulton, Noland, Meszler, and Thomas, concluded that increases in lane mileage resulted in increases in vehicle miles traveled beyond baseline travel demand. The study concluded that "a 10% increase in lane mileage can result in anywhere from a 2% to a 6% increase in total VMT," and observed that "[e]nvironmental costs may also be more significant when induced travel impacts are accounted for, resulting in major differences in the relative social costs and benefits of alternative mobility enhancing projects." A second report by Noland and Cowart,

entitled *Analysis of Metropolitan Highway Capacity and the Growth in Vehicle Miles of Travel*, concluded that "forecasts of congestion reduction resulting from added highway capacity may be overestimated to the extent that they do not account for induced travel." A third report, entitled *Relationships Between Highway Capacity and Induced Vehicle Travel*, by Robert Noland, concluded:

> The results of the analyses presented clearly demonstrate that the hypothesis of induced demand cannot be rejected. Increased capacity clearly increases vehicle miles of travel beyond any short run congestion relief that may be obtained. The methods employed all found statistically significant relationships between lane miles and VMT.

at http://www.preservationist.net/transportation/induced_travel/pdf/epa_induced_traffic.pdf

More recent research documents that increasing highway capacity in congested urban areas tends to induce additional travel and increased air emissions, to the point that the added capacity is fully utilized, and congested conditions are created once again, long before the 20 or 30-year plus "useful lifetimes" of the new infrastructure. Indeed, the research indicates that as a result of induced travel, the useful lives of capacity expansion projects may be as short as 7 to 10 years. Kaufman, *Draft Report on Induced Travel Demand and Traffic Flow Improvements*, Mid-America Regional Council, March 31, 2004, at http://www.marc.org/transportation/cmaq/Scoring/InducedTravel.pdf

In 2005, Todd Litman of the Victoria Transport Policy Institute, in *Induced Travel Impact Evaluation*, summarized the state of the research as follows:

> For example, adding lanes on an uncongested rural highway generally induced little additional travel, but adding lanes on a congested urban hghway often induces significant additional vehicle travel by reducing travel costs and stimulating sprawl (dispersed, automobile-dependent, urban fringe development). This sprawl tends to increase per capita vehicle travel in an area. If some residents would otherwise choose less sprawled housing locations, their additional per capita vehicle travel can be considered to be induced by the roadway capacity expansion.

(May 11, 2005) at http://www.santepub-mtl.qc.ca/Environnement/pdf/toddlitman.pdf

The failure to evaluate these effects in the DEIS renders it deficient.

## D. THE DEIS FAILED TO CONSIDER GLOBAL WARMING AND GREENHOUSE GAS EMISSIONS IN ASSESSING THE NEED FOR INCREASED HIGHWAY CAPACITY

The DEIS fails to consider the impact -- on both the need for and the long-term wisdom of adding two more highway lanes to the I-94 N-S Corridor -- of recently-adopted state and national policies requiring significant reductions in greenhouse gas emissions. Nor is there a single word in the DEIS regarding the increased greenhouse gas emissions which will result if the added highway capacity contained in the preferred alternative is constructed. The failure of the DEIS either to reconcile the increased greenhouse gas

emissions with the current state and federal commitments to significantly reduce overall emissions, or to justify that failure on some grounds, is a serious deficiency. Given that highways and public transit are alternative ways to move people from place to place within the metropolitan area, it is imperative that the EIS describe and consider the relative impacts on greenhouse gas emissions of public transit improvements as an alternative to adding highway capacity.

The City of Milwaukee, the state of Wisconsin, the federal government, and the Intergovernmental Panel on Climate Change[36] have each concluded that rapid and significant reductions in greenhouse gas emissions are necessary to reduce the harmful impacts of global climate change. Any decision to invest nearly $2 billion (before inflation) in this highway project, without considering its direct and indirect lifetime impacts on greenhouse gas emissions -- including the serious potential for depriving far more emission-efficient transit alternatives of funding -- would not only be unwise, but would also be directly contrary to the requirements of NEPA.

Both the state of Wisconsin and the federal government have begun to take steps to address global warming, including state and federal efforts to begin to reduce carbon dioxide emissions into the atmosphere. The federal government has committed to negotiating international agreements to achieve greenhouse gas emission reductions.[37] The state of Wisconsin has committed to significant greenhouse emission reductions from both stationary and mobile sources.[38] The DEIS does not indicate that any consideration whatsoever was given to the impact on highway travel demand of any additional efforts to reduce carbon dioxide emissions, such as a carbon tax or other impositions on fossil fuel use, which will increase the cost of automobile travel.[39]

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[36]The IPCC was established by the World Meteorological Organization and the United Nations Environment Programme. Its *4th Assessment Report*, issued in November 2007, is available at http://www.ipcc.ch/ipccreports/ar4-syr.htm

[37] The United States Supreme Court held in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), that carbon dioxide is a pollutant subject to regulation under the Clean Air Act. More recently, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the United States Court of Appeals for the 9th Circuit held that NHTSA was required to include in an EIS a consideration of the impacts of vehicle greenhouse gas emissions in connection with an agency decision on corporate average fuel economy for vehicles. (Case Nos. 06-71891, 06-72317, 06-72641, 06-72694, 06-73807, and 06-73826, November 15, 2007). A discussion of the significance of the impacts of global warming appears at pages 81 through 84 of the 9th Circuit's slip opinion (identified as pages 14916-14919).

[38] See Governor Doyle's signing, along with 9 other Midwestern Governors, of the Midwestern Regional Greenhouse Gas Reduction Pact on November 15, 2007, and the earlier establishment of the Wisconsin Energy Independence Fund at http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=3027

[39] Nor is there any indication that any consideration was given to the global warming impacts of any additional greenhouse gas emissions resulting from "induced demand", the additional travel which occurs in response to the construction of additional highway lanes. Given the nearly-unanimous scientific consensus that emissions of carbon dioxide are a cause of global climate change, the DEIS must address the potential impacts of

A recent study has concluded, that even after crediting for carbon dioxide emission reductions projected to result from initial relief of congestion, adding one new lane-mile of urban highway will increase carbon dioxide emissions by more than 100,000 tons over its 50-year expected lifetime.[40] Between emissions resulting from production of the highway construction materials, emissions resulting from construction operations themselves, and emissions resulting from additional vehicle travel on the new lanes and induced vehicle travel off the highway, the proposed 76 lane-miles of added highway in the N-S Corridor will result in huge additional greenhouse gas emissions. The DEIS is inadequate because it fails to describe the magnitude of those emissions and fails to assess their impact on global warming and on the state and federal commitments to reduce such emissions.

## E. THE DEIS FAILS TO PROPERLY ADDRESS STORMWATER IMPACTS

The Wisconsin DNR has noted that:

> Urban development alters the natural infiltration capability of land through the creation of impervious surfaces such as rooftops, driveways, sidewalks, streets and parking lots. The storm water and snowmelt that run off these impervious areas are higher in velocity, volume, pollutants and temperature than flows in areas that have more natural vegetation and soil to filter and disperse the runoff.
>
> . . .
>
> Storm water running off impervious surfaces can have devastating effects on receiving waters.

*Background Memo on Proposed Revisions to NR216, Storm Water Discharge Permits,* 1/22/2004, at http://www.dnr.state.wi.us/runoff/rules/nr216/Background_memo_Feb2004.pdf

Highways represent particularly large, connected areas of impervious surface, which collect rainwater and end up discharging exceedingly high volumes of water into area creeks and rivers during and after rainfall events. In addition, motor vehicles traveling on the highway deposit particulate air emissions, oil, antifreeze, hydraulic fluids, and toxic particles resulting from brake and tire wear onto the roadway, which causes the stormwater discharging from highways to be particularly heavily polluted.

While the DEIS refers to stormwater impacts of the proposed project, it does not come close to adequately describing the impacts of adding two additional highway lanes to the I-94 N-S Corridor, ***particularly in the already urbanized portions located within the City and County of Milwaukee***. There, urban development has already altered the balance between impervious surfaces and what preceded them -- natural surfaces which allowed

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additional carbon dioxide emissions resulting from the added highway lanes included in WisDOT's preferred alternative.

[40] Clark Williams-Derry, *Increases in greenhouse-gas emissions from highway-widening projects*, Sightline Institute, October 2007, at http://www.sightline.org/research/energy/res_pubs/analysis-ghg-roads

rainwater to infiltrate into the ground, usually near where it fell. Impervious surfaces replaced natural surfaces in this area to such an extent that most local creeks and streams were eliminated -- replaced by storm sewers or actually diverted into concrete channels or culverts. Indeed, substantial stretches of Wilson Park Creek and the Kinnickinnic River were even channelized into concrete-lined flow-ways, in order to more quickly transport somewhere downstream the greatly increased volumes of stormwater runoff.

The DEIS fails to acknowledge the extent to which the urbanized portion of Milwaukee County is already subject to flooding as a result of intensive development of its land area. No mention is made of the flood management planning which has been conducted by the Milwaukee Metropolitan Sewerage District in an effort to control and minimize flooding. Nor does it refer to MMSD's Villa Mann Creek project and Wilson Park Creek stream rehabilitation project, located near the Mitchell interchange. See http://www.mmsd.com/floodmanagement/kinnickinnic_river_watershed.cfm#midpic

The DEIS provides no information regarding the potential impact of dramatically increasing the amount of impervious surface in this area. This is no mere academic or hypothetical concern, as concerns over flooding have caused MMSD to spend hundreds of millions of dollars on watercourse projects within Milwaukee County over the last 10 years, as well as spending upwards of $3 billion on wastewater conveyance and treatment projects, all driven largely by the need to deal with excessive amounts of stormwater which used to overwhelm the region's separated and combined sewer systems 50+ times per year. *See* http://www.mmsd.com/wastewatertreatment/overflow_reduction_plan.cfm http://www.mmsd.com/about/history.cfm http://www.mmsd.com/wastewatertreatment/overflows.cfm and http://www.mmsd.com/floodmanagement/projects_intro.cfm

Moreover, just as it does with other sorts of impacts, the DEIS fails to acknowledge that the stormwater impacts of the project are highly concentrated in the urbanized City and County of Milwaukee portion of the N-S Corridor. At page 4-17, the DEIS describes the increase in impervious surface which the project would cause as follows:

> The Safety and Design Improvements Alternative would increase impervious areas by 8 percent over the No-Build Alternative, and the Safety and Design Improvements with Added Capacity Alternative by 25 percent.

This language does not even suggest to the reader, much less inform him or her, that the increased impervious areas, and therefore the resulting stormwater impacts, are largely located in Milwaukee County. The actual acreage of impervious surface to be located in each county under each of the project alternatives is set forth in Table 4-12. Of the 216 acres of impervious surface to be added within the N-S Corridor if the highway widening alternative is constructed, 118 acres are located in Milwaukee County, 49 acres in Kenosha County, and 47 acres in Racine County. ***Only by comparing the figures in Table -12, and calculating the appropriate ratios, would a reader of the DEIS discover***

***that if the highway widening alternative is constructed, the impervious area associated with the highway within Milwaukee County would increase by 50%.***[41]

Despite this concentration of stormwater impacts within the City and County of Milwaukee, and the admission at 4-53 that the amount of storm water runoff from the freeway system will increase, the DEIS indicates at 4-54 that no changes to the existing storm water collection system in Milwaukee are planned. The generic references in the DEIS to use of best management practices to reduce stormwater peak flows and to reduce pollutant loadings in stormwater discharged from the project area into area creeks and rivers fail to demonstrate that careful analysis and due consideration has been given to the magnitude of the concentrated stormwater impacts within the urbanized Milwaukee area. Merely referring to using stormwater best management practices is not sufficient to demonstrate that the remaining impacts of adding so much impervious surface within Milwaukee County are either insignificant or manageable.[42] This is all the more troubling, because where the DEIS has compared specific projected stormwater discharges from the project with a comprehensive watershed plan elsewhere in the Corridor, as was done for the Des Plaines River Watershed, it found that the discharge rates "will likely exceed the plan's recommended rates." DEIS at 3-2

## F. THE DEIS INADEQUATELY DESCRIBES AND ASSESSES INDIRECT AND CUMULATIVE IMPACTS

The law is clear: as part of the analysis of the environmental impacts of a highway expansion project, transportation agencies must take a "hard look" at the indirect or growth-inducing effects of the expansion project, 40 C.F.R. § 1508.8(b), and the cumulative impacts of the project in combination with "past, present, and reasonably foreseeable future" actions in the area.[43]

### 1. Indirect Impacts

Indirect effects are the reasonably foreseeable impacts that are caused by a proposed action but which appear later in time or further in distance than the direct effects of the action. 40 C.F.R. § 1508.8(b); *Citizens Advocate Team v. U.S. Dept. of Transp.*, 2004 U.S. Dist. LEXIS 5419, at *14-*15 (N.D. Ill. 2004). Indirect effects include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). It is well established that in analyzing a highway project such as the one at issue in this proceeding, an agency cannot simply state that development will occur with or without the project, but instead must actually analyze the possible growth-inducing effects of a proposed highway project. *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002); *Laguna Greenbelt, Inc. v. U.S.*

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[41] In comparison, the corresponding increase in Kenosha and Racine counties is approximately 15-16%.

[42] This is all the more troubling, because where the DEIS has compared specific projected stormwater discharges from the project with a comprehensive watershed plan elsewhere in the Corridor, as was done for the Des Plaines River Watershed, it found that the discharge rates "will likely exceed the plan's recommended rates." DEIS at 3-2

[43] 40 C.F.R. § 1508.7.

*Dept. of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994); *Citizens Advocate Team*, 2004 U.S. Dist. LEXIS at *15; *Wilds v. Slater*, 2000 U.S. Dist. LEXIS 20771, at *26 (D.S.C. 2000).

The DEIS fails to perform the required "hard look," and instead essentially offers conclusory statements regarding the project's impacts. DEIS at 4-10 through 4-12

As noted above, at pp. 5-9, the DEIS totally ignores the impact on public transit funding of expending about $2 billion in limited transportation funds on this highway project.[44] If there could be any more significant indirect effect of this project than the potential for using up the state's transportation funding and thereby foreclosing needed transit improvements from being implemented, it is hard to think of one. Nevertheless, other than noting that "a civil rights advocacy group" has raised the concern, the DEIS never addresses the ***substance*** of the issue.

The indirect effect of continuing, and even increasing, the state and region's imbalanced investment in transportation facilities which guarantee continuing dependence on oil, rather than reducing that dependence by increasing the role of public transit, is another important effect which is not even mentioned in the DEIS.

The DEIS similarly ignores the indirect effect of this huge highway investment in continuing and even increasing the isolation of disabled, minority, and low income individuals and communities from employment and other opportunities because of their relative lack of automobiles and drivers licenses. Again, other than noting that the issue has been raised, the DES fails to address its ***substance.***

The DEIS fails to evaluate the indirect effects associated with a loss of development and redevelopment in the city of Milwaukee due to construction of the Drexel interchange, and, conversely, the potential indirect benefits to the city of Milwaukee's redevelopment if lanes are not added to the highway.

Despite the ever-growing body of research demonstrating the existence of induced travel caused by highway expansion projects, particularly in congested urban corridors, the DEIS ignores induced travel. As a result, it fails to acknowledge, must less to accurately describe and consider, the increases in toxic air emissions, noise, and other harmful impacts of additional motor vehicle traffic which the preferred alternative's expanded capacity will cause. Among those ignored impacts, as noted above at pages 23-25, will be increased greenhouse gas emissions.

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[44] At 2-44, there is a passing acknowledgement that sufficient funding may not be available to construct additional highway lanes along the entire N-S Corridor. Yet nowhere does the DEIS indicate any awareness of the reality that there is simply not enough money to pay for this project, other highway expansion projects proposed in southeastern Wisconsin and elsewhere in the State, and to fund the 100% expansion of public transit services which the regional transportation plan concluded is needed. A thorough study of the shortfall in transportation revenues, compared to the costs of building and maintaining highways, local roads, and transit, is found at http://www.1kfriends.org/documents/1000_Friends_ofWI_Roads_Highways_and_Transit_Funding_July_2007.pdf

Moreover, the indirect effects analysis in section 4.2.1 of the DEIS is inadequate because it fails to analyze the effects of the project on air pollution and bringing the area back into attainment for National Ambient Air Quality Standards. Although the DEIS defined indirect effects to include "effects on air," (DEIS 4-4, citing, 40 CFR 1508.8), the DEIS failed to analyze the indirect effects on air pollution, and specifically failed to analyze the conformity with the state SIP to bring the areas of non-attainment back into attainment.

The failure of the DEIS to analyze these indirect effects of the proposed expansion project is arbitrary and capricious and therefore contrary to law. *See, e.g., Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997); *Sierra Club v. U.S. Dept. of Transp.*, 962 F.Supp. 1037 (N.D. Ill. 1997).

2. Cumulative Impacts

NEPA requires a careful analysis of the cumulative environmental impacts of this highway expansion project. Instead of identifying and taking a "hard look" at the cumulative impacts of past, present, and reasonably foreseeable projects in combination with this Corridor expansion project, the DEIS simply provides a general overview of the past and projected future impacts of development in general on a series of environmental resources. Such summaries of generalized development impacts are no substitute for the detailed analysis of the cumulative impacts of the expansion project that NEPA requires.

Cumulative impacts are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[45] The purpose of the cumulative impacts requirement is to ensure that an agency provides a "realistic evaluation of the total impacts" of its activities by analyzing the impacts of individual projects together rather than "in a vacuum." *Grand Canyon Trust v. Federal Aviation Admin*, 290 F.3d 339, 342 (D.C. Cir. 2002). A cumulative impacts analysis must both adequately catalogue past, present, and reasonably foreseeable future projects and also carefully consider the combined impacts of those projects on various environmental resources in the area. *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997). Such analysis must provide "detailed and quantified" information, rather than just vague generalities or conclusory statements, regarding cumulative impacts. *Id.; Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998).

WisDOT's discussion of cumulative impacts in the EIS consists primarily of a summary of the impact of past and projected future impacts of development in general on various environmental resources in the Corridor. In particular, the EIS provides data from local and regional land use plans regarding the loss of wetlands, surface waters, agricultural lands, wooded areas, water and air quality, and the like due to development in the area, together with references to a few ongoing projects. (DEIS, pp. 4-12 to 4-18). Nowhere does the DEIS either identify or analyze the present or future cumulative impacts of the expansion project in combination with other projects. For example, while the 2003 Regional Freeway System Reconstruction Plan is referenced beginning at page 1-7, there is no analysis of the projected cumulative impact of reconstructing (and potentially adding more lanes) to the entire freeway system. The DEIS does not address the ***fiscal***

[45] 40 C.F.R. 1508.7.

***impact*** of such combined actions; the impact of the combined projects on funds available for maintaining or improving public transit; the cumulative impacts on air, water, wetlands, forests, protected species; the cumulative impacts on greenhouse gas emissions; the cumulative impacts on sprawl; ***or the cumulative impacts on disparities between minority and majority communities.*** Also, it is not at all apparent from the DEIS just what projects, plans, or developments were considered in assessing "cumulative" impacts.

WisDOT's superficial discussion of cumulative impacts is insufficient for two reasons. First, the EIS does not identify the "past, present, and reasonably foreseeable future" projects that have or will contribute to cumulative impacts in the area. An agency must identify such projects in order to allow the public and a reviewing court to ensure that an adequate review of cumulative impacts occurred. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999); *City of Carmel*, 123 F.3d at 1160. General descriptions such as those in the DEIS fail to provide the requisite identification of the projects that have or will contribute to cumulative impacts in the area. *City of Carmel*, 123 F.3d at 1160 (references to "development projects" and "ongoing urbanization" too general to adequately identify projects at issue).

The cumulative effects analysis in section 4.2.2 of the DEIS is also inadequate because it fails to adequately analyze the impact of the highway expansion combined with other sources of air pollution on bringing the area back into attainment with the NAAQS. The cumulative effects analysis is essentially that SEWRPC prepares the Transportation Improvement Program to show conformity with the air SIP, and that the highway expansion is included in the Transportation Improvement Program, so therefore, there must be no "substantial cumulative impact" on air quality. (DEIS 4-17) Moreover, this section fails to address the fact that the area will be newly designated as non-attainment for PM2.5 by 2009, and fails to analyze how this project adds to the cumulative impacts on non-attainment for these pollutants.

WisDOT's cumulative impacts discussion is also flawed because it does not analyze and evaluate the cumulative impacts of the expansion project and other transportation projects that WisDOT has carried out or will carry out in the future. Courts have consistently held that the agency must analyze the combined impact that a proposed highway project and other major transportation projects will have on environmental resources in the area. *See, e.g., City of Carmel*, 123 F.3d at 1161; *Senville v. Peters*, 327 F.Supp. 2d 335, 348, 369 (D.Vt. 2004); *North Carolina Alliance for Transp. Reform v. U.S. Dept. of Transp.*, 151 F.Supp. 2d 661, 697-98 (M.D.N.C. 2001). Yet WisDOT considered only the impacts of overall development in the Corridor itself, with no acknowledgment of the role that WisDOT's transportation projects elsewhere in the region have played or will play in such development. At no point does the EIS discuss the impact of past, present and future transportation projects in combination with this expansion project, or the combined role that such projects have played or will play in causing or triggering the loss of resources such as wetlands and woodlands. By subsuming an analysis of this expansion project and other transportation projects in a more generalized discussion of the impacts of development overall, WisDOT has failed to provide the "realistic evaluation of the total impacts" of its activities that is required by NEPA. *Grand Canyon Trust*, 290 F.3d at 342.

## G. THE DEIS FAILS TO INCLUDE ACCURATE COST ESTIMATES AND A PLAN FOR FINANCING THE PROJECT

It is apparent from the discussion of project alternative costs in the DEIS that WisDOT has selected ***the most costly*** of all of the considered options as its preferred alternative. While that fact is easily determined by comparing the cost estimates for the various project alternatives, the DEIS really does not discuss the implications, or even identify that there may be any implications, of the considerably higher price tag for its preferred alternative.[46]

Moreover, it is clear that the overall cost estimate of approximately $1.9 billion for the proposed project, including the Racine and Kenosha County interchanges, is unrealistically low. This cost estimate assumes a 3% annual inflation adjustment. However, this is unrealistic in view of the actual inflation in roadbuilding costs in recent years. According to the American Road & Transportation Builders Association, the cost of highway and street construction materials increased by 6% from September 2006 to September 2007, and those material prices increased nearly 32% over the last three years. With construction on the project scheduled to run from 2009 through 2016, the public, agency decisionmakers, and public officials need to be provided with more reasonable estimates of the cost of the proposed public investment. Without realistic cost estimates, there cannot be the fair and objective evaluation of alternatives required by state and federal law.

The DEIS fails to discuss how the proposed project is to be paid for. This is no trivial omission, given the persistent state budget deficits, the record-shattering federal budget deficits in recent years, and the projected depletion of highway funds. Together with highway expansion projects elsewhere in the state, there are plans for building far more highways than the State can afford to pay for, or that the state and local municipalities can afford to patrol and maintain. State officials have noted that the Federal Highway Trust Fund is projected to have a negative balance by 2009, which is precisely when construction is scheduled to begin on this project.

## H. THE DEIS WRONGLY ASSERTS THERE IS UNIVERSAL LOCAL SUPPORT FOR WISDOT'S PREFERRED ALTERNATIVE

Section 1.3 of the DEIS, which describes local government input, is inadequate and erroneous because it falsely describes local government input as uniformly positive and supportive of the expansion project. This section fails to reflect that since at least 2002, the City of Milwaukee has been on record opposing the expansion of I-94 from six to

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[46]Compared to reconstruction of this segment of I-94 on its existing footprint, the Safety and Design Improvements Alternative adds $200 million to the cost; the WisDOT's preferred alternative, Safety and Design Improvements with Added Capacity, adds another $200 million; the Drexel Avenue and 27th Street Interchanges could add another $40 million to those numbers. (DEIS 4-45) In short, the WisDOT's preferred alternative involves the expenditure of up to $440 million more than simply rebuilding the existing segment of interstate highway. These costs do not include the hundreds of millions of dollars of interest payments that will be necessary if borrowing is used to finance the project, as will certainly be the case.

eight lanes. First, the Milwaukee Common Council passed a resolution on May 1, 2002, stating this opposition (Appendix C, at C-28). Second, in a June 8, 2006 letter from the City of Milwaukee, Department of Public Works, to WisDOT, the City of Milwaukee stated that it "will vigorously oppose any freeway capacity expansion" because it fails to address the need for "modern rapid transit" in this region. (Appendix C at C-26). Third, in an August 21, 2007, letter from the City of Milwaukee, Department of Public Works, to WisDOT, the City reiterated its concerns about freeway expansion and lack of rapid transit. (Appendix C at C-28) Reflecting these concerns, the City of Milwaukee Common Council recently passed, and Mayor Barrett recently signed, a resolution opposing the addition of highway capacity to the I-94 N-S Corridor in the absence of integrated planning ***and implementation*** of mass transit facility improvements. The resolution called on WisDOT to reduce the cost of the I-94 project by roughly 10%, or $200 million, with those funds transferred to the Kenosha-Racine-Milwaukee commuter train line. (Legislative File 071114, resolution adopted 12/11/2007, signed 12/13/2007).

Moreover, the DEIS fails to note that the Board of School Directors of the Milwaukee Public Schools and the Board of Supervisors of Milwaukee County have both passed resolutions opposing the adding of highway lanes to I-94 in Milwaukee.

## IV. WISDOT FAILED TO HOLD A PROPER PUBLIC HEARING, AS REQUIRED BY THE FEDERAL AID HIGHWAY ACT

### A. THE LAW REQUIRES A "PUBLIC" HEARING.

Under federal law, WisDOT was required to hold public hearings on the EIS. See 23 U.S.C. § 128(a) (1994); 23 C.F.R. § 777.111(h). The public hearing provides a means for informing the public about a proposed project. The hearing, however, must be "more than a public presentation by the highway department of its plans and decisions." *Coalition of Concerned Citizens Against I-670 v. Damien*, 608 F. Supp. 110, 124 (S.D. Ohio 1984). Instead the hearing must serve as a forum for the agency to "be directly and publicly confronted with opposing views" on the project so that the agency can make the best decision. *D.C. Federation of Civic Ass'ns. v. Volpe*, 434 F.2d 436, 441 (D.C. Cir. 1970).

Courts do not take public hearings lightly. The D.C. Circuit noted in *D.C. Federation* that they are the forum ordained by Congress in which citizens... "participate in highway planning decisions. The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 434 F.2d at 441 (D.C. Cir. 1970)(citation omitted). The D.C. Circuit also noted that the congressional history associated with the public hearing requirement "shows a long-standing and ever increasing congressional concern that highway planners be directly and publicly confronted with opposing views." Id.

In *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1132 (C.D. Cal. 1999), the court raised similar concerns, noting that "the plaintiffs have raised serious questions about whether the format of an open house is the equivalent of a public hearing." While the court did not rule on this issue, it added that "[p]ublic hearings provide the

community and the decisionmakers a forum for the free and contemporaneous exchange of ideas. It is a dynamic process which has at its core the idea that it is only through a public meeting that the details and intricacies of controversies can be best explored and understood." Id. Finally, the nature of the term "public hearing" suggests something more than a series of one-way, one-on-one conversations between individuals and stenographers.

### B. WISDOT HELD HEARINGS WITHOUT AN OPPORTUNITY FOR THE PUBLIC TO EXPRESS THEIR VIEWS, IN PUBLIC, BEFORE AGENCY DECISIONMAKERS

In the past, the Federal Highway Administration has recommended, for a controversial project, that WisDOT use a Hybrid Combination Hearing format which allows those citizens who wish to state their views publicly before the assembled audience of agency decisionmakers and members of the public to do so.[47] Here, despite the highly controversial nature of WisDOT's planned highway widening, particularly that portion located in Milwaukee County, the most densely populated county in the state, each of the public events relating to the N-S Corridor was in the form of an open house or an "Open Forum," in which the agency would accept written testimony or oral testimony ***if given in private to a court reporter.***

No opportunity was ever given for citizens to state their views publicly before agency decisionmakers and attending members of the public audience. While members of the public were allowed to submit written comments or dictate comments to stenographers outside the hearing of others, the format did not allow them to hear each other address WisDOT officials, nor could they directly and publicly address those officials. By removing the ability for citizens to hear one another speak, and thereby learn of the views of other citizens, WisDOT in effect substituted a series of private conversations for a standard public meeting format. This is a far cry from a meeting in which decisionmakers are being "directly and publicly confronted with conflicting views." *D.C. Federation of Civic Associations*, 434 F.2d at 441. As a result, the public hearing requirements of 23 U.S.C. § 128(a) (1994) and 23 C.F.R. § 777.111(h) applicable to this project have not been satisfied.

## VI. CONCLUSION

These comments identify a multitude of errors, deficiencies, and inadequacies in the DEIS for this project. Some of these problems represent errors of omission, while others are errors of commission. Some are procedural, while others are substantive. Some go to the asserted "need" for the proposed addition of highway lanes, while others go to the effects of adding more lanes.

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[47] *Email of April 26, 2001, Richard Madrzak of the Federal Highway Administration, to WisDOT project manager Brian Bliesner regarding the Highway 164 highway widening project in Waukesha and Washington Counties*, which stated: "Because of the controversy on this project, I strongly recommend you proceed with a Hybrid Combination Hearing. See FDM 6-10-3. Unless that portion of the public who are in opposition to the project are given an opportunity to speak, they do not feel they have been heard." (Attachment G).

Some of these errors, large and small, may be the result of WisDOT's decision to attempt to advance or accelerate the construction schedule for this project. Whether or not that is the case, the multitude of problems identified and described in these comments demonstrate that ***the preferred alternative for the project needs to be rethought.*** This is particularly the case in light of the failure to satisfy legal ***requirements*** regarding analysis of ***environmental justice*** issues and the failure to acknowledge, much less justify, the direct ***contradiction*** between a decision to add 38 lane-miles of highway capacity within the N-S Corridor and recent developments in state and federal policies regarding energy and greenhouse gas emissions. Whatever the cause of these errors may be, however, the only conclusion that can be reached is that WisDOT's choice of a preferred alternative needs to be rethought, and that this project needs to be returned to the drawing board for correction, rather than accelerated.

Very truly yours,

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