

November 10, 2008

Planning Certification Review
Federal Highway Administration
525 Junction Rd, Suite 8000
Madison, WI 53717

Submitted electronically only: wisconsin.fhwa@fhwa.dot.gov

Re: Recertification of Southeastern Wisconsin Regional Planning Commission as a Metropolitan Planning Organization

To Whom It May Concern:

Thank you for the opportunity to comment on your review of the recertification of the Southeastern Wisconsin Regional Planning Commission (SEWRPC) as the Metropolitan Planning Organization (MPO) for the Milwaukee, Racine, and Kenosha urbanized areas, and the Wisconsin portion of the Round Lake Beach urbanized area, a region encompassing seven counties in Southeastern Wisconsin.

These comments are submitted on behalf of the following organizations:

- ACLU of Wisconsin;
- Black Health Coalition of Wisconsin;
- Citizens Allied for Sane Highways;
- Good Jobs and Livable Neighborhoods Coalition;
- Midwest Environmental Advocates; and
- NAACP - Milwaukee Branch.

In order to maintain its MPO planning authority, SEWRPC is required to comply with the MPO regulations, 23 CFR 450, Subpart C. During the 4-year certification, the FHWA and FTA must also review whether SEWRPC is complying with other federal laws, including Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d-1) and 49 CFR part 21; 49 U.S.C. § 5332, prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age in employment or business opportunity; 23 CFR part 230, regarding the implementation of an equal employment opportunity program on Federal and Federal-aid highway construction contracts; and the Clean Air Act, §§ 174 and 176 (c) and (d), as amended (42 U.S.C. §§ 7504, 7506 (c) and (d)) and 40 C.F.R. part 93, targeting transportation-related air pollution. 23 C.F.R. § 450.334(a)(2) – (a)(4), (a)(6).

As discussed in detail below, SEWRPC's non-compliance with these legal requirements is extensive and continuing.

Under 23 CFR § 450.334(b)(1) and (2), the FHWA and FTA have explicit authority to condition certification on the MPO taking corrective action, to limit certification to specific categories of

projects,¹ or to “decertify” the MPO and thereby withhold up to 20% of federal funding for the metropolitan planning area and/or withhold approval of certain categories of projects. Because SEWRPC is not complying with applicable federal laws and requirements, we urge you to exercise this authority.

Our objections to the recertification of SEWRPC are discussed in more detail below, but they fall into the following general categories:

- I. SEWRPC’s structure perpetuates discrimination against communities of color and low income persons in the region, and especially in the City of Milwaukee.
- II. SEWRPC has failed to comply with affirmative action requirements in hiring, promotion and contracting, and has taken steps that retain the segregated status of its workforce.
- III. SEWRPC fails to meaningfully seek input from, or comply with suggestions of, SEWRPC’s Environmental Justice Task Force.
- IV. SEWRPC fails to comply with civil rights requirements and perpetuates disparate impacts on low income and communities of color through its transportation, land use and water supply planning, as well as its lack of housing planning.
- V. SEWRPC’s transportation planning is not fiscally constrained, undermining any conformity with the Clean Air Act.

We urge you to decline to recertify SEWRPC, and require that as a condition of certification of any MPO for the region changes in governance structure be adopted so that any subsequent or redesignated MPO fairly represent all the regions’ communities, including its minority and low income residents.

To the extent that you decide to impose conditions on recertification, we urge you to include these conditions, among others:

- ***Require SEWRPC to immediately cease its current hiring and promotion practices (including promoting from within and failing to utilize affirmative action in seeking professional service contractors), engage in affirmative action for all staff and consultant hires and promotions, and locate an office, with significant numbers of staff, within the city of Milwaukee;***
- ***Require SEWRPC to immediately implement recommendations of its Environmental Justice Task Force, including the EJTF recommendation that, prior to SEWRPC adopting any plan, it incorporate a socio-economic impact analyses by a reputable, independent source other than SEWRPC;***
- ***Require SEWRPC to take immediate steps to develop and enforce methods by which issues of particular concern to communities of color and low income communities are actually implemented – such as implementation of transit recommendations throughout the region (including but not limited to those that would ensure access to suburban jobs for low income and minority urban residents) and inclusion of***

¹Many MPOs around the United States have in fact been subject to corrective actions.

affordable housing throughout the region and in all Smart Growth plans prepared by or for communities in the region.

I. SEWRPC's Outmoded Structure Discriminates against Communities of Color and Low Income Communities, including City of Milwaukee Residents.

SEWRPC is made up of 21 members - three each from seven counties (Milwaukee, Waukesha, Washington, Ozaukee, Racine, Kenosha & Walworth). Milwaukee County has nearly half the area's population (and 3/4 of the region's low income and minority populations), but gets no more voice than Ozaukee County, 1/10th its size. This structure clearly has a discriminatory effect on communities of color.

Further, communities of color and low income communities are disproportionately concentrated within the city of Milwaukee. Yet the city of Milwaukee has no representation on SEWRPC - even though the city has more residents than Waukesha, Ozaukee and Washington Counties COMBINED. Those three non-diverse suburban counties get nearly half (9 of 21) of the votes on SEWRPC, while the city of Milwaukee gets none.

The city of Milwaukee also has more residents of color than in all six of the other counties in the region combined (and, in fact, more residents of color than the total population of five of the six other counties in the region) - so the city's lack of representation on SEWRPC has a discriminatory effect on persons of color.

The lack of representation of the city of Milwaukee on the 21-member SEWRPC commission has contributed to the disregard of urban needs and city of Milwaukee issues, residents and potential hires. (In fact, none of SEWRPC's 11 core staffers (senior managers) live in the city of Milwaukee.)

Federal law grandfathers in this unfair structure. However, under current federal rules, if a new MPO were designated, it would open up requirements that local elected officials and officials from transit agencies be included on the Commission. 23 U.S.C. §134(d)(2). We urge that the certifying agencies take all steps possible to ensure this occurs – including the decertification of SEWRPC in its current form.²

II. SEWRPC's Hiring, Promotion and Contracting Practices Do Not Comply with Affirmative Action Requirements, and They Exclude Persons of Color.

Federal regulations – including regulations issued by the FHWA and FTA – prohibit SEWRPC from taking actions that have the effect of discriminating on the basis of race (regardless of whether that discrimination is intentional). 49 C.F.R. § 21.5(c)(3). Because, as discussed below, SEWRPC has repeatedly engaged in actions that have a discriminatory effect, and because the FHWA and FTA are required to consider this Title VI non-compliance as part of the certification review, SEWRPC should not be recertified.³

² The city of Milwaukee concurs. See, Resolution 080313 (10/29/08), passed unanimously by the Milwaukee Common Council and signed by Milwaukee's mayor.

³ We also request that, in reviewing SEWRPC's certification, you review and consider the discrimination

As set forth in SEWRPC's own 2008-2009 Affirmative Action plan, SEWRPC has 49 professional staff, only three of whom are people of color. *Not one* of SEWRPC's executive, chief, senior or principal professional staff members is a person of color. Instead, SEWRPC's "Organizational Display" reports 18 administrators and supervisors employed by the agency, and all are white. Moreover, SEWRPC does not even identify the underutilization of minorities among administrators and supervisory staff a problem area, nor does it articulate any efforts to address this problem.⁴

To the contrary, SEWRPC's employment practices, including promoting from within when the existing professional staff is almost entirely white non-Hispanic, indisputably has a significant, racially discriminatory effect. Yet SEWRPC not only insists on promoting from within, but after concerns were raised about this practice it wrote that practice into its 2008-09 Affirmative Action Plan.

Further, SEWRPC completely lacks diverse planning staff. The Affirmative Action plan "Organizational Display" reports 18 planners employed by SEWRPC, all of whom are white non-Hispanic. The plan also limits the available and "reasonable" recruitment of planners to the 7-county area, even though minority planners are available nationally, national recruitment of planners would be an expected norm in the field, and 15% of urban and regional planners in the U.S. are non-white, non-Hispanic. SEWRPC's lack of planning staff diversity exacerbates other discriminatory effects of SEWRPC's structure, discussed above, and its planning practices, discussed below.

Additional actions by SEWRPC, such as choosing an office in Pewaukee that is inaccessible by transit and failing to use existing office space in Milwaukee County (the region's most diverse county, with the largest proportion of professionals of color) to employ persons of color, have or tend to have the effect of discriminating against potential minority employees. Again, SEWRPC "responded" to EJTF and community concerns about its lack of transit access by changing its affirmative action plan to state that the lack of transit was not a barrier even though SEWRPC had conducted no study to support its claims, and its own prior work has shown that the lack of transit access does disproportionately harm persons of color.

In addition, SEWRPC has a long history of hiring professional service contractors without any competitive bidding and without even collecting demographic information, much less engaging

complaint filed with the Office of Federal Contract Compliance against SEWRPC in September, 2008. FHWA staff indicated they were aware of this complaint, and an additional copy is being forwarded. In addition, please note that it is anticipated that a supplemental complaint is likely to be filed based on the fact that in the affirmative action plan finalized after the complaint was filed, SEWRPC has formalized processes – such as promoting from within and rejecting the effect of the lack of transit access on staff diversity – that indisputably have a significant discriminatory effect.

⁴ SEWRPC also claims to have significant numbers of minority technical staff. However, SEWRPC also has stated that it "counts" summer and temporary interns as part of this technical staff – an action prohibited by the EEOC. When those interns are excluded, SEWRPC's technical staff is much less diverse than reported.

in affirmative action.⁵ A review of the record indicates that these contractors are overwhelmingly, if not exclusively, white non-Hispanic persons. This discriminatory selection process is so extreme that SEWRPC entered into a no-bid contract with two white non-Hispanic consultants to study the 30th St. Corridor in Milwaukee – a neighborhood overwhelmingly populated by low income and minority persons. Yet SEWRPC never even sought consultants of color to prepare this study.

SEWRPC’s pattern and practice of providing professional services contracts to white non-Hispanic persons and to companies owned and/or operated by white non-Hispanic persons without engaging in bidding or other affirmative action procedures, is also a “method of administration” that has the effect of discriminating against persons of color, in violation of 49 C.F.R. § 26.7(b), as well as the previously cited regulations.

III. SEWRPC Failed to Meaningfully Seek Input From or Adopt Recommendations from Diverse Community Groups and Its Environmental Justice Task Force.

Media reports indicate that SEWRPC claims that it complied with civil rights and affirmative action requirements by meeting with diverse groups and creating an Environmental Justice Task Force (EJTF). These claims obscure the extent to which SEWRPC staff and commissioners have ignored input from, and rejected the requests of, those entities (many of whom have signed these comments and strongly dispute these claims by SEWRPC). This consistent effort to limit or ignore the role of entities that SEWRPC claims it is using to diversify its practices is another reason why SEWRPC should not be recertified, and why a new regional planning entity needs to be created.

For example, with respect to the current recertification, SEWRPC did not inform its own EJTF of the October 22 public meeting until 8 days before the meeting occurred, and then only informed the EJTF in a brief announcement at the end of an hours-long meeting.⁶ Further, although the document creating the EJTF explicitly states that the EJTF’s role is, among other things, to “facilitate the involvement of, and help ensure the full and fair participation of, low-income, minority and disabled individuals and communities at all stages in relevant areas of regional planning, as determined in consultation with them,” SEWRPC never sought any EJTF input in attempting to ensure a diverse constituency participate in this recertification process.

SEWRPC also continues to create “advisory committees” – entities that, under SEWRPC’s structure and practice, have significant decision making roles - that lack meaningful (or any) representation of persons of color or and persons with disabilities. In 2007, SEWRPC’s executive director provided examples of the demographics of regional advisory committees, including the following:

- Population and Economic Forecasts Committee; 12 members, all white;
- Regional Land Use Planning Committee; 25 members, 24 white, 1 African-American;

⁵ SEWRPC management has admitted it does not engage in competitive bidding for professional service contracts.

⁶ Moreover, SEWRPC did not even put the existence of the recertification hearing on the Oct. 14, 2008 EJTF agenda until AFTER several EJTF members – who had elsewhere learned about the meeting – requested that it do so.

- Regional Telecommunications Planning Committee; 22 members, 21 white, 1 African-American;
- Regional Water Supply Planning Committee; 33 members, 32 white, 1 Hispanic; and
- Regional Water Quality Management Plan Update Committee; 34 members, all white.⁷

At the same time, SEWRPC rejected NAACP Milwaukee’s request to serve on the 2035 Transportation Advisory Committee (even though SEWRPC has allowed other, non-diverse and non-governmental groups to serve on such committees, such as on the Regional Freeway Reconstruction Study and on the Water Supply Study). The failure to allow diverse participation in advisory committees is also a violation of Title VI rules. See, e.g., 49 C.F.R. §21.5 (1)(viii).

Moreover, when SEWRPC made a presentation to the EJTF on how advisory committees are created, and when concerns about the lack of advisory committee diversity were raised, SEWRPC failed to even inform the EJTF that the document creating the EJTF specifically delegated that committee to “[i]dentify prospective representatives of EJ organizations (whether or not members of the EJ Task Force) who could be nominated to serve on other SEWRPC advisory committees.”⁸

SEWRPC also rejected requests of its own EJTF to conduct a diverse and inclusive search for an impending executive director vacancy, and later for an assistant director vacancy.⁹ Further, despite the request of its own EJTF that SEWRPC recruit diverse candidates for other higher-level positions, SEWRPC instead changed its Affirmative Action plan to emphasize that it promotes from within whenever possible (an action the EJTF itself suggests has a discriminatory effect).¹⁰

Likewise, when EJTF members requested updating the Land Use plan to address concerns regarding urban sprawl, SEWRPC indicated that instead the Housing Study would be based upon the existing land use plan (which EJTF members had criticized as promoting urban sprawl, and which, as noted above, was not created by a diverse advisory committee).¹¹

SEWRPC similarly rejected requests from numerous community groups representing communities of color and low income communities that it conduct its Regional Housing Study before it facilitated local smart growth planning, to ensure that housing study results and recommendations could be incorporated into the local plans. SEWRPC then went on to assist

⁷Information provided by SEWRPC Executive Director Phil Evenson to ACLU of Wisconsin via email on 3/20/07.

⁸ See, Doc. Creating EJTF, pp. 3-4 (www.sewrpc.org/transportation/taskforce/pdfs/ejtf_background_doc.pdf); Atch. 2 to EJTF Minutes of Nov. 27, 2007 (www.sewrpc.org/commission/committees/detail.asp?ID=48#scheduledmeetings).

⁹ See, e.g., EJTF Minutes of March 18, 2008 at p. 9 (www.sewrpc.org/transportation/taskforce/pdfs/2008-03-18_minutes_ejtf.pdf); Exec. Ctte Minutes of March 20, 2008 at pp. 2-4 (www.sewrpc.org/commission/committees/pdf/2008/2008-03-20_minutes_ec.pdf) and EJTF Minutes of May 27, 2008 at pp. 2-3 (www.sewrpc.org/transportation/taskforce/pdfs/2008-05-27_minutes_ejtf.pdf)

¹⁰ See, e.g., EJTF Minutes of July 29, 2008 at p. 3 (www.sewrpc.org/transportation/taskforce/pdfs/2008-07-29_minutes_ejtf.pdf); SEWRPC 2008-09 Affirmative Action Plan at p. 9 (www.sewrpc.org/about/affirmative_action_plan_2008-2009.pdf)

¹¹ EJTF Minutes of May 27, 2008, at pp. 4, 7-9.

numerous county and local governments in completing their Smart Growth plans while the Housing Study languished. It took these actions despite having said to advocates, in writing in 2004, that it planned to begin the Housing Study in the spring of 2005. As of November 2008, the study has yet to formally begin.

These repeated failures by SEWRPC to prioritize and action upon the recommendations of, and commitments to, diverse community organizations and constituencies are another reason why SEWRPC should not be recertified in its current structure.

We note that by a vote of 8-1 at its October 14, 2008 meeting, the EJTF recommended that “every SEWRPC plan, i.e. housing, land use, water, etc. will incorporate socio-economic impact analyses by a reputable, independent source other than SEWRPC before the plan may be adopted ...” It is unclear at this time whether SEWRPC intends to accept and act upon this recommendation. It is critical that FHWA and FTA condition any recertification of SEWRPC on an explicit requirement that SEWRPC immediately implement this recommendation.

IV. SEWRPC’s Policies and Practices Perpetuate Discriminatory Effects on Communities of Color and Low Income People.

Southeast Wisconsin is one of the most racially segregated regions of the United States.¹² It is also economically segregated. As indicated above, Milwaukee County has nearly half the region’s population, but 3/4 of the region’s low income and minority residents, and 87% of its African American residents, and low income and minority residents are even more concentrated in the city of Milwaukee.

Addressing the needs of low income and minority residents in the planning area is not just desirable: it is required by civil rights and environmental justice laws, regulations and policies, including Title VI of the Civil Rights of 1964 and its implementing regulations, federal transportation statutes, the Clean Air Act, and federal Environmental Justice Orders. As the FHWA and FTA make clear:

The goal of Title VI/environmental justice is to ensure that services and benefits are fairly distributed to all people, regardless of race, national origin, or income, and that they have access to meaningful participation. Title VI/environmental justice in transportation programs is achieved through:

*Avoiding, minimizing, or mitigating disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority and low_income populations.

¹² See, e.g., U.S. Census Bureau, “Residential Segregation of Blacks or African Americans: 1980 to 2000,” (Dec. 2004), Ch. 5 and Fig. 5.3 (emphasis added) (“[T]he five most segregated metropolitan areas for Blacks in 2000 were, in order, *Milwaukee-Waukesha*, Detroit, Cleveland-Lorain-Elyria, St. Louis, and Newark.” (at <http://www.census.gov/hhes/www/housing/resseg/ch5.html>). Milwaukee-Waukesha is also in the top third of large metropolitan areas for residential segregation of Latinos. *Id.* at Chapter 6.

* Ensuring the full and fair participation in the transportation decisionmaking process by all potentially affected communities.

* Preventing the denial of, reduction in, or significant delay in the receipt of benefits by minority and low_income populations.¹³

As the FHWA and FTA have also made clear, the MPOs have specific obligations to ensure environmental justice.

- As the agency responsible for coordinating the regional transportation planning process, *the MPO must make sure that all segments of the population have been involved* with the planning process.
- The impact of proposed transportation investments *on underserved and underrepresented population groups* must be part of the evaluation process.¹⁴

SEWRPC's failure to address the discriminatory effects of its planning on communities of color is an action that has the effect of discriminating on the basis of race (regardless of whether that discrimination is intentional). 49 C.F.R. § 21.5(c)(3). It therefore is relevant to, and supports, a determination that SEWRPC should not be recertified.

A. SEWRPC's Transportation Planning Violates Obligations to Ensure that Minority and Low Income Communities Receive a Fair Share of the Benefits of Transportation Planning.

In reviewing SEWRPC's transportation planning, there is no question that persons of color and low income persons in the region are disproportionately dependent upon transit. There is also no question that, despite this dependence, transit service in the region is being reduced, so that communities of color and low income communities are disproportionately harmed by transit cuts. At the same time, SEWRPC's transportation planning routinely approves highway improvements that are sought, particularly by suburban communities, without consideration as to who bears the benefits and burdens of highway improvements especially in light of declining transit service. This lack of attention to those discriminatory effects violates Title VI and implementing regulations.¹⁵

¹³“Major Policy and Planning Issues: Title VI/Environmental Justice,” *The Transportation Planning Process: Key Issues - A Briefing Notebook for Transportation Decisionmakers, Officials, and Staff* (Federal Highway Administration & Federal Transit Administration), available at:

www.planning.dot.gov/documents/BriefingBook/BBook.htm#6BB

¹⁴*Id.* (emphasis added).

¹⁵ SEWRPC also has failed to meaningfully consider or seek to ameliorate remedy many of the negative effects of its highway expansion proposals upon communities of color and low income communities, such as the potential health effects caused by traffic and highway construction pollution upon persons who live, work or attend school near highways, and who appear to be disproportionately low income and/or minority.

While SEWRPC claims it has no authority to facilitate or enforce transit development, it has failed to make adequate efforts to do so. For example, it has repeatedly refused to even attempt to link its authority to approve (or disapprove) highway expansion to implementation of transit recommendations, despite repeated requests from advocates for underserved communities – and without considering the relative benefits and burdens on communities of color had it taken such steps. Nor has SEWRPC sought or taken the same kinds of urgent, affirmative steps to ensure transit expansion.

SEWRPC rejected multiple requests to develop its 2035 Regional Transportation Plan with elements that would seek to enforce actual implementation of its transit recommendations. As stated above, SEWRPC also refused to allow community groups representing communities of color to participate on the 2035 transportation plan advisory committee. At the same time, earlier this year SEWRPC approved the fast-tracking of a \$25 million I-94 interchange to serve a western Waukesha shopping mall at Pabst Farms, an area not served by transit whose population is almost entirely white non-Hispanic.¹⁶

Transportation planning must be done in a more inclusive manner that results in planning that addresses the transportation infrastructure needs of low income communities and communities of color. To date, SEWRPC has failed to meet this requirement, and as such should not be recertified.

B. SEWRPC’s Land Use Plan, on Which the Transportation Planning is Based, is Seriously Flawed.

SEWRPC’s Land Use Plan, on which the transportation planning is based, is also seriously flawed, and fails to address Title VI and environmental justice concerns.

Although SEWRPC’s land use plan “serves as a guide for growth and development in the seven county SE Wis. Region,” the 2035 Regional Land Use Plan (the most recent one) simply recites principles and concepts of the plans going back to 1966.

Those concepts, however, do not address the reality of racial segregation in the region. The 2035 land use plan does not address the fact that many low and moderate income working families and unemployed persons, who reside in the older urban communities of the region, are harmed by the lack of affordable housing in the outer suburbs of the region. The plan also does not acknowledge or address the racial import of this problem.

The 2035 land use plan also does not address the harm and additional racially discriminatory effect caused by the fact that new and expanding employment centers are increasingly locating in the outer rings of the region, and that in fact nearly all net job creation in the four-county portion of the region (Milwaukee, Waukesha, Ozaukee and Washington counties) in the past decade has

¹⁶ FHWA staff indicated they were aware of the complaint filed in August 2008 regarding the discriminatory effect of this decision, and we request that the complaint be considered in the recertification review process. An additional copy of the complaint is being forwarded.

been in the “WOW” counties.¹⁷ Further, access to most of those jobs is only available by automobile, making them unavailable to many low income persons and persons of color. To the contrary, SEWRPC argues - in the face of regional experience and numerous studies - that highway expansion has nothing to do with urban sprawl, and refuses to look at the effects of sprawl on low income and minority neighborhoods and residents.

In addition, the 2035 land use plan fails to adequately address or seek to remedy the negative environmental impacts of pushing new development onto prime farmlands and open space, or factor in the added costs of new infrastructure and utilities such as highways, water supply and waste water treatment facilities. It fails to address who benefits from this growth, and who is burdened by it, and whether those burdens are disproportionately visited upon communities of color who have not shared equally (and in many instances, barely at all) from this expansion.

C. SEWRPC’s Draft Water Supply Plan Is Similarly Flawed.

The Water Supply Study prepared by SEWRPC similarly violates Title VI and environmental justice requirements.

The SEWRPC water supply advisory committee originally had 33 members, 32 of whom were white non-Hispanic, and none of whom was African-American.

From the outset, this non-diverse advisory committee, and non-diverse SEWRPC staff, excluded from the study nearly all factors related to water supply except supply and demand. In particular, the study failed to evaluate any socioeconomic (*e.g.*, environmental justice) effects of diverting Lake Michigan water to suburban communities, a particular problem given the residential and employment segregation in this region. SEWRPC also failed to collect data upon or evaluate likely socio economic impacts, such as impacts on the location of job growth, housing and transportation, in the study, yet moving water across the region will have an impact on these and other matters directly affecting low-income communities and people of color, particularly those who live in the city of Milwaukee. SEWRPC failed to meaningfully evaluate who would benefit from, and who would be burdened by, a water supply expansion, or whether there would be a disproportionate harm to communities of color and low income communities in the city.

In addition, the water supply plan takes as a given the assumptions of where and to what extent growth will occur as projected in the 2035 Regional Land Use plan, which as discussed above neglects to address racial and income segregation in the region. Rather than tie growth to water availability, the study seeks to find as much water as needed to support suburban growth. Given the racial segregation in the region, this clearly has a discriminatory effect.

Moreover, the water supply planning process demonstrates the silo nature of SEWRPC’s planning and the exclusion of city of Milwaukee interests. Despite the fact that two of the alternatives proposed by the study involve Milwaukee’s Metropolitan Sewerage District (MMSD) (*i.e.*, sending “return flow” to MMSD or sending it to the Menomonee River, for which

¹⁷ See, *e.g.*, UWM Center for Economic Development, *The Economic Challenges Facing Milwaukee’s Inner City – Statistical Snapshots* (available at: www4.uwm.edu/ced/snapshot/challenges_innercity.pdf)

MMSD is currently creating a restoration plan), SEWRPC did not request MMSD's input in the creation of the water supply study. Not surprisingly, the water supply plan also fails to adequately account for water quality and ecosystem impacts that would occur with discharging large new volumes of "return flow" wastewater into tributaries of the Lake Michigan basin.

D. SEWRPC Lacks a Current Regional Housing Study On Which to Reasonably Base its Transportation Planning.

As discussed throughout these comments, Milwaukee is the most racially segregated region in the country - with the least diverse suburbs - and our region also suffers from a tremendous lack of affordable workforce housing, and accessible housing.

Despite this segregation, SEWRPC has not conducted a regional housing study since the 1970s. SEWRPC also has failed to follow the recommendations of its own extensive 1975 study to continually monitor, support and reevaluate regional housing issues.¹⁸

Further, although in 2004, SEWRPC's Executive Director stated, in writing,¹⁹ that he expected the housing study to begin in the spring of 2005, three and one-half years later, that study still has not begun. As stated above, even though advocates repeatedly suggested that SEWRPC conduct its housing study BEFORE moving forward on local Smart Growth plans (so that the housing study information could be included in those plans), SEWRPC refused to do so and instead has moved much more quickly in working on Smart Growth plans – which disproportionately benefit less diverse suburban communities.

SEWRPC also stated in October 2008 that it refused to ask local governments to help pay for the housing study. In contrast, SEWRPC was more than willing to request – and find creative methods to get²⁰ - hundreds of thousands of dollars from local governments to support the water

¹⁸See, SEWRPC, *Planning Report NO. 20* [1975 Housing Study] at pp. 456-7:

"[I]t is recommended that the Commission provide, on a continuing basis, technical assistance to enable county housing authorities and local units of government to more precisely establish the magnitude and characteristics of the existing housing need on a community and neighborhood level. The Commission should also provide technical assistance on a continuing basis as required with respect to the utilization of housing subsidy programs which are available for the abatement of the identified housing problems. Furthermore, the Commission should establish a monitoring system to determine whether housing subsidy programs are being utilized in the appropriate areas and are assisting appropriate households. It is also recommended that the Commission undertake a major reevaluation of the magnitude and characteristics of the housing need at regular intervals to determine the extent of the housing problems, the effectiveness of efforts undertaken to abate those problems, and the need to modify or adjust the recommended regional housing plan. A major reevaluation of the regional housing situation should be conducted approximately every fifth year after the publication of this report."

¹⁹Letter from Philip Evenson to ACLU (Aug. 6, 2004).

²⁰For example, when SEWRPC realized that Milwaukee County supervisors were unlikely to vote to pay \$261,000 for the study sought by suburban communities, SEWRPC went to the obscure Milwaukee County Automated Mapping and Land Information System – an entity then chaired by SEWRPC's former Executive Director – for the money, which did not require Milwaukee County approval. (www2.jsonline.com/story/index.aspx?id=301030) This contrasts with SEWRPC's reluctance to seek

supply study requested by Waukesha county communities. The discriminatory effects of the benefits and burdens of these choices are further reason why SEWRPC should not be recertified.

V. Contrary to Federal Regulations, SEWRPC's Transportation Plans and TIPs Are Not Fiscally Constrained.

SEWRPC is responsible for ensuring that transportation planning conforms to air quality regulations under the Clean Air Act. Transportation planning cannot be found to conform to the Clean Air Act if the projects are not fiscally constrained, meaning there must be the funding to implement the plans. Although the 2035 regional transportation plan and the Transportation Improvement Program (TIP) for 2005-2007 were found to conform to Wisconsin's State Implementation Plan for ozone pollution, this finding is undermined by the fact that these transportation plans are not fiscally constrained. Because, as discussed below, SEWRPC's planning is not fiscally constrained and does not conform to the ozone pollution implementation plan, the FHWA and FTA should refuse to recertify SEWRPC.

Federal law mandates that, "[t]ransportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity."²¹ The DOT's regulations only allow a plan to include projects where there is a financial plan that shows "how the adopted transportation plan can be implemented."²² The transportation plan needs a financial plan that demonstrates that costs and revenue sources "are reasonably expected to be available to adequately operate and maintain . . . public transportation."²³ Further, for nonattainment and maintenance areas, this financial plan must include "specific financial strategies required to ensure the implementation" of the transit projects that are used to show conformity with the SIP.²⁴

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

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

The plan of action should provide information on the actions that will be taken to obtain the new funding such as how the support of the public, elected officials, business community, and special interests will be obtained, e.g. comprehensive and continuing program to make the public and others aware of the need for revenue sources and the consequences of not providing them. Past experiences (including historical data) with

local funding for the housing study, and is yet another example of the discriminatory effect of SEWRPC's actions.

²¹ 40 C.F.R. § 93.108.

²² 23 C.F.R. § 450.322(f)(10).

²³ 23 C.F.R. § 450.322(f)(10)(i).

²⁴ 23 C.F.R. § 450.322(f)(10)(vi).

obtaining this type of funding, e.g., success in obtaining legislative and/or voter approval for new bond issues, tax increases, special appropriations of funds, etc., should be included. Where efforts are already underway to obtain a new revenue source, information such as the amount of support (and/or opposition) for the measure(s) by the public, elected officials, business community, and special interests should be provided.

* * *

The financial plan will be part of the plan or TIP and will be reviewed through the public involvement process. The following are examples of specific cases where new funding sources should not generally be considered to be “reasonably available”: (1) past efforts to enact new revenue sources have generally not been successful; (2) the extent of current support by public, elected officials, business community and/or special interests indicates passage of a pending funding measure is doubtful; or (3) no specific plan of action for securing the funding source and/or other information that demonstrates a strong likelihood that funds will be secured is available.²⁵

All three disqualifying examples offered by DOT for when new funding should NOT be considered reasonably available apply to SEWRPC’s planning area, and its transportation planning should be found to not be “fiscally constrained” as required by Federal law.

Further, the lack of planning that is fiscally constrained undermines the ability to make an accurate Conformity Analysis to get the region back into compliance with air quality standards for ozone pollution. The Conformity Analysis states that the public transit portion of the transportation plan includes “significant improvement and expansion of public transit in Southeastern Wisconsin, including development within the Region of a rapid transit and express transit system, improvement of local bus service, and the integration of local bus service with the proposed rapid and express transit services.”²⁶ The air model is based on the 2025 transportation plan and the 2035 transportation plan that propose an increase in transit service (measured in vehicle miles of transit service) by 72% from year 2005 to 2025 and by 100% in 2035, and that fares would be consistent with inflation.²⁷

The models were calibrated using 2001 travel data that do not reflect subsequent, significant cuts in transit funding, coupled with increased fares that have resulted in declines in ridership.²⁸ Contrary to the Conformity Analysis’ assumption that “fares would be consistent with inflation,”²⁹ since 2001 fare increases have considerably outpaced inflation:³⁰

Fare Type	Dec. 2000	Jan. 2008	Increase	Inflation
Cash Fare	\$1.35	\$2.00	48%	24%

²⁵ 58 Fed. Reg. 58060 cols. 2-3.

²⁶ Conformity Analysis at 7.

²⁷ Conformity Analysis at 17.

²⁸ Conformity Analysis at 22.

²⁹ Conformity Analysis at 17.

³⁰ Information in table comes from: Milwaukee County Transit press releases from 2000 – 2008, attached hereto as Exhibit 2. Inflation information calculated for 2000 to 2008 comes from <http://data.bls.gov/cgi-bin/cpicalc.pl>

Weekly	\$10.50	\$16.00	52%	24%
Freeway Flyer	\$13.00	\$22.00	69%	24%
Sr. Citizen	\$0.65	\$1.00	53%	24%

The model also incorrectly assumes that all transit projects in the 2005-2007 TIP were implemented.³¹ The TIP “incorporates all . . . rapid transit facilities and services and includes both geographic expansion of service and improvement of frequency of transit service.”³² These transit expansions and improvements were included in the emissions model.³³ Including this in the model is invalid because transit facilities and services have not expanded, and in fact, have been cut.

For instance, from 2001 - 2007, Milwaukee County eliminated ten bus routes; reduced service on thirteen routes; ended year round downtown trolley service; and cut weekend and night-time service.³⁴ Moreover, both state and local funding of transit have been inadequate to ensure implementation of the recommended improvements. These problems have contributed to the increases in rates coupled with the decreases in services:

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

Without increases in State transit assistance funds sufficient to address cost inflation and the enactment of dedicated local funding for public transit, the transit system can expect to deplete its “bank” of unspent Federal capital funds, and face implementing dramatic service cuts—up to a 35 percent reduction in service by the year 2010.³⁵

Contrary to the transportation plans’ assumptions about transit growth, a projected cut of 35% in transit services by the year 2010 would mean:

Eliminate bus service after 10 p.m., Monday through Saturday. Limit Sunday service to 9 a.m. to 6 p.m. Get rid of seven routes and cut back the service on 17 others. Eliminate the Freeway Fliers, the express MCTS routes from suburban communities to downtown Milwaukee.³⁶

³¹ Conformity Analysis at 19.

³² Id.; see also Id. at 21.

³³ Conformity Analysis at 24.

³⁴ Milwaukee County Transit press releases , Exhibit 2; and <http://mobilehappenings.blogspot.com/2008/03/excellent-commentary-on-milwaukee.html>; *see also* <http://www.keynews.org/archive2/busroutes0308.html>

³⁵ http://www.sewrpc.org/milwcotdp/pdfs/2007-02_newsletter_01_milwcotdp.DOC at p. 2.

³⁶ <http://media.www.marquettetribune.org/media/storage/paper1130/news/2007/03/08/News/Mcts-Running.Low.On.Funds-2762788.shtml>

To compound the state funding problems, there are significant local funding barriers to maintaining, much less improving, the transit system. SEWRPC admits that “service cuts and higher fares that have been implemented by the Milwaukee County Transit System in 2001 and later years stand as indicators of the local funding problems faced by the Milwaukee County Transit System.”³⁷ Milwaukee County is unique in the U.S. because it relies on property taxes to fund transit expenditures.³⁸ The transit system needs to replace this reliance on property taxes with a dedicated source of funding to finance transit. SEWRPC predicts that without this change, Federal funds will soon be “fully exhausted” and “more extensive service cuts and additional fare increases may be needed if property taxes cannot be increased to finance the transit system.”³⁹

Accordingly, Milwaukee transit staff told WisDOT in 2004 that “they won’t be building anything and that transit will continue deteriorating, unless there is dedicated funding.”⁴⁰ Staff also confirmed that WisDOT has not made transit funding a priority.

Given these facts, it is clear that the planned transit projects are not “fiscally constrained” because (1) past efforts to enact new revenue sources have generally not been successful; (2) the extent of current support by public, elected officials, business community and/or special interests indicates passage of a pending funding measure is doubtful; or (3) no specific plan of action for securing the funding source and/or other information that demonstrates a strong likelihood that funds will be secured is available.⁴¹

The transportation plans and TIP provide no reliable evidence that the revenues required to construct and operate the transit projects will be made available. Nor do the plans and program demonstrate that written commitments to construct and operate the resulting transit improvements have been secured. Since there is no demonstration of “reasonably available” funding for the proposed transit projects, the plan is not “fiscally constrained.” As such it is not appropriate to rely on the plans to show conformity with Clean Air Act requirements designed to protect public health from the harms of transportation-related air pollution. Thus, SEWRPC has not complied with the MPO regulations to ensure its transportation planning is fiscally constrained, and should not be recertified.

Conclusion

For the above stated reasons, the undersigned groups urge you to take action to remedy the deficiencies in SEWRPC’s role as regional MPO for transportation. We request that you decertify SEWRPC and require that it be recertified or redesignated under current law, which would require inclusion of the city of Milwaukee and transit entities in its governance structure. If rather than decertify you condition approval on certain factors, we urge that you condition certification on specific requirements that address the inequities currently perpetuated by

³⁷ <http://www.sewrpc.org/milwcotdp/need.shtm>.

³⁸ <http://www.sewrpc.org/milwcotdp/need.shtm>.

³⁹ <http://www.sewrpc.org/milwcotdp/need.shtm>

⁴⁰ Report on Meeting between City of Milwaukee and WisDOT, November 17, 2004, at 4.

<http://www.dot.wi.gov/projects/state/docs/2030city-milwaukee.pdf>

⁴¹ 58 Fed. Reg. 58060 cols. 2-3.

SEWRPC. These conditions would include, among others, that SEWRPC comply with affirmative action in its hiring and contracting practices, locate an office in the city of Milwaukee, that SEWRPC contract with an outside consultant to conduct socio-economic impact studies of its plans before approving any plans, and that SEWRPC take immediate and concrete steps to ensure and facilitate implementation of those portions of its plans that provide significant benefits to communities of color and low income communities.

Submitted by:

ACLU of Wisconsin
By: Karyn Rotker, Senior Staff Attorney
207 E. Buffalo St., Suite 325
Milwaukee, WI 53202

Black Health Coalition of Wisconsin
By: Dr. Patricia McManus, President
3020 W. Vliet Street
Milwaukee, Wisconsin 53208

Citizens Allied for Sane Highways
By: Gretchen Schuldt, Co-Chair
P.O. Box 080215
Milwaukee, WI 53208

Good Jobs and Livable Neighborhoods Coalition
By: Pamela Fendt, Director
633 S. Hawley Rd., Suite 115
Milwaukee, WI 53214

Midwest Environmental Advocates
By: Melissa Scanlan, Founder & Senior Counsel
1845 N. Farwell Ave, Suite 100
Milwaukee, WI 53202

NAACP Milwaukee Branch
2745 N. Dr. Martin Luther King Jr. Dr.
Milwaukee, WI 53212