

Sept. 26, 2016

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

Submitted electronically only: Wisconsin.FHWA@dot.gov

Re: Recertification of Southeastern Wisconsin Regional Planning Commission as a Metropolitan Planning Organization, and Wisconsin Department of Transportation Planning

To Whom It May Concern:

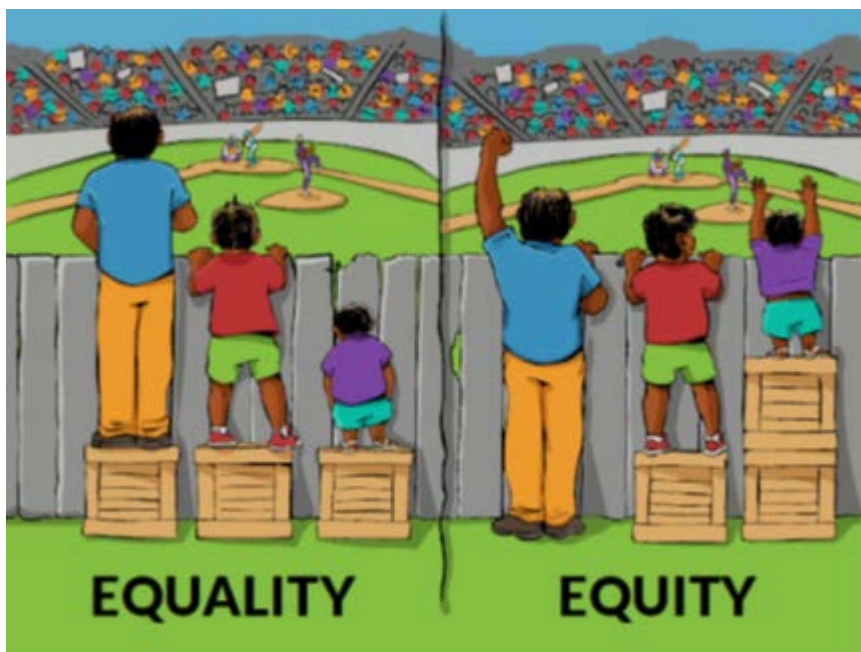
Thank you for the opportunity to comment on the FHWA/FTA joint review of the recertification of the Southeastern Wisconsin Regional Planning Commission (SEWRPC). While there has been some limited progress, such as SEWRPC's involvement with and support for Bus Rapid Transit and somewhat improved public outreach, we are raising many of the same concerns and criticisms that were raised in the past. Most significantly, we are profoundly concerned about the longstanding inability – and refusal – of both SEWRPC and WisDOT to provide equity in *outcomes*. The fact that these deficiencies remain suggests a need for strong and immediate federal intervention.

The core point is that SEWRPC (and WisDOT) have created, and continue to create, plans and projects that disproportionately benefit white non-Hispanic residents, utterly fail to provide an equitable share of the benefits of transportation system investments to communities of color, and routinely impose disproportionate burdens upon communities of color and persons with disabilities.

The failure to ensure equity in *outcomes* is in direct violation of the central goals of Title VI of the Civil Rights Act and Environmental Justice – as FHWA itself has articulated them.

Equity in transportation seeks fairness in mobility and accessibility to meet the needs of all community members. *A central goal of transportation equity is to facilitate social and economic opportunities by providing equitable levels of access to affordable and reliable transportation options based on the needs of the populations being served, particularly populations that are traditionally underserved.* This population group includes individuals in at least one of the following categories: Low Income, Minority, Elderly, Children, Limited English Proficiency, or Persons with Disabilities. It is important to note that transportation equity does not mean equal. An equitable transportation plan considers the circumstances impacting a community's mobility and connectivity needs and this information is used to determine the measures needed to develop an equitable transportation network.

The graphic in Figure 1 illustrates the differences between equality and equity. To attain an equitable transportation network, all components of Title VI, EJ, and Nondiscrimination [sic] must be considered.



Source: Interaction Institute for Social Change

FHWA, “Environmental Justice, Title VI, Non-Discrimination, and Equity” (viewed 9/16/16 at www.fhwa.dot.gov/environment/environmental_justice/equity/) (emphasis added); *see also*, FHWA & FTA, “Transportation Planning Process Briefing Book” (2015) (viewed 9/16/16 at www.fhwa.dot.gov/planning/publications/briefing_book/fhwahep15048.pdf) at 22 (“*Transportation Equity* refers to the way in which the needs of all transportation system users, in particular the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households, older adults, and individuals with disabilities, are reflected in the transportation planning and decision making process *and its services and products. Transportation Equity means that transportation decisions deliver equitable benefits to a variety of users and that any associated burdens are avoided, minimized, or mitigated so as not to disproportionately impact disadvantaged populations*”) (emphasis added) & 23-24 (state DOTs and MPOs must “Develop[] measures to verify whether the benefits and burdens of transportation services are distributed equitably across the transportation planning area” and ensure that “the specific interests of low-income and minority populations [are] addressed in transportation policies, plans, and projects...”); FHWA, “What is Environmental Justice,” (viewed 9/16/16 at www.fhwa.dot.gov/environment/environmental_justice/) (“Environmental Justice (EJ) at the Federal Highway Administration (FHWA) means identifying and addressing disproportionately high and adverse effects of the agency’s programs, policies, and activities on minority populations and low-income populations to achieve an equitable distribution of benefits and burdens”); FHWA, “Guidance on Environmental Justice and NEPA” (“EJ/NEPA”) (Dec. 16, 2011) (viewed 9/21/16 at https://www.environment.fhwa.dot.gov/projdev/guidance_ej_nepa.asp) (“desired outcome” is providing “[f]air distribution of the beneficial and adverse effects of the proposed action.”) Also *see generally*, 49 C.F.R. Ch. 21; 49 C.F.R. § 21.5(b)(2) (recipient of

federal transportation funds “may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect of subjecting persons to discrimination* because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.”) (emphasis added).

Moreover,

[t]he major area of impact by plans and programs is through decisions which identify one or more planned improvements over other options. . . . To the extent that plans and programs include proposed improvements with disproportionate beneficial impacts or reflect decision processes that exclude certain groups, the long-term agenda for transportation improvements may be inappropriately biased.¹

FHWA, “Title VI: Non-Discrimination in the Federal-Aid Highway Program,” at 7-1 to 7-2 (Attachment A).² “Project teams sometimes think that because there is no discriminatory intent on the highway agency’s part, impacts of the various alternatives under consideration are not discriminatory or do not fall disproportionately on a particular segment of society. This can be a faulty assumption on some projects - an assumption that can lead to misunderstandings and mistrust.” *Id.* at 7-11.

In order to maintain its MPO status, SEWRPC is required to establish its compliance with federal civil rights and environmental regulations, including, *inter alia*, Title VI of the Civil Rights Act of 1964 and 49 CFR part 21; the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. *See* 23 C.F.R. § 450.334(a). During the certification review, the FHWA and FTA must review whether SEWRPC is complying with these federal laws and regulations. 23 C.F.R. § 450.334(b). Under 23 CFR §§ 450.334(b)(1), (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, 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. The time is long past due for that authority to be exerted. Because SEWRPC is not complying with applicable federal laws and requirements, we urge you to exercise your authority and decertify SEWRPC for the violations described below, or, at a minimum, order specific corrective action on each area under continuing federal supervision. We also urge stringent oversight of WisDOT for similar violations.

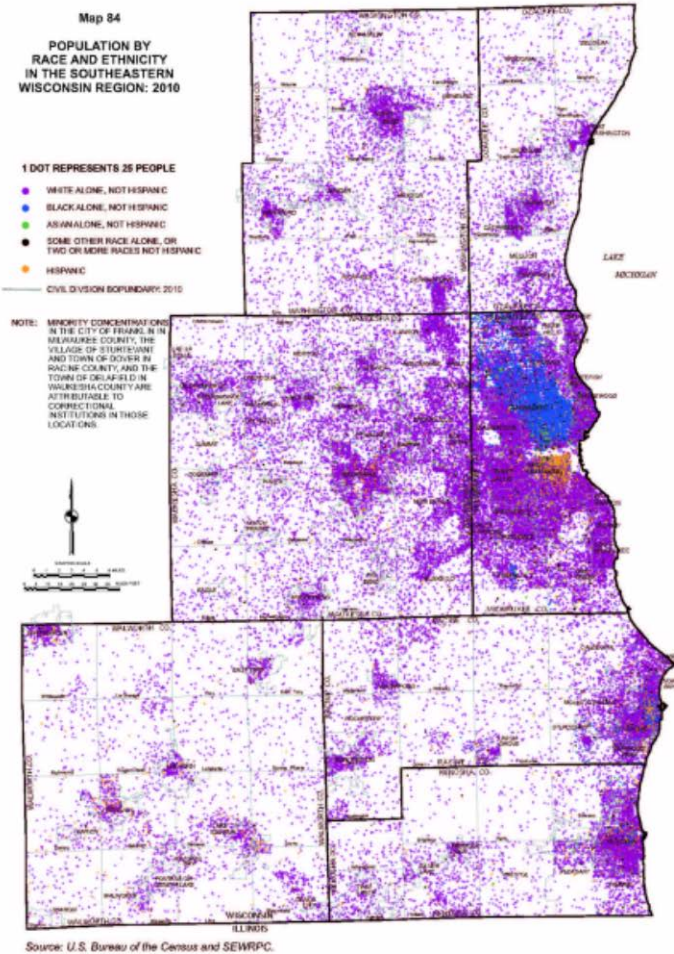
I. BACKGROUND

The background for these comments is the significant, disproportionate, transit-dependence and segregation of persons of color and persons with disabilities in this region. Within the seven-county area served by SEWRPC, Milwaukee County has 47% of the region’s

¹ This is true regardless of whether there is public involvement from communities of color. Public involvement without equitable outcomes does not fulfill Title VI or Environmental Justice requirements.

² References that were not located online are attached to these comments.

total population, 63% of its Latino population, and 86% of its African-American population.³ Three of SEWRPC’s counties – Ozaukee, Washington and Waukesha – are more than 90% white non-Hispanic; four counties – those three and Walworth – are only 1% African-American.⁴ Further, communities of color are concentrated not only in Milwaukee County, but within the city of Milwaukee. These disparities render Milwaukee the most segregated metropolitan area in the United States for African-Americans and in the top third for segregation of Latinos.⁵



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³ US Census, Profile of General Population and Housing Characteristics: 2010 (Data set DP1) (calculated based on White non-Hispanic alone, Black non-Hispanic alone, Hispanic/Latino of any race).

⁴ Racine and Kenosha counties are majority white, but more diverse than the other counties. *See also*, Housing Plan at 369-70.

⁵ *See, e.g.*, U.S. Census Bureau, “Racial and Ethnic Residential Segregation in the United States: 1980-2000,” at Chs. 5, 6 (https://www.census.gov/hhes/www/housing/housing_patterns/pdfoc.html); “Ranking: Milwaukee Still Country’s Most Segregated Metro Area” (WUWM, Nov. 27, 2013) (viewed 9/23/16 at <http://wuw.com/post/ranking-milwaukee-still-countrys-most-segregated-metro-area>)

SEWRPC, *Regional Housing Plan for Southeastern Wisconsin 2035* (“Housing Plan”), at 378 (<http://www.sewrpc.org/SEWRPCFiles/Publications/pr/pr-054-regional-housing-plan-2035.pdf>)

SEWRPC is well aware that overlaid on this residential segregation is a profound income and poverty gap, which is also concentrated in Milwaukee. Its own Housing Plan showed, for example, that 58% of households in the region with incomes below 80% of the median income – and 64% of those below 30% of the region’s median - live in Milwaukee County.⁶ SEWRPC also knows that the disparities in income and poverty rates have a profound racial component. In every county in the region with enough minority residents to make a comparison, Latino and African-American residents have average incomes far below those of white residents.⁷

At the heart of metropolitan Milwaukee’s hypersegregation is this fact: Milwaukee has the lowest rate of black suburbanization of any large metropolitan area in the country. . . . The Hispanic level of suburbanization in Milwaukee, though much higher than the black rate, still lags significantly behind [even] other highly segregated metropolises. In short, to a greater extent than any large region in the country, Milwaukee’s minorities are concentrated in the urban core, in neighborhoods . . . marked by concentrated poverty, joblessness, and other measures of socioeconomic distress.

Wisconsin and Milwaukee’s black and Hispanic communities manifest deep and enduring socioeconomic effects of historic discrimination across a wide range of areas. Along a daunting array of dimensions . . . the state and its largest metropolitan center display overwhelming patterns of racial inequality, racial disparities, and racially-based socioeconomic distress: most segregated metropolitan area in the nation, widest racial income gap, second highest black poverty rate, among the highest levels of concentrated poverty in neighborhoods and schools, *second lowest rate of black male employment, third lowest rate of [black] female [employment]*, second widest racial gap in school test scores, *third lowest rate of minority business ownership*, worst racial disparities in incarceration rates. Minority communities in Wisconsin and metro Milwaukee (where 80 percent of the state’s black population lives and 45 percent of the state’s Latino population resides) clearly bear the socioeconomic effects of racial inequities. . . .

Levine, Dr. Marc V., “Racial Disparities, Socioeconomic Status and Racialized Politics in Milwaukee and Wisconsin: An Analysis of Senate Factors Five and Six of the Voting Rights Act” (Oct. 18, 2013) (“Levine report”) at 8-9, 22-23 and *generally* 5-23 (Attachment B); *see also* Housing Plan at 451 (“About 31 percent of families with African American householders in the Region are in poverty compared to about 4 percent of families with White/Non Hispanic householders”).

⁶ Housing Plan at 394 (calculated from Table 108).

⁷ Housing Plan at 399 (Table 111 and Fig. 26).

In addition to residential segregation, SEWRPC is well aware of the profound, racialized, disparities in the mode of transportation, and of the the need for transit to ameliorate them.⁸

Only about 75 percent of Milwaukee County Black/African American households indicated they have an automobile available for travel, and only an estimated 60 percent of Black/African American adults have a driver's license. Only about 85 percent of Milwaukee County Hispanic households indicate they have an automobile available for travel, and only an estimated 50 percent of Hispanic adults have a driver's license. In comparison, about 90 percent nonminority households indicate that they have an automobile available for travel, and an estimated 80 percent of nonminority adults have a driver's license.

SEWRPC, 2050 Regional Land Use and Transportation Plan ("Vision 2050"), App. N at N-6;⁹ *see also*, *Milwaukee County Transit System FAQs* (viewed 9/14/16 at www.ridemcts.com/about-us/faqs) (majority of Milwaukee County Transit System riders are persons of color, and nearly half are African-American); Pawasarat & Quinn "Readiness for Employment: Milwaukee Teens without Driver's Licenses," (UWM-Employment & Training Inst. 2012, viewed 9/14/16 at <http://www4.uwm.edu/eti/2012/TeenLicenses.pdf>) (substantial majority of African-American and Latino 16 and 17 year olds have no licenses, while most white teens have licenses or instruction permits). Moreover, even many residents who have licenses – including 40% of African-American males - cannot legally drive. *See, e.g.*, Pawasarat & Quinn, "Drivers Status Report for Milwaukee County," (UWM-Employment & Training Inst. 2012, viewed 9/14/16 at <http://www4.uwm.edu/eti/2012/DriversStatusReport.pdf>) at 6.¹⁰ As SEWRPC made clear in its last long range plan – which was in effect until at least August 2016 - "[t]o fully implement the regional [transportation system] plan, there will be a need to assure that progress in plan implementation particularly with respect to public transit continues during economic downturns, and is not eroded through service reductions. As minority and low income¹¹ populations disproportionately use and are dependent upon, public transit, these populations are disproportionately impacted by reductions in transit service." SEWRPC, "A Regional Transportation System Plan for Southeastern Wisconsin: 2035" ("2035 Plan") (2006) at 592 (http://www.sewrpc.org/SEWRPCFiles/Publications/pr/pr-049_regional_transportation_system_plan_for_se_wi_2035.pdf).

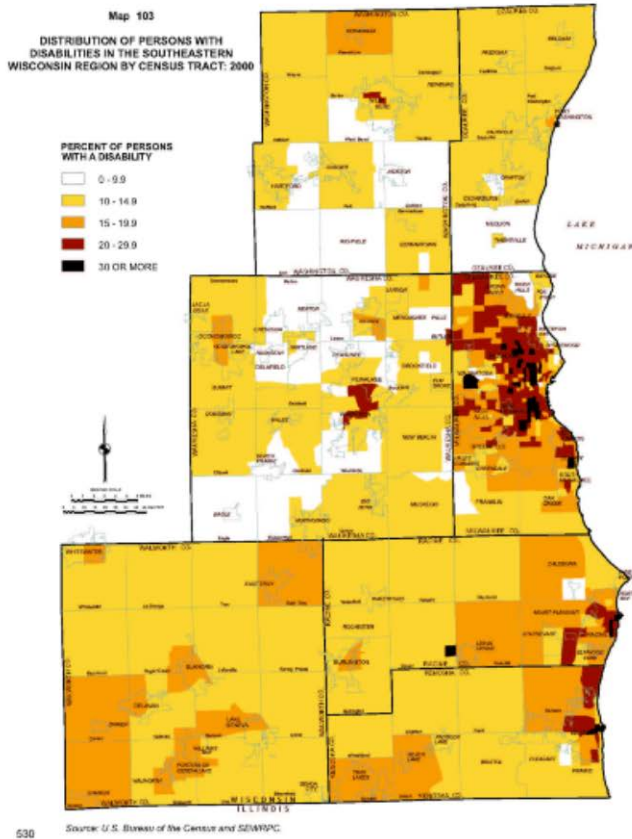
⁸ WisDOT also has known of the relationship between communities of color and transit dependence for more than 15 years. *Infra* Sec. ____.

⁹ SEWRPC has yet to post the final plan. The Vision 2050 references, unless otherwise stated, were obtained from drafts posted at www.sewrpc.org/SEWRPC/VISION_2050/2050RegLandUseTranspPlan.htm

¹⁰ "Drivers with license suspensions remain heavily concentrated in lower income city neighborhoods. . . . Two-thirds of the suspensions/revocations issued to Milwaukee County residents over the past three years were for failure to pay forfeitures (FPF) rather than for unsafe driving. . . ." *Id.* at 2.

¹¹ Many of these low-income persons are persons with disabilities: even those who work average only half the earnings of non-disabled workers. Housing Plan at 464.

Persons with disabilities also disproportionately live in Milwaukee County,¹² and, as in the case of persons of color, are disproportionately concentrated in the city of Milwaukee. *See, e.g., Housing Plan at 530:*



In fact, 53% of the persons in SEWRPC’s seven-county region with disabilities affecting their ability to care for themselves, 56% of the total persons over 18 with disabilities significant enough to affect their ability to live independently, and 64% of the non-senior adults with disabilities that affect their ability to live independently, are in Milwaukee.¹³ Persons with disabilities in the region also tend to have significantly lower incomes than persons without disabilities.¹⁴

¹² Milwaukee County has more than half the region’s persons with disabilities, and at age levels 5-17, 18-64, and 65+, the highest percentages of persons with disabilities live in Milwaukee County. *Housing Plan at 528 (Table 158).*

¹³ *Housing Plan at 532 (calculated from Table 159).*

¹⁴ *See, e.g., 2010-14 American Community Survey 5-Year Estimates, “Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status,” (Data Set S1811) (showing, for example, that in Milwaukee County, 29% of persons with disabilities had incomes below poverty level, compared to 17% of non-disabled persons; in Waukesha County 11% of persons with disabilities had incomes below poverty level, compared to 4% of non-disabled persons).*

In addition, persons with disabilities are also disproportionately dependent upon transit – both para-transit and fixed-route service – to meet their needs.¹⁵ SEWRPC knows this as well. Housing Plan at 528, 534. Further, “[a]ccessible, reliable transportation is one of the most critical — and perhaps least appreciated — components of becoming an active, productive member of the workforce for many Americans with disabilities. The best job, skills, or employment program provides few benefits if there is no reliable means of getting to work. Transportation systems have become increasingly accessible, but many people with disabilities are still not able to benefit from the options available to most Americans. Access to public and private transportation for individuals with disabilities is more than just physical accessibility. It can include travel training for individuals with cognitive disabilities, coordination of transportation resources, and understanding one’s rights.” U.S. Dept. of Labor, Office of Disability Employment Policy (viewed 9/20/16 at www.dol.gov/odep/topics/Transportation.htm)

II. DISCUSSION

A. *SEWRPC’s decision to exclude most transit expansion from the federally recognized Vision 2050 plan, while including unfunded highway expansion, discriminates against communities of color and persons with disabilities.*

SEWRPC’s 2035 Plan – which was in effect during virtually the entire period since the last recertification - explicitly stated that transit was necessary to ensure that persons of color benefited from regional transportation system investments. The 2035 Plan also was explicit that transit improvements were to be given “equal priority” with other improvements¹⁶ and that even during economic downturns it is necessary that “progress in plan implementation, *particularly with respect to public transit*, continues, and is not eroded through service reductions.”¹⁷ The reality, however, is that both before and since the 2035 Plan was adopted there was *both* an erosion of transit service and fare increases. The years-long failure to comply with the transit recommendations of the regional plan has already seriously and disproportionately burdened transit dependent populations, who are disproportionately persons of color and persons with disabilities.¹⁸ *See also, e.g.,* “Vision 2050 Detailed Alternatives Summary Handout” (Fall 2015)

¹⁵ *See, e.g.,* Vision 2050 App. N at N-6 (“Another transit dependent population is people with disabilities, with about 10 percent of this population in Milwaukee County utilizing transit for travel to and from work). And these statistics do not include the many persons with disabilities who are not employed but depend on transit to access other services, such as school, medical care, and shopping.

¹⁶ 2035 Plan at 366.

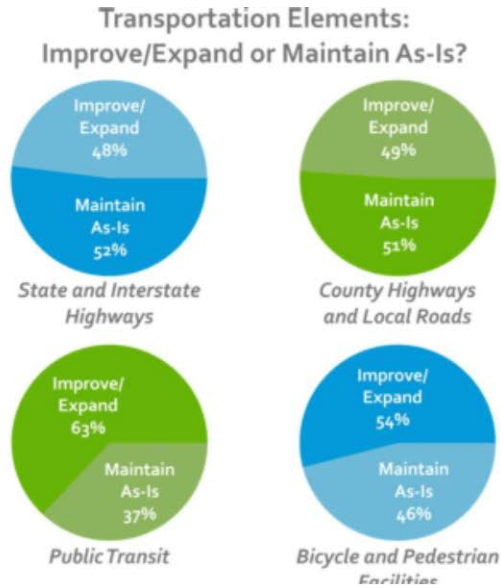
¹⁷ *Id.* (emphasis added).

¹⁸ *See, e.g.,* 2010-14 American Community Survey 5-Year Estimates, “Means of Transportation to Work by Selected Characteristics,” (Data Set S0802) (for example, mean travel time to work in Milwaukee County for single-occupancy-vehicle drivers is 21 minutes while by transit is 43 minutes, and 55% of Milwaukee transit commuters have commutes longer than 35 minutes, compared to only 11% of drivers). Similar and substantial travel time disparities exist in other counties.

Exacerbating this problem are actions taken by (racially segregated) Waukesha County to limit transit service, including declining to approve language in the Housing Plan that sought to ensure full implementation of the public transit provisions of the 2035 Plan. *See, e.g.,* Attachment C (replacing Housing Plan language that “State, County and affected local governments should work *to fully*

at 18 (viewed 9/22/16 at http://vision2050sewis.org/SEWRPCFiles/Vision2050/Vision2050_handout.pdf) (projecting decline from 62 percent to 52 percent of region’s jobs accessible by transit if current trends continue).

During the planning process for the new long range plan, SEWRPC’s Vision 2050 Regional Land Use and Transportation Plan (“Vision 2050”), it became absolutely clear that a substantial increase in public transportation was widely desired – far more widely desired than highway improvement or expansion.



SEWRPC, “Vision 2050 Land Use and Transportation Questionnaire” (telephone survey response) (viewed 9/21/16 at <http://vision2050sewis.org/Vision2050/TheResults/LandUseandTransportationQuestionnaire>); *see also, id.*, “Vision 2050 Update,” (Presentation to Environmental Justice Task Force, 3/22/16) at 6 (viewed 9/21/16 at http://www.sewrpc.org/SEWRPCFiles/Vision2050/VISION2050_03-22-16_presentation-EJTF-00230838.pdf) (95% of commenters on preliminary plan in favor of rapid transit and commuter rail).

Transit expansion was also clearly determined to be a critical, equitable, outcome for persons of color and persons with disabilities.

Comparing the accessibility provided to employment and major activity centers under the Preliminary Plan to those of the Trend and existing conditions indicates that the Preliminary Plan significantly improves accessibility provided by transit, and *many of the*

implement the public transit element of the 2035 regional transportation system plan in order to provide better connectivity between affordable housing and job opportunities” with “State, County and affected local governments should work to provide better connectivity between affordable housing and job opportunities through transportation options to major employment centers” – i.e., deleting all the transit language) (emphasis added).

investments in transit are targeted in areas that would result in the minority, lower income populations, and people with disabilities of the Region benefiting from these improvements...

The Preliminary Plan would increase the existing minority population with access to at least 100,000 jobs by transit by about 14 percent ..., compared to about 8 percent for non-minority and families with income above poverty...

[T]he substantial increases in transit service under the Preliminary Plan would provide access for more people to existing retail centers, major parks, public technical colleges/universities, health care facilities, grocery stores, MRMC, and GMIA... The significant expansion under the Preliminary Plan would greatly improve access to existing minority and lower income populations and people with disabilities to the activity centers analyzed, with the Preliminary Plan generally serving 10 to 30 percent more minority and low-income populations than the Trend...

A comparison of the improvements in accessibility under the transit element of the Preliminary Plan to the highway element of the Preliminary Plan clearly indicates that the transit element would result in substantial increases in transit accessibility to jobs and other activities, and the highway element would result in only modest increases in highway accessibility to jobs and other activities.¹⁹

“Vision 2050 – Preliminary Draft App. H – Complete Results of the Preliminary Recommended Plan Evaluation,” Criterion 2.1.1: Level of accessibility to jobs and activity centers for minority and low-income populations by mode (emphasis added) (viewed 9/16/16 at http://vision2050sewis.org/SEWRPCFiles/LUTranSysPlanning/2016-03-30-mtg/VISION2050-AppendixH_draft.PDF)

Moreover, the plan advocated by the community would have vastly improved transit *quality*, and thus access to jobs, health care, education, and other locations – especially for communities of color and persons with disabilities.

The Preliminary Plan would substantially increase the amount of the existing minority and lower income populations and people with disabilities that would have access to Excellent or Very Good transit service compared to the existing transit service—47 percent compared to 9 percent for minority population, 44 percent compared to 10 percent for families in poverty, 37 percent compared to 8 percent for families with incomes less than twice the poverty level, and 30 percent compared to 7 percent for people with disabilities. With the further decline in transit under the Trend, it is expected that only about 1-2 percent of these existing populations would be served by Excellent or Very Good transit service under the Trend.

¹⁹ And those “modest increases” would only apply to minority and disabled *drivers*, who, as discussed supra Sec. I, are much less likely than whites and non-disabled persons to have cars and (valid) drivers licenses.

The Preliminary Plan would improve transit service over existing conditions in particular for existing minority and lower income populations and people with disabilities. . . [It] would result in approximately an additional 38 percent of the existing minority population with access to Excellent and Very Good transit service, as compared to approximately an additional 12 percent of the non-minority population. Similarly, the Preliminary Plan would result in approximately an additional 34 percent of the existing families in poverty and 29 percent in families with incomes less than twice the poverty level with access to Excellent and Very Good transit service, as compared to approximately an additional 14 to 16 percent of families with higher incomes, respectively. With respect to people with disabilities, the Preliminary Plan would result in approximately an additional 23 percent of people with disabilities receiving Excellent and Very Good transit service, as compared to approximately an additional 19 percent of people without disabilities.

Id., Criterion 2.1.3: Transit service quality for minority and low-income populations (emphasis added). *See also*, “Vision 2050 Update,” (Presentation to Environmental Justice Task Force) at 23 (“Example Findings of Equitable Access Criteria – Transit access to jobs and transit service quality - Significantly better transit connections for environmental justice populations under the Preliminary Plan than the Trend.”)

During most of the Vision 2050 process, the emphasis was on what kinds of improvements the community wanted to see. Although there was acknowledgement that these plans might increase costs, there was no focus on any alleged fiscal constraints. Nevertheless, at virtually the end of the process, SEWRPC publicly stated that the transit improvement –*and only the transit improvement* – portion of the plan was not feasible due to fiscal constraints that apply to the regional transportation plan. *Contrast, e.g.*, “Vision 2050 Detailed Alternatives Summary Handout” (Fall 2015) (no discussion of “fiscal constraint”) with “Vision 2050 Draft Plan Summary Booklet” (Spring 2016) at 14 (raising in workshop handout – apparently for the first time at all, and certainly for the first time prominently – that most transit improvements would not be included due to fiscal constraint) (viewed 9/22/16 at <http://vision2050sewis.org/SEWRPCFiles/Vision2050/draftplanbooklet.pdf>). Removing these transit improvements from the final plan absolutely undermines the integrity of the process and the equity of the outcomes.

This is particularly true since even though funding for transit improvement and expansion has at times been difficult to obtain, highway funding has been, and is increasingly, a disputed issue, with inadequate budgets and project delays already occurring.²⁰ Yet in the “Federally

²⁰ *See, e.g.*, Marley, Patrick, “GOP rift emerges on Walker roads plan,” *Milwaukee Journal Sentinel* (Sept. 21, 2016) (viewed 9/22/16 at <http://www.jsonline.com/story/news/politics/2016/09/21/walker-urges-vos-come-up-road-plan/90787670/>); Wispolitics Budget Blog, “DOT would delay road projects, cut back on maintenance to meet 5 percent cut” (viewed 9/20/16 at <http://budget.wispolitics.com/2016/09/dot-would-delay-road-projects-cut-back.html>); Marley, Patrick, “Wisconsin faces nearly \$1 billion shortfall on roads,” *Milwaukee Journal Sentinel* (July 27, 2016) (viewed 9/16/16 at <http://www.jsonline.com/story/news/politics/2016/07/27/wisconsin-faces-nearly-1-billion-shortfall-on-roads/87650960/>); Edmonson, Catie, “Highway project delays rack up \$700 million cost overruns,”

Recognized Transportation Plan” (FRTP) SEWRPC chose to include the entire (and unfunded) highway portions of Vision 2050 as “fiscally constrained,” while simultaneously and intentionally *refusing* to include transit improvement on purported fiscal constraint grounds. Thus, SEWRPC chose to impose disparate, adverse treatment on the primary portion of the Vision 2050 Plan that is necessary and best able to meet the equity outcomes for communities of color and persons with disabilities *and only on that portion of the plan*.

Consequently, rather than providing the equity its prior plan and most of the recent planning process promised and the community desires, further, catastrophic, transit reductions are predicted. As SEWRPC itself stated, “the transit system included in the Federally Recognized Transportation Plan would decrease how many jobs would be accessible via transit (similar to the Trend discussed below)” – a concession it, shockingly, makes in the paragraph titled “Creating a More Equitable Region.” “Vision 2050 Draft Plan Summary Booklet” at 18; *see also*, SEWRPC, Revised Draft Ch. 2 of Vision 2050 Plan at 107 (“transit service under the [Fiscally Constrained Transportation Plan]²¹ would be expected to decline rather than significantly improve as recommended under VISION 2050.”) (viewed 9/23/16 at <http://vision2050sewis.org/SEWRPCFiles/LUTranSysPlanning/pr-055-vol-3-chapter-2-draft-revised.pdf>) SEWRPC appears to have had some recognition that this plan could have adverse effects, *id.* at 130, but adopted the plan anyway. Thus, SEWRPC’s response to known discriminatory effects has not been to ensure that persons of color and persons with disabilities receive a fair share of the benefits of transportation system investments.

Moreover, SEWRPC also waters down the language it used in the 2035 plan, which made it clear that transit improvements are as critical as highway expansion, and that transit declines cannot occur without an adverse effect on communities of color, in an apparent effort to try to avoid addressing the nature and extent of the discriminatory effects imposed by the FRTP it adopted. But there can be no doubt that an absolute and significant reduction in transit service – affecting the quality of that service, as well as access to jobs, education, health care and other destinations – is an adverse effect. And it is clearly and disproportionately persons of color and persons with disabilities who will be subjected to, and even more burdened by, those adverse effects. Excluding the transit improvements those communities need – especially while including highway projects that disproportionately benefit whites, and especially in light of the years-long patterns of planning and project development that have already operated to the disproportionate detriment of communities of color and persons with disabilities in this region – is, at a minimum, a “criteri[on] or method[] of administration which ha[s] the effect of subjecting persons to discrimination” “or ha[s] the effect of defeating or substantially impairing

Milwaukee Journal Sentinel (June 12, 2016) (viewed 9/16/16 at <http://www.jsonline.com/story/news/politics/2016/06/13/highway-project-delays-rack-up-700-million-cost-overruns/85857758/>); Sommerhauser, Mark, “Transportation secretary: No major tax, fee hikes planned; project delays coming,” *Wisconsin State Journal* (June 2, 2016) (viewed 9/16/16 at http://host.madison.com/wsj/news/local/govt-and-politics/transportation-secretary-no-major-tax-fee-hikes-planned-project-delays/article_99a48b57-c39f-5140-832c-535d540a027c.html); Stein, Jason, “Budget compromise would stall most Wisconsin road projects,” *Milwaukee Journal Sentinel* (June 8, 2015) (viewed 9/23/16 at <http://archive.jsonline.com/news/statepolitics/budget-compromise-would-stall-most-wisconsin-road-projects-b99515413z1-306557151.html>).

²¹ Some SEWRPC materials use FTCP, others use FRTP.

accomplishment of the objectives of the program” for persons of color or persons with disabilities, in violation of federal regulations. *See, e.g.*, 49 C.F.R. §§21.5(b)(2), 27.7(b)(4).²²

SEWRPC also tries to elide the extent of the discriminatory effect of restricting the transit elements of the plan by focusing on the race of people who *commute to work* and then arguing that most persons of color commute by car. *See, e.g.*, Vision 2050 Equitable Access Analysis at N-1, N-2, N-4, N-5 (repeatedly calling automobile the “dominant” mode of travel for communities of color *based on work commuting data*) (viewed 9/23/16 at <http://www.sewrpc.org/SEWRPCFiles/LUTranSysPlanning/2016-06-29-mtg/VISION2050-EquitableAccessAnalysisoftheFRTP.PDF>) But the “work commuter” focus is a red herring: given the significant lack of job access by transit in the region *of course* most persons with jobs commute by car – because if they do not have cars, they are far less likely to be able to get to work at all. That work commuting is itself a metric that incorporates a discriminatory effect is evidenced by the profound, racially disparate, employment rates in the region. In fact, African-Americans and Latinos are far more likely than whites to be unemployed and thus not commuting at all – in part precisely *because of* the lack of transit access to jobs. *See, e.g.*, Levine report at 13-18. This “work commuter” focus also obscures SEWRPC’s own data discussed above, that show 40% of African-Americans and half of Latinos *do not have drivers’ licenses*, and thus cannot *drive* to work or anywhere else. Moreover, even if work commuting were an appropriate metric, where, as here, persons of color are *more likely than whites* to depend on transit and *less likely than whites* to commute by car, then there is “disproportion.”²³ The FRTP exacerbates rather than mitigates that harm.

The FHWA and FTA cannot continue to allow this disparate treatment to continue. The FHWA and FTA have an obligation to ensure that the region’s MPO (and WisDOT) stop doing things the way they have been done in the past and take other, concrete actions to reverse this trend and provide minority communities and persons with disabilities an equitable share of the benefits of transportation system investments.

B. Rather than acknowledge the discrimination and lack of transit equity, SEWRPC fails to set or comply with goals and standards to measure civil rights compliance.

As part of a certification review, evaluation of civil rights compliance is mandatory. Although the MPO normally certifies its own civil rights compliance, MPOs must have a reasonable basis for making this certification. Thus, FTA requires MPOs to “have an analytic

²² *Also cf., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-8 (1977) (Discriminatory intent can be inferred from a variety of factors, including the “impact of the official action, whether it ‘bears more heavily on one race than another[,]’ . . . [t]he historical background of the decision [,] . . . [t]he specific sequence of events leading up the challenged decision[,]. . . [d]epartures from the normal procedural sequence[,] . . . [s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached[, and] [t]he legislative or administrative history”)

²³ *Cf., e.g.*, FTA Circular 4702.1B (Oct. 1, 2012) at Ch. I-2 (defining disproportionate burden and disparate impact). Similarly, when persons with disabilities are more likely to commute by transit than persons without disabilities, they “disproportionately” use transit.

basis in place for certifying their compliance with Title VI.”²⁴ This analytic basis must “identif[y] the benefits and burdens of metropolitan transportation system investments for different socioeconomic groups.” Thus, FHWA and FTA must determine whether SEWRPC’s “[c]riteria (to establish self-certification) appears reasonable; ... [d]ocumentation [is] available to support self-certification; ... [and] [p]lanning/transportation agencies have procedures, policies, and/or guidelines that address Title VI, ADA, ... as required by regulation.”²⁵ FHWA and FTA’s review further extends to whether MPO “[s]tandards, measures and benchmarks are reasonable to demonstrate significant disparity of impacts in accessibility to and delivery of transportation facilities/services” and that the “MTP, TIP, and other aspects and products of the planning process are consistent with Title VI and related laws/requirements .”²⁶

There is no question that the Preliminary Recommended Plan Evaluation correctly concluded that transit expansion was necessary to ensure non-discrimination and that underserved communities receive a fair share of the benefits of transportation system investments, and that the projected expansion would accomplish those goals. But rather than adopt this plan and then seek to ensure that these recommendations were implemented, or at least to mitigate the extent of the racial disparity by imposing the same “fiscal constraint” requirements on highway projects that disproportionately benefit white persons, and rather than even acknowledge the discriminatory effect of this disparate treatment, SEWRPC changed the rules of the game by coming up with different measures, such as the number of persons of color who commute to work by car, which both employ circular logic and obscure the profound disparity.

Any effort by SEWRPC, therefore, to self-certify civil rights compliance or claim the LRTP complies with civil rights requirements – even though SEWRPC removed the transit recommendations needed to ensure non-discrimination from the FRTP – must be rejected. Moreover, FHWA and FTA cannot allow SEWRPC to change its goals and measurements and obscure the extent of the discriminatory effect its FRTP will impose, *e.g.*, rather than applying the standards used in the 2035 Plan - that the “public transit recommendations of the regional transportation plan would, in particular, serve minority and low-income populations within Southeastern Wisconsin,” trying to pretend that a *decline* in transit service will somehow benefit communities of color, presumably so as to be able to assert that its LRTP, TIPs and other transportation planning products do not have a discriminatory effect.²⁷

²⁴ FTA Circular 4702.1A at VII-1.

²⁵ Transportation Planning Capacity Building, “Transportation Management Area Planning Certification Review Primer” (viewed 9/19/16 at www.planning.dot.gov/documents/primer/intro_primer.asp#2.11)

²⁶ *Id.* (www.planning.dot.gov/documents/primer/intro_primer.asp#2.12)

²⁷ SEWRPC (and WisDOT) similarly lack meaningful or equitable criteria to evaluate the effect on communities of color of urban sprawl facilitated by highway capacity expansion proposals – including even more growth in suburban communities such as Waukesha County, who remain resistant to SEWRPC’s transit improvement proposals. Attachment C. Moreover, in this racially segregated region, making it easier for suburban commuters to access employment in Milwaukee will almost certainly facilitate and exacerbate segregated sprawl patterns (especially when communities like Ozaukee and Waukesha Counties also refuse to accept many of the regional housing plan recommendations intended to

C. *SEWRPC Fails to Accept and Follow Through on Input From Diverse Community Groups.*

Under federal regulations:

The participation plan shall be developed by the MPO in consultation with all interested parties and shall, at a minimum, describe explicit procedures, strategies, and desired outcomes for: ...

(vi) Demonstrating explicit consideration and response to public input received during the development of the metropolitan transportation plan and the TIP;

(vii) Seeking out and considering the needs of those traditionally under-served by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services...

23 C.F.R. § 450.316 (a).

Yet SEWRPC still fails to meaningfully incorporate input from underrepresented communities in decision-making – especially regarding outcomes. The Vision 2050 debacle makes this clear. Throughout the process, SEWRPC actually did make efforts to involve the public – including some improved efforts to obtain input from underserved communities and its Environmental Justice Task Force. But throughout the process – although it mentioned the “trend” of decreased transit – SEWRPC simply did not make clear to those who gave their time

ensure affordable housing in the region.) *See, e.g.*, “Chair of Economic Development Committee in Milwaukee County Criticizes Outer Suburbs’ Rejection of the Regional Housing Plan Created by SEWRPC,” *Urban Milwaukee* (Sept. 2, 2014) (viewed 9/22/16 at <http://urbanmilwaukee.com/pressrelease/chair-of-economic-development-committee-in-milwaukee-county-criticizes-outer-suburbs-rejection-of-the-regional-housing-plan-created-by-sewrpc/>) (noting Ozaukee County board rejected Housing Plan and Waukesha County board “amend[ed] the plan to point of gutting it.”); Attachment C.

Although in the past SEWRPC has argued that highway expansion does not promote suburban sprawl, even WisDOT has admitted that it can in fact do so. *See, e.g.*, I-94 East-West Corridor FEIS (Jan. 20, 2016) at 3-181 (10 minutes of travel time savings can “substantially affect” “intraregional land use patterns”); WisDOT FDM at 25-5-5.2.2 (development “could be assisted or discouraged by a proposed transportation project”); *see also, e.g., Milwaukee Inner-city Congregations Allied for Hope & Black Health Coalition of Wisconsin v. Gottlieb*, 944 F.Supp.2d 656, 672 (W.D.Wis. 2013) (“it seems that one effect of implementing SEWRPC’s highway-expansion recommendations across the region would be to facilitate suburban sprawl and its associated environmental effects, such as the destruction of natural areas.”); *Highway J Citizens Group v. USDOT*, 656 F.Supp.2d 868, 888-9 (E.D.Wis. 2009) (“Having assumed that the area will continue to urbanize with or without new roads, the EIS acknowledges that this project and others will continue to harm resources, but it essentially advises that, given the existing trend towards urbanization, the environmental harm will come to pass no matter what decision the agency makes. This discussion does little to assist informed decisionmaking or informed public participation because it does not discuss whether, or the extent to which, the agency’s decision is likely to contribute to the problems associated with urbanization and suburban sprawl.”)

and effort that, whatever improved transit they desired was not feasible (or make clear that it planned to include more highway expansion than transit expansion – even though highway expansion is also not funded, and is less desired than transit expansion).

Instead, at virtually the end of the process SEWRPC then turned around and disregarded the most equitable and widely desired element of the plan: substantially improved and expanded public transportation. Public involvement that rejects the outcomes sought by the public – especially the core outcomes needed to ensure equity for communities of color and persons with disabilities – is not adequate or meaningful. *See, e.g.*, Attachment A at 7-4 (“failing to seriously consider comments by minority groups/persons is discriminatory. . . [M]embers of the public may feel that commenting is futile because the agency position is obvious. . . On the agency side,. . . in responding to comments, agencies then tend to focus on explaining why public comments cannot be implemented.”) SEWRPC’s actions in the Vision 2050 process – soliciting input, and then rejecting core elements of the desired plan with little notice, after community members had invested time and effort - made a mockery of the public involvement process.²⁸

D. SEWRPC’s Governance Structure is Discriminatory.

As FHWA and FTA are aware, SEWRPC is made up of 21 members, three each from seven counties in the region. Milwaukee County, with 47% of the region’s population (and the overwhelming majority of the region’s low income and minority populations), gets no greater vote than Ozaukee County, less than one-tenth its size.²⁹

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 of color than in all six of the other counties in the region combined (and, in fact, more residents of color than the *total* populations of five of the six other counties in the region) - so the city’s lack of representation on SEWRPC clearly dilutes the decision-making power of persons of color in the region.

This discriminatory governance structure cannot be divorced from the planning processes. At a minimum, it is incumbent on the FHWA and FTA to evaluate whether, as appears likely, the discriminatory governance structure is leading to discriminatory planning and project outcomes. We urge that the certifying agencies take all steps possible to ensure that a governance change occurs – including the decertification of SEWRPC in its current form and/or conditioning recertification on a redesignation.³⁰

²⁸In addition, as we have raised for at least the prior two recertification cycles, SEWRPC provided little notice about recertification to the public and failed to meaningfully involved its own EJTF in the recertification process or use the EJTF to conduct community outreach. The notable lack of attendance at the recertification review hearing makes this clear. It also continues to operate with an EJTF that lacks several members on the roster, and has had at least two official vacancies for months or years.

²⁹Milwaukee County Total Population: 947,735; Ozaukee: 86,395. U.S. Census, “Profile of General Population and Housing Characteristics: 2010.”

³⁰The city of Milwaukee concurs. *See*, Resolution 080313 (10/29/08), passed unanimously by the Milwaukee Common Council and signed by Milwaukee’s mayor.

E. SEWRPC's Hiring, Promotion and Contracting Practices Fail to Adequately Include Persons of Color.

SEWRPC's hiring, promotion and contracting processes also remain a concern, as discussed during the last several recertification cycles.

SEWRPC continues to lack meaningful management diversity, yet it also continues to maintain a policy of promoting from within. SEWRPC still has only one nonwhite staff member in management, but continues to promote from within, while only 5 of 45 professional staff members are people of color. SEWRPC 2016-17 Affirmative Action Plan at 6-7, 25 (viewed 9/22/16 at <http://www.sewrpc.org/SEWRPCFiles/CommissionFiles/GeneralInfo/affirmative-action-plan-2016-2017.pdf>) Moreover, there is still not a single African-American or Latino planner – a core, if not *the* core – function of SEWRPC (as was the case in the last recertification cycle), nor is there a single African-American or Latino engineer. *Id.* at 25.

In addition, as discussed in passed recertification cycles, SEWRPC retains its primary office in Pewaukee, an overwhelmingly white city that is completely inaccessible by transit, and appears to have no full time staff assigned only to the transit-accessible office it has in Milwaukee. *Id.* at 12. While SEWRPC states that it supports transit, its office has been inaccessible for many years, and rather t should instead be moving more staff to a transit-accessible office in a location closer to communities of color. It is also not clear whether SEWRPC continues its history of hiring professional service contractors without any competitive bidding and without even collecting demographic information, much less engaging in affirmative action.

F. WisDOT also fails to ensure equitable outcomes for communities of color and persons with disabilities.

The certification review team also requested comments on WisDOT's planning process. As numerous comments we have submitted make clear, WisDOT suffers from many of the same deficiencies as SEWRPC: the refusal to ensure equitable *outcomes* for communities of color and persons with disabilities, and inappropriate efforts to obscure the nature and extent of the discrimination its policies and plans impose.

WisDOT has known of the relationship between communities of color and transit dependence for more than 15 years: in 2000, WisDOT settled a race discrimination complaint based on disparate treatment of funding for, and disparate development of, highway and transit projects in the Milwaukee area, by agreeing, *inter alia*, that “[t]he Wisconsin Department of Transportation shall continue to use its best efforts to expand and improve transit service within the Milwaukee Metropolitan Area to enable transit dependent residents of Milwaukee to better access areas of job growth.” *Wallace v. Thompson*, No. 99-020 and *Campaign for a Sustainable Milwaukee et al. v. Thompson*, No. 99-029 (US DOT- OCR, Nov. 17, 2000) (Attachment D). Its most recent Title VI Implementation Plan identifies – as one of only two methods to satisfy Title VI - that it will “[w]ork with Federal, State, local, and transit planning partners *to create and enhance intermodal systems*, and support projects that can improve the natural and human environments for EJ and LEP communities.” WisDOT, “Title VI Nondiscrimination Plan and

Assurances,” (2014) at 26 (viewed 9/21/16 at <http://wisconsin.gov/Documents/doing-bus/civil-rights/titlevi-ada/2014tilteviplanassur.pdf>) See also WisDOT, “Connections 2030:Statewide Long Range Transportation Plan” (“2030 Plan”) (2009) at 15-5 to 15-8 (viewed 9/21/16 at <http://wisconsin.gov/Documents/projects/multimodal/conn2030/2030-15.pdf>) (state LRTP showing that the greatest number and concentration of African-Americans, Latinos, Asians, persons living in poverty, and zero-vehicle households are all in southeastern Wisconsin).

Yet WisDOT continues to fail and refuse to meaningfully consider transit expansion alternatives in project planning - even though transit expansion is required to ensure equity for communities of color and persons with disabilities. In the absence of transit expansion, these disproportionately minority residents and disproportionate number of persons with disabilities will not benefit from plans and projects that prioritize highway construction and expansion over maintaining and expanding transit. Thus, these communities do not receive a “[f]air distribution of the beneficial . . . effects of the proposed action. . . .” EJ/NEPA. Instead, WisDOT routinely tries to pretend that the racial implications of disparate transit dependence do not exist by, for example, focusing only on work commuters (without acknowledging, for example, the extremely high levels of unemployment in the African American community) in the same way as SEWRPC, *supra* Sec. II.A, or discussing “transit-dependent, low skilled workers,” I-94 FEIS at Sec. 3.29.2.7, without analyzing or addressing the *race* (or disability status) of those persons. This is not a meaningful or serious effort to analyze data fairly, much less achieve anything that resembles equitable outcomes.

WisDOT’s planning materials also make clear its disregard for actual outcomes that ensure equity. The Federal Highway Administration (FHWA) Title VI implementing regulations impose numerous requirements on state highway agencies, including specific actions these agencies must take. 23 C.F.R. § 200.9. For example, state agencies must “collect[] statistical data (race, color, religion, sex, and national origin) of participants in, and beneficiaries of State highway programs, *i.e.*, relocatees, impacted citizens and affected communities.” *Id.* at § 200.9(b)(4). They must “conduct Title VI reviews of program areas,” *id.* at § 200.9(b)(5) and “[e]stablish[] procedures for pregrant and postgrant approval reviews of State programs and applicants for compliance with Title VI requirements; *i.e.*, highway location, design and relocation. . . .” *Id.* at § 200.9(b)(13). They must also “[e]stablish procedures to identify and eliminate discrimination when found to exist.” *Id.* at § 200.9(b)(14).

Among the issues subject to a Title VI analysis is project development. And within project development, a Title VI analysis must be applied to consideration of alternatives, Attachment A at 8-4, as well as to an evaluation of social, economic, indirect, cumulative, and other effects on communities of color. Conducting such an analysis also requires a determination as to whether white non-Hispanic communities will receive a disproportionate share of project benefits. “To the extent that plans and programs include proposed improvements with *disproportionate beneficial impacts* . . . the long-term agenda for transportation improvements may be inappropriately biased.” Attachment A at 7-1 to 7-2 (emphasis added).

WisDOT should be well aware of these requirements. In 2012, the FHWA Office for Civil Rights placed WisDOT in deficiency status due to non-compliance with Title VI.

Attachment E at 11. Its lengthy report outlined specific deficiencies, including WisDOT’s failure to address Title VI in its “Facilities Development Manual” (FDM), which is used to guide development of projects such as this one, and gave WisDOT specific instructions, including the need to address “[h]ow [Title VI/Nondiscrimination impacts [are] identified and analyzed under [the Socio-economic factors chapter].” *Id.* at 18. Yet as of this date, more than four years later, WisDOT still has ignored this requirement and failed to address Title VI issues in this chapter. To the contrary, most of the chapter has not been updated since the 1980s and the rest since the 1990s. *See*, FDM Ch. 25 (viewed 9/21/16 at <http://wisconsin.gov/rdwy/fdm/fd-25-00toc.pdf>) There is, therefore, no meaningful way that WisDOT has addressed Title VI requirements in its planning processes and analysis of the socioeconomic impacts of its plans and project – and we are concerned that the federal agencies have, for years, allowed this utter failure to continue.

Conclusion

For the above stated reasons, the undersigned groups urge you to take immediate, concrete action to remedy the deficiencies in SEWRPC’s role as regional MPO for transportation, including by decertifying SEWRPC and requiring that a new MPO, with proportional representation from the city of Milwaukee, be created.

If you decline to decertify SEWRPC, we urge you to condition certification on specific requirements that address the inequities currently perpetuated by SEWRPC and closely monitor implementation of those conditions. These conditions would include, among others, a that SEWRPC fundamentally change the way in which it conducts transportation planning so as to ensure that the *outcomes* of that planning do not have the effect of discriminating against communities of color and persons with disabilities. We also request that you find that WisDOT has remained in Title VI deficiency status – or outright noncompliance - and closely monitor its performance, plans, and project development, to ensure that it, too, conducts its activities in a manner that ensures equitable outcomes.

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